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Winfried Brugger · Michael Karayanni (eds.)

Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law

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Introduction

Just exactly how closely (or distantly) correlated should the church and the state be? May a state recognize or dignify the role and meaning of religion at all? If yes, may it then accentuate a particular religion with religious-oriented public holidays, for example in a land where this religion has a strong historical importance? Or should the state treat and support all religions the same? Or, maybe the state should even grant special consideration and support to minority religions so as to achieve a more real equality? The present volume intends to answer some of these questions via a portrayal and comparison of various legal orders — primarily Germany, Israel, France and the USA will be considered. Furthermore, some authors even bring an international-law perspective to light. The analyses are structured from a state-institutional perspective of "church and state" as well as from a fundamental rights and human rights orientation — here the religious and world-view freedoms stand in the spotlight. Whether, and how, these church-and-state aspects vary within the divergent modern state contexts — and how they transnationally evolve — is also taken up. Accordingly, also belonging to this query is the question as to whether the "neutrality" of a state towards world-views and religions, something which is legally obligatory in many states, can be consistent and capable of implementation at all. All of these articles refer back to a symposium which took place at the *Internationales Wissenschaftsforum* in Heidelberg from 14 – 16 July 2005. The symposium was organized by the law faculty of the University of Heidelberg and the Minerva Center for Human Rights of the Hebrew University in Jerusalem within the framework of a cooperation program set up between the two universities.

A Socio-Historical Perspective

Matthias Koenig explores changing relations of religion and public order in modern society from a socio-historical perspective. He first points out the special role of the modern nation-state, whose genesis led to the first functional split of politics, state and church and which made possible the concept of a secular state. For Koenig, "secular" means not

so much the relegation of the meaning of religion or the privacy of religion, rather it connotes a three-way nexus between state sovereignty, collective identity and citizenship-status. There will then be various church-and-state constellations according to the way each individual country understands and legally articulates this "citizenship-status". Koenig sees four varieties of national citizenship at the forefront — liberal, republican, state corporatist and social corporatist models. Then in respect to where the emphasis lies, the distance between the church and the state comes to fruition, which Koenig then makes clearer via examples from the USA (liberal), France (republican) and Germany (corporatist). In the end, these structural differences are being subjected today to a uniform transnational and individual-rights based standard, namely the freedom of religion as a human right. This development makes clear to Koenig that our post-secular society (Habermas), as it is often called, does not shy away from the axioms of the modern-age, rather it carries them forward by leading to a structural decoupling of statehood, national identity and individual rights.

Models of Church-State Relations and Their Impact on Freedom of Religion

Winfried Brugger first analyses the interplay of structural church-state clauses and rights-oriented freedom of religion clauses in modern constitutions. He then describes six models of church-state relationships: 1. aggressive animosity; 2. strict separation in theory and practice; 3. strict separation in theory and accommodation in practice; 4. division and cooperation; 5. formal unification of church and state; and 6. material unification of church and state. Liberal constitutionalism and international law nowadays guarantee freedom of religion, which structurally leads to the illegality of models 1 and 6. Most disputes about church-state relations thus concern the question of which one of the remaining models should be chosen. Brugger addresses this question by analysing the constitutional law and judicial balancing tests used in the USA and Germany. Some of the most prominent and controversial cases are covered in detail: Should a country whose constitution in principle distinguishes between religious and political powers and whose population traditionally has been mostly Christian allow public-school prayer, the establishment of state-organized Christian community schools, or the display of the Christian cross or Ten Commandments on the walls of public schools, or acknowledge the influence of Christianity by endors-

ing the presentation of nativity scenes during the Christmas season? The answers to these questions will depend on the degree of separation or distance between the church and the state.

Shimon Shetreet first analyses five models of state-church relationships which resemble the models in the article by Winfried Brugger: the theocratic model, the absolute-secular model, the separation of state and religion model, the established church model, and the recognised religions model. He then describes the impact of these different models on the issue of freedom of religion. Next, Shetreet dwells on developments in US constitutional law where he identifies the existence of two major trends: The first development pertains to the broadening of the zone of legislative discretion for accommodating law to religion which has taken place. The second, which happened to take place almost simultaneously, was the narrowing of the zone in which the legislature is affirmatively required to make religious accommodations. Shetreet then analyses many exemptions and privileges which the law allows on grounds of religion and conscience and develops the pertinent factors of the courts for being accommodating (or not accommodating) in such cases. In the second part of his paper, Shetreet turns to the Israeli experience, where due to the Jewish nature of the State, Judaism has generated a number of controversies where exemptions were called for on the basis of freedom of religious conscience. Finally, Shetreet concludes that despite the installation of many religious norms in the Israeli legal system, members of all religions tend to be better protected in Israel than they might be in a secular-model state.

German, Comparative and International Law Perspectives

Christian Walter analyses the first of two controversial leading German cases on the public display of religious symbols in public spaces. In 1995 the Federal Constitutional Court decided that the Bavarian provision calling for Christian crosses to be hung in grade-schools was unconstitutional. This decision is considered one of the most controversial ever in the history of the Court. Many Christians saw this decision as an overdrawn summation for the priority of "negative freedom of religion" in situations that are not really repressive. On the other hand, proponents of the case stressed the importance of protecting minorities precisely in times of religious pluralism and ever-increasing secularization of society. Walter analyses the positions of the majority and the minority in the *Cross Case* and compares this with parallel arguments

from US case law. He compares the church-state relationships in both countries — the US is oriented towards separation, whereas Germany rather towards an arrangement between separation and cooperation. In the end, he sees a coherence and continuance — different than most critics of the *Cross Case* — of the Court's case law concerning the decisions from the 1970s (which allowed Christian community schools) and the *Cross Case*.

Hans Michael Heinig deals with an issue contested now for several years, whether public-school teachers may wear religious garments or portray their religious beliefs outwardly. The opportunity for such case was presented by a Muslim teacher named Ferestha Ludin, who insisted on wearing her head-scarf during class time despite opposition by the school administration. The officials saw her behaviour as violating the rule whereby public officials shall refrain from taking a stand on political or religious issues. Heinig analyses the socio-political landscape of the case, including the various constitutional interests of the teacher, the students in her classes, the parents of the students and the *Bundesland*. He portrays the relevant case law all the way to the Federal Constitutional Court, which in the end did not decide the case on its merits. The Court pointed out that a prohibition on certain clothing or symbols needs a legal basis before appropriateness can be decided via a balancing of the relevant legal interests. In any event, Heinig himself finds that in light of the already existing legal position an unfettered freedom of teachers to present their religious beliefs is out of the question.

Dagmar Richter examines how the countries in a "separation" system deal with the wearing of religious clothing in public schools. She mainly compares the church-state systems of France and the USA and shows the different histories of their commitments to the separation model. In France, predominant for quite some time was an anti-clericalism and a mistrust of intermediary associations — a concept unknown in the US — which were seen as competing with the loyalty to the French nation and its understanding of republicanism. This is the background of French *laicism*, which in accordance with the enacted Law on the Application of the Principle of Laicism in Public Schools and Colleges forbids the wearing of obvious religious clothing for both teachers and students. The legal position is different in the USA, as Richter diagnoses after an examination of the (partially) state-specific case law: in the US, the wearing of religious clothing by students is usually placed under the free-exercise-of-religion clause; the teachers, on the other hand, have to accept restrictions on this type of clothing, for example through so-called "garb statutes" in some of the fifty states. Such laws are not, in

the view of the Supreme Court, necessarily at odds with the First Amendment. They must however comply with, on the one hand, the freedom of religion and, on the other hand, the neutrality of the state towards religion itself and specific religions. According to a disputed view, individual US-states can prohibit the wearing of religious clothing by teachers on account of the abstract danger of influencing young children. The author sees here a necessity for a campaign of enlightenment, which makes clear to children that different religious symbols and clothing are an expression of the plurality on world views of the citizenry and should not be seen as a disruption of the public order in schools.

Jochen A. Frowein begins by pointing to the fact that freedom of religion developed as a guarantee of one of the most personal spheres of human identity and belief against theocratic and governmental oppression, and thus formed the basis of some of the most influential movements to establish early democratic governments. After mentioning recent conflicts in this area, he analyses seminal decisions by the adjudicatory bodies with regard to Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the European Convention on Human Rights. These covenants do not outlaw state churches, but they do prevent many restrictions on religious freedom. The cases analysed by Frowein address a multitude of particular intrusions on the freedom of religion: church taxes imposed on non-believers; obligation of parliamentarians to swear a religious oath; restrictions on freedom of opinion based on respect for religious feelings; justified and unjustified governmental restrictions on religious proselytizing; wearing headscarves or turbans despite state prohibitions; tensions between the secular and the religious law of divorce; the duty of the state to accommodate priests in restricted environments; and the extent and limits of state power to interfere with religious organizations. The survey demonstrates that in the foreseeable future there will be no shortage of cases in which international law will be faced with the difficult task of delineating an appropriate balancing between the wish for expansive religious expression and state regulations with the aim of securing democracy, equality and order.

Israeli Perspectives

Ruth Gavison, in her paper, tackles one of the most hotly debated issues in the church-state discussion as it has evolved in Israel over the

years: the statutory regulation of days of worship and days of rest. Indeed, from its inception, the State of Israel has worked to give legal substance to its identity as a Jewish state. However, soon many realized that this would be no easy task, for Judaism is not only a nationality but a religion as well. The secular and the religious camps both prescribed different methods for protecting that which they thought was important for Israel as a Jewish nation-state. The secular camp argued for statutorily prescribing what they deemed essential for Israel as a Jewish nation-state, whereas the religious camp called for prescribing Jewish religious norms for all Jews, secular and religious alike. The outcome was the enactment of primary legislation by the Israeli Parliament (the *Knesset*) as well as regulations by local government agencies. The results were that not only was the Jewish Sabbath declared to be the official day of rest in Israel, but additionally, restrictions were imposed during the Sabbath on public transportation and on shops being open. Gavison's main thesis is that such restrictions should not be understood as a human-rights dilemma, i.e. not as a dilemma between the interests of those within the Jewish community who want to be free from religious cohesion and the interest of those within the same community who want to be in an environment enabling them to live according to their religious ideals. Rather, in her opinion, the regulations concerning the Sabbath primarily concern the type of social norms and public culture which the State of Israel, as a Jewish state, desires to maintain. A major part of her article is the Gavison-Medan Proposal, which develops a model of regulation for Sabbath that hopefully both observant and non-observant Jews can embrace.

The government in Israel hands out generous financial aid to an array of religious institutions: religious courts, religious councils that offer religious services (e.g. *Kosher* certificates), burial societies, religious schools and more. As a result, there has been a long-standing debate on whether such support justifies action on the part of government, including the judiciary, intended to supervise the activities of such institutions, even to the extent of intervening in the body of norms that such institutions administer. **Barak Medina** takes an in-depth look at this debate. At first, he outlines the arguments stating that it is in the best interest of religion not to be supported by government, for such support will necessarily entail the imposition of liberal democratic norms on religious institutions and practices. However, Medina's main thesis provides the counterargument: The support of religious institutions should be understood as fostering freedom of religion; and more importantly, it does not necessarily justify the regulation of the relevant

religious institutions or practices. In his opinion, the government empowerment of religious institutions can justify the regulation of the discretion of the religious entity only if the religious authority works to substantially violate the individual freedom of religion and if there is a considerable risk that this potential will be realized. Medina substantiates each of his arguments by drawing on the rather rich experiences of Israeli law, especially through the experiences of the Israeli Supreme Court in settling conflicts between the objectives that the religious institutions seek to realize and the secular norms that pertain to individual autonomy.

Ofra Golan takes us into the workings of the religious doctrine itself — in what manner and degree does Jewish law value the concept of informed consent in medical treatment? Though such a topic might seem to detour from the general theme of this book, Golan commences her article by noting how Israeli law as a whole can call upon Jewish law in an attempt to formulate public norms in Israel. Golan's thesis derives from a recognized dichotomous tension: on the one hand, the duty to respect personal autonomy, and on the other hand, the duty to preserve human life. It has long been thought that under Jewish law this tension does not exist, for it has long been held that the duty to preserve human life is paramount, even under circumstances that contradict sacred duties such as observing the Sabbath. However, Golan disagrees with this dogma; she maintains that such a convention is applicable only in explicitly clear-cut cases where it is obvious that by withholding medical treatment there would be an immanent risk to life. In the other cases, which in fact are the vast majority of cases, the will of the patient is foremost and is to be respected. From this concept stems another duty of Jewish law, that of respecting a patient's dignity — a value important to each of us, and one we would like preserved in the event any one of us would need to make such a decision regarding medical treatment.

The literature discussing group rights has put forward strong arguments justifying why group membership may (or, indeed, should) grant individuals and groups alike certain accommodations. These accommodations can be in the form of public support for the group's cultural institutions, the legal guarantee that group members have adequate representation in public institutions and the right to practice one's own traditional rituals — be these of cultural, religious or national identity. However, one pressing issue that has yet to receive an adequate remedy is where the group norms and practices infringe upon basic individual liberties. An example of such an instance is the right of women to be equal to men. In **Frances Raday's** paper, this tension is observed in

connection with the struggle of the Women of the Wall (WoW) to pray at the site of the Western Wall in Jerusalem, exactly as men do. Raday, as a scholar of feminism and a legal activist who has personally been involved in representing the WoW before the Israeli Supreme Court, takes issue with the public and legal debate that the WoW actions have aroused over the years. Raday believes that the real issue behind the objection to allow WoW members to pray at the Western Wall is the insistence of Jewish Orthodoxy on the visibility of patriarchy in the public space. Raday takes an additional step in this direction when discussing past judgments handed down by the Israeli Supreme Court related to petitions by WoW members seeking to force the government to respect their right to pray. In her assessment, a careful look at the decisions of the Court reveals that, in a sense, the Court went along with patriarchal underpinnings of the Jewish orthodox establishment. This is mainly attributed to the fact that when the court recognized the principal right of WoW members to pray at a site in the Western Wall compound, it did so only partially and, even then, on the basis of the general notion of the freedom of religion and freedom of assembly, but not on the basis of egalitarianism.

Michael Karayanni discusses the place of religion in Israel, not in the context of the place of Judaism in the Jewish state as it is usually discussed, but in the context of the religions of the Palestinian-Arab minority which constitutes approximately twenty percent of the total population of Israel. His thesis is that specifically due to the Jewish nature of Israel and the peculiar controversies that the imposition of the religious norms has had within the Jewish community, issues pertaining to the religious accommodations of the Palestinian-Arab minority have been viewed as separate and different. In essence, they are considered to be a group accommodation granted to religious minorities. Moreover, this notion of separateness has been reinforced over the years given the underlying government policies towards the Palestinian-Arab minority in Israel as a whole and as a result of the dominant perceptions among the Palestinian-Arab community leaders — religious and secular alike. Karayanni's arguments show that this paradigmatic notion of separateness has normative implications as well. One such implication is, once again, the predicament of the individual freedoms vis-à-vis the group accommodation.

American Perspectives

Mark S. Weiner contends that state neutrality toward religion can and should remain a guiding aspiration of US constitutionalism, but that it is based on two conflicting and at the same time inseparable lines of tradition: universalistic liberal ideals of individualism and free choice and particularistic religious commitments that want to make their voices heard and their beliefs acknowledged and supported. Thus, the concept of state neutrality works as a tool of constitutional cultural management for a society that is at once highly religious, liberal and increasingly pluralistic. The tensions become evident in the differing notions of neutrality that US Supreme Court justices use: formal versus substantive neutrality. They also become evident in strict versus accommodationist constructions of the "wall of separation" between church and state. These competing understandings of neutrality and separation underlie the jurisprudence of the Supreme Court, which because of these internal tensions cannot be called consistent or consistently separationist. Rather, according to Weiner, this jurisprudence deserves to be called statesman-like because it uses the aspirational concept of neutrality between church and state in a prudent way that the American public can live with — and maybe someday even embrace.

Edward J. Eberle points out that this tension between separationism and accommodationism is not only a present-day phenomenon but goes back to early American history where religious evangelicals — with Roger Williams as the most prominent thinker in this tradition — and enlightened civic-republicans advocated a strict separation between church and state. They thought that putting a distance between these two spheres would best serve the interests of each. On the other hand, the puritan tradition and statesmen like George Washington and John Adams supported cooperation between church (i.e. the Christian church) and state to aid religion and support the state. This approach comes close to the way church and state are organized in contemporary Germany. Eberle also analyses the movement of the Supreme Court's recent jurisprudence away from a genuine wall of separation to various indirect ways of state support for religions in the public school area, for example by allowing vouchers for parents who then decide on the type of schools the parents want to send their children to. Although in these instances "formal neutrality" is respected, "substantive neutrality" does not occur because most parents use the vouchers to pay for private religious schools.

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Heidelberg/Jerusalem, summer 2006
Winfried Brugger and *Michael Karayanni*

Contents

I. A Socio-Historical Perspective

Religion and Public Order in Modern Nation-States: Institutional Varieties and Contemporary Transformations*

Matthias Koenig

The political significance of religion is back on the agenda of interdisciplinary academic debate. One does not need to recall the world-wide rise of Christian, Jewish and Islamic fundamentalism, the intensification of religious nationalism in South Asia, and the dynamics of religiously legitimated ethnic conflict to find evidence that religion continues to be strongly influential in modern society. Even within many seemingly "secularized" Western countries, new forms of politics of religious recognition have emerged which merit closer academic attention. It is indeed hard to find a country which is not witnessing public debates over religious symbols (headscarves, crucifixes etc.), constitutional conflicts over Church-State relations and political controversies over the accommodation of religious minorities.

In this contribution, I analyze these politics of religious recognition in a sociological perspective by contextualizing them in long-term institutional transformations of what may be called the institutional core of political modernity — the nation-state. That "religion" is invested with new legitimacy as a category of collective identity and is thus becoming an important resource in struggles for recognition in secular public spheres, as I shall argue, is a consequence of the nation-state's loss of

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* A more comprehensive version of this paper has previously been published as *Matthias Koenig*, "Politics and religion in European nation-states – institutional varieties and contemporary transformations", 291-315, in: Bernhard Giesen/Daniel Šuber, Religion and Politics. Cultural Perspectives, 2005.

charisma and, more precisely, of the structural decoupling of statehood, national identity and individual rights.

I shall present my argument in three steps: First, I highlight the relations between religion, politics and law within the institutional framework of the classical modern nation-state. Here I wish to give a somewhat different twist to conventional theories of "secularization" by stressing that the place of religion in modernity has presupposed cultural constructions of state sovereignty and national identity which were premised on a sacralization of the "secular". To underline this point, I secondly provide an ideal-typical sketch of institutional varieties of modern public order which until today continue to affect the modes of governing religious diversity and incorporating religious minorities.[1] The (possible) witnessing today of partial convergences of these institutional arrangements, which will be my third point, can be explained by the shift of charisma from the nation-state to universal human rights as epitomized by processes of legal transnationalization.

I. Religion, Modernity and the Nation-State

The major sociological paradigm for interpreting the place of religion in modernity used to be the theory of secularization. Modernity, in this still somewhat prominent view, gave rise to the rationalization of world-views, the differentiation of social subsystems from religious authority, and eventually, the decline of religious beliefs.[2] More recently, however, the theory of secularization has become highly contested. Critics, such as José Casanova, claim that public forms of religion, which have accommodated the basic premises of modernity, are not only empirically possible but also normatively legitimate, in so far as

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[1] In the following, the term "incorporation" is used in its current sociological meaning, and *not* as a legal concept; it thus denotes the mode of including persons into an existing political community or *corps politique*; see e.g. *J. Alexander,* Theorizing 'Modes of Incorporation': Assimilation, Hyphenation, and Multiculturalism as Varieties of Civil Participation, Sociological Theory 19/3 (2001), 238-49.

[2] For comprehensive overviews of sociological theories of secularization see *K. Dobbelaere*, Secularization: A Multi-Dimensional Concept, 1981; *O. Tschannen*, Les théories de la sécularisation, 1992; and for their recent defence *D. Pollak*, Säkularisierung: Ein moderner Mythos?, 2003; *P. Norris/R. Inglehard*, Sacred and Secular. Religion and Politics World-Wide, 2004.

they are conceived as part of a pluralistic civil society composed of multiple voluntary associations, and as a moral voice within the rational discourse of an autonomous public sphere.[3] Similarly, Danièle Hervieu-Léger, taking up the Weberian problem of "meaning" in modernity, tries to account for the ways in which modernity does not only *not entail* a decline of religion but is actually *productive* of ever new social forms of religion that respond to the modern condition of uncertainty and contingency.[4]

Yet these contributions leave intact what is perhaps the core of the classical paradigm of secularization, namely the thesis of a functional differentiation of religion from other spheres such as politics and law. For instance, in his account of religious de-privatization, Casanova explicitly upholds a normative concept of differentiation, arguing that religion may not raise any claims to power within the political system proper.[5] He thereby takes for granted an essentialist definition of religion, which reduces religious beliefs and practices to a specific form of moral argumentation within a separate domain of human life.[6] Similarly, Hervieu-Léger associates religion defined as "*lignée croyante*" with heteronomy as opposed to the autonomy of the political.[7] Both accounts, as well as many other contributions, miss, firstly: an awareness of cultural frameworks within which the relations of religion and politics are embedded; and secondly, a critical reflection on the pragmatic function of social (not to mention legal) definitions of "religion" within modern public spheres. A more thorough theoretical revision of the secularization paradigm should, therefore, treat "religion" as well the "secular" as discursive phenomena which are closely related to the cultural construction of modernity and its institutionalization in nation-

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[3] See *J. Casanova*, Public Religions in the Modern World, 1994, 19-39 and 232.

[4] *D. Hervieu-Léger*, La religion pour mémoire, 1993, 119 and 135.

[5] *Casanova* (note 3), Public Religion, 5; 65; 211.

[6] See on this point the perceptive analysis of Casanova's argument in *Talal Asad*, Formations of the Secular. Christianity, Islam, Modernity, 2003, 181-201.

[7] See *Hervieu-Léger* (note 4), La religion, 171; and *D. Hervieu-Léger*, Croire en modernité: au-delà de la problématique des champs religieux et politique, in P. Michel (ed.), Religion et Démocratie. Nouveaux enjeux, nouvelles approches, 1997, 361-381, esp. 374. In his critical reply to Hervieu-Léger, Patrick Michel has therefore suggested pushing further her analysis towards a sociology of (religious and political) "belief"; see *P. Michel*, Politique et religion. La grande mutation, 1994.

states.[8] The following remarks provide some analytical elements of such an approach.

Perhaps the most crucial aspect of the emergence of modernity as a cultural program is the imagination and sacralization of the "secular". Following Shmuel N. Eisenstadt's Weberian analysis of Axial Age civilizations and their internal transformations, the cultural construction of modernity in Europe can be described as a result of heterodox movements within Christianity. These movements that crystallized in the Protestant Reformation both radicalized the axial tension between the transcendent and the mundane order and attempted to resolve it by means of an inner-worldly reconstruction of society.[9] Traditional modes of legitimization broke down and what formerly were themes of social protest — liberty, equality and solidarity — moved into the centre of society. That this breakthrough to modernity fundamentally changed the social place of religion is already evident at the level of historical semantics. Indeed, it was in post-Reformation political vocabulary that the very concept of "religion", of rather marginal importance in premodern discourse, received its particular modern meaning.[10] The modern concept of "religion" has, first of all, a generic meaning signifying a presumably distinctive phenomenon ("religion"), distinct in essence from the newly emerging and equally essentialized domains of rational inner-worldly action, i.e. of economy, politics, law and science. Secondly, it also has a relativistic and historicist meaning ("*a* religion"/"religions"), allowing for different actualizations of the essence of "religion" in historical systems of belief that are assumedly shared by a certain group of people, enacted in their common rituals and embod-

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[8] Such a problem-shift has been suggested, most notably, by *J. Matthes*, Is secularization a global process? An exercise in conceptual history, in: Dai Kangsheng et al. (eds.), Religion and Modernization in China. Proceedings of the Regional Conference of the International Association for the History of Religion, Beijing 1992, 1995, 53-62; and *F. Tenbruck*, Die Religion im Maelstrom der Reflexion, in: J. Bergmann/A. Hahn/T. Luckmann (eds.), Religion und Kultur. Sonderheft 33 der Kölner Zeitschrift für Soziologie und Sozialpsychologie, 1993, 31-67.

[9] See, for instance, *S. Eisenstadt*, Max Weber on Western Christianity and the Weberian Approach to Civilizational Dynamics, Canadian Journal of Sociology 14 (1989), 203-224.

[10] *E. Feil*, Religion. Die Geschichte eines neuzeitlichen Grundbegriffs vom Frühchristentum bis zur Reformation, 1986; *id*, Religion. Die Geschichte eines neuzeitlichen Grundbegriffs zwischen Reformation und Rationalismus (1540-1620), 1997.

ied in mutually exclusive membership organizations. More fundamentally, this modern concept of "religion" was premised on a new imagination of the "secular". The *saeculum*, previously conceived as interlude between Creation and *eschaton*, was re-conceptualized as unlimited social time-space within which both "religion" and "politics" were situated.

Now if we ask how the "secular" as modernity's *imaginaire*, to use Cornelius Castoriadis' terminology, was institutionalized, we have to take account of the nation-state as framework for processes of rationalization and differentiation. Indeed, with the breakthrough to modernity, the political sphere gained autonomy vis-à-vis the Church and became the major focus for rational reconstructions of society. In other words, the charisma which in medieval Roman Christianity was partly invested in the "spiritual" authority of the Church (*ecclesia*) shifted entirely to "secular" authorities (*imperium*) and, as one should note in passing, opened up the possibility of absolute politics.[11]

Under the historical conditions of early modern Europe, it was the territorial state that happened to be conceived as the organizational centre for modern projects of rationalization, into which both former feudal or corporate units and individual actors were incorporated.[12] The state was now also seen as the focus for symbolic constructions of collective identity, most notably in the course of the English, the American and the French Revolutions through which political power became accountable to the "People" or the "Nation".[13] The project of modernity was thus institutionalized in the form of the nation-state in which a specific type of political organization, the sovereign territorial state, was structurally coupled with a specific type of collective identity, the imagined community of the nation. The institution of citizenship, composed of the elements of state membership, individual rights and national identity, clearly reveals this particular social form of coupling political

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[11] That the shift of charisma from "spiritual" to "secular" authorities, which has to be understood against the background of the Gregorian Revolution, cannot be equated with a differentiation of politics and religion has been shown by *A. Pizzorno*, Politics Unbound, in: Charles S. Maier (ed.), Changing Boundaries of the Political. Essays on the Evolving Balance Between the State and Society, Public and Private in Europe, 1987, 27-62, esp. 33, 44.

[12] See on this point also *G. Thomas/J. Meyer*, The Expansion of the State, Annual Review of Sociology 10 (1984), 461-482.

[13] Cf. *B. Anderson*, Imagined Communities. Reflections on the Origin and Spread of Nationalism, 2nd ed., 1991.

organization and cultural collectivity, of making congruent political and cultural boundaries.

While this shift of charisma to the "secular" political sphere reduced the influence of religion in legitimating power and in defining collectivities, it did not imply that "spiritual" matters and the Christian tradition more generally became publicly irrelevant. On the contrary, what was now called "religion" could be incorporated into the nation-state's projects of rationalization and disciplinization. The state gained organizational control over practices and institutions which formerly were placed under "spiritual" authorities, such as education, science, and most notably, as Harold Berman has recently shown in his account of legal implications of the Reformation, over private and civil law.[14] Furthermore, Christian symbols could be drawn upon to construct collective identities, particularly in the confessional age when sovereign rulers assumed the right to determine the "religion" of their subjects, but also later, in the "second confessional age" of the nineteenth century, when national identities were constructed with reference to confessional traditions.[15]

Again, historical semantics are indicative of these trends. In fact, the concept of "religion" lent itself to political contestations about symbolic boundaries between "public" and "private".[16] Thus, during the formation of absolutist territorial states after the confessional wars and the Peace of Westphalia (1648), "religion" was located in a private sphere opposed to a state sphere that was considered to transcend all "religious" particularities. In the eighteenth century, when a new conceptual opposition was formulated between the state and what was now understood as "civil society" and the "public sphere" as loci of social transcendence, "religion" was further privatized conceptually. Until today, as legal controversies show, definitions of "religion" are a highly

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[14] *H. Berman*, Law and Revolution. The Formation of the Western Legal Tradition, 1983, and *id*., Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition, 2004; see also *P. Prodi*, Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra scienza e diritto, 2000.

[15] See the contributions in *P. van der Veer/H Lehmann* (eds.), Nation and Religion. Perspectives on Europe and Asia, 1999.

[16] See in this respect Reinhart Koselleck's analysis of post-Reformation political discourse; *R. Koselleck*, Kritik und Krise. Eine Studie zur Pathogenese der bürgerlichen Welt, 1973 [1959], 18, 29, 154.

contested resource in discourses over state sovereignty and national identity as well as their limitations.

Finally, from the French Revolution onwards, the semantic dichotomy of heteronomous "religion" and modern autonomous "politics" was transposed onto the meta-narrative associated with the concept of "secularization". Originally a strictly legal term, the concept has since the nineteenth century been used metaphorically within a relatively flexible narrative structure, couched in either utopian or nostalgic idioms and emphasizing either continuity or discontinuity. In each of its forms, the meta-narrative of "secularization", against the political-theological background of Christianity, has contributed to the cultural self-understanding of modern statehood and national identity.

To conclude, the shift of charisma from "spiritual" to "secular" authority resulted in new arrangements of politics, law, collective identity and religion within modern nation-states. These institutional arrangements were premised on the construction of the "secular" as a social space, within which both "politics" and "religion" are situated.[17] It is in *this* sense that secularization is indeed concomitant with the emergence of modernity, all the while multiple relations between "politics" and "religion", ranging from differentiation to de-differentiation, are possible.[18]

II. Institutional Varieties of "Secularism"

Given the diverse historical trajectories of state-formation and nation-building in early modern Europe, the cultural construction of a secular space and the institutional arrangements of politics and religion within

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[17] "With the rise of the nation-state comes an enormous shift of what religion means. Religion produces the secular as much as the reverse, but this interaction can only be understood in the context of the emergence of nationalism in the nineteenth century"; *P van der Veer*, Imperial Encounters. Religion and Modernity in India and Britain, 2001, 20.

[18] That de-differentiation of politics and religion was a major phenomenon in early modern Europe, most notably within Lutheran territories, has been stressed by *P. Gorski*, Historicizing the Secularization Debate, American Sociological Review 65 (2000), 138-167, esp. 150. Yet, while I concur with his criticism of the differentiation thesis as a paradigmatic core of the secularization theory, I would stress that the de-differentiation takes place *within* the modern condition and its conception of a "secular" social space.

it took different forms. In the comparative literature, such institutional varieties of relations between politics and religion are often reduced to legal arrangements of Church and State, distinguishing regimes of separation, of co-operation and of state or national church.[19] Against this conventional typology, I propose to focus more systematically on varying characteristics of the nation-state as the institutional framework of political modernity. For that purpose, I draw on a well-established typology of public order in sociology's new institutionalism, in which two analytical dimensions of variation are combined: (a) the degree to which the modern project of rationalization is carried by a centralized state; and (b) the degree to which the individual has substituted former feudal units as an autonomous actor. Four ideal types of public order, and hence of citizenship incorporation, can thus be distinguished: liberal, statist/republican, state corporatist and social corporatist.[20] Each type displays elective affinities to different modes of symbolizing national identity, varying between the poles of universalistic or more particularistic codes.[21] While time does not permit to develop this typology in more detail, I wish to at least sketch its implications for institutional arrangements of politics, law and religion and for modes of incorporating religious minorities.

Liberal polities are characterized by a low degree of "stateness" and a high degree of individualization. No corporative units (rather, only individuals) are recognized as legitimate actors in the public sphere, while the state refrains from incorporating citizens into a centralized project of rationalization and only provides legal guarantees for their rational pursuit of interest in civil society. This implies recognition of a pluralism of individual religious orientations in the public sphere, with tendencies of favouring associational and voluntary modes of religious organization. Due to the weak degree of "stateness", the governance of religion and of religious diversity is regarded less as a state affair and more as a decentralized process of negotiations in civil society. Conflicts between state and ecclesiastical authorities therefore display only

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[19] See, for instance, with special reference to the government of religious diversity *S. Monsma/J.C. Soper*, The Challenge of Pluralism: Church and State in Five Democracies, 1997.

[20] For the most recent and comprehensive formulation of this typology see *R. Jepperson*, Political Modernities: Disentangling Two Underlying Dimensions of Institutional Differentiation, Sociological Theory 20 (2002), 61-85.

[21] See *S. Eisenstadt/B. Giesen*, The construction of collective identity, Archives européennes de sociologie 36 (1995), 72-102.

low profiles. This model has been highly influential in Anglo-Saxon countries including even Great Britain where, in spite of the establishment of the Anglican Church since the 1534 Act of Supremacy under Henry VIII, relatively pluralistic modes of incorporating religious minorities have developed. This is shown by the tradition of legal exemptions for individuals belonging to religious minorities, which starts with the Toleration Act (1689) and continues until the Religious Exemption Act (1976), exempting Sikhs from having to wear motorcycle crash helmets. It is not by accident that Muslim minorities have met less political resistance in Britain in being included into major social institutions, such as schools, city councils and Parliament. However, conflicts did arise to the extent that claims for recognition focused on the modification of symbols of national identity. Yet, even the Protestant or Christian elements in the set of British national symbols have, not unlike in American civil religion, a potential for pluralistic modes of incorporating religious minorities as they conceive religion as publicly relevant; it is quite revealing in this respect that Muslims have expressed themselves in favour of the establishment of the Anglican Church and against the statist or republican secularism.[22]

In comparison with liberal polities, the statist or republican polity model has been less favourable to the recognition of religious minorities. Here, the cultural program of modernity is institutionalized in a highly individualized and highly centralized public order. Thus, individuals are directly incorporated into the collective project of rationalization without taking into account their respective position in civil society. The public sphere is regarded as homogeneous and as being composed of formally equal citizens, whereas the representation of particularistic identities, especially those that are categorized as "religious", are excluded and restricted to the private sphere. Conflict characterizes the relations between the state and ecclesiastical authorities, and public religious policies are aimed at controlling the symbolic boundaries of the state and on projecting relatively homogeneous national identities in various social fields, notably in the education system. Obviously, the French Republic is the prime example of this institutional trajectory. Until today, the "*guerre des deux Frances*" — to use Emile Poulat's fe-

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[22] This point has been stressed by *T. Modood*, Anti-Essentialism, Multiculturalism, and the 'Recognition' of Religious Groups, Journal of Political Philosophy 6 (1998), 378-399.

licitous phrase[23] — has left its imprint on the political vocabulary and public institutions of the French Republic, most notably by establishing the concept of *laïcité*. Due to the high degree of state centralization of public functions, combined with the national symbol of *laïcité*, religious claims for recognition are easily perceived as transgressing the symbolic boundary between the public and the private, or as polluting the sacred core of the nation. Ongoing conflicts over the wearing of religious symbols in public schools are indicative of the strong persistence of the republican polity model, in which the public sphere is defined in expansive terms. Equally indicative are in that respect, perhaps paradoxically, the state's interferences in the formation of central religious organizations. Thus, it was the French government which created a central representative organization of Muslims, although, as continuing controversies of the legitimacy of the *Conseil Français du Culte Musulman* (CFCM) show, with rather dubious success.

Finally, in both of the corporatist polity models, individuals are incorporated into public projects of rationalization via corporative intermediate units. In the German-speaking bi-confessional region, state corporatist models of public order were historically predominant. Religion(s) used to be regarded as a component of the public sphere, and religious organizations were even invested with public or state functions. It is in their capacity of being members of a corporative religious organization that individuals are perceived as religious actors. Hence, the state's public policy of religion is mainly concerned with regulating the public functions of corporative religious communities, even after formal separation of church and state. The state-corporative model is reflected in institutional arrangements of close co-operation between the state and the two churches, such as those of the *Weimarer Reichsverfassung* and the *Grundgesetz* of the Federal Republic of Germany. The legal dimension of this model is epitomized by the complex set of constitutional, legislative and contractual regulation that constitute the so-called *Staatskirchenrecht*, within which rules of a selective co-operation between a presumably "neutral" state and the churches are laid out and the conditions for granting religious communities the status of "corporations of public law" are specified. Its political dimension is the continuing strong influence of the two Christian churches in the public sphere, notably in the fields of social welfare and education, but also with respect to public policies vis-à-vis religious minorities. Not unlike

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[23] *E. Poulat*, Liberté, Laicité. La guerre des deux France et le principe de la modernité, 1987.

the French situation, the incorporation of religious minorities is controlled by the organizational centre of the state. However, it takes a particular form in centring on legal questions of including religious organizations in the system of privileged relations between the state and the religious communities. Also, as religion is considered publicly relevant, conflicts focus not on the question *whether* but rather *which* religions are to be publicly recognized.

Needless to say this is but a highly stylized typology which cannot account for the historical complexities of state-formation and nation-building and their impact on relations between politics, law and religion. In fact, several countries — the Netherlands, Belgium and Spain — display mixtures of these types. Yet, the analysis suggests that different patterns and degrees of differentiation between "politics" and "religion" crystallized in modern Europe, all of which are, however, shaped by the strong coupling of political organization and collective identity within the nation-state. While these patterns still continue to affect struggles over the legitimate place of religion within the public sphere, they all are currently subject to far-reaching transformations.

III. Contemporary Transformations of Secularism

In spite of historical path-dependencies, we currently observe convergent trends in the institutional arrangements of politics, law and religion. As religious pluralization is progressing, in Europe notably due to continuing migration from Islamic and Asian countries, routine relations between political and religious actors and institutions are challenged. The possibility to conceive of a "*laïcisation de la laïcité*" and a "*laïcité ouverte*" in French public discourse is perhaps most indicative of this development.[24] Awareness of the religious dimension of integration policies has also led to contestations and debates about the future of the Anglican establishment and about the evolution of German *Staatskirchenrecht* towards a more pluralistic *Religionsverfassungsrecht*. Although these debates are triggered by specific religious claims for the recognition of immigrants, they exemplify long-term structural trans-

[24] This notion has been coined by *J. P. Willaime*, État, pluralisme et religion en France. Du monopole à la gestion des différences, in: J. Baubérot (ed.) Pluralisme et minorités religieuses, 1991, 32-43; ibid. Europe et religions. Les enjeux du XXIe siècle, 2004; for a related analysis see also *M. Gauchet*, La religion dans la démocratie. Parcours de la laïcité, 1998.

formations of the nation-state to the extent that they are increasingly framed in the cognitive and normative categories of a transnational human-rights discourse.

In fact, the legitimacy basis of the classical nation-state has been considerably transformed in the post-war period through the emergence of what is called "post-Westphalian" international law. Two developments, analyzed in depth in sociological world-polity studies, directly affect national models of public order and citizenship:[25] the decoupling of state membership and individual rights and the decoupling of state membership and national identity. First, the transnational diffusion of ideas of human rights in the post-war period and their institutionalization in international organizations (both governmental and non-governmental) has firmly established a charismatic status of "universal personhood" to which rights are, at least in principle, attached independently from formal state membership or nationality. The human-rights discourse provides new repertoires of contestation and justification for both individuals and states and, thereby, changes domestic political dynamics. Second, within the transnational human-rights discourse there has been a proliferation of new rights that clearly go beyond the classical European political tradition. Of particular importance in this respect are rights to equality and non-discrimination, as well as their recent specification in articles on individual rights to cultural identity and on minority rights, which oblige states to adopt a pro-active approach to promote the identity of ethnic or national, linguistic and religious minorities on their territory. Notably since the 1990s, the concept of a right to cultural identity and related notions have taken hold in transnational human-rights discourses, as demonstrated by the *UN Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities* (1992), a variety of activities of the Council of Europe and the Organization for Security and Co-operation in Europe — not to mention the jurisdiction of the European Court on Human Rights. Together, these two transformations amount to a de-charismatization of the nation-state, with charisma being shifted to universalistic human rights. A new model of public order is thus institutionalized, in which, to use the terms of human-rights scholar Asbjørn Eide, "common domain" and "separate domain" are coordinated so as to respect ethnic, linguistic and religious differences.

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[25] *Y.N. Soysal*, Limits of Citizenship. Migrants and Postnational Membership in Europe, 1994.

The emergence of new institutional bases of rights and the transnational diffusion of a new model of public order implicate substantial institutional changes in the public governance of religious diversity. As state membership, individual rights and national identity have become increasingly decoupled, new categories of identity have been legitimated and sanctioned in the public sphere, including "religion". A closer analysis of contestations over the concept of religion in transnational human-rights discourse shows that since 1945 the classical modern meaning of religious liberty has been superseded by its insertion within a semantic field of "racial discrimination" and "cultural diversity".[26] International organizations such as the United Nations, the Council of Europe and (not least) the European Union are mounting normative pressure on nation-states to adopt anti-discrimination laws and reforming historically developed church-state relations.[27] Struggling to find more pluralistic modes of incorporating religious minorities, governments increasingly co-operate with organized religious bodies in many institutional fields including education, welfare provisions and legislation. Also, as shown by the recent legal prohibition of visible religious signs in state schools, which re-affirmed a strict interpretation of French *laïcité*, even seemingly national models are framed by references to global and European norms of religious liberty.[28] As a consequence, various countries are experiencing controversies over religious identities, religious symbols and most notably over the proper boundaries between "religion" and "politics".

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[26] See in greater detail *M. Koenig*, Weltgesellschaft, Menschenrechte und der Formwandel des Nationalstaats, Zeitschrift für Soziologie 34 (2005), Sonderband Weltgesellschaft, 374-393.

[27] To be sure, both the Council of Europe and the European Union tend to respect national traditions of church-state relations, as evinced by the jurisprudence of the ECrtHR on religious liberty and, even more explicitly, by the Eleventh Declaration amending the Treaty of Amsterdam. Yet legal discourse does contribute to partial convergence by means of the transnational circulation of normative frames of reference; see *H.M. Heinig*, Vom deutschen Staatskirchenrecht zum europäischen Religions(Verfassungs)Recht. Verfassungsrechtliche und verfassungstheoretische Anmerkungen zum Verhältnis von Staat und Religionsgemeinschaften in Europa, in: Dieter Fauth (ed.) Staat und Kirche im werdenden Europa. Gemeinsamkeiten und Unterschiede im nationalen Vergleich, 2003, 71-91.

[28] The Report Laïcité et République, written by a Commission of political and intellectual leaders under Bernard Stasi to prepare new legislation, explicitly places the French tradition in a broader international perspective.

IV. Conclusion

My thesis and argumentation have stressed the pivotal role of the nation-state as a major institutional framework of political modernity and its visions of a "secular" social space, within which various modes and degrees of differentiation between "politics" and "religion" — institutional varieties of secularism — are possible. I have also tried to shed some light on contemporary transformations of the nation-state that result in new conflicts over the delineation of boundaries between politics and religion.

I would like to conclude on a sceptical note concerning a currently fashionable diagnosis of a coming "post-secular society". This diagnosis, which assumes — to recall Habermas' main argument[29] — a return of religious languages into the public sphere of rational discourse and hence a relativization of secular or secularist arguments, is misleading on several accounts.[30] First of all, religion had never quite disappeared or been entirely privatized within the framework of the classical nation-state. Moreover, multiple patterns of differentiation and even de-differentiation between politics and religion were possible; even the "secular" political sphere was itself invested with charismatic or sacred qualities in the emergence of modernity. "If the secularization thesis no longer carries the conviction it once did", to quote Talal Asad, "this is because the categories of politics and religion turn out to implicate each other more profoundly than we thought, a discovery that has accompanied our growing understanding of the powers of the nation-state".[31]

At the same time, contemporary transformations in the relation between politics and religion, epitomized by struggles over the recognition of religious identities, are far from constituting an exit from the secular and modern condition; rather, they indicate a shift of charisma from the nation-state to human rights, as a result of which new particularistic identities, including religious ones, are sanctioned as legitimate expressions of the universal. Far from challenging the major premises of political modernity, claims to the recognition of religious identities con-

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[29] See *J. Habermas*, Glauben und Wissen. Rede anläßlich der Verleihung des Friedenspreises des Deutschen Buchhandels, 2001, 22.

[30] For a similar argument see *H. Joas*, Braucht der Mensch Religion?, 2004, 122-128, who rightly emphasizes the *internal* transformation of religious languages.

[31] *T. Asad*, op. cit.

tribute, in other words and perhaps paradoxically, to a further disenchantment, namely the disenchantment of the modern nation-state.

What remains an open question is how the human-rights-based governance of religious diversity can be reconciled with our understanding of democracy. As Charles Taylor has argued,[32] the coupling of statehood and national identity has been an assumption of modern patterns of democracy. Models of associative or consociative democracy, which by contrast allow the peaceful co-existence of a diversity of autonomous collectivities including those premised on religion, still need to be found. Perhaps this will turn out to be the most challenging question for future constitutional controversies over religious diversity.

[32] See, e.g., *Charles Taylor*, Die Religion und die Identitätskämpfe der Moderne, in: N. Göle/L. Ammann (eds.), Islam in Sicht. Der Auftritt von Muslimen im öffentlichen Raum, 2004, 342-378.

II. Models of Church-State Relations and Their Impact on Freedom of Religion

On the Relationship between Structural Norms and Constitutional Rights in Church-State-Relations*

Winfried Brugger

I. Introduction

The modern western state has developed to a large part as a political organization that has bid farewell to the medieval union of church and state in the *res publica christiana*. State authority was no longer reliant on the one and only Christian church but rather on Protestantism and Catholicism. The later rivalry between these two denominations as well as the struggles for dominance by their political supporters also made peaceful relations impossible. Military intervention, war and bloodshed were the result. The secularization of authority in the western world as such appeared inevitable.[1] Politics was to concentrate on the secular is-

* For their generous help in improving the English of this article, I would like to thank Mark Tracy, Heidelberg, and William Funk, Portland, USA.

1 See *E.-W. Böckenförde*, Die Entstehung des Staates als Vorgang der Säkularisation (The Development of the State as a Process of Secularization) in: Staat, Gesellschaft, Freiheit (State, Community and Freedom) 1976, 42 et seq.; *C. Walter*, Religionsverfassungsrecht in vergleichender und internationaler Perspektive (Constitutional Religious Rights in Comparative and International Perspectives) 2006, Chapter 2 I, 23 et seq.; *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989): "The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than on the basis of their religious faith. A secular state, it must be remembered, is not the same as an atheistic or anti-religious state. A secular state establishes neither atheism nor religion as its official creed."

sues of well-being – i.e. the requirements of peaceful cohabitation, productive cooperation in worldly, economic matters for the benefit of all. Specifically excluded from this equation was the ultimate question regarding faith and belief.[2] In religious matters, the attainment of eternal salvation, despite the continued influence of the Christian ideals on political actors, was no longer to be achieved under the sword of the state.[3] The development towards a structural division between church and state continuously evolved in most European states and in the new United States. The powers of the two authorities were clearly divided: worldly well-being and common good on the one hand and eternal salvation on the other.[4] The latter was to follow the principle of personal responsibility, within the framework of religious freedom and conscience.[5]

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[2] Classical literature concerning this point: *Th. Hobbes*, Leviathan, 1651, chapter 39: Priority of the duty of government to secure worldly peace even in the face of religious strife, but without a guarantee of religious freedom. See also *Hobbes*, De Cive, 1642 (reprint 1983), chapter 13 VI, concerning the obligations of the sovereign to its citizens: "1. That they may be defended against [foreign] enemies. 2. That Peace be preserved at home. 3. That they be enrich't as much as may consist with public security. 4. That they enjoy a harmeless liberty …. [that] they may quietly enjoy that wealth which they have purchased by their own industry."

[3] See *J. Story*, Commentaries on the Constitution, 1833, reprint with introduction by *R. Rotunda/J. Novak*, 1987, 701 (§ 990): "religion…can be dictated only by reason and not by force or violence."

[4] See *Böckenförde* (note 1), 43 et seq., and in reference to the public school sector the remarks of Justice Jackson dissenting in *Everson v. Board of Education*, 330 U.S. 1, 22 et seq. (1947): religious schools, in the case at hand catholic schools, teach the "mission" and "faith and order of the Church" (p. 23), while state schools, released from such messages, "inculcate all needed temporal knowledge... [and] worldly wisdom…" (p. 24). See also the minority opinion at p. 15: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority." See also in the attachment to this decision the "Memorial and Remonstrance Against Religious Assessment" by James Madison, 63 et seq., concerning the "light of revelation" (70) in contradiction to the "liberties, the prosperity, and the Happiness of the Commonwealth" (72).

[5] For a historical analysis of religious freedom see *R. Grote*, Die Religionsfreiheit im Spiegel völkerrechtlicher Vereinbarungen zur politischen und territorialen Neuordnung (The Freedom of Religion as Reflected in International Conventions on the Political and Territorial New Order) in: *R. Grote/Th. Ma-*

It is no surprise that modern constitutions promote separation of church and state as well as prohibit state coercion with regard to faith.[6] A classic example is the First Amendment of the United States Constitution from 1787/1791, which in addition to ensuring the freedom of speech addressed religious activities by delineating the structural relationship between church and state and guaranteeing individual freedom from state coercion.[7] It expressly provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

In *Everson v. Board of Education*, a US Supreme Court decision from 1947, Justice Hugo Black summarized the historical background:

> "A large portion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics

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rauhn, eds., Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitsschutz und Staatskirchenrecht. Völker- und verfassungsrechtliche Perspektiven (Religious Freedom Between Individual Self-Determination, Protection of Minorities and Church Law. International Law and Constitutional Perspectives), 2001, 3 et seq.

[6] See Article 16 of the Virginia Bill of Rights of 12 June 1776: "That religion… can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other." This was however only beneficial to Christians, as noted by *Th. Giegerich*, Religionsfreiheit als Gleichheitsanspruch und Gleichheitsproblem (Freedom of Religion as a Claim and Problem of Equality), in: *Grote/Marauhn* (note 5), 241, 247. *A. Hollerbach*, National Identity, the Constitutional Tradition and the Structures of Law on Religions in Germany, in: European Consortium for Church-State-Relations, ed., Religions in European Union Law, 1998, 89, 90, believed the following two pillars were "absolutely indispensable": "Religious liberty for the individuals, for groups and religious bodies itself and the institutional separation with the recognition of autonomy, respectively self-determination."

[7] For an extensive analysis of the history of and current religious freedoms in the US, including case excerpts, see *M. Ariens/R. Destro*, Religious Liberty in a Pluralistic Society, 1996.

> had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews… men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them."[8]

Black noted that these old-world practices were initially continued in the new colonies. "The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishment which all, whether believers or non-believers, would be required to support and attend."[9] Under these guidelines, state churches as well as privileges granted to particular faiths and political-religious unions were not a peculiarity of old Europe but also of new America.[10]

II. Structural Norms and Constitutional Rights

The First Amendment, addressing the question of religion, was directed against the devastation of war and religious oppression which Justice Black described as the "evils it was designed forever to suppress."[11] The first part of the amendment constructed the so-called "Establishment

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[8] 330 U.S. 1, 8 et seq. See also the brief historical summary by *Böckenförde* (note 1).

[9] *Id.*, 9. See also the historical analysis in *Engel v. Vitale*, 370 U.S. 421 et seq. (1962); *Allegheny v. A.C.L.U.*, 492 U.S. 573, 646 et seq. (Justice Stevens concurring in part and dissenting in part).

[10] See *U. Fülbier*, Die Religionsfreiheit in der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika unter spezieller Berücksichtigung der jeweiligen Methoden der Verfassungsinterpretation (The Freedom of Religion in the Federal Republic of Germany and the United States of America with Special Consideration of the Respective Methods of Constitutional Interpretation), 2003, 129 et seq.; *Walter* (note 1) Chapter 3, II 76 et seq.

[11] *Everson v. Board of Education*, 330 U.S. 1, 14 et seq. (1947).

Clause",[12] while the second set forth the "Free Exercise Clause." Both clauses together (i.e. neither in isolation) regulated the relationship between state, church and religion. Other modern constitutions, like the German Basic Law (*Grundgesetz*) (hereafter Basic Law),[13] typically contain both provisions[14] and tend to be more specific in the scope of protection. Not only is the "free exercise of religion" protected, but paragraphs 1 and 2 of Article 4 also ensure the freedom of faith and conscience, as well as the freedom to profess a religious or philosophical creed. Article 9 of the European Charter of Human Rights is even more detailed. The scope of religious freedom[15] is designated under three elements: "freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practicing and observance."[16]

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[12] In the US the term "Establishment Clause" is predominant. Because the regulation refers to a prohibition against establishing a church by the state, "Non-establishment", however, appears to be more accurate.

[13] An English translation of the Basic Law is available from the Press and Information Office of the Federal Republic: *The Basic Law for the Federal Republic of Germany*, last edition 1998. A version is also available on the internet at: www.jurisprudentia.de/jurisprudentia.html.

[14] For example see "Soviet Law on Freedom of Conscience and Religion" from October 1, 1990, cited by *J. MacLear*, Church and State in the Modern Age. A Documentary History, 1995, 500 et seq., Section 1, no. 1 (Religious Freedom and Equality as the Legal Objective), no. 3 (Freedom of Conscience), no. 4 (Equality of Citizens with Regard to Their Religion), no. 5 (Separation of Church and State).

[15] The European Convention on Human Rights (ECHR) contains no structural norms concerning the relationship between church and state, due to the fact that it is not a "constitution", but rather an international treaty; the regulation of church-state relations belongs to the internal organization of the state. This does not exclude the possibility that religious freedoms anchored in international treaties indirectly affect church-state relations. In this regard, see *J. Frowein*, Religionsfreiheit und internationaler Menschenrechtsschutz (Religious Freedom and International Protection of Human Rights), in: *Grote/Marauhn* (note 5), at 73 and 78 et seq.; *Walter* (note 1) § 7 III, 200 f.; part 4, 332 et seq. For example, see note 72 concerning the decision of the European Court of Human Rights in *Manoussakis v. Greece*, *Frowein*, *id.*, 87 et seq., and *Walter* (note 1) 483, 398 in reference to securing pluralism.

[16] See also Articles II-10 and I-51 of the Draft of the European Constitution concerning the freedom of religion and the status of churches and world-view communities (*weltanschaulichen Gemeinschaften*) and moreover the indirect in-

The United States Constitution, as a classical and relatively short constitution, does not regulate in such explicit detail. However, rulings of the Supreme Court have compensated for this deficiency. In a famous passage from the *Everson* decision, Justice Black summarized his view of the essential elements of the religion clauses in the First Amendment:

> "The 'establishment of religion' clause of the First Amendment provides as a minimum that: [1] neither a state nor the federal government can establish a church. [2] Neither may pass laws which [a] aid one religion, [b] aid all religions, or [3] prefer one religion over another. [4] Neither can force nor influence a person to attend or not attend a church against his or her will or force a person to profess a belief or disbelief in any religion. [5] No person may be punished for having or professing religious beliefs or disbeliefs, for church attendance or absence. [6] No tax in any amount, large or small, may be levied to support any religious activity or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. [7] Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. [8] In the words of Thomas Jefferson, the clause against establishment of religion was intended to erect a 'wall of separation.'"[17]

The passage clarifies the close connection between the two clauses as well as between the structural and individual rights aspects. Although Justice Black only considers the consequences of the non-establishment clause and summarizes it within the context of the separation-wall doctrine, the eight elements of the definition concern both negative and positive aspects of religious freedom as well as the problem of equality.[18] On one hand, the problem is addressed at the level of illegal gov-

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fluence of European Law on church-state relations especially in the area of labour and information protection law as well as charitable activities, *Walter* (note 1), Chapter 13, 403 et seq.

[17] *Everson* (note 4), 15 et seq. Brackets here and elsewhere by the author. Specific commentary on Thomas Jefferson's metaphor of the wall of separation in *C. T. Anglim*, Religion and the Law. A Dictionary, 1999, 347 et seq.; *D. Dreisbach*, Thomas Jefferson and the Wall of Separation Between Church and State, 2002. As to different lessons drawn from the American history on the background of religious strife, see section VII below under Madison and Story.

[18] See on the connection between constitutional freedoms and equality rights as well as their textual sources in national and international law *Giegerich* (note 6), 244 et seq.

ernmental influence and on the other in regard to individual freedoms. In many ways, both clauses act in concert. However, it is clear that in many instances religious freedom cannot come to full fruition in the single individual but is rather dependent on the surrounding community of the faithful.[19] Differences between the two religion clauses may arise when a strict separation of church and state is viewed as constitutionally necessary, even though on the level of individual rights no state "force" is being applied.[20] The opposite case is also possible – the structural requirements of division between the two spheres may be more lenient than what would be required under the Free Exercise Clause.[21]

The close connection between structural norms and basic rights is also clear in other constitutions. Like the First Amendment of the US Constitution, the German Basic Law also regulates both aspects of religious freedom. Article 4 Basic Law is the core provision of the free exercise of religion, and Article 140 Basic Law, which incorporates Articles 136-139 and 141 of the Weimar Constitution (*Weimarer Reichsverfassung*), is the primary structural regulation. Both articles form a unity when German courts resolve church-state problems. Closer examination reveals that the rights guaranteed in Article 4 (1) Basic Law also possess structural and equality elements. The paragraph not only addresses "religion" but also "worldviews" (*Weltanschauungen*). Both are to be treated as equal. Thus, structurally, the state must maintain a neutral standpoint, not identifying itself with a particular view. The incorporation of specific articles of the Weimar Constitution also establishes religious freedom, provides for religious equality and is structurally ori-

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[19] See *N. Dorsen/M. Rosenfeld et al.*, Comparative Constitutionalism. Cases and Materials, 2003, 974: "[There] can be no protection of religion outside the church, which is the only repository of religious rights; or at least freedom of religion cannot be fully protected without giving adequate protection (power of self-determination and autonomy) to the church."

[20] See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) in terms of a strict theory of separation at the structural level: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion." As noted on p. 431, a violation of the non-establishment clause may also occur in the absence of "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion...." See also *Allegheny v. ALCU* 492 U.S. 573, 627 et seq. (1989): The strict institutional separation of church and state also forbids the "subtle ways [in which] a government can show favoritism."

[21] An example here is the crucifix decision of the German Constitutional Court. See section VIII below.

ented. As such, the micro and macro elements of religious life are regulated together.[22]

Does the wall of separation between church and state as set forth by Justice Black also apply in Germany? In light of Article 7 (3) Basic Law, the church clauses in the Weimar Constitution, past and current legislation as well as the possibility of contracts between church and state, this would appear to be obviously not the case.[23] In Germany, a permeable barrier does exist between the two spheres; however, it is certainly not a strict wall of separation.[24] The element of division is largely stipulated in the prohibition of a state church (Article 140 Basic Law in connection with Article 137 (1) Weimar Constitution) as well as the negative right not to be required to practice a particular religion or philosophical creed. This division does not, however, lead to strict separation. The Basic Law allows for religious instruction in state schools (Article 7 (3)), while in the US, as a general rule,[25] a spatial separation between re-

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[22] Constitutionally guaranteed rights are contained in Article 136 of the Weimar Constitution, and equality rights are promulgated in Article 137 (5) and (7). Structural regulations are provided in Articles 137 (1) and 139. Articles 137 (2) and 141 have mixed elements.

[23] See *A. von Campenhausen*, Staatskirchenrecht (Church Law), 3rd ed. 1996, § 11; *B. Jeand'Heur/S. Korioth*, Grundzüge des Staatskirchenrechts (Introduction to Church Law) 2000, § 5; *A. Hollerbach*, Religion und Kirche im freiheitlichen Verfassungsstaat (Religion and Church in the Constitutional State), 1998, 13 et seq.

[24] See *Hollerbach*, National Identity (note 6), 89: "It is well-known that the German system of juridical state-church relations, what we call '*Staatskirchenrecht*', is based on two pillars: The fundamental right of religious liberty in its positive and negative sense on the one hand and the institutional separation on the other; a separation that necessarily includes autonomy or self-determination or self-governance. But there are also significant elements of connection and cooperation: church tax, religious education in public schools, etc. Upon the basis of the constitution and few special laws the preferred instrument for handling this system is the treaty, the contract. This system of co-operation in the spirit of liberty and partnership is valid for the whole of Germany. In the course of reunification it has been confirmed."

[25] On spatial separation see *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious teachers cannot hold classes in a public school building). More lenient is the case of *Agostini v. Felton*, 521 U.S. 203 (1997) (in the framework of a neutral assistance program beneficial to both public and private, religious-orientated schools, state teachers may give an elective course in religious schools when the circumstances make it clear that a secular objective is being pursued). The rule of thumb in the US is that when a state establishes a public

ligion and public schools is required.[26] In Germany, it is in the discretion of the federal states (*Laender*) to establish Christian public schools.[27] Moreover, churches may receive the status of public corporations (*Körperschaft des öffentlichen Rechts*) and may enjoy the benefit of receiving church tax withholdings, something inconceivable in the United States. State subsidy of religious institutions is to a greater extent possible in Germany than in the US, as e.g. Article 140 Basic Law in connection with Article 138 (1) Weimar Constitution makes clear.[28] This demonstrates that at the level of structural norms, as opposed to positive individual rights, more than one solution is possible. In par-

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forum, even if on its own property, and admits speakers or provides subsidies (e.g., for student newspapers), religious speakers must also be admitted or corresponding activities supported. The opposite would present an unconstitutional violation of the "free exercise" and "free speech" clauses of the First Amendment. See *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Education v. Mergens*, 496 U.S. 226 (1990): *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

[26] What is the legality of the activities of religious officials in state institutions? This is permissible under Article 141 Weimar Constitution in the following instances: "To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind." The article is interesting for many reasons. It is an example of the interaction of structural regulations (who may be active in state institutions) and positive religious freedom (the right of the church to espouse its belief and administer to its followers). It also refers to a central problem in the area of church-state relations: coercion is to be ruled out, even "compulsion of any kind." This hints towards an exclusion of even weak and indirect compulsion as described in notes 20 and 40; the choice of this construction depends on the reasons discussed here later. Lastly it may be noted that even in the American separation model 3 and probably also model 2, priests are permissible in prisons, hospitals and the military although the spatial separation is not present. The reason is that it concerns restricted environments under governmental control. The followers present at these locations can only be administered to by means of state accommodation. Thus, upon closer consideration, the positive dimension of religious freedom (Free Exercise Clause) prevails over the structural Non-Establishment Clause.

[27] For a more detailed analysis see section VI.

[28] See the *Everson* case discussed in sections III 2 and 3 as well as the summary of judicial decisions by *P. Prygoski*, Constitutional Law, 9th edition 2003, chapter 19 B 2. For Germany, see section III 4.

ticular, there are several variations, which may be ideally distinguished under six models.[29]

[29] See also *S. Shetreet*, in this volume, section 1, with five models: (1) theocratic, (2) absolute-secular, (3) separatist, (4) established church, (5) recognized religions model; *G. Robbers*, ed., Staat und Kirche in der Europäischen Union (State and Church in the European Union), 1996; *id.*, Das Verhältnis von Staat und Kirche in rechtsvergleichender Sicht (The Relationship of Church and State in a Comparative View), in: W. Brugger/S. Huster, eds., Der Streit um das Kreuz in der Schule (The Conflict of the Crucifix in the School), 1998, 59 et seq. *Robbers* uses a three-pronged differentiation: (1) state church, (2) separation system and (3) cooperation system citing the examples of no. 1 as Denmark, England, Greece, Sweden and Finland (concerning the last two examples see footnote 214 below); no. 2 France and Netherlands; no. 3 Germany, Spain, Italy, Belgium, Luxemburg, Austria and Portugal. Similar analysis in *Dorsen et al.* (note 19), 995 with three models: "separatist", "states with concordats", and "states with national or state churches" (with an alternative view on 975 et seq.: secularism, separation, coexistence, benevolence, and state religions), and *Giegerich* (note 6), 288 et seq.: state religions (with internal distinction in formal and material unity states), laissez faire systems und cooperation systems. *E. Caparros* in his General Report in: *E. Caparros/L. L. Christians*, eds., Religion in Comparative Law at the Dawn of the 21st Century, 2000, 3 et seq., differentiates the three following systems: (1) interrelations fécondes, (2) coexistence pacifique, (3) juxtaposition hostile. No. 1 corresponds more or less to model 4 or 5 presented here, Caparros' model 2 is similar to model 2 or 3, and his model 3 is similar to this article's model 1. *P. Foundethakis*, Religion and Constitutional Culture in Europe, RHDI 53 (2000), 227 and 233 et seq., delineates along the following lines: (1) states with an established church, (2) states supporting a church, (3) states with quasi-separation, (4) states with separation of church and state.

III. Six Models on the Relationship between Church and State

Six Models of State-Church Relationships

1. Aggressive Animosity between State and Church	2. Strict Separation in Theory and Practice	3. Strict Separation in Theory, Accommodation in practice	4. Division and Cooperation	5. Formal Unity of Church & State, with Substantive Division	6. Formal and Substantive Unity of Church and State

1. Animosity between Church and State

The political regime of a country may have an anti-religious attitude in its official ideology, constitution or political practice. It may force religions and churches to go underground or perhaps attempt to eliminate them altogether. For example, the communists in Albania were fiercely against religion. Article 37 of the 1976 Constitution stated: "The state recognizes no religion of any kind and supports and develops the atheistic view so as to ingrain in the people the scientific and materialistic world-view".[30] A hostile attitude toward religion was dominant in most communist governments before the collapse of the Soviet Union at the end of the 1980s.[31] This is hardly surprising when one considers that

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[30] Author's translation. Moreover *W. Stoppel*, Recht und Schutz der nationalen Minderheiten in Albanien (Rights and Protection of the National Minorities in Albania), 2003, 27 et seq.; *F. Hoffmeister*, Die rechtliche Stellung der Minderheiten in Albanien (The Legal Status of Minorities in Albania), ZaöRV 55 (1995), 799, 802.

[31] See *K. Daniel/W. C. Durham*, Religious Identity as a Component of National Identity: Implications for Emerging State-Church Relations in the Former Socialist Bloc, in: *A. Sajó/S. Avineri*, eds., The Law of Religious Identity. Models for Post-Communism, 1999, 117 and 122 et seq.; moreover with special consideration of Russia, *A. A. Krasikow*, Church-State Relationships in Russia: Yesterday, Today, and Tomorrow, in: *Sajó/Avineri*, 153, 161 et seq., concerning "State Atheism". *Hollerbach* rightly summarizes the more recent history of Germany (note 6) at 90: "[We] should not forget at all the experiences with two totalitarian regimes in our land with their hostility against churches and religion."

Karl Marx in his 1844 criticism of Hegel's legal philosophy referred to religion as the opium of the people.[32] Animosity toward religion is not, however, limited to Marxist-Leninist ideology and practice.

Time and time again anti-clerical political and intellectual efforts have been mounted advocating against the influence of religious representatives in state affairs in general as well as against church attempts to claim dominance in particular.[33] France is often cited as an example.[34] This variant of hostility, though, is different from aggressive Marxism-Leninism. Whereas the latter sees in religion a genuine hoax and manipulation (or, unspoken, a powerful critic of all totalitarian powers), the former in its religion-friendly version challenges domination of state power by religious power. Thus, in anti-clericalism or laicism there exists no categorical hostility between church and state, but a

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[32] See *K. Marx*, Contribution to the Critique of Hegel's Philosophy of Right, in: Deutsch-Französische Jahrbücher 1844 (German-French Yearbook 1844), www.baylor.edu/~Scott_Moore/texts/Marx_Contr_Crit.html: "Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people." See also *V. Lenin*, Socialism and Religion, Novaya Zhin, No. 28, December 3, 1905, here cited after www.marxists.org/archive/lenin/works/1905/dec/03.htm: "Religion is one of the forms of spiritual oppression which everywhere weighs down heavily upon the masses of the people. …" Additional citations of Marxian criticism of religion have been compiled by *I. Fetscher*, ed., Der Marxismus. Seine Geschichte in Dokumenten (Marxism. His History in Documentation), 2nd ed. 1973, in section 1 "Religionskritik" (Criticism of Religion), 47 et seq.

[33] See *J. S. Schapiro*, Anticlericalism. Conflict Between Church and State in France, Italy, and Spain, 1968, 3: "The conflict between church and state has been one of the outstanding problems in the history of modern Europe. It took different forms in different countries and in different periods, yet the fundamental issue was always and everywhere the same, namely which was supreme over the other." See also *R. Rémond*, L'Anticléricalisme en France de 1815 à nos jours, 2nd edition, 1999, 23 et seq., concerning the motivation for the anticlericalism directed mostly against Catholicism: "L'Eglise menace l'Etat, la nation, les individus, la famille."

[34] See *Schapiro* (note 33), 112: "France, the classic land of anticlericalism"; *Rémond* (note 33), who names on page 357 other countries and areas in which the tenets of anticlericalism appear or have become predominant and have historically or even currently been influenced by the catholic faith such as Belgium, Italy, Spain, Portugal and South America. The often applied term "*laïcité*", also has a connotation critical of religion. See *Giegerich* (note 6), 291 et seq., and *H.-M. Heinig*, Öffentlich-rechtliche Religionsgesellschaften (Public Law Religious Corporations) 2003, 43 et seq.

sense of danger if a religion – usually the dominant one in a country – wants to usurp the messages and instruments of governmental power for its aggrandizement. A secular outlook on life can be combined with this mistrust and then lead to general anticlericalism, but this variant is still different from militant atheism à la Marxism-Leninism. One is well advised to distinguish these three different kinds of animosity or hostility. (1) Adversarial tones towards religion in general point to militant secularism, often combined with the goal of not only eliminating but also replacing religious themes and promises with secular ones. (2) Hostility towards religion in its "softer" version renounces totalitarian annihilation of religion and religious believers, but fights "civilly" for a secular outlook on life. (3) Adversarial tones towards one particular religion, such as against Catholicism in France, can also be expressive of the wish to keep the two organizations separate, for their respective best interest. If the latter is the case, one moves to the following model 2.[35]

2. Strict Separation in Theory and Practice

This model is a variation of the wall-of-separation doctrine to the extent that it refers to spatial and organizational entanglements as well as common policies of church and state, and it is strictly applied in practice.[36] An example is the above-mentioned case of *Everson v. Board of Education*. In 1941, New Jersey enacted a law that provided funds for school bussing to both public and private schools, including Catholic schools. The dissenting opinions of the Supreme Court saw this as a benefit to the Catholic religion and therefore as an infraction of the Non-establishment Clause. The justices did express their sympathy for

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[35] See in addition to *Schapiro* (note 33) *Walter* (note 1), chapter 3 I, 69 et seq. Additional citations under www.ex.ac.uk/~prcooke/mlfl110/bibliog_anticlericalism.htm. See also *M. Troper*, The Problem of the Islamic Veil and the Principle of School Neutrality in France, in: *Sajó/Avineri* (note 31), 89 and 91: "In the minds of some of its advocates, laicité carries strong antireligious overtones." Concerning the thesis that a division of church and state is beneficial to both see note 39 addressing Justice Black in *Engel v. Vitale*, 370 U.S. 421, 430 ff., 434 et seq. (1962).

[36] In the American terminology these are "absolutist separationists", as opposed to "accommodationist separationists", here addressed under model 3. See *Anglim* (note 17), Art. Accommodationist (or Non-preferentialist) and Art. Separationist, 32 et seq. and 312 et seq.

Christian parents who were forced to pay taxes for the support of state schools but could not enjoy the privileges of school bussing. This was obviously a financial burden and perhaps even a penalty against religiously oriented students and parents. Yet, this was found to be tolerable, for once the state begins financially giving benefits to churches, more far-reaching regulation could no longer be prevented. Justice Jackson noted, "[i]f the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political control with it."[37] The financial disadvantage was weighed against the concrete advantage – a strict separation provided for maximum freedom for minority religions in relation to hostile mainstream religions or other majority preferences. "[It] is the same constitution that alone assures Catholics the right to maintain these [parochial] schools … when predominant local sentiment would forbid them."[38] Thus, as Justice Rutledge concluded, the complete separation of church and state, covering spatial and organizational as well as substantive and financial aspects was "best for the state and best for religion."[39] Furthermore, it "is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in dissensions inevitable when sect opposes sect over demands for public funds to further religious education, teaching or training in any form or degree, directly or indirectly."[40]

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[37] *Everson v. Board of Education*, 330 U.S. 1, 27 (1947).

[38] *Id.*, 27.

[39] *Id.*, 59.

[40] *Id.*, 59. See also 19 "complete and uncompromising separation", 26 concerning "direct or indirect" convergences as well as the language of the non-establishment clause "in absolute terms" and its "rigidity", 60 on "complete separation". In *Zorach v. Clauson*, 343 U.S. 306, 319 (1952), Justice Black formulates in his dissent: "… it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained". See also *Lynch v. Donnelly*, 465 U.S. 668, 710 (1984) (Justice Brennan, dissenting), against a "blur[ring of] the distinction" between secular and religious elements; the state must be "scrupulously neutral" (714) in relation to religions; even a "small step" (725) in the direction of preference is not permitted. It is "the exclusive prerogative of our Nation's churches, religious institutions, and spiritual leaders" to preserve the nation's religious heritage (725). Similarly strict is Justice Brennan, in *Allegheny v. ACLU*, 492 U.S. 573, 639 (1989). Even the name of the Christmas tree makes it a religious symbol that the state may not display: "[The] attempt to take the 'Christmas' out of the Christmas tree is unconvinc-

Model Elements of Strict Separation

Strict separation applies to	1. Substantive policies of the state (worldly/common good instead of salvation) 2. Locality (state as opposed to religious facilities) 3. Organization (no cooperation)
Unconstitutional	Accommodation and support, whether direct or indirect, whether substantial or marginal
Consequences for the private sphere	Strong positive and negative religious freedom
Consequences for the public sphere	Strong positive and negative religious freedom
Consequences for the state sphere	Maximization of negative religious freedoms against state paternalism; beneficial for "radical" and/or suppressed religions

3. Strict Separation in Theory, Accommodation in Practice

The majority of the Justices in *Everson* arrived at a different conclusion, although they accepted the wall-of-separation doctrine. The Non-establishment Clause admittedly forbids the government from levying church taxes for religious purposes. A different assessment, however, is legitimate when taxes are raised neutrally and the state provides a service not only for public but also private schools. This is a traditional state duty similar to providing police protection, trash collection, fire-fighting or ensuring the safety of public streets. As such, the Non-establishment Clause does not exclude religious schools and students from receiving state support.[41] A different conclusion would limit the

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ing." An advocate against the strict separation refers to the "relentless extirpation of all contact between government and religion": Justice Kennedy, dissenting in *Allegheny*, *id.*, 657. Additional references in *Walter* (note 1), chapter 5 IV 1 d, 141 et seq.

[41] This majority opinion also makes its way into recent decisions concerning financial support of schools. See the summary by *Prygoski* (note 28), chapter

positive freedom of religion and may be understood as a hostile attitude towards religion. "[The First Amendment] requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[42]

This moderate, accommodating view of the separation-wall doctrine suggests that the wall need not be quite as high and thick as the other, stricter version. Doctrinally speaking, one religious clause (i.e., the Free Exercise Clause) is used to limit the strict-structural Non-establishment Clause. In the terminology of the German Constitutional Court (*Bundesverfassungsgericht*, hereafter BVerfG), a "practical concordance" between two norms must be found.[43] Exactly where the line of separation is to be drawn was not answered in *Everson*. In the 1971 case *Lemon v. Kurtzman*, the US Supreme Court developed the *Lemon* Test, which distinguished three components of the Non-establishment Clause: "first, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive

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XIX B 2, 294 et seq.: *Board of Education v. Allen*, 392 U.S. 236 (1968) (neutral support of school books in state as well as private and religious schools); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (constitutionality of financial support for handicapped students of private and religious schools); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (similar decision concerning sign language interpreters); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (the permissibility of certificates allowing parents to send their children to state, private or religious schools). Contrary decision for example in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (impermissibility of financial support of teachers in religious schools).

[42] *Everson* Case (note 4), 18. This approach would also be accepted in France despite the separation of church and state. See *C. D. Classen*, Religionsfreiheit und Staatskirchenrecht in der Grundrechtsordnung (Religious Freedom and Church Law in the Constitutional Order), 2003, 14 et seq.: "'*laïcité*' today is tolerance and equality and is even to be understood in terms of positive neutrality… [S]ince 1959 catholic private schools have received state support along with state and other private schools" (translation mine). In comparison, this would not be possible in the US.

[43] See *K. Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (Introduction to Constitutional Law in the Federal Republic of Germany), 16th ed. 1988, Section 10 II 2; *D. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd ed., 1997, 45 et seq.

government entanglement with religion.'"[44] If even one element is lacking, the statute is unconstitutional.[45]

The divergence from the strict separation approach is clear – marginal and indirect support as well as weak, organizational entanglement are not alone sufficient to be deemed unconstitutional. This also applies to the intent and purpose of the subsidy. However, it should be noted that all three parts of this test as well as the burden of proof can still be "strictly" or "loosely" applied (this also pertains to the following "endorsement test"[46] and the corresponding basic-rights criteria of "force" and "discrimination"). A lenient interpretation of the *Lemon* Test was suggested in the dissenting opinion in *Allegheny v. ACLU*: "The requirement of neutrality inherent in the *Lemon* formulation does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgement and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and to the detriment of the religious."[47]

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[44] *Wallace v. Jaffree*, 472 U.S. 38, 55 et seq. (1985) (Moment of Silence Law), citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

[45] *Id.*, 56.

[46] See notes 114 et seq. as well as *Allegheny v. ACLU*, 492 U.S. 573, 593 (1989): "[The] word endorsement is not self-defining… "; see also 608 f. concerning the burden of proof.

[47] *Allegheny v. ACLU*, 492 U.S. 573, 576 (1989) (Justice Kennedy, dissenting). See also the admonition to apply "proper sensitivity", 656, which naturally is claimed by all parties concerned. As to the differing viewpoints of neutrality, see *Walter* (note 1), 20-21, 367 et seq., 393 et seq.

Elements of the *Lemon* Test

I. Unconstitutional Statutes	II. Constitutional Statutes
1. Exclusive or primary intent is the support of (one) religion, or	1. Goal of religious support is secondary or marginal
2. Exclusive or primary effect is the support of (one) religion, or	2. Supportive effect is secondary, weak or marginal
3. Excessive or strong organizational entanglement of the state and a church/religion	3. Only weak or marginal organizational entanglement

4. Division and Cooperation

No wall of separation between church and state exists where the two actually cooperate, i.e. beyond mere accommodation, in certain areas in the larger context of fundamental division. In this model, the third element of the *Lemon* Test is clearly implicated, but also relativized – organizational entanglements beyond the categories of "weak" and "marginal" are legal. Depending on the type and scope of cooperation, the first and second elements will also be interpreted more openly, as in the case of Germany.[48] For example, the basic division between church and state is a result of the individual and collective religious/philosophical freedoms in Article 4 (1) and (2) Basic Law. This provision establishes a clear distinction. Religion and churches are the subjects of basic rights, and the state has the duty to respect those rights. Article 140 Basic Law, in connection with Article 137 (1) Weimar Constitution, is also significant in that it stipulates that state churches are not allowed. Followers and the faithful are to build religious communities from bottom to top. Despite this, the division does not lead to a strict separation but rather to partial cooperation and mutual coordination. This is demonstrated in Articles 7 (3) (religious instruction in state schools) and 140 Basic Law in connection with Articles 137, 138 and 141 Weimar Constitution allowing for various methods of cooperation and support by means of

[48] See *Robbers*, Staat und Kirche (State and Church) (note 29), 351 et seq., and Dorsen *et al.* (note 19), 977: "The German approach to church-state relations is often considered as 'cooperationist'. Regardless of the relevant constitutional provisions, Spain, Italy, Poland, Hungary, as well as some Latin American countries cooperate with an increasing number of (major) churches, through agreements and concordats with the Vatican."

the constitutions of the German *Laender*, by statutes, as well as in public contracts (*Konkordate*) with churches. Such contracts include the terms of cooperation between churches and the state with regard to the administration of cemeteries, spiritual care for prison inmates and members of the military, the organization of religious classes in public schools and the funding of those educational, medical and social activities of churches that the state determines to be in the public interest.

Granting churches the status of a public law corporation as stipulated in Article 140 Basic Law in connection with Article 137 (5) and (6) Weimar Constitution could be understood as an abdication of the separation-wall doctrine. However, this would be a misunderstanding. It is only a formal incorporation of a church as a public body – the church remains a religious institution not subject to direct governmental regulation, but with some "governmental" powers of its own, e.g. the right to hire personnel in civil service status and disciplinary and judicial powers.[49] The state supports these corporations by withholding church taxes from member salaries (Article 137 [6]), as well as by allowing certain other privileges in tax and zoning law.[50] In exchange, the respective churches must make certain concessions to adhere to the German Basic Law in general and to its state-church system in particular (*Rechtstreue*).[51] Thus, the incorporated church is not completely unencumbered, as in the model of strict separation,[52] to advocate radical messages in its doctrine contradicting the most elementary elements of the German Constitution. The advantages are thus juxtaposed against the disadvantages. With this exception, however, state influence is greatly limited. No religious group can be forced to obtain the status of a public law corporation, and the church retains the right to regulate its own

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[49] See BVerfGE 102, 370, 387 et seq. (Jehovah Witnesses); *Campenhausen* (note 23), §§ 17, 31; *Jeand'Heur/Korioth* (note 23), § 18.

[50] A list of privileges often cited as a "bundle package" (*Privilegienbündel*) may be found in BVerfGE 102, 370 et seq. See also *Campenhausen* (note 23), § 31 VIII.

[51] See BVerfGE 102, 370. On this decision see the English-language article "From the Outside Looking In: The Jehovah's Witnesses' Struggle for Quasi-Public Status under Germany's Incorporation Law", in www.germanlawjournal.com, vol. 2, no. 1 (15 January 2001).

[52] See section III.2 above concerning *Everson*. *Dorsen et al.* (note 19), 1000, expound in their analysis that the requirement of loyalty to the constitution leads to the exclusion of those religions as candidates for the status of a public cooperation which advocate the authority of God over worldly authorities.

affairs without state interference (excessive entanglement in terms of the *Lemon* Test), Article 137 (3) Weimar Constitution. Religious organizations of a private law as well as a public law character may also claim their "corporate" rights under the "collective" aspect of the guarantee of freedom of religion in Article 4 Basic Law.

5. Formal Unity of Church and State with Substantive Division

The organizational convergence of church and state may go well beyond granting the status of a public law corporation as in Germany. For instance, the political community may form a state church or identify itself with a particular national church.[53] Two models must be distinguished: on the one hand a formal union, and on the other hand a material union or identification of the two authorities.[54] Formal identification occurs when despite an official commitment of the state to a state or national church, (1) both entities primarily retain separate organizational structures, (2) pursue differing objectives (worldly/common good vs. eternal salvation), (3) have independent decision-making processes, (4) the church does not exercise state authority and external force, and (5) the religious/confessional freedom of all followers as well as non-followers is largely respected. This is the case, for example, in Great Britain, Greece and Israel.[55]

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[53] *Dorsen et al.* (note 19), 974, mention, for example, the constitutions of Italy 1947, Spain 1977 and Poland 1997. *Robbers*, Verhältnis (note 29), 59 et seq., cites Denmark, England and Greece as countries with state churches as well as Sweden and Finland (concerning the constitutional changes in the latter two countries see note 214).

[54] Concerning the differentiation between models 4 to 6 see *Dorsen et al.* (note 19), 980: "At one extreme, the state may identify strongly with a particular religious tradition. In the extreme case (i.e. model 6), this may lead to a virtual theocracy such as in Iran, or it may lead to official establishment of religion with varying degrees of toleration or non-toleration for other religions (i.e. model 5). A milder version of state identification involves endorsement of a particular religious tradition and the special role it has played in a country's history and culture, without necessarily making it the officially established church in a country" (i.e. model 4, maybe even model 3). Naturally, there can be material overlapping in particular sections without formally constituting a state church or national religion. An example would be the situation in several (former) colonies in the (later) United States. See *Walter* (note 1), chapter 3 II, 77 et seq.

[55] See also the reference in note 29 above by *Robbers*.

The situation in Great Britain is quite complex.[56] Sociologically speaking, the country is largely influenced by the Christian faith.[57] However, the internal legal order reflects clear regional differences in state competencies.[58] The dominant Christian denominations must be differentiated by their formal connection with state authority: "[the] law does identify regions within [the United Kingdom] with Christianity in the sense that regions are identified with distinct denominational Christian churches. The law identifies the State in that part of the United Kingdom which is England with the Church of England; the law identifies the Principality of Wales with the Church of Wales; the law identifies the nation with the Church of Scotland in Scotland."[59] As for the formal and in some aspects material union between church and state, "the Monarch is the head of the Church of England; royal succession is denied to those married to Roman Catholics; the Monarch must promise at accession to uphold and maintain the established church; the Monarch has a statutory power to appoint candidates as bishops of the church; some bishops are members of the House of Lords...."[60] Moreover, the following elements are to be noted: "Christianity is one of the principle beneficiaries, … religious education must be broadly Christian as must school worship;[61] only Christianity is protected by the law of blasphemy (Islam is not); the law of the Church of England is treated as part of the law of the land, the law of the Roman Catholic Church is not...."[62]

Despite this, according to the English viewpoint, a material union between church and state does not exist. "[The] state has accepted the Church [of England] as a religious body in its opinion truly teaching

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[56] See *F. Lyall*, Religious Law and its Application by Civil and Religious Jurisdictions in Great-Britain, in: *Caparros/Christians* (note 29), 251 et seq., in particular 254 and 265; *N. Doe*, National Identity, the Constitutional Tradition and the Structures of Law in the United Kingdom, in: European Consortium for Church-State Research, eds., Religions in European Union Law, 1998, 93 et seq.; *D. McClean*, Staat und Kirche im Vereinigten Königreich (State and Church in the United Kingdom), in: *Robbers*, Staat und Kirche (note 29), 333 et seq.

[57] See *Doe* (note 56), 97 and 111.

[58] *Id.* (note 56), 95 et seq.

[59] *Id.* (note 56), 98. See also 104 and 117.

[60] *Id.* (note 56), 99.

[61] See also *McClean* (note 56), 342 et seq. See the parallels to the institution of the Christian public school in Germany in section VI below.

[62] *Doe* (note 56), 114.

the Christian faith, and [has] given to it a certain legal position, and its decrees, if rendered under certain legal conditions, certain [sic!] legal sanctions"; however the church "is not thereby made a department of the State."[63] The bottom line is that differential treatment of the Church of England in comparison with other churches has remained within a manageable scope.[64]

In its 1975 constitution,[65] Greece established the Orthodox Church as a national church[66] in Article 3 (1): "The dominant religion in Greece is that of the Christian Eastern Orthodox Church. The Greek Orthodox Church, which recognises as its head Our Lord Jesus Christ, is indissolubly united, doctrinally, with the Great Church of Constantinople and with any other Christian Church in communion with it (oxodoxi), immutably observing, like other churches, the holy apostolic and synodical canons and the holy traditions...."[67] Partly, this is understood as a mere factual acknowledgment of the current situation, due to the fact that 96 % of the population are members of the faith.[68] This view, however, contradicts numerous legal provisions, which provide distinct advantages for the Orthodox Church. These advantages include:[69] State

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[63] *Marshall v. Graham* [1907], 2 KB 112 at 126 per Justice Phillimore, here cited by *Doe* (note 56), 99.

[64] See *Doe* (note 56), 97: "[There] is a broad equality of legal freedom as between religions; the law does not generally disadvantage non-Christian faiths because they are non-Christian … There are, however, notable exceptions to this general principle...."

[65] In 2001 Greece revised its constitution. The articles relevant here, however, namely 3 und 13 (as well as 16 concerning the educational duty of the state) were not altered. See *A. Filos*, Die neue griechische Verfassung (The New Greek Constitution), ZaöRV 62 (2002), 993, 998 et seq. and 1021 et seq.

[66] This is not a new regulation. Such an article was present in all Greek constitutions since the national revolution in 1821, see *A. Filos*, Die rechtliche Stellung der Minderheiten in Griechenland (The Legal Status of Minorities in Greece), in: *J. Frowein et al.*, eds., Das Minderheitenrecht europäischer Staaten (The Rights of Minorities in European States), 1994, 61 and 72.

[67] Cited according to the translation of the ECHR in its decision *Sofianopoulos v. Greece*, Reports of Judgments and Decisions 2002-X, 461 et seq.

[68] *Foundethakis* (note 29), 240 note 48.

[69] See the list in *I. M. Konidaris*, Die Beziehungen zwischen Kirche und Staat im heutigen Griechenland, Österreichisches Archiv für Kirchenrecht 40 (1992), 131, 138. See also *C. Papasthatis*, Staat und Kirche in Griechenland, in: *Robbers* (note 29), 79, 92 et seq.; *J. Madeley/Z. Enyedy*, eds., Church and State in Contemporary Europe. The Chimera of Neutrality: Special Issue of "West

ceremonies are conducted along the lines of Orthodox Church rituals; the Greek state remunerates the clergy of the Orthodox Church;[70] obligatory religious instruction based on Orthodox teaching is conducted in public elementary and secondary schools (a teaching waiver is however available for non-believers or followers of other religions);[71] and, in the process of issuing building permits for religious buildings, the competent Orthodox bishop has a legal say in the matter.[72] Article 3 of the Greek Constitution is completed and qualified by Article 13, which guarantees religious freedom: "1. Freedom of conscience in religious matters is inviolable. The enjoyment of personal and political rights shall not depend on an individual's religious beliefs. 2. There shall be freedom to practice any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law...."[73] As such, it is clear that even though a state church formally does exist, in many areas it is not complemented by a substantive union between church and state.[74]

Israel also fits within this model. An all-encompassing constitutional document does not exist, but rather a series of "Basic Laws", which regulate particular issues of state organization and constitutional rights.

European Politics" vol. 26 no. 1 (January 2003), 120 et seq., as well as the English translation of the privileges by *Foundethakis* (note 29), 239 et seq., who also references specific tax advantages.

70 This means that non-believers are called to support the national church by means of the tax system. See for a contrast to the view of model 2 (above) section III 2.

71 See *C. Starck*, Religionsunterricht und Verfassung. Eine rechtsvergleichende Betrachtung, in Bürgerliche Freiheit und Christliche Verantwortung (Religious Courses and the Constitution. A Legal Comparison, in Citizen Freedoms and Christian Responsibility), Festschrift Christoph Link, *H. de Wall/M. Germann*, eds., 2003, 483, 490: "Religious instruction is obligatory; only children who do not belong to the Orthodox Church may receive a waiver" (author's translation).

72 The European Court for Human Rights views this as a violation of Art. 9 ECHR: *Manoussakis v. Griechenland*, *Reports of Judgments and Decisions* 1996-IV, 1346 et seq. See also *Filos* (note 65), 998 note 23.

73 Cited according to the ECHR in *Sofianopoulos* (note 67). Detailed discussion by *I. Kriari-Catranis*, Freedom of Religion under the Greek Constitution, Revue Hellénique de Droit International 47 (1994), 397 et seq.

74 Concerning decisions of the European Court of Human Rights which have often critically addressed Greece, see *Walter* (note 1), chapter 12, 332 et seq.; *Frowein* (note 15), 79 et seq.

However, neither the relationship between church and state nor religious freedom has been clearly regulated in text.[75] Formally speaking, the state of Israel is a Western state in the form of a parliamentary republic.[76] It is, however, clear in the declaration of independence as well as the above mentioned Basic Laws that along with the establishment of the Israeli State in 1947/48 a homeland for all Jews was created. This suggests a strong connection between the people, the state and Judaism (even though the term "Jewish" has a narrower religious and a wider cultural connotation).[77] On the basis of this historical background, an informal and statutory legal terrain was formed in which the religion of Judaism, to which approximately 80 % of the population belongs (and a portion of that is the orthodox faction), is the preferred religion. For instance, Rabbinical courts have exclusive jurisdiction in questions concerning family law such as marriage and divorce for Jews;[78] the State of Israel grants financial aid to religious institutions for festivities; it supports religious schools as well as secular schools; and Jewish religious holidays and dietary regulations have been established which may be enforced by law. Lastly, religious norms influence the decision as to who receives the status of "Jew" and thus has the right to immigrate.[79] Conflicts in church-state relations exist not only between liberal, conservative and orthodox schools of the Jewish religion but also in rela-

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[75] In 1992 the Knesset enacted two "Basic Laws" – a constitutional right to practice a profession and one concerning human dignity and freedom. These however contained no article addressing the freedom of religion or details of the relation of church and state. See *G. Sapir*, Religion and State in Israel: The Case for Re-evaluation and Constitutional Entrenchment, in: Hastings International and Comparative Law Review 22 (1999), 617, 635 et seq.

[76] See Art. Israel, in: Herder-Staatslexikon, 7th ed. 1995, vol. 7, 678, 679 f.

[77] *M. M. Karayanni*, The "Other" Religion and State Conflict in Israel: On the Nature of State Accommodation of Minority Religions, in this volume, characterizes in section I "Israel as a state … officially defined on national, ethnic and religious grounds as a Jewish state" and points to "the Jewish (Zionist) national movement stressing the emancipation of the Jewish people by becoming sovereigns in a state of their own". See also *S. Shetreet*, in this volume, section 5.

[78] The other recognized religions have corresponding jurisdiction over their members – i.e., Muslims, Christians and Druzes.

[79] See *Karayanni* (note 77), section I, also concerning the aforementioned points, and *R. Reichman*, "Wer ist Jude?" (Who is a Jew?), Frankfurter Allgemeine Zeitung, 11 March 2005, 8. See also the summary by *Shetreet*, in this volume, section 5 b.

tion to the minority religions (Christian, Muslim and Druze) as well as the non-religious population. In several cases, the Supreme Court of Israel, on disputed statutory grounds, supported the negative freedom of religion and promoted some aspects of state neutrality.[80] However, the existing and close connection between Judaism and the State of Israel was not questioned. This is perhaps due to the widely-shared assessment that in light of internal and external threats of war and terrorism, the unity of the country and status quo should be relied upon and excessive confrontations in church-state relations should be avoided.[81]

In terms of the *Lemon* Test, the identification of the state with a particular church would lead to an unconstitutional organizational entanglement. In countries supporting the formal unification model, this overlap would be viewed as not excessive to the extent that religious freedoms of all individuals and groups are widely respected. An excessive entanglement would also be denied due to the fact that the means (external vs. internal force) and final objectives (secular well-being vs. ultimate transcendence) of both authorities remain distinguishable. Why is it that Great Britain and Greece have chosen the formal-unification model? Obviously, to maintain a strong line of tradition, which most members of the community view as part of their specific identity. Such traditions, according to the argument, should be publicly recognized and supported without turning into substantial discrimination or overt force (adherents of strict separation would of course contest these claims). In the case of Israel, the gathering of Jews from all over the world and territorial protection was the motivation and legitimation for establishing a separate state.[82] As for discrimination between the state/national church and other religions, the situation depends largely on constitutional provisions and the relationship between organizational rights on the one hand and relevant constitutional rights to freedom and equality on the other. This spectrum can extend from (1) close equality between the dominant and minority religions and/or non-religions (in all aspects with the exception of some symbolic and formal distinctions), (2) indirect discrimination or "soft" coercion (i.e. financial support of the state church), and lastly (3) "overt" discrimination in the

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[80] See *Sapir* (note 75), 635 et seq., and *Dorsen et al.* (note 19), 1004 et seq.

[81] Concerning these background assumptions see the article by *Sapir* (note 75).

[82] See *Sapir* (note 75), 625: Advocates of this viewpoint claim that "Israel faces life-threatening dangers that are much more urgent than issues of religion and state". Sapir does not, however, view this argument as convincing.

form of explicit legal disadvantages such as access to public office. The last example leads us to the next (and final) model.

6. Formal and Substantive Unity of Church and State

In this model, the state church or national religion is not merely symbolically and formally, or even "softly", associated with state authority. Rather, the practical policies and organizational structures of the two are extensively intertwined. In this sense, one approaches theocracy. The models of division and separation no longer apply: legal obligations often are identical to religious duties, and illegal acts tend to be seen as "sins". Internal and external coercion can combine, intensifying the coercive force. In terms of fundamental rights, a theocratic system devalues the negative freedom of religion and limits the exercise of worldly authority, which may not, even in a state of emergency, contradict religious commandments. The level of paternalism and suppression also increases, precisely because binding precepts with the threat of penalty are made regarding ultimate, personal beliefs about the meaning of the world and moral accountability. The duties to belong to the one, true religion or church and to profess the right faith fit seamlessly into this union of church and state, as exemplified in some Muslim countries by the prohibition on leaving the one, true religion.[83] An example of an extreme form of this model was the reign of Taliban in Afghanistan prior to the US/NATO intervention in 2002.[84] A second example of a Muslim theocracy can be noted in the summary of the Supreme Court of Paki-

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[83] See *Dorsen et al.* (note 19), 977: "Apostasy (leaving one's religion) is a crime punishable by death in certain Islamic republics, in accordance with the Koran." Further references 1002 et seq. as well as in *N. Lerner*, Religion, Beliefs, and International Human Rights, 2000, Chapter 4: Proselytism and Change of Religion, 80 et seq. See also the Islamic Charter presented by the Central Committee of Muslims in Germany in 2002. Its Art. 11 mentions the freedom to choose and change one's religion. See the discussion by *H. Bielefeldt*, Muslime im säkularen Rechtsstaat. Integrationschancen durch Religionsfreiheit (Muslims in the Secular State. Chances for Integration through Religious Liberty), 68 ff.

[84] See *Larry P. Goodson*, Afghanistan's Endless War. State Failure, Regional Politics, and the Rise of the Taliban, 2001, 18 et seq., 116 et seq.; *N. Nojumi*, The Rise of the Taliban. Mass Mobilization, Civil War, and the Future of the Region, 2002, 152 et seq.

stan, which described the elements of the predominant Islamic Law in the decision of *Zaheeruddin v. State*:[85]

> "(i) Islamic law or Shari'ah is the supreme law of the land, and all legislation, including the Constitution, must yield to it; (ii) Islamic law is a self-evident and fixed normative code, one that can be deployed without any revision or development to seek answers to all problems confronting a state in modern times, including issues of constitutional governance and fundamental individual rights …(iii) in a Muslim/majority state, no protection needs to be provided to religious beliefs and practices which are out of step with, and offend, the majority; and (iv) the dictates of international human rights law must yield to the pronouncements of Islamic law and are thus irrelevant with respect to questions regarding the freedom of religion in a Muslim state."[86]

More moderate forms exist in other Muslim countries.[87] A material moderation occurs when tolerance towards other faiths is fostered to a greater or lesser extent, but there is no true guarantee of basic rights, and an institutional division does not occur.[88] Organizational moderation can be observed when political and religious leaders are separate persons; however, in this case, the real question is how much influence

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[85] *Zaheeruddin v. State*, 26. S.C.M.R. (S.Ct.) (1993) (Pakistan), here cited after *T. Mahmud*, Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice, Fordham International Law Journal 19 (1995-96), 40, 44.

[86] *Id.*, 51.

[87] One has to point out a fact that holds true not only for the Muslim religion but also for Christianity: both religions have a long tradition and differing schools or sects; this diversity should not be forgotten. In states oriented toward Islam, one must differentiate between orthodox or even fundamentalist beliefs and those of moderate and liberal viewpoints. Often in Islamic states, one can observe a close connection between political and religious leadership. Yet, experts such as *L. C. Brown*, Religion and State. The Muslim Approach to Politics, 2000, 178, speak of "the Islamic legacy of resisting governmental efforts to impose religious doctrine". See also the collection of fundamentalist and more secular Muslim voices in *Bielefeldt* (note 83), 59. There are even cases where there is separation of church and state, such as Turkey.

[88] Concerning this point see *M. Kriele*, Habeas Corpus als Urgrundrecht (Habeas Corpus as Original Constitutional Right), in *id.*, Recht, Vernunft, Wirklichkeit (Law, Reason and Reality), 1990, 71, 78 et seq.: "Rechte und Toleranzen" (Law and Tolerance); *Bielefeldt* (note 83), 24 et seq., see also *Dorsen et al.* (note 19), 975 et seq.

one person or group exercises over the other.[89] If there is significant tolerance or distance between church and state, one is approaching the fifth model outlined above.

IV. The Structure of Judicial Balancing in the Models of Separation

When spatial, organizational or material contact between church and state occurs, which criteria are relevant in the process of judicial balancing? The answer structurally depends on the constitution of the state in question and particularly if it applies the strict separation or division model with mutual recognition of both authorities (i.e. models 2, 3 and 4) or if it postulates a formal (model 5) or material (model 6) unification of church and state. The following observations mainly address models 2 to 4. There are three reasons for the selection of these particular models.

First, a newly established state is not likely to choose formal or material unification of church and state.[90] Other rules may apply for communities previously established under a material unification of church and state, for instance in a Muslim state, which cautiously strives for division or separation (e.g. if the liberal viewpoint associated with these

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[89] If one considers religion and world-views (*Weltanschauungen*) together in terms of modern freedoms of religion, one may also include the Marxist states of the former Soviet Union and the German Democratic Republic in this type. The state and party organizations were formally separated. Materially, however, the Marxist-Leninist parties exercised significant influence on the political organs and were also privileged in the legal system. Thus, one could characterize them as a secular, atheistic form of a state church. See already the description of model 1. Concerning the instrumental role of the state in relation to the leadership role of the party, see *G. Brunner*, Einführung in das Recht der DDR (Introduction to the Law of the German Democratic Republic), 1975, § 4; *N. Reich/H.-Chr. Reichel*, Einführung in das sozialistische Recht (Introduction to the Law of Socialism), 1975, § 11, 1.

[90] See the assessment by *Daniel/Durham* (note 31), 151: "The overall pattern of church-state relationships emerging in the former communist bloc is one in which hostility toward religion is being supplanted by cooperation and even outright endorsement of major religions. The trend is toward deprivatization, with the emerging models ranging between cooperationist and endorsement in terms of the identification of church and state. Formal establishment of dominant churches appears unlikely…."

models achieves greater influence in the country).[91] Removing the countries falling under model 5 from further consideration should not be taken as a categorical repudiation of its tenets. Within its traditional framework, this model can represent a functioning and legitimate polity to the extent that it respects essential aspects of religious freedom and institutional divisions (however not in every detail, as a strict-separation model would require).

Second, human rights conventions, which protect all religious and philosophical beliefs,[92] show that while such pacts do not have the authority to replace the internal constitutional order, they do have an effect on the structural relationship between church and state. They require foremost a friendly posture of the state toward religion and thus contradict the combative stance in model 1. At the same time, they rule out a complete identification of church and state in the meaning of model 6, due to the fact that this model does not tolerate any form of non-religious being or disassociation from the preferred religion or church.[93] International conventions do not *per se* exclude formal identification as described in model 5. However, the documents do exert a certain amount of pressure due to the fact that religious freedom for minority groups is expressly stated. As such, a material division of church and state in many important areas may be necessary.

Third, these models are widely discussed within the framework of liberal states, where the structural relationship between church and state guarantees long-term peaceful and cooperative cohabitation, or at least coexistence. The crux of this discussion focuses on the strict separation model 2, the separation-accommodation model 3 or the division-coop-

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[91] Concerning the conflict between fundamental and enlightened viewpoints in Islam see *Bielefeldt* (note 83). See also the example in *W. Brugger*, Zum Verhältnis von Neutralitätsliberalismus und liberalem Kommunitarismus (Concerning the Relationship between Liberal Neutralism and Liberal Communitarianism), in: *Brugger/Huster* (note 29), 109, 147 et seq.

[92] See for example Art. 2 (Equal Treatment of Religion and World-Views) and 18 (Freedom of Conscience, Religion and World-Views) UDHR; Art. 2 I (Equal Treatment of Religion and World-View) und 18 (Freedom of Religion and World-Views) IPCPR; Art. 9 (Freedom of Religion and World-Views) und 14 (Equal Treatment of Religion and World-View) ECHR. Additional notes in *Walter* (note 1), chapter 14, 456 et seq.

[93] In the same vein *Walter* (note 1), chapter 14 IV 2 b bb (3), 487: "State churches and anti-religious states have the same dangers for the freedom of religion."

eration model 4, as in Germany. The tenets of the models are heavily debated, and the results of the debates are sometimes surprising. For instance, the crucifix decision of the German Constitutional Court advocated a stronger separation – a step from model 4 to model 3 or even model 2[94] – while on the other side of the Atlantic, some recent rulings of the United States Supreme Court may be described as a partial movement away from the separation model 3 towards the German cooperation model 4.[95] In the European Union, many commentators notice a trend toward the German division-and-cooperation model.[96] Others argue that only a strict separation between church and state can ensure long-term peace and equality.[97] The opposing view argues that equality is only possible by granting preference towards disadvantaged and discriminated minorities.[98] Assessing the merits of these arguments is beyond the scope of this article. The main focus is how the choice of one specific, structural model (especially model 2, 3 or 4) influences the interpretation of constitutional rights and vice versa.

The structural criteria, which guide the determination of proper/improper entanglement in the division-and-separation models, are the principles of independence, neutrality, equal treatment and non-identi-

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[94] See *Brugger*, Zum Verhältnis (note 91), 109 et seq., 114, and section VIII below.

[95] See for instance *Walter* (note 1), chapter 5, 138 et seq. with a summary on p. 159 et seq. and sections VII und VIII below.

[96] See *Hollerbach* (note 6), 91 et seq.: "[The] German system … is a system of balance … balance between the extreme positions of strict separation and of close connection … those extreme positions … move towards the middle." Similarly *Robbers*, Verhältnis (note 29), 62 with a "convergence thesis": "there is a gradual trend toward a careful removal of the state from the state churches on the one hand and increasing readiness for cooperation in the states observing separation on the other."

[97] See *Walter* (note 1), chapter 7, 186. By referring to a citation from Rudolf Smend, Walter notes that a close cooperation between state and church requires large churches, which are willing to compromise and are unified in many things; for truly pluralistic and partly antagonistic relationships this model would run into difficulties. See also the last pages in the Walter book. *Rémond* (note 33), 374 ff. describes a resurrection of anticlericalism in France due to the emergence of Islam.

[98] See *Grote* (note 5), 52, advocating a "cautiously balanced 'power sharing' [between] the groups in conflict" and "the establishment of positive obligations for the active support of disadvantaged religious or world-view groups."

fication.[99] As previously mentioned, these criteria may be applied strictly or loosely, with or without compromise.

At the level of individual rights, a similar assessment must be made. How far does the definitional scope (*Schutzbereich*) of religious or world-view freedom reach? Which degree of entanglement or overt force is necessary to constitute a state "interference" (*Eingriff*) with the basic right in the doctrinal sense? Are there important individual or collective interests that implicitly or explicitly limit constitutional rights and may thus justify (*Rechtfertigung*) legal interference?[100]

The definitional scope of "free exercise" has been previously mentioned. Modern constitutions such as the German Basic Law and the European Convention on Human Rights not only protect religion but also philosophical creeds. They guarantee internal aspects (such as personal conscience), external dimensions (such as the free exercise of religious rituals) as well as individual and collective applications, including the collective right to incorporate the religious community itself. To the extent that "philosophical creeds" are not explicitly protected, as in the case of the United States Constitution, there has been an expansive interpretation of "religion" which also encompasses "the infidel, the atheist or the adherent of a non-Christian faith such as Islam or Judaism."[101]

In the case of constitutional limitation clauses, some differences exist. The German Basic Law in Article 4, the "Free Exercise Clause" in the First Amendment to the United States Constitution as well as Article 18 UDHR contain no limitation on the free exercise of religion. In comparison, Article 9 ECHR and Article 18 of the UN Pact on Civil and Political Rights have limitation provisions. This is an important textual difference. However, substantively, two questions address the

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[99] See for example BVerfGE 93, 1, 15 et seq.; *Hollerbach* (note 6), 91: "secularity, neutrality and equality"; *Heinig* (note 34), chapters 3 and 5 concerning "Freiheit, Parität, Öffentlichkeit und Differenz" (Freedom, Parity, Publicity and Difference). See on the opposite side what is forbidden, *Allegheny v. A.C.L.U.*, 492 U.S. 573, 574 (1989) "endorsement, favoritism, preference, or promotion", 590 (non-identification), and the following cases.

[100] As to these doctrinal steps in assessing whether a constitutional right has been violated, see *W. Brugger*, Book Review of D. Beatty, Constitutional Law in Theory and Practice, Am.J.Com.L. 46 (1998), 583, 588 et seq.

[101] *Allegheny v. A.C.L.U.*, 492 U.S. 573, 590 (1989), with reference to *Wallace v. Jaffree*, 472 U.S. 52. See also *Anglim* (note 17), Art. Religious Belief, Definition of, 272 et seq., and *Giegerich* (note 6), 258 et seq. concerning the current understanding of religion and worldview.

crux of the matter. On the liberty side, the question is whether illegal direct or indirect force is being applied to a person who is acting positively within the protected realm of the respective free exercise clause, or who negatively claims to have a right to refrain from certain acts (such as professing a religion or belief). On the equality side, the question arises whether state action constitutes unequal treatment or discrimination between persons or communities of differing faiths. This equal treatment component is guaranteed (1) through the use of the term "religion" (instead of, e.g., Christianity), (2) through the implicit or explicit addition of "philosophical creeds" as an equivalent form of religion, and (3) through extensive interpretation of "religion" which applies equally to traditional religions as well as to contemporary religious movements. (4) In addition, modern constitutions and human rights conventions often protect against discrimination by means of separate equality norms. For instance, Article 3 (3) Basic Law forbids unequal treatment based on religious beliefs: "no person shall be favored or disfavored because of … faith, or religious or political opinion."[102] Similar provisions can also be found in human rights conventions.[103]

It is clear that these criteria largely overlap. Structural non-neutrality, unequal treatment or identification with a particular religion often leads to illegitimate force and discrimination.[104] Why is this so? When state authority is allied with a particular religion or church, external force leads to an internal pressure to manipulate one's conscience in fear of exclusion from the dominant social and political order. The same applies when the state places its authority and reputation in one church, and it is clear that the state primarily identifies itself with this institution.[105]

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[102] See Art. 33 paragraph 3 GG as well as Art. 140 GG in connection with Art. 136 paragraph 2 WRV.

[103] See notes 22 and 92 above and the overview by *Walter* (note 1), chapter 14, 456 et seq.

[104] See for example the following representative formulation from *Allegheny v. A.C.L.U.*, 492 U.S. 573, 610 (1989): "[The] Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths." See also 611: "The antidiscrimination principle inherent in the Establishment Clause…."

[105] Contrarily, it is clear from model 5 that in the formal union between church and state neutrality, equal treatment and non-identification do not apply

Connection between Structural Norms and Basic Rights

I. Structural relationship between church and state	1. Independence 2. Neutrality 3. Equal treatment 4. Non-identification
II. Religious freedom as a constitutional right	1. Freedom: no force or coercion applied 2. Right to equality: no discrimination

Having mentioned the most important criteria of impermissible entanglements between church and state, it is now necessary to examine more closely the interpretation of these criteria within the framework of models 2 to 4. This will be undertaken through an analysis of representative judicial decisions. The following does not address a normative evaluation of the cases' results, but rather an analysis of the manner in which according to the *Zeitgeist* and the attitudes of the justices a broad or narrow interpretation of the relevant criteria is chosen. In this respect, judges have substantial flexibility. Moreover, it will be demonstrated that strict separation between church and state leads to a broader interpretation of illegal force or discrimination. Similarly, a more accommodating view of the division leads to a more narrow definition of unjustifiable force and discrimination.

V. Voluntary School Prayers! Voluntary School Prayers?

In 1962, the US Supreme Court decided the case *Engel v. Vitale*.[106] The school administration of the State of New York had authorized the local school authorities to require school children to recite a prayer formulated by the administration. The prayer had a non-denominational

– in any case not on the formal level. As such, the discrimination element of equal treatment is constitutionally limited. The constitutional right not to be forced in religious matters, though, is taken seriously in this model exactly to that extent that it allows non-believers and adherents of minority religions to live according to their beliefs and to repel at least substantial harassments by state power and/or the preferred religion.

[106] 370 U.S. 421(1962).

character and was Christian in a wide sense of the term. No other prayer could be recited. After resistance from some parents and initial legal proceedings, the state modified its statute. Those students who did not wish to pray could remain quiet or remove themselves from the classroom. Even this revised version was determined by the Court to be unconstitutional.[107]

Justice Black, who had written the Court's opinion in *Everson*, wrote the majority opinion. The regulation of the school authorities constituted state action that was both an unconstitutional force against the students and partisan against non-Christian religions. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain...."[108] In following: "[The] constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[109] In this regard, the requirements of the Non-establishment Clause could go beyond the prohibitions of the Free Exercise Clause. Even if the recital would have qualified as voluntary (which Black denied), structural unconstitutionality in the form of a close proximity between government and religion would exist. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can save it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment...."[110] According to this viewpoint, the unconstitutionality of the prayer did not depend upon distinguishing between impressionable school children and non-impressionable adults. If the recital of such a prayer, with the above-mentioned possibility of avoidance, was stipulated for a state institution of higher learning or a state-run adult education center, then one could plausibly accept its "voluntary nature" and thus reject an illegal infringement of the free exercise clause. However, this would not deny its structural unconstitutionality. What was the reason for the dis-

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[107] See, however, the dissenting opinion of Justice Stewart, 370 U.S. 421, 444 et seq., who concluded in the same manner as the German Constitutional Court that no constitutional violation had occurred.

[108] 370 U.S. 421, 431.

[109] *Id.*, 425.

[110] *Id.*, 430.

tance requirement according to Black? The first and foremost goal of the Non-establishment Clause is the conviction that "a union of government and religion tends to destroy government and to degrade religion … [and] religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate."[111]

According to the two models of separation (variations 2 and 3), a state-ordered school prayer with a Christian background is unconstitutional. The *Lemon* Test,[112] developed nine years later and which articulated the criteria relevant to model 2,[113] would also deny the constitutionality of a statutory school prayer. First, the initial version of the order followed the exclusive objective of preferring one religion in the prayer. Even in the later, more open version, the primary support of religion is evident in its "Christian" character. This particular religion is the starting point; the person who is not in agreement with the mainstream religion must identify himself or herself as such by remaining silent or leaving the room. Second, its effect would support the followers and sympathizers of that religion and possibly those undecided pupils. Third, due to the fact that a school organized the prayer, and not a competent church or religion, an organizational entanglement of the two spheres had occurred.

One can also examine the school prayer case under the equality equation of the revised *Lemon* Test as proposed by Justice O'Connor in *Lynch v. Donnelly* (often referred to as the "endorsement test"). O'Connor viewed state support of religion as contrary to the constitution when the equal worth of individuals in the political community is endangered.[114] Such "endorsements" occur in two situations:

> "one is excessive entanglement with religious institutions which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by non-adherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they

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111 *Id.*, 370 U.S. 421, 432.

112 See note 44 above.

113 Already mentioned above in note 17.

114 This test has the unspoken foundation in *R. Dworkin's* reasoning that in the political arena the constitutional right to "equal concern and respect" is the most basic right: Taking Rights Seriously, 1978, 183 et seq., 272 et seq., 292.

> are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message...."[115]

Transformation of the *Lemon* Test into O'Connor's Endorsement Test

I. Structural level: non-establishment of religion or church	**II. Rights level: free exercise of religion**
Organizational cooperation between church and state is unconstitutional. It is viewed as …	an indication for strong coercion, combining external and internal elements (violation of personal liberty)
Substantive endorsement of religion or a particular religion or church is unconstitutional. It is viewed as...	an indication for political status as an outsider for the adherents of other religions or beliefs (violation of equality)

It is clear that all relevant standards are applied in *Engel v. Vitale*: independence, neutrality, equality, non-identification and non-coercion. However, has the case been correctly decided? Would another solution[116] be "perverse," as is the opinion of Justice Black?[117]

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[115] *Lynch v. Donnelly*, 465 U.S. 668, 687 et seq., concurring. See most recently the summary of the test in *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2321 et seq., concurring (the O'Connor-Test no. 2, so to speak). See the table of this test in the attachment. According to this last view, it is a case of a permissible state reference to a possibly religious symbol when in the viewpoint of a neutral and educated observer "ceremonial deism", instead of a call to God, is predominant. The following elements are determinative for O'Connor: the symbol (1) must have a long tradition and wide dissemination in the country; (2) it may not have a context of prayer or worship; (3) it may not make a reference to a specific God; however a reference to a generically understood "God" may be acceptable; (4) the religious content must be minimal for the objective observer, according to the circumstances. It is clear how the structural elements (traditional and secular context in (1) and (2)), equality concerns (3) and freedom interests (4) play together. See also the parallel considerations in *Brugger*, Zum Verhältnis (note 29/91), 148 et seq.

[116] See also the continuance of this jurisprudence in *Lee v. Weisman*, 505 U.S. 577 (1992): The practice of many American high schools to include "invocation and benediction prayers" given by a priest at commencement ceremonies is unconstitutional, due to the non-establishment criteria as well as free-exercise-criteria because of the "subtle force" exerted towards others.

In 1979, the BVerfG came to a different conclusion in a similar case. Two German *Laender* had prescribed a non-confessional, non-denominational Christian prayer in public schools. The prayer was to be recited neither during religious courses as allowed in Article 7 (3) Basic Law nor within the context of another school subject, but rather at the beginning of the school day. As such, it was an event organized by the state, administered by the teacher and connected with the possibility for students to either remain silent or leave the classroom.[118] The Constitutional Court began by emphasizing that state action had occurred and that all concerned governmental actors (i.e. the state governments, school authorities and teachers) were required to observe basic constitutional rights. Consequently, with regard to the freedom of religion in Article 4 Basic Law, the recital must be "based on complete voluntariness"[119] and must be chosen "in complete freedom."[120] The court acknowledged that such events had the purpose of supporting the positive expression of the Christian faith and therefore extended beyond merely reminding students of Christianity's empirical influence on the German culture (and as such would already be determined unconstitutional under the first prong of the *Lemon* Test).[121] The court did not overlook that students who wished to refrain from the prayer would openly admit their non-belief by remaining silent or leaving the classroom. The BVerfG's formulation is reminiscent of O'Connor's outsider argument in the framework of the reconstructed *Lemon* Test: "[Such a] distinction could be unbearable for the person concerned if it should place him in the role of an outsider and serve to discriminate against him as opposed to the rest of the class. Indeed, the pupil in the classroom is in a different, much more difficult position than an adult who publicly discloses his dissenting conviction by not participating in certain events. This is especially true for the younger schoolchild, who is hardly capa-

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117 See note 111 above.

118 See BVerfGE 52, 223 et seq. (1979).

119 BVerfGE 52, 223, 239 (translation mine).

120 BVerfGE 52, 223, 248 (translation mine).

121 See BVerfGE 52, 223, 240: "When the state… allows school prayer outside of a religious study class as a 'religious exercise', it supports Christianity and as such a religious element in the school, which extends past the religious references recognizing the cultural and educational influence of Christianity [in our culture]" (BVerfGE 41, 29, 52) (translation mine). Such a prayer is permissible under the above mentioned requirements of free will and non-discrimination.

ble of critically asserting himself against his environment … Nonetheless, one cannot assume that abstaining from school prayer will generally or even in a substantial number of cases force a dissenting pupil into an unbearable position as an outsider."[122]

One can observe the similarities and differences between the United States Supreme Court and the German Constitutional Court. According to both courts, unconstitutional force and discrimination occur, if the dissenting students, by means of having to remain silent or leave the room, are placed under serious psychological pressure or branded as "outsiders". Is this, however, actually the case? Empirical evidence was not presented by either court, and according to the American ruling was hardly necessary, due to the fact that spatial and organizational proximity of the state with religious functions under the concept of strict division in models 2 and 3 is unconstitutional even if none or only a few students experienced psychological pressure. According to the German division-and-cooperation model, this is alone not sufficient. Close proximity is not in itself constitutionally "suspect" or "perverse" or viewed as "damaging" to the participating organizations.

In the German school prayer decision, the proximity to Christianity as a historically influential factor as well as support for the religious rights of Christian pupils and parents is neither inadmissible coercion nor unequal treatment. The German Court assumed and implicitly required that the type, scope and frequency of the prayer would remain within permissible limits, and serious pressure would not occur. The court further assumed and required that teachers, according to the applicable constitutional standards of non-obligation and non-discrimination, would instruct pupils in the spirit of tolerance.[123] Under these standards, institutional support of the Christian religion may occur, given the fact that this religion is historically rooted in and has been a defining factor for the German community. Such a weak endorsement remains within constitutional limits to the extent that it does not aggressively turn against other religions, philosophical creeds or their followers, but rather acts as an integrating force. In other words, the state may say "religion is a good thing, and in Germany the Christian religion has

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[122] BVerfGE 52, 223, 248 et seq., cited after *D. P. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd ed. 1997, 466.

[123] BVerfGE 52, 223, 232, 249 et seq. Concerning the exception case of especially unstable students see 253.

a value, as long as actual coercion and discrimination do not occur."[124] One might also say that the remaining marginal aspects of coercion or unequal treatment do not constitutionally amount to unreasonable force, discrimination or an impermissible entanglement of church and state. The positive aspect of religious freedom, that is, the positive opportunity for Christian students to conduct classroom prayers in a country greatly influenced by Christianity,[125] prevails over the negative aspect of religious freedom. The latter protects against forcing a religious practice on a person and serious discrimination, but it does not, as such, encompass the right not to disclose if a student is or is not a Christian and if that student wishes to pray or not to pray in school.

The constitutional reasoning in the American model of separation arrives at a different conclusion. In the situation of state proximity to religion, as is the case when prayers are conducted in public schools, the negative constitutional right reigns supreme.[126] Entanglement between church and state indicates an unconstitutional discrimination and unequal evaluation of insiders and outsiders. These assessments, of course, are only persuasive within the models of separation insofar as they espouse a strict separation (model 2) or at least advocate, compared with Germany (model 4), a stricter reading of the guiding standards of "coercion" and "discrimination" (as in model 3). The comparison of the two rulings demonstrates that the more porous or moderate an institutional differentiation is viewed, the higher the standards will be placed before unconstitutional "coercion" or "discrimination" can be determined. The opposite is also true. In the American strict-separation approach (model 2), even the remote possibility of force or discrimination, or even a slight hint of it, is sufficient to spill over into unconstitutionality.[127]

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[124] See the parallels to this view in section VII where Madison's and Story's views, as interpreted by Justice Rehnquist, are sketched, and in note 192.

[125] According to Art. 7 paragraph 1 GG this remains a prerogative of the federal states in Germany. They may, but do not have to provide such opportunities. Parents of pupils and the pupils themselves do not have a constitutional right that the state creates a school type conducive to their religious beliefs. See BVerfGE 52, 223, 242.

[126] In the German school prayer case, this line of reasoning was proposed by the Constitutional Court of Hesse, before the case was decided by the Federal Constitutional Court. See in BVerfGE 52, 223, 225 et seq., 245 et seq.

[127] See notes 20 and 40 above.

VI. Christian Public Schools

In Germany, *Christliche Gemeinschaftsschulen* or Christian Community Schools (hereafter Christian public schools) have been a traditional part of the educational landscape. Although suggested by the German name, this is not an association of private Christian schools but rather a type of state school deemed permissible in two decisions of the BVerfG in the 1970s,[128] which remain in force to this day.[129] In many regions in Germany, parents may send their children either to a Christian public school or to a secular public school. However, in some areas only the former is available.

According to the American version of separation (model 2), it would be impermissible to allow the term "Christian" to appear in the title of the school.[130] According to the separation model 3, as well as the *Lemon* Test, it would depend if the primary purpose of this school was to support Christianity and if such support actually occurred. Moreover, it would depend if church and state in this framework would be working in close proximity. If only one of these tests were fulfilled, a "Christian public school" would be determined unconstitutional.[131]

The German Constitutional Court, on the contrary, regarded Christian public schools as constitutional. Based on the authority of the German

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[128] See BVerfGE 41, 28 and 41, 88.

[129] See BVerfGE 93, 1, 19, Crucifix Decision. The earlier decisions were formally confirmed. However, in fact, in the crucifix decision the court moved in the direction of a stricter separation between church and state. See also the parallels to the British variation of the Christian religious schools in note 61 above.

[130] See also notes 40 above and 167 below addressing Justice Brennan's definition of the "Christmas tree".

[131] See also the case of the state of Kentucky hanging the 10 Commandments on the classroom wall, along with the inscription: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of the Western Civilization and the Common Law of the United States": *Stone v. Graham*, 449 U.S. 39 Fn. 1 (1980). The majority opinion found this to be a violation of the non-establishment clause. Justice Rehnquist, dissenting (*id.*, 43 et seq.), viewed the additional text as a constitutional life vest: "The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional" (44). "It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era" (45 with citation of a lower court decision). This case is also comparable to the German crucifix decision in the following section.

Laender to establish public schools in Article 7 (1) Basic Law, the constitutional standards to be respected in establishing such a school include the constitutional rights of parents to educate their children in Article 6 as well as students' and parents' right to religious freedom in Article 4. Due to the fact that the German non-establishment clause in Article 140 Basic Law in connection with Article 137 (1) Weimar Constitution ("No state church shall exist") was not deemed at issue, and the legal understanding of separation did not have the wide reach as in the United States, the principle of strict separation was not considered a binding constitutional standard. In Germany, the principle of "strict restraint" does not apply in the area of religious and philosophical creeds.[132] Structural constitutional requirements such as neutrality are tied into and form a part of the interpretation of the free exercise clause in Article 4 Basic Law. Thus, the obligation of neutrality, according to the ruling of the German Constitutional Court, does not exclude "a consideration of the confessional composition of the population and its more or less deep religious roots."[133] As such, the state may accommodate the prevalent Christian traditions and, in order to respect (or even strengthen) the positive constitutional right to practice a particular religion, establish a school form fitting for parents and children.

While the US conception of separation (externally) cuts off support of religious traditions, in Germany the question of how much coercion and discrimination non-adherents of mainstream traditions are expected to endure shifts from an external to an internal test. It is not unconstitutional, according to the German viewpoint, when the intent and effect of creating such a school is to support Christianity in a broad sense. However, the state must internally ensure that the close proximity between the state and the dominant religion does not spill over into *serious* coercion or *substantial* discrimination.

In this respect, the German Constitutional Court required the fulfillment of four criteria:[134] (1) The school may not proselytize and demand reverence towards the Christian faith; (2) it must remain open towards other religions and philosophical creeds; (3) Christian references during

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[132] See BVerfGE 28, 49 rejecting this position.

[133] BVerfGE 41, 28, 51. See also 60.

[134] See *Kommers* (note 122), 463 in the school prayer case; 470 in the Christian public school case, and the original citations in BVerfGE 41, 28, 51 et seq.; 41, 65, 78 et seq., 84 et seq.

general instruction[135] must primarily be directed toward a recognition of the cultural influence of Christianity in the German community (i.e. the value of tolerance and of help for poor and weak); and (4) it may not espouse the truth of its religious tenets. The amount of state force that still remains after fulfilling these requirements[136] must be accepted by parents and students when one of the German *Laender* chooses to establish such a school. "Their confrontation with a worldview in which the influential force of Christianity has been acknowledged does not lead … to a discriminatory devaluing of those minorities and worldviews that are not connected with Christianity."[137] This applies only to the extent that non-discriminatory standards are observed and tolerance and objective discussion are predominant, even though the overall normative frame is Christianity in a broad sense. After analyzing the relevant legal bases, which required patience, tolerance and objective discussion, the justices assumed that these standards, on the whole, had been fulfilled.[138] Accordingly, it is insufficient to prohibit such a Christian school, if only isolated instances of infraction against constitutional and statutory requirements occur, such as a single isolation of a non-Christian student.[139] If this occurs, identification and correction within the framework of applicable law must follow.[140]

Upon examination of these elements, it is clear that the BVerfG wished to rescue this type of school from the verdict of unconstitutionality. If Christian public schools were to proselytize, solely represent Christian values and obligate students to accept the truth of those values (what is arguably presupposed by the term "Christian school"), then the above-mentioned criteria of independence, neutrality, equal treatment and non-identification of the state with a particular religion would no longer be fulfilled. Serious coercion to include substantial discrimination against non-believers would be the result. In terms of the *Lemon*

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135 This does not naturally apply to religious study courses as stipulated in Art. 7 paragraph 3 GG in which students of similar beliefs and convictions meet.

136 See *Kommers* (note 122), 470, "minimum of coercive elements". BVerfGE 41, 28, 51 refers to remaining elements of "minimal force", which is more realistic than the formulations in the school prayer case, notes 119 and 120 above.

137 BVerfGE 41, 28, 52; 41, 65, 85 et seq.

138 See BVerfGE 41, 28, 59 et seq. and 41, 65, 83 et seq.

139 See BVerfGE 41, 28, 63, 64.

140 See BVerfGE 41, 28, 64. This is in contrast to the crucifix decision of the BVerfG. See notes 171 et seq. below and the "heckler's veto" in note 185 below.

Test, the first and second elements (purpose and effect)[141] would clearly lead to unconstitutionality. Even according to the revised, equality-based version of the test,[142] the school would clearly create insiders and outsiders and thus be unconstitutional. The legal situation is different for this type of school, though, within the guidelines of the German Constitutional Court. In fact, the BVerfG is concerned with revising (the strict separationists would say "deconstructing") the three elements of the *Lemon* test and with distinguishing between genuine religious messages and the far-reaching moral and civil religious teachings of Christianity.

German Reconstruction of the *Lemon* Test and the O'Connor Endorsement Test

I. Unconstitutional According to the American View	**II. Constitutional According to the German Reconstruction (Model 4)**
1. Exclusive or primary purpose is the endorsement/support of (one) religion or church, or	1. Similar to America, with the exception that the recognition of Christianity as an influential cultural factor and institutional accommodation of the majority of Christians in the country are not viewed as an unconstitutional purpose.
2. Primary effect is religious endorsement/support, or	2. Similar to America, but the acknowledgment of the historical importance of Christianity and acceptance of the moral values supported by Christian beliefs do not count as such.
3. Existence of excessive or strong entanglement between governmental and church organizations, or	3. Similar to US with the exception that state schools remain non-religious despite being organized in a broad-based Christian spirit and special rules exist for voluntary religious instruction (Article 7 III Basic Law).
4. Religious support or endorsements that lead to insider status for the dominant religion and outsider status for other religions or beliefs.	4. Similar to US with the requirement that isolation and discrimination is balanced out by tolerance and objective discussion.

[141] Note 45.

[142] Notes 114 et seq.

Notwithstanding, it is clear that the BVerfG's rescue operation is more closely aligned with the German model 4 of division-and-cooperation than with models 2 and 3 of the United States. According to the latter view, the incorporation of the term "Christian" would be constitutionally suspect and lead to a violation of both versions of the *Lemon* test. In the event that the facts of the case regarding intent and effect of creating such a school were unclear (due to the lack of a serious attempt by the court to clarify the situation), the suspicion would certainly, in the case of model 2 and possibly in the case of model 3, spill over into unconstitutionality. In the framework of separation, just how persuasive would the German Court's argument be for the United States Supreme Court? One cannot be certain, but even a hint of proximity between church and state is sufficient to be deemed unconstitutional in the strict separation model (model 2). Yet, according to the accommodation version of model 3, a result such as the one reached by the German Constitutional Court would not be impossible.

VII. Justice Rehnquist's "German" Deconstruction of the American Separation Model

The two versions of separation are widely debated in American constitutional law, as well as among United States Supreme Court Justices. There are voices that regard both versions of the wall-of-separation doctrine as historically incorrect. They advocate allowing a closer proximity between church and state that in effect approaches the German model of division, accommodation, coordination and support.[143] Writing a dissenting opinion in the 1985 case *Wallace v. Jeffries*, Justice Rehnquist[144] reconstructed the historical dimension of the Non-establishment Clause differently from the wall-of-separation doctrine.[145] Ac-

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[143] The author is not in a position to assess the scholarly quality of these differing historical analyses. Yet, at the least they are not absurd, rather tenable, because each of these positions on the Non-establishment Clause cites eminent historians. Of course, critics may argue that one may always draw differing conclusions from historical material depending on one's personal predispositions.

[144] From 1986-2005 William Rehnquist was the Chief Justice of the U.S. Supreme Court.

[145] See *Wallace v. Jaffree*, 472 U.S. 38, 91 et seq. (1985) (Moment of Silence Law). Additional citations by *Walter* (note 1), chapter 5 IV 1, 140 et seq., in par-

cording to Rehnquist, Justice Black would have been better advised not to rely on Jefferson's conception. He noted that during the Constitutional Convention Jefferson was nowhere to be found, due to the fact that he was in Paris at that time. Black should rather have relied upon James Madison, who had played a critical role during the Constitutional Convention in Philadelphia as well as in the first Congressional Session that proposed the First Amendment. Madison at that time was a representative of a moderate, accommodating view of religion when interpreting the Non-establishment Clause.[146] In his view, the clause included three prohibitions: (1) no state/national church, (2) no state coercion in the exercise of religion; and (possibly) (3) no discrimination between religions.[147] The Non-establishment Clause was neither meant to advocate a "wall of separation" between church and state nor to be interpreted as an obligation of strict neutrality between religion and non-religion. In this Madisonian interpretation, for example, the introduction of a statutory moment of silence in state schools for the purpose of "meditation or voluntary prayer" would be constitutional.[148] Moreover, the moment of silence would still be constitutional even if further investigation of the statutory motivation revealed that the encouragement of school prayer was precisely what was intended.[149] The

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ticular to the religion-friendly interpretations of Justices Scalia, Kennedy und Thomas. The most recent defense of this approach is Justice Scalia's dissenting opinion in *McCreary County v. ACLU of Kentucky*, 125 S.Ct. 2722 (2005).

146 The view represented by Madison at that time is more accommodating than his view in the 1785 "Memorial and Remonstrance Against Religious Assessments". The Memorial was directed against the plan of the state of Virginia to levy a tax which was to support Christian religious institutions; non-Christians were to be given the option to allow the same tax to benefit local schools. The text of the Memorial is provided in *Everson v. Board of Education*, 330 U.S. 1, 63 et seq. (1947), *supra* note 3; it forms the one building block for the strict separation theory in *Everson* and *Engel v. Vitale*. See also the article Madison's Memorial and Remonstrance Against Religious Assessments (1785), in *Anglim* (note 17), 221 et seq. Concerning the "later" Madison see Rehnquist, in *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985).

147 Summarization in *id.*, 98 et seq.

148 These are the facts of the case in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

149 For this reason the majority of the court found the law unconstitutional. This solution would not convince a German jurist. For them, a narrow legislative objective would be overcome by a more neutral and extensive formulation in the text of the statute. Why not remain within the confines of the legal text and regulate violations of neutrality under the statute? See BVerfGE 41, 28, 64,

reason? According to Madison, the purpose of the Non-establishment Clause was to allow "prayer" over "non-prayer".

Rehnquist not only advocated reading the constitution's Non-establishment Clause with Madison's eyes, but he also mentioned the more extensive views of Joseph Story, a Supreme Court Justice between 1811 and 1845 and a leading American constitutional commentator. In his *Commentaries on the Constitution*, Story addressed the original intent of the Non-establishment Clause and went beyond the elements of Madison, noting an additional criterion:

> "[P]robably at the time of the adoption of the Constitution, and of the amendments to it now, under consideration [First Amendment], the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."[150]

From this viewpoint, an ecumenical Christian school prayer recited in state schools under the condition of non-obligation would be considered constitutional. This viewpoint is in line with the result of the German school-prayer case. It would also lead to a different conclusion than the American school-prayer case *Engel v. Vitale* – that is, the

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supra note 139 et seq. This would correspond to the principle of judicial self-restraint in relation to democratically enacted laws, which the Supreme Court rhetorically advocates; see *W. Brugger*, Einführung in das öffentliche Recht der USA (Introduction to Public Law in the USA), 2nd ed. 2001, § 3 II 8. The fact that the majority of justices do not accept accommodation is a clear symbol that the decision follows the separation concept of model 2. The use of the words "complete neutrality toward religion" (472 U.S. 38, 39 und 60) is conclusive. Justice Powell und Justice O'Connor would accept moment-of-silence laws, if they were not "spoiled" by the "bad" objective of supporting religion: *id.*, 62 and footnote 2, 67, 72 et seq., 84, due to the fact that the laws would allow for an extensive field of reflection, and the beliefs of the students would not be revealed.

[150] *Story* (note 3), 700 (§ 988). Cited by Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 104.

school prayer would be constitutional, insofar as the conditions of non-obligation and absence of discrimination were met.[151]

An Alternative "German" View of the Non-Establishment Clause Objective: Differentiation, Cooperation and Endorsement

1. Madison: unconstitutional on the structural level:	Establishment of a state church or religion.
2. Madison: unconstitutional on the level of individual liberty:	Governmental coercion in the sphere of religious expression and action.
3. Madison: unconstitutional on the equality level:	Discrimination between religions and churches.
4. Madison: yet constitutional:	Priority of religion over non-religion.
5. Story: also constitutional:	Preference for Christianity, as long as coercion against adherents of other beliefs is eliminated.

If one adds the fifth element of the historical reconstruction,[152] the German case of Christian public schools would be considered constitutional![153] In any case, the Madison-Story view would no longer correspond to the separation model, but rather approach the German model of division, accommodation and cooperation. Based on this point of view, the *Lemon* Test[154] would have to be reformulated accordingly: (1) The support of religion in general (Madison), a specific religion such as Christianity (Story) or any religion deeply rooted in a country[155] would

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151 See section V. This point of view would also entail that requirements of spatial distance between church and state would be weakened.

152 This is a different reconstruction from that of Justice Black in *Everson* in section III.2 above. Both view the goal of the non-establishment clause to be the elimination of religious repression and guarantee of religious freedom. While Black connects this with the idea of the separation wall, according to Story the framers of the Constitution wanted to "exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government." See *Story* (note 3), 701 (§ 991).

153 See section VI above.

154 See notes 44 et seq. above.

155 Apart from the concrete historical point of departure – America –, one must also normatively generalize the above mentioned points. They must also apply to other regions and countries in which traditionally one religion has become the religion of the people – i.e., Buddhism or Islam.

be permissible; (2) preference may not spill over into serious discrimination or coercion toward other faiths or non-adherents; and (3) excessive organizational entanglement between church and state authority would typically lead to an unconstitutional spill-over.

The Rehnquist-Madison-Story doctrine reconstructing the Non-establishment Clause, however, did not prevail in the Supreme Court. Nonetheless, this minority view demonstrates that the historical interpretation of the clause also drives the constitutional interpretation of freedom (coercion) and equality (discrimination, neutrality). If "religion" as such has priority over "non-religion", some small deficiencies of neutrality and proximity do not automatically lead to impermissible identification, illegal force or discrimination. This consequently applies to the priority of Christianity over other religions according to the viewpoint of Story in the United States (or in Germany) to the extent that the Christian faith – or any other religion or belief system – is the traditional, normative building block (i.e. *Volksreligion* or "civil religion") of the community. If this were the case, why should a government distance itself from this belief system? Why should it be impermissible to acknowledge this tradition and give it some "weak" support?[156]

What if the traditions of a community changed over time? What if the Christian belief became weak and was replaced by increasing multiculturalism, diversity of religions and sects, or even religious indifference and atheism? Rehnquist's considerations are best understood in the context of balancing judicial and legislative authority. His arguments are most valid if viewed in the context of a well-functioning political process in which the legislature addresses new developments and attempts to integrate them. He remains critical of constitutional courts, which quickly arrive at a verdict of unconstitutionality by aggressively widening the scope of "coercion" and "discrimination" in religious matters in order to force a structural shift in church-state relations.[157] The German crucifix decision would be such a case of judicial activism.[158] By stressing the importance of a correct historical interpretation

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[156] Concerning this reason from German jurisprudence, see note 124 et seq. above and note 166 below addressing O'Connor. As to its communitarian background, see *Brugger*, Zum Verhältnis (note 91), 148 et seq.

[157] As for judicial activism and judicial restraint in general, see *W. Brugger*, Demokratie, Freiheit, Gleichheit. Studien zum Verfassungsrecht der USA, 2002, 45 et seq., 108 et seq., 169 et seq., 291 et seq.

[158] See notes 171 et seq. below. *B. Schlink*, "Between Secularization and Multiculturalism", in: *Sajó/Avineri* (note 31), 77, 78: "In fact, the German Constitu-

of the Non-establishment Clause and arriving at a narrower scope of the clause than that of the mainstream American jurisprudence, Rehnquist wished to limit the authority of the Supreme Court and strengthen the authority of the legislative powers – i.e. democracy. This institutional view is, however, not shared by all. There is a divergence of opinion between advocates of judicial activism and judicial restraint. Three arguments for judicial restraint can be made: (1) A free political process is a constituent part of the constitutional order, and it provides a forum for the equal recognition of all religions and world-views. (2) Only a marginal amount of coercion and discrimination is legitimate; serious afflictions remain unconstitutional. (3) As long as countries have broadly shared religious traditions, be they Christian, Muslim, or otherwise, it is legitimate for the legal system to support this connection and not distance itself from it, especially if the main tenets of the prevailing religion have been transformed into general ethical standards of the community.

VIII. State Support of Religious Symbols?

The establishment of a Christian public school can already be viewed as an example of state support for a religious symbol. Cases in which the state presents religious symbols in the public arena are controversial in the separation models 2 to 4. Is this an illegitimate case of recognition, support or even identification with the respective symbols and underlying religions? In other words, does this not lead to disregard, non-support or even ostracism of other religions? Two American cases and one German case illustrate the difficulty of these questions.

On one side of the Atlantic, the cases address nativity scenes displayed by city administrations during the Christmas season. In *Lynch v. Donnelly* the exhibit belonged to the city of Pawtucket and was placed on display in a private park in cooperation with the Chamber of Commerce. The city had placed several secular and commercial exhibits around the birth scene to include a Santa Claus, a sleigh, a Christmas tree, candy canes and a caroling group. In a vote of 5 to 4, the Supreme Court upheld its constitutionality.[159] In *County of Allegheny v.*

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tional Court's crucifix decision fits smoothly, if not into its line of precedents, then into the line of social development."

[159] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

A.C.L.U., a nativity scene belonging to a Catholic Church group was placed in a court building with the permission of the city without being decorated with other secular items. An angel held a banner with the inscription "Gloria in Excelsis Deo" ("Glory to God in the Highest").[160] In a 5 to 4 decision, the Supreme Court found the display unconstitutional. Contrarily the Court found a large Jewish Chanukah Menorah depiction placed just outside the City-County Building on a public street next to a Christmas tree with a banner inscription "salute to liberty" as constitutional. In all three cases, it was uncontested that "state action" had occurred and that the Christian and Jewish symbols in themselves had religious character.

Was it the manner of the display that transformed the narrower religious context into a primarily secular and commercial enterprise? If that were the case, according to the *Lemon* Test: (1) No primarily religious objective was being pursued; (2) It may be assumed that support of the particular religion was not or only marginally occurring; and (3) Organizational entanglement between church and state could be ruled out. In terms of the O'Connor reconstruction of the *Lemon* test, the following two questions would have to be asked: Does there really exist state support for a religion? Would this support lead to an illegal differentiation between insiders and outsiders? In all of these cases, the Supreme Court emphasized that "context matters". *Lynch* diverges from *Allegheny* according to the majority opinion of the Supreme Court in salient aspects. A public park is less associated with the state than a court building. The exclusive exhibition of the nativity scene leads to an insider/outsider feeling among observers of the display, whereas in a broader, secular or commercial context, many or most observers would typically think of other Christmas season activities: relaxing, enjoying and shopping![161] The combination of Christian and Jewish symbols in itself would probably be viewed as too narrow and not sufficiently neu-

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[160] *Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989).

[161] See also *Allegheny* (note 160), 574 headnote 2: "When viewed in its overall context, the crèche display [in Allegheny] violates the Establishment Clause. The crèche angel's words endorse a patently Christian message: Glory to God for the birth of Jesus Christ. Moreover, in contrast to *Lynch*, nothing in the crèche detracts from that message. Although the government may acknowledge Christmas as a cultural phenomenon, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."

tral and general.[162] If one considers that both symbols are displayed in connection with a "salute to liberty", and next to the Menorah stood a Christmas tree having less religious character or intensity than the nativity scene, then one could reasonably say that there existed less danger of "religious favouritism." One could argue that these symbols represent liberty as a general American value and thus have become a part of the American civil religion.[163] The scene is reminiscent of and fosters American pluralism.[164]

In the *Lynch* case, the majority of the justices of the Supreme Court did not deny that certain positive effects for Christianity could result from the display of the nativity scene. After all, only one religion, and a formative religion in the United States at that, is publicly recognized and clearly honoured. This, however, did not result in unconstitutionality: "We can assume, arguendo, that the display advances religion in a sense, but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. Whatever benefit to one faith or religion or to all religions inclusion of the crèche in the display effects, is indirect, remote and incidental, and is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of Christmas, or the exhibition of literally hundreds of religious paintings in governmentally sponsored museums...."[165] In other words, it is a "typical museum setting" which "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday...."[166] According to the majority opinion, this is,

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[162] See *Allegheny* (note 160), 615: "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone."

[163] See *Anglim* (note 17), Art. Civic Religion, 105 et seq.; *Brugger*, Zum Verhältnis (note 29/91), 148 et seq.; *H. Lübbe*, "Zivilreligion und der ‚Kruzifix'-Beschluß des Bundesverfassungsgerichts" (Civil Religion and the Crucifix Decision of the German Constitutional Court), in: *W. Brugger/S. Huster*, eds., Der Streit um das Kreuz in der Schule. Zur religiös-weltanschaulichen Neutralität des Staates (The Conflict of the Crucifix in the Classroom. Concerning the Religious and Worldview Neutrality of the State), 1998, 237.

[164] In this regard, see the concurring opinion of Justice Blackmun in *Allegheny* (note 160), 613 et seq.

[165] *Lynch* (note 159), 669.

[166] *Lynch* (note 159), 692, Justice O'Connor, concurring. In *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2322 (2004), Justice O'Connor

despite its clear Christian origins, not sufficient[167] to be deemed unconstitutional.[168]

To summarize these considerations, one may say that the general constitutional requirements of the separation models 2 to 4 – i.e. independence, neutrality, equal treatment, non-identification, and abstinence from coercion and discrimination – were applied in these cases. The majority of the justices, however, accepted that in a primarily Christian country the public authorities need not treat Christianity as purely "invisible" or as a strictly "private matter". The historical meaning of Christianity may be honoured (i.e. "museum setting"). The state may also use religious symbols outside of the museum environment for the commemoration of the formative traditions or defining historical moments, especially during holidays when it concerns "ceremonial deism"

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uses the term "commemoration", covering events also outside the museum setting. According to her view these must be permissible in order not to cut the band between the past, present and future, *id.*, 2322. Even a mild support should be possible. Such references "serve … the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *id.*, 2322, in reference to her previous comments in *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984). In the German school prayer case (note 124), this mild support of the Christian students' appeal to God was acceptable to the extent that it was voluntary and occurred without discrimination. Much less religious than the active prayer is the following newer case of the crucifix hanging passively on a wall in the public school, which the German constitutional court determined to be unconstitutional.

[167] A different view is presented by the dissenting Justice Brennan in *Lynch*. For him, the nativity scene denotes "sectarian exclusivity" which refers to the core message of Jesus' birth for Christianity – i.e., "path toward salvation and redemption … one of the central elements of Christian dogma", and the clear message of inclusion (of all Christians) and the exclusion (of all non-Christians), *Lynch*, 700, 708. The parallel to the German crucifix case is clear as well as the separationist position.

[168] One may also consider the provision of Art. 139 WRV incorporated into the German Basic Law in its Art. 140, providing for rest and relaxation on Sundays. This norm contains several abstractions of the possible narrow Christian understanding that Christians may not labor on Sunday and must praise God and attend church services. It refers to Sunday and other non-religious holidays established by law, such as e.g. Labor Day and the first of May. The article speaks of "days of rest from work and of spiritual improvement." The latter guarantees to Christians the possibility to attend church but not to other religions and their holy day. Compare the moment-of-silence-case, note 148 above.

and not the construction of a theocracy.[169] In any case, outside generally recognized historical moments or traditions, the accommodation of religion only applies when sufficient neutrality is present and when secular objectives and effects as well as the absence of organizational entanglement can be expected.[170]

The crucifix decision of the German Constitutional Court in 1995[171] is the parallel case in Germany.[172] By statute, the *Land* of Bavaria had or-

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[169] Concerning this expression see *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Justice Brennan, dissenting). See also Justice O'Connor in *Elk Grove Unified School District* in note 166 above. For examples see the following cases: *Marsh v. Chambers*, 463 U.S. 783 (1983) (permissibility of a priest's prayer at the commencement of session of the Nebraska legislature); *McGowan v. Maryland*, 366 U.S. 420 (1961) (permissibility of holiday provisions providing for rest on Sunday). See also Justice Stewart, dissenting in *Engel v. Vitale*, 370 U.S. 421, 446, 450 (1962): "At the opening of each day's session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, 'God save the United States and this Honorable Court.' Both the Senate and the House of Representatives open their daily Sessions with prayer. Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God. Countless similar examples could be listed, but there is no need to belabour the obvious. It was all summed up by this Court just ten years ago in a single sentence: 'We are a religious people whose institutions presuppose a Supreme Being.'" See also additional references of Justice Kennedy, dissenting in *Allegheny v. A.C.L.U.*, 492 U.S. 573, 672 et seq. (1989), and the recent summary of Chief Justice Rehnquist in *Elk Grove School District* in the next note.

[170] For example, the inscription of "In God We Trust" on American coins, 36 U.S.C. § 186, 31 U.S.C. § 5112 (d) (1) (1982 ed.) as well as the references in *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) and Chief Justice Rehnquist, concurring in *Elk Grove School District v. Newdow*, 124 S.Ct. 2301, 2318 (2004). The appeal to God is controversial in the Pledge of Allegiance, which is recited in many American schools under the direction of the teacher with the possibility of students refraining. An appeal to the Supreme Court in *Elk Grove Unified School District* was dismissed for procedural reasons. Chief Justice Rehnquist hinted in his concurring comments that he would rule on its permissibility similarly as in the coin case: "our national culture allows public recognition of our Nation's religious history and character", *id.*, 2319.

[171] BVerfGE 93, 1 (1995). English translation in *Kommers* (note 43), 471 et seq., and in *Dorsen et al.* (note 19), 1027 et seq. See also the article by *C. Walter*, in this volume.

[172] See also *Stone v. Graham*, 449 U.S. 39 (1980), *supra* note 131: Ten Commandments on the wall of a public school as violation of the non-establishment clause, *McCreary County v. ACLU of Kentucky*, 125 S.Ct. 2722 (2005) and *Van*

dered crucifixes to be hung in state elementary schools, leading to legal action by the parents of a student. During the administrative procedures, the school board stated it was willing to remove the large crucifix and replace it with a small cross on the sidewall. Despite the compromise, the state law was deemed unconstitutional. Specifically, the Court held that it was a violation of the right to religious freedom in Article 4 (1) Basic Law. Moreover, it considered the structural standards of neutrality and non-discrimination.

How does this case fare in comparison with the arguments brought forward so far? Here the state clearly supported a core Christian symbol, a symbol more religious than a Christmas tree in a park. Due to obligatory school attendance in Germany, it was more compulsory than a display in a public area and similar to the American example of displaying a nativity scene in a courthouse. However, the difference was the audience – adults in a court building vs. children in a schoolhouse. The German Constitutional Court and the United States Supreme Court agree that great care is required with impressionable children who can be easily coerced or do not have the comprehension ability of adults.[173] Moreover, the type of observance or confrontation is different. The one is in a park where free will plays a role. In a court building, it may be voluntary or involuntary, but in Germany, a student cannot avoid being confronted with the walls of the classroom. In addition, school attendance is required for several hours during the day while a person can quickly pass a nativity scene in a park or court building. This all leads to the conclusion that, despite the absence of "hard" force in the form of an obligation to bear testimony of a belief or adoration of

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Orden v. Perry, 125 S.Ct. 2854 (2005). In the first case, a 5:4 majority of the Supreme Court held that the posting of the Ten Commandments on the wall of a court house violated the non-establishment clause; in the second case, a different 5:4 majority held that the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds was constitutional. In the first case the Supreme Court concentrated on the actual religious purposes of the county executives, despite their belated efforts to add secular exhibits, thus making use of the first element of the *Lemon* test. In the second case, the Ten Commandments had been surrounded for years by many other secular monuments without resulting in civil strife, thus confirming its weakened religious or additional secular character as element of mere ceremonial deism. Both recent cases confirm that "context matters" in the area of display of religious symbols or messages. More on these recent decisions in this volume in the article by *M. Weiner*.

[173] *Supra* note 122 and also BVerfGE 93, 1, 20.

a symbol, an impermissible amount of factual coercion[174] toward non-Christians as well as a favouritism of Christianity over other religions was occurring. With this, ostracism and impermissible identification between church and state are close at hand. Even though not all of these considerations were addressed in the German court decision, it arrived at exactly this conclusion.

The case would have had a different outcome in the United States according to the Rehnquist-Madison-Story standard of non-establishment. As long as no serious coercion was applied and no clear discrimination occurred, the state may prefer religion over non-religion (Madison) and Christianity over other religions (Story), to the extent that the state in question has a strong Christian tradition, which is the case in Bavaria. Using the Supreme Court's line of separation-and-accommodation, that is to say model 3, it is a difficult case. Some elements suggest constitutional validity, others invalidity. The former include the passivity of the symbol,[175] the lack of required acts of reverence, the fact that the cross may have a broader contextual meaning as a civil religion or even of a folkloristic nature and may have a strong "commemorative" (and not "prescriptive") character. Its invalidity may be deduced from the connection of state authority with students who are more impressionable than adults and who might not be able to distinguish between the many possible meanings of the crucifix. According to the strict separation version (i.e. model 2), there is no doubt about the impermissibility of the cross on the wall in the schoolroom.

Is the conclusion of the German Constitutional Court persuasive? One may compare the German crucifix case with the older German school-prayer case. In that dispute, the Court held that no undue coercion or discrimination occurred if non-Christians kept silent or left the class-

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[174] The first kind of "hard" coercion, in German constitutional law, is called the normative or classic intrusion on a liberty ("*klassischer Grundrechtseingriff*"); the second, softer coercion is called factual intrusion ("*faktischer Grundrechtseingriff*"). The latter one requires that the governmental actor wanted to intrude on the right and/or that the intrusion in fact is more than marginal; it must be substantial.

[175] See the minority opinions in *Allegheny v. A.C.L.U*, 492 U.S. 573, 577, 663 et seq. (1989), which characterized the display of a nativity scene (and corresponding Jewish Menorah) on state property (courtroom, and not a school) as permissible due to its passive nature: "the displays present no realistic danger of moving the government down the forbidden road toward an establishment of religion" (577).

room and thus identified themselves as non-Christians.[176] Such dangers did not however exist in the crucifix case. Additional parallels to the Christian public schools are also obvious.[177] What is the difference between obligating a person to attend "such a type of school" (i.e., a school formulated under Christianity in a wide sense of the term) or to simply learn "under the cross"?[178] In both cases there is an obligation to attend school, and in both cases, if the requirements of the German Constitutional Court were met, no religious teaching would occur. The crucifix would merely hang in the classroom and have only a passive character.[179] Although the German Constitutional Court maintained the opposite,[180] one can easily gaze in another direction: towards the blackboard, to the teacher, to the schoolbook, to other students, to the wall and everything else hanging there. Many students may not notice the crucifix at all or may only be mildly interested in it.[181] Others may feel supported by its presence. Yet for other students and parents, as demonstrated in the court proceedings, its presence and the sight of it may indeed be provocative. But why is this so? Is this necessarily the case? Can one reasonably say that the crucifix stands for many different messages? It certainly stands for the genuine Christian message of Jesus' suffering, but perhaps also something else?[182] The crucifixion could be

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176 *Supra* notes 118 et seq.

177 *Supra* section VI.

178 BVerfG, E 93, 1, 18, translated in *Kommers* (note 43), 474.

179 On this point the majority in *Lynch* determined that the nativity scene was part of a broader Christmas display: "The crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas … [and] may well have special meaning to those whose faith includes the celebration of religious Masses …" 465 U.S. 668, 685 (1984). Nonetheless, according to accommodation view (3), this is not sufficient to indicate unconstitutionality. In any case, the crucifix hangs on the wall of a state school, which is different than a city park.

180 BVerfGE 93, 1, 16, 18, 24.

181 The BVerfG denied this: E, 93, 1, 24, translated in *Kommers* (note 43), 478: "Students who do not share the same faith are unable to remove themselves from its presence and message." These are empirical arguments without empirical research.

182 This was not addressed by the BVerfG, rather only the genuine Christian components: E 93, 1, 19 et seq., translated in *Kommers* (note 43), 475: "it symbolizes man's redemption from original sin through Christ's sacrifice just as it represents Christ's victory over Satan and death and his power over the world." One may compare Justice Brennan's "separationist" emphasis of the predominant meaning of the nativity scene, note 167 above. Contrarily the majority in

viewed as the first case of religious prosecution and blatant injustice to be prevented in the future, for instance through constitutional protection of religious liberty. Or it could be a symbol of the Christian religion as the carrier of generally recognized and constitutionally protected values such as human rights to include advocacy for the poor and weak. Or the crucifix could stand as a reminder of Christianity's influence on Western and German culture.[183] Depending on the eyes of the beholder, all this as well as a negative (the crusades) or even perhaps a meaningless connotation (folklore or a "piece of wood") is possible. The question is: which interpretation is judicially relevant?

Although denied by the BVerfG, it is obvious that the Court's majority set a different point of emphasis than earlier decisions. It applied the specific Christian message as the starting point and did not take into account the broader moral, cultural and folklore meanings of the symbol. It concentrated on the possible provocative effect of the crucifix for one particular student and identified this provocation as an illegitimate "coercion". The Court did not take into account its effects on other minorities or the majority of the students in the classroom who might experience positive effects or perhaps none at all. On the other hand, the Court ruled that there was no justification for this intrusion. It did not value the state's interest in commemorating the traditional influence of the cross via a "weak", non-discriminatory support of its general moral message or the interests of the many Christian students and parents.[184]

Thus, the Court departed from its previous rulings. The earlier approach of accommodation and cooperation was replaced by the American view of separation as in model 2 or 3. The Court's decision implies a stricter concept of neutrality, equal treatment and non-identification and promulgates a lower threshold of "illegal coercion". Apparently, "one heckler's veto"[185] is sufficient. The state cannot require that a stu-

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Lynch noted: "In a pluralistic society a variety of motives and purposes are implicated," 465 U.S. 668, 680 (1984), when symbols are used. This insight should apply to the effect and meanings of all symbols as long as the context does not indicate one primary or overwhelming effect or purpose.

183 The minority of the court emphasized this point.

184 In this case, the question of federalism played a role as well, which is beyond the scope of this article: The court had to consider how far the power of the German states reaches with regard to the establishment of their school systems.

185 Concerning this term and the problems connected with it, see Chief Justice Rehnquist, concurring in *Elk Grove School District* (note 166), 124 S.Ct.

dent glance in another direction, accept a plural meaning of the cross or tolerate the religious views of other class members. As such, the court charts a course of "complete separation" and "rigidly" deems any type of limitation, either "direct or indirect" as sufficient to be deemed unconstitutional.[186] Obviously, it did not make a difference to the Court whether a *large* crucifix hung above the chalkboard *in front of* the classroom (parallel to the nativity scene in a court building, indicating a close connection between church and state) or rather whether it was a *small* cross placed *somewhere else* in the classroom (as the school administration in Bavaria proposed as a compromise).[187] The crucifix is categorically adjudicated as a symbol with "missionary zeal."[188] Admittedly, the German approach is different from the American perspective of a spatial separation of church and state, especially in schools.[189] This is not generally required in Germany and was not demanded by the German Constitutional Court in the crucifix decision. Rather, the Court would have had no reservations if religious symbols of all students had been represented in the class,[190] or even none at all. However, it is clear that the Court has charted out a hard line in the direction of American separation. Even a small amount of coercion or discrimination of a single student, or even a slight merging of church and state in the form of "weak" support of Christianity is sufficient to spill over into unconstitutionality. This may appear to some (or many) German

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2301, 2320 (2004), and Justice Sandra Day O'Connor, concurring, *id.*, 2321 et seq. According to O'Connor, in order to gauge the constitutionally decisive factor of determining the meaning of the symbol one must look through the eyes of a "reasonable observer" familiar with the history of the country.

186 Concerning these elements see note 40 addressing *Everson*.

187 This point is decisive for the dissenting Justice Kennedy in *Allegheny v. A.L.C.U.*, 492 U.S. 573, 642 (1989), who contrary to the majority in this case (notes 160 et seq.), found that even a menorah, standing adjacent to a Christmas tree connected with a "salute to liberty", violated the non-establishment clause: "[The] sight of an 18-foot menorah would be far more eye catching than that of a rather conventionally sized Christmas tree."

188 BVerfGE 93, 1, 20, translated in *Kommers* (note 43), 475.

189 See note 25, addressing also the relativizations of this view. Likewise *Allegheny v. A.C.L.U.*, 492 U.S. 573, 666 et seq. (Justice Kennedy, dissenting).

190 According to the perspective of advocates of strict separation, this would be inadmissible. See Justice Brennan, in *Allegheny v. A.C.L.U.*, 492 U.S. 573, 644 (1989): "neutrality not just among religions, but between religion and non-religion."

citizens to be a good policy decision in light of a growing multi-religious culture in Germany. However, constitutionally speaking, a different reasoning and result would also have been possible, as noted by the minority opinion and the arguments mentioned above. In complicated cases as mentioned above, where structural and individual rights arguments are heavily intertwined, arguments from both sides are equally plausible and earlier precedents point in both directions. Justices should be cautious in assessing violations of basic rights, especially if the ruling will affect the current structure of church-state relationships. This area of law is the result of many political and legal compromises established over centuries in order to ensure peaceful and productive cohabitation. One heckler's veto, or even the honest voice of a single citizen, should not be sufficient to establish new church-state structures, at least to the extent where no serious coercion or discrimination has taken place.

If we take the more accommodating standard of church-state relations and apply it to the cross decision, a finding of invalidity would have required a determination that the genuine message of Christianity was in fact identified with the state authority. Only in this way would state action support students of the religious majority and consequently ostracize and devalue students of minority religions. In the event that this was not the situation, a slight limitation of neutrality and non-identification should be constitutionally acceptable (and even though it may not be the best policy decision, it is not automatically a bad one). This loss would be compensated by underpinning the moral and religious foundation of the community – to the extent that the religion has become a civil religion as well as the fabric of the moral identity of the population at large (i.e. as noted in the maxims of tolerance or helping the weak and the poor).[191] State commemoration of such traditions in museums, schools and other public places would be constitutional despite the fact that it would generally be connected with a "weak" generalized support. The message would read: "This tradition has a value, it is something good"[192] to the extent that the religious tradition was em-

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[191] This can, for instance, be an important value. See the analysis of *Daniel/Durham* (note 31), 142 concerning the role of the Christian church in the former Soviet-block countries: "In each country, dominant religious traditions continued to play the role of a repository of national culture and traditional values during the communist period."

[192] This is clearly stated in *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (Justice O'Connor, concurring): "the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging the rec-

bedded in a broader cultural-moral field.[193] State support is "generalized" and "weak" because it does not exclude but rather invites intellectual discourse and criticism, especially in the context of a school, but also in public debate. The fact that the exhibition of such symbols causes some members of a religious majority to feel confirmed in their religious conviction is illegitimate only in the model of strict separation (model 2), in which even the slightest hint of coercion and identification is sufficient for unconstitutionality. As long as a community has chosen the division-and-cooperation model (model 4), it is constitutionally more acceptable to tolerate such risks of inequality and limitations. Determining the constitutional validity of weak support for majority religions is difficult and contested in the American accommodation-separation model (model 3), as noted in the various tests promulgated by Supreme Court justices. At the end of the day, the particular context of the case and the shifting majority will determine what is acceptable and what is not.

IX. Retrospection and Future Perspectives

Upon review of the complex interaction of constitutional rights and structural norms in the relationship of church and state in the practical cases described here, the following is clear: Both norm levels are analytically separate, but in practice work together and influence each other. How this interaction develops will largely be determined by high court justices within the framework of flexible methods of interpretation.

1. The stricter a constitutional court institutes a structural division between church and state, the wider the net will be which identifies constitutional infractions against the freedom of religion or the constitutional right to equality. Even a minimal, indirect psychological force for a single person or perhaps marginal identification of state authority with a majority church is sufficient for a judgment of unconstitutionality. Such a judgment can force changes in complex church-state arrangements with a long tradition of evolution and compromise (e.g. the

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ognition of what is worthy of appreciation in society." This does not exclude criticism but rather includes it.

[193] See note 166 addressing Justice O'Connor in *Elk Grove* as well as footnotes 118 et seq. concerning the case of school prayer in Germany.

majority in the German crucifix decision as well as the minority in *Everson*).[194] In other words, any form of support for the constitutional right to practice religion by means of state accommodation or the expression of commemoration will be constitutionally suspicious.[195]

2. The opposite is also true. The more accommodating the basic division between church/religion and state is viewed, especially in models 3 and 4, the higher the standards will be for identifying infractions against clauses guaranteeing religious liberty and equality between religions.[196] Only serious, substantial or even unavoidable acts of coercion and/or clear discriminations are sufficient for a verdict of unconstitutionality (e.g. the German school-prayer case, Christian public schools, or the nativity scene cases in the US).[197]

3. Courts will interpret religious liberty and equality clauses in order to construct an appropriate model for applying structural standards of differentiation, separation, neutrality and non-identification. The more or less a constitutional court signals its willingness to accept marginal instances of coercion, inequality and partiality, the more lenient or restrictive it will be in its interpretation of the respective structural requirements. One striking example of unwillingness to accept even minor harm to a minority believer is the German crucifix case in which the BVerfG referred to the unavoidable coercive force of a crucifix on the wall of a classroom.[198] If even a marginal limitation of equal treatment between believers and non-believers or between particular churches or religions is deemed unconstitutional, then such jurisprudence will also spill over into the relationship between church and state. Even the slightest unequal treatment will be determined to be an impermissible identification and, as such, an infraction against the principle of neutrality. The "outsider" (the term used often in this context), as opposed to the "insider", cannot rely on close state proximity or sym-

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194 *Supra* notes 36 et seq., 171 et seq.

195 This is clearly recognized by Justice O'Connor, concurring in *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985), with a remedy proposal: "The solution to the conflict between the Religion Clauses lies not in 'neutrality', but rather in identifying workable limits to the government's license to promote the free exercise of religion."

196 Concerning flexibility in the interpretation of the American tests, see notes 46 et seq. and Justice O'Connor, concurring in *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985).

197 *Supra* notes 118 et seq., 128 et seq., 159 et seq.

198 Notes 171 et seq. above.

pathy and help for his or her particular religion; still, the term can be interpreted both in an extensive and more restrictive manner.[199] A more restrictive interpretation would require a real, clear, intensive and/or wide-reaching discrimination, to be empirically demonstrated and not only postulated. A more extensive interpretation would allow any claim of psychological distress of a student to be a sufficient indicator for establishing the status of outsiders.[200]

4. When a constitutional court develops jurisprudence that respects the established church-state relationship and views these norms in an accommodating rather than separating spirit, then it will cultivate its "passive virtues".[201] It will respect the Framers' intent and the constitution's text and arrive at judgments of unconstitutionality only in instances of clear and substantial violation. If the constitutional court determines that basic rights have priority and minimizes the limitations of religious freedom, then it becomes an activist court.[202] In the grey area between both extremes, the outcome of the case will often depend on complex, unforeseeable balancing acts of changing groups of justices forced to arrive at a binding majority (or at least plurality) opinion. In difficult cases, the court may not be able to clearly explain the reasoning of its decision, its consistency with past cases or even its meaning for future conflicts. The numerous competing American tests in the area of church-state relations and the often-criticized judicial inconsistencies are good examples.[203]

5. International courts adjudicating human rights conventions or other norms relevant to the freedom of religion[204] also act within the poles of judicial activism and restraint. Activist courts will tend to re-

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[199] Note 115 above.

[200] Note 185 concerning "one heckler's veto".

[201] See *A. Bickel*, The Supreme Court 1960 Term – Foreword: The Passive Virtues, in: *J. L. Coleman*, ed., Readings in the Philosophy of Law, 1999, 330 et seq.

[202] See already *supra* note 157 and *N. Manterfeld*, Die Grenzen der Verfassung. Möglichkeiten limitierender Verfassungstheorie des Grundgesetzes am Beispiel E.-W. Böckenfördes (The Limits of the Constitution. Perspectives of a Limited Constitutional Theory of the Basic Law as per Example of E.-W. Böckenförde), 2000, Parts B. and C.

[203] See for example the extensive list provided by Chief Justice Rehnquist, dissenting in *Wallace v. Jaffree*, 472 U.S. 38, 107 et seq. (1985): "unworkable plurality opinions" (110), "consistent unpredictability" (112).

[204] See the references in notes 15 et seq., 92 above.

strict church-state regulations that accommodate the traditions and religions of the majority. Such judicial activism in effect will marginalize the support or cooperation elements in the church-state models 3 and 4, which maintain relations to the dominant religion or church. Such activism is fuelled by the view that political/legal legitimacy can primarily be attained through individual constitutional rights and minority protection.[205] Majority decisions, preferences or traditions tend to be viewed as "suspect".[206] Contrarily, judicial restraint would be demonstrated with the attitude that the protection of non-adherents of the mainstream religion does not constitutionally require a regime of strict separation between state and religion. Rather, the constitutional status of majority traditions can and must be balanced with minority views. Neither one nor the other should be categorically viewed as "suspect" or "repressive". According to this view, a government could accommodate and/or coordinate activities, messages or symbols in areas of overlap between religion, civil religion, morality, cultural values and folklore. In any case, a substantial amount of coercion or unequal treatment of other world views would not be allowed, and the basic difference between secular and religious authority and organizations would have to remain clear.[207]

6. Regardless of what position a constitutional court assumes, in many cases one observation comes to the fore. Courts in this area often use empirical arguments of what the constitutional framers intended with the corresponding non-establishment clauses, or what state actors intended with the exhibition of religious symbols, or even what effect occurs in the audience. However, empirical proof is rarely considered, e.g. of the proselytizing crucifix and its unavoidability.[208] If it is consid-

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[205] For example *Giegerich* (note 6), section III, 266 et seq. concerning "Freedom of Religion and Worldviews as Source of Individual and Collective Rights to Equality."

[206] See *Brugger*, Liberalismus (note 157), 259, 262 et seq.

[207] Notes 120 et seq. (school prayers in Germany), 166 (Elk Grove).

[208] See *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, concurring): Questions concerning the "effect of a moment of silence law [are] nor entirely a question of fact…" See also *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Justice Brennan, dissenting): "Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts. The District Court's conclusion concerning the effect of [the city's] display of its crèche was in error as a matter of law."

ered, for instance by investigating the legislative will in the moment-of-silence case, then the court's predetermined course is often evident. One vote, a "substantial" vote[209] or several votes are sufficient (what about the impact of the other voices?). The "historical will" is granted priority over the written law, even if it is neutrally formulated and is binding upon all governmental actors.[210] Often a court will choose the following escape route: "[Under] the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.'"[211] Such a standard is as inevitable as it is unsatisfactory, due to the fact that it forces the court into a position of the intelligent and neutral observer and amateur social scientist. Outside the area of evident, substantial coercion/discrimination and inside of the vast grey area of "soft" coercion, "marginal" unequal treatments, "minor" partisanship and "weak" identification, the standard of an objective observer hardly solves the problem of judicial activism or restraint.

7. When one examines the six possible models of church-state relations, one can conclude in light of most modern constitutions and human rights pacts that models 1 and 6 are illegitimate and impermissible.[212] Hostility between church and state means that either no religious freedom is provided in the legal system or that despite its incorporation in the law it is exposed to substantial repression. The purpose of religion and world view to openly address existential aspects of human life is denied and attacked.[213] The danger of oppression also exists in states that fuse political authorities and religious leaders in order to dominate

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[209] In *Wallace v. Jaffree* (Fn. 145, 148), the moment-of-silence case, it was the sponsor of the initiative who stated that the law was enacted in order to reintroduce voluntary prayers in schools. According to Justice O'Connor, a secular objective was not discussed, 472 U.S. 38, 74 ff. (1985), contrary to the opinion of Chief Justice Burger, *id.*, 86 et seq. In any case, the wording of the statute mentioned "meditation" before "voluntary prayer". Justice O'Connor did not find this sufficient to save the statute. The same justice is however more flexible in *Elk Grove* (note 166), 124 S.Ct. 2301, 2325.

[210] See the opposite reasoning in the German Christian Public School Case (notes 139 et seq.).

[211] *Allegheny v. A.C.L.U.*, 492 U.S. 573, 597 (1989) citing *Grand Rapids, School District v. Ball,* 473 U.S. 390.

[212] Sections III 1, 6 and IV.

[213] See *Hollerbach*, Religion (note 23), 29.

the population through the combined use of external pressure and internal coercion.

In contrast to models 1 and 6, the variations 2 to 5 create relationships in which religious and non-religious groups as well as a multiplicity of religions can flourish side-by-side and co-exist with state authority, even though for many commentators the distance between state and religion generally is too great or, conversely, the formal identification of the two spheres is too close. Empirically, model 5, consisting of the formal but limited substantial identification of church and state, is retreating in the Western world as demonstrated in the example of Sweden.[214] Nonetheless, one should not forget that this is one model among several which may garner basic legitimacy. In light of the fact that many countries still maintain a substantive unity of church and state, it is more realistic to expect a movement from model 6 to model 5 rather than to model 4 or even the American model of separation.

8. If one were to expect a worldwide convergence in church-state structures,[215] then it would be in the form that legal systems theoretically and in practice divorce themselves from models 1 and 6. Between these two poles, it should be possible in terms of the salient constitutional law and human-rights treaties for high courts to respect the concrete historical forms of church-state relations. Such relationships develop over long periods of time, have endured historical convulsions and represent concrete and precarious compromises in which many parties were involved. Thus, they represent complex formal and informal structures, which are not easily moulded according to ideal norma-

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[214] Until 2000 the Lutheran Church was the national church in Sweden. Since then the constitution provides for a stricter separation between church and state. See *Sverige riksdag*, ed., The Constitution of Sweden. The Fundamental Laws and the Riksdag Act, 2003, in particular 47 and Chapter 2, Art. 1-5 as well as Art. 2 of the Instrument of Government Act. See also Chapter 8, Art. 6. See also *Classen* (note 42), 12 et seq. This similarly applies to Finland. See *E. Christensen*, Is the Lutheran Church Still the State Church? An Analysis of Church-State Relations in Finland, Brigham Young University Law Review 1995, 585 et seq. and the new constitution from March 1, 2000, in particular § 11.

[215] See *Robbers*, Verhältnis (note 29), 62 concerning the theory of convergence in the development of Church Law in Europe: "there is a gradual, cautious denationalization of national churches on one hand and an increasing willingness to cooperate in the countries which observe strict cooperation" (translation mine). Similar observations by *Classen* (note 42), 12 et seq.

tive or legal systems.[216] While in Western states church-state relations are governed by highly developed legal systems, they are never completely perfected and must remain subject to criticism. Both the political system and the religious organizations must answer the question as to whether they truly support the "well being" and the "ultimate concerns" of their members. To the extent that the church-state relationship generally functions, occasional instances of unequal treatment are only minor deficiencies open to correction in free states – specifically in the political process. It is precisely in this forum that the struggle for recognition is carried out, as well as within the framework of high court decisions excluding gross instances of coercion or discrimination.

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Annex: Reformulation of Justice O'Connor's Endorsement Test (O'Connor 2)[217]

I. Constitutional endorsements of religious symbols, if no. 1 through 5 are given.	**II. Unconstitutional endorsements of religious symbols, if one of the following is given.**
1. Long history, broad use of symbol, approaching ubiquity.	1. New religious symbol, restricted distribution, uncommon references.
2. No context of prayer or worship.	2. Context of prayer or worship.
3. No reference to a particular religion.	3. Reference to one particular religion.
4. Minimal religious content.	4. Strong religious content.
5. Judgment as to these criteria from the point of view of a reasonable observer (i.e. the justice or court).	5. Same as column I; the "heckler's veto" does not count.

[216] See *Hollerbach*, Religion (note 23), 31: "there is neither the test-tube state nor a test-tube religion, but rather respective concrete forms with a specific history and characteristics" (author's translation).

[217] See note 115. O'Connor deduces the definition of "ceremonial deism" from this test.

The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel

Shimon Shetreet

I. Introduction: The Religion-State Relationship and Freedom of Religion

The prevailing view in comparative international law, including that of this author, used to be that the establishment of religion and its recognition by the state or the separation of religion from the state did not, as such, violate religious freedom or constitute unlawful discrimination for religious reasons or breed religious intolerance. However, in recent years this view has changed, as it has become clear that the secularist approach has often led to less openness and a reduced sensitivity to religious freedom. This can be seen in religious statutes regulating use of religious symbols in public space and government facilities.

Many countries which separate church and state nevertheless grant exemptions from certain legal duties such as military service on grounds of religious beliefs, while other countries which have a state-established religion do not. The relationship between church and state often has no significant effect on the free exercise of religion, and, thus, the Draft Convention on the Elimination of All Forms of Religious Discrimination provided that neither the establishment of a religion nor the separation of church from state in and of itself is an interference with the freedom of religion, unlawful discrimination on religious grounds or religious intolerance.

Of course, if in consequence of the state's recognition of a particular religion, that religion or its adherents are given preferential treatment

over other religions or over persons who are not members, there exists an infringement of the principle of religious freedom – a principle which requires the equal treatment of all religions. The same principle applies where the separation of religion and the state leads to the preferential treatment of people with no religion (or of disbelievers) as against others.

It should be noted that, irrespective of state recognition of a particular religion, the religious beliefs of the majority of the population inevitably affects the life of the state. In the United States and Canada, for instance, this phenomenon is reflected in the prescription of Sunday as the weekly day of rest. In contrast, in Israel this day is Saturday, along with the Jewish festivals, although the right is reserved to non-Jews in Israel to select the rest day customary among them. In Israel, this phenomenon is also manifested in the status enjoyed by the Chief Rabbis.

In this paper it is proposed to analyse in the context of comparative perspectives the different models of relationship between church and state and their impact on freedom of religion. Special attention will be paid to exemptions on grounds of religion and conscience. These issues will be examined with reference to a number of legal systems, as well as a study of the Israeli experience. The concluding part of the paper will offer an analysis of special issues arising in the Israeli legal system as a result of the integration of law and religion.

II. Analysis of Models of Relationship between Church and State

The relationship between the state and religion can be reflected in different forms. We can divide these forms into five models: the theocratic model, the absolute-secular model, the separation of state and religion model, the established church model, and the recognised religions model. The two most extreme of these above-mentioned models, the theocratic model and the absolute secular model, are non-democratic, while the other three models are democratic in their relation to religion.

The *theocratic model* suggests that religion will dominate the state. Its theory dictates that there should be one officially recognized religion and that other religions are forbidden. The other non-democratic model is the *rejection of any religion*, i.e. formal atheism of the state. This law forbids any religious act, and the freedom of religion is deprived.

The democratic state must ensure and preserve the freedom of religion, defined as the freedom of any religion to maintain its religious activities, the freedom of any person to maintain personal faith and religion and to fulfill religious commandments and rituals,[1] and equally, the right to be free from religion. As Salman Rushdie commented on the connection between democracy and religion,

> The moment you say that any idea system is sacred, the moment you declare a set of ideas to be immune from criticism, satire, derision, or contempt, freedom of thought becomes impossible. We must win the right to criticize the religion without fear of retribution. Criticism, free speech, is the foundation of an open society. We need to criticise and use reason to solve our problems. No belief, rational or irrational, scientific or divinely inspired, should be exempt from critical examination. If a belief is sound it will stand on its own merits. If it is not it deserves to fail. No religion should seek immunity from the examination of its claims, or seek freedom from moral criticism of its practices.

The foundation of the democratic state is secular law which has been accepted and determined in a democratic way by a legislature in a democratic parliament and which does not contradict the principles of the democracy.[2] There are, as mentioned, three models which maintain these important principles of democracy to settle the relationship between state and religion, all of which shall be expounded below.[3]

The first model is the *separation of state and religion model*. In this model, the state's legislation is secular; its purposes are non-religious, and no religion is preferred. The separation of state and religion is expressed by the principle that the state does not interfere with the religious organizations and these organizations do not interfere in the matters of the state. The separation can be created in different ways: the state can declare itself a secular state (as in the constitutions of France,

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[1] See *B. Neuberger*, Religion and Democracy in Israel, 1997, 16 [in Hebrew]. The freedom of religion will be limited only when the fulfillment of religious commandments would result in violence, in breach of the public order, or in deprivation of civil rights.

[2] *Ibid*., 17.

[3] Today it is accepted that a state's adoption of a regime of state religious separation or (on the other hand) of an establishment of a formal religion does not necessarily offend the freedom of religion or lead to discrimination on a religious basis. See Art. I(d) of the International Draft Convention on the Elimination of all Forms of Religious Intolerance.

India and post-communist Russia), as "neutral" concerning matters of religion (such as in the constitutions of Australia, Ireland and Spain), or as separate from issues of religion (as in the constitution of Poland, or in the interpretation of the First Amendment of the US Constitution by the Supreme Court of the United States).[4] A regime of separation of religion and state does not in and itself dictate that state's approach toward religion: the separation may be a result of a positive attitude toward religion and a need to preserve it (as in the United States), or as a consequence of a negative attitude towards religion, stemming from the desire to preserve the state's secular character (as in France). Some states combine various elements of these models, such as in the constitution of the Ukraine, which provides for the separation of church and state and allows for the establishment of places of worship. However, at the same time, non-indigenous religious institutions in the Ukraine are subject to governmental restrictions.[5]

The United States adopted the separation of state and religion model and is often used as an illustration of this model.[6] The first amendment of the Constitution holds that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". This clause does not literally constitute a regime of separation. However, this section was interpreted as the adoption of the separation model. The interpretation was based on two important parts of the section: the Establishment Clause[7] and the Free Exercise Clause.[8]

The combination of the two clauses was the basis of the "wall theory", described by President Jefferson as having been intended to create "a wall of separation between church and State", meaning that the state is not to interfere in religious affairs nor should religion interfere in the

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4 For the "Establishment Clause", see the following discussion.

5 *International Coalition for Religious Freedom*, Religious Freedom World Report: Ukraine, updated 3 April 2004, available at http://www.religiousfreedom.com/.

6 For further Case law illustrating American law: *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Employment Div., Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty* 435 U.S. 622 (1978). See also The Religious Freedom Restoration Act of 1993.

7 The state shall not establish any formal preferable religion, and its view in the matters of religion will be neutral.

8 Its purpose is to protect the churches from the interference of the state and to maintain the freedom of religion and belief.

affairs of the state.[9] A consequence of this attitude is that in the United States the right to be free not to practice religion is regarded as a constitutional right. In *Torasco v. Watkins* the US Supreme Court unanimously held that Maryland's requirement that a person holding public office must state a belief in God was constitutionally impermissible.[10] Speaking for the court, Black, J. stated:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

In Sweden the Lutheran Church used to be the national church until the year 2000. The constitution of Sweden was amended and introduced a policy of strict separation between state and church.[11] This similarly applies to Finland, which adopted its new constitution on March 1, 2000.[12]

The second model is the *established church model*, which means that the state recognizes a certain religion and a certain church as the state's national church. This can be expressed in a multitude of ways, including through state financial support to institutions of this religion or in benefits given to the members of this religion. The difference between this model and the theocratic model is in the approach towards other religions and non-religious people. While the theocratic model state does not tolerate other religions and non-religious groups, the *established church model* state is democratic (at least regarding freedom of religion). Examples of states that have adopted this model are England (the Anglican Church is the Church of England), Denmark, Norway, Iceland, Greece and Bulgaria (the Eastern Orthodox Church). There are

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[9] *Everson v. Board of Education*, 330 U.S. 1 (1946). This case dealt with the question of governmental financial allowances for driving-expenses for a catholic school's students. The court decided that these payments were not against the constitution.

[10] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[11] The Constitution of Sweden available at http://www.riksdagen.se/templates/R_PageExtended_6319.aspx.

[12] The constitution of Finland (Entered into force on 1, March 2000), Chapter 2, section 11 available at http://www.om.fi/uploads/54begu60narbnv_1. pdf.

states in which the recognition of one formal church is only symbolic and declarative (such as the recognition of the Catholic Church in Liechtenstein, Monaco and Malta) – this is named "*the endorsed church*" sub-model.

Another model is the *recognised religions model*. The state in this model does not recognize one formal religion, and a formal national state church does not exist. Rather, the approach is neutral. This model is similar to the separation model, because in these two models the state does not interfere in the internal matters of the state, such as in the appointment of priests. The important difference between these models is that in the *acknowledged religions model* the churches are recognized by the state as special corporations, and the state is responsible for supplying religious services, such as financing the foundation and maintenance of churches. Cooperation exists between the state and the acknowledged churches without a preference of one over another. This is the model adopted in Germany, which recognizes as "acknowledged religions" the Catholic, Protestant, Anglican, Jewish and Muslim communities. In Germany, one's religious affiliations are recorded on income tax forms, with income tax contributions being directed to support the community indicated on the form.[13] In addition, German laws allow certain church officials to sit on local and state government boards and commissions "where they help decide everything from how public tax revenue is spent to how public media are run – or which minority faiths are considered 'dangerous sects'".[14] Latvia also follows this *recognised religions model*. In Latvia, religious institutions must register with the state if they wish to enjoy certain privileges and rights.[15] In Canada, although there is no recognized state religion, separate religious school systems (Catholic and Protestant) were constitutionally established and are funded by the state, and the "supremacy of God" is constitutionally recognized but without reference to the religion over

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[13] German Embassy Washington D.C., available at http://www.germany-info.org/relaunch/culture/life/religion.html.

[14] *S. Theil*, Tolerating Intolerance: Germany debates the headscarf and finds it un-German, available at http://www.aicgs.org.

[15] *International Coalition for Religious Freedom*, Religious Freedom World Report: Latvia, updated 26 June 2004, available at http://www.religiousfreedom.com/.

which this God reigns.[16] Another state adopting this model, albeit in a more liberal way, is post-communist Hungary.[17]

It should be noted that Prof. Brugger suggests a classification based on six models of the relationship between state and church, including: animosity between state and church (*The Theocratic Model*); strict separation between state and church in theory and practice; strict separation between state and church in theory, with practical accommodation; division between state and church plus coordination and cooperation; formal unification of state and church and formal and material union of state and church.[18]

III. Comparative Observations

We have described various models of and attitudes towards the preferable connection between state and religion. In the following passages we shall focus on solutions adopted in some of the above-mentioned states.

With respect to the *separation of state and religion model*, various approaches are followed. According to one approach, the term "separation" must be widely interpreted, and the prohibition of the state to interfere in matters of religion should be total and strict.[19]

This has been the dominant approach taken by the Supreme Court of the United States. A symbol of this approach can be seen in the series of prayer-in-school cases heard by the US Supreme Court. One of first of these cases was *Engel v. Vitale* (1962), which held that public school prayer is unconstitutional.[20] The court held that reciting the following prayer at the start of every school day was unconstitutional, even if students were not compelled to recite the prayer:

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16 Canadian Charter of Rights and Freedoms.

17 For the differences between the Hungarian system and the German System, see *Neuberger* (note 1) *supra*, at page 15.

18 *W. Brugger*, On the Relationship between Structural Norms and Constitutional Rights in Church-State Relations, found in the current volume.

19 See *A. Schwarz*, "No Imposition of Religion: The Establishment Value", Yale L.J. 77 (1968), 692; *A. Schwarz*, "The Non-establishment Principle: A Reply to Professor Gianella", Harv. L. Rev 81 (1968), 1465.

20 *Engel v. Vitale*, 370 U.S. 421 (1962).

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen.

The majority of the court noted the very nature of prayer is religious and that government officials creating such a religious activity for school children is inconsistent with the Establishment Clause.

In a later case, *Wallace v. Jaffree* (1985), this principle was upheld. In a 6-3 decision of the US Supreme Court, it was decided that an Alabama law requiring a moment of "silent meditation or voluntary prayer" at the beginning of each school day violated the Establishment Clause of the First Amendment.[21] This principle was extended in *Lee v. Weisman* (1992), which held that even non-sectarian school-endorsed prayers are forbidden by the Establishment Clause, which forbids all prayers in public schools, not only those following a certain religious tradition.[22] The Supreme Court further held in *Santa Fe Independent School Dist. v. Doe* (2000) that even student-led, student-initiated prayer at sports events violates the Establishment Clause; for despite such student initiative, when religious prayers are conducted "on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer", they are imbued with the understanding that they are official and school-approved, thus rendering them unconstitutional.[23]

Even in less extreme cases, when the matter at issue was not prayer but rather the use of public funds to pay the salaries of public employees teaching in religious private schools, the US Supreme Court has held that such practices violate the Establishment Clause, due to the "excessive entanglement of church and state".[24]

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[21] *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[22] *Lee v. Weisman*, 505 U.S. 577 (1992).

[23] *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290 (2000). See also *Zorach v. Clauson*, 343 U.S. 306 (1952) discussing the constitutionality of a law allowing students to be absent from public schools for the purpose of attending religious services and education.

[24] *Aguilar v. Felton*, 473 US 402 (1985). See also: *Lemon v. Kurtzman*, 403 U.S. 602 (1971), dealing with providing financial support to religious institutions announcing the 'Lemon Test'.

In other cases involving public religious symbolism, e.g. the sister cases *McCreary County v. ACLU of Kentucky*[25] and *Van Orden v. Perry*,[26] the plaintiffs argued that displays of the Ten Commandments in courthouses in Kentucky and Texas, respectively, violated the Establishment Clause. Decisions in both cases came down on 27 June 2005. In split 5/4 decisions, the Supreme Court ruled against the display in Kentucky and for the display in Texas. The difference, explained Justice Stephen Breyer (who was the only Justice to vote differently in the two cases), was that the Kentucky display (consisting of hanging framed copies of the tablets) was apparently the result of a government effort "substantially to promote religion"; whereas the Texas display, a monument on courthouse grounds, served a "mixed but primarily non-religious purpose".

In Alabama, a statue of the Ten Commandments that was on display in the rotunda of the courthouse has already been put into storage following a decision that its display amounted to an unconstitutional promotion of religion; and in the wake of the most recent court decisions, on 2 July 2005, the Kingston municipality in the state of New York ordered a sculpture of the ten commandments placed in front of the Ulster County Courthouse as part of a sculpture exhibit to be removed.[27]

In a slightly different vein, *Epperson v. Arkansas* holds that a state is constitutionally forbidden to prohibit the teaching in its public schools and universities that the human species may have evolved from other forms of life. The State of Arkansas was the involved in this case, and the impugned was the state's "anti-evolution" statute adopted in 1928.[28]

However, in contrast to these cases, it has been held by the Supreme Court that when there is religious symbolism in a clearly *public* as opposed to *governmental* institution, religious displays are permitted. Thus, it was held in *Capital Square Review Board v. Pinette* (1995) that the Klu Klux Klan was allowed to erect a non-supervised cross in Capitol Square in Columbus, Ohio that was regularly used by organizations and individuals for public activities. The court held that as the park was a "genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years" there was no risk

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[25] *McCreary County v. ACLU of Kentucky* 2005 U.S. LEXIS 5211.

[26] *Van Orden v. Perry* 2005 U.S. LEXIS 5215.

[27] "Mayor orders removal of courthouse sculpture with Ten Commandments," Newsday.com, July 2, 2005.

[28] *Epperson v. Arkansas*, 393 US 97 (1968).

of the impression of government favouritism as is prohibited by the Establishment Clause.[29]

According to a different interpretation of the Establishment Clause, the interpretation of the First Amendment should be literal and strict, and therefore, as long as the state does not prefer one religion or church over any other, or as long as the religious benefit is incidental to the secular purpose, the state is allowed to support religious schools or traditions. This attitude was seen in *Lynch v Donnelly* (1984)[30] where the US Supreme Court held that there was no violation of the Establishment Clause when the City of Pawtucket, Rhode Island erected a Christmas display which included a crèche with depictions of baby Jesus, Mary and Joseph. The Court held that this display was permitted by the Establishment Clause, for the crèche was "sponsored by the City to celebrate the Holiday [of Christmas] and to depict the origins of that Holiday. These are legitimate secular purposes." That there was a secondary religious objective was an insufficient reason to deem the display unconstitutional. The Court looked at whether the crèche could be construed as being state-endorsed and found that it could not:

> There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary; and since the City owns the crèche, now valued at $200, the tangible material it contributes is *de minimis*. In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries. There is nothing here… [of] "comprehensive, discriminating, and continuing state surveillance" or… "enduring entanglement".

The court in *Allegheny County v. Greater Pittsburgh Chapter ACLU* built on the decision in *Lynch*, holding that when *secular* rather than *religious* symbols of Christmas or Chanukah were sponsored by the government, this did not violate the Establishment Clause. In other words, a Christmas tree used in a secular fashion was permissible.[31]

Some scholars claim that religious services are a basic need, and therefore the preservation of religious freedom obliges the state to support

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[29] *Capital Square Review Board v Pinette*, 115 S. Ct. 2440 (1995).

[30] *Lynch v. Donnelly*, 465 US 668 (1984).

[31] *Allegheny County v. Greater Pittsburgh Chapter ACLU*, 492 US 573 (1989).

such services. According to this view, a coherence-ideal obliges adopting this stricter interpretation of the Establishment Clause.[32] Thus, in a modern welfare state, which is supposed to support basic public services, there is a conflict between the principles of separation of religion on the one hand and freedom of religion on the other hand. In the US, preserving freedom of religion without violating the establishment prohibition is a very difficult mission. Therefore, this view supports the stricter termination of "establishment."[33]

It should be noted that the fact that the United States adopted the separation method does not mean that the US approach towards religion is hostile. On the contrary, American society is very religious, and anti-religious groups are considered marginal. Approximately 95% of Americans claim a "belief in God" and over 40% maintain that they attend Sunday religious services. Indeed, Demarath and Williams contend that this combination of a state separating itself from religion and a religious population is no accident, for the very *separation of state and religion* model breeds a religious polity. They claim that in such an environment not only would the division of state and religion be intolerable were there not the free ability to express one's religious views, but also the removal of the government from religion gives the populace more freedom to express their individual religious views.[34]

Although also based on the separation model, the French attitude is very different from that of the US. In France, the French Revolution brought about the perspective of the secular as a critical component of French identity, and therefore France is less accommodating vis-à-vis religions in its vehement insistence on a secular state. This perspective was described by Alain Juppé, the former French Prime Minister, who expressed a common view when he declared that "We must defend

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[32] See *R. Gavizon*, "Religion and State: Separation and Privatization," Mishpat Umimshal 2 (1994), 55 (63) [in Hebrew] and especially footnote no. 15, which directs to the important judgment: *Muller v. Allen*, 463 U.S. 388 (1983).

[33] Since the value of freedom of religion is more important, according to this view, than the value of separation. For the comparison of these values see: *W.G. Katz*, "Freedom of Religion and State Neutrality," U. Chi. L. Rev. 20 (1953), 426.

[34] *N.J. Demerath/K.S. Straight*, "Religion, Politics, and the State: Cross-Cultural Observations," Cross Currents, available at http://www.crosscurrents.org/Demerath.htm.

secularism – the next step may be separate train compartments for men and women, beaches reserved for one sex".[35]

The separation of religion and state was solidified on 9 December 1905 when France passed a law separating church and state. Based on three interlocking precepts – religious freedom, state neutrality, and public church powers – the *Law on Secularity* is regarded as a basis of the French principle of *laïcité*, defined as the neutral separation of church and state, done without hostility towards religious beliefs. Under the principle of *laïcité*, a citizen's first allegiance is to French society, rather than to a particular group, whether it is religious or otherwise.

The 1905 law ended public funding of all religious groups, declared all religious buildings property of the state, prohibited the attachment of religious signs on public buildings and prohibited the republic from continuing to name French archbishops or bishops.

A highly visible expression of French *laïcité* was seen in September 2004 when legislation came into effect banning students from wearing "conspicuous" religious items in schools, including Jewish skullcaps, Muslim headscarves, Sikh turbans and large Christian crucifixes. The law, entitled *Loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* is very straightforward in content – the non-technical provisions providing simply that:

> In public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or attire through which they conspicuously exhibit a religious affiliation.
>
> Note that the internal regulations [of the schools] require disciplinary procedures to be preceded by a conversation with the student.

The *laïcité* aspect of the law has been elucidated with the explanation that the law is able to bring about a neutral study environment[36] and that banning conspicuous religious symbols is a way of promoting successful cultural integration.[37] However, some have also opined that the

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[35] BBC News, World Edition, Thursday, 11 December, 2003, available at http://news.bbc.co.uk/2/hi/europe/3135600.stm.

[36] *T. Wilson*, Handling the Headscarf Issue: The French Headscarf Ban in a European Context, available at http://www.arts.auckland.ac.nz/FileGet.cfm?ID=C79B0D70-0CC5-407E-87E2-C818F64E06A8.

[37] *D. Williams*, "In France, Students Observe Scarf Ban: Hostage Takers in Iraq had called for Repeal," Washington Post Foreign Service, Friday, September 3, 2004; A11.

law is intended to "combat rising Muslim fundamentalism in France, and to protect the rights of women, widely viewed … as submissive to men if they wear head scarves".[38]

Other religions have also been singled out in France for contravening the principle of French secularism.

In a child custody case following a divorce, a woman [Mrs. Séraphine Palau-Martinez] was denied the custody of her children outside of holidays for various motives, among which her belonging to the Jehovah's Witnesses; the court of appeals of Nîmes considered that the educational rules applied by the Witnesses to their children were essentially criticisable because of their hardness, their intolerance, and the obligation for children to proselytize. The case went before the European Court of Human Rights (ECHR) (request #64927/01), which ruled that the French court, in that respect, should have based itself on actual facts regarding the mother's handling of her children and not on abstract, general notions pertaining to the mother's religious affiliation.[39]

A less publicized French law restricting religious freedoms came into effect on June 21, 2001. This legislation, entitled *Loi no 2001-504 du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales* ("Law number 2001-504 of 12 June 2001 intended to reinforce the prevention and repression of sectarian [cultic] groups that infringe on human rights and fundamental freedoms") has been applied only once, to Arnaud Mussy (leader of the *Néo-Phare*) who had announced imminent apocalypse, resulting in the suicide of one of his followers and the attempted suicides of two others. Despite its sparse application, there has been international objection to the legislation on the basis that it discriminates on the basis of religion, partly due to the use of the word "sect", which has negative connotations.

In November 2002, the Council of Europe passed a resolution inviting France to reconsider the law and to clarify certain terms in the law. However, the Council of Europe also noted that only the European Court of Human Rights was empowered to resolve whether the law was compatible with the Convention.

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[38] French Head Scarf Ban Underway, October 20, 2004, CBS News, available at http://www.cbsnews.com/sections/home/main100.shtml.

[39] French Legislation for the Prevention and Repression of Cultic Groups: Legal Recourses before the European Court of Human Rights (ECHR), available at http://en.wikipedia.org.

In contrast to France's move towards eliminating conspicuous religious symbols, France has also, in some cases, protected religious freedom. In October 2002, the administrative court of Orléans annulled a municipal decision issued by the mayor of Sorel-Moussel.[40] The decision granted the mayor the pre-emptive right to purchase a plot of land that the local Jehovah's Witness community had intended to buy and use for the construction of a house of worship. The court held that the mayor had abused his right of pre-emption. A month later, in November 2002, the Auch court of large claims held that an organization created in order to prevent Jehovah's Witnesses from constructing a place of worship in Berdues was to be dissolved, for the organisation's goal was to "hinder the free exercise of religion".[41]

The difference in attitude between *secular model* states and *recognized religions model* states can be illustrated by comparing the treatment of the headscarf issue in France (a secular model country) and in Germany (a recognised-religion state). In September 2003, the German Federal Constitutional Court held that unless prohibited by state laws, Muslim teachers could not be forbidden from wearing a religious headscarf. Following this decision, seven German states began drafting such legislation. Beginning in the autumn of 2006, German teachers in Bavaria will be forbidden from wearing Muslim headscarves; although, unlike the situation in France, other religious symbols including Jewish skullcaps, Christian crucifixes, and Christian nuns' habits will continue to be permitted to be worn by teachers. German legislators believe they have circumvented Article Four of the Constitution, which guarantees equal treatment of all religions, by labelling Muslim head scarves as a political rather than a religious symbol. The distinction in different religious symbols has been justified by Germans as being necessary in order to educate children about Christianity and their Christian roots.[42]

In contrast to Germany, the United States and France, England has adopted a different answer to the question of the link between state and religion: the *established church model*. According to this framework, the monarch is the head of the Established Church, must be Anglican in order to rule the kingdom, and cannot convert to a different religion. In

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40 Available at http://www.coordiap.com/juri01.htm.

41 Available at http://www.geocities.com/droit_tj/partie2.htm.

42 *Theil* (note 14) *supra*. See also U.S case of *Goldman v. Weinberger*, 475 U.S. 503 (1986) where it was held that the Free Exercise Clause did not require the Air Force to exempt an Orthodox Jewish officer from uniform dress regulations. Consequently he was not allowed to wear a skullcap indoors.

the Coronation Oath, the monarch pledges to maintain the Protestant Reformed Religion established by the law[43] and to be the "Defender of the Faith", in other words, defender of the Protestant-Christian faith.

The acknowledgment and support of the state in one formal religion can be illustrated in many other examples. The Established Church organizes the formal state ceremonies, such as the Monarch's coronation ceremony or requiem ceremonies for soldiers who died in a war; the twenty-six most senior bishops, including the archbishops of York and Canterbury, sit in the House of Lords as "Lords Spiritual"; all the measures of the Established Church, which are accepted by the General Synod (the general assembly of the church) must receive the confirmation of the Parliament; the General Synod has the power to propose legislation to Parliament;[44] the Book of Common Prayer was confirmed by Parliament[45] and the monarch appoints archbishops and bishops upon the recommendation of the Prime Minister.

Another example is the British *Law of Blasphemy*, which holds that "to reproach the Christian Religion is to speak in subversion of the law".[46] In the schools, a daily act of collective worship is followed, and the prayers in most of the country schools in England and Wales are of a Christian nature and reflect the basic principles of the Christian tradition (without referring to a specific church). In addition, religious lessons are carried out in the public schools, although parents are allowed to exempt their children from participating in these lessons and in the daily conduct of collective worship. One quarter of the primary schools in England, and one in sixteen of the English secondary schools, are Church of England schools. In sum, approximately one million students are educated in Church of England schools.[47]

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[43] *Coronation Oath Act, 1688*.

[44] Factsheet L10 (Rev. Oct. 2003): Legislation Series House of Commons Information Office: Church of England Measures.

[45] In 1588, 1662, 1872, 1990 and 1994 – see *P. Cumper*, Religious Human Rights in the United Kingdom, Emory Int.L.Rev. 10 (1996), 115. On the issue of religions in new Europe see *P. Cumper/S. Wheatley*, Minority Rights in New Europe, 1999.

[46] See *R. Post* "Blasphemy, The First Amendment and the Concept of Intrinsic Harm," Tel-Aviv U. L. Rev. 8 (1988), 293-324.

[47] Church of England Website, at http://www.cofe.anglican.org/about/thechurchofenglandtoday/.

A law providing protection to the church is the *Church of England Assembly (Powers) Act 1919*. It was enacted in order to allow the Church of England to submit proposals to Parliament concerning any issue, excepting theological matters, affecting the Church. The law was enacted due to the concern that Parliament was becoming too busy to deal properly with Church legislation. A subsequent piece of legislation providing a legal connection between the Church and the State is the *Synodical Government Measure (CAM. No. 2 1969)*, which received Royal Assent on 25 July 1969. The Measure established a General Synod, which makes legislative provisions to Parliament in the same way as the Church Assembly did prior to the General Synod's inception. The General Synod may also submit Canons (generally involving the work of the clergy and not subject to Parliamentary process) directly to the monarch by way of the Home Secretary.[48]

Although Parliament is under no obligation to approve Church of England measures, and it will not automatically pass them in the case of controversial issues, it is uncommon for Parliament to reject them, due to its desire not to unduly interfere in Church matters. Between 1992 and 2003, Parliament passed 17 Church of England Measures.[49]

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[48] Fact-sheet L10 (Rev. Oct. 2003): Legislation Series House of Commons Information Office: Church of England Measures, 2-3.

[49] Fact-sheet L10 (Rev. Oct. 2003): Legislation Series House of Commons Information Office: Church of England Measures, 5. The following are reports of Parliament's Ecclesiastical Committee between March 1992 and 2003: 1992-93 Incumbents (Vacation of Benefices) (Amendment) Measure 202 515 64-II 1993 No.1; 1992-93 Priests (Ordination of Women) Measure; Ordination of Women (Financial Provisions) Measure 1993 No 2; 1993 No. 3; 1993-94 Pastoral (Amendment) Measure 205 18 3-II 1994 No.1; 1993-94 Care of Cathedrals (Supplementary Provisions) Measure 1994 No.2; 1993-94 Church of England (Legal Aid) Measure 207 457 64-II 1994 No.3; 1994-95 Team and Group Ministries Measure 208 149 21-II 1995 No.1; 1994-95 Church of England (Miscellaneous Provisions) Measure 209 645 79-II 1995 No.2; 1996-97 Pensions 210 383 65-II 1997 No.1; 1997-98 National Institutions Measure & Church of England (General Synod) Measure 211 772 111-II 1998 No.1; 1997-98 Cathedrals Measure 212 1026 147-II 1999 No.1; 1998-99 Care of Places of Worship Measure 213 488 68-II 1999 No.2; 1999-00 Church of England (Miscellaneous Provisions) Measure 214 500 64-II 2000 No.1; 2000-01 Churchwardens Measure 215 306 41 2001 No.1; 2001-02 Synodical Government (Amendment) Measure 216 1136 157-II 2003 No.1; 2002-03 Church of England (Pensions) Measure 217 74 4-II 2003 No.2; 2002-03 Clergy Discipline Measure 218 613 87-II 2003 No.3.

The conclusion of this analysis is that the English system has created a strong connection between state and religion, between the English nation and the Established Church. However, it must be stressed that despite the fact that there is one religion that the state formally prefers, other religions are not discriminated against, and there exists in England complete freedom of religion. Evidence for this is that despite the State's formal endorsements of the Church, only forty-three percent of the English population identify themselves as being members of the Church of England.

IV. Exemption on Grounds of Religion and the Relations between Church and State

1. Introduction

In the following discussion, it is proposed to examine the kinds of exemptions and privileges which the law allows on grounds of religion and conscience. We shall begin with examples of the types of exemption and privilege problems, and subsequently the doctrines utilized by the courts for resolving the issues in this area will be discussed. Finally, general justifications for granting exemptions will also be examined, as well as the specific considerations which are weighed by the courts in determining whether to grant or deny exemptions. The analysis suggests that considerations regarding the granting of exemptions are not dependent predominantly on the nature of the relationship of church and state, but rather on broader considerations applicable to all systems. However, states with provisions commanding the secular nature of the state may be less friendly to religions, as can be seen such by the exclusion of religious head coverings in France.

2. Exemptions on Religious and Conscientious Grounds: Illustrations Classified

Legislatures and courts have created certain exemptions and privileges that allow individuals and institutions to pursue freely their religious activities. The nature of these exemptions and privileges fall into distinct categories, and the different categories raise different problems. The basic categories are:

(1) Privileges and exemptions which relieve direct conflicts between specific laws and religious tenets in cases where adherence to one requires disobedience to the other;

(2) Privileges and exemptions which relieve indirect conflicts in cases where the law creates an economic loss or social hardship upon those who follow certain religious or conscientious principles;

(3) Relief from regulation of certain religiously or conscientiously motivated activities;

(4) Desirable exemptions from the discharge of legal duties, the performance of which would not necessarily create a conflict;

(5) Privileges conferred through affirmative action taken by government to allow satisfaction of religious and spiritual needs under circumstances that, without such affirmative government action, would prevent religious fulfillment.

Exemption problems in the first category are caused when the law requires an act or omission which "results in the choice for the individual of either abandoning his religious principles or facing criminal prosecution". The legislatures "reveal a deep concern for the situation of the contravening imperatives of religion and conscience or suffering penalties",[50] and to relieve the individual of this dilemma, a legal privilege or exemption may be granted. This "happy tradition" of "avoiding unnecessary clashes with the dictates of conscience" may take the form of an exemption from a legal duty, the discharge of which is categorically forbidden by the individual's religion or beliefs (such as the conscientious objector draft exemption), or it may take the form of a privilege to disregard a law which prohibits an act commanded by one's religion (such as the privilege to use an otherwise prohibited drug in a religious ceremony).

Conscientious objectors to war are one category of persons granted varying exemptions depending on the nature of their beliefs. One who is opposed to any form of military service may be granted a total exemption from serving in the armed forces. Opposition to service in a combatant unit, which involves killing and carrying arms, but not to service in a non-combatant unit, generally gives rise to an exemption from the former only. No exemption is granted to conscientious objectors who oppose participation in a particular war.

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[50] *Gillette v. United States*, 401 U.S. 437, 445 (1971).

Another exemption was seen with the Amish community in the US, which received exemption from school attendance past eighth grade from the US Supreme Court on the basis of freedom of religion.[51] A further instance of exemption exists in the US, Canada and England, where giving an affirmation in place of an oath is permitted where religious beliefs are involved.

Other exemptions from legal duties range from that granted by the English Abortion Act to a doctor who conscientiously opposes taking part in, approving, or performing an abortion, to the current controversy in the United States regarding the right of pharmacists to refuse to dispense birth control pills on the basis of their religious beliefs, to the exemption from the duty to work on Sunday in times of emergency when workers of designated industries are required to work on Sundays. The Indian constitution from its inception provided a state exemption for Muslim personal law.[52]

Canada's approach tends to permit first-category exemptions when doing so does not unreasonably infringe upon the rights of others. Examples of this attitude can be seen in administrative board rulings regarding the wearing of Sikh turbans. In *Dhillon*, the British Columbia Human Rights Tribunal held that a law requiring the wearing of a safety helmet in the place of a religious turban for a motorcycle road test discriminated against members of the Sikh religion who wear turbans as a *bona fide* article of their faith.[53] On the other hand, in *Pannu v. Skeena Cellulose Inc.*, the same tribunal held that it was not religious discrimination to require a Sikh man to shave his beard, another symbol of his religion, if he wished to retain his job. In that case, the tribunal held that the consequences of not being clean-shaven, that is, not being able to be properly fitted with a face mask to protect against poisonous gasses, would pose a danger for other workers and not just to Mr. Pannu. The tribunal explained that in Mr. Pannu's case that if he succumbed to poisonous gasses due to an improperly fitting gas mask, other workers would have to put themselves in danger in an attempt to assist him. This situation was contrasted to the set of circumstances in *Dhillon*, where not wearing a motorcycle helmet posed a danger only to the rider.[54]

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[51] *Wisconsin v. Yoder*, 406 U.S. 205, (1972).

[52] *Demerath/Straight* (note 34) *supra*.

[53] *Dhillon v. British Columbia (Ministry of Transportation and Highways, Motor Vehicle Branch)*, [1999] B.C.H.R.T.D. No. 25 (QL).

[54] *Pannu v. Skeena Cellulose Inc.*, [2000] B.C.H.R.T.D. No. 56 (QL).

The above examples illustrate exemptions from legal duties; in this first category of exemptions and privileges, there are also privileges to perform affirmative acts which would otherwise be prohibited by law. For example, the members of the Native American Church have been granted the privilege of using peyote (a controlled drug) in religious ceremonies. Similarly, an exemption for use of sacramental wine was upheld during the liquor prohibition period. Exemptions from statutes prohibiting spiritualism are other examples.

In many cases both exemptions from required acts and privileges to perform ordinarily prohibited acts have been denied by courts. The well-known Mormon polygamy cases are examples.[55] Similarly, statutes outlawing snake handling in religious rituals have been upheld, and religious grounds were not sustained either for exempting parents from liability for violation of child labour regulations[56] or supporting privilege in faith-healing cases. A further example of an exception to this exemption category involves the mandatory taking of a suspect's blood sample for the purpose of obtaining evidence – even if forbidden for religious purposes, the blood will be taken.

Conflicts between law and religion can arise in the area of compulsory medical treatments and physical examinations. Such conflicts may be either direct or indirect and illustrations will serve to distinguish the two. If medical treatments and physical examinations are required as prerequisites to obtaining public licenses or services, such requirements create *indirect* conflicts because there is no irreconcilable dilemma: an individual is free to choose between following his religious obligations and obtaining the public service or license. Thus vaccinations or X-ray examinations required of students prior to school admission, and examinations for venereal disease prior to obtaining marriage licenses, create indirect conflicts when required over objection on religious grounds. Medical examinations required for welfare benefits arguably also give rise to *indirect* conflicts if the examinations are contrary to religious beliefs.

Harsher consequences occur when the law imposes a duty on parents to provide their children with a specific sort of medical care to which they are religiously opposed, or where the requirement of vaccinating school

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[55] See *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1878) where the Mormon defendant's charge for bigamy was affirmed by the Supreme Court, after marrying a second wife at the same time that the first wife was still living.

[56] *Prince v. Massachusetts*, 321 U.S. 158 (1944).

children is coupled with compulsory education laws, for then there is a direct conflict between religion and law. In these cases the choice lies between religion and criminal sanction, or perhaps between religion and custody of the child.

An illustration of this type of conflict occurs with blood transfusions. In *B(R) v. Children's Aid Society of Metropolitan Toronto*, a one-year old baby of Jehovah's Witness parents was made a ward of the state when her parents refused a blood transfusion for her, as their religion dictated they must do.[57] A similar decision was rendered a few years later in *B.H. v. Alberta (Director of Child Welfare)* when a sixteen-year-old girl was made ward of the state and forced to endure blood transfusions to treat her leukemia despite the wishes of both her and her mother, both Jehovah's Witnesses, that she not receive them. The Supreme Court of Canada held that as the girl was not a "mature minor" she was incompetent to refuse treatment.[58] In these cases, no exemptions were granted due to the age of the children involved.

In France, an uneasy tension exists between religious freedom and the doctor's duty to the patient in blood transfusion cases. In a 2001 case, a patient's widow sued a hospital for giving her late husband blood transfusions against his religious wishes. The court held that a doctor's obligation to respect the will of a patient and that same doctor's obligation to successfully treat that patient are equal obligations. In other words, a doctor has neither "a legally predefined obligation to treat the patient, nor … a legally predefined obligation to abide by the patient's wishes."[59]

In the second category of privileges and exemptions, where indirect conflicts are relieved in cases where the law creates an economic loss or social hardship upon those who follow certain religious or conscientious principles, problems arise when the law forces the individual to choose between following religious or conscientious principles, thereby suffering loss, or abandoning the religion or individual conscience in order to avoid such a loss.

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[57] *B(R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, (1005) 26 CRR (2d) 202.

[58] *B.H. v. Alberta* (Director of Child Welfare), 2002 ABCA 109, May 1, 2002. Leave to appeal to the Supreme Court of Canada denied S.C. No. 29174, July 2, 2002.

[59] Available at http://www.conseil-etat.fr/ce/actual/index_ac_lc0115.shtml.

An example of indirect conflict arises in fluoridation cases. Where individuals are religiously opposed to the use of any drugs, fluoridation of water supplies forces them to choose between their religion, and the expense and inconvenience of seeking a pure water supply.

In *West Virginia State Board of Education v. Barnette*,[60] an exemption was granted. In that case, public school children of Jehovah's Witnesses challenged the validity of their duty to salute the flag in school since it was contrary to the commandments of their religion. The Supreme Court held that they could not be required to salute the flag. The categorization of an exemption granted in a case like *Barnette*, in other words, whether it is direct or indirect, depends on the sanction imposed for violation of the flag salute duty. If a criminal sanction is imposed, then the exemption is clearly within the direct conflict category. If the sanction is expulsion from school, arguably it is within the second category, since the child has the option of attending a private school which does not require flag salute. While perhaps a reasonable argument in the case of university education, this latter argument is hardly tenable with primary and high school education, because of the established duty of the public government to provide such educational services.

If a statute compels workers of designated industries to work on Sunday in times of emergency, and grants an exemption to workers who are conscientiously opposed to Sunday work, but still leaves them unprotected from jeopardizing their seniority or other rights by their objection to Sunday work, the statute creates an indirect conflict. A South Carolina statute resolved the problem in favour of the individual by providing that "if any employee should refuse to work on Sunday on account of conscientious … objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner".[61]

The English Slaughter of Animals Act offers an example of the third category of privileges and exemptions: a privilege to perform an act, otherwise prohibited, in order to resolve an indirect conflict between law and religion. The Act grants the privilege to slaughter animals, normally forbidden, to Jews and Moslems whose religions forbid the eating of meat unless the animal is slaughtered in accordance with cer-

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[60] 319 U.S. 624 (1943).

[61] S.C. Code § 64-4.1 (1960 Supp.): "no employee shall be required to work on Sunday … who is conscientiously opposed to Sunday work" falls within the first category of exemptions; it resolves a direct conflict.

tain rules. This privilege relieves them of the choice between the onerous economic burden of importing properly slaughtered meat and abandoning their religion's dictates.

Zoning law offers another example of exemptions in this category, in that houses of worship and other buildings used for religious purposes are generally relieved of zoning requirements. In the absence of such a relief provision, it should be noted, there might arise an indirect conflict between law and religion. If, as is the case in the Orthodox Jews' belief, one may not drive or ride in a car on Saturday, the zoning of synagogues away from residential areas to places which one cannot reasonably walk but needs to drive creates a conflict between the zoning laws and religion. In such a case, the Orthodox Jew may avoid the conflict by staying home, walking unreasonable distances or moving to a place closer to the synagogue. All these alternatives are indirect burdens on his freedom of religion. A resolution of the conflict by exempting Orthodox synagogues from the zoning regulations would fall within the second category; the exemption of all houses of worship from zoning laws without view toward a particular conflict falls within the third category, as a mere exception to regulation. This very question, whether building a house of worship is a religious right thus leading to zoning exemptions, was raised in the Canadian case of *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*. However, in that case the Supreme Court of Canada ruled on the basis of a different point of law, and so the issue remains unresolved in Canada.[62]

Exemptions from licensing and taxation requirements, when granted for the selling of religious literature, also fall within this third category.

In the fourth category of exemptions and privileges, exemptions from regulation of certain religiously or conscientiously motivated activities are granted because, for various reasons, the legislatures deem it desirable to exempt the individual or institution from discharging a legal duty. There are few exemptions which fall into this category. Tax exemptions of all kinds for churches are examples, including income tax, property tax, estate and gift tax, inheritance tax, and the like. Other examples are the ministerial draft exemption[63] and the priest-penitent

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[62] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 Supreme Court of Canada.

[63] Selective Service Act of 1948, 50 U.S.CA. § 456(g) (1964). Divinity students are also entitled under this section to draft exemption.

privilege, if it is granted when the communication is not required by the penitent's religion and the disclosure by the priest is not forbidden by religion. In France, for example, *associations culturelles* (religious-supporting organization) can request an exemption from various taxes, including taxes on donations, as long as the organization's purpose is limited to organizing religious worship and the organization does not infringe on public order.[64]

The categorization of these exemptions might differ if it were argued that their abolition would result in interference with the free exercise of religion. Thus, the ministerial draft exemption is sometimes justified by invocation of the free exercise clause of the US Constitution. If this justification is correct, then the exemption falls within the third category as a relief from regulation. Likewise, if the justification for tax exemptions is the avoidance of governmental involvement in religious institutions, this exemption would be in the third category, since it relieves the church from monitoring its activities for ascertaining and collecting the amount of the taxes due. This view was advanced by the US Supreme Court in *Walz v. Tax Commissioner of the City of New York*.[65] In that case a New York realty owner challenged the validity of a New York constitutional provision which allowed tax exemption statutes for "religious, educational or charitable" organizations. It was alleged that the exemptions violated the establishment clause of the first amendment by requiring a contribution to religious institutions. The Court upheld the statute, saying "it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."[66] As to any conflict with the establishment clause, the Court concluded that "the exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches",[67] because "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens,

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[64] The application of this law has been subject to criticism, with the Association Les Témoins de Jéhovah (a French Jehovah's Witnesses association) complaining that they are not awarded the same tax-exempt privileges as other groups.

[65] *Walz v. Tax Commissioner of the City of New York* 397 U.S. 664 (1970).

[66] *Ibid.* at 673.

[67] *Ibid*. at 676.

tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes".[68]

In the US, exemptions from anti-discrimination statutes also come within this type of relief; these exemptions are warranted more by the nature of the regulations than by any Congressional purpose to resolve a conflict or to protect the free exercise of religion. It is quite natural that a statute prohibiting discrimination on grounds of religion would exempt religious institutions which naturally limit most of their activities to members of their religion and which require as a qualification for employment, service or benefit a membership in the religion. Unlike in the employment area, the US Congress expressly provided that the exemption from the fair housing law shall be granted only to religions which do not exclude persons from membership on grounds of colour, race or national origin. It remains unclear whether such a qualification impliedly applies to the equal employment statute since it is not expressly provided for.

In this fifth category, the government does not prohibit conduct or waive statutory requirements or duties. Rather it chooses to take some affirmative measures in order to ensure that the religious needs of individuals are satisfied. Here, the government solves religious problems resulting from special circumstances under which the individual loses the ordinary religious opportunities. Providing for "chaplains and places of worship for prisoners and soldiers cut off by the state from all civilian opportunities for public communion"[69] is one example. Giving worship and pastoral care in state hospitals is another. And allowing "the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood"[70] also falls within this category.

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[68] *Ibid*. at 674. See also *United States v. Lee*, 455 U.S. 252 (1982) where the court found the need to uniformity paramount in a case requiring an Amish employer to pay Social Security taxes for Amish employees. See also *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (ruling that dismissal of employees on religious grounds is unconstitutional).

[69] *Abington School Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring). See also *W. Katz*, Religion and American Constitutions, 1964, 21; *D. A. Gianella (Part II)*, Religious Liberty, Non-Establishment and Doctrinal Development, Harvard L. Rev. 80 (1967), 525; *Katz* (note 33) *supra* at 429-33.

[70] *Schempp Case* (note 69) supra.

In a footnote by the Supreme Court in *Barnette*, it was stated that "those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life".[71] This does not refer to a right of having a chaplain and proper facilities for worship but rather to the types of "freedoms" which, because of the need for uniformity and strong discipline in the armed forces, might be denied to soldiers and granted to civilians.

The soldier, the prisoner and the patient in a state hospital are all in special circumstances (cut off from their ordinary community services) which justify governmental acts that fall within the fifth category, in other words, acts designed to solve their religious problems.

3. Analysis of Conceptual Issues

In the United States, the First Amendment commands that "Congress shall make no law respecting an establishment of religion". The first amendment also commands that Congress shall make no law "prohibiting the free exercise" of religion. There is a tension between the establishment clause and the free exercise clause since protection of the free exercise of religion through legal accommodation of religious demands arguably violates the establishment clause. As Justice Brennan stated, "There are certain practices conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment".[72]

The exemptions and privileges granted to resolve direct and indirect conflicts between law and religion theoretically raise questions with both religion clauses. When the law, which creates the conflict, happens to be derived historically from or is parallel to a religious rule (e.g., Sunday closing), the argument can be raised that enforcement of the religiously coloured law violates the Establishment Clause. Similarly, when a conflict resolving exemption is granted but limited to certain individuals it can be argued that the limitation constitutes an establishment of religion.[73] However, the tendency of the courts in the conflict

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[71] *Bd. of Educ. v. Barnette*, 319 U.S. 624, n.19 (1943).

[72] *Schempp Case* (note 69) *supra*. As to the conflict between the Free Exercise Clause and the Establishment Clause, see *Schwartz* (note 19) *supra.*

[73] See e.g., *Gillette Case* (note 50) *supra*. In other cases, though theoretically a claim for exemption on religious grounds involves an establishment of relig-

cases is to focus on the Free Exercise Clause while paying little or no attention to the establishment clause. Even in cases where relief from regulation is involved (the third category of exemptions), the courts apply concepts of the Free Exercise Clause, since regulation is deemed to be an interference with the free exercise of religion.

A similar issue, but with different legal bases, arose in Canada with respect to Sunday closing laws that traditionally have religious roots. The Supreme Court of Canada resolved the issue by ruling that when mandatory Sunday closing laws are based on religious mores, they are unconstitutional on the basis of discriminating on religious grounds.[74] In contrast, they are permitted if the purpose of the law was to provide for a common day of rest, which is a secular objective.[75] A similar attitude has been seen in US case law, where a law providing for closing shops on Sundays was regarded by the Supreme Court as not infringing religious freedom as their current objective was to provide a uniform day of rest and was without religious objectives.[76]

Again speaking of the US, the constitutionality of exemptions of the fourth category ordinarily rests upon the Establishment Clause. The approach seems to focus on establishment despite arguments based on the free exercise clause.

Within the fifth category, affirmative acts taken by the government in providing chaplains and facilities inevitably pose Establishment Clause conflicts. However, in defence, it must be acknowledged that the special circumstances of soldiers and prisoners create certain tensions which cannot always be avoided.

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ion, the court has focused, and presumably will continue to focus, on the Free Exercise Clause. See e.g., In *Re Jenison*, 375 If.S. 14 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 399 (1961); *Barnette Case,* Note 71 *supra.*

[74] *Big M Drug Mart v. The Queen*, (1985) 1 S.C.R.295, 18 D.L.R. (4th) 321, 58 N.R. 81, (1985) 3 W.W.R. 481, 37 Alta L.R. (2d) 97, 60 A.R. 161, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 18 C.C.C. 3d) 385.

[75] *Edwards Books and Art v. The Queen*, (1986) 2 S.C.R. 713, 30 C.C.C. (Ed) 385, 87 C.L.L.C. 14,001, 28 C.R.R. 1, 55 C.R. (3d) 193, 19 O.A.C. 239, 71, N.R. 161, 35 D.L.R. (4th) 1, 58 O.R. (2d) 442n.

[76] *McGowan v. Maryland*, 366 U.S. 420 (1961). See also: *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703 (1985), where the court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath.

Lord Denning once stated that only in a "religious state" like the United Kingdom, where there is no separation between church and state, is it possible to have complete freedom of religion. In other countries, he suggested, there always exists the danger that the individual will be forced to choose between loyalty to the state and loyalty to his religion. However, history has borne out that conflicts between law and religion exist in all countries, regardless of the status of the church/state relationship. Governments invariably impose duties and prohibitions which may affront religious tenets and the law must resolve the conflicts.

Furthermore, if Lord Denning meant that only in countries with established religion will conflicts always be resolved in favour of individuals, then this proposition too has not been proven correct in all instances, for many countries which separate church and state nevertheless grant exemptions from certain legal duties on grounds of religious beliefs, whereas there are other countries with state-established religions which deny or even expressly exclude analogous exemptions. Moreover, if Lord Denning meant that countries with established religion always resolve legal-moral conflicts in favour of the state, even that premise of religious freedom cannot withstand scrutiny.

A better statement might be that the relationship between church and state has less of an effect on the free exercise of religion than the law and practice within a given legal system. As noted above, Demerath and Straight write that the model permitting the greatest religious freedom is the framework similar to that of the United States, where there is a separation of religion and state combined with the right of the citizenry to pursue religious beliefs freely and openly.[77]

4. Considerations for Granting or Denying Exemptions: General Justifications for Granting Exemptions

Perhaps the major justification for granting exemptions is the contribution that religion makes to the community. As the US Supreme Court stated in *Gillette*:[78]

> Congressional reluctance to impose [a choice between contravening imperatives of religion and conscience or suffering penalties] stems

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[77] *Demerath/Straight* (note 34) *supra*.

[78] *Gillette Case* (note 50) *supra*.

> from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state.

Years ago, US Chief Justice Stone made his oft-quoted statement that:

> … all our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital indeed is it to the integrity of men's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation.[79]

Obviously, the social value of religious and conscientious morality justifies exemptions when law and religion conflict, but it also justifies exemptions in the absence of any conflict. Thus in *Walz*, dealing with property tax exemptions for churches, the Court spoke of religious institutions "that exist in harmonious relationship to the community at large and foster its 'moral and mental improvement'".[80] The Court also stated that "[t]he state has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life".[81]

In the US case of *School District v. Schempp*,[82] the Court refused to sustain bible reading in classrooms as a means of accomplishing "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature". Relying on this decision, one commentator argued that the ministerial draft exemption could not be justified on the ground that it "would enhance home-front morale in time of war and generally benefit the well-being of the people".[83]

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[79] *United States v. Maclntosh*, 283 U.S. 605, 623 (1931) (dissenting opinion). Courts and commentators frequently speak about the value of religion and conscience to society which justifies granting exemptions. See *United States v. Seeger*, 380 U.S. 163, 170-72 (1965); *Lord Denning*, "The Influence of Religion on Law," in 33rd Earl Grey Memorial Lecture *(*1953).

[80] *Walz Case* (note 65) *supra*.

[81] *Ibid*. at 673. See also *D. Robertson*, Should Churches Be Taxed?, 1968, 191.

[82] *Schempp Case* (note 69) *supra*.

[83] Note, The Ministerial Draft Exemption and the Establishment Clause, Cornell L. Rev. 55 (1970), 992 (996).

In an example where an exemption was not granted, the Supreme Court of Canada held that parents that objected to the use of books in the classroom which depicted same-sex families in a positive light due to religious grounds did not have the right to ban such books, for doing so would effectively infringe on the rights of other constitutionally protected groups, namely homosexuals.[84] Therefore, as indicated in the example noted above regarding the right of Sikhs in Canada to display the images of their religion, exemptions granted to religious factions in Canada are limited by the rights of others that would be infringed by the granting of such exemptions.

The combination of morality and inner duty, which is found in religion, makes it an effective means for promoting moral and social values.[85] It should be noted that the moral and social contributions of religion can justify not only exemptions for orthodox religions holding traditional principles of morality but also exemptions for religious groups holding principles wholly different from those held by the majority of society. The conflict between traditional moral principles and those advanced by dissenting groups results in a fertile confrontation inviting a re-examination of orthodox religions and society at large.

Religious institutions also "uniquely contribute to the pluralism of … society by their religious activity". According to this view "government may properly include religious institutions among the variety of non-profit groups which receive tax exemptions, for each group contributes to a vigorous, pluralistic society". Exemptions on conscientious and religious grounds are also justified by the fact that "religious or conscientious values frequently represent an idealism which serves a valuable function in society". Thus draft exemptions to conscientious objectors may be justified "as a valuable reminder to the nation that war is undesirable and that evil should be returned with good", for the exemption "stands as a mark of the nation's continuing adherence to the ideal of peace". In addition to advancing highly regarded social ideals, conscientious objection serves society by causing re-examination of controversial policies and keeping the issues alive. The priest-penitent privilege may be justified on the ground that compelling the disclosure of religious confidence affronts human dignity and invades personal privacy.

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[84] *Chamberlain v. Surrey School Board*, 2002 SCC 86.

[85] Note, Defining Religion: Of God, The Constitution and the D.A.R., U. Cm. L. Rev. 32 (1965), 533 (550).

Society's approach to the problem of an individual who objects to obeying a law on conscientious grounds should be different from that of an individual who disobeys a law for a selfish and materialistic reason.

Tax exemptions may be justified on the ground that churches and other religious institutions serve the public welfare by sponsoring welfare projects in various fields, such as health, education and charity, which would otherwise be paid for with public funds.

US Chief Justice Burger in *Walz* stated that few concepts are more deeply embodied in the fabric of the US national life (beginning with pre-revolutionary colonial times) than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favoured over others and none suffered interference.

While admitting that a right cannot be acquired in violation of the Constitution, the Chief Justice explained that an unbroken practice of according the exemption to churches – openly and by affirmative state action, not covertly or by state inaction – is not something to be lightly cast aside. Economic justifications have been advanced to justify tax exemptions. It has been suggested that the property tax exemption granted to churches is justified if the presence of a church increases the value of lands surrounding it. It has also been argued that church property is unproductive with respect to the generation of income and therefore not an appropriate subject of taxation.

5. The Considerations in the Decision Making Process on Exemptions

The considerations having impact on the decision-making process are essentially the same for the legislatures and the courts. Here, an attempt will be made to delineate the various considerations as they emerge from the decisions of the courts. It is submitted that the factors about to be examined determine the cases more than any doctrinal approach allegedly or seemingly utilized by the courts.

First, it is determined whether the prohibitory or regulatory law interferes with the religious liberty of the individual; and second, it is decided whether the religious claim is sincerely held. A negative answer to either of these questions will doom a claim from the outset.

If a court concludes that the duty, prohibition or requirement imposed by law interferes with a truly-held religious belief, it proceeds to examine the degree of interference. This focuses on the individual's interest in the case. Then the public interest behind the law is analyzed. It is at this point, when the court is weighing the public interest against the interest of the individual, that a multiplicity of factors plays a role. The court must consider all the factors which tend to amplify or minimize the harm to public interest if an exemption is granted, while at the same time evaluating the harm to the individual if an exemption is denied. As noted above, this was the thought process in the Canadian administrative tribunal in *Pannu*, which weighed the harm to the individual if he was forced to go without a beard (contrary to his religious beliefs) or else look for other employment, versus the harm to the public interest if he was permitted to wear an ill-fitting gas mask.

Generally, if a statutory scheme is designed to protect traditional police power interests of the state, a court is less inclined to grant an exemption than it would be if mere pecuniary interests of the state are involved. But it can safely be said that most decisions rest on the totality of the circumstances and a multiplicity of factors. Therefore, it should be kept in mind that the several considerations discussed below are not intended to imply that one factor can be conclusive of a case.

Administrative difficulties in enforcing a law can play an important role in the decision-making process. Discussing the Sunday law exemption the US Supreme Court stated that "Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring".[86] In response to a claim for religious exemption from the anti-marijuana laws, the Fifth Circuit asserted:

> It would be difficult to imagine the harm, which would result if the criminal statutes against marijuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes, the anti-marijuana laws would be meaningless and enforcement impossible.

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[86] *Braunfeld Case* (note 73) *supra*. See also *McGowan Case* (note 76) *supra*: "It seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common day-of-rest provision."

Certain exemptions raise enforcement problems as a result of the inherent difficulty in knowing whether a claimant's belief is "truly held".[87] But the possibility of spurious claims is not conclusive. Thus, in *Sherbert*, the Court said that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights".

When an exemption is claimed which "in its nature could not be administered fairly and uniformly over the run of relevant fact situations",[88] then the chances weigh heavily against establishing the exemption. In the context of deciding an exemption for conscientious objection to a particular war, the Court said: "Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of a free government".[89]

The possibility of causing harm to others is usually much greater when performing a positive act than when refraining from doing an act. It is in the former case that the courts usually sustain the denial of an exemption on the grounds that it is in collision with rights of other individuals. In addition, even where an exemption might cause harm only to the person claiming the exemption, the courts ordinarily deny the exemption if the harm is too excessive. This factor takes us to the well-known Hart-Devlin debate. Lord Devlin would justify enforcement of moral norms, under certain conditions, even if they are not aimed at protection of the rights of others and even if they are applied to consenting adults. Professor Hart takes the position that the state can intervene only for the protection of the rights of others. It seems that the courts reflecting, so to speak, the "sense of community," are following the Devlin theory.

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[87] See *Gillette Case* (note 50) *supra*; *Braunfeld Case* (note 73) *supra* at 609 (1961). As to the distinction between the question of "truth" of the belief which is beyond the power of the court and the question whether the belief is "truly held," see *Seeger Case* (note 79) *supra*; *United States v. Ballard*. 322 I-T.S. 78 (1944).

[88] *Gillette Case* (note 50) *supra*. See also *ibid* at 456.

[89] *Ibid*.

The hopelessness of coercing a person to discharge a duty, to which he is religiously or conscientiously opposed, is an important consideration in two respects. First, such person, if coerced, will not discharge the duty properly. Thus "the hopelessness of converting a sincere conscientious objector into an effective fighting man"[90] justifies the granting of draft exemption. Likewise, an individual who is coerced to "judge" his fellow men against his religious belief is likely to return a verdict substantially coloured by the emotional stress under which the coercion places him. Second, sincere religious and conscientious objectors would rather go to jail than discharge the duty in violation of their religious and conscientious principles.

The numbers of persons who can possibly lay claim to an exemption have an impact on the decision to grant or deny an exemption. The greater the number, the greater the inclination of the court to deny the exemption and vice versa. Thus, in *Sherbert v. Verner* the Court relied on the small number of possible claimants for sustaining an exemption.[91] Likewise, the number of conscientious objectors to war has been regarded as an important factor for the decision to grant or deny a draft exemption.

When an exemption would give its claimant an economic advantage over other persons, denial of the exemption or legislative imposition of an alternative duty is likely. In *Braunfeld v. Brown*, the Court supported the denial of Sunday laws exemptions on the ground that "to allow only people who rest on a day other than Sunday to keep their business open on that day might well provide those people with an economic advantage over the competitors who must remain closed on that day".[92]

Returning to draft laws, it should be noted that unconditional exemption would confer a very substantial economic advantage on those who could continue to pursue their private interests while their fellow citizens were conscripted into military service. Therefore, the scheme establishing the exemption imposes on conscientious objectors alternative duty in lieu of military service.

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[90] *Welsh v. United States*, 398 U.S. 333, 369 (1970). See also *Gillette Case* (note 50) *supra*.

[91] The Court pointed out that of 150 or more Adventists in the place where petitioner lived only she and another one had not found an employment which did not require Saturday work, *Verner Case* (note 73) *supra*.

[92] *Braunfeld Case* (note 73) *supra*.

As in other areas of the first amendment, legislative judgment plays an important role in the decision-making process. Thus in *Sherbert v. Verner* the Court sustained an exemption by relying on a general statutory scheme, which granted exemption to Sunday worshippers.[93] Likewise, in *re Jenison*[94] the Court supported its conclusion that an exemption from jury service should be granted on the ground that the statutory scheme already granted the exemption to certain classes of people. Of course, the courts also deny exemptions pursuant to legislative judgments. It seems, therefore, that when a general statutory scheme affords a basis for sustaining an exemption, the courts are inclined to grant the exemption. Bearing this in mind, it is an interesting question whether a court would exempt a priest from reporting a crime, which he discovers through religious communications if a general statutory scheme provides for a priest-penitent privilege.

When a conflict is between the law and fundamental principles of religion and conscience, courts are more inclined to grant an exemption than when the religious principle involved is not a central tenet of the religion. In *Sherbert v. Verner*, the Court regarded the observance of the Sabbath as "a cardinal principle" of the faith of Seventh Day Adventists.[95] In *People v. Woody*,[96] sustaining an exemption from the drug laws, the court noted that peyote played "a central role in the ceremony and practice of the Native American Church" and that the "ceremony marked by the sacramental use of peyote composes the cornerstone of the peyote religion.[97] Distinguishing *Woody*, the Fifth Circuit pointed out in the *Leary* case[98] that the use of marijuana was not a central tenet of Hinduism and it was not used by Hindus universally.

Professor Konvitz[99] has criticized this approach, because it is very difficult to decide what is "a fundamental principle, a central tenet," or a "cornerstone" of religion. He argues that sometimes there are disputes even within a given religion as to what constitute the central tenets of the religion. This being so, it seems difficult to understand how the

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93 *Verner Case* (note 73) *supra*.

94 *Re Jenison* (note 73) *supra* (on remand from the Supreme Court).

95 *Verner Case* (note 73) *supra*.

96 *People v. Woody,* 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

97 The court also said that "to forbid the use of peyote is to remove the theological heart of peyotism." *Ibid*. at 818, 40 Cal. Rptr. at 74 (1964).

98 *Leary v. United States*, 383 F.2d 851 (1967).

99 *M. Konvitz*, Religious Liberty and Conscience, 1968, 78-79.

courts can determine such questions. The courts' inclination to grant an exemption when the law is in conflict with a central tenet of religion should not be read to mean that the state might not prohibit any activity which happens to be a central tenet of a particular religion. As always, the gravity and importance of the public interest must be considered.

In discussing the difficulties of operating a draft system which would exempt conscientious objectors from "particular" wars, the Supreme Court referred to "a danger of unintended religious discrimination – as danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear".[100]

Confining exemptions to religions which do not discriminate on grounds of colour, race or national origin as Congress has done in the Fair Housing laws should not be taken as Congress's "preference for prevailing morality over religious liberty of radical dissenters". Such discrimination is not "compatible with the political concepts and traditions embodied in our Constitution",[101] and should not be upheld or encouraged by a government charged with the duty to eliminate improper discrimination.

In cases of unknown, non-orthodox or unpopular sects, the courts tend to stress the possibility of fraudulent claims.[102] Perhaps then, organized religions have less trouble in obtaining exemptions than unorganized ones.[103] Bearing in mind that fraudulent claims are more likely when the religion is unknown, it seems that it is reasonable to stress the possibility of fraudulent claims in cases of unknown or unorganized religions. But the true question is whether the public interest in preventing fraudulent claims outweighs the damage to religious liberty which results from the emphasis on fraudulent claims in cases of unpopular religions. The answer to this question requires a difficult value judgment.

The existence of techniques for minimizing potential harm to the public interest may play an important role in the determination to grant an exemption. A prime technique is alternative duty, and it can eliminate sev-

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[100] *Gillette Case* (note 50) *supra*.

[101] *Walz Case* (note 65) *supra*.

[102] *Leary Case* (note 98) *supra*; *State v. Big Ship*, 243 P. 1067 (Mont. 1926); *State v. Bullard*, 148 S.E.2d 565 (N.C. 1965).

[103] Compare *Woody Case* (note 96) *supra*, with *Leary Case* (note 98) *supra*; *Bullard Case* (note 102) *supra*.

eral considerations militating against giving an exemption. If a substitute burden is imposed on an individual, which is as onerous as the duty from which he seeks exemption, then it is unlikely that he will seek the exemption fraudulently. Alternative duty may indemnify the public to some extent for the loss resulting from an exemption, and it may eliminate the economic advantage which the exempted individual might have, absent alternative duty. Alternative duty, however, is not feasible when the individual claims a privilege to perform an act otherwise prohibited. Nor is it feasible when the public interest can be served only by a particular individual, as, for example when the only witness available objects to testifying on religious grounds.

Another technique is the employment of alternative means to achieve the state's goals. The issue here is whether the alternative means are as effective and inexpensive as those which interfere with religious liberty. In *Wisconsin v. Yoder*[104] the Court noted that "The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life … this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief".[105]

The degree of government interference with religion is always a relevant consideration – the greater the interference, the better the chances for relief. When the law commands an individual to perform an act in violation of his religious belief, it is considered a greater interference with religious liberty than when the law prohibits an act required by religion. The difference lies in the degree of compromise available: inaction frequently represents an individual's compromise between violating his conscience and actively interfering with the right of others to act in ways which he disapproves. When the law compels an act, this compromise is lost.

6. Concluding Remarks on Exemptions

The categorization of exemptions suggested in the opening section can help in determining their constitutionality and in deciding whether an exemption should be granted. American case law has broadened the

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104 *Wisconsin Case* (note 51) *supra*.

105 *Ibid* at 225.

zone of legislative discretion for accommodating law to religion. This emerges very clearly from the voucher system cases allowing the use of state vouchers for social services provided by religious institutions such as schools,[106] but at the same time the decisions indicate that the Court is narrowing the zone in which the legislature is affirmatively required to make accommodation. The "benevolent neutrality" doctrine leaves ample room for legislatures to accommodate the free exercise values, if so desired. Yet the question whether an exemption claimed by an individual on religious or conscientious grounds should be granted remains dependent upon a balancing test, and it has been suggested that specific considerations in fact determine exemptions rather than doctrinal approaches. The relationship between church and state is not the dominant factor for the existence of an exemption of religion from duties or prohibitions or limitations.

V. Issues of Integration of Religion and State and Limitations on Religious Liberty in Israel

1. Legal Protection for Religious Liberty in Israel

The *Palestine Mandate* of 1922 contained a number of provisions ensuring freedom of religion and conscience and protection of holy places, as well as prohibiting discrimination on religious grounds. Further, the *Palestine Order in Council* of that same year provided that "all persons … shall enjoy full liberty of conscience and the free exercise of their forms of worship, subject only to the maintenance of public order and morals". It also laid down that "no ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship".[107] These provisions of the *Mandate* and of the *Palestine Order in Council* have been recognized in the Israeli legal

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[106] For the vouchers cases see *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Zelman v. Simmons-Harris*, 536 U.S. 639. (2002); and see also flexible view on tax exemptions in *Walz Case* (note 65) *supra*.

[107] See Articles 2, 13-18 of the Mandate for Palestine, and Articles 83 and 17(1)(a) of the Palestine Order in Council of 1922.

system and are instructive of Israeli policy in safeguarding freedom of conscience and religion.

Israel's *Declaration of Independence*, promulgated at the termination of the British Mandate in 1948, is another legal source that guarantees freedom of religion and conscience and equality of social and political rights irrespective of religion. Although it notes that the land of Israel is the birthplace of the Jewish people and that the State of Israel "will be based on the precepts of liberty, justice and peace taught by the Hebrew Prophets", it also states that the State of Israel "will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions". The *Declaration* itself does not confer any legally enforceable rights; however, the Israeli High Court has held that "it provides a pattern of life for citizens of the State and requires every State authority to be guided by its principles".[108]

To support the fundamental existence of the right of freedom of conscience and religion, the courts have relied on the reality that Israel is a democratic and enlightened state. In one significant court decision, Justice Moshe Landau stated that "the freedom of conscience and worship is one of the individual's liberties assured in every enlightened democratic regime".[109] In dealing with questions of religious freedom, as well as other human rights, the Israeli courts have relied on the *Universal Declaration of Human Rights* and the *International Covenant on Political and Civil Rights*, which reflect "basic principles of equality, freedom and justice which are the heritage of all modern enlightened states".[110] In doing so, the courts have required that two conditions be met: that the principle in question is common to all enlightened countries and that no contrary domestic law exists. In this regard, Justice Haim Cohen stated:

> It is decided law that rules of International law constitute part of the law prevailing in Israel insofar as they have been accepted by the majority of the nations of the world and are not inconsistent with any enactment of the Knesset. The principles of freedom of religion are similar to the other rights of man, as these have been laid down in the *Universal Declaration of Human Rights, 1948*, and in the

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[108] HCJ 262/62, *Perez v. Kfar Shmaryahu Local Council* 16 P.D, 2101 (2116) (per Justice Summon).

[109] Cr. App. 112/50, *Yosifof v. Attorney General*, 2 P.D 486 (598, 612) (per Justice Landau).

[110] HCJ 301/63, *Streit v. Chief Rabbi*, 18(1) P.D 598 (612).

> *Covenant on Political and Civil Rights, 1965*. These are now the heritage of all enlightened peoples, whether or not they are members of the United Nations Organization and whether or not they have as yet ratified them … For they have been drawn up by legal experts from all countries of the world and have been prescribed by the [General] Assembly of the United Nations, in which by far the larger part of the nations of the world participates.[111]

This ruling gives way to an interesting situation: although the State of Israel need not sign, ratify or otherwise adhere to a given international treaty and will, therefore, not be bound by it in international law, the private Israeli citizen is nevertheless able to rely on that same treaty in domestic Israeli court proceedings.

On the other hand, Justice Yitzhak Kister has expressed the view that because of the special nature of the Jewish religion "it is not possible, or at least very difficult, to employ with regard to the Jewish people and the Jewish religion the forms and definitions common among the peoples of the world in respect of freedom of religion".[112] With that view, this author cannot agree. There is nothing to prevent resort to principles common to foreign legal systems and accepted by civilized peoples, so long as the special considerations stemming from the peculiar character of the Jewish religion and a Jewish state are not ignored, where they have their proper place. It is noteworthy that the Israeli Supreme Court customarily avails itself of leading principles in foreign law in matters of religious freedom, and this course is followed even by those of its judges who explicitly recognize the singularity of the Jewish religion.[113]

Many provisions of Israeli statutory law are devoted to the protection of holy places and sites which are used for prayers and for other religious purposes.[114] The *Protection of Holy Places Law, 1967* makes it a penal offence punishable by up to seven years imprisonment for dese-

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[111] HCJ 103/67 *American Orphan Beth El Mission v. Minister of Social Welfare*, 21(2) P.D 325.

[112] HCJ 132/66 *Segev v. Safad Rabbinical Court*, 21(2) P.D, 560.

[113] See, e.g., Cr. App. 217/68, *Isramax v. State of Israel*, 22(2) P.D 343, where Justice Silberg resorted to American case law regarding the Sabbath to justify the prohibition of the opening of a petrol station under a by-law.

[114] E.g., section 3 of the Local Authorities (Vesting of Public Property) Law, 1958, excludes property used for religious purposes and services from that which a local authority is empowered to acquire compulsorily for public purposes.

crating or violating a Holy Place and punishable by up to five years imprisonment for preventing a member of a different religion from accessing places sacred to them or for violating their feelings with regard to such places. Similarly, the *Basic Law: Jerusalem, Capital of Israel*, a law with constitutional status, provides in section 3 that:

> The Holy Places shall be protected against desecration and any other violation, and against anything that is liable to interfere with freedom of access by members of different religions to the places they hold sacred, or that is liable to offend their feelings toward those places.

In Israel there are penal sanctions for trespass on places of worship and burial, for indignity to corpses and for disturbances at funeral ceremonies. The Supreme Court has dealt very stringently with acts that offend religious sentiment.

The protection of religious liberty is not expressly provided by the *Basic Law*: *Human Liberty and Dignity 1992* or in the *Basic Law: Freedom of Occupation*. However, according to the interpretation of each of the Basic Laws, there is implicit protection to rights in addition to those expressly enumerated.[115] One of the non-enumerated rights within the context of human dignity has been interpreted to be religion.

An important provision in both the *Basic Law: Human Dignity and Liberty* and in the *Basic Law: Freedom of Occupation* refers to a Jewish and democratic state. What is the meaning of a "Jewish State" in this provision? Justice Barak ruled that, in a democratic state, when a judge adjudicates a certain issue, that judge must be mindful of the values of the state in which the adjudication is taking place. Similarly, when a judge interprets a legal statute or a broadly stated basic law provision, it is similarly the role of the judge to ensure that the statute or law will be interpreted according to the basic values of the applicable system.

The basic statute can be found in the *Declaration of Independence of the State of Israel*, which is based on the principles of equality and justice, democracy, public order, national security, the separation of powers and human rights in the context of Israel. The Court has recognized Israel's *Jewish* nature, originally by virtue of the *Declaration of Independence* and later by express provisions in the Basic Laws (Israel's constitutional laws) that Israel is a Jewish state. In order to illustrate what is

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[115] *H. Somer*, "Non-enumerated Rights: On the Scope of the Constitutional Revolution," Heb. U. L. Rev. 28 (1997), 259 [in Hebrew].

a "Jewish State", I find it most useful to quote verbatim from a leading book of Professor Aaron Barak on legal interpretation:[116]

> A 'Jewish State' is the state of the Jewish People: 'this is the natural right of the Jewish people to be like all other peoples depending on its own right and his own sovereign state'. A State every Jew will have the right to immigrate to and in which the gathering of the Jewish Diaspora is one of its basic values. A 'Jewish State' is a state whose history is integrated in the history of the Jewish people, its language is Hebrew, its main holidays reflect the national revival. A 'Jewish State' is a state whose main concern is Jewish settlement in its fields, cities and villages. A 'Jewish State' is the state that eternalizes the memory of the Jews who were mass murdered in the Holocaust and is designed to form 'a solution to the problem of the Jewish people without homeland or independence by reviving the Jewish State in the land of Israel'. A 'Jewish State' is a state that promotes Jewish culture, Jewish education and the love of the Jewish people. A 'Jewish State' is the 'materialization of the yearnings of the generations for the redemption of Israel'. A 'Jewish State' is a state where the values of freedom, justice and equity of the heritage of Israel are its values. A 'Jewish State' is a state whose values are derived from its Jewish tradition, whose Bible is its basic book, and the prophets of Israel are the foundation of its morality. A 'Jewish State' is a state in which the Jewish law plays a very important part and where matters of marriage and divorce of Jews are adjudicated according to the laws of the Torah. A 'Jewish State' is a state in which the values of the Torah of Israel, the values of Jewish heritage, and the values of Jewish *halacha* are part of its basic values.

Chief Justice Barak, on another occasion, has also commented on the meaning of the phrase "the values of the State of Israel as the Jewish State":[117]

> This provision is the conclusion that the values of the state of Israel as a Jewish state have two main aspects: the first aspect being the Zionist aspect, the other aspect being the cultural, the heritage, or the *halachic* aspect as may be defined by each individual. The Zionist aspect is reflected, for example, in the right of a Jew to immigrate to

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[116] *A. Barak*, Legal Interpretation, vol. 3 at 332 (on Constitutional Interpretation). [in Hebrew].

[117] *A. Barak*, The State of Israel as a Jewish and democratic state, Tel-Aviv U. L. Rev. 24 (2000), 9 (11) [in Hebrew].

> Israel and the *Law of Return 1950*. The cultural aspect is reflected, for example, in the *Foundations of Law Act 1980*, which provides that when there is a lacuna, it is to be filled by the principles of freedom, justice, equity and peace of the heritage of Israel … All of this and other elements make the State of Israel a Jewish state even for a person who is not familiar with the world of *halacha*.

Elsewhere I have expressed the view that a "Jewish State" means a traditional Jewish State but not a halachic or a religious state.[118]

2. Vision and Realities

When Benjamin Ze'ev Herzl wrote in *Altneuland* about the state of the Jewish nation, he envisioned the separation of state and religion.[119] This has not been realized. In Israel, there is no separation of religion and state. However, at the same time, there exists no established religion in the accepted sense, as described at the beginning of this essay.

Some have argued that this merging of state and religion is due to the nature of Judaism, which embodies a pattern of religious daily life rather than a mere set of religious dogmas and which intermingles religious and national elements, thus not lending itself to a natural separation of religion and state. As David Ben-Gurion explained, "the convenient solution of separation of church and state, adopted in America not for reasons which are anti-religious but on the contrary because of deep attachment to religion and the desire to assure every citizen full religious freedom, this solution, even if it were adopted in Israel, would not answer the problem".[120] This solution would not work in Israel, for in the US, the primary religion is Christianity, a religion which better lends itself to a separation from the state than does Judaism, the primary religion in Israel. (Judaism being both a religion and a nation).

Another reason for the connection between religion and state in Israel is rooted in the absence of clearly defined rules in Jewish law regarding the relationship between Judaism and an independent Jewish state.[121]

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[118] *S. Shetreet*, The Good Land: Between Power and Religion, 1998.

[119] See *A. Rubinstein*, "State and Religion in Israel," J. of Contem. History 2(4) (1969), 107 (108).

[120] *D. Ben Gurion,* Nezah Yisrael, 1962, 154-55 [in Hebrew].

[121] See *I. Englard,* Religious Law in the Israeli Legal System, 1975.

Apart from the peculiar nature of Judaism, a further factor contributing to the melding of religion and state in Israel flows from the decision by Israel's lawmakers to assign legal jurisdiction over matters of personal status (a legal concept encompassing "status" issues such as marriage and divorce) to religious bodies according to an individual's religion or religious affiliation. Furthermore, the plaintiff may select a religious court for other types of judicial matters. This approach, predating the establishment of the state and reinforced through legislation enacted after its creation, guarantees an even deeper intertwining of religion and state. One law, for instance, provides that only kosher food shall be served in the Israeli Defence Forces and in other government institutions.

The existence of two equivalent court systems with concurrent jurisdiction has led to some tension. In *Katz*, a check was put on the power of the religious courts when the Supreme Court held that they were not allowed to issue a *ketav serouv*, or refusal order, in matters outside of their exclusive jurisdiction.[122] A *ketav serouv* is, in effect, an order compelling a defendant in an action within the non-exclusive jurisdiction of the religious courts to appear before the religious court. If the defendant fails to appear, he or she is subject to religious sanctions. The practice of the religious courts to issue such an order for all matters created an unjust situation, for plaintiffs in the same cases were permitted, according to Jewish law, to appear in a secular court.

The integration of religion and state in Israel is visible in many other fields, some expressly regulated by statutory law,[123] others relying on

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[122] HCJ 3269/95 *Katz v. Jerusalem Regional Rabbinical Court*, 60(4) P.D, 590. The case involved the issue of a writ of denial by the rabbinical court against an individual who refused to have his civil matter be adjudicated by the rabbinical court in accordance with the terms of a complaint filed according to Din Torah.

[123] Such as the expression "Jewish and democratic state" in: *Basic Law: The Dignity and Freedom of a Person* (1992), s. 1A; *Basic Law: Freedom of Occupation* (1994), s. 2; these laws are relatively recent, but the principle of a Jewish state existed from the day of the establishment of the State, in the Declaration of Independence, and later in various judgments. See for example: Elections Appeal 1/65, *Yardor v. The Chairman of the Election Committee*, 19(3) P.D. 365. However, there is the claim that the expression "Jewish" refers to the cultural and historical belonging and has no direct connection to the Jewish religion. For this perspective, see *R. Gavison* (note 32) *supra*, at 57. About the term "Jewish," see *A. Maoz* "The Rabbinate and the Courts: Between the hammer of law and the anvil of 'Halakah', Hebrew Law Yearbook 16-17 (1991), 289 (308)

delegated regulation. Among them are the application of a religious test to the *Law of Return*,[124] which provides automatic Israeli citizenship to Jews wishing to reside permanently in Israel (but not for non-Jews);[125] the exclusive application of religious jurisdiction and religious law in matters of marriage and divorce,[126] the conduct of religious education financed out of state funds,[127] the validation of non-orthodox conversions in Israel by a declaration rather than an operative verdict[128] and the establishment of a special Ministry of Religious Affairs.[129]

Other examples of the presence of religious norms in political life would be the law, passed in 1977, prohibiting the opening of "houses of amusement" on the Ninth of Av, the memorial day of the destruction of the Second Temple, as well as the law requiring state and governmental institutions to use the Hebrew date, along with the Gregorian, in all documents.

A compromise between those who support and those who are against the mingling of religion and state is seen in the *Foundations of Law Act, 1980*. This law provides that when the judiciary cannot reach a decision through the interpretation, analogy or inference of existing law, the

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[in Hebrew]; *Symposium*, "The Role of Religion in Public Debate in a Liberal Society," San Diego L. Rev. 30 (1993), 643. There is a common claim that the Jewish values (those that the Justice Foundations Law refers to) are broad enough to include all matters that seem related to our culture and heritage. In this context see *H. Cohen,* "The Law of Remnant," Hebrew L. Yearbook 13 (1987), 285 (300); *A. Barak*, Commentary in Law, vol. I (1992), 528-529.

124 *The Law of Return* (1950).

125 A notable (and large) exception to this law is that individuals with a Jewish parent or a grandparent, or who are the spouse of an individual with a Jewish parent or grandparent, are eligible for the same rights of immigration as a Jew: *Law of Return 5710-1950*, s. 4A(a). The reasoning behind this exception is historical – because in Nazi Germany such individuals were liable to the same prosecution as were Jews, it was decided that in Zionist Israel, they would, on the contrary, benefit from such relationship.

126 The *Rabbinical Courts Adjudication Law [Marriage and Divorce]* (1953); see also *P. Shifman,* State Recognition of Religious Marriage: Symbols and Content, Isr. L. Rev. 21 (1986), 501.

127 *State Education Law* (1953); see *S. Goldstein,* The Teaching of Religion in Government Funded Schools in Israel, Isr. L. Rev. 20(1) (1992), 36.

128 HCJ 1031/93, *Pissaro v. Minister of the Interior*, 49(4) P.D. 661.

129 Further see *The Religious Councils Act by the Jewish Religious Services Law*.

court shall invoke the legal principles of the "heritage of Israel". The wording of the phrase "heritage of Israel" constitutes a compromise solution between those who preferred a direct reference to Jewish law, and those who categorically rejected any such reference. The phrase "heritage of Israel" has been interpreted to refer to Jewish cultural values generally, rather than their narrow Halachic meaning only. Section One of the *Foundations of Law Act, 1980*, was passed with the following wording:

> Should the court consider a legal question that requires resolution, and the solution is not to be found in the existing legislation, judge-made law, or by means of analogy or inference, the court will resolve the question on the basis of the principles of freedom, justice, integrity and peace of the heritage of Israel.

The court interpreted the meaning of "the heritage of Israel" in *Handles*.[130] Justice Aharon Barak viewed the phrase as meaning that it is permissible to turn to Jewish law as a source of learning, a treasury of legal thought, which might provide inspiration to the judges.

The reference by Justice Barak was to "law" in its cultural, rather than its normative, context. In Justice Barak's view, Jewish law does not constitute a system of justice that applies in Israel, but rather it exists for the purpose of providing a comparative legal system. In contrast, Justice Elon, expressing the minority opinion, opined that the law refers to Jewish law in order to clear up any uncertainties as to its own content. Jewish law may not constitute a binding body of laws, but it can provide guidance to the court regarding the issue before it.

Observant and Jewish Orthodox people in Israel, being opposed to rulings that treat Jewish law as cultural rather than legally binding, oppose the secularization of the legal system. This is attributed to the peculiar situation where Israel's constitution is being written in a piece-meal fashion, in the form of a series of "*Basic Laws*". Opposition to the passage of a constitution comes from the Knesset's religious parties, who believe that the Torah is the sole constitution of the Jewish people, and that it may not be replaced by a secular constitution. The religious parties are concerned that a secular constitution based upon the democratic-liberal principles contained in the *Declaration of Independence* will undermine the religious influence that now exists in the state, including the undermining of the legality of religious marriage laws.[131]

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[130] *Z. Sharf*, 12, 13, 14 of May 1948 (1965), 214-226.

[131] C.A. 546/78 *Kupat Am Bank, Ltd. v. Handles*, 34(3) P.D., 57.

Those who are opposed to regulation in the religious sphere do not, in fact, desire absolute separation, but rather they contest those provisions which force religious norms upon non-Observant or non-practicing Jews and compel recourse to religious authorities. What is asked for is not, for instance, the abolition of marriage by religious ceremony, but rather the alternative of civil marriage. In this author's opinion, Jewish religious law is better placed with the individual than with the state.[132] Following this, as the individual is entitled to religious freedom, it is incumbent upon the state to enable the individual to observe his religious beliefs without interference.[133]

There have been several Supreme Court decisions which have supported this view. Thus, for instance, the Supreme Court has ruled that state-supported television may operate on the Sabbath,[134] it has overturned a municipal bylaw forbidding cinema houses from operating on the Sabbath,[135] and it has recognized the right to secular burial,[136] leaving the decision as to one's participation in religion in these matters to the individual. Furthermore, the Supreme Court recognizes secular marriages and non-Orthodox conversions of Israeli residents performed abroad.[137]

Despite the attempt to reconcile religious tensions, they are often evident in Israel between the religious and non-religious sides of Israeli society. An example is the trial of Knesset Member (MK) Arie Derei, the Leader of *Shas* religious political party, who was convicted for bribery and sentenced to four years' imprisonment. The trial and prosecution were viewed by significant segments of Israel's religious society as being discriminatory. The sharp increase in Shas's representation in the Knesset in the following elections, occurring in 1999, was at least partly at-

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[132] In a Jewish state, however, there is the further requirement that the ancestral past of Judaism should not be forgotten.

[133] See *I. Englard*, The Relationship between Religion and State in Israel, Scripta Hierosolymitana 16 (1969), 254 (274).

[134] District court 708/69 *Adi Kaplan v. the Prime Minister and the Broadcasting Authority*, P.D. 23(2), 394.

[135] Criminal Case (Jerusalem) *State of Israel v. Kaplan*, 265(2) P.D (1988) 5748.

[136] HCJ 397/88 *Menucha Nechona v. Minister of Religious Affairs* (not published).

[137] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*, 17(1) P.D. 225 (marriage). HCJ 230/86 *Miller v. Minister of Interior*, 40(4) P.D 436.

tributed to the Derei trial and the alienation felt by religious segments of Israeli society.[138]

3. Imposition of Religious Norms

The most difficult problem relating to religious liberty in Israel is posed by the imposition of religious norms and restrictions of a religious nature on all Jews, whether or not they are religiously observant. This is a live issue in Israel, where only about twenty percent of the population describes themselves as religious (of this number, five or six percent consider themselves "ultra-religious"). Of the remaining Israelis, forty percent of Israeli population label themselves as "traditional" (observing some, but not all, religious dictates), and somewhat over forty percent of Israelis consider themselves to be completely secular.

To determine whether the enforcement of a norm of religious origin infringes on freedom of conscience and religion, a distinction must be drawn between a norm of religious origin which is not generally recognized and adopted by society and one which is. The enforcement of a norm of the first type (such as the application of religious law in marriage and divorce) involves a violation of religious liberty; the enforcement of a norm of the second type – such as the prescription of a day of rest[139] – does not. In this second case, the enforced norm is treated like any other norm which has been accepted by society and which the state may enforce through legislation. As Justice Simon Agranat, the President of the Supreme Court, observed:

> The function of the State, so democratic theory teaches, is to fulfill the will of the people and give effect to those norms and standards which it prizes. It follows from this that the common conviction must first form among enlightened members of society that these norms and standards are true and just, before we can say that a gen-

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[138] The 1999 election sent a conflicting message. Prime Minister Ehud Barak was elected directly by a majority of the secular and traditional vote, prevailing over the more religious vote which supported Natanyahu. The Left parties, some of which ran on an anti-religious coercion platform, increased in power. On the other hand, Shas and another Orthodox party increased their power as well. The overall balance was an increase from 23 to 27 seats for the religious and Ultra-Orthodox parties.

[139] As has been permitted by the Canadian and US courts, as noted above.

> eral will has been created to give them binding force, to stamp them as positive law and attach its sanctions.[140]

This opinion involves the much-debated issue of whether the state may legislate morality or compel a moral norm. With regard to Jewish law, Justice Landau has distinguished between "rules which prescribe man's behaviour to his fellow man, which affect the relationship between man and Divinity."[141] This view prescribes that coercion of non-believers does not derogate from freedom of conscience and religion. The difficulty I find with this distinction is that it implies that there would be nothing wrong with the enforcement of conduct, religious in origin and in substance, provided only that it concerns human relations. However, such a concept, when taken to its logical extension, is objectionable. A law, for instance, compelling the sending of Purim gifts or the opening of one's doors to the poor on Passover (following the injunction of the *Haggadah*, "Let all in need come and eat") or the consolation of those in mourning would be entirely valid according to Landau's perspective because it relates to man's conduct toward his fellow men, although its source and substance are religious. However, on a moral level, such legislation would be objectionable. Furthermore, the distinction between relations between fellow man and with the divine are not always clear-cut. By what criteria does one determine whether a norm is of one or the other? With a religious yardstick, or a secular one? And where a rule is measurable by both measurements, which one prevails?[142]

Admittedly, the compulsion of rules affecting man's relations with his Maker is a more serious invasion of freedom of conscience; yet, in the realm of man's conduct toward his fellow men, enforcement of norms which have not secured the societal approval that is generally considered a prerequisite for their enforcement offends against freedom of conscience. It should be added that the enforcement of the provisions of private law drawn from Jewish sources, such as those relating to baileys, guarantee, sale, and the like, does not violate religious freedom, provided that the inherent religious elements have been filtered off.

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[140] HCJ. 58/66, *Shalit v. Minister of the Interior*, 23(2) P.D. 477 (602).

[141] HCJ 51/69, *Rodnitzki v. Rabbinical Court of Appeal*, 24(1) P.D, 704 (712).

[142] This critique of the distinction set up by Justice Landau also applies to the one suggested by Justice Silberg.

Justice Moshe Silberg has distinguished between the "rational" and the "creedal" commandments of Judaism.[143] While the former may, in his opinion, rightly be enforced on the public without prejudicing religious freedom, the coercion of the latter must not offend against that freedom. Again, I cannot agree with this distinction. That a religious norm is rational does not justify its compulsion until it has won the social approval required to render it a norm binding upon society. It is possible also for such societal approval to be gained by creedal norms. Moreover, does this mean that, before deciding to enforce any norm, one must inquire and ascertain whether it is "rational" or "creedal"? Justice Agranat has held alternatively, that one must find out whether the general public will exert itself to turn the religious norm in question into a norm of socially binding effect.[17] I agree with that view. The point is that the test of whether a norm having its source in religion deserves to become a binding one in society cannot be a religious one – namely, its classification as "rational" or "creedal" within the Jewish religion – but solely the test of whether it has won contemporary social consensus.[144] Ultimately, the test for justifying coercion of norms is not their content, but the measure of social consent that they receive.

Further, when the question arises whether to impose an obligation regarding an act which may affect religious freedom, it is not enough to inquire generally into the nature of the proposed norm. A religious norm may, in its totality, be a positive social norm, but the specific acts involved may not have gained the necessary consensus justifying coercion. Thus, although few dispute the introduction of a *Saturday* day of rest, despite (or because of) its religious origin; thus, it is a positive social norm, and one should not thereby infer that every restriction regarding the type of activities that may be carried out on the Sabbath is justified and involves no violation of religious freedom. Army regulations relating to the Sabbath and the festivals provide that entertainment in army units should be so arranged as to avoid "profanation" of the holiness of the day. Soldiers have thus been prohibited from listening to the radio and recordings in messes and clubrooms. For secular soldiers, these regulations have nothing to do with the positive norm of a rest day that has social value but are rather connected with the religious prescript in Jewish law against "profanation" of the Sabbath day, a religious precept which holds no personal meaning to them. From the fact that observance of a weekly rest day is, in general, a positive norm, no

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143 *Isramax Case* (note 113) *supra* at 354 et seq.

144 *Shalit* Case (note 140) *supra*.

inference can be drawn that these particular regulations are (or are not) repugnant to religious freedom.

Israeli law at present provides several examples of coercion of religious law that are not accepted norms within Israeli society. The application of Jewish law to marriage, including the requirement of an engaged woman to partake in religious classes and submerge herself in a religious *mikvah* prior to being allowed to marry, and divorce, with its arguably sexist overtones whereby only men have the right to divorce, as well as the subjection of citizens and residents to the exclusive jurisdiction of the religious courts in such matters, are an improper coercive enforcement of a religious norm. The very necessity to marry before a religious authority results in further restrictions: a woman who leaves the faith loses property rights, and the marriage of a *Cohen* (a man whose descent is traditionally traced to the ancient priesthood) with a divorcee or a woman with "questionable morals" is forbidden. None of these matters are to be found in any statute. The enforcement of Jewish religious dietary laws was attempted, but overruled in *Mitrael*,[145] which held that it was an infringement to occupation (work) to prohibit the importing of frozen non-Kosher meat. However, on account of the court ruling, religious norms were again instituted through the inclusion of an overriding clause in the legislation at issue, the *Basic Law: Freedom of Occupation*.[146]

In the *Marina Solodnik* case the Court dealt with the power of local governments to prohibit and regulate the sale of pork products. The Court held that before a local government may decide on the content of the regulation, such as limiting the shops selling pork products to remote areas or industrial zones outside the center of the city, the views of the community must be considered. However, this is a *consideration* only, not a following of such community views.[147]

The court reviewed the constitutionality of by-laws regulated by several local authorities, forbidding the selling of pork products within the municipal territories. The authority to institute the by-laws rested upon the parliament's *Authorization Act*. Therefore, the High Court was

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[145] HCJ 3872/93, *Mitrael v. Prime Minister and Minister of Religions*, 47(5) P.D. 485.

[146] *Basic Law: Freedom of Occupation*, s. 8.

[147] HCJ 953/01 *Marina Solodkin v. Beit-Shemesh Municipality and others*, 58(5) P.D. 595.

asked to criticize the municipality discretion by judging the coherence of the by-laws alongside the aims of the *Authorization Act.*

The objective and subjective aims founding the *Authorization Act* were judged to be based on three interests. The first was the interest to protect the Jewish religious sentiment due to the image of the pig as a religious symbol of defilement. The second was the interest to protect the individual's fundamental rights, including the rights to freedom of occupation and freedom of conscience and religion – an objective aim that founds every single legislative act in Israel. The third was the interest to authorize the local authorities to establish instructions as to selling pig products considering the distinctive characteristics of each municipality.

Stating those three interests as basing the aims of the *Authorization Act*, the High Court refrained from judgement as to the coherence between the by-laws and the act. Instead the by-laws were suspended by the High Court in order to allow the municipalities to re-examine the coherence between the by-laws and these three interests.

Justice Landau has observed that "the enforcement of religious law in marriage and divorce … is not actually the same as the full operation of all the halachic rules affecting marriage and divorce … [the *Marriage and Divorce Law* of 1953] is not to be read as imposing any prohibition which is really religious in origin and substance on the Jewish population of Israel, including those for whom the observance of religious prohibition is not a matter of religious belief."[148] The law, he argues, "is not intended to offend against freedom of religion guaranteed to all citizens of our State or to impose the observance of religious precepts on the non-religious public." Justice Landau urged that the law of 1953 that had granted jurisdiction over marriage and divorce to the Rabbinical Courts be interpreted in ways which would avoid inconsistency with the basic principles of freedom of religion that are part of the law of the land.

Because the army controls the lives of soldiers in service more closely than the state controls the lives of its citizens, religious norms are enforced to a greater extent on soldiers than on civilians. Army regula-

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[148] Even were the distinction adopted, it is not practical nor can it always help to justify the coercion of norms, due to the multicultural diversity of the population in Israeli cities. Justice Silberg himself faced difficulties in explaining the nature of the Sabbath commandment and found in it both "rational" and "creedal" elements intermingled. He also found it difficult to justify the closing of businesses on Jewish festivals and had to appeal to the fact of those festivals being national values. See *Isramax Case* (note 113) *supra* at 356-58.

tions regarding the High Holy Days, for example, provide for obligatory participation in educational activities conducted by the army chaplaincy. The Minister of Defence has explained in the Knesset that, for two reasons, this does not involve any assault upon freedom of conscience and religion. First, the regulations do not oblige any soldier to do anything apart from listening to talks on the moral values of the Jewish festivals. Second, the talks correspond to those on other subjects given by education officers of the army, where attendance is also mandatory. It seems to this author, however, that the information work of the education officers has nothing in common with the educational activities of the chaplaincy. This author also believes that these army regulations are invalid because, at least in theory, they make it a duty for all soldiers to attend, including Druses, Circassians, and other non-Jewish soldiers.

A similar problem arises in connection with the study of the Bible in state schools. While the *State Education Law* does assert that elementary education is to be based on "the values of Jewish culture," the use of the Bible and other religious literature as "religious instruments" within the compass of prayer or religious preaching is appropriately forbidden as repugnant to freedom of conscience and religion. Such a use is totally different from the use of this literature as an "educational instrument" for teaching Jewish cultural values or even for inculcating moral values.[149]

Similarly, the issue of Shabbat (the Jewish Sabbath), the mandatory day of ritualistic rest for religious Jews, has caused much debated controversy in Israel. According to *Halacha*, there are many restrictions imposed on Shabbat, many of which are objectionable to secular Jews. The judicial branch took measures to defend individual freedoms, by invalidating many restrictions imposed by local authorities in their effort to meld public operations with religious laws. These operations included the opening hours of businesses, public transportation, and the operation of gas stations and television stations on the Sabbath.[150] The legislative branch empowered the local authorities to close businesses on the Sabbath, but the executive branch failed to enforce municipal by-laws or national legislation that shut down businesses on the Sabbath.[151]

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[149] *Rodnitzki Case* (note 141) *supra* at 712. There are further grounds for this view, but they lie outside the scope of the present study.

[150] *Kaplan Case* (note 135) *supra*.

[151] *E. Don-Yehiya*, The Politics of Accommodation: The Resolution of Religious Conflicts in Israel, 1997, 48-51 [in Hebrew].

There has been a change in this matter, with heightened enforcement of the *Work and Rest Hours Law*, which forbids the employment of Jews on the Sabbath without a permit, even within the jurisdiction of the regional (rural) councils.[152] As for the closure of streets on Shabbat, the judicial branch tried to maintain a balance between the religious sensibilities of religious residents and the freedom of movement of secular residents.[153] The executive branch has faced increased pressure from religious quarters to close even more streets on the Sabbath. The Supreme Court is inclined toward a social compromise.[154] However, this compromise is beginning to seem more like a concession to demands of the religious public than the proper implementation of judicial principles as would be the case if the sides adopted a traditional-Jewish democratic approach.

Another issue arises with respect to the issue of the enlistment of *yeshiva* students (students who study Torah) into the army. Although in Israel enlistment is generally universal, the Israeli Supreme Court held in *Rubenstein*[155] that *yeshiva* students may receive an exemption through the postponement of their service, but this cannot be done by the Minister of Defence and must be granted through primary Knesset legislation. The Court did not nullify the arrangement but granted the Knesset time to amend the legal situation.[156] The issue of the exemption of *yeshiva* students is controversial, with the number of exempted students today numbering approximately 41,000.

4. The Secular Primary-Purpose Test

In legal terms, the difference between religious norms, which are not part of the societal consensus, and norms with religious roots, which have been adopted by the society, assumes the form of the secular pri-

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[152] *Isramax Case* (note 113) *supra*.

[153] HCJ 174/62 *League for Prevention of Religious Coercion v. Jerusalem City Council*, 16(4) P.D, 2665; HCJ 531/77 *Baruch v. Traffic Commissioner of Tel Aviv and Central Districts—Central Road Sign Authority*, P.D. 32(2) 160.

[154] HCJ 5016/96, 5025/96, 5090/96 *Horev and others v. Minister of Transport and others*, 51(4) P.D.1.

[155] HCJ 3267/97, *Rubenstein v. Minister of Defense*, 52(5) P.D.481.

[156] For a comparative view, see *S. Shetreet*, "Exemptions and Privileges on Grounds of Religion and Conscience," Kentucky Law Journal 62 (1974), 377.

mary-purpose test. If the primary purpose meant to be served by the law is secular – that is to say, is acceptable to enlightened members of society – no improper coercion is involved, even if a religious purpose is incidentally served. For instance, the designation of Sunday as the general day of rest in much of the western world would *prima facie* constitute the coercive enforcement of a Christian religious norm on the entire population, but since the primary purpose is now secular, the incidental result of enforcing a religious norm does not invalidate such a law.

The secular primary-purpose test is acceptable to the courts in Israel, whether or not they apply it explicitly. Justice Silberg has held that where a religious purpose is not primary to a law but the provisions of that law can be justified by the secular purpose achieved, no infringement of religious freedom occurs, even if the statutory provision also serves some religious purpose.[157] Justice Zvi Berinson has held that the fact that a municipal by-law, dealing with the opening and closing of businesses, accords with religious demands will not invalidate all or any part of it "if the primary purpose sought to be achieved by means of it is not a religious purpose".[158]

A legislative or administrative act serving a religious purpose, if given effect by an administrative authority, possesses force only on condition that the religious purpose is incidental or marginal to the secular primary purpose. Thus, the Israeli Supreme Court has decided that the introduction into an import license of a condition whereby the importer of food must produce a certificate of *kashrut* from the Rabbinate to obtain clearance of the goods from customs does not serve the economic purposes of the law restricting imports. Therefore, the court found that the authority, in imposing such a condition, had improperly exercised its powers in order to attain a religious purpose.[159] Similarly, the Supreme Court has denied validity to an order of the Food Controller that prohibited the breeding of pigs in certain areas by virtue of his general power to regulate the inspection of food. In its ruling, the court noted that "the sole firm grounds, or at least the primary and decisive grounds, for the Food Controller's administrative and legal acts in this

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[157] In *Isramax Case* (note 113) *supra* at 353, Justice Silberg sums up the secular primary-purpose test adopted in the United States.

[158] *Ibid.*, 362.

[159] HCJ 231/63, *Retef Ltd. v. Minister of Commerce and Industry*, 17 P.D 2730.

matter were national-religious and not economic grounds inherent in the purposes of food control".[160]

5. National-Religious Norms

A special problem arises with what are termed in Israel national-religious norms. Certainly, religious freedom is consistent with the imposition of national norms that bind a society to its historic values and cultural heritage. The intermingling of national and religious elements in Judaism requires, however, that a distinction be drawn between purely religious norms and norms which display national features.

National-religious norms are enforceable upon individuals only when they have secured societal consensus. However, their introduction into official state institutions may be warranted, even when their enforcement upon the individual citizen is not justified. Thus, the State of Israel may properly require that Jewish symbols and values should be preserved by governmental authorities and the official representatives of the state in the course of their duty even though these may lack the consensus which would transform them into norms binding on all citizens. Analogously, it is this author's view that the observance of the dietary laws in the army is justified. This is not because military standardization and national unity make it undesirable to set up two kitchens in every army unit or because there is no hardship involved in non-observant soldiers eating *kosher* food while the alternative policy creates severe hardship for many soldiers, but rather because the observance of dietary laws in the army forges a bond with the Jewish people's past by means of one of the most conspicuous of Jewish symbols.

6. Governmental Response to Religious Needs

In Israeli law, religious matters are regulated by the national legislature. In the absence of specific legislation, there is no warrant for the enforcement of any religious norm by the executive branch of govern-

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[160] HCJ 105/54, *Lazarovitz v. Food Controller*, 10 P.D 44, 55, per Justice Berinson. It may be contended, however, that prohibition of pig-breeding in respect of Jews is warranted, because the entire matter is rooted in Jewish national tradition.

ment. However, in contra-distinction to the enforcement of religious norms, governmental administration may, within the scope of its general authority, include religious considerations along with others in the regulation of public life. Such is the case, for example, in ordering the closure during the hours of prayer of a section of road adjoining a synagogue. The court held that:

> [I]n attaching some value to the consideration that motor traffic along the roads concerned on a Jewish festival and the Sabbath, disturbs worshippers during their prayers in the Yeshurun Synagogue and prevents them from praying in tranquillity, [the Traffic Controller] gave thought to an interest of a religious character. However, this does not invalidate his decision, just as it would not be invalid had he had in mind some cultural, commercial, health or other like interest.[161]

Consideration of interests having a religious character is justified "provided they affect an appreciable part of the public" and do not impose a "burden which cannot be borne".[162] The justification for taking account of religious considerations and interests derives, as has been suggested, from the fact that they fall into a wide category of matters, which may properly be given consideration for the purpose of exercising authority.[163]

7. Equality and Judaism in Israel: Jewish Women

The application of Jewish law – *halacha* – raises contractual issues as well as issues concerning human rights, particularly the rights of women are affected.

Some argue that the preferred position of Jews in obtaining citizenship is objectionable.[164] This author does not share this view, observing that

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[161] *League for Prevention of Religious Coercion Case* (note 153) *supra* at 2668.

[162] *Isramax Case* (note 113) *supra* at 362. Justice Berinson states: "As between one way of doing things in disregard of religious considerations and another way having regard for religious considerations, but without placing upon the public too heavy a burden, the second is certainly to be preferred."

[163] A similar reason serves in the United States to justify government acts supportive of religion. See *P. Kurland* in Law and Religion 18 (1962), 122.

[164] See the *Law of Return, 1950* and the *Nationality Law, 1952*.

it is noteworthy that the *Declaration of the Independence* of the State of Israel commits to "ensure complete equality of social and political rights to all its inhabitants irrespective of religion".[165]

A central issue in Israel has been the question of "who is a Jew?" Is being Jewish a matter of religion or of nationality?[166] Is one's affiliation to Judaism determined by birth or religious faith?[167] Indeed, even the issue of whether religious pluralism is acceptable to Judaism or not has had to be considered, with Orthodox Jews believing that religious pluralism is not a part of Judaism while Conservative and Reform Jews espousing that it is fundamental. This final question also affects the manner in which a person not born a Jew may become one.

The issue of gender equality also constitutes a central controversy in the debate over the role of religion in Israeli society.

The world according to *halacha* is divided into two spheres: the public, which is the man's place, and the private, which is the domain of women.[168] According to Maimonides, women may not be appointed to public office.[169] Such *halachic* imperatives are, it is said, dictated by woman's fragile nature, as well as by the imperative of strict female modesty.[170] Further *halachic* rulings involve the relationship between wife and husband, which is one of domination-subordination.[171] Religious imperatives regarding the role of women and men have been strongly criticized by scholars, by Dr. Carmel Shalev and by Professor Frances Raday among others.

Dr. Shalev disapproves of the double standard in the Jewish laws of marriage and divorce which are patently discriminatory towards women. Women's role in the ceremonies of marriage and divorce are wholly passive. For example, divorce according to Jewish law is the uni-

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165 Official Gazette, No. 1, 5 Iyar, 5708 (14 May 1948).

166 See *Shalit Case* (note 140) *supra*.

167 See HCJ 72/62 *Ruffaizen v. Minister of Interior*, 16 P.D. 2428.

168 See, e.g., *Y. Leibowitz*, Faith, History and Values 73 (1982) [in Hebrew].

169 Maimonides, Kings 1:5: "One does not place a woman on the throne, as it was said: 'a king over you' and not a queen; and likewise all offices in Israel – only a man may be appointed".

170 Various prejudices about woman's frivolity reinforce this norm. "Women are light-headed" (Shabat 33B; Kidushin 80B); "A woman's wisdom is only in her spinning wheel" (Yoma 66B).

171 See, e.g., *A. Rosen-Zvi,* Israeli Family Law: The Sacred and the Secular, 1990, 226 ff. [in Hebrew].

lateral legal act of the man. Moreover, the rule of monogamy is a double standard, applying only to women. Dr. Shalev also criticizes the discriminatory and male-dominant nature of Muslim law, which is the applicable law for the Muslim residents of Israel.

The critics also attack the Jewish rule of monogamy, which is enforced by punishing the child of the adulterous woman for its mother's sin, referred to as *mamzerut*. It is the child of the adulterous married woman – not the adulterous married man – who may not marry a regular member of the Jewish community and is thus excommunicated from Jewish society. The adulterous woman is further punished by the rule that forbids her to marry her lover. Furthermore, there exists the law of *Agunot*, which applies to women whose husbands arbitrarily refuse to divorce them, resulting in the women being unable to remarry.[172] Due to religious laws permitting men to be polygamous, refusing to divorce one's wife does not hinder such men's future relationships with other women.

Women in Israel's orthodox community may not be ordained as rabbis,[173] nor can they serve as judges in the rabbinical courts.[174] Women do serve, however, as rabbinical advocates before the rabbinical courts.

Dr. Carmel Shalev describes the controversy in the Jewish community of pre-Israel Palestine regarding the issue of women's political rights in the formative years of Jewish self-government under the British Mandate.[175] It seemed self-evident to the first women pioneers that the vision of Zionism was one of equality. However, they had not taken into account the political pressures of the Agudat Yisra'el party, representing the ultra-Orthodox community in Palestine, to deny women the right

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[172] Cf., e.g., *P. Lahav*, "The Status of Women in Israel – Myth and Reality," Am. J. Comp. L 22. (1974), 107 (119-124).

[173] *Marriage and Divorce (Registration) Ordinance, 1919*; section 2(6) of the *Chief Rabbinate of Israel Law, 1980*.

[174] *Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953*; *Dayanim Law, 5715-1955*.

[175] An account of the *halachic* controversy is brought by Elon, J. in HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, 42 P.D. (2) 241 (246-265). A major distinction was made between "passive suffrage," i.e., the right to be elected to public office, as opposed to "active suffrage," i.e., the right to vote. Elon, J. also referred to the *halachic* debate over women's right to education, at 265-270. This pertains to the historical exclusion of women under the *halacha* from participation in what Leibovitz termed "the cultural heritage of Judaism and its spiritual contents." See *Y. Leibovitz*, *op. cit*., at 72.

to vote and to be elected to the institutions of the Yishuv. Nor did they consider the capitulation of the male Zionist politicians who were not as free as they professed to be from the shackles of the image of the religious Diaspora Jew. The campaign to guarantee women the most basic rights of political participation lasted for eight years, between 1918 and 1926.[176] To this day, the issue of women's right to be elected to the Knesset divides national religious and ultra-Orthodox politicians, and prevents the formation of one unified religious party.

The question of women's right to full political participation arose in two cases in the High Court of Justice. In *Shakdiel v. Minister of Religious Affairs*,[177] the Minister wished to exclude the petitioner, a woman, from serving as a member of the Yeruham religious council, an administrative body in charge of budgeting and providing religious services in the community. Shakdiel had been elected under a statutory law to serve on the council by her party faction in the local authority. The Court found that the sole reason for her disqualification was the fact of her being a woman. Having ruled that this was unlawful discrimination, the Court ordered the inclusion of Mrs. Shakdiel in the Religious Council.

In another case, *Poraz v. Lahat, Mayor of Tel Aviv-Yaffo*,[178] the court upheld the right of women to participate in the election of the chief rabbi as representatives of the municipal council.

In *Raskin v. Jerusalem Religious Council*[179] the religious council acting under the law had informed the owners of hotels and other halls catering for family celebrations that kashrut (religious dietary) certificates would not be issued if "immodest" (belly dancing) performances were allowed to take place. Such certificates are *de facto* necessary for a hotel or a hall to attract clients. The Court held that the religious council had exceeded its lawful authority under the Law, which was enacted for the

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[176] This chapter in the annals of Zionist history might have been lost, were it not for the fact that a tract composed by one of the women active in this campaign was reprinted and published by a contemporary feminist grass-roots organization. See *S. Azaryahu*, The Association of Hebrew Women for Equal Rights in Palestine, 1977 [in Hebrew].

[177] *Shakdiel Case* (note 175) *supra*.

[178] HCJ 1/88 *Poraz v. Lahat, Tel Aviv-Yaffo Mayor*, 42(2) P.D. 309.

[179] HCJ465/89 *Raskin v. Jerusalem Religious Council*, 44(2) P.D. 673.

purpose of regulating the kashrut of food and not of enforcing other irrelevant (from the secular law) *halakhic* rules.[180]

Another case involves freedom of religious worship.[181] A group of women wishing to hold services at the Western Wall were forbidden by the Ministry of Religious Affairs' representative to don *talithot* (traditional prayer shawls) or to read from a Torah scroll, claiming that this was a deviation from the custom of the place. Under section 1 of the *Protection of Holy Places Law, 5727-1967*, "the Holy Places shall be protected … from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places". Interestingly enough, it was the religious women praying at the Wall that were most offended by the petitioners.[182]

Finally, it is worth mentioning one more instance of prejudice, to women's right to equality in education, even though it did not involve any specific religious statute. This was a petition to the High Court of Justice concerning the exclusion of women, as such, from participating in a vocational training course held by the Ministry of Labour. The training in computerized printing was to be held at a religious educational institution in Jerusalem that objected to the presence of women on its premises.[183] The petition was withdrawn from the Court on the advice of the bench, which suggested that the women did not have sound grounds for their case as they could easily participate in a similar course in Tel Aviv. This is one more instance of the complicity of Israeli

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[180] This was not, however, the end of the affair. The rabbis did not comply with the Court's ruling and demanded that the hall owners deposit security checks with the religious council to guarantee they would not commission belly-dancing performances and display signs stating that "according to the Rabbinate's instruction it is forbidden to hold an immodest performance in this hall". The petitioner filed a second petition, and finally reached an out-of-court settlement, that security deposits would not be required, and that the sign should state "according to the *halacha* immodest performances should not be held" (Newsletter of the Association of Civil Rights in Israel, March 1991).

[181] See the following cases: HCJ 257/89 *Hoffman v. Supervisor of the Wall* 48(2) P.D. 265; HCJ 3358/95 *Hoffman v. The General Director of the Prime Minister Office* 54(2) P.D. 345; Further Hearing 4128/00 *The General Director of the Prime Minister Office v. Hoffman* 57(3) P.D. 289.

[182] Exact form of implementation has yet to be finally decided.

[183] HCJ 889/86 *Cohen v. Minister of Labour* 41 (2) P.D. 540.

male decision-makers in upholding practices that compromise gender equality on the basis of a religious worldview.

Women's suffrage was jeopardized by such complicity in the 1920s. This pattern of compromise appears to repeat itself. Matters affecting women are perceived to be marginal. The prevailing attitude is that equality is a matter of private, personal relations beyond the reach of the law. But the legal constitution of the private sphere is structured on discriminatory religious norms. Nevertheless, even the question of non-religious marriage, which occupied the High Court of Justice in several cat-and-mouse bouts with the rabbinical courts during the 1960s,[184] was framed as a matter of neutral freedom of conscience and not of gender equality.

The discrimination against women under religious law was in the background of the enactment of the *Women's Equal Rights Law, 1951*. Likewise, the ratification by the Israeli government of the *Convention on the Elimination of All Forms of Discrimination against Women* contained a qualification for marriage and divorce. Israel could not ratify the provision of Article 16 that "State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations".

Despite the High Court of Justice decision in *Bavli*,[185] which held that rabbinical courts must consider civil joint property ownership during divorce cases, in actual practice the rabbinical courts avoid this ruling by referring the spouses to non-judicial settlement with respect to joint property division. By doing this, rabbinical courts avoid having to invoke the principle of joint ownership, which contradicts the property arrangement as dictated by the laws of the Torah.

In practice, this limits the partner wanting the divorce, particularly if this is the wife, to press for a final settlement in the rabbinical court. The rabbinical courts' failure to enforce the High Court of Justice ruling negatively and seriously affects women's rights. The fact that the legislative and executive branches have failed to respond to the non-enforcement of the High Court of Justice ruling by the rabbinical courts testifies to the negative contribution they make on this issue.

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[184] For a classic example, see HCJ 80/63 *Gurfinkel-Chaklai v. Minister of the Interior*, 17 P.D. 2048. As Professor Raday commented at the time, there is no doubt that women were allowed admission in order to perform cleaning and cooking tasks.

[185] HCJ 1000/92 *Bavli v. The Great Rabbinical Court*, (1994) 48(2) P.D. 221.

8. Non-Orthodox Communities in Judaism

Within Judaism there are various groups and rites, depending on geographical location during exile, i.e. Ashkenazi or Sepharadi, and the form of worship, Habad or Neturei-Karta, and Orthodox (subdivided into the Haredi and Modern Orthodox streams), Conservative or Reform. The application of the Millet system has resulted in hegemony of Orthodox Judaism. Orthodox institutions control the jurisdiction over personal status such as marriage, divorce and burial, and jurisdiction over holy sites.[186] Despite the fact that Conservative and Reform Jews are predominant mainly outside Israel, but they have repeatedly challenged the Orthodox monopoly within Israel.[187]

The first challenge was in 1962, in the *Perez* case.[188] The High Court agreed that the Reform movement was entitled to use public facilities just like the Orthodox groups on the grounds of equality. During the 80's there were some challenges in cases of registration of Jews converted by Reform Rabbis.[189] The High Court mostly agreed with the Non-Orthodox movements. However, the petitions' main claim has usually concentrated on interpretation of law, and not on grounds of the principle of equality. In two cases,[190] the question was whether the minister of interior or the population registration officer were authorized to check the validity of conversion made by non-Orthodox Rabbis. In both cases, instead of claiming for the violation of the equality principle, the petitioners preferred to focus on the administrative question about the discretion of the relevant public authority. In both cases, the Supreme Court accepted the petitions and ordered recognition of any conversion made abroad by non-Orthodox Rabbis. The only case in which the main question was indeed the equality principle was of Reform Rabbis who demanded recognition for marriage licensing author-

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[186] *Chief Rabbinate of Israel Law, 1980; Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 1953; Jewish Religious Service Law, 1971; Protection of Holy Sites Law, 1967*.

[187] *F. Raday,* "Religion, Multiculturalism and Equality: The Israeli Case," Isr. Y.B. on Hum. Rts. 25 (1996), 193 (214).

[188] HCJ 262/62 *Perez Case* (note 108) *supra*.

[189] HCJ 230/86 *Miller v. Minister of Interior* 40(4) P.D. 436; HCJ 382/88 *Shas v. the Census Officer* 43(2) P.D. 727.

[190] *Ibid*.; HCJ 384/88 *Association of Sepharadic Orthodox Conregations v. the Census Officer* 43(2) PD 727.

ity on the ground of equality.[191] This petition failed. The High Court found that the Minister of Religious Affairs was acting within his authority and reasonably in accepting the expert opinion of the Chief Rabbinical Council in Israel, which denied the fitness of Reform Rabbis to register marriages. The court relied on the Israeli law, which constituted the Council as the official source for interpretation of the Jewish law. Therefore, the moment the council decided that Reform Rabbis are not qualified to register marriages the question of equality was no longer relevant. The court also rejected the analogy of the petitioners between Reform Jews and Karaim, an ancient Jewish sect which is authorized to register marriages of its members. Justice Elon distinguished between the two communities, the Karaim being a birth status and Reform Judaism a personal belief.[192]

Another challenge of the Reform movement was successful,[193] but again failed to establish the decision on the ground of equality as a Fundamental Right. The High Court decided that members of Conservative and Reform movements who had been elected as representatives of political parties to religious councils could not be discriminated against because of their personal beliefs. However, the court emphasized the fact they were representatives of political parties, and therefore they do not represent their own beliefs. Hence, this case cannot be seen as recognition of the Court in non-Orthodox Jews' right for equality.[194]

In contrast, in the case of the Progressive Judaism Movement, the High Court gave full theoretical recognition to the right of non-Orthodox movements to equal treatment by public authorities.[195] The Supreme Court held that the Ministry for Religious Affairs is not authorized to discriminate against non-Orthodox movements in an exhibition of religious services. However, the petition was rejected for an administrative reason, the short time left before the exhibition.

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[191] HCJ 47/82 *Movement for Progressive Judaism Fund in Israel v. Minister for Religious Affairs* 43(2) P.D. 661.

[192] *Ibid* 691.

[193] HCJ 699/89 *Hoffman v. Municipal Council of Jerusalem* 48(1) P.D. 678.

[194] See also HCJ 3351/97 *Dr. George Brenner v. Minister of Committee According to Religious Services Law*, ed 51(5) 754, which held that a person cannot be disqualified from being a member of a religious counsel on account of not being Orthodox.

[195] *Progressive Judaism Fund Case* (note 191) *supra* at 382.

Due to the Jewish status given to the Reform movement by the Israeli courts, the religion of Israelis is not longer indicated on Israeli identity card. As Haredi Jews are opposed to having Reform Jews identified as "Jews" on their identity cards, due to their position that those in the Reform movement are not in fact Jews, legislation was enacted preventing the annotation of anyone's religion on their Israeli identity cards. In the *Hoffman* case,[196] the High Court took a step backward when it declared that women's right for equality should give way to religious sensitivities of ultra-religious Jews. Justice Elon rejected the petition of women asking to pray at the Western Wall (the most holy place for Jews) with prayer shawls and Bible Scrolls as men do, something which is against Jewish law. Justice Elon rejected the women's petition because of the highly sensitive nature of the site and the fear of violence leading to a desecration of the holy place. Justice Levin held that all groups, which wish to use the holy place of legitimate purpose, should get equal chance to express their beliefs:

> If we do not hold this to be the case, we will in effect give an exclusive monopoly to one particular approach to freedom of expression over another, and the right to worship and freedom of expression will be infringed.[197]

The Supreme Court ultimately ordered the facilitation of prayer in a section of the Western Wall for use by Reform and Conservative congregations.[198]

9. Secular Jews

Religious ideology plays a major role in public life,[199] resulting in the denial and disregard of secular values.[200] This superiority of religious ideology over the secular ideology can be seen in many issues.

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[196] *Hoffman v. Supervisor of the Wall* (note 181) *supra*. For U.S. Case law dealing with intra-Church disputes see *Jones v. Wolf* 443 U.S. 595 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969); Serbian *Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich*, 426 U.S. 696 (1976).

[197] *Ibid*, 357.

[198] HCJ 3358/95 *Hoffman v. Director of the Prime Minister's Ministry* 54(2) P.D, 345.

[199] *Gavison* (note 32) *supra*.

The situation is problematic on two levels. First, freedom of religion, which has been recognized as a Fundamental Right – including freedom from religion, which is the right to manage one's life without being forced to use the religious administration.[201] The second level is the absence of recognition of an independent secular ideology with its own values and beliefs, which deserves treatment equal to that received by the religious ideology.

Some legal challenges have been brought before courts to limit the domination of religious ideology in public life, but only very few of them were based on claims of equality. Most petitions were based on interpretation of statutes, such as the power of municipalities to close streets,[202] garages[203] or cinemas[204] on Saturdays.

The first issue is the monopoly given to religious law in marriages and divorces. Rabbinical adjudication law (*Marriages and Divorces*)[205] holds that every marriage of Jews will be attended according to the Jewish religious Law, by a Rabbi. The same settlement is applied also to the other religious communities. This settlement is a violation of the individual right for freedom of conscience. In certain cases it also violates the right of individuals to get married because of biblical restrictions. This is the case in marriage of a *Cohen* and a divorced woman.

While the legislature and the authorities accept the existing situation and keep it as a *status quo*, the courts usually try to avoid the restrictions of Religious Law.[206] Private marriages and marriage abroad are examples for judicial solutions, which intend to help individuals to minimize the violation of their rights.

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[200] *F. Raday* (note 186) *supra,* at 219.

[201] *P .Shifman,* Who's afraid of Civil Marriages?, 1995 [in Hebrew]; *S. Shetreet,* Freedom of Conscious and Religion: the Freedom from Enforcement of Religious Norms, Heb. U. L. Rev. 3 (1972), 467 [in Hebrew].

[202] HCJ 332/70 *Zalzberg v. Ashkelon Municipality* 24(2) PD 572; *Baruch Case* (note 153) *supra*.

[203] *Isramax Case* (note 113) *supra*.

[204] HCJ 5799, 5609, 5703/91 *Israel Theatres Ltd. v. Netanya Municipality* 47(3) PD 192.

[205] *Rabbinical Adjudication Law [Marriages and Divorces] (1953)*, at 2.

[206] *S. Shetreet,* Between the Three Branches of Government: The Balance of Rights in Matters of Religion in Israel, 1998.

The first time the Supreme Court recognized a civil marriage conducted abroad was in *Schlesinger*.[207] The court held in that case that whenever one is married by the law of the country where the marriage was held, the minister must register the person as married. Hence, when there is an official marriage certificate, neither the officials nor the minister are authorized to check whether the marriage was religious or not. This rule enabled the court in other cases to grant aliment for a wife of such civil marriage abroad, as she was married according to the Jewish Law.[208] An expanding of this orientation has occurred when the court recognized marriage abroad by messenger, in which the parties could stay in Israel and be married by proxy in Mexico or Paraguay.

Another way of avoiding the religious restrictions on marriages was recognized in *Segev*.[209] The High Court held that couples that are not allowed to get married because of religious restrictions can get married in a private marriage. According to Jewish Law such marriages are not legal, but valid after they are done. The court enabled such couples to get married with no Rabbi and still be registered as married. In this way the court solved the emerging problem of couples unable otherwise to marry. However, the High Court refused to approve this solution for couples that could get married in a religious ceremony but preferred not to.

Another alternative to religious marriage is the reputable spouse or "common law wife". This settlement was constituted by legislation, and was expanded by favourable judgments. The recognition was first made in the definition of "relative" in the *Dead Soldiers Act (Rehabilitation)*,[210] where "wife" included also a "woman who lives with him together and known in public as his wife". Similar definitions were included in other legislation.[211] The Supreme Court continued this orientation and consolidated the rights of such common law marriage. First, the court enabled a woman who is still married to be considered as common law wife of another man.[212] Second, the court approved an

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[207] *Funk-Schlesinger Case* (note 137) *supra*.

[208] C.A. 566/81 *Shmuel v. Shmuel* 39(4) PD 399.

[209] HCJ 130/66 *Segev Case* (note 112) *supra*.

[210] *Dead Soldiers Act [Rehabilitation] (1950)*, s.172.

[211] See the *Inheritance Act (1965)*, s. 55.

[212] C.A. 394/61 *The State v. Fesler* 16 PD 102.

agreement for alimony for a common law wife.[213] Finally, the court has applied the sharing rule over common law marriage.[214]

The second issue is burial. Although there exists the *Right for Alternative Civil Alternative Burial Act 1996*,[215] permitting secular burial, there are few places where such burial exists, and the policy of the authorities through the years has caused a *de facto* monopoly of the rabbinical administration. Applications for lands for secular burial were brought up many times, but until the 1990's they were all turned down by the Ministry for Religious Affairs and the land administration.[216] The obligation to conduct funerals by religious ceremony is a violation of freedom of conscience. In addition, there are many cases of refusals to bury a body, or burying a body "outside the fence", because of religious restrictions, as in the case of suicide.

The change came in the *Menuha Nechona* case.[217] The association asked to establish a secular cemetery, but the Ministry for Religious Affairs and the land administration delayed their approval for years. Former President Shamgar, although recognizing the individual right for secular burial, did not interfere in the administration considerations. The principle held by Shamgar was brought into action through the years 1994-1996, when the author served as the Minister for Religious Affairs. Eight concessions were given to associations for alternative burial and *The Right for Alternative Civil Burial Act* was legislated.[218] This law defines a civil cemetery as one in which "burial is done according to individual ideology".[219] After substantial delays by the new government after the 1996 elections, the establishment of first new alternative cemetery was inaugurated in February 1999.

The third issue is the Kashrut (Kosher) certification of food. These certifications are given by the state Rabbinical Councils, and are necessary if a religious person is to eat the food. Problems arise usually with respect to deciding on such certifications and in regards to granting permission to import pork.

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213 C.A. 563/65 *Jeger v. Flaviz* 20(3) PD 224.

214 C.A. 52/80 *Shahar v. Fridman* 38(1) PD 443.

215 Statutes of Israel 5756 (1996), 249.

216 *S. Shetreet* (note 206) *supra*, at 14.

217 HCJ 397/88 *Menuha Nechona Case* (note 135) *supra*.

218 *The Right for Alternative Civil Burial Act (1996).*

219 *Ibid* at 1.

In the *Marbek* case,[220] the Supreme Court first held the decision about giving kosher certifications is subject to judicial review. The court further held that the rabbinical council must consider only the kosher nature of the food itself, and not general religious policy considerations. This rule of the Supreme Court was included in legislation in 1983.[221] The High Court used an expanding interpretation for this law, and ruled that no consideration beside the food itself is allowed in any decision about the Kashrut status of a food.[222]

With the pork question, the situation was different. At first there were petitions against municipal rules which prohibit the sale of pork. The courts mostly accepted them for two reasons. First, the municipalities had no authority to restrict meat selling. Second, courts treated the pork issue as a religious matter, demanding Knesset legislation.[223] This technical question was clarified in 1956, when the Knesset allowed the municipalities to restrict sale of pork,[224] however, the substantial question of the violation of fundamental rights remained open.

In 1992 the *Basic Law: Freedom of Occupation* changed the situation by granting the court the power to invalidate legislation which restricts a person's occupation in a way incongruent with state values.[225] This Basic Law was brought before the High Court in the *Mitrael* case,[226] which came to court after Mitrael Ltd. did not receive permission to import pork because it is not kosher. Justice Or emphasized the need to preserve equality values between religion and secularism:

> A state in which freedom of conscience coexists with freedom of religion and worship cannot prevent one person from eating non-kosher meat merely because knowledge of it will injure the sensitivities of another person … In such case, consideration of the latter's feelings at the cost of the former's would result in inequality: The person who keeps kashrut will continue in the life style which he believes is correct whilst the other will be forced to live in a way

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[220] HCJ 195/64 *The Southern Association v. Head Rabbinical Council* 18(2) P.D. 324.

[221] *Deceit in Kashrut Prohibition Act (1983).*

[222] *Raskin Case* (note 179) *supra*.

[223] HCJ 72,177/55 *Fredy et al v. Tel-Aviv Municipality* 10 PD 734.

[224] Municipality Act [Special Authorization] (1956), s.1.

[225] Basic Law: Freedom of Occupation, s.7.

[226] *Mitrael Case* (note 145) *supra*.

> which does not accord with his beliefs, or his non-beliefs – that is, he will suffer from religious coercion.[227]

Nevertheless, the Basic Law was changed by the Knesset in 1994, right after this decision of the High Court. This change was intended to enable the restrictions on pork importing.

A fourth issue, and a central topic for Israeli society, is that of conversion.[228] The importance of this topic is due to the very intermingling of state and religion, for in Israel, one's status as a Jew is extremely important. In *Na'amat*,[229] a petition was filed against the decision of the census registration in the Ministry of Interior not to recognize non-Orthodox conversion to Judaism that was conducted in Israel and its refusal to register as Jews people who went through such conversion. The Supreme Court ruled in a majority of ten judges, against the dissenting opinion of Justice Englard, that the registration official is not authorized to decide in legal questions, and that when being told to register a person as Jewish he must do so, unless he has a reasonable doubt that the person's statement is untrue; the mere fact that the conversion to Judaism was not orthodox cannot constitute such a doubt. Thus, the Court ordered that minors who were born abroad as non-Jews, adopted by Israelis and went through non-Orthodox conversion in Israel, be registered as Jews.

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[227] *Ibid.,* at 501.

[228] *Miller Case* (note 189) *supra*, HCJ 264/87 *Association of Torah-Observant Sephardim Shas Movement v. Kahane, Director of the Interior Ministry Population Registry*, 43(2) P.D. 723.

[229] HCJ 5070/95 *Na'amat v. The Minister of Interior*, Takdin-Elyon 2002(1) 634. The *Naamat* case followed *Pissaro (Goldstein) Case* (note 128) *supra*. In that case the High Court was confronted with the legislative barrier of *The Religious Community Ordinance (Conversion) upon the Population Registration Act.* The petitioner asked to be registered as a Jew on the "Nationality" and "Religion" articles on the Population Registration following a reform conversion which was made in Israel. The problem raised was that the certain obliged procedure dictated by the ordinance was not fulfilled on that certain case. According to the procedure one must have, upon joining a religious community through a conversion in Israel, a formal certificate from the head of the religious community to prove being part of that community. The conversion registration shall be based upon the formal certificate and will be constitutive regarding the formal acknowledgement of the conversion. The Court only made a declaration that the non-Orthodox conversion in Israel was valid in principle, the Ordinance notwithstanding.

President Barak, who wrote the majority opinion, stressed that the Court's ruling deals only with administrative authority, rather than deciding the loaded question of "Who is a Jew." Barak based the ruling on two prior decisions of the court: the first one being the *Funk-Schlesinger* decision[230] which is forty years old. In that decision it was determined that regarding the nationality and religion fields in the population registry, they only have statistical and not legal meaning. Therefore, the registration clerk must consent to a registration application unless it is blatantly false. The second decision is the *Shas* case,[231] which determined that non-Orthodox conversion should be recognized. Barak rejected the State's claim that the *Shas* decision is relevant only to conversions which took place outside of Israel. Justice Englard, in his dissenting opinion, wrote that the petitions should be dismissed since the conversion discussed in the law has only one meaning, conversion according to Jewish law as it has been developed over generations.[232]

Following the decision the Minister of Interior, Eli Yishai, publicly declared that he would not obey the verdict. However, after harsh public and political criticism, including by the attorney general, Mr. Yishai retreated from his extreme statement, but instead he made a very significant decision, proposing to cancel the "nationality" article on ID cards and in the population registration. Clearly this proposal was intended to bypass the court's ruling. Although the field still exists in Israeli identity cards, it is now left blank. For the religious population, it is preferable that no one's religion is noted than to acknowledge that one born of a reform conversion could be considered to be Jewish.

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230 *Funk-Schlesinger Case* (note 137) *supra*.

231 *Kahane Case* (note 228) *supra*.

232 For U.S Case law related to Judicial Remedies in religious matters, see *Avitzur v. Avitzur*, 58 N.Y.2d 108, 459 N.Y.S. 2d 572 (1983)(allowing a remedy in state court to order a Jewish husband to give a divorce to his wife); *Dan Rav v. New Jersey Alliance* 129 NJ Law R (1990), invalidating state regulations regarding kosher announcements by caterers. See also *J. Sexton*, The American Doctrine of Church and State as Illustrated in Two Cases Involving Human Rights, in: *S. Shetreet*, Women in Law, 1998, 319-334.

10. Non-Jewish Communities

In recent years, the Supreme Court has demonstrated a much greater willingness to enforce religious equality in cases of petitions filed by non-Jewish petitioners. For instance, in the case of *Reem*[233] the municipality of Upper Nazareth refused the posting of advertisements regarding the development of housing projects in the village of Yaffia on municipal billboards on the ground of the language of the advertisements being Arabic. The refusal was based on a municipal by-law which required that every advertisement must include Hebrew text occupying no less than two thirds of the space of the advertisement. In its decision, the court drew a balance between the two values of freedom of expression, and the promotion of the Hebrew language, a central value of the state of Israel. In this particular case the balance was drawn in favour of freedom of expression, and the court held that the publication of the advertisement must be allowed.

In the case of *Adala v. the Minister of Religious Affairs*,[234] the Supreme Court dealt with arguments of petitioners regarding the equal allocation of funds for the maintenance of cemeteries. This petition was filed after a previous one on the same subject was dismissed due to an overly general, insufficiently focused approach which did not allow a granting of a judicial remedy.[235]

In the second *Adala* case, the petitioners relied on the policy statement *One Law*, a document issued by author in his capacity as Minister of Religious Affairs. *One Law* dealt with the allocation of funds to non-Jewish communities. In *Adala*, the petitioners argued that the Ministry of Religious Affairs violated the duty to allocate funds equally, free of discrimination against certain sectors. It was found that the allocation for maintaining non-Jewish cemeteries was lower than the other general population, and therefore the Ministry was ordered to introduce changes in cemetery funding allocations, and to provide transparent and clear criteria for such allocations.[236]

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[233] C.A. 105/92 *Reem Engineers Contractors Ltd v. Municipality of Upper Nazereth* 47(5) P.D. 189.

[234] HCJ 1113/99 *Adala v. Minister of Religious Affairs* 54 (2) P.D164.

[235] HCJ 240 /98 *Adala v. Minister of Religious Affairs* 52 (5) P.D. 167.

[236] A similar result can be seen in the case HCJ 727/00 *Committee of Arab Mayors v. Minister of Housing*, 56(2) P.D. 79, which ordered the Ministry of Housing to apply equal criteria for the allocation of funds by the Ministry to

Every community has autonomous jurisdiction over the personal status over its members. Also prohibition of work on the weekly rest day and religious holidays varies with the accordance of the religion of the workers. However, this equal respect is subject to the basic fact and constitutional reality that Israel was established as a Jewish state, and Judaism is the majority religion.

This situation has in the past brought about petitioners losing cases in the Supreme Court. In the *Watad* case,[237] a Muslim student claimed for discrimination, because of state financing to *yeshiva* institutions, which are for Jews only. The High Court of Justice rejected the petition, because it could not find any Muslim institution comparable to a *yeshiva*, and hence there is no discrimination. Another petition was brought up by organizers of a music festival,[238] who demanded equal funding for Church music in a publicly funded festival. The Court refused to review the discretion of the administrative authorities.[239]

Arab municipalities. See also the case HCJ 6698/95 *Qadan v. Administration of the Lands of Israel*, 54(1) PD 258, in which the administration was ordered to provide Arab citizens with housing in the community village. For critical comment on the *Qadan* judgment, see *S. Shetreet*, The judgement in the *Qadan* affair was not unavoidable, Land 56 (2003), 27. A further judgment following the same judicial trend of thought is HCJ 4112/99 *Adalah v. Municipality of Tel Aviv* 56(5) P.D. 393, in which the Court held that municipalities should add signs in the Arabic language in mixed population areas. However, see the dissenting opinion of Justice Cheshin.

[237] HCJ 200/83 *Watad v. Minister of Finance* 38(3) PD 113.

[238] HCJ 175/71 *Music Festival v. Minister of Education and Culture* 25(2) PD 821.

[239] For comparative research on state funding of religious institutions, see *Aguilar Case* (note 24) *supra,* stating that Federal funds to public employees who taught in parochial schools was unconstitutional because the program was an excessive entanglement of church and state in the administration of benefits. In *Rosenberger v. Rectors and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), refusal to pay a third party contractor for printing stating that the respondent's costs of petitioner's student publication based on its religious editorials was not supported by establishment clause concerns; *S. Shetreet*, State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective, Notre Dame J. of Law, Ethics and Public Policy 13 (1999), 421.

VI. Conclusion

From our analysis we see that whereas in the past the conceptual categorization models of religion and state relations adopted by a particular state had little or no bearing on the quality of the protection of religious liberty, this has changed today. Legislation in France, including the recent laws banning conspicuous religious symbols in schools, shows that the *secular model* is liable to be less protective of religious liberty in practice than the *separation of state and religion model*, the *established church model* or the *recognized religions model*.

The *separation of state and religion model*, as seen in the United States, strives to separate the state from religion in a neutral fashion. In the United States, the Supreme Court tends to permit symbols of religion when they are not seen as being endorsed or promoted by the government, or as long as their secular aspects are primary.[240] The United State's religious population has often been seen as being committed to the separation of state from religion. With respect to the *established church model*, as seen in England, the status of the Church of England as the official church appears not to have caused problems for other religions.

Germany is an example of the *recognized religions model*. As noted above, religious affiliations are indicated on one's income tax forms, and recognized religious institutions are thus partially funded. However, as is the case in England, the fact that the state supports religion does not necessarily lead to a religious citizenry.

The level of tolerance of religious practices of minorities has lessened in Europe, especially in countries that follow the secular model, such as in France. This is possibly because of the apprehension and threat perceived by the majority in these countries.

Canadian case law shows an approach to religion tending to be permissive of religious freedoms as long as such freedoms do not infringe on the freedoms of others.[241]

Israel is a complex case study of the relationship between religion and state. On the one hand, there is a deep interdependence of religion and state, and the Jewish nature of the state is recognized as an important

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[240] For examples, see *Lynch Case* (note 30) *supra,* and *Greater Pittsburgh Chapter Case* (note 31) *supra*, discussed above.

[241] For example, *Dhillon Case* (note 53) *supra*; *Pannu Case* (note 54) *supra*; and *B.H. v. Alberta Case* (note 58) *supra*.

value of the State of Israel. On the other hand, the rights of other religions are also recognized. A symbol of these interlocking values is seen in Israel's court system – the interconnection of religion and state is seen in Israel's dual courts – there are both secular and religious courts. The courts are also reflective of the religious freedom seen in Israel, for the religious courts deal with matters of marriage and divorce of Jewish, Arab, Druze and Christian communities. Similarly, Israeli legislation protecting holy places protect the holy places of all religions.

In general, despite other laws installing certain Jewish traditions into government institutions, such as mandatory *kashrut* catering in government institutions, members of all religions tend to be better protected in Israel than they might be in a secular model state where all public forms of religious observance can be equally discouraged.

III. German, Comparative and International Law Perspectives

From the Acceptance of Interdenominational Christian Schools to the Inadmissibility of Christian Crosses in the Public Schools

Christian Walter

Introduction

There are many sources of bad law. The most prominent among them is certainly the one mentioned in the subtitle of this presentation. If hard cases really make bad law, the conclusion is inevitable that this is going to be a presentation of bad law. Given the German debate on the Federal Constitutional Court's decision on crosses in Bavarian classrooms,[1] there is more to that than a mere play on words. If German Constitutional Lawyers were to nominate the worst decision which the Court ever has rendered, the so-called "Crucifix-Decision" would have good chances to be among the front runners. It has produced so many legal commentaries that we almost need bibliographies in order to collect the literature on this single decision.[2] Among the many aspects that are worth being highlighted even at a decade's distance (the decision was rendered in May 1995), the public reaction to the decision is certainly the most striking. The decision has provoked demonstrations by more

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[1] VerfGE 93, 1; an English translation of the decision can be found at http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverg.shtml?16may 1995 (visited on 10 November 2005).

[2] *A. Nolte*, Das Kreuz mit dem Kreuz, JöR N.F. 48 (2000), 87 et seq. (89 note 8), with an almost complete bibliography until 1999; for numerous references see also *M. Heckel*, Das Kreuz im öffentlichen Raum. Zum Kruzifix-Beschluß des Bundesverfassungsgerichts, DVBl. 1996, 453 et seq., 453 Anm. 1; the main competing positions are represented in *W. Brugger/St. Huster* (Hrsg.), Der Streit um das Kreuz in der Schule, 1998.

than 300,000 people, among them the Prime Minister ("Ministerpräsident") of Bavaria, and the Catholic and Protestant Bishops of the area.[3] It is, of course, necessary and interesting to inquire into the reasons why the public reaction was so intense and in a sense emotional. But before doing so, I want to briefly state the facts and present the main arguments in the Court's reasoning.

I. The German Crucifix Decision – Facts and Legal Reasoning

The facts of the decision may be summarized as follows: Bavarian legislation concerning elementary schools provided for crosses to be attached to the wall of each classroom. This fact was considered to be an unjustified infringement on the freedom of religion of a student who was brought up following the anthroposophical philosophy of Rudolf Steiner. In her classroom, a crucifix with a total height of 80 cm and a 60 cm body was affixed directly above the blackboard. A majority of five judges followed the argument presented by the petitioners and declared the respective section of the School Regulations for Elementary Schools in Bavaria void. The main reason was that the concept of compulsory schooling combined with the compulsory affixation of crosses or crucifixes on the walls amounted to what the Court called in one of the hotly debated passages of its decision as "learning under the cross".[4] The Court did not find any possible justification for this interference with freedom of religion and accordingly declared the respective norm of the School Regulations void. Following the Court's decision, Bavaria amended its laws and the solution found is that in principle the crosses remain; and students who disagree have to contact the school authorities who then should strive for an agreement, failing which, the crosses in the classrooms in which the respective student(s) attend will be removed.

The dissent, written commonly by three judges, denies any interference with freedom of religion. The basic argument is that it is impossible to place the "negative" freedom of religion of those students who disagree

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[3] For a brief overview of the debate, see *D. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany 2nd ed., 1997, 482 et seq.; see also *R. Lamprecht*, Zur Demontage des Bundesverfassungsgerichts, 1996.

[4] BVerfGE 93, 1 (18).

with the cross above the "positive" freedom of religion of the others who consider it to be a representation of their personal convictions. Also, the minority of three judges disagreed with the majority's assumption that the cross was above all a symbol of a particular religious faith. In the view of the minority, the cross – at least when placed on walls in public schools – was basically a symbol for the objectives set for Christian nondenominational schools, namely the values of Christianity-marked Western culture.

II. Paradoxes of Legal Analysis: Giving Content to a Symbol

There is a striking paradox in both the analysis presented by the majority and the minority. The majority, which concludes that the crosses – at least in principle – ought to be eliminated, has to give the symbol a specific religious meaning in order to do so:

> "The cross continues to be one of the specific faith symbols of Christianity. It is, indeed, its symbol of faith as such. It symbolizes the salvation of man from original sin brought about through Christ's sacrificial death, but at the same time also Christ's victory over Satan and death and his lordship over the world: suffering and triumph simultaneously (see the entry "Kreuz" in: Höfer/Rahner [eds.], Lexikon für Theologie und Kirche, 2nd ed. 1961, vol. 6, col. 605 ff.; Fahlbusch et al. [eds.], Evangelisches Kirchenlexikon, 3rd ed. 1989, vol. 2 col. 1462 ff.). For the believing Christian it is accordingly in many ways an object of reverence and of piety. The equipping of a building or a room with a cross is still today understood as an enhanced profession of the Christian faith by the owner. For the non-Christian or the atheist, just because of the importance that Christianity attaches to it and that it has had in history, the cross becomes a symbolic expression of particular religious convictions and a symbol of their missionary dissemination. It would be a profanation of the cross running counter to the self-perception of Christianity and the Christian churches to regard it, as the decisions challenged do, as a mere expression of Western tradition or cult token without a specific reference to faith."[5]

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[5] BVerfGE 93, 1 (19 et seq.); translation as in note 1.

While the majority thus heavily emphasizes the religious meaning of the symbol, the minority, by contrast, reduces its symbolic meaning to Western civilization in general:

> "The requisite balancing of interests with those of non-believers and people with different beliefs shows no breach of the constitution.
>
> aa) In assessing and evaluating these interests, one cannot as the Panel majority does take as a general basis the Christian theological view of the importance and meaning of the cross symbol. The decisive thing is rather what effect the sight of the cross develops with individual pupils, in particular what feelings the sight of the cross may induce in the other-minded (on this cf. also BVerfGE 35, 366 [375 f.]). It may be that in a pupil of Christian faith the sight of the cross in the classroom may in part awaken those notions described by the Panel majority as the meaning of the cross (grounds, C II 2 b). For the non-believing pupil, by contrast, this cannot be assumed. From his viewpoint the cross in the classroom cannot have the meaning of a symbol for Christian beliefs, but only that of a symbol for the objectives set for the Christian nondenominational school, namely the conveying of the values of Christianity-marked Western culture, and alongside that, a symbol of a religious conviction he does not share, rejects and perhaps combats."[6]

To sum up: The majority, which rules against religious symbolism in public schools, seems to take the religious contents more seriously than the minority, which argues in favour of such symbolism. What shall one make of this seemingly paradoxical shift of positions with regard to the meaning of the symbol?

A commentary on this paradox may start with an analysis in a comparative perspective. In the United States a similar problem of defining the meaning of religious symbolism has arisen in the context of the Supreme Court's establishment clause jurisprudence. Due to the separationist origins of the establishment clause jurisprudence,[7] religious symbols in public places have played an important role in the US Supreme Court's jurisprudence. Is a Christmas crèche in a shopping centre a violation of the no-establishment clause if the crèche is displayed by order of the public authorities? A majority of five judges answered

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[6] BVerfGE 93, 1 (32); translation as in note 1.

[7] See notably *Everson v. Board of Education*, 330 U.S. 1 (1947), at 3, 15 et seq. and 18), using the famous formula of a "wall of separation between church and state".

in the negative arguing that Christmas is "a significant historical religious event long celebrated in the Western World."[8] Justice *O'Connor* following her so-called "no endorsement"-test argues that the commercial surroundings deprive the crèche of its religious connotation.[9] By contrast, a minority of four justices argued that a religious symbol does not lose its religious content merely because of the surroundings in which it is displayed.[10]

The strong reliance on the context of the symbol in question provoked more cases: What if a Christian crèche inside the town house is combined with a Jewish Chanukah menorah outside the building and the menorah itself is placed next to a Christmas tree and a freedom statue resembling the French freedom cults of the days of the Revolution? The Court found that the crèche, being placed inside the public building and without any surroundings which might reduce its symbolism for one specific religion, violated the no-establishment clause.[11] By contrast, the Chanukah menorah, being combined with the Christmas tree and the freedom statue was considered to be a symbol that "both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."[12] Similarly, the minority in the case with the crèche in the shopping centre argued, that "it blinks reality to claim, as the Court does, that by including such a distinctively religious object as the crèche in its Christmas display, [the city] has done no more than make use of a traditional symbol of the holiday, and has thereby purged the crèche of its religious content and conferred only an 'incidental and indirect' benefit to religion."[13]

McCreary and *van Orden*, the most recent decisions of the US Supreme Court of 27 June 2005, concern the construction of monuments displaying the Ten Commandments in Court buildings and in the area sur-

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8 *Lynch v. Donnelly*, 465 U.S. 668 (1984), 680 et seq.

9 *Lynch v. Donnelly*, 687 et seq. and 692, Justice O'Connor concurring.

10 *Lynch v. Donnelly*, 699 et seq. and 705 et seq.

11 *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), 598 et seq.

12 *County of Allegheny v. American Civil Liberties Union*, 616.

13 *Lynch v. Donnelly*, 706, Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Stevens join, dissenting.

rounding the Texas State Capitol.[14] The two cases decided were quite similar in their basic facts, but the outcome was exactly the opposite.

McCreary is basically a case about the "secular purpose prong" of the famous *Lemon* test. The Lemon test was created by the Court in 1971 in the decision *Lemon v. Kurzman*. According to that three-step-test, the regulation in question only passes the no-establishment clause if it: 1) pursues a secular aim, 2) neither directly nor indirectly advantages or disadvantages religion, and 3) does not lead to an excessive entanglement between church and state.[15] Accordingly, the Court asks whether the two counties in question followed a secular purpose when posting the Ten Commandments in their Courthouses. Given the circumstances, it answers this question in the negative.

In *van Orden* the "passive use" of a religious symbol is introduced as a new concept. It is combined with a historic argument which relies on the role which the Decalogue is said to have played in American history. Interestingly, the character as a religious symbol is not denied, but the historical perspective together with the "passive use" of the monument allows the Court to rule against a violation of the establishment clause:

> "Of course, the Ten Commandments are religious – they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."

While one must not overlook the difference between the public surroundings of a State Capitol and a class room,[16] the argument neverthe-

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[14] *van Orden v. Perry* (http://www.law.cornell.edu/supct/pdf/03-1500P.ZO), and *McCreary County v. ACLU* (http://www.law.cornell.edu/supct/pdf/03-1693P.ZO), both visited on 3 November 2005.

[15] *Lemon v. Kurzman,* 403 U.S. 602 (1971); especially for the third prong (excessive entanglement between church and state) of the Lemon-Test see *L. H. Tribe*, American Constitutional Law, 2nd ed. 1988, 1226 et seq.

[16] In fact the Supreme Court has declared unconstitutional the display of the Ten Commandments in any public classroom (*Stone v. Graham*, 449 U.S. 39 [1980]).

less has an interesting similarity with the position of the minority in the German crucifix case. The minority there also argued that the crucifix stood for Judeo-Christian history and culture in general.[17] It is also closely related to the historical argument justifying the crèche in a shopping mall quoted above.[18]

The gist of the various approaches by the Courts in the cases mentioned is that they try to establish an objective meaning of the symbol in question.[19] Does it convey a religious message or not? However, it seems that determining an objective meaning exactly is the problem. Symbols are social constructions. Hence, the concrete meaning of any symbol always is the product of an interaction between the symbol and a person who views the symbol. If this analysis is correct, it necessarily implies that there are several meanings which may be given to a symbol. It is, therefore, impossible to discern *a* single meaning of the crucifix in the classroom.[20] This is a problem which the majority of the German Federal Constitutional Court and the minority run into alike.[21] Both try to establish an "objective" meaning of the symbol – the one side in emphasizing its religious meaning, the other in putting the emphasis on the secular aspects.

But what, then, is the correct approach? Or: Which is the authority competent for interpreting the symbol? Of course, at the end of the day, it is always the Courts which have the final authority of interpretation.[22] But there are techniques to alleviate the difficulty. Such techniques have especially been developed with respect to defining the scope of protection of freedom of religion. Because this fundamental freedom, just as the freedom of conscience, has the general problem of

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17 See the quotation above, note 6.

18 See above, note 8.

19 For a similar problem concerning the Islamic headscarf see *J. Oebbecke*, Das "islamische Kopftuch" als Symbol, in: FS für Wolfgang Rüfner, 2003, 593 et seq.

20 See in this context the linguistic approach by *B. Jeand'Heur*, Bedeutungstheorie in Sprachwissenschaft und Rechtswissenschaft, in: *Brugger/Huster* (note 2) 155 et seq. (157 et seq. and 163), which comes to the same conclusion.

21 The minority less so, since it adresses the problem of viewer-dependent perspectives, BVerfGE 93, 1 (32); translation as in note 1.

22 This point is very much emphasized in German legal doctrine by *J. Isensee*, Wer definiert die Freiheitsrechte? 1980, 34; and *S. Muckel*, Religiöse Freiheit und staatliche Letztentscheidung 1997, 121.

who may define its content. In this area, both the European Court of Human Rights and the German Federal Constitutional Court grant what one may call the "power of the first definition" to the individual concerned. The basic approach is that one plausibly has to demonstrate an infringement upon freedom of religion.[23] This implies the obligation to plausibly present the religious doctrine in question and to explain why it is infringed upon.[24]

My submission is that the correct approach to the problem of giving meaning to religious symbols has to be a similar one. One has to start with the meaning given to the symbol by the person or persons concerned, i.e. the student and her parents. If, according to their — plausible! — perception the symbol implies an infringement on freedom of religion, the legal analysis has to start from there. This does not free the Courts from their inevitable duty of finally deciding the case. But it avoids general and abstract definitions of religious symbols. For example, the majority of the German Court in its crucifix decision has been criticized for violating the principle of neutrality in giving an authoritative and binding meaning to a religious symbol. Such criticism could be avoided by the approach suggested here, because it starts on the premise that it is impossible to determine an objective meaning of the symbol in question.

The approach also allows for intermediate solutions which have been discussed in German legal writing. In applying the plausibility test, it makes a difference whether we are faced with a crucifix of the kind mentioned in the case (80 cm high, 60 cm body, in the middle above the black board) or a small cross somewhere in a corner. The latter will be

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[23] EKHR YB 8 (1965), 174 (184) – *X v. Austria*; DR 11, 55 (56) - *X v. UK*; BVerfGE 24, 236 (247 et seq.) see the English version in: *Kommers* (note 3), 445 et seq.; see also BVerfGE 83, 341 and 353, where the jurisdiction of the State Courts is confirmed without renouncing the earlier decision concerning the relevance of the self-conception of the religious community in question.

[24] A plausibility test is also often used in literature, see *H. M. Heinig*, Öffentlich-rechtliche Religionsgesellschaften, 2003, 61 and 127; *M. Morlok*, Selbstverständnis als Rechtskriterium 1993, 405; *K. Pabel*, Der Grundrechtsschutz für das Schächten, EuGRZ 2002, 220 et seq. and 227; *C. D. Classen*, Religionsfreiheit und Staatskirchenrecht in der Grundrechtsordnung, 2003, 64 et seq.; *S. Muckel*, in: K. H. Friauf/W. Höfling (Hrsg.), Berliner Kommentar zum Grundgesetz (Loseblatt; Stand: II/01), Art. 4, Rn. 29; *S. Mückl*, Religionsfreiheit und Sonderstatusverhältnisse – Kopftuchverbot für Lehrerinnen, Der Staat 40 (2001), 96 et seq. and 114.

found less easily as an infringement of religious freedom than the former.

III. Coercion as a Test of Infringement upon Freedom of Religion

Another element of the decision which is worth commenting on in a comparative perspective is the coercion-test applied by the Federal Constitutional Court as well as the dissent of the minority on that point. The majority argues — quite convincingly — that the coercive element is present because of the concept of compulsory elementary schools.[25] For the minority, by contrast, the coercive element of the school concept is not enough. It asks whether or not the crucifix coerces the students to some form of religious exercise, a question which is answered in the negative:

> "The psychic impairment and mental burden that non-Christian pupils have to endure from the enforced perception of the cross in class is of only relatively slight weight. The minimum of elements of compulsion, which in this respect is to be accepted by pupils and their parents (cf. BVerfGE 41, 29 [51]), is not exceeded. The pupils are not obliged to particular modes of conduct or religious exercises before the cross. They are accordingly, by contrast with school prayer (cf. BVerfGE 52, 223 [245 ff.]), not forced to display their differing philosophical or religious conviction by non-participation."[26]

A similar test — and similar arguments in applying it — has been used by the U.S. Supreme Court when dealing with cases concerning prayer at ceremonial occasions in schools. In these cases, some of the Justices who favour such a "no-coercion test",[27] as it has come to be called, take

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[25] BVerfGE 93, 1 (18); translation as in note 1.

[26] BVerfGE 93, 1 (33); translation as in note 1.

[27] *Lee v. Weisman* 505 U.S. 577 (1992), 631 et seq. (640 et seq.); Justice Scalia dissenting; a similar approach is taken by Justice Kennedy; see *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1988), 655 et seq. (660 et seq.); *Board of Education v. Mergens*, 496 U.S. 226 (1990), 258 et seq.; *Lee v. Weisman*, 505 U.S. 577 (1992), 587 et seq.; see already Justice Stewart in: *School District of Abington Township v. Schempp* 374 U.S. 203 (1963), 308 et seq. (316 et seq.).

into account the psychological situation of students who want to attend the graduation ceremony but would then have to accept some kind of religious ceremony.[28] For others such an "indirect coercion" would not be enough to conclude a violation of the no-establishment clause. Hence, they would only see a violation if the government forced someone to participate in a religious activity without allowing for the choice to leave.

In the context of the US-American approach to church and state relations, the no-coercion test gives much leeway to religious activities in schools. It has been criticised for being too closely oriented on issues of religious freedom and for not distinguishing properly between the free-exercise clause and the no-establishment clause.[29] It implies that as long as there is no coercion, the no-establishment clause is not violated. All the other tests which are proposed in the area would apply much stricter criteria and hence forbid religious symbols such as a crucifix in classrooms.

In this respect, fundamentally different approaches between the situation in Germany and in the United States may be stated. The fact that the no-coercion test until now could not be established as a general approach of the Court indicates that the idea of separation between church and state is much stronger and stricter in the United States. All examples cited by Justice Souter in his concurring opinion refer to cases in which a religious endorsement was conveyed without any coercion. According to Souter's reading of the no-establishment clause, the clause has exactly the function of filtering such public activities.[30] Under German constitutional law, by contrast, the Federal Constitutional Court in a decision concerning school prayers accepted even the endorsement of specific religions, as long as such endorsement remains restricted to creating a favorable environment for the exercise of freedom of religion. In this perspective, school prayers are a positive use of freedom of religion by those students who favour the prayer. According to the German school prayer decision, the conflicting interests of those who do not want to participate in the prayer are sufficiently taken into account

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[28] *Lee v. Weisman*, 505 U.S. 577 (1992), 587 et seq., Justice Kennedy writing for the majority and speaking of "indirect coercion".

[29] See notably on this point the opinion by Justice Souter in: *Lee v. Weisman*, 505 U.S. 577 (1992), 609 et seq. (621), Justice Souter concurring.

[30] *Lee v. Weisman*, 505 U.S. 577 (1992), 609 et seq. (621), Justice Souter concurring.

by their option to leave the class room for the duration of the prayer.[31] Whether or not this solution provides for an appropriate balance between the conflicting interests (or if an optional general meditation for the whole school might have been a more lenient approach given the psychological obstacle of leaving the classroom when the prayer starts),[32] shall not be of further interest here. The decisive difference between the German and the American approaches lies in the balancing of fundamental rights, which takes place in Germany, whereas in the U.S. a rather schematic approach of separation between church and state prevailed for quite some time. This holds at least true for school prayer and related cases.[33] In other areas, notably in the context of admission to public places and public-funding programmes, other criteria are becoming more and more relevant. These cases are largely decided on criteria of equal access and private choice.[34]

IV. The Crucifix Decision in Relation to the Court's Earlier Jurisprudence on Church and State Relations

German Constitutional Law on Church and State Relations not only has a long tradition but even today still relies on the norms originally provided for in the Weimar Constitution of 1919. Hence, the question has been asked many times whether or not the crucifix decision deviates from earlier jurisprudence in the area.[35] The basic issue of the decision — the protection of rights of individuals belonging to a minority — is not new, and with respect to freedom of religion it has become relevant many times in the history of the Court's jurisprudence.[36] It is also

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[31] BVerfGE 52, 223 (240 et seq.); see the translation in: *Kommers* (note 3), 461 et seq.

[32] This is the proposition by *E.-W. Böckenförde*, Vorläufige Bilanz zum Streit um das Schulgebet, DÖV 1974, 253 et seq. and 257.

[33] The most recent decision is *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

[34] See notably *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and concerning school voucher programmes *Zelman v. Simmons-Harris* 536 U.S. 639 (2002).

[35] See among others *J. Isensee*, Bildersturm durch Grundrechtsinterpretation, in: H. Maier (Hrsg), Das Kreuz im Widerspruch, 1996, 9 et seq. and 11.

[36] See the overview given in: *Kommers* (note 3), 444 et seq.

worth taking into account the subject area in which the problem arises — namely elementary schools. Schooling is in many — if not all — legal orders a highly sensitive issue, because the cultural and moral formation of the generations to come is at stake. With the brief reference to the earlier school prayer decision, the relation between the Crucifix decision and the prior holdings of the Court in Church and State issues has already been alluded to.[37] One of the major criticisms concerning the Crucifix-decision was that it is allegedly at odds with the Court's earlier jurisprudence.

Apart from the already mentioned school-prayer case, three decisions from the 1970's concerning religious elements in public schools are on point. According to the German Constitution, decisions on schooling, i.e. the types of schools and the contents of the curricula, fall within the competence of the *Bundesländer*.[38] The German Federal Constitutional Court had the opportunity in the 1970's to rule on amended laws concerning public schools in Baden,[39] Bavaria[40] and North Rhine-Westphalia.[41] In the "southern" cases (Bavaria and Baden), the applicants argued that the respective reforms introduced allowed for too many religious elements in schools. The decision concerning the so-called non-denominational schools in Baden dealt with the question of whether parents had a constitutional right that their children be brought up in schools with a general religious background ("non-denominational school with Christian character"). The Court strongly emphasized the state's competence to decide on schooling issues. It then went on to describe the difficult triangle between the parents' constitutional right to education (including religious education!), the constitutional right of freedom of religion (which the Court saw primarily in respect of the children concerned) and the state's power to organize education in public schools. It noted that in a pluralistic society it is impossible that the state, when organizing public schools, manages to equally take into account all different wishes of the various parents. According to the

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[37] See above note 31 and the corresponding text.

[38] See generally on this point *R. Gröschner*, Art. 7 MN **52**, in: *H. Dreier* (Hrsg.), Grundgesetz, Kommentar, Bd. 1, 2. Aufl., 2004; especially with respect to the Crucifix decision, *M.-E. Geis*, Zur Zulässigkeit des Kreuzes in der Schule aus verfassungsrechtlicher Sicht, in: *Brugger/Huster* (note 2), 41 et seq. (53 et seq.).

[39] BVerfGE 41, 29.

[40] BVerfGE 41, 65.

[41] BVerfGE 41, 88.

Court, it is the task of the democratically elected legislator to find a balance between the positive and negative aspects of freedom of religion. In doing so, the legislator could take into account that reference to religious and spiritual influences was not generally excluded by the Constitution. The Court concluded that introducing the concept of non-denominational Christian schools was not as such prohibited. However, the legislation had to provide for solutions which reduced "coercive elements" to the absolute minimum necessary.

> "Being confronted with points of view, which admit the formative force of Christian thinking, does not lead to a discriminatory perspective on minorities not attached to Christianity if no absolute truths are conveyed but the building of the autonomous personality in the area of religion is the focus."

The Bavarian provision in question was more explicit in its orientation to Christian values than the one just referred to from Baden. It read:

> "Public elementary schools are common schools for all pupils required to attend elementary schools. In these schools pupils are educated according to the principles of Christian denomination. Details are regulated by the Elementary Schooling Act."

The Court resorted at the time to what is called in German "verfassungskonforme Auslegung". It interpreted the rather explicit provision in a manner which reduced its orientation on Christian values in order to keep it in conformity with the constitution.[42] According to the Court, a proper balance had to be struck between positive and negative aspects of freedom of religion. In doing so, the Court referred explicitly to the same arguments which were used in respect of the regulation in Baden.

Among the debates which were generated by the crucifix-decision, the question of whether it continued along the lines of the decisions just mentioned or whether it constituted a shift in the argumentation has been hotly disputed.[43] In its reading of the 1975 decisions, the majority emphasised the requirement of any reference to religious convictions as having to be introduced in a non-discriminatory and a non-compulsory manner.[44] On the basis of this interpretation, it concluded that the af-

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[42] BVerfGE 41, 65 (82 et seq.).

[43] See above note 35.

[44] "The affirmation of Christianity […] relates to acknowledgement of a decisive cultural and educational factor, not to particular truths of faith. But Christianity as a cultural factor includes the idea of tolerance for the other-

fixation of crosses in public schools *per se* violates the requirements set up in 1975:

> "The affixing of crosses in classrooms goes beyond the boundary thereby drawn to the religious and philosophical orientation of schools. As already established, the cross cannot be divested of its specific reference to the beliefs of Christianity and reduced to a general token of the Western cultural tradition. It symbolizes the essential core of the conviction of the Christian faith, which has undoubtedly shaped the Western world in particular in many ways, but is certainly not shared by all members of society, and is indeed rejected by many in the exercise of their fundamental right under Art. 4 (1) Basic Law."[45]

It is interesting to see that the important shift of interpretation which goes along with the 1993 Crucifix decision occurs within the doctrinal structures established by the 1975 decisions. The Court sticks to the then-established line, but arguably is stricter in its application. A reason for the difference in flexibility on the Court's part may be that it was confronted with structurally different cases. In 1975, it was dealing with the constitutionality of norms. In reviewing norms, resorting to the technique of interpreting the norms in question in conformity with the constitution is a possible solution. The consequence of such a decision is that the norms in question have to be applied in a specific manner. However, it is difficult to apply the same solution where the Court is not confronted with the interpretation of a norm but with a practice, i.e. the affixation of a symbol in public schools. While norms can be applied in conformity with the interpretation demanded by the Court, a practice is either constitutional or it is not. Resorting to an "interpreta-

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minded. Their confrontation with a Christianity-marked image of the world will not involve discriminatory denigration of non-Christian philosophies of life, at least as long as the object is not the conveying of beliefs but the endeavour to realise autonomous personality in the religious and philosophical sphere, in accordance with the basic decisions of Art. 4 Basic Law [cf. BVerfGE 41, 29 (51 et seq.); and 41, 65 (85 et seq.)]. The Federal Constitutional Court has accordingly pronounced the provision for Christian nondenominational schools in Art. 135, second sentence, of the Bavarian Constitution compatible with the Basic Law only when given an interpretation conforming with the constitution, cf. BVerfGE 41, 65 (66 and 79 et seq.), and has stressed in relation to the nondenominational school of Christian character in the traditional sense in Baden that this is not a bi-denominational school, cf. BVerfGE 41, 29 (62)", BVerfGE 93, 1 (23); translation as in note 1.

[45] BVerfGE 93, 1 (23 et seq.); translation as in note 1.

tion" of the practice may be manifest when the practice in question is the affixation of a symbol, which (as discussed above) is of course always open to interpretation. However, there is a clear difference between the two situations. The interpretation of norms in conformity with the Constitution leads to the individual being confronted with decisions that are in conformity with the Constitution. The "interpretation" of symbols in conformity with the Constitution requires that the individual concerned has to adapt his or her perception of the symbol – exactly what human rights protection intends to avoid.[46]

Conclusion

There can be little doubt that the issue of religious elements in public schools belongs to one of the most difficult areas of law. Almost all interests involved on the various sides are fundamental and hence the legal and political debate of these issues is a heated one in practically any given country. In this presentation, some of the American cases have been compared to the German crucifix decision. While there are many common grounds in the arguments used, an important difference needs to be emphasised. The difficulty in the U.S. lies in the fact that a religious society has had to live for many years with a constitutional approach that relies on a rather strict separation between church and state, especially in public schools. Hence, the tension was (and to some extent still is) one between the wants of a majority in society and the approach taken by the Courts. The cases seem to reflect a tendency to examine in detail the limits of the jurisprudence concerning the separation between church and state. In Germany, by contrast, the jurisprudence for many years had a tendency of accommodating the needs of the long-time predominant Christian churches. The relationship between church and state was consequently described as one of co-operation in partnership.[47] The crucifix decision received so much criticism in doctrine, because it was perceived as a move away from the traditional position of the Constitutional Court. At some years distance and with other less

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[46] This is an argument against the proposition of applying the doctrine of interpretation in conformity with the constitution to symbols proposed by *Isensee* (note 35), 21.

[47] *A. Hollerbach*, § 138: Grundlagen des Staatskirchenrechts, in: *J. Isensee/P. Kirchhof* (Hrsg.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Bd. VI, 2. Aufl., 2001, 476 et seq., MN 139 et seq.

controversial decisions having been rendered in between,[48] it seems that the decision cannot be seen as a sharp break with earlier decisions. The lines to these earlier decisions have been traced here. There certainly is a shift in the position taken by the Court, but one that occurs within the structures set up in 1975. Rather, the decision should be viewed as a first jurisprudential step of recognising the changing religious structures of German society. Some of the difficult issues related to the growing Muslim Community will be dealt with in the following "Hard Case II". As far as "Hard Case I" is concerned, the perspective at ten years distance is less agitated. Seen primarily in its legal structures, the case possibly was not really such a hard one, hence, the famous saying may also work in the reverse: after all, the law which it has produced was not so bad!

[48] See for instance BVerfGE 102, 370.

The Headscarf of a Muslim Teacher in German Public Schools

Hans Michael Heinig[1]

I. Introduction

The law lives in cases. Cases force us to concretize our legal principles and general rules and test them in real-life situations. Cases reveal to us which factual and legal constellations we have failed to consider sufficiently, and which constellations are still in need of a solution. Also, legal cases often consolidate issues and conflicts that involve society as a whole. The parties in court, then, litigate *pars pro toto* – that is, on behalf of the entire society.

Precisely, this phenomenon can be observed in the case of a teacher's headscarf in a German public school.[2] The legal conflict over the teacher's headscarf highlighted two issues on Germany's agenda: the

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[1] The author would like to express his thanks to *Joseph Windsor*, Max-Planck-Institute for Comparative Public Law and International Law, Heidelberg, and Prof. Dr. *Mark Weiner*, Rutgers School of Law, Newark, for their assistance with the translation.

[2] The leading case (Ludin - BVerfGE 108, 282; BVerwG, NJW 2004, 3581; BVerwG, NJW 2002, 3344; VGH Mannheim, NJW 2001, 2899; VG Stuttgart, NVwZ 2000, 959) is the subject of this article; a second case ended with an agreement at the Federal Administrative Court (see before the settlement OVG Lüneburg, NVwZ-RR 2002, 658; VG Lüneburg, NJW 2001, 767). The Muslim headscarves at issue in public schools also occupied the European Court of Human Rights, see EGMR, NJW 2001, 2871 (teacher in Switzerland); EGMR, EuGRZ 2005, 31 (schoolgirl in Turkey). A comparable conflict has been settled in the sphere of private law: the dismissal of a sales assistant due to her wearing a headscarf (see BVerfG, NJW 2003, 2815; BAG, NJW 2003, 1685; LAG Hessen, NJW 2001, 3650).

problem of political, anti-Western Islam and the problem of integration of immigrants, in particular those from countries strongly shaped by Islam. The media covered the case in depth; the body of academic commentary on the topic is barely manageable;[3] and a multitude of politicians weighed in on the topic.[4] Not only did the headscarf become a re-

[3] In English see *A. von Campenhausen*, The German Headscarf Debate, Brigham Young University Law Review 2004, 665; *M. Mahlmann*, Religious Tolerance, Pluralist Society and the Neutrality of the State, German Law Journal 4 (2003), No. 11 (http://www.germanlawjournal.com); in German more than 100 academic articles have been published in the last years. See e.g. on the decision of the Constitutional Court, *F. Hufen*, Der Regelungsspielraum des Landesgesetzgebers im Kopftuchstreit, NVwZ 2004, 575; *U. Battis/P. Bultmann*, Was folgt für den Gesetzgeber aus dem Kopftuchurteil des BVerfG?, JZ 2004, 581; *E.-W. Böckenförde*, Anmerkung, JZ 2004, 1181; *M. Morlok*, Der Gesetzgeber ist am Zug, RdJB 2003, 381; *U. Mager*, Der Kopftuchstreit vor dem Bundesverfassungsgericht, Religion – Staat – Gesellschaft 2004, 275; *J. Ipsen*, Karlsruhe locuta – causa non finita, NVwZ 2003, 1210; *U. Sacksofsky*, Die Kopftuchentscheidung, NJW 2003, 3297; *S. Baer/M. Wrase*, Staatliche Neutralität und Toleranz, JuS 2003, 1162; regarding the first decision of the Federal Administrative Court, *L. Michael*, Anmerkung, JZ 2003, 256; *M. Morlok/J. Krüper*, Auf dem Weg zum „forum neutrum"?, NJW 2003, 1020; *G. Neureither*, Anmerkung, JuS 2003, 541; see in general *G. Sydow*, Religiöse Symbole im Öffentlichen Dienst, ZG 2004, 313; *G. Britz*, Das verfassungsrechtliche Dilemma doppelter Fremdheit, KJ 2003, 95; *C. Goos*, Kruzifix und Kopftuch, ZBR 2003, 221; *S. Huster*, Warum die Lehrerin (k)ein Kopftuch tragen darf, in: FS für Tsatsos 2003, 215; *S. Muckel*, Gleicher Zugang zu jedem öffentlichen Amt, FS für Christoph Link 2003, 331; *M. Triebel*, Kopftuch und staatliche Neutralität, BayVBl. 2002, 624; *J. Rux*, Der Kopftuchstreit und kein Ende, ZAR 2002, 366; *E.-W. Böckenförde*, „Kopftuchstreit" auf dem richtigen Weg?, NJW 2001, 723; *N. Janz/S. Rademacher*, Das Kopftuch als religiöses Symbol oder profaner Kleidungsgegenstand, JuS 2001, 440; *S. Mückl*, Religionsfreiheit und Sonderstatusverhältnisse, Der Staat 40 (2001), 96; *M. Jestaedt*, Grundrechtsschutz vor staatlich aufgedrängter Ansicht, FS für Listl 1999, 259; *K.-H. Kästner*, Religiös akzentuierte Kleidung des Lehrpersonals staatlicher Schulen, FS für Heckel 1999, 359; see also the book-length works by *S. Rademacher*, Das Kreuz mit dem Kopftuch, 2005; *S. Mann*, Das Kopftuch der muslimischen Lehrerin als Eignungsmangel im Beamtenrecht, 2004; *S. Lanzerath*, Religiöse Kleidung und öffentlicher Dienst, 2003.

[4] See, especially, the speech of the Federal President *J. Rau*, Religionsfreiheit heute, epd-Dokumentation Nr. 6 (2004), 4-6; (for an overview of the different political statements [Federal Chancellor *G. Schröder*, President of the Bundestag *W. Thierse*, Prime Minister of Bavaria *E. Stoiber*, State Minister of Education in Baden-Württemberg *A. Schavan*, and others] see http://www.bpb.de/themen/NNAABC,0,Konfliktstoff_Kopftuch.html [20/9/2005]).

ligious symbol, but also the controversy over the headscarf became symbolically charged.[5]

At the outset, then, it seems appropriate briefly to address the general political and cultural significance of the case before I turn to the hard legal issues involved.

(1) The Story Behind the Leading Headscarf Case

In order to better understand the symbolic, meta-legal dimension of the legal proceedings about the headscarf, we should first look to the history of the case.[6] The name of the Muslim woman who took the headscarf-case to court, and thereby found a place in the annals of German legal history, is *Ferestha Ludin*. She was born in 1972 in Afghanistan and has lived in Germany since 1987. She has been a German citizen since 1995. Following her university studies, she was accepted to the state preparatory service for grade school teachers in Baden-Württemberg; however, after passing the second state examination in 1998, she was not taken-on permanently as a public school teacher. In failing to hire Ms. Ludin, the school board could not, and did not intend to, suggest that she would misuse her teaching position for purposes of Islamic indoctrination, nor that she supported religiously-motivated violence, nor that she would tacitly advocate a strict Islamic lifestyle within the classroom. Instead, the decisive factor for the school board was that she was not willing to refrain from wearing a headscarf during instruction. Thus, she lacked the necessary "personal aptitude".

At the various levels of administrative jurisdiction, Ms. Ludin was unsuccessful in challenging the rejection of her application for permanent placement.[7] Yet she achieved partial success before the Federal Constitutional Court: it remanded the case to the Federal Administrative

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5 The mere fact that a Muslim woman wears a headscarf is not in and of itself to be seen as religious symbolism. She is simply fulfilling an obligation stemming from her faith, as she understands it. In this sense, the headscarf can be differentiated from the Christian cross worn on a chain around the neck. The headscarf, however, has gradually become symbolic, as it became an instrument of intra-Islamic cultural struggle, following the Iranian Revolution.

6 See BVerfGE 108, 282 (283-286); *H. Oestreich*, Der Kopftuchstreit, 2004, 45-81; *J. Kandel*, Auf dem Kopf und in dem Kopf, 2005, 21-24.

7 See note 2.

Court because there was no legal basis for the non-placement of a teacher based on religious dress. The state of Baden-Württemberg passed such a statute at once,[8] so that the Administrative Court again rejected the complaint.

During the legal proceedings, which were backed by Germany's Central Council of Muslims and the labor union Verdi, among others, Ms. Ludin put forward varying reasons as to why her wearing the headscarf was indispensable. At first she claimed, the headscarf was constitutive of her personality, and that she would be robbed of her dignity without the covering, but she later emphasized her religious motivations. This shift in argument was not accidental. It allowed Ludin to avoid the unpleasant question of whether all (Muslim) women who do not wear a headscarf therefore lack dignity.

At least politically Ludin further opened herself to attack by categorically rejecting any form of compromise (for example, during oral proceedings before the Federal Constitutional Court) while simultaneously calling for tolerance from parents, children, and professional colleagues. From the very beginning, she refused to acknowledge the religious interests of third parties in the matter – for instance, a student's right to be free from the effect of the headscarf's religious appeal.

It is also remarkable that, during the lawsuit, Ms. Ludin began working for a private grade school belonging to the Islamic Federation in Berlin – an organization closely associated with the Islamist group Milli Görus.[9] Confronted with this fact, Ludin responded on record that she had been completely unaware of the school's background. Whether such a claim is credible, each must decide for themselves. At any rate, it certainly demands extraordinary skepticism: either Ludin knowingly began employment with a dubious private school, categorized as Islamist, which would mean she was publicly untruthful, or she is profoundly naïve. In either case, the state would be well advised to do without such personnel.

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[8] Gesetz zur Änderung des Schulgesetzes vom 01.04.2004 (GBl. S. 178).

[9] On Milli Görus see the Report of the Department of the Interior about the protection of the constitution 2004; *Bundesministerium des Inneren*, Verfassungsschutzbericht 2004, 213-219.

(2) The Sociopolitical Landscape and the Headscarf Case

Yet, interestingly the concrete factual case itself hardly played a role in the legal dispute, in its media coverage, or in legal academic debate. The general desire was for a fundamental, landmark decision. Thus, the dispute quickly detached from the specific person and made its way onto the sociopolitical stage. Two trends could be observed in the process. First, varied groups put forth political and cultural arguments which can easily be converted into legal positions – an issue to which I will return. Second, a specific sociopolitical preference does not correspond to a specific meaning of the teacher's headscarf; rather, the headscarf constantly found supporters and opponents in highly varied social circles with arguments pro and con specific to each milieu. This peculiarity defines the debate and may at the same time offer an explanation for the unique difficulty in finding a satisfying, definite and persuasive solution to the headscarf controversy.[10]

For instance, advocates of a multicultural social ideal underscore the equal rights and values of all cultural expression; according to such critics, then, the strictly Islamist teacher must also receive a position in the school. At the same time, left liberals, who generally otherwise give voice to multiculturalism, yet here displayed a certain discomfort at the way of life and political orientation associated with the headscarf. They worry over the radically antiliberal orientation of political Islamism. Closely related to this position are proponents of emancipatory lifestyles, especially feminists. They view the headscarf as an expression of sex-based social subordination.[11] At the same time, though – remarkably – postmodern feminism might associate the headscarf with the desexualization of the social world and thus welcome it as an expression of sexual indisposability. Similarly, others emphasize that by all means a teacher with a headscarf integrated into modern professional life exhibits emancipatory assertions. A prohibition on headscarves for teachers, on this view, would pressure Muslim women away from employment and solidify the stereotype of the Anatolian housewife in the Diaspora, isolated from social contact.

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[10] The different sociopolitical positions are outlined in *Kandel*, note 6, and in *Oestreich*, note 6; see also in the internet http://www.bpb.de/themen/NNAABC,0,0,Konfliktstoff_Kopftuch.html (login: 20/09/2005).

[11] A prominent representative of this position is the editor of the feminist magazine EMMA, *Alice Schwarzer*.

And then there are those who argue vehemently against the headscarf. Occasionally, some make vociferous warnings about the "Islamic cultural import" into the "Christian Occident".[12] Such voices can be heard especially from church-related groups. Other actors, close to the church, however, resolutely emphasize the right to equal protection within a system based on a pro-religion interpretation of the German constitution (the Basic Law).[13] Here, the dominant concerns involve the banishment of religion, in its entirety, from the *espace public*. In opposition to such a stance, above all in formerly Communist eastern Germany, supporters of a laical reorientation of the Federal Republic have antireligious motivations. And, finally, the "etatists" pack into the battle, worried about disruptions to the educational system and threats to state neutrality by a headscarved teacher.

II. Legal Issues

The myriad sociopolitical arguments for and against the headscarf translate into a variety of legal positions.[14] While collision between legal positions naturally is the general rule, in certain circumstances, these legal conflicts are irresolvable – that is, a sober-minded consideration of the arguments and counterarguments finds the scales so evenly balanced that a single, persuasive, quasi-evident resolution cannot honestly be posited. It seems that the teacher's headscarf is just such a situation.

(1) Teachers' Religious Freedom & Nondiscriminatory Access to Public Facilities

It goes without saying that the fundamental rights of the teacher militate in favor of permitting the headscarf, and foremost the freedom of religion (Article 4, paragraphs 1-2 Basic Law). This fundamental right guarantees the freedom to have and cultivate a faith, to manifest it out-

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[12] *C. Hillgruber*, Der deutsche Kulturstaat und der muslimische Kulturimport, JZ 1999, 538.

[13] *E.-W. Böckenförde*, Mit dem Unvertrauten vertraut werden, FAZ Nr. 164 (17.07.2004), 41.

[14] *Huster*, note 3, 217-221; *H. M. Heinig*, Was ist unter Religionsfreiheit zu verstehen?, epd-Dokumentation 2004,Nr. 50, 5 (13).

wardly, and to live according to it – to orient one's entire life toward religious doctrine.[15] In wearing the headscarf, the believer is persuaded that she is fulfilling a religious obligation; she considers the headscarf an expression of her religious beliefs. It thus represents both a profession and a practice of religion.

Yet the schoolteacher appears in her role as public official, that is, as civil servant. Fundamental rights such as the freedom of religion classically are protected rights as *against* the state. The teacher, however, is functionally interwoven *with* the state. The freedom of religion she enjoys in her personal life and development, therefore, can only be taken into limited consideration in the context of her civil service.

The degree of this reduction is hotly debated.[16] Even if at one time it could have been assumed or maintained that in Germany fundamental rights were not valid in special status (military, prison, school, civil service), the notion has been prevalent for quite some time that fundamental rights cannot be excluded from any state area. Therefore, there cannot be a complete restriction on the exercise of fundamental rights, not even in special-status situations such as the civil service; the interests of the public official cannot be *a priori* excluded. Still, the civil-servant status brings with it a moderation requirement that limits the exercise of fundamental rights. This required moderation must be concretized separately for each sector of public service. The pedagogical sector *per se* permits greater discretion for individual development than in military service or the judiciary. In the context of a military deployment, for example, a refusal to follow orders for religious or conscientious reasons must be the absolute exception, if the integrity of the entire Armed Forces is to be maintained.[17] And, in the judiciary, claiming one's own

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[15] BVerfGE 108, 282 (197); in general *H. M. Heinig*, Öffentlich-rechtliche Religionsgesellschaften, 2003, 119-130; *H. M. Heinig/M. Morlok*, Von Schafen und Kopftüchern, JZ 2003, 777 (778-780), which contains further citations to judicial decisions and academic literature.

[16] See e.g. on the one hand BVerfGE 108, 283 (297-314), and on the other hand *id.*, 314-340 (dissenting opinion).

[17] The Federal Administrative Court, however, is of a different opinion. In the case BVerwG, NJW 2006, 77, see further: *M. Droege/A. Fischer-Lescano*, NVwZ 2006, 171, a soldier of the German Federal Armed Forces refused his services due to conscientious reasons. In his opinion, the duties that he performed (development of standardized application software) were indirectly supporting the US war in Iraq, which was in his way of thinking a violation of the law of nations. The Federal Administrative Court has rescinded the disciplinary sentence, since it is a soldier's right to refuse services due to conscien-

fundamental rights obviously does not relieve one from the duty to act in accordance with the law. However, a teacher's individuality and personality cannot be erased from the classroom. This, in turn, tends to leave a greater margin for observance of fundamental rights. A public schoolteacher may therefore call upon her fundamental right to freedom of religion, although only with certain limitations contingent on the public position.

Nonetheless, Article 33 (3) of the Basic Law provides the teacher with comprehensive constitutional protection. The norm prohibits religious discrimination concerning access to public office; placement must occur independently of religious affiliation, and adherence or non-adherence to any religion may not become a disadvantage. Here, one might even be tempted to interpret the term *affiliation* broadly, so as to comprehend the direct and indirect avowals of faith, involved in the religiously motivated wearing of an article of clothing.[18]

(2) Parents' and Students' Rights

The teacher's constitutional rights are of course not protected absolutely; instead, they must be weighed against the fundamental rights of parents as well as students.[19]

Freedom of religion positively protects the right to have a faith and to act accordingly, but it also protects negatively *against* being forced to exercise religion and *against* coercive confrontation with religion.[20] Students are subject to compulsory education and thus cannot avoid the teacher's headscarf as a religious symbol. If negative freedom of religion protects students from having to "study beneath the cross", as the Federal Constitutional Court forcefully formulated it,[21] then it also protects against the permanent, unavoidable, state-sponsored confrontation

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tious reasons. Therefore a soldier's freedom of consciousness cannot be suppressed by the Army's protected interest of its functionality; both protected interests are rather to be balanced preservingly, according to the Federal Administrative Court.

18 *Heinig/Morlok*, note 15, 784.

19 BVerfGE 108, 282 (299-301).

20 BVerfGE 93, 1 (15-17); 108, 282 (301-302).

21 BVerfGE 93, 1 (18); see to this decision *C. Walter*, in this book.

with other religious symbols. This is true in particular when such symbols are not discreet and inconspicuous.

Similarly, the Basic Law safeguards parents against objectionable religious influence on their children in public schools. Article 6 (2) of the Basic Law states that the care and upbringing of the children is the natural right of the parents. This right of education includes decisions on the religious shaping of the child's education and the insulation of the child from what they believe to be damaging religious influences.

(3) State Neutrality

The state's religious-worldview neutrality would also seem to argue at first against the headscarf worn by the teacher. The state is the common home of all citizens and constitutionally may not identify itself with any specific religion. Such an impression could arise where civil servants perform their service while outfitted with a religious symbol. But the religious and worldview neutrality of the state also may not turn against a specific religion. To ban the headscarf exclusively would therefore be problematic as well.

It should further be noted that very different forms of neutrality are thinkable: from the strict division of church and state, a wall of separation, to open neutrality that would permit a space for citizens' various religions within the state sphere.[22] Thus far, the Basic Law has been interpreted with a "religion-friendly" understanding of neutrality and a refusal of laicism, as practiced in France.[23] The state and religious groups, thus, are reciprocally oriented toward each other, as shown by examples such as religious instruction in public schools (Article 7 [3] Basic Law) and the status of religious groups under public law (Article 140 Basic Law, in connection with Article 137, paragraphs 5-6, Weimar Constitution). Admittedly, the potential for conflict with the state's openness to the faiths of its citizens was also lower when more than 90% of the German population still belonged to one of the two Christian churches. Such times have passed. Germany's religious pluralism

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[22] See *Huster*, note 3, 220-230; for the constitutional concept of neutrality in religious issues see also *S. Huster*, Die ethische Neutralität des Staates, 2002; *S. Huster*, Der Grundsatz der religiös-weltanschaulichen Neutralität des Staates, 2004; *Heinig*, note 15, 176, all with further references.

[23] See *Heinig*, note 15, 43-45 and 176-180.

could therefore lead to an altered conception of neutrality in certain sub-areas.[24] But one should be careful at this point. Both the principle of neutrality itself and the Kantian idea of equal freedom support the constitutional theoretical primacy of a reciprocal, open, friendly interaction between religious groups and the state.[25] In contrast, a strict separation *à la française* should be the exception. Only if reciprocal recognition and freedom (including public effects within the state sphere) cannot lastingly bring about religious peace in subsectors such as the school, is it (then) possible to imagine that the weight of argumentation would, in the long term, shift toward a model of stricter separation.

(4) Symbolic Ambiguity of the Headscarf

Further constitutional issues arise from the symbolic ambiguity of the headscarf.[26] In Iran and Turkey as well as in European migrant circles, it stands in part for a political Islam which gives little weight to open democratic elections, the concept of fundamental rights inherent to all human beings, the separation of church and state, and the equality of all religions. This Islam cannot be reconciled with the Basic Law, so the headscarf wanders into the hazy territory of unconstitutional symbols. A militant democracy can justifiably expect that its civil servants refrain from wearing an (at least) symbolically ambiguous piece of clothing. At the same time, a sort of collective liability for individual believers must also be avoided. If fundamental rights and the rule of law, especially the principle of proportionality, truly pursue the concept of protecting the individual in all his or her particularity, then a constitutional analysis of a teacher's headscarf should also sufficiently consider the individual motivation for wearing the headscarf.

Similar questions follow from the many possible interpretations of the headscarf as regards the above-mentioned equal rights of men and women. A fundamentalist Islam does not attribute the same participatory opportunities to the sexes, insisting instead on a traditional allocation of gender roles. The headscarf, then, is supposed to reflect these

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[24] BVerfGE 108, 282 (309-310).

[25] *Heinig*, note 15, 31-52 and 176-180.

[26] BVerfGE 108, 282 (303-304).

beliefs visually. Article 3(2) of the Basic Law, in contrast, requires the state to promote the equal rights of men and women.

(5) Suggested Solutions

In light of the myriad of constitutional aspects for and against the headscarf in the classroom, it comes as no surprise that legal scholars have advocated, and continue to advocate, all imaginable outcomes: from the unconstitutionality of a headscarf ban to a demand for case-by-case evaluation, from a prohibition of headscarves when parents and students protest to a constitutionally-obligatory ban on headscarves. Some would even attempt to differentiate between Christian and non-Christian symbols.

But, until the Federal Constitutional Court's judgment, one notion had found little support, namely, the notion that there might not be a single correct solution to the case, but that the Basic Law's framework of constitutionally acceptable action permits of a certain political, discretionary leeway. *Stefan Huster* published thoughts along these lines shortly before the Court handed down its opinion in 2003, and *Martin Morlok* and I added our voices to this approach.[27] Accordingly, it is not the Federal Constitutional Court, but the democratically elected legislature that is called on to make the general decision on the teacher's headscarf.

III. The Federal Constitutional Court's Judgment on the Teacher's Headscarf

(1) Content of the Decision

Precisely this approach was taken by the majority of the Federal Constitutional Court's Second Senate, which presided over Ludin's case. According to the Court, the legislature has, in principle, to define more closely the criteria for aptitude in public service. In the case of a Muslim teacher with a headscarf, the lawmaker must respect constitutional limitations – the freedom of religion and the guarantee of access to public positions without discrimination based on religious affiliation. These rights belonging to the teacher, then, must be weighed against the nega-

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[27] *Huster*, note 3; and *Heinig/Morlok*, note 15, 785.

tive freedom of religion of the students, the parents' right to educate their children, and the state's duty to supervise the school system [Article 7 (1) Basic Law]. The Court held that the task of balancing these two sets of interests is incumbent on the democratic lawmaker (here, the federal States). However, without a specific legal basis, the non-placement of the teacher due to her headscarf was unconstitutional.

The Court reasoned that, so long as the legislator tolerates a teacher's wearing of a headscarf, it would not *per se* be seen as state identification with a particular religion.[28] The headscarf did not represent a concrete, constant endangerment of peaceful school operation, although such an endangerment could not be ruled out for all time and in all cases. The Court held that an "abstract danger" exists,[29] and the lawmaker would thus have to conduct a prognosis to measure the degree of such threats. For this, the lawmaker may consider the objective appearance of the headscarf and its effect on third parties and may also abstract from the wearer's concrete motivations.[30]

The Constitutional Court's decision expressly permits the federal States "to arrive at varying outcomes, since the appropriate middle course may also incorporate school tradition, the denominational composition of the population and the degree to which it is religiously rooted".[31] The Court thereby consciously accepts that extremely different regulations might be adopted in the sixteen federal States. This has effected some criticism. However, if one accepts the Court's premises that varying resolutions can be constitutional and at the same time that the States are to make the decision, albeit within the framework of constitutionally permissible regulations, then the possibility of divergence among the States is unavoidable.

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[28] BVerfGE 108, 282 (299-301 and 305-306).

[29] BVerfGE 108, 282 (303).

[30] A dissenting minority of the Court's Second Senate would have held the then-present regulations of civil-service law to be sufficient to justify the complainant's non-placement. A separate headscarf-provision was not necessary, they reasoned, and public officials could raise their fundamental rights only to the degree that the position's specific legalities allow. The teacher's headscarf, in the concrete case, violated the civil servant's duty of moderation – a duty which can directly be drawn from the constitution – since the headscarf was objectively suited to "bring about impediments to school operation or even conflicts in the school relationship with implications for fundamental rights" (author's translation); BVerfGE 108, 282 (314-340).

[31] Author's translation; BVerfGE 108, 282 (303).

The critics of the Court's decision, however, are correct insofar as they fault the Court for failing to offer any significant assistance in actually shaping permissible regulation.

(2) Problems of the Decision

a) Is Really Every Solution Constitutional?

A close reading of the judgment gives the impression that, not only multiple, but virtually all imaginable solutions to the issue would fit equally well with the Basic Law. In this sense, the margin of discretion seems overextended. Following its holding on the crucifix in the classroom, the Court should have, at the very least, ruled out an unconditional right on the part of the teacher to realize her religious interests. In weighing the teacher's interests against the conflicting fundamental rights of the students and parents, the teacher necessarily must be in the structurally weaker position. The teacher voluntarily enters the educational field; she or he has freely chosen this career with the state as employer.[32] In contrast, the students are subject to mandatory attendance without any possible alternative. Their freedom of religion would be completely repressed, were teachers able to assert their religious interests in the school in every instance and without consideration of the interests and rights of students, parents and colleagues. Therefore, for the sake of safeguarding the fundamental rights of third parties, a public schoolteacher can and must be required to refrain from wearing a headscarf or other religious garments in school in cases of serious conflict, motivated by religion or worldview. Put simply: whoever would teach tolerance cannot merely demand tolerance, but must also personally live it. In Ms. Ludin's case, this required minimum was evidently not met.

Furthermore: If one follows the line of logic sketched here, this would also function to "expose" fundamentalist teachers with headscarves. If a teacher is willing, when needed, to defer observance of a rule that is considered religiously obligatory, such as the wearing of a headscarf, she thereby necessarily displays a modern, democratic understanding of religion. That is, she will not absolutely insist upon her own, (certainly)

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[32] In this regard, the teacher's constellation of fundamental rights is substantially different than that of a student who wears a headscarf; a total headscarf ban in public schools would undeniably be unconstitutional in Germany.

sincere faith in all circumstances and irrespective of the rights of third parties.

A consequence of the here-presented considerations is that the rejection of an applicant, who under no circumstances would forego wearing her headscarf during instruction, actually required no specific legal justification. Indeed, the civil servant's duties to the law, moderation and neutrality would have sufficed. Thus, the Constitutional Court's reasoning, albeit well-founded in large part, is doubtful on this point. The Court assumes that specific legal regulation would be required for any case of non-placement on account of a headscarf. Such a requirement, in my opinion, would only be valid if the framework of constitutional permissibility were defined by state-specific solutions. Yet the Basic Law already prohibits one specific solution to the conflict – i.e., the solution of conceding extensive priority to the teacher's interests. In this regard, specialized regulation is not required for what is self-evident. Consequently, the provisions of civil-service law would have been sufficient.

b) Constitutional and Unconstitutional Differentiations

Regrettably, the Federal Constitutional Court neither made such clarifications and differentiations nor supplied further detail on state-law implementation. All the same, it did affirm that civil-service duties that interfere with freedom of religion must "respect the imperative of equal protection for the various belief systems".[33] Accordingly, the prohibition of religious discrimination is to be interpreted restrictively. An explicit differentiation between Christianity and other worldviews, between Christian and other symbols, would be unconstitutional.

Thus, it is not unproblematic that, in the wake of the Court's ruling, some federal States have adopted exception clauses in school statutes for the display of Christian and Occidental values and traditions.[34] To the degree that they specifically intend to prefer a Christian teaching staff, they contradict the judicial guidelines. So it is not justifiable to forbid explicitly the wearing of a headscarf, while permitting a teacher to wear

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[33] Author's translation; BVerfGE 108, 282 (313).

[34] So (in different ways) in Baden-Württemberg (§ 38 II Schulgesetz), Hessen (§ 86 III Schulgesetz) and Bavaria (Art. 59 § 2 Gesetz über das Erziehungs- und Unterrichtswesen). For an overview of the legislative measures in the States see http://www.uni-trier.de/%7Eievr/kopftuch/kopftuch.htm (login: 20/09/2005).

a visible cross. Accordingly, the Federal Administrative Court's second judgment on the headscarf issue upheld Baden-Württemberg's exception clause as constitutional, as it does not prefer any specific religion, but only allows the classroom display of the world of values that has emerged from Christian-Occidental culture.[35] In this sense, it permits a didactic illustration of Christian symbols but *not* the profession of a Christian faith on the teacher's part. Consequently, for instance, a nun who teaches at a public school must also refrain from wearing her habit except during religious instruction.[36] Likewise, a Jewish public schoolteacher may not wear a yarmulke.

Sure enough, the Constitutional Court's decision leaves the question open, whether *nonreligious* differentiations in dress code for teachers would be acceptable. Two cases, in particular, are imaginable: first, some symbol might disrupt the peaceful operation of the school, or second, a symbol's objective appearance and its potential effect may be seen as an unconstitutional symbol.

The first differentiation plays a role when teachers are forbidden by law from wearing religious symbols that are objectively suited to upset school order.[37] Similarly, such a differentiation plays a role when case-by-case decisions are made, for example, when the headscarf is generally permitted and prohibited only after students and parents object, or when the headscarf is preventively forbidden and permitted in specific cases. All three constellations involve differentiation based not expressly on religious grounds but on some other conflict or tension in the school.

The second differentiation focuses on possible expression that in itself is hostile to the constitution, leading to bans on symbols that are seemingly repugnant to the constitution and educational goals.[38] Here, too, the state does not evaluate the religious statement, as such, and does not differentiate in terms of religious doctrine and content; rather, the state looks to potential outward effects. In this respect, such constitutional

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35 BVerwG, note 2 above.

36 See VG Stuttgart, NVwZ 2006, 1444.

37 Such clauses exist in nearly every State which enacted legislation after the Constitutional Court's decision, so in Baden-Württemberg (§ 38 II Schulgesetz), Hessen (§ 68 II Beamtengesetz, § 86 III Schulgesetz), Bavaria (Art. 59 § 2 Gesetz über das Erziehungs- und Unterrichtswesen), Bremen (§ 59b IV Schulgesetz).

38 See note 37 above; also Lower Saxony (§ 51 III Schulgesetz).

safeguards in the behavior and dress codes for schoolteachers are not directed against a particular religion; instead, they discriminate according to the negative, outward, objectively determinable impact. The latter – as the Constitutional Court has repeatedly stressed – does not contravene the state's neutrality of religion and worldview. When religious regulation is understood not only as cultural law but also as regulation of social dangers, such state action even becomes almost imperative in a militant democracy.

It seems to me that such religion-unspecific differentiation is certainly permissible, if properly applied, that is, with due respect for the freedom of religion and the principle of equality, and where compelling, constitutionally legitimate reasons exist. Examples of such reasons would be, on the one hand, peaceful school operation and, on the other, the civil servant's duty of political moderation, rooted in the state's duty of neutrality, or the structural principles of the Basic Law as a whole.

The federal State of Berlin operates without differentiation.[39] There, the wearing of any religious symbols for all public servants in schools, by the police and in the judiciary is forbidden. From the perspective of constitutional theory, or at least of constitutional politics, one might ask whether this solution satisfactorily implements the system for weighing interests outlined above, whether such a generalized ban is compatible with a secular, but non-laical legal system that is to be religiously open and friendly. The Basic Law, at least as traditionally interpreted, establishes a religiously open system of reciprocal interaction, and there are good reasons to follow such an interpretation. As a consequence, then, the lawmaker should carry the burden of proof as to whether religious conflicts with this legal model can no longer be controlled due to the specifics of the situation (for example, increased pluralization or serious cultural and religious tensions between subpopulations). A laical total ban on religious symbols for civil servants, especially in school, should therefore be considered only *after* the other solutions discussed here.

IV. Conclusion

The debate on the public schoolteacher's headscarf is highly complicated due to its strong sociopolitical implications. It thus makes sense that the Federal Constitutional Court deferred the question to an inter-

[39] §§ 1, 2 Gesetz zu Artikel 29 der Verfassung von Berlin.

nal social compromise and thereby ultimately to the democratically legitimate lawmaker. While the Court refuses to make a substantive decision, it simultaneously resists the temptation to act as an *ersatz* legislator.

At the same time, the Court could and should have more clearly defined the contours of constitutionally-valid regulation of the headscarf: a) the case-by-case solution (objection or preventive ban with permitted exceptions), and b) the prohibition of symbols that threaten school operation, or c) the situation where they can be understood as objective expressions of beliefs hostile to the Constitution. Whether a laical total ban would also always be permissible is doubtful. In any event, a proper interpretation of the Basic Law eliminates an unconditional authorization of religious symbols within the realm of public service.

Largely unaddressed in the controversy over the headscarf, European law entails numerous provisions on equal access of women and men to employment (Article 141 ECT and directives) and a prohibition of religious discrimination in employment and occupation (Directive 78/2000/EC). Depending on its form, a headscarf ban for teachers may conflict with these guidelines.[40]

And it is only a matter of time before the Constitutional Court will have to deal with the federal States' regulations in terms of their reasonableness and discriminatory character. Obviously, the last word in the debate over the headscarf in public schools has yet to be spoken.

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[40] *Mahlmann*, note 3, marginal note 31.

Religious Garments in Public Schools in Separation Systems: France and the United States of America

Dagmar Richter

I. Introduction

1. On Separation and Neutrality

This article will examine the impact that so-called "separation systems", in particular the French and the U.S. systems, have on the range of the freedom of religion. It is characteristic of such systems that the state keeps separated from the church in all respects, namely refrains from financing churches, using its agents, displaying religious signs in public buildings, etc. Focusing on the right to wear religious garments in public schools, either by students or by teachers, this study tries to analyse similarities and discrepancies in a closely-defined field, which is specific enough for comparative analysis and yet also allows for some further conclusions about the significance of the separation system.

Separation as an instrument to free the state from religious influence can be described as the strictest form of neutrality, which not only tends to keep the same distance (equidistance) from all religions but simply avoids any contact that might be regarded as non-neutral. In a purist view, one may even find that real neutrality can only exist in a separation system, for it is either pure or not: If a state calls itself 'neutral' but co-operates with the religious communities in public affairs, it may of course declare to be exercising something like "positive neutrality"[1] in the over-all perspective, but unavoidably must compromise neutrality

[1] For details see *S. Monsma*, Positive Neutrality, 1993.

in the single case. Moreover, such neutrality remains a theory, because nobody can verify whether each single religious group would really have been treated equal ("neutral"), if it is the balance account which should count alone. Therefore, the concept of separation denying co-operation with all religious communities must not be limited to the term of "negative neutrality" as if it were the bad one among two different forms of neutrality. It may rather be regarded as what it is: clear and uncompromised neutrality.

2. Separation as a Means of Reform

Although isolated elements of the idea of separation can be found even in the early history of religion,[2] a comprehensive concept of separation emerged only much later as a means of reform by eliminating conservative clerical impact from the state in order to install a secular regime of democracy. This idea was developed in the era of enlightenment and realised for the first time in revolutionary France, though not for long. The reformers first had to learn that a separation system can only be introduced if there is an organised society (state) which has the capacity to provide for all facilities society needs without the help of the church: Good governance including public education on public expenses, but also obedience to the laws and community spirits that keep a society together, something which in Revolutionary times had not yet reached the stage of nationalism. Separation, thus, marks a period of transition from a pre-national society that is being linked by a common religion to a secular and gradually more liberal society. It puts an end to the long-lasting symbiosis of the crown and the church, where the crown had granted protection to the church and its agents while the well-organised church had overtaken public administration, the whole of it being legitimised by the almighty.

3. Laicism as a Means of Hasty Transformation

The most radical form of a separation system is laicism, which rules the church-state relationship in France, in some of the French-speaking

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[2] See, e.g., Matthew 22:21 ("Give therefore to the emperor the things that are the emperor's, and to God the things that are God's.").

cantons of Switzerland[3] and in Turkey.[4] It usually occurs where a long-lasting entanglement of an *Ancien Régime* with a specific religious community is to be dissolved suddenly and thoroughly in order to quickly reach what we call a "modern state". In doctrine the rise of laicism has been explained as being a means of transformation in a mono-religious society.[5] But there is also an element of dramatic change which may be due to a pressing need for reform. Whereas the dominant church (e.g. the Roman Catholic church in France) had formerly participated in the state and religion had legitimised state action, the laic state suddenly redefines and reshapes itself on a secular basis. In this respect laicism may be described as a means of hasty reform being implied by a secular elite onto a still traditional-minded population.

II. France

1. The History of Laicism and Religious Freedom

The French Republic, due to its anti-clerical and revolutionary tradition, has always been cautious in its approach to freedom of religion. This freedom was always suspect to encourage the agents of the Roman Catholic Church to regain former influence. Accordingly, Article10 of the Declaration of the Rights of Man and Citizen of 1789[6] only referred to the freedom of religious expression:

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[3] See Judgment of the Swiss Federal Court of 12 November 1997, Entscheidungen des Schweizerischen Bundesgerichts/Arrêts du Tribunal Fédéral Suisse (BGE/ATF), vol. 123 I, 296 et seq. (*X. contre Conseil d'État du canton de Genève* [in French]); European Court of Human Rights, Appl. No. 42393/98 (*Dahlab v. Switzerland*), Reports 2001-V.

[4] See Art. 2 of the Constitution of the Turkish Republic of 1982 (accordingly Art. 2 of the Constitutions of 1924 and 1961). For details pertaining to the wearing of religious garments in public institutions see European Court of Human Rights, Judgment of 29 June 2004, Appl. No. 4474/98 (*Şahin v. Turkey*), §§ 27 et seq.

[5] See *C. Gusy*, Kopftuch – Laizismus – Neutralität, Kritische Vierteljahresschrift (KritV) 2004, 153, at 155 et seq.

[6] Published in English by the Avalon Project at Yale University. See www.yale.edu/lawweb/avalon/rightsof.htm (visited on 1 April 2007).

> "*Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi.*"
>
> "Nobody shall be disquieted because of his opinions, even if they are of a religious character, provided that their manifestation will not disturb public order as being established by the law."[7]

Although this provision never entered into force, it became part of later Constitutions such as the contemporary Constitution of the French Republic of 1958.[8]

The concept of laicism[9] can be traced back to the late 18th century. In the context of the French Revolution, representatives of the Roman Catholic clergy had to pledge an oath of loyalty to the State (1790) and suffered oppression and even brutal violence. Nevertheless, only indirect clauses on laicism could be found in the French Constitution of 1795. The new regime tried to establish a non-religious rather than an anti-religious state ideology: After the Revolution had been settled France, in the context of Napoleon's coronation plans, concluded a Concordat with the Holy See (1801) and in the post-Napoleonic period even more openly returned to a system of collaboration.

The real laic movement occurred only in the late 19th century, when the French Third Republic was suffering from a severe "clash of cultures": While Catholic conservatives wished to continue the traditional collaboration between the State (the Monarchy) and the Catholic Church, democrats wished to terminate such entanglement once and forever. This period has been named as the era of 'anti-clericalism' (*Kulturkampf*). Particularly in the field of education, the point of controversy was whether public schools without – or rather with – Catholic influence were to be considered as reigned by the devil.[10] It was a time when modern states were acquiring the capacity of running public schools without assistance by the Churches. After all, Laicism as a cornerstone of the Republican compact ("*la laïcité, pierre angulaire du pacte répub-*

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7 Translation by the author.

8 See *infra* II.2.1.

9 See generally *J. Cornec*, La laïcité, 1961; *L. Mejan*, La séparation des églises et de l'état, 1959.

10 See *N. Chauvin*, Laïcité scolaire et protection des élèves, Revue administrative 1997, 10, at 11: "*l'école du diable*", "*l'école-sans-dieu*".

licain")[11] prevailed. By the law of 1882[12] religious instruction was banned from public schools. In 1886 another law prescribed that education should be trusted to laic personnel alone (Article 17 *Loi Goblet*[13]). Legislation in this period primarily aimed at destroying congregations such as the Society of Jesus.[14]

Preceded by a climate of civil war for more than 20 years, the *Act Concerning the Separation of Churches and the State of 1905*[15] terminated the traditional collaboration between the State and the Catholic Church – except for the provinces of Alsace and Lorraine which as parts of the German *Reich* kept their special status even after World War I when they were reacquired by France. Being still in force, the Act of 1905 is being qualified today, even by the Catholic Church, as the fundament of a "peace process" between the Catholic Church and the State, which has contributed to "a better understanding of laicism".[16] Its main articles (Articles 1 and 2) read:

> "*La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public.*"
>
> "The Republic ascertains the freedom of conscience. It guarantees the free exercise of cults which shall be subject only to those restraints that are prescribed thereafter in the interest of public order."
>
> "*La République ne reconnaît, ne salarie ni ne subventionne aucun culte […].*"
>
> "The Republic does neither acknowledge, pay nor subsidize any cult […]."

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11 See introduction of the Stasi Report (Rapport de la commission Stasi). See *infra* II.4.

12 *Loi du 28 mars 1882 sur l'enseignement primaire obligatoire (Loi Ferry).*

13 *Loi du 30 octobre 1886 sur l'organisation de l'enseignement primaire (Loi Goblet).*

14 See *T.J. Gunn*, Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and *Laïcité* in France, Journal of Church and State 46 (2004), 7, at 13.

15 Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat. See *R. Piastra*, De la loi de 1905, Recueil Dalloz 181 (2005), 1876.

16 See *Frankfurter Allgemeine Zeitung* No. 38 of 15 February 2005, at 2 („Frankreich würdigt sein Laizitätsgesetz").

However, the Act of 1905 was so rigidly applied during the first years that the *Conseil d'État* as the supreme court of appeal for administrative cases felt obliged to intervene, namely in 1912 in the famous case of *Abbé Bouteyre*.[17] Abbé Bouteyre was a catholic priest, who wished to participate in a *concours* for higher (academic) studies, but was refused only because he was a priest. The *Conseil d'État* ruled in a quite formalistic manner that there was no law on the incompatibility of being both a student and a priest. As long experience had shown, clergymen within a university's community would not deprive the system of public education of its laic character. Of course, after the judgment, the Parliament preferred not to pass a law denying all clergymen access to higher studies.

Since the 1920s the term of "*laïcisme*" instead of today's "*laïcité*" became more and more popular indicating the State's hostile attitude toward the churches.[18] It was only after World War II when the principle of laicism (to be more correct: "laicity") was explicitly inserted into the Preamble of the former Constitution of 1946 declaring that:

> "*L'organisation de l'enseignement public gratuit et laïque à tous les degrés est un devoir de l'Etat.*"
>
> "Organising public schools in order to make them free of charge and laic in all grades is a duty of the State."

This provision also reflects a long experience which has led to the conclusion that public schools can only fulfil their function, if they are not only laic but also free of charge.

2. Contemporary French Law as Before 2004

2.1. Laicism and Neutrality

Today the principle of laicism is laid down in Article 2 of the contemporary Constitution of the French Republic of 1958, which reads:

> "*La France est une République indivisible, laïque, démocratique et sociale.*"

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[17] Judgment of 10 May 1912, Recueil des Arrêts du Conseil d'État 1912, 561.

[18] See *H. Franzke*, Die Laizität als staatskirchenrechtliches Leitprinzip Frankreichs, Die Öffentliche Verwaltung (DÖV) 2004, 383, at 383, referring to *Bedouelle/Costa*, Les laïcités à la française, 1998, 6, at 9 et seq.

"France is an indivisible, laic, democratic and social Republic."

Additionally, the Constitution of 1958 refers to the former Constitution of 1946 obliging the State to provide for laic education in public schools.[19]

Interpreting this, the *Conseil d'État* formulates, "the principle of laicism in public schools is one of the elements of the laicism of the State and of the neutrality of the whole public service".[20] In other words: the application of the principle of laicism in public schools is fundamental for the whole system. Just like neutrality, laicism can be described as a principle that reflects the transformation process from a mono-religious (Roman Catholic) to a multi-religious state.[21]

2.2. Individual Freedom

The free exercise of religion cannot as such be found in the contemporary French Constitution. It rather integrates Article 10 of the Declaration of the Rights of Man and Citizen of 1789[22] protecting the freedom of religious expression.

This traditional approach is confirmed by Article 10 of the French Code of Public Education of 1989:[23]

> "*[...] Dans les collèges et les lycées, les élèves disposent, dans le respect du pluralisme et du principe de neutralité, de la liberté d'information et de la liberté d'expression. L'exercice de ces libertés ne peut porter atteinte aux activités d'enseignement.*"
>
> "[…] In colleges and high schools, the students dispose, while respecting pluralism and the principle of neutrality, of the freedom of information and expression. The exercise of these freedoms must not infringe upon educative activities."

It would be wrong, though, to assume that the freedom of religious expression is guaranteed only by French law. According to Article 9 of the European Convention on Human Rights, the freedom of religion is

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19 See *supra* II.1.

20 See, e.g., Recueil des Arrêts du Conseil d'État 1992, 389 (*Kherouaa*); 1994, 129 (*Yilmaz*); 1995, 122, at 123 (*Aoukili*); 1996, 187, at 188 (*Ali*).

21 See *Gusy* above note 5, at 156 note 18, pointing out that neutrality always needs a chance for comparison.

22 See *supra* II.1.

23 *Loi n° 89-486 du 10 juillet 1989 d'orientation sur l'éducation*.

considered to be a fundamental right and one of the major principles of the French Republic. Additionally, the French courts refer to the freedom of conscience and to the principle of equality.[24]

2.3. Conflicting Principles – "Synthèse Juridique"

After all, French law contains both the principle of laicism and neutrality and religious freedom in the form of the freedom of expression. Those must be weighed in order to reach a "*synthèse juridique*", a juridical synthesis. In that respect France follows the European human rights approach by weighing constitutional principles in order to determine whether the limitation of freedom keeps within the limits of proportionality instead of trusting in the rationality of tests as has been developed by American jurisprudence.[25]

2.4. Laicism v. Islamism? – The Conseil d'État's *1989 Opinion on Religious Signs*

After the poor Abbé Bouteyre enjoyed his remedy in 1912,[26] the conflicts relating to Catholic Church activists have almost faded away. However, in the mid-80s of the last century, Islamic immigrants mainly from the Maghreb region created plenty of new cases. The "clash of cultures" became apparent in 1989, when 17 girls were expelled from a school in Creil – simply because of wearing an "Islamic headscarf" (*foulard islamique*). While this school enacted strict and intrinsic rules, other schools practiced a policy of "laissez-faire" or anything in between. As a consequence of the *Affaire de Creil*, the French government started to enact directives in order to establish a common practice on laicism in public schools,[27] but failed. Finally Prime Minister Lionel

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[24] See, e.g., CdE in *Kherouaa* (*infra* II.3.1.1.).

[25] As to the U.S. American test method, see *infra* III.1.3. and 1.4.

[26] See *supra* II.1.

[27] See, e.g., Circulaire of 12 December 1989 of the Minister of State, Minister of National Education on Youth and Sports (socialist *L. Jospin*), Journal officiel, 15 December 1989, 15577; commented on by *C. Durand-Prinborgne*, La circulaire Jospin du 12 décembre 1989, RFDA 1990, 10 et seq. After the Parliamentary election of 1993 the new (conservative) minister, *F. Bayrou*, issued the Circulaire of 20 September 1994.

Jospin asked the *Conseil d'État* to deliver an opinion on the constitutionality of prohibiting religious garments in public schools.

In November 1989 the *Conseil d'État* delivered its famous opinion on the wearing of religious signs in public schools.[28] The State Council held that the wearing of religious garments or signs is protected by the freedom of expression and not as such incompatible with the principle of laicism, provided that the manner of wearing would not constitute an act of proselytism nor infringe upon the principles of laicism, pluralism and tolerance, the rights and convictions of others, the system of obligatory education, and generally the good order of the institution. The result, however, was that the number of scarf-wearing girls increased dramatically as well as the internal school conflicts about the scarf. Again, some of the schools tolerated almost every type of propagandistic garment while other schools rigidly expelled scarf-wearing Muslim girls from school. Such inconsistencies necessitated legislation, which was delivered by Parliament in March 2004.[29] The new Act on Laicism, however, departed considerably from the prior case law.

3. Leading Cases

The *Conseil d'État* in its role as the supreme French Court of appeal in administrative matters produced a series of leading cases on religious garments starting right after the *Conseil's* Opinion of 1989 was delivered:

3.1. The Students' Right to Wear Religious Garments

3.1.1. Kherouaa (1992) and Subsequent Cases

It was only in November 1992 when the *Conseil* decided on the *Kherouaa* case.[30] In this case several school girls were expelled from a school in Paris for persistently ignoring the prohibition of wearing the *foulard*

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[28] Opinion (Avis) of the Conseil d'État of 27 November 1989, published in: Revue fr. Droit adm. 1990, 6 et seq., annotated by *J. Rivero*, id., 1 et seq.

[29] See *infra* II.4.

[30] Judgment of 2 November 1992 – *Kherouaa, Kachour, Balo et Kizic*, Recueil des Arrêts du Conseil d'État 1992, 389 (= AJDA 1992, 833, annotated by *M. Schwartz*, id. 788).

islamique on the school estate. As the *Conseil d'État* pointed out, students in school shall not only enjoy fundamental rights such as the freedom of conscience and the prohibition of discrimination, but shall also be entitled to express and manifest them in school, provided that they respect pluralism. However, the *Conseil d'État* also laid down the limits of religious freedom in accordance with its Opinion of 1989:

> "*…, mais que cette liberté ne saurait permettre aux élèves d'arborer des signes d'appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public.*"[31]
>
> "… that this freedom does not permit students to show signs of religious adherence which, by their nature or by the way they were worn individually or collectively, respectively by their ostentatious or demanding character, constitute an act of oppression, of provocation, proselytism or propaganda, infringe with the students' or other members' of the educative Community dignity or freedom, endanger their health or security, disturb the performance of school activities, undermine the teachers' educative role, after all, jeopardize the order of the institution or the normal functioning of the public service."

Accordingly, the showing of religious signs shall only be prohibited, if it has an "ostentatious" or "demanding" character which endangers or undermines the "normal" functioning of a public school respecting public order (order of the institution) in any respect. The crucial question is whether the individual circumstances of the case were of such character that any harm for the school order could arise from it. For there is only one authority in France empowered to create general rules, which is the Parliament,[32] an absolute and general prohibition must be

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[31] CdE, id. at 390.

[32] Cf. *M. Troper*, The Problem of the Islamic Veil and the Principle of School Neutrality in France, in: A. Sajó/Sh. Avineri (eds.), The Law of Religious Identity, 1999, 89, at 96.

considered unconstitutional as infringing upon the students' freedom of speech. After all, the mere wearing of an Islamic headscarf could not justify any disciplinary measure or expulsion. These principles were confirmed by the *Conseil* in *Yilmaz* (1994),[33] *Ali* (1996),[34] *Outamghart* (1996)[35] and *Ligue islamique du Nord et alt.* (1996).[36] Furthermore, the *Conseil* as well as doctrine have always emphasized that the principles of laicism and neutrality are not meant to propagate atheism but rather to protect religious freedom in a pluralist society.[37]

3.1.2. Aoukili (1995)

In *Aoukili* the *Conseil* decided on the case of two school girls, Fatima and Fouzia Aoukili, who refused to obey the teachers' order to take off their headscarves during the sports lesson according to the rules of the school.[38] Their resistance was backed up by the parents patrolling in front of the school waving protest banners. The *Conseil d'État* held that the wearing of a headscarf is not compatible with the good functioning of sports lessons[39] and, therefore, qualified the girls' behaviour as a serious attack against school order, which constituted sufficient ground for expelling them from school.

The decision has three remarkable aspects: First, that the Court explicitly mentioned the parents' activities as having aggravated the case, second, that the Court did not refer to the girls' health and safety, and third, that it did not show the slightest effort to consider any exemption from obligatory sports lessons. After all, this judgment may be inter-

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[33] Judgment of 14 March 1994 – *N. et Z. Yilmaz*, Recueil des Arrêts du Conseil d'État 1994, 129.

[34] Judgment of 20 May 1996 – *Ministre de l'éducation nationale v. Ali*, Recueil des Arrêts du Conseil d'État 1996, 187.

[35] Judgment of 20 May 1996 – *Ministre de l'éducation nationale v. Outamghart*.

[36] Judgment of 27 November 1996 – *Ligue islamique, Chabou, Moussaoui et alt.* See Internet (http://perso.wanadoo.fr/alain.complido/CE_Ligue%20islamique.htm; 3 August 2005).

[37] CdE, id. (*Kherouaa*), at 390.

[38] Judgment of 10 March 1995, Recueil des Arrêts du Conseil d'État 1995, 122.

[39] CdE, id. at 123: "[...] que le port de ce foulard est incompatible avec le bon déroulement des cours d'éducation physique".

preted as accepting that the headscarf, worn by students, may be regarded as being *generally* incompatible with the purposes of sports lessons.

3.2. The Teachers' Status: The Marteaux Case (2000)

As concerns the teachers' right to wear religious garments in public schools – there simply is none. The leading case in this area is *Marteaux* of May 2000:[40] Mlle Marteaux was dismissed from her job as a teacher at the Reims Academy, because she appeared in class wearing religious garments.[41] After some lower regional courts had accepted such dismissals,[42] the Administrative Court of Châlons-en-Champagne wanted to know from the *Conseil d'État*, if it has to take into account the teacher's willingness to fulfil her educative duties or the specific character of the religious garments, which was described as being "*ostentatoire*" (ostentatious or proudly shown).

The *Conseil d'État* acknowledged that teachers have individual rights even in their public function. However, it held that

> "*le principe de laïcité fait obstacle à ce qu'ils disposent, dans le cadre du service public, du droit de manifester leurs croyances religieuses*"
>
> "the principle of laicism sets an obstacle to those disposing of the freedom of manifesting their religious beliefs within the framework of public service".

Consequently, it does not matter what potential influence there might be on the children, or what kind of disposing, or what effect the religious sign has. The *Conseil d'État* plainly concluded that

> "*[...] le fait pour un agent du service de l'enseignement public de manifester dans l'exercise de ses fonctions ses croyances religieuses, notamment en portant un signe destiné à marquer son appartenance à une religion, constitue un manquement à ses obligations.*"

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[40] Judgment of 3 May 2000, Recueil des Arrêts du Conseil d'État 2000, 169.

[41] We do not learn what kind of garments she actually wore.

[42] Cf. TA Versailles of 14 April 1992 (*Brazza*): "Mlle Brazza portait en permanence, dans le collège, un foulard islamique et a refusé de s'en séparer malgré la demande qui lui en avait été faite par le principal du collège; qu'alors qu'elle exerçait une fonction éducative, son attitude était de nature à porter atteinte à la liberté de conscience des élèves dont elle avait la charge." (RJIF 1993, 77; annotated by *Cayla*).

> "[…] the fact that a teacher of a public school manifests his or her religious beliefs in duty, namely by wearing a sign which aims at showing adherence to a religion, constitutes a failure in fulfilling one's duties".

According to this judgment the principles of laicism and neutrality of public service will automatically prevail. There will be no need of weighing arguments or interests – provided that there is a *manifestation*.

4. The 2004 Act on the Application of the Principle of Laicism

In December 2003, the so-called *Stasi Commission* (named after its chairman, Bernard Stasi) issued its report on religious clothing and insignia.[43] Although the Commission voted for prohibiting public school students from wearing clothing and insignia signifying a religious or political affiliation, it also recommended several accompanying measures such as improving living standards, limiting the duration of the law, introducing days off work both for the Christian majority and religious minorities, etc. Furthermore, the Commission addressed the problems a prohibition would provoke, namely its concern that Muslim girls could be withdrawn from public schools and placed in private religious schools. At any rate, it has been hotly debated whether a legal prohibition would improve or rather worsen the situation.

Trying to solve the problems that had occurred in school practice, the French Parliament adopted the *Act on the Application of the Principle of Laicism* on 15 March 2004.[44] Article 1 amending the Code of Education (L. 141-5-1) reads:

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[43] Commission de réflexion sur l'application du principe de laïcité dans la République, Rapport au Président de la République, transmitted by 11 December 2003. See Internet http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf. See also Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, Rapport sur le projet de loi (N° 1378) relatif à l'application du principe de laïcité dans les écoles, collèges et lycées publics (par *M. P. Clément*, Député) of 28 January 2004, published by the French Parliament (http://assemblee-nationale.fr/12/rapports/r1381.asp; visited on 29 March 2004).

[44] Loi n° 2004-228 du 15 mars 2004 encadrant en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse

> "*Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.*
>
> *Le règlement intérieur rappelle que la mise en œuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève.*"
>
> "In public schools, colleges and high schools the wearing of signs or dress by which pupils conspicuously manifest a religious affiliation is prohibited.
>
> Internal rules shall ensure that, before a disciplinary procedure is being performed, a dialog with the student concerned has taken place."

This Act outlaws religious garments only if they are *conspicuously manifested*. However, there is a significant difference in formulation: While the *Conseil d'État* has always used the term "ostentatoire" (ostentatious) as restricting criteria in order to describe a problematic showing of religious garment, the new law speaks of a manner of wearing which must only be *ostensible* (conspicuous).[45] In that respect it is important to know that the Act on Laicism was further clarified or obscured – as you like it – by the Minister of National Education, Monsieur le Ministre Fillon, who, on 18 May 2004, enacted administrative rules, the so-called *Circulaire Fillon*.[46] This regulation defines religious signs and garments as those which everybody clearly recognizes as having a religious character, e.g. the Muslim headscarf (*le voile islamique*), the yarmulke (*la kippa*) or "a cross of a manifestly excessive effect". Although there shall be no distinction between the religions, the Christian cross seems to be privileged, because it must be "manifestly excessive" in effect whereas the Jewish yarmulke shall be prohibited as such. As the regulation points out, "discreet" religious signs would be accepted only if they are being shown by students, not by teachers. Accordingly, a teacher must not wear or show even the slightest sign of religion in class.

The Act as interpreted by the *Circulaire Fillon* has not really changed the law concerning teachers' obligations, but it certainly has changed

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dans les écoles, collèges et lycées publics, Journal Officiel of 17 March 2004, 5190.

45 Cf. *P. Malaurie*, Laïcité, voile islamique et réforme législative, La semaine juridique 2004, 607, at 610.

46 Journal Officiel of 22 May 2004, 9033. See *O. Dord*, Laïcité à l'école: l'obscure clarté de la circulaire 'Fillon' du 18 mai 2004, L'Actualité Juridique Droit Administratif (AJDA) 60 (2004), 1523 et seq.

the students' legal position: Whereas the *Conseil d'État* had held that the wearing of religious garments by students may only be prohibited if the manner of wearing can be considered to endanger public order,[47] the new French law turns it quite the other way round. Now, it is principally prohibited to wear religious garments except discreet ones. Even if the new law shall imply that any visible sign would disturb the peace in school, it has replaced the weighing of constitutional principles with the doctrine of *automatic response*. It may, however, be doubted whether the Act on the Application of Laicism can be justified under constitutional or European and International Human Rights law.[48]

III. United States of America

1. Contemporary Law[49]

1.1. The Religion Clauses: Free Exercise and Establishment

Two main principles can be deduced from the First Amendment to the United States Constitution of 1791: First, the freedom of religion includes the freedom of holding religious beliefs as well as to exercise them. Second, the so-called *Establishment Clause* prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community, either by excessive entanglement with religious institutions, by government endorsement[50] or by disapproval of religion. The First Amendment reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; […]."

Although the wording of the provision addresses the Federal Congress,[51] it has been extended to the States via the Fourteenth Amend-

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47 See *supra* II.3.1.1.

48 See *infra* IV.1.2.

49 The author thanks Dr. *S. Less* (Heidelberg) for his very kind advice.

50 The prohibition of "endorsement" precludes government from conveying the message that a particular religious belief is favoured or preferred. See U.S. Supreme Court in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

51 See *infra* III.1.2.2.

ment. However, there must be a State organ involved which can – at least in the broad sense – be considered as "Congress".

"Establishment" and "Free Exercise" have always been regarded as "correlative and co-existing ideas"[52] reflecting the fundamental principles of separatism and voluntarism: Voluntarism demands that the advancement of a church would come only from the voluntary support (personal choice) of its followers, while separatism (non-entanglement) ensures that both religion and government function best because they are separated from each other.[53]

1.2. The History of Separation

1.2.1. State Benefactors as "Nursing Fathers" of the Colonies

Before the Declaration of Independence in 1776, all American colonies followed the concept of the state government being a "nursing father" of the Church.[54] After the colonies were united, it became clear that states could no longer provide for religious homogeneity but rather should fund different churches. Accordingly, "general assessment schemes" were designed in order to allow (male) individuals to make their personal choice by designating their share of religious taxes on the denomination they liked. Whereas Congregationalists and Anglicans had received public support before and wished this practice to continue, Baptists as well as liberals opposed any kind of assessment. On the one hand, religion was considered as indispensable for inducing obedience to the state law. On the other hand, Baptists feared that state support would corrupt the Churches, whereas liberals found that supporting the Churches violated the citizen's natural right to freedom of religion.[55] The church-state debate was particularly virulent in the State of Massachusetts, where the religious issue had almost caused the failure

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[52] See *K. Sullivan/G. Gunther*, Constitutional Law, 15th ed., 2004, 1436.

[53] Cf. *L. Tribe*, American Constitutional Law, 2nd ed., 1988, § 14-3.

[54] See Isaiah 49:23 ("Kings shall be thy nursing fathers, and their queens thy nursing mothers."). According to this, e.g., Queen Elizabeth I was called "Nource of the Church" by the Bishop of Salisbury. See *J. Jewel*, A Defence of the Apologie of the Churche of Englande, London 1570.

[55] See *Library of Congress*, Religion and the State Governments (Religion and the Founding of the American Republic), V. State Governments. See www.loc.gov/exhibits/religion/rel05.html; 1 April 2007.

of the new State Constitution. Finally, the famous Article III of the Bill of Rights of the Massachusetts Constitution of 1780 asserted that:

> "The happiness of a people, and the good order and preservation of civil government, essentially depends on piety, religion and morality."[56]

After Article III had preserved the concept of nursing, a general assessment scheme was introduced in the State of Massachusetts.

A similar debate took place in Virginia, where Patrick Henry proposed "A Bill Establishing a Provision for Teachers of the Christian Religion" to the Virginia House of Delegates in December 1784. Such efforts to foster government-supported religion provoked James Madison to issue his famous "Memorial and Remonstrance" in 1785.[57] As a consequence, the Act for Establishing Religious Freedom[58] as drafted by Thomas Jefferson[59] was adopted by the House of Delegates in January 1786, putting an end to any state nursing in the State of Virginia.

1.2.2. Federalist Roots

The Establishment Clause originally aimed at barring Congress from interfering with state establishments which were quite common at the time the First Amendment was adopted[60] and only later shifted towards a comprehensive principle of neutrality. As the wording reveals, the same applies to the Free Exercise Clause which originally was directed against federal intervention.

1.2.3. Two Streams of Tradition

If one looks closer at the development of the separation doctrine in the United States, two streams of tradition can be identified: Originally, the

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[56] Bill of Rights of the Inhabitants of the Commonwealth of Massachusetts from Account of Frame of Government agreed upon by the Delegates of the People, Boston 1780. See Library of Congress (note 55).

[57] *J. Madison*, To the Honourable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance, June 1785.

[58] *T. Jefferson*, An Act for Establishing Religious Freedom, January 1786 (July 1786).

[59] Library of Congress (note 55).

[60] See *K. Sullivan/G. Gunther*, Constitutional Law (note 52), 1439.

concept of separation was meant to depart from the church-state system of England, where the monarchs since Henry VIII were the heads of the Church of England. This stream repelled the European-type *Ancien Régime* by granting asylum for religious reasons to those immigrants who fled from intolerance, bigotry and persecution.[61] It reminds us of the French approach which was contributed to the American debate by Thomas Jefferson, according to whom the Establishment Clause was intended to erect a "wall of separation".[62] Although this stream of tradition has found its way into contemporary jurisprudence, it has never been undisputed and was gradually overruled more often in later times.[63]

Another stream of tradition answers to the fact that immigrants from all over Europe had brought a wide range of religious denominations to America, whose adherents were to be integrated peacefully into society. Of course, this necessity does not call for a strict separation between church and state, but could rather be sufficed via *equal treatment*. As a consequence, there are adherents to a strict as well as to a less strict separation, all of them being entitled to invoke American tradition.

1.2.4. From "Know-Nothing Nativism" to the Implementation of Non-Establishment

In the mid-19th century the so-called "Know-Nothing nativism" put the question of separation aside when granting preferential treatment to the community's dominant religion. One of the consequences was that teachers were allowed to visibly represent their religion even in public schools.[64] At that time it was probably not quite clear whether the local community must be regarded as "Congress" according to the First Amendment. However, contemporary authors tried to explain the denial of separation by the "real" purpose of the First Amendment, which

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[61] See *J. Madison*, Memorial and Remonstrance (note 57), particularly Nos. 7, 9.

[62] Cited by Supreme Court Justice Black in *Everson v. Board of Education* 330 U.S. 1 (1947).

[63] See *E. Chemerinsky*, Neutrality in Establishment Clause Interpretation: A Potentially Radical Right Turn, in: S. V. Monsma (ed.), Church-State Relations in Crisis: Debating Neutrality, 2002, 211-221 (with further references).

[64] Cf. Supreme Court of Oregon, 723 Pacific Reporter, 2nd Series, 298, at 310 (*Cooper v. Eugene School District*; see *infra* III.2.2.2.a) aa).

was described as "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects".[65]

In 1875 Republican James Blaine acting on behalf of President Grant introduced an Amendment to the U.S. Constitution (*Blaine Amendment*)[66] which would have strengthened the separation of church and state, but failed in the Senate. During the following decades *anti-Catholic intolerance* broke out in various states of the U.S. like in Europe which, particularly in the period between 1890 and 1930, resulted in the enactment of constitutional or statutory law against "sectarianism", e.g., (anti-)garb statutes.[67] Considerable anti-Catholic sentiment surrounded, for example, the enactment of a statute in the State of Oregon in 1923.[68] Some States like Nebraska, North Dakota, Oregon and Pennsylvania still have such garb statutes.[69]

1.3. The Establishment Clause Between Separation and Neutrality

It is not so clear what exactly follows from the Establishment Clause. Does it erect a "wall of separation" as Supreme Court Justice Black wrote in *Everson v. Board of Education* (1947) in referring to Thomas Jefferson[70] or does it just require neutrality, either formally, whereby government never adverts to religion at all, or rather in a more substantive but less restrictive way by treating all religious and non-religious

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[65] *J. Story*, Commentaries on the Constitution of the United States 594, § 1877 (1851). Quoted after Supreme Court of Oregon (note 64), at 310, note 15.

[66] "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, [...], shall ever be under the control of any religious sect or denomination [...]." Quoted after U.S. Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203, at 218.

[67] See *infra* III.2.2.2.a).

[68] See Supreme Court of Oregon (note 64), at 308. See also U.S. Court of Appeals for the Third Circuit in *U.S.A. v. Board of Education for the School District of Philadelphia* (note 114) 894 respecting the Pennsylvania religious garb bill of 1895.

[69] See *H. Bastian*, Religious Garb Statutes and Title VII: An Uneasy Coexistence, 80 Georgetown Law Journal 211, note 4 with further references.

[70] See note 62.

organizations equally?[71] In practice, state action violates the Establishment Clause, if it fails to pass the so-called *Lemon test*, which was established by the U.S. Supreme Court in *Lemon v. Kurtzman* (1972).[72] According to *Lemon* a statute or regulation – the test applies to general rules only – must satisfy three prongs:

1. The statute or regulation must serve a secular purpose;
2. Its principal effect must be one that neither advances nor inhibits religion nor endorses any substantive religious viewpoint;
3. It must not result in an excessive entanglement with religion.

The first two prongs on "purpose and effect" were, however, modified by the Supreme Court in *County of Allegheny v. ACLU*[73] according to Justice O'Connor's minority vote in *Lynch v. Donnelly*.[74] The modified test puts the emphasis on the message that endorsement sends to the adherents of a favoured religion on the one hand and to non-believers on the other hand, putting the question: Would a 'reasonable person' perceive such governmental action as endorsing (or disapproving of) religion? Would the message within the public sphere create insiders on the one hand and outsiders on the other hand?

1.4. The Right to Freely Exercise One's Religion and Its Limits

According to U.S. constitutional law neither students nor teachers, even in their function as public employees, forfeit their First Amendment freedoms when they enter school.[75] While religious beliefs are guaranteed absolutely, the free exercise of religion may, however, be regulated by law the more it tends to be *religiously motivated conduct*. Infringements on the right to freely exercise one's religion must be closely scrutinized, after the Supreme Court had adapted *strict scrutiny* to free exer-

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71 See *Sullivan/Gunther*, Constitutional Law (note 52), 1434.

72 403 U.S. 602, 612-613 (1972).

73 492 U.S. 573, 580-581 (1989) – *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.

74 465 U.S. 668, 671 (1984). See *J. Stronks*, The O'Connor Concurring Opinion, in: Monsma (note 63) 127, at 129 et seq.

75 393 U.S. 503 (1969) – *Tinker v. Des Moines Independent Community School District*.

cise cases in its landmark decision in *Sherbert v. Verner* (1963).[76] This test requires:

1. The claimant to demonstrate a *substantive burden* on religiously motivated conduct;
2. The state to demonstrate a *compelling interest* in enforcing the challenged rule; and
3. The state to demonstrate that this interest cannot be served by a less restrictive means (that the rule is *narrowly tailored*).

The Court, however, has favoured a different approach in cases where an exemption from civil duties is at stake. In *Wisconsin v. Yoder* (1972),[77] where Amish parents revoked their free exercise rights in order to reject public school education, the Supreme Court did not ask for a compelling state interest in enforcing compulsory education laws but preferred to apply the rational basis test. This test was also applied by the U.S. Supreme Court in *Goldman v. Weinberger* (1986),[78] which is the only case so far where the Supreme Court had to deal substantially with religious garments. Goldman, a Jewish officer in the U.S. Air Force, wanted to wear his yarmulke instead of the Air Force headwear as prescribed by the Air Force dress code. As the majority of the Supreme Court judges held, the state's interest to keep up the uniformity of the military justifies the restriction on Goldman's free exercise of religion. The minority objected that a strict scrutiny analysis should have been applied instead and would have led to another outcome of the case.[79] *Goldman*, however, is not very expressive for our question, because public schools in the United States usually don't have a uniform dress code.[80] However, *Yoder* and *Goldman* stand for the crucial problem in U.S. American constitutional doctrine that there always exists a test providing for rationality in many cases, but when a real hard case

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[76] 374 U.S. 398 (1963).

[77] 406 U.S. 205 (1972).

[78] 475 U.S. 503 (1986). See for similar cases U.S. Court of Appeals for the Ninth Circuit in *Sherwood v. Brown* (1980), 619 F.2d 47; U.S. District Court for the District of Columbia in *Bitterman v. Secretary of Defence* (1986), 553 F.Supp. 719.

[79] See *D. Carpenter*, Free Exercise and Dress Codes: Toward More Consistent Protection of a Fundamental Right, 63 Indiana Law Journal 601, at 607-608 (1987/1988), approving Justice O'Connor's "cogent dissent".

[80] There are few exceptions. See III.2.1. (note 81).

occurs, the applicability of the test will be debated and as a result the test could be modified or even put aside.

2. Relevant Cases

2.1. The Students' Right to Wear Religious Garments

There are only a few cases in U.S. law dealing with religious garments worn by students in public schools. This can be explained by the fact that normally no compelling state interest could be invoked in order to restrict the students' wishes to wear a Muslim headscarf, a skullcap (yarmulke) or a Christian cross. Very rarely is a mandatory *school uniform policy* being introduced in order to reduce disciplinary problems, but so far there are no cases relating to the duty to wear a school uniform conflicting with the individual's religious beliefs.[81] However, in ordinary cases, where no such policy is involved, religious garments may cause a danger for safety or public order. In such cases, their wearing could exceptionally be restricted.

2.1.1. *Menora v. Illinois High School Association* (1981-83)

In *Menora v. Illinois High School Association* several adherents of the Jewish faith filed a class action against the Illinois High School Association which prohibited the wearing of headwear, including yarmulkes, during basketball games. The plaintiffs' sons wished to participate in inter-scholastic basketball competitions in order to represent their private religious (Jewish) secondary school. The District Court for the Northern District of Illinois[82] found that the plaintiffs had a sincere religious belief which urges them to wear head-coverings even while playing basketball. As the no-headwear rule would force them to choose between either observing their religious beliefs or participating in interscholastic basketball games, the students were considered to be burdened in their religious practice. The District Court could not see which compelling safety interest was being invoked so as to overcome First Amendment rights.

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[81] See, however, U.S. Court of Appeals for the Fifth Circuit in *Canady v. Bossier Parish School Board* (2001), 240 F.3d 437. This case deals with the freedom of speech.

[82] Judgment of 17 November 1981, 527 F.Supp. 637.

This judgment was vacated by the Seventh Circuit Court of Appeals.[83] The Court of Appeals mainly referred to the concept of "false conflict": The plaintiffs here were said to "have no constitutional right to wear yarmulkes insecurely fastened by bobby pins". They rather had to avoid the conflict by offering an adequate method for attaching yarmulkes to their heads. Yet it recommended to the Association to accept that, for otherwise it would be standing on "constitutional quicksand". Apparently, the Court of Appeals was eager to escape the problem. It ignored the fact that the High School Association had prohibited all headwear (explicitly regardless of the method of attachment) and the fact that the plaintiffs need not prove possible ways of escape, rather the Association should show a compelling interest in refusing any kind of accommodation, and ignoring the fact that suggesting "chin straps" or sewing the yarmulke to headbands or wearing bathing caps or anything else would hold up Jewish orthodox basketball players to ridicule. At any rate there were no doubts on the fact that excluding any accommodation would eliminate Jewish orthodox teams from competition. All of this was put away by the Court of Appeals declaring that it were not for the Court to devise the method, which, however, firmly believed that such a method existed. Despite the sharp criticism,[84] the petition for writ of certiorari was denied by the U.S. Supreme Court in January 1983.[85]

2.1.2. *Cheema v. Thompson* (1995)

In *Cheema v. Thompson* the U.S. Court of Appeals for the Ninth Circuit[86] had to decide whether three young Khalsa Sikh boys should be permitted for religious reasons to wear a ceremonial knife in school. The knife (so-called *kirpan*) was about 6-7 inches long with a blade of 3 ½ inches, which was not in conformity with the school's total ban of all weapons from school grounds. Furthermore, there was no doubt that the other students' safety and the school's concern about a "peace-

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[83] Judgment of 30 June 1982, 683 F.2d 1030.

[84] See *Cudahy*, Circuit Judge, dissenting; and also *Carpenter* (note 79, at 609 et seq.) blaming the Menora Court for incompletely applying the strict scrutiny analysis.

[85] Judgment of 17 January 1983, 459 U.S. 1156, Justices Marshall and Blackmun dissenting.

[86] Judgment of 12 October 1995, 67 F.3d 883, 135 A.L.R. Fed. 675.

ful learning environment" constituted compelling governmental interests. Although the court at least thought about accommodating the religious needs, the case was considered to present a somewhat unique question of "least restrictive means", because the Cheemas had taken an all-or-nothing position: They could only wear actual knives being long enough to serve as functional knives. Therefore, the Court concluded: "We simply cannot allow young children to carry long, wieldable knives to school. Period."

The case proves the American Courts' willingness to accommodate religious needs, even if they may seem to be unusual or grotesque to non-believers. This Court actually considered the possibility of allowing Sikh boys to wear a fake knife in class which would not hurt anybody or to sew the handles of the knife to the sheaths, but also demanded the Sikhs to 'accept accommodation'. As they did not or could not – for religious reasons – their action was dismissed. Therefore, the case raises the question whether strict religious rules which are fundamental to the believers can be accommodated at all, and more importantly, whether the Courts are entitled to take into consideration a compromise solution viewing the fact that the Courts themselves have designed it according to their secular values. If there is no real choice, because the religious rule is believed to be obligatory by its adherents, a state court must not argue that the religious person has failed to agree on a compromise solution. It rather has to show that, unfortunately, the believer must bear the negative consequences according to the law.

2.1.3. *Shermia Isaacs v. Board of Education of Howard County, Maryland* (1999)

In *Shermia Isaacs v. Board of Education of Howard County, Maryland*, an eighth grade girl was prohibited from wearing an African head-wrap rising several inches above the top of her head. Isaacs wished to wear that headgear even in class because she wanted "to celebrate her African-Caribbean heritage". This was incompatible with the school's "no hats rule" which banned all hats from school except religious headgear such as yarmulkes and Muslim hijab, including head-scarves. Hats were considered to cause conflicts in the hallways, obscure the teacher's view of the students and the students' view of the blackboard and foster a "less respectful climate" for learning.

The U.S. District Court for the District of Maryland[87] held that Shermia Isaacs considered her multicoloured head-wrap to be an African cultural symbol and, therefore, enacted her right to self-expression which affords constitutional protection as "symbolic speech". However, the school's encroachment of that right was examined under the traditional standard of review, which requires only that the challenged state action be shown "to bear some rational relationship to legitimate state purposes". Although the school met this precondition, the Court also considered whether the no-hats rule was "content neutral" in view of the fact that religious headgear was explicitly exempted. In that respect it concluded that religious headgear, even if regarded as symbolic speech like the African head-wrap, would at the same time represent an exercise of religion. Such conduct (other than in the case of Shermia Isaacs) would implicate more than one constitutional right and, consequently, enjoy increased constitutional protection. As the Court put it, religious headgear would have "hybrid constitutional protection" and, therefore, may be privileged.

It is interesting to learn from this judgment that religious garments other than non-religious may be explicitly exempted from general rules. The founding for this exemption seems, however, formalistic. The Court could have argued instead in a more substantial manner that there is a burden greater than that which non-religious people would have to bear under the same rule.

2.1.4. The Hearn Case (2004): From Tolerance to Anti-Islamism After September 11?

After all, the *Menora* case remains a rare example for prohibiting measures because U.S. law normally exempts religious garments from no-hats rules in schools as well as in other public institutions. However, after the terrorist attacks of 11 September, 2001, the Muslim head-scarf has gained a new quality in the eyes of non-Muslim Americans. It was only then when the Muskogee School District in Oklahoma prohibited all head coverings in order to halt "gang-related activity" pretending to defend Federal education requirements. One of the victims of this rule was eleven-year-old Nashala Hearn who was suspended from school for wearing a Muslim head-scarf in early 2004. In this case (*Hearn v.*

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[87] Judgment of 30 March 1999, 40 F.Supp. 2d 335. My gratitude to *S. Mahmud*, Esq., Minnesota, who kindly informed me of this case.

Muskogee School District) the Justice Department joined Hearn's lawsuit,[88] accusing the school district of violating the equal protection clause of the 14th Amendment to the U.S. Constitution. As the Department's spokesman declared, the Department had taken similar positions in workplace cases, but did not know of any cases involving schools yet. Eventually, the case was settled in a friendly way.

2.2. The Teachers' Rights

2.2.1. The Nuns' Garb Cases (1894- ca. 1965)

The compatibility of religious dress with the role of public school teachers is an old issue in U.S. law, which had played an important role from the late 19th century until the midst of the 20th century. In this period dozens of cases were decided by state courts quite differently despite of the fact that all of them relate to the same question. While some states, e.g. Pennsylvania and Oregon, enacted (anti-)garb statutes, other states did not, or even explicitly allowed teachers to wear religious garb in public schools, such as Arkansas and Tennessee. Accordingly, some of the cases were decided on grounds of a specific statute or regulation on religious garb, whereas other judgments were based on a general constitutional or statutory provision prohibiting "sectarianism" in public schools.[89]

In *Hysong v. Gallitzin Borough School District* (1894),[90] there was no specific statute or regulation in the State of Pennsylvania prohibiting religious garb, rather a law prohibiting "sectarian teaching". This can be explained by the fact that Pennsylvania has traditionally hosted a great variety of religious groups including so-called sects such as the Mennonites, among them, e.g. the Old Order Amish.[91] While school education had been provided mainly by churches from the late 17th century on, the State established free elementary schools by the Free School Act of 1834. When the Hysong case came up, the Pennsylvania Court could

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[88] See Find Law, Legal News and Commentary, 15 April 2004 (http://news.findlaw.com/; 19 April 2004).

[89] A comprehensive survey on the jurisprudence was published in 1958. See *L. Tellier*, Wearing of religious garb by public-school teachers (Annotation), 60 ALR2d (American Law Reports, 2nd ed.) 300 et seq.

[90] 164 Pa 629, 44 Am St Rep 632.

[91] See Encyclopedia Britannica (www.britannica.com/eb/article-78281/Pennsylvania#613759.hook; 2 May 2007).

not see the problem about sectarian teaching, but was rather concerned that the education of the children might have been trusted only to those men and women "who are destitute of any religious belief". Consequently, the majority came to the conclusion that the wearing of the garb alone would not constitute sectarian teaching and, therefore, not disqualify them from teaching. Only one dissenter found that those teachers would "by their striking and distinctive ecclesiastical robes" necessarily and constantly assert their membership in a particular church and "the subjection of their lives to the direction and control of its officers". For the same reasons, after the Hysong Judgment had been delivered, some other states explicitly prohibited religious garb in public schools by statute. The State of Pennsylvania is one example.[92]

In 1906 the New York Court of Appeals in *O'Connor v. Hendrick*[93] moved in the opposite direction holding that some control over the habiliments of teachers were essential to the proper conduct of schools. It thereby produced one of the rare judgments[94] declaring garments as such to be influencing regardless of how its wearer behaves. This may be regarded as the reason why the verdict was directed against "grotesque vagaries in costume" such as, e.g. "the display of orange ribbons", which should not be permitted without being destructive of good order and discipline. Transferring these deliberations to the costume worn by the Sisters of St. Joseph the Court considered that costume as "inspiring, if not showing sympathy for a religious denomination". It concluded that a teacher wearing it in class violated New York's constitution which prohibited the State from "aiding" any school wholly or in part under control of a religious denomination.

The problem resurfaced after World War I. In *Gerhardt v. Heid* (1936),[95] a North Dakota Court could find no evidence that any of the St. Benedict Sisters had departed from their line of duty: As the laws had not prescribed the fashion of dress of the teachers, the wearing of the religious habit could not have converted the school into a sectarian school. This judgment cannot be easily explained by the religious characteristics of North Dakota, which since its creation in 1889 had public schools. Though there has always been a strong Catholic segment, its

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92 See *infra* III.2.2.2.a) bb) on *U.S.A. v. Board of Education for the School District of Philadelphia* (1990).

93 184 NY 421, 77 NE 612, 7 LRA NS 402, 6 Ann Cas 432.

94 See also *Zellers v. Huff*, *infra* (note 97).

95 66 ND 444, 267 NW 127.

population mainly belongs to Protestant denominations.[96] Under those circumstances, one may only suggest that the Protestant majority could afford tolerating Catholic garb and additionally might have had a special motivation to do so.

On the other hand, the Supreme Court of New Mexico contrarily held in *Zellers v. Huff* (1951)[97] that the State of New Mexico unconstitutionally sponsored the Catholic Church by allowing nuns to wear their religious garb when teaching in public schools. This Court held – in concordance with the New York Court of Appeals in *O'Connor*[98] – that the wearing of religious garb and insignia "by its very nature" would introduce sectarian religion into the school. However, the New Mexico Court, other than the New York Court, did not confine its judgment to "grotesque vagaries in costume" but rather took a clearly strict position. This can be explained by the fact that the Catholic Church has always had a strong position in the State of New Mexico, where education has traditionally been largely in the hands of religious orders.[99] Taking into consideration that Catholics have traditionally formed the largest single religious group in the country New Mexican Catholicism had not really a "sectarian" character but rather a predominant character. Under these conditions, its influence remained strong in society even after the State had established public schools in the 1850s and passed its first public school law in 1891. Accordingly, *Zellers* could be interpreted as an attempt to support the efforts to separate the state effectively from a religious group that had kept its former influence on the educational system without representing the political majority.

In *Rawlings v. Butler* (1956),[100] a Kentucky court decided on grounds of a constitutional provision that no preference should be given by law to any religious sect, society, or denomination. This legislation could rather be interpreted as responding to the great variety of churches than as a bar on the Catholic Church, which has always had a great influence

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[96] See Encyclopedia Britannica (www.britannica.com/eb/article-78845/North-Dakota; 2 May 2007).

[97] 55 NM 501, 236 P2d 949.

[98] See note 93.

[99] See Encarta (http://encarta.msn.com/encyclopedia_761568489_6____59/Arkansas.html#s59; 18 August 2005).

[100] 60 ALR2d 285.

in the State of Kentucky.[101] In this State, the role of the churches was particularly strong because a state-wide public school system could only be established in the first half of the 20th century, whereas several attempts to achieve that goal during the 19th century had failed. This background may serve as an explanation for why the no-preference clause did not prevent this court from holding that the dress worn by nuns or sisters would "not deprive them of the right to teach in public schools so long as they did not inject religion or the dogma of their church". It even qualified religious convictions and modes of dress as being totally personal by holding that "*the garb does not teach. It is the woman within who teaches*". Only one dissenter was of the opinion that "the distinctive garbs, so exclusively peculiar to the Roman Catholic Church" created "a religious atmosphere in the school room", for "these good women are the Catholic Church in action". This would have a "subtle influence" upon the tender minds of the children and "silently promulgate sectarianism".[102]

It may be summarized that earlier jurisprudence dealing with the garb worn by Catholic nuns when teaching in public schools was not consistent at all, but varied from one state to another. The reasons for the discrepancies in jurisprudence and legislation can only (partly) be deduced from the different types of state-church relationships. There are only a few judgments affirming the negative influence of the garb on the pupils, which can to some extent be explained by the tension between a Protestant religious majority and the Catholic Church in some of the states. On the other hand, there are states like New Mexico, where a Catholic majority supported the Catholic Church while a secular elite struggled to reduce clerical influence in state institutions in order to foster a climate of reform and modernization. This New Mexican policy of anti-clericalism resembles that of the Republic of Mexico, where

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[101] The Catholic influence traces back to the early 19th century when a great number of Catholics, particularly from Maryland, had immigrated to Kentucky encouraging the establishment of Catholic institutions like the diocesan see at Bardstown in 1808 or the founding of orders like the Sisters of Loretto and the Sisters of Charity of Nazareth. While members of the Roman Catholic Church represent about one sixth of all church members, Kentucky is a predominantly Protestant state where the "revivalist movement" has always played an important role. Cf. *T. Matthews* (Wake Forest University), Lecture 14: For a Review of the History of Catholicism in the United States, Catholicism in the South, published in the Internet (www.wfu.edu/~matthetl/ south/fourteen.html; 5 August 2005).

[102] All emphasis is by the author.

church and state had been separated by decree of President Benito Juarez after the Revolution of 1860, but without much effect in reality. A strong opposition continued to attack all separation legislation, particularly Article 3 of the Mexican Constitution of 1917 which explicitly prescribed secular education in public schools.[103]

Wherever the garb was tolerated, at least certain conditions had to be met: First, no sectarian propaganda could be added; and second, no Statute could explicitly prohibit the wearing of the garb. Courts denying any influence of the garb may have taken into consideration additionally that public education in former times, at least in some regions, could hardly be provided without the help of the Catholic Church. Furthermore, a great majority among former judges had simply feared a public school system without Christian influence much more than the influence which the Catholic Church in particular might have continued to keep. This concern reminds us of the debate on *l'école du diable/ l'école-sans-dieu*, which had taken place in France also at the beginning of the 20th century.[104]

2.2.2. The Era of Multiculturalism and Individualism

a) Garb Statute Cases

aa) *Cooper v. Eugene School District* (1985/86)

A series of new cases concerning religious garb policies started from the mid-1980s: In *Cooper v. Eugene School District* (1985/86),[105] Janet Cooper, who had become a Sikh after marriage and unofficially changed her name to Karta Kaur Khalsa, one day appeared in class with white clothes and a white turban. She wrote a letter to her colleagues

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[103] Article 3 of the Constitution of Mexico of 1917 reads in its relevant parts: "(I.) Freedom of religious beliefs being guaranteed by Article 24, the standard which shall guide such education shall be maintained entirely apart from any religious doctrine and, based on the results of scientific progress, shall strive against ignorance and its effects, servitudes, fanaticism, and prejudices. Moreover [...] (IV.) Religious corporations, ministers of religion, stock companies which exclusively or predominantly engage in educational activities, and associations or companies devoted to propagation of any religious creed shall not in any way participate in institutions giving elementary, secondary and normal education and education for labourers or field workers."

[104] See *supra* II.1.

[105] See notes 108 and 110.

explaining that "[t]here are some changes happening in my life […] I would like to share them with you […] I am a Sikh […] As part of my religion I will begin wearing my turban all the time and often be dressed all in white. […] I am very open to hear your concerns or to explain more fully what I am doing." Apparently, she was somehow confused as to the gender-related aspects of the Sikh dress code, but this was the kind of dress she personally felt obliged to wear. The issue of the case was whether she had violated the *Oregon Garb Statute* and, therefore, should have lost her teaching certificate. The relevant provisions read:

> (ORS 342.650) "No teacher in any public school shall wear any religious dress[106] while engaged in the performance of duties as a teacher."[107]
>
> (ORS 342.655) "Any teacher violating the provisions of ORS 342.650 shall be suspended from employment by the district school board. The board shall report its action to the Superintendent of Public Instruction who shall revoke the teacher's teaching certificate."

The Court of Appeals of Oregon (1985)[108] held that Cooper violated the Statute. However, it concluded that revocation of a teacher's certificate for violation would be a much greater sanction than was necessary to preserve neutrality and, as such, would amount to an unconstitutional infringement upon the teacher's right to free exercise of religious beliefs (First Amendment to the U.S. Constitution). Attributing to the teacher a "dual role", Cooper was described to be both an individual entitled to express her belief and, at the same time, an agent of the state who represents its authority to her students. The Court of Appeals also addressed the question whether Cooper's Sikh attire would "let the school district appear to support her religion" or whether everybody (including her youngest students) would rather think that she acted in her individual role. Though the Court avoided giving an answer via its

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106 The term "religious dress" connotes clothing that is associated with and symbolic of religion, that is, clothing that communicates the wearer's adherence to a particular religion.

107 The term "while in performance of his duties as a teacher" only refers to those duties which systematically bring the teacher into contact with the students.

108 708 P.2d (Pacific Reporter, 2nd series) 1161 (Or. App. 1985).

reference to proportionality, this question seems to be crucial for the problem.[109]

The Supreme Court of Oregon when vacating this judgment in 1986[110] pointed out that there was a legitimate concern that the teacher's appearance in religious garb may leave a conscious or unconscious impression among young people (and their parents) that the school would endorse the particular religious commitment of the person whom it has assigned the public role of a teacher. This was assumed to make the otherwise privileged display of a teacher's religious commitment incompatible with the "atmosphere of religious neutrality". However, the Supreme Court of Oregon has only held the Garb Statute constitutional – that is to say "narrowly tailored" and "not overbroad" – if certain conditions be fulfilled:

1. The term "religious dress" must be judged from the perspective both of the wearer and of the observer. It is dress "which is worn by reason of its religious importance to the teacher and also conveys to children […] a degree of religious commitment beyond the choice to wear *common decorations* […], *such as a small cross or Star of David*".[111]

2. Generally "more than a teacher's dress is needed to show a forbidden sectarian influence in the classroom".

3. Continual or frequent repetition of a teacher's appearance in specifically religious (not merely ethnic) dress.

4. The formulation "performance of his duties as a teacher" means appearing in religious dress while dealing directly with children.

With these criteria, the judgment seems to continue the old jurisprudence on the nuns-garb in a more sophisticated way. However, it may be doubted whether the exclusion of "common decorations" could be regarded as content-neutral, if one considers those examples which were mentioned such as "a small cross" or the "Star of David". Apparently, this does not reflect the existence of Islam or any other minority religion in society. A lack of neutrality is also underlined by the fact that the term "common" relates to the majority culture and religion. Accordingly, critical authors have argued that the court has based its

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[109] See *infra* IV.1.1.

[110] 723 P.2d (Pacific Reporter, 2nd series) 298 (Or. 1986).

[111] Supreme Court of Oregon, id. Emphasis by the author.

judgment on "mere speculative appearances of sectarian influence": The subjective impressions of some hypothetical students or parents who may falsely perceive that the school endorses the Sikh religion could not be convincing because no one could possibly perceive the State of Oregon as endorsing a minority religion.[112] Furthermore, it may be criticized that the Oregon statute would not be violated whenever a teacher only occasionally appears in religious dress, for the provision reads clearly that "[N]o teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher." After all, the (Anti-) Garb Statute was softened by the new test, whereas the Sikh teacher lost her job contrary to what the first instance judgment had proposed. Cooper's Appeal was dismissed by the U.S. Supreme Court "for want of a substantial federal question" (Justices Brennan, Marshall and O'Connor dissenting).[113]

bb) *U.S.A. v. Board of Education for the School District of Philadelphia* (1990)

In *U.S.A. v. Board of Education for the School District of Philadelphia* (1990) the U.S. Court of Appeals for the Third Circuit[114] decided on the constitutionality of Pennsylvania's Garb Statute of 1895 (amended later).[115] This Statute reads in its relevant parts:

a. "That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

b. "Any teacher […] who violated the provisions of this section, shall be suspended […], and in case of a second offence […] shall be permanently disqualified from teaching in said school. […]"

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[112] See *Carpenter* (note 79), at 619.

[113] Judgment of 30 March 1987, 480 U.S. 942, 107 S.Ct. 1597.

[114] Judgment of 9 August 1990, 911 F.2d (Federal Reporter, 2nd series) 882 (3rd Cir. 1990).

[115] This Statute, which was enacted after the judgment in *Hysong v. Gallitzin Borough School District* (1894) has been delivered (see *supra* III.2.2.1.), was attacked as unconstitutional but was upheld as reasonable restraint in *Commonwealth v. Herr* (1910), 229 Pa 132, 78 A 68.

These provisions were applied on Alima Delores Reardon, a substitute teacher, who later in her life became a devout Muslim covering her entire body save face and hands. The (federal) Court of Appeals had to decide whether the Board of Education violated Title VII of the *Civil Rights Act of 1964*. The relevant part of Title VII (a) reads:

> "It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's […] religion."

Title VII also defines the term of "religion", thereby establishing an exception:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

According to this provision there is no longer a ground for "religion", if accommodating religious practices would cause "undue hardship" to the employer. As the U.S. Supreme Court held in *Trans World Airlines v. Hardison* (1977),[116] where an employee refused to work on Saturdays for religious reasons, it is undue hardship to require the employer to bear more than a *de minimis* cost. However, "cost" must not always be measured in terms of dollars.

The U.S. Court of Appeals for the Third Circuit interpreted *Cooper* as standing for the proposition that the Oregon statutes permissibly advance a compelling interest in maintaining "the appearance of religious neutrality" in the public school classroom. Viewing the concern of preserving an "atmosphere of religious neutrality" and also viewing the fact that the Pennsylvania Statute was almost identical to the Oregon Statute, the U.S. Court of Appeals concluded that the summary disposition by the U.S. Supreme Court in *Cooper* had precedential value: If the Oregon Garb Statute was narrowly tailored to a compelling state interest, they could not judge differently on the Pennsylvania Statute. This

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[116] 432 U.S. 63, 97 S.Ct. 2264.

holding was not only attacked by one judge concurring,[117] but also sharply criticised in literature.[118]

b) Labour Law: *McGlothin v. Jackson Municipal Separate School District* (1992)

Deborah McGlothin, a former teacher's aide sued a Mississippi school district for unfair termination in violation of her rights under Title VII of the Human Rights Act and the First Amendment to the U.S. Constitution.[119] McGlothin was blamed by her employer for wilful failure to conform to the dress code of the school. Over the years she was wearing either red berets or African-style head-wraps in class. She let her hair grow and refused to wash it for months in order to keep it natural. Respecting the fact that Mrs. McGlothin had to teach a course in elementary school entitled "Keeping Healthy" (how personal hygiene affects one's mental, social and physical health) she was given notice by the school board several times that her appearances were not appropriate and that her head-wrap was against the school's dress code. When she was asked about her reasons for doing so she originally responded that she needed to wear the head covering to keep from getting cold and that she was of Afro-American heritage. It was only when her termination because of insubordination was already at stake that she started to invoke religious beliefs. She named her belief as being "the original Hebrew Israelites from Ethiopia" and cited teachings from various religions including Rastafarianism. Despite that she described her religion as her "way of life", her "spiritual lifestyle", her culture and also as her personal preference.[120] Her boss, whom she blamed of having chosen to

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[117] Justice Ackerman, id. 895 et seq., at 896.

[118] See, e.g., *Bastian* (note 69), particularly at 213 ("court failed to address the most pressing issue"), 225 ("inartful and superficial"), 226 (inappropriately relying on summary dispositions of the U.S. Supreme Court). Despite all polemics, Bastian convincingly ponders how the garb statute could ever be compelled by the Establishment Clause, if only three other states have such statutes. This would lead to the conclusion that the remaining forty-seven states continuously violate the First Amendment.

[119] *McGlothin v. Jackson Municipal Separate School District*, Judgment of the U.S. District Court for the District of Mississippi of 30 November 1992, 829 F.Supp. 853.

[120] As she put it: "I mean that what you see, my external appearance, the culture is what you see. But it's based on my race and the culture of my race and

"imitate the dress style and hair characteristics of the majority race in this country", should not have the right to try to force her to conform to racial and cultural practices foreign to her ancestry.

Under these circumstances, the U.S. District Court for the District of Mississippi was not convinced that McGlothin had a *religious belief*. Although it conceded that the U.S. Supreme Court has not defined precisely what constitutes a religious belief and that such belief need not recognize a supreme being, it pointed out that merely one's personal preference was not considered as to be sufficient in American constitutional jurisprudence. As was quoted from the U.S. Supreme Court, a religious belief rather must have "an institutional quality about it", that is to say it must "concern a comprehensive religious theory, and be sincere".[121] Taking into consideration that the determination of what is religion is a most delicate question, the District Court held that "the very '*concept of ordered liberty*'[122] precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests […]". As McGlothin had not communicated her beliefs sufficiently to the employer, she was denied the protection of the Religion Clauses.

IV. Résumé

1. France and the United States in a Comparative Perspective

The study has shown significant differences between the federal system of the United States of America and centralized France, though both of the systems follow the separation doctrine in principle. Although federal basic rights play a decisive role in the U.S., there is, due to a lack of specific U.S. Supreme Court jurisprudence, no uniform U.S. constitutional law respecting religious garments, whereas in France the *Conseil d'État* as well as central legislation provide for such uniformity. Nevertheless, we may resume that both the French and the U.S. constitutional jurisprudence clearly differentiate between the students' and the teachers' rights. As a consequence some similarities flow from the common

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that my religious views are that these things reflect my religious views, […]." See note 119.

[121] *Brown v. Pena*, 441 F.Supp. 1382, at 1385.

[122] Emphasis by the author.

assumption that the schoolchildren's legal status must be regarded primarily from the human rights perspective, whereas teachers, though having the same rights in principle, are mainly subject to their public servant function. Recent French legislation, however, seems to adjust the students' status to the teachers' status and so departs from that common line.

1.1. The Teachers' Personal Appearances: State Action or Need for Enlightenment?

As concerns teachers, both of the systems react restrictively: In France teachers are absolutely prohibited from showing any religious garments or signs as a consequence of the principle of laicism. U.S. courts usually deny that such prohibition would follow directly from the Establishment Clause,[123] but there are other voices maintaining that the Establishment Clause indeed prohibits government from even "appearing to take a position" on questions of religious belief,[124] or that it prevents even subtle inculcation of the message that religion is preferred over non-religion, irrespective of whether that message is intentional and thereby protects constitutional neutrality.[125] It is, however, undisputed in U.S. American jurisprudence that the teacher's wearing of religious garments may be prohibited by state legislation such as garb statutes, if certain conditions are fulfilled.

While both systems accept that a teacher has a dual position being both a public servant and a human being, they have to face the problem that society cannot easily be persuaded to engage in such sophisticated differentiation. Ordinary people would not like to decide whether teach-

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[123] U.S. Court of Appeals for the Third Circuit interpreting *Cooper* (note 108, at 308) in *U.S.A. v. Board of Education for the School District of Philadelphia* (note 114), at 888: "In so holding, the *Cooper* court did not conclude that tolerating religious garb in the classroom would violate the establishment clause, but rather that a rule against such religious dress is permissible to avoid the appearance of sectarian influence, favouritism, or official approval in the public school. The policy choice must be made in the first instance by those with lawmaking or delegated authority to make rules for the schools." See also id., at 889 (note 5).

[124] U.S. Supreme Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984), at 687, at 1366 (Justice O'Connor concurring).

[125] U.S. Court of Appeals for the Third Circuit in *U.S.A. v. Board of Education for the School District of Philadelphia* (note 114), at 900 et seq.

ers act in their private or public function, but rather attribute their personal religious convictions automatically to the state they represent. Whereas the French concept of laicism does not produce any arguments on the potential effects religious garments might have, American courts explicitly consider that teachers might have a powerful influence particularly on young children in their function as "role models".[126] This jurisprudence refers to the "intense and captive classroom atmosphere", which further enhances the "symbolic connection" between religion and the state,[127] concerning the "symbolism of a union between church and state".[128] Aspects such as captivity or the vulnerability of the very young audience (being subdued to an apparently religious teacher by obligatory school instruction) have convinced the U.S. Supreme Court, at least in earlier times, to apply a strict separation doctrine concerning religious establishment in the public school context.[129] In *Cooper*, the Court of Appeals at least addressed the question whether the teacher's Sikh attire would "let the school district appear to support her religion" or whether everybody (including her youngest students) would rather think that she acted in her individual role.[130] This aspect has also been considered by the Supreme Court of Oregon, which in the same case took the position that the term "religious dress" must be judged from the perspective both of the wearer and of the observer.[131]

However, it is the observer's perspective which seems to be highly problematic: As has rightly been argued in American doctrine "utterly unproven, subjective impressions of some hypothetical students or parents should not be allowed to transform individual expression of religious belief into state advancement of religion".[132] Even if such perspective were correct, one may find that most elementary schoolchildren would be capable of realizing that the diversity of religious and non-

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[126] Cf. U.S. Supreme Court (Justice Brennan) in *Edwards*, 482 U.S. 578, at 584; 107 S.Ct. 2573, at 2577.

[127] U.S. Court of Appeals for the Third Circuit in *U.S.A. v. Board of Education for the School District of Philadelphia* (note 114), at 899.

[128] Cf. U.S. Supreme Court (Justice Brennan) in *Grand Rapids School District v. Ball*, 473 U.S. 373, at 390; 105 S.Ct. 3216, at 3226.

[129] See *Bastian* (note 69), at 227-228.

[130] See note 108.

[131] See note 110.

[132] See U.S. Supreme Court in *Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1337 (1986), Justice Burger dissenting.

religious dress among the teachers clearly reflects the school's neutrality on religious issues.[133] If there is a "subtle influence" being conveyed by religious garments, it will meet with lots of counter-influences provided that the teaching personnel on the whole represents the pluralist society and is not predominated, e.g., by the Catholic Church as was the case in many countries in the 19th century. As a consequence, the position of strict separation is more and more being modified by the *reasonable person perspective* which nowadays is considered to be the most adequate means for testing endorsement in the United States.[134]

What must be expected by a "reasonable" person in our context? It could be argued that state law prohibiting teachers totally from wearing religious garments is actually based on social prejudices dominating the schoolchildren's and their parents' minds. This, however, should not motivate restrictions, but rather be objected to by the state being responsible for defending the teachers' human rights by information, instruction and other adequate means and activities. Such "necessity for a campaign of enlightenment" has also been demanded by the European Court of Human Rights in cases where individuals were blamed as troubling the functioning of public institutions only because they were homosexual.[135] The same applies in our context.

1.2. Schoolchildren: Trouble-Shooters or State Representatives?

In France, schoolchildren and students have originally been permitted to wear religious garments, provided that they did not wear them in order to disturb public order or endanger their own health. The French Law on the Application of Laicism of 2004, however, has turned this into the opposite: Religious garments are now generally prohibited except "discreet" ones. In contrast, in the United States such wearing is privileged rather than prohibited, for the state has to show a compelling interest in restriction. However, if there is such compelling interest – e.g., if religious garments worn by students would invoke safety concerns or provoke civil war in the class room – it can be prohibited according to U.S. law.

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133 *Bastian* (note 69), at 230.

134 See *supra* III.1.3.

135 ECHR, Appl. Nos. 31417/96 and 32377/96 (*Lustig-Prean and Beckett v. the United Kingdom*), §§ 93 et seq.

1.2.1. Why the French System Can Hardly Be Compared to the U.S. System

It is worth mentioning that the French law and policy has been clearly rejected in the United States as far as school attendants are concerned. For many Americans, the French effort to prohibit children from wearing religious garments and insignia raises suspicions about prevailing anti-religious attitudes in France.[136] As religious communities have reported, twenty-seven U.S. Representatives sent a letter to the French Ambassador in the United States expressing their concern that the then pending French legislation on *laïcité* would threaten the religious rights of French children and disproportionately affect Muslims, especially Muslim women.[137]

One may, however, doubt whether these critics are based on a comprehensive understanding of the ideological background, which may be described as the specific *French concept of nation* and what the French nation understands to be its *Republican* attitude.[138] French commentators usually speak of a fight against "communitarianism",[139] which connotes the bad influence social communities are supposed to have on individual persons. In France, "intermediate groups" such as religious communities have not only been suppressed in Revolutionary times,[140] but are still suspect of preventing single group members from becoming real citizens (*citoyens*) who alone are regarded as being capable of enjoying equality and liberty.

Protecting individuals from group pressure was therefore the reason for a policy that uses public institutions as a means of *cultural integration*

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[136] *Gunn* (note 14), at 7. See also *R. Teitel*, Through the Veil, Darkly: Why France's Ban on the Wearing of Religious Symbols is Even More Pernicious than it Appears, Findlaw Commentary of 16 February 2004 (http://writ.corporate.findlaw.com/commentary/20040216_teitel.html; visited on 3 June 2005).

[137] The Honda-Ehlers-letter has been published by Sikhnet. See www.sikhnet.com/s/HondaLetterb. Date of visit: 29 July 2005.

[138] As to laicism as a cornerstone of the Republican compact see *supra* II.1.

[139] See, e.g., *F. Bussy*, Le débat sur la laïcité et la loi, Recueil Dalloz 180 (2004), 2666, at 2667: "la volonté de lutter contre le communautarisme"; *A. Garay/E. Tawil*, Tumulte autour de la laïcité, Recueil Dalloz 180 (2004), 225, at 226: "refus du 'communautarisme.'"

[140] *Le Chapelier* Act of 1790 prohibited every association (*groupes intermédiaires*).

and homogenisation levelling out all regional, linguistic or religious differences.[141] Particularly schools have always been charged with forging future citizens, the "civic" society within a necessarily secular frame.[142] This commitment has to be considered in view of the fact that the French nation, other than, e.g., the German one, is not based on ethnic affiliation but rather on the common use of the French language and the acceptance of fundamental values such as the principle of laicism in public life. Accordingly, those elements of coherence are indispensable for keeping the state together.[143] Because they rather have an idealistic than a natural character, schools must implant them into every new generation. After all, a fair critique must not simply compare the French judgments to the American judgments in order to find out that the latter produces more individual freedom in the result, but rather put the question this way: If the principle of laicism can be justified as such, what does it demand from the individual? Can that be considered to be consistent with the purpose of laicism? Is there a concept of laicism which provides for "systematic consistence" (*Systemgerechtigkeit*) in practical application? Of course, systematic correctness cannot justify any system, but the system itself must respect the limits set by national and international human rights.

1.2.2. Why Prohibiting Children from Wearing Religious Garments in School Does Not Constitute a Case of Laicism

There are serious doubts on whether the French Act on the Application of Laicism is compatible with constitutional, European and International Human Rights law. On the one hand, a Special Rapporteur of the U.N. Human Rights Commission has recently criticized the new

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141 Cf. *Troper* (note 32), at 101.

142 Cf. *H. Godfrey*, School's bid for headscarf ban widens French divide, "The Observer" of 15 June 2003. I would not follow the author's presumption that "[s]chool is to forge future citizens, and civic is secular", because society other than state institutions must not be secular. See also *Troper* (note 32), at 92, according to whom "schools were to be a part of the integrating machinery of the state".

143 It goes too far to blame the *Conseil d'État* for not really balancing the principles of laicism and neutrality against individual freedom, but using instead its balancing technique "to camouflage the commitment of its members to this ideology". See *Troper* (note 32), at 101.

French law.[144] On the other hand, the European Court of Human Rights has held that the principle of laicism may justify restrictions pertaining to religious garments.[145] This jurisprudence, which until now pertains to teachers and university students only, is based on a large margin of appreciation conceded by the Court to the individual state parties to the Convention in view of their different cultural traditions. In the *Şahin* case,[146] the prohibition of religious garments was explicitly considered as being justified by the principle of laicism because it would help to preserve individuals from social pressure. However, as concerns schoolchildren, there are some doubts on whether the principle of laicism may be invoked at all.

If one acknowledges laicism as a special method of arranging church-state relations in order to keep them separate from each other, it is hard to explain how schoolchildren could undermine the laicism of the state by their personal appearances. This result can only be reached if the children were regarded as representing the laic state. By prohibiting them from wearing religious garments in school in defending the principle of laicism, the state necessarily attributes to them a public function (or at least a public status) in their capacities as members of the institution. However, this approach ignores the fact that children have not de-

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[144] See Statement of the U.N. Special Rapporteur on Freedom of Religion of 30 September 2005: "The law of March 2004 on conspicuous religious symbols in public schools has a positive element as it takes into account the autonomy of a female child who may be subjected to gender discrimination at a stage when she is unable to realize the consequences of being lured or forced into wearing a headscarf. At the same time, the law denies the right to those teenagers who have freely chosen to wear a religious symbol in school as part of their religious belief. […] It is my impression that the direct and, in particular, the indirect consequences of this law have not been properly considered. […] The implementation of the law by school establishments has in a number of cases led to abuses that provoked feelings of humiliation, in particular amongst young Muslim women. According to many voices, such public humiliation can only lead to radicalization of the affected persons and those associated with them. […]" (published in the Internet at www.unhchr.ch/huricane/huricane.nsf/0/AA8F269703D694EAC125708C00455C34?opendocument).

[145] See European Court of Human Rights, Judgments of 29 June 2004 and of 10 November 2005, Appl. No. 44774/98 (*Şahin v. Turkey*), §§ 99 et seq. (with further references). See also *Dahlab v. Switzerland* (*supra* note 3).

[146] See note 145. The Judgment has been upheld by the Grand Chamber on 10 November 2005.

liberately joined the institution. Since they are obliged to attend school, one should not consider them to be school representatives.

Furthermore, such a public role seems to be incompatible with their "minor" age. Even if society would expect a laic state to prohibit the wearing of religious garments by all private consumers who only attend, visit or use a public institution, it could not argue that this applies to schools alone and not to universities, public hospitals or prisons.

One may argue that all religious garments must be prohibited in schools, if this is necessary to defend public order. But if there is any such necessity test involved leading to a differentiation between the consumers of the various types of public institutions, restrictions cannot be justified by the principle of laicism, but instead must rely on public order. In other words, laicism cannot be compromised according to the different institutions, rather it must be applied consistently.[147] Therefore, the only question the new French law poses is whether the wearing of religious garments by schoolchildren would threaten public order in French schools to such an extent that a general prohibition is "necessary in a democratic society" as the European Convention on Human Rights formulates (Art. 9 § 2 ECHR).

2. Does the Separation System Matter?

The comparison between the U.S. and the French separation systems does not really contribute to the theory of a stringent dependency that the church-state system possibly has on religious liberty.[148] Considering the fact that the U.S. system produces discrepancies within the individual fifty states despite the Non-Establishment Clause of the U.S. Constitution, *federalism* seems to play a more important role than separationism. We have also learnt that *laicism* may motivate law and jurisprudence which differ fundamentally from those of "simply separating states". There are also elements of *public order* involved which may

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[147] Cf. *Garay/Tawil* (note 139), at 228, criticising that the application of the law depends on the local circumstances, particularly that it does not apply to the province of Alsace-Lorraine. The authors also refer to the Stasi Commission according to which "laicism has not the same shape in Paris as it has in Strasbourg, Cayenne or Mayotte".

[148] See *W. Brugger*, On the relationship between structural norms and constitutional rights in church-state relations, in this volume, 21 et seq.

vary from one place to another and from one type of public institution to another according to the grade of tolerance a society is apt to exercise in the different places, times or contexts. After all, we must conclude that there is not even a pure separation system producing clear results. Instead, the system only serves as a framework in which individual rights and public order elements are more or less determining the legal results. The more international human-rights impact there will be the more convergent the traditional categories of the church-state relationship will become.[149]

[149] For the convergence theory see *Brugger* (note 148) with further references.

Religion and Religious Symbols in European and International Law

Jochen A. Frowein

1. Introduction

It has long been recognized that freedom of opinion is an essential precondition for political democracy. Freedom of opinion first developed within the nature of freedom of religion. Against the powerful church and against its important ally the state, the claim to freedom of religion was first launched as an attack to protect the individual in one of the most personal spheres of human identity and belief. Georg Jellinek has argued that the natural-law theory which came to recognize freedom of religion is at the basis of the movement towards striving for civil and fundamental rights. This theory has not met with general approval, but one cannot overlook that freedom of religion was the basis of some of the most influential political movements to establish early democratic governments.[1]

For a long time after the Second World War, Western constitutional systems took freedom of religion more or less for granted and did not see any real problems within this context. This has changed completely since religious fundamentalism has become one of the main sources of danger in the era of globalization. When I addressed the subject *freedom of religion and international human rights* in the year 2000 on the occasion of the 75th birthday of the Max-Planck-Institute for International Law in Heidelberg, I referred to those conflicts in the world which pertain to religious fundamentalism. I mentioned Afghanistan,

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[1] See *G. Jellinek*, Die Erklärung der Menschen- und Bürgerrechte, 1895; as to the role of freedom of religion in constitutional and international law see now *Chr. Walter*, Religionsverfassungsrecht, 2006.

Indonesia, Sudan, Nigeria as well as Northern Ireland and the former Yugoslavia — in particular Bosnia-Herzegovina and Kosovo. I referred to the attacks against American embassies in Africa and also against the World Trade Center in New York in 1993. I even mentioned the bombing in Oklahoma which was clearly influenced by protestant fundamentalism. The last example that I referred to was the murder of Prime Minister Rabin.[2]

Since 11th September 2001, that which was stated in 2000 needs no further examples. The conflict between the absolute truth seen in the commands of God and the legal order, which protects all human beings, is again obvious.[3] It was obvious during the religious wars in the 16th and 17th centuries, and it led to the establishment of the secular state in Europe and later in North America. But the underlying tension remains. How difficult it is to recognize tolerance, as proclaimed by *Nathan der Weise* in Lessing's important drama, can be demonstrated by the development of the Catholic Church. Only in the 1960s did the idea of religious freedom for every human being (as part of human dignity) become fully accepted by the Catholic Church.

2. Freedom of Religion in International Law

Public international law has a long tradition of protecting freedom of religion. The system of intervention laid down in the Treaties of Westphalia in 1648 for protecting the members of a religious minority in a German territory was the first example of a guarantee of freedom of religion in international law. But only after the Second World War, with the establishment of an International Bill of Human Rights, did freedom of religion really become part of international law. Article 18 of the Universal Declaration of Human Rights (1948) included this guarantee. The Declaration itself is not automatically binding in international law, but after the coming into force of the International Covenant on Civil and Political Rights in 1976, there is no doubt that the rule first

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[2] *J. A. Frowein*, Religionsfreiheit und internationaler Menschenrechtsschutz, in: R. Grote/Th. Marauhn, Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht – Völker- und verfassungsrechtliche Perspektiven, 2001, 73-88; the volume contains many important contributions to this subject.

[3] *D. Benjamin/St. Simon*, The Age of Sacred Terror, 2002.

formulated in 1948 is part of binding international law. I would argue that this is also the case for the few states which have not ratified the International Covenant on Civil and Political Rights.

Article 18 of the International Covenant on Civil and Political Rights reads as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

It is of great importance that this guarantee is not limited to freedom of religion. Freedom of religion is protected in the same way as freedom of thought and conscience. It is also of importance that the freedom to have or to adopt a religion or belief of choice is expressly recognized. This means that any compulsion by the state as to membership in a religious community is a violation of that principle. It is not without interest that in Sweden, even in 1948, this freedom was not fully protected. Persons leaving the Lutheran state church could do so only when joining another Christian community. This rule was abrogated before Sweden joined the European Convention on Human Rights which has a guarantee quite similar to Article 18.[4]

Neither Article 18 nor Article 9 of the European Convention on Human Rights outlaws the system of state churches. Indeed such a system still exists in a number of European countries, in particular in the United Kingdom. However, the role of a state church may never be such that the individual freedom of religion can be in any way re-

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[4] See *K.-H. Partsch*, Die Rechte und Freiheiten der Europäischen Menschenrechtskonvention, in: Bettermann et al., Die Grundrechte, Vol. I/1, 1966, 428.

stricted. This is of great importance and has been adjudicated within the system of the European Convention on Human Rights. When a medical doctor, as member of the Anglican Church, was forced to pay church taxes to the Swedish state church, the Commission and the Court found a violation of the European Convention. The Commission established that this was a violation of the freedom of religion. The Court was more reluctant and saw only a violation of the right to property in connection with the rule against discrimination. I am of the opinion that the Commission took the correct approach.[5]

In a system where freedom of religion prevails, the state may not lay down general obligations which interfere with religious beliefs. The European Court of Human Rights held in the case of *Buscarini v. San Marino* that the obligation for parliamentarians to swear a religious oath is a violation of Article 9.[6] In the same way, the state cannot discriminate on the basis of membership in a religious organization. This was confirmed by the European Court of Human Rights in the case of *Hoffmann v. Austria* where a person belonging to the Jehovah Witnesses could not receive child care.[7]

The European Court of Human Rights has rightly held that it is an obligation of the state to protect religious peace and religious tolerance in a pluralistic system. Therefore, restrictions of freedom of speech on the basis of the need to respect religious feelings can be introduced. However, this must be done in a proportionate manner and must be tested as to the necessity. In a case concerning a movie which had been shown in Catholic Bavaria, the Court held without any difficulties that a prohibition to show that film in Tirol was not a violation of the Convention.[8] The case seems to be quite doubtful. However, the *Wingrove* Case (Britain), involving a video showing extreme sexual acts in relation to the body of Christ, is certainly an example where the restriction can be justified.[9]

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5 *Darby v. Sweden*, ECHR 187 (1990).

6 ECHR 1999-I.

7 ECHR 255 –C (1993).

8 *Otto Preminger Institut v. Austria*, ECHR 295-A (1994).

9 ECHR 1996-V.

3. Freedom to Manifest One's Religion or Belief

All of the international texts include a specific guarantee for the manifestation of religion. Article 18 § 1 of the Covenant enshrines the freedom — either individually or in community with others and in public or private — to manifest religion or belief in worship, observance, practice and teaching. The French text makes it even clearer that the manifestation is not limited to religious practices but also to others. By combining "*sa religion ou sa conviction*", it is clear that the Article does not limit the manifestation to religious motivations. The European Commission of Human Rights has recognized that pacifists' beliefs may be of a nature which can be protected under Article 9. The manifestation of such beliefs is then fully protected.[10]

It is also evident that the teaching of one religion, including proselytizing, is protected by freedom of religion. It was a clear violation of that principle when Greece convicted a Jehovah's Witness for discussing his religious beliefs with others.[11] Another Greek case has shown that there are limits to proselytism where undue pressure is being used. When officers of the Greek Air Force tried to pressure soldiers under their command to become members of a protestant church, it was a proselytism not protected by Article 9 of the European Convention. However, the conviction of these officers for their attempts to proselytize civilians was a violation of Article 9.[12]

Wearing religious symbols is protected by freedom of religion. This applies for the headscarf and for the turban. It will be discussed later whether under specific circumstances the state may restrict that freedom under § 2 of Article 9 of the European Convention. It is sometimes an important issue as to how far the scope of the freedom to practice one's religion may go. There have been cases where people refused to pay taxes on the basis of their religion or other convictions. The European Commission and the Court of Human Rights have held that freedom of conscience and religion does not give the right to refuse to pay taxes, which is a neutral duty that does not interfere as such with

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[10] *Arrowsmith v. UK*, Decisions and Reports of the European Commission of Human Rights (from now on DR), 19, 5 (1978), now confirmed by the Court ECHR *Leyla Sahin v. Turkey*, Judgment of 10 October 2005.

[11] *Kokkinakis v. Greece*, ECHR 260-A (1993).

[12] *Larisses and others v. Greece*, ECHR 1998-I.

personal beliefs or religious creeds.[13] The European Court of Human Rights has recently referred to this case law of the Commission, approving it.[14]

In an impressive judgment in 2000, the Court also protected the decision of a conscientious objector belonging to the Jehovah Witnesses who had been convicted by a military court. This conviction prevented him from later becoming a certified accountant on account of this criminal conviction. The Court did not find a violation in the conviction but found a violation in the impossibility to become a certified accountant. The automatic calibration of his behavior to that of normal criminals was seen to be a violation of Article 14 in conjunction with Article 9.[15]

The European Commission of Human Rights had to consider whether an issue arose under the Convention where a religious Jew had been convicted by the French courts to pay damages to his former wife because, although the divorce under civil law had become final, he refused to deliver the so-called *guett* necessary to allow remarriage under Jewish religious law. The applicant claimed a violation of his right under Article 9 because under Mosaic Law the delivery of the letter is purely discretionary and a religious act. A careful analysis of the decision by the Commission shows that the Commission was faced with more difficult problems than might appear at first reading. The Commission stated at the outset that the applicant objected to the delivery only because he would then lose the right to remarry his former wife, since being a member of the "Cohen" family he could not marry a divorced wife. The Commission explained that it is common practice to deliver the *guett* and the applicant had been asked to explain his position by the Tribunal Rabbinique de Paris. The Commission concluded from there that the refusal was not a practice of his religion in the sense of Article 9 and the application was dismissed as being manifestly ill-founded.[16]

One may say that the case was too trivial to merit our attention. But as a matter of principle, it is not easy to accept that the state interferes with the performance of a clearly religious act by a conviction to pay damages. The holding of the Commission seems to be that the applicant had not really established why his refusal had anything to do with relig-

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13 DR 37, 142 (1983).

14 *Leyla Sahin v. Turkey*, Judgment of 10 October 2005.

15 *Thlimmenos v. Greece*, ECHR 2000-IV.

16 DR 35, 199 (1983).

ion. Since the refusal had very damaging effects for his former wife, who wanted to remarry according to religious rules, the Commission may have assumed that it was a case of malicious intent.

It must also be recognized that positive obligations result for a state from freedom of religion. In prisons there must be a priest available for those prisoners who want to contact him. The European Commission held that in a German prison no obligation exists to have a minister of the English High Church but there must be a protestant priest.[17] In a case where a Muslim, who had been employed as teacher in England, claimed the right to be absent from school every Friday afternoon for about one hour to pray in the mosque, the Commission recognized a certain obligation for the authorities to have due regard to the specific situation of a Muslim. But taking into account the fact that the applicant had not claimed such a right when he was first employed, the Commission dismissed the case on the facts because no lack of regard on the part of the school could be shown.[18] Also, Jewish religious slaughtering must be protected by legislation.[19]

4. Restrictions on the Freedom to Manifest Religion

It is interesting that cases were quite rare in which the limitation clause of Article 9 § 2, similar to Article 18 § 3 of the Covenant, was actually applied by the European Convention organs. Some early decisions would certainly not be upheld today. A good example of this is the case where a prison administration prohibited a Jew (who had converted to Buddhism) from growing a beard. The Commission relied on the protection of order in prison, as the government had stressed the necessity to identify prisoners easily.[20] Of a different character was a decision to refuse a Buddhist a religious book which contained instructions for self-defense. Here, § 2 may clearly be invoked to protect the order in prison.[21]

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17 Collection of Decisions 23, 1.

18 DR 22, 27 (1981).

19 *Cha'are Shalom Ve Tsedek v. France*, 2000-VII. The case concerned a special sort of slaughtering. The Court held that it was sufficient that the applicants could buy this meat (*glat*) in Belgium. This reasoning is doubtful.

20 Yearbook 8, 174.

21 DR 5, 100 (1976).

Of some interest in this context is the famous decision concerning a Sikh who complained that he had been fined twenty times for failing to wear a crash helmet when riding his motorcycle in the United Kingdom. The Commission noted that Sikhs were later granted exemption from these rules by United Kingdom legislation but had no difficulty to accept the regulation as such as being covered by the protection of health.[22] The case raises more difficult issues than the Commission admitted since only the driver's health was at issue here.

A problem arose when the Church of Scientology in Sweden complained about restrictions to advertise the so-called e-meter, a religious electrometer, in a specific way. The Commission interpreted the advertising as being merely of a commercial character, therefore not coming within the ambit of Article 9.[23] Taking into account the price, the context and the sort of advertisement this seems to be correct; although one must admit that advertisements for instance for water of Lourdes or trips to Lourdes also have a commercial aspect without leaving the sphere of Article 9 § 1 as acts covered by freedom of religion. The European Court of Human Rights has found violations concerning the practice of religion in several cases concerning Greece, where the teaching of religious doctrines (other than for the Greek Orthodox Church) and the establishment of places of worship were restricted.

In recent years, the Court has dealt in detail with restrictions to wear the headscarf. In a case concerning Switzerland the Court stated that in a class of small pupils the headscarf can be seen as a powerful external symbol which could influence the children. Therefore, the school may prohibit the wearing of the headscarf by a teacher.[24] Much more difficult was the case decided by the Grand Chamber of the Court concerning the wearing of headscarves by students in Turkish universities. The Court found that the prohibition to wear a headscarf for students was possible because the State had to guarantee tolerance among different religious groups and must protect different pluralistic views. According to the Court, the prohibition was mainly based on the principles of secularism and equality. In particular equality of the sexes was very much behind the rule. The effect of the headscarf for women who do not wear it can justify the prohibition according to the Court. The Court underlines that there exist extremist political movements in Tur-

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22 DR 14, 234 (1978).

23 DR 16, 68 (1979).

24 *Dahlab v. Switzerland*, 2001-V.

key which are trying to force upon the society religious symbols and the idea of a society based on religious principles. Therefore, secularism is of the utmost importance.[25]

5. The Prohibition for the State to Interfere with Religious Organizations

The European Court of Human Rights has decided several cases concerning rivalries between different religious organizations. It has established the principle that it is not for the state to lay down specific rules for religious organizations. The state must be neutral vis-à-vis different groupings and must not recognize one group among several as being the legitimate one. In a Greek case, the conviction of a Muslim *mufti* who was not recognized by the state for religious practices was seen as a violation of Article 9 of the European Convention.[26] The non-recognition of a split-up church in Moldavia was equally seen as a violation because without such recognition the church could not perform any activities. The Court confirmed again that it is not the task of the state to establish unity of religion. The state must ensure that the different rivaling groups tolerate each other.[27] These judgments clearly show that it is not for the state to protect a church against activities by its members to reform the church or to set up new churches. Indeed, what happened through the historical process of reformation in Germany is clearly protected by freedom of religion.

6. Conclusion

Freedom of religion is certainly one of the most important guarantees of personal liberties. As already indicated, the importance of that guarantee has shown itself again at the end of the 20th and the beginning of the 21st centuries. The ever-present tension between what people consider to be a religious truth and the requirements of public order in a

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[25] *Leyla Sahin v. Turkey*, Jugdment of 10 October 2005.

[26] *Serif v. Greece*, ECHR 1999-IX.

[27] *Metropolitan Church of Bessarabia and others v. Moldavia*, ECHR 2001/XII.

secular society is not easy to solve. One hopes that the recognition of freedom of religion as an individual right of every person may be the solution for these many tensions existing.

IV. Perspectives from Israeli Law

Claiming Equal Religious Personhood: Women of the Wall's Constitutional Saga

Frances Raday[*]

I. Introduction

The Women of the Wall, known as WoW, are religious Jewish women who wear the ceremonial prayer shawl (*tallit*), as do men; pray from the Torah Scroll, as do men; and pray aloud in a group (*tfila*), as do men. They have called it the three T's: *tallit, Torah, tfila.* I will present here the story of their struggle against religious violence and the public veto of their prayer at the site of the Western Wall in Jerusalem. This is a struggle which has led them to appeal three times and respond once over the past fifteen years to the Supreme Court, in the last two of which proceedings I represented them as counsel. The WoW are committed to redefining their identities as religious women, claiming equality rather than exit as a feminist strategy in confronting the patriarchy of Judaism.[1] Their struggle against silencing at the site of the Western Wall is highly symbolic in its attempt to redefine public space, designated as subject to patriarchal custom by religious authorities with governmental ascent and collusion. The narrative of the Supreme Court litigation provides the material for a unique exploration of the potential

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[*] This article is an expression of my respect for the Women of the Wall. My warmest appreciation goes to Adv. Nira Azriel who was my "sister in law" and to Adv. Jonathan Misheiker who contributed to the struggle during the 10 years in which we fought for the rights of the WoW before the High Court of Justice. I want to thank Trudy Deutsch for her helpful research assistance.

[1] For an anthology of writings of the experiences of the spiritual leaders of the WoW, see *P. Chesler/R. Haut*, Women of the Wall – Claiming Sacred Ground at Judaism's Holy Site, 2003.

and the limits of law in providing a path to equal religious personhood for women.

II. Hermeneutics or Exit – Issues of Identity

The dilemma facing religious feminists in the monotheistic religions – Judaism, Christianity and Islam – is to choose between various levels of hermeneutic reform within existing Orthodoxy, to join another branch of the religion which is more open to feminist reform, to set up their own women's denominations or to exit from the religions to post-biblical or non-biblical spirituality movements. Each of these strategies has its own complex implications both for the religious identity of the women and for their feminist self-realisation. The WoW are part of the new wave of feminist activism struggling for expression through hermeneutic reform strategy within existing Orthodoxy. They are conducting their struggle at the center of the public space and public ritual of Orthodox Judaism, at the Western Wall.

Hermeneutic reform feminists have, since the 1970s, made some headway in Christianity and Judaism, achieving the ordination of women in some branches of Christianity (Lutheran, Episcopal and Protestant) and Judaism (Reform, Reconstructionist and Conservative). However, these successes have not extended to the Orthodox branches of the monotheistic religions. The Orthodox streams of religion in Christianity and Judaism (Roman Catholicism, Eastern Orthodoxy and Orthodox Judaism) have not agreed to ordain women. A woman-led Moslem mixed-sex prayers for the first time on record on March 18th 2005 at Synod House of the Cathedral of St John the Divine in New York; the service was organized by a group of activists, journalists and scholars who hoped to encourage discussion about the centuries-old tradition of reserving the role of prayer leader for men. However the prayer service was held on the Cathedral premises after three mosques refused to host it, and it was subsequently denounced by Moslem clerics, amongst them Sheik Sayed Tantawi of Cairo's Al-Azhar mosque.[2]

The WoW are mostly Orthodox women and all of them, including the few non-Orthodox among them, have chosen to seek equality as women only within the strictures of Orthodox rulings. The WoW seek

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[2] BBC News (18 March 2005), available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4361931.stm.

the chance to pray as equal partners within the Orthodox Jewish tradition and not as silent, passive shadows of men. Nevertheless they do not challenge the entire corpus of Orthodox patriarchality. They have not chosen to pray in mixed prayer groups of men and women but pray separately from men in the *ezrat nashim,* the women's section, at the Wall. Nor do they attempt to pray in a *minyan*, which is a group of at least ten men required for certain prayers, but pray in a group which is not a *minyan* and does not read those prayers whose recital is restricted to a *minyan.* Additionally, they have chosen to emphasise the womanly narrative in Judaism, meeting on *Rosh Hodesh*, the first day of each Hebrew month, which is associated with the monthly celebration of womanhood.[3] The WoW's mode of prayer is not prohibited by the *halakha* (religious Jewish law). It is customary for men but, although it does not violate prohibitions of Jewish halakhic law, it is not regarded as acceptable for women by Israel's Orthodox rabbinical authorities or by Israel's Chief Rabbis.[4] However, the WoW's mode of prayer is not unanimously rejected by Orthodox rabbinical authority and each of its elements is fully recognized as acceptable by well-respected Orthodox authorities.[5] Moreover, it is not regarded as prohibited by most modern Orthodox communities outside Israel.[6] In this way, the WoW's prayer is distinguished from the mode of prayer of Reform and Conservative Jews, in which men and women pray together and women may form part of a *minyan*, which is uniformly rejected by Orthodox rabbinical authority.

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[3] Pirkei D'Rabbi Eliezer Chapter 45.

The women heard about the construction of the Golden Calf and refused to submit their jewellery to their husbands. Instead, they said to them: You want to construct an idol and mask which is an abomination and has no power of redemption? We don't listen to you. And the Holy One, Blessed be God, rewarded them in this world in that they would observe the New Moons more than men, and in the next world in that they are destined to be renewed like the New Moons.

[4] HCJ 257/89 *Anat Hoffman v. Western Wall Commissioner*, 48(2) PD 265 (Hereinafter*: Hoffman I,* 1994). See judgment of Justice Elon, at 349; Expert opinion of Eliav Schochetman submitted to the court in *Hoffman I*, on file with the author.

[5] Expert opinion of Shmuel Shiloh submitted to the court in *Hoffman I*, on file with the author; *A. Weiss*, Women at Prayer – A Halackhic Analysis of Women's Prayer Groups*,* 1990, 43-56.

[6] *Chesler/Haut* (note 1) *supra*, at xxvii.

The struggle for the WoW's feminist reading of the Orthodox texts and for women's participation in Orthodox rituals has been conducted in the public space of Judaism and not in a private place. It is not in a Women's Church or Jewish synagogue but at the public place most central for Jewish religious sacredness. The choice of this public space is due to the uniqueness of the Western Wall's symbolism for religious Judaism and the spiritual gravitation of the women in the group to it. Orthodox women's prayer, which requires separation from men, is possible because they can pray in the *ezrat nashim*, which is women's space in the Plaza of the Western Wall. Nevertheless, their attempts to pray in their mode in *ezrat nashim* at the Western Wall Plaza were met with violence by other Orthodox Jewish worshippers. In an open letter, Judy Labehnson, one of the early members of the WoW, reminisced about their initial encounter with violence and her own decision to abandon the group and leave the Western Wall to the ultra-Orthodox fanatics. Subsequently she regretted her decision to surrender in light of further manifestations of violence and argued that the generality of Jews cannot allow the Wall to be turned into a bastion of ultra-Orthodox intolerance. She talked of her fear that if this should happen, the words of Lamentations might become prophetically true for those Jews in search of a middle path: "How doth the city sit solitary that was full of people – all her beauty so departed."[7]

In their choice of hermeneutics over more radical solutions, feminist religious women are attempting to maintain a hybrid identity, both Orthodox and feminist. By using this strategy they risk rejection by both the Orthodox community and the feminist community, each of whom from its own position is likely to disclaim the validity of the compromises made in order to combine the two identities. As mentioned, Orthodox Jewish, Christian and Moslem religious leaderships have solidly opposed the ordination of women. The Orthodox rejection was made abundantly clear in the case of the WoW and, indeed, not only was there violent opposition from the fanatics but there was widespread condemnation and no vocal support from establishment religious figures in Israel.

From the radical feminist angle, spiritualist or secular, the endeavor to transform monotheism through interpretation seems futile. The radical view is that the core message of the monotheistic religions is hierarchical and patriarchal by definition, and hence there can be no interpretive transformation. Carol Christ, for instance, claims that the Bible's core

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[7] Letter by *J. Labehnson*, on file with the author.

message is one of intolerance and that its core symbolism makes male domination appear normal and legitimate, a mirroring on earth of male authority on high.[8] Radical religious feminists or indeed secular feminists could wonder what motivates religious feminists to try to square the circle as the WoW are doing. The answer to this may lie in the impossibility for some religious feminists of separating from the spiritual identity of the Orthodox religion in which they were raised. The depth of spiritual conviction has been clear in the WoW: this is their religion, their *tallit*, their Torah and their place in *ezrat nashim.* Also, beyond theological religious identity, there is a question of community and family identity. Exit from the Orthodox community would entail a split from community and family, as regards shared place and form of worship and ritual. It would affect family events such as children's bar mitzvas or marriages. These are heavy prices for religious women to pay, and they impose a painful choice. It is the choice of WoW to push the feminist limits of Judaism as far as is possible within the Orthodox tradition. This may appear to be a limited agenda from outside the Orthodox circle but it is an autonomous choice.[9]

The religious community of Orthodox Judaism is a social and political world, with its own leadership, its laws, its norms of daily behaviour and its social organisation. The attempt of the WoW to claim their own Orthodox heritage as women within this community can perhaps be compared to the early days of the struggle to gain a voice in democracy. The attempt of women to gain a voice in Western democracies lasted over a hundred years, from the time of the French Revolution. The struggle of the Seneca Falls feminists and the English Suffragettes against exclusion and silencing met with violent opposition from "democratic" governments. On the secular political level, women's partici-

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[8] *C. P. Christ*, The Laughter of Aphrodite: Reflections on a Journey to the Goddess, 1987, 59-60; in *R. M. Gross*, Feminism and Religion – An Introduction (1996). Gross says: "It's too broken to be fixed: the feminist case against theological transformation of traditional religions," at 140-146.

[9] For full discussion elsewhere of the issue of consent to patriarchy, see *F. Raday*, Culture, Religion and Gender, I.Con, International Constitutional Law Journal 1(4) (2003), 663. The preparedness of these women to face violence and to pursue legal remedies would suggest that this is not a case of coerced consent to a patriarchal culture or religion but of genuine choice. The choice of hermeneutics rather than exit by women in other situations may not be the result of genuine choice. Thus, for instance, in many Moslem communities, exit is not an option: law, community and family will combine to prevent and heavily punish any such attempt.

pation and voices have become an accepted part of democratic discourse. The feminist struggle against exclusion from the public sphere and silencing is now being re-enacted in the context of religion in general and, in the case of WoW, in the context of Orthodox Judaism.

III. Feminist Ritual – Patriarchy Challenged

It has been the pain of exclusion from leadership roles and ritual practices that has been the first motivating factor for many religious feminists to challenge the patriarchal status quo in their religious communities. Rita Gross writes:

> … in Christianity and Judaism … continued reflection and experiences led us to the realization that we were excluded from ritual and leadership because of certain theological concepts, especially the image of the deity as male. It became clear that if patriarchal control of ritual was eliminated, the patriarchal naming of god would closely follow, which could lead to even more experimentation with praxis in other areas.[10]

The exclusion of Orthodox Jewish women from wearing a *tallit*, reading from a Torah scroll and praying aloud in a group are obvious ways of excluding women from both ritual and leadership. The attempt of the WoW to break the patriarchality of this ritual exclusion is, of course, a very important first step on the way to challenging the patriarchality of Orthodox Judaism as such. The WoW's manner of prayer is, as said, in a women's prayer group (*tfila*), wearing prayer shawls (*tallit*) and praying aloud from the Torah: the three Ts. In each of these there is a challenge to the patriarchal hegemony of the religion. The reasons why each of the attributes of the WoW's mode of prayer is considered offensive and unacceptable by those rabbinical authorities that oppose it are richly expressive of patriarchy in feminist discourse and this goes far to explain their violent opposition to their manifestation. It correspondingly explains the importance to Orthodox feminism of changing the rituals.

The different aspects of the WoW's mode of prayer are all linked to public participatory prayer and are hence directly or indirectly connected to the performance of active duties at fixed times (*mizvot 'asse*

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[10] *Gross* (note 8) *supra*, at 200.

she-ha-zman gramman).[11] Women are exempt from performing such duties and there is conflicting opinion as to whether they may waive this exemption even if the exemption is not to their advantage but to their disadvantage. The objection to women's active participatory public prayer, since it involves performance of active duties at fixed times, is ostensibly attributable to the family role of women, and it would seem as though the primary concern is that they may abandon their traditional child-caring role. However, on closer examination, this ostensibly pragmatic exemption turns out to be much more. A Middle Ages tract, the Book of Abudraham, spells out for us the family functions which will pre-empt a woman from carrying out performance of active duties at fixed times:

> And the reason why women are exempted from *mizvat asse she-hazman gramma* is that the woman is bound to her husband to tender to his needs. And had she been obliged to do *mizvat asse she hazman gramma,* it is possible that at the appointed time for the carrying out of the *mitzva* the husband might order her to do his *mitzva*. And if she carries out the Almighty's *mitzva* and neglects his *mitzva* , let her beware of her husband. And if she carries out her husband's *mitzva* and neglects the Almighty's *mitzva,* let her beware her Creator. Hence, the Almighty exempted her from His *mitzvot* so that she should be at peace with her husband.[12]

There are few such well articulated pieces of evidence regarding the connection between ritual, maleness of the deity and the hierarchical power of men in family and society.

The objection to group prayer with a Torah Scroll is an expression of the exclusion of women from the public sphere and public functions. In this context, it touches also on that aspect of public sphere activity that

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[11] Mishna, Kidushin 1,7.

[12] The Book of Abudraham (Seder tefilot shel chol, chapter 3 brachat hamizvot). Even for the skeptical, this tract portrays an unexpectedly patriarchal picture. It does not relate to women's childbearing role or even to child rearing but concentrates solely on the competing duties which a woman has to her husband and to God. It should be noted that there are sources which deny that a wife has to be submissive and obedient to her husband and, in particular, it is clearly provided that it is forbidden for a husband to coerce his wife to have intercourse with him. Be that as it may, in the context of *mizvat asse she hazman gramma,* the emphasis put on wifely duty to her husband and the competition between her husband and the Almighty for the right to her obedience express patriarchal hegemony.

is associated with the acquisition of power through knowledge and spiritual authority. This exclusion is a well worn theme of feminist analysis. In her book, *Public Man Private Woman,* Jean Elshtain summarizes the course of Western civilization, starting from the Greeks:

> Truly public, political speech was the exclusive preserve of free male citizens. Neither women nor slaves were public beings. Their tongues were silent on the public issues of the day. Their speech was severed from the name of action: it filled the air, echoed for a time, and faded from public memory with none to record it or to embody it in public forms.[13]

As regards the wearing of prayer shawls, Professor Eliav Schochetman, the *halakhic* expert for the State respondent in the WoW litigation, concluded that women may not wear prayer shawls, at least in public. He argued that, although it might be theoretically permissible, it would be an exhibition of "arrogance" for them to do so. Arrogance, in this context, is "behaviour which is vulgar and proud, shows contempt for others, and is unconventional in the community"; arrogant behaviour by women even in private but most certainly in public is considered improper and impermissible. Furthermore, Schochetman points out that the wearing of *tallit* is contrary to the prohibition in the Torah according to which "a woman must not take man's apparel."[14] This prohibition is reminiscent of Naomi Wolf's analysis, in her book *The Beauty Myth*, of the role which the differentiation between male and female clothing has played in retaining male superiority.[15]

Perhaps the most emotive objection that has been brought to bear against the WoW is the argument that it is forbidden to hear women's voices in song. The fear of the disturbing impact of women's voices first appears in the Babylonian Talmud. There, in a commentary on the sayings of the Rav Shmuel, the Talmud says that Shmuel spoke of the need for modesty in women's dress, saying: "A woman's thigh is seductive" and admonishing women: "If you show your thigh you show your shamefulness." In this context, the Talmud reports, Shmuel also said:

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[13] *J. B. Elshtain*, Public Man Private Woman – Women in Social and Political Thought, 1981, 14.

[14] Note 4 *supra;* Devarim 22, para. 5.

[15] See *N. Wolf*, The Beauty Myth: How Images of Beauty are Used against Women, 1991.

"A woman's voice is seductive."[16] Shmuel's saying came to be taken as requiring women to preserve their modesty by not exposing their voices in song in public, analogously to not exposing their bodies.[17] However, the original source of the phrase used by Shmuel was the Song of Songs:

> O my dove, that art in the clefts of the rock, in the secret places of the stairs, let me see thy countenance, let me hear thy voice; for sweet is thy voice and thy countenance is comely.

The transposition is revealing. From a sensual rejoicing in women's beauty, amongst the most exquisitely erotic pieces of love poetry ever written, with its repetitive mutual themes of sensual longing, was derived a ruling which turns women's sensual beauty to shameful seductiveness. This etymological source of the "seductiveness" (*ervah*, lit. 'pubes,' fig. 'shame,' 'prostitution') of women's voices is evidence of the interlinking of the silencing of women not only with the politics of patriarchal domination but also with the psychology of sexual fear of women's sensuality. It is reminiscent of the Sirens of Greek mythology whose song lured sailors to their deaths. The move is from sensuality to silencing. Thus, the purpose of the silencing is double: silencing women's voices in implementation of the exclusion of women from participation in the public arena and silencing women's voices in order to protect men against women's sensuality.

The accumulation of reasons for preventing Jewish women from praying in a group with the three Ts – *tallit*, *Torah*, *tefila* – signifies deep patriarchal fears of women's active participation and partnership in the public sphere of social life. The impact on women is marginalisation. As Elshtain writes:

> Because women have throughout much of Western history been a silenced population in the arena of public speech, their views on these matters, and their role in the process of humanization, have either

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[16] Babylonian Talmud masechet brachot page 24 column 1 "R. Yitzhak said: An [uncovered] hand's-breath is ervah. In what context? If regarding looking [at a woman], did not R. Sheshet say: Anyone who gazes even at a woman's little finger is as if he gazes at her private parts?

Rather, regarding his wife and reading Shema. R. Chisda said: A woman's thigh is ervah, as it is written.. R. Shmuel said: A woman's voice is ervah, as it is written.. R. Sheshet said: A woman's hair is ervah, as it is written."

[17] The requirement that women not raise their voices in song at the time of prayers later found expression as a prohibition in the *Shuklhan Aruch*. *Y. Qaro*, Shulkhan Aruch [Code of Jewish Law] (c.1500s).

> been taken for granted or assigned a lesser order of significance and honor compared to the public, political activities of males. Women were silenced in part because that which defines them and to which they are inescapably linked – sexuality, natality, the human body (images of uncleanness and taboo, visions of dependency, helplessness, vulnerability) – was omitted from public speech.[18]

IV. The Wall and Its Symbolisms

The mode of prayer of the WoW has special significance for Judaism and for Israel because of the women's commitment to praying at the Western Wall. The spiritual gravitation of the women to this location is because of the Wall's symbolism for religious Judaism. They, like many other Jews, men and women, from Israel and elsewhere, regard this place as a religious and cultural center. The choice of the Western Wall brings its different symbolisms into play in the diverse perceptions of the identity of the WoW, which I will discuss below.

The Wall is the only structure remaining from King Solomon's ancient Temple of Jerusalem, rebuilt in glorious style by King Herod, and destroyed by the Romans in 70 AD. It is a high wall built of enormous Herodian stones which formed part of the western perimeter wall of the Temple. After the destruction of the Temple, the Romans expelled almost all the Jews from the Land of Israel and they were dispersed, in what they called the exile or the Diaspora. Some Jews remained in Jerusalem, and the tradition of praying at the Wall began around 200-300 AD. It is known as the Wailing Wall in English because Jews, throughout the centuries, have come there from all over the world to write prayers and messages on paper and stick them in the nooks between the stones and to lament the loss of the temple and their land. Jews had access to the Wall during the time of the Ottoman Empire and the British Mandate, and pictures remain of the prayer of men and women intermingled. Attempts by the Jewish population, in 1928, to set up a *mexitza* (a barrier to separate men from women) were thwarted by opposition from the Moslems and the British Governor on the grounds that it would be an expression of Jewish national identity. After the War of Independence, in 1948, when the Wall fell under the control of Jordan, Jewish access to the Wall was prevented. Up to this point the sym-

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[18] *Elshtain* (note 13) *supra*, at 15.

bolism of the Wall was of Jewish dispersal and longing for a return to nationhood in Jerusalem.

After the Six Day War in 1967, Israel gained control of the Western Wall, and for the first time since 70 AD Jews were able to worship there publicly and without fear. In the post-1967 State of Israel, the Wall has been regarded as a site of great symbolic significance, both for Jews in Israel and for Jews in the Diaspora, not only as a holy place but also as a historical, national and cultural symbol: "a symbol of the sadness of generations and the desire to return to Zion … an expression of the strength and survival of the nation and of its ancient roots and eternality."[19] It has been described as a "contemporary shrine," where "the heterogeneity of the Jewish people brought together in a single space, is captured, condensed and highlighted."[20] Prayers, bar mitzvas, the swearing in ceremony of the paratroopers, singing and dancing take place by the Wall. When Pope John Paul II visited Israel in 2000, he wedged a note in a nook of the Wall in acknowledgment of the Jewish custom.[21]

This historical, national, cultural and sacred symbolism is not accepted by all. From a Muslim perspective, Jewish worship by the Wall is perceived as symbolic of Jewish nationalism, as it has been since 1928, and is regarded currently as a manifestation of the hegemony of Occupation. During the second *Intifada*, the Wall became a site of Israeli-Palestinian conflict. The Wall, still the perimeter of Temple Mount, and the Plaza were targets of stone-throwing by Muslim worshippers from the great El Ahksa Mosque Plaza just above it. Also, within Judaism, not all are content to see the Wall as a contemporary shrine. The Jewish religion has traditionally refrained from regarding the sacred as located at geographical or physical sites and has chosen to regard it as embodied in the Torah scroll and in the teachings of the Jewish religion. For this reason Prof. Yeshayahu Leibovitch considered the attitude of veneration towards the Wall as idolatrous.[22] For some of the radical secular

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[19] See judgment of President Shamgar in *Hoffman I,* at 353.

[20] *D. Storper-Perez/H. Goldberg*, The Kotel: Towards an Ethnographic Portrait, Religion, 24(4) (1994), 309. Taken from *Shakdiel* (note 22) *infra*, at 144.

[21] During his visit to the Western Wall, John Paul II observed the custom of inserting a short prayer into a nook in the wall. There is a copy of that signed and stamped prayer preserved at Yad Vashem.

[22] *L. Shakdiel*, Women of the Wall: Radical Feminism as an Opportunity for a New Discourse in Israel, Journal of Israeli History, 21(1/2) (2002), 126 (143-145).

Jewish Left the Wall symbolises the ethnocracy of the Zionist project in general and the Occupation in particular. Some Jewish feminists have regarded feminist activism in the context of the Wall as conflicting with their political activities for peace, in organisations such as Women in Black. In this theme, Leah Shakdiel has described the Wall as "all maleness and war,"[23] and has asked whether this is not such a defining essence as to be beyond the reach of feminist activism. She has also said, albeit tentatively, that the WoW appear to have fallen inadvertently into the trap of maintaining Jewish national sovereignty in the Wall Plaza, Judaizing the space.[24]

Discussion of the right of the Jewish people to national sovereignty in general and at the Western Wall in particular is beyond the scope of the present paper.[25] The present focus is on women's role within the existing frameworks of religious organisation. Whatever political perspective one takes regarding the Wall's place in Israel's political ethos, in 1967, the Wall became a blatant symbol of women's marginalisation in the public space of Jewish Orthodoxy and at the heart of the Nation. The area facing the central section of the Wall, previously crowded with tenements, was levelled and paved, and the space was divided by a *mechitza,* with three quarters of the space allocated to men and only a quarter to women. Furthermore, the men's area contains the access to the underground tunnels and synagogues, along the lower levels of the Herodian walls, considered to be even closer to the Holy of Holies of the Second Temple. Thus with the conjunction of state power and religious institutionalism, the space became clearly, and patriarchally, gendered.

V. Identifying the Ideological Basis of the Confrontation

The WoW's prayer met violent opposition from other Orthodox worshippers, male and female. On December 9th 1988, a group of Orthodox feminists held their first prayer service, in the *ezrat nashim* at the Western Wall, based on the custom of women's prayer groups with the

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[23] *Ibid., at* 143.

[24] *Ibid*., at 155.

[25] I have discussed the issues of the rights of the Jewish and Palestinian peoples to self-determination elsewhere: *F. Raday*, Determination and Minority Rights, Fordham Int'l L. J 26 (2003), 453.

three Ts, which had been introduced by Jewish feminists in the United States. The women were verbally abused and men praying on the far side of the *mechitsa* screamed at them and made threatening gestures. In 1989, an additional group of women from the United States, who were later to form an International Committee for the Women of the Wall, also began to hold prayer meetings by the Wall. At the following prayer meetings the violence increased. The women were subjected to physical attacks from Orthodox men and women praying at the Wall who threw objects at them, pushed them and hit them. Similar violence erupted against Reform and Conservative Jews who attempted to pray near the Wall in mixed-sex prayer groups. The repeated violence was orchestrated by small groups of fanatics, mostly *yeshiva* students who study and live in the vicinity of the Wall. However, its importance exceeds the number of its perpetrators. Many people who would not identify themselves with the violence have not condemned it but rather harshly condemned the women for provoking it.

Why the violence against the WoW at the site of the Wall Plaza? Admittedly, this is not the way every Orthodox Jewish woman wants to pray, but why should it arouse opposition to the point of violence? What is so threatening about it? It is not an activity that directly threatens or even delegitimises the right of others to pray in their own way. It is not a way of prayer that violates *halakhic* prohibitions. There is some *halakhic* authority for the legitimacy of this mode of prayer and, furthermore, even those who oppose it base their opposition not on general *halakhic* prohibition but on its "unacceptability" and on the "custom of the place." Nevertheless, the WoW's attempt to pray in their manner arouses furious opposition and fanatical violence. The reason for the violence is clearly that the WoW's prayer threatens something deep in religious conviction which both permeates and extends beyond the *halakhic* debate.

It is my view that the "something" beyond the *halakhic* debate that produces violence is the desire of the Orthodox Jewish establishment to preserve religious patriarchal hegemony against the challenge of religious feminism. This view is not accepted by all. There are two alternative accounts of the conflict. The first is Leah Shakdiel's account of the conflict as resistance of a nationalistic and religious alliance to a feminist challenge. The second is Ran Hirschl's account of the conflict as a contest for cultural hegemony between a secularist-libertarian elite and traditionally peripheral groups, in this case the ultra-Orthodox community. I will look more closely at each of these alternative accounts in turn.

Leah Shakdiel argues that most Israelis perceive the WoW, in their demand to change the custom of prayer by the Wall, as challenging Jewish-Israeli nationalism and that it is this that produces the vigorous opposition to any attempt to disrupt the status quo at the Wall. It is, in her view, the alliance between nationalism and religion that forms a male chauvinistic barrier to the WoW.[26] She cites the secular media's bias against the WoW in substantiation of this approach.[27] She considers that the "WoW chose to take on this double political alignment, in a specific site that unites the parties participating in its meaning, religious as well as national." Denoting the struggle as being against religious and national patriarchy allied, Shakdiel states that women's failure to win priority for gender issues over communal ones is innate to secular politics just as it is to Torah politics, and suggests that secular feminists are often no more successful in challenging cultural patriarchy than religious feminists in contesting religious patriarchy.[28] This analysis is, I think, problematic in both the Israeli and the international context.

Religious patriarchy forms the hard core of patriarchal norms in Israeli society, and the State endorses this religious patriarchy on a basis of pragmatic political considerations. Direct opposition to the WoW in Israel is solely religious. The WoW's struggle is against the maintenance of religious patriarchy, which is endorsed by the State. The flaunting of female autonomy, or for that matter secular or homosexual agendas, in defiance of Orthodoxy is enough to raise the fury of fundamentalist religious activists and no additional ulterior motive of nationalist fervour is needed to explain the phenomenon. Similar displays of fury and violence have been exhibited by this sector in situations which have in no way involved nationalistic symbolism. Thus, there have been violent demonstrations by the ultra-Orthodox against the driving of cars on public thoroughfares on the Sabbath, against the recognition of homosexual rights, against the proposal to draft ultra-Orthodox youth to army service, against the recognition of the right of women to sit on religious councils and their right to equal shares of the matrimonial property in divorce proceedings in rabbinical courts. These demonstrate that there is an independent religious political agenda that is quite divorced from nationalism and is, indeed, often in conflict with it. The common factor in all the situations is resistance to the challenge to Orthodox hegemony. In some of the cases, the State, through its judicial authority,

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[26] *Shakdiel* (note 22) *supra*, at 150-151.

[27] *Ibid.*, at 129.

[28] *Ibid.*, at 152-154.

has attempted to mitigate religious coercion or privilege and in others it has not. There is no proof here of a nationalistic and religious alliance over a whole range of issues.

The State's motives for acting as agent to support the religious status quo in the case of the WoW are not only not manifestly nationalistic, they are also not manifestly sexist. In this regard, I would contest Shakdiel's claim that feminists have made as little headway in achieving recognition for their agenda in the secular-civil demos as in the religious realm. In both legislation and litigation, the feminist lobby in Israel has been highly successful in achieving radical norms of equality in all fields other than that of personal status, which was delegated by the Knesset to the jurisdiction of the religious courts of all three communities, Jewish, Moslem and Christian. Thus legislation on women's equal rights, equal employment opportunity, working parents' rights, sexual harassment, retirement age, prevention of family violence, division of matrimonial property and income tax is very progressive. Supreme Court judgments on equality between the sexes have endorsed a strong equality principle, with a form of strict scrutiny, affirmative action as integral to equality and recognition of the necessity of paying the costs of accommodation of women's biological makeup in order to ensure equality of opportunity.[29] The only form of group discrimination currently endorsed by the Israeli legal system (as opposed to group discrimination practised in violation of legal norms) is in the religious jurisdiction over personal status. Rather than seeking ulterior nationalist or patriarchal motives for the Knesset's continuing endorsement of this religious discrimination against women, it might be appropriate to remind ourselves of the price that the religious public and the religious political parties would surely exact from coalition governments in the face of an attempt to repeal this legal arrangement. Furthermore, it seems clear that the political reason for not confronting the religious parties is not because it serves a hidden anti-feminist agenda. After all, although women are the primary victims of the discrimination generated under the personal law, they are not the only ones. For instance, secular persons who do not want a religious marriage and mixed-religion couples are unable to marry in Israel. Additional victims of the political concessions to the religious parties are the soldiers and reservists who carry an unequal burden of military service in view of the exemption of ultra-Orthodox youths from compulsory service. By this more pragmatic

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[29] For my fuller discussion of this issue, see *F. Raday*, On Equality – Judicial Profiles, Isr. L. Rev. 35 (2003), 380.

analysis, the endorsement of Orthodox patriarchy in the case of the WoW is a part of the endorsement of religious hegemony in general by the State and it seems more likely to rest on political pragmatism than on ideology of one kind or another.

Fundamentalist religious resistance to women's rights is unique neither to Judaism nor to Jerusalem. Indeed, religious fundamentalism constitutes the most virulent form of patriarchal politics in this era. Religious fundamentalism has the subjugation of women high on its agenda. At the beginning of the 21st century, the patriarchal hegemony of religion persists as an ideologically patriarchal core, in the centre of the growing egalitarian regulation of women's role in society. Religious institutions not only preach but also proselytise patriarchy, linking into pockets of resistance to feminist change. Jewish fundamentalism aims to exclude women from active participation in public religious life and to retain the husband's ultimate power to withhold divorce. Christian fundamentalism aims for control of women's bodies by the Church; it opposes contraception and violently opposes autonomous choice in abortion. It preaches return to traditional family values, with wifely obedience and mothers educating their children at home. Moslem fundamentalism subjects women to polygamy, obedience to their husbands in all social and sexual matters and the veil, depriving them of both private power and public participation. Fury at criticism of these patriarchal politics led to the fatwa against Salman Rushdie and to the killing of Theo Van Gogh. Hindu fundamentalists have rallied to support reintroduction of the institution of *sati*. The fundamentalist religious communities are not only holding on to an internal ethos of patriarchy, they are also trying to reintroduce this ethos into the realm of universal norm. The opponents of the WoW, like fundamentalists elsewhere, are not content to preserve the patriarchal character of the Jewish Orthodox rituals in private space such as Orthodox synagogues. They insist on the visibility of patriarchy in the public space and, indeed in this case, at the symbolic centre of national space.

As for the reaction of the secular to the WoW, popular reaction to the group was generally hostile. Even academics, intellectuals and journalists who are generally committed to a liberal point of view demonstrated overt hostility to the WoW. They claimed in newspaper articles and public discussion that this was a "provocation." Unlike the religious-nationalist stance, this reaction is rather one of indifference and incomprehension. It is consonant with the general perspective of the secular majority in Israel that the Jewish religion is what the Orthodox establishment says it is. The secular liberal community has no interest in

the women's struggle to open up Orthodoxy and make it more egalitarian, regarding it as irrelevant to human rights concerns. Their attitude to the WoW is that if they want to worship as Orthodox Jews, they should take the whole bundle, including the discrimination against them. This attitude, that the culture or religious community is homogenous and that there is no need to seek out and protect cultural dissent within the community is, of course, commonly found in multiculturalist literature and does not require the rationale of nationalist motives to explain it.

Ran Hirschl regards the conflict as a contest for cultural hegemony between a secularist-libertarian elite and traditionally peripheral groups, in this case the ultra-Orthodox community. His classification of the WoW as belonging to a secularist-libertarian elite is echoed in Leah Shakdiel's writing. She presents the association of the WoW with a secularist-libertarian elite not as an identity choice but rather as an identity trap, resulting from the group's "Jewish-Ashkenazi exclusivity," its struggle for the legitimacy of Jewish religious pluralism and its resort to the judicial system for support. Hirschl's perception of the ultra-Orthodox as belonging to the social periphery in Israel and, by implication as being socially excluded, disadvantaged and powerless, has strong echoes in Israeli legal multiculturalist writing.[30] Juxtaposing these two groups, he suggests that support for the WoW's position represents the creation of a "safe haven" for threatened secularist-libertarian elites.[31] Hirschl's representation of the conflict is seemingly justified by Shakdiel, who says the WoW "cannot escape the problems that [their] strategy entails: … an anti-religious struggle concealed in the rituals of secular nationalism."[32] These classifications and their juxtaposition are all based, in my view, on a wrong reading of Israeli reality.

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[30] See *A. Harel/A. Shenrech*, Separation between the Sexes on Public Transportation, Academic College of Law L. Rev. 1 (2003) [in Hebrew]; for an opposing view see *N. Rimault*, The Separation between Men and Women as Sexual Discrimination, Academic College of Law L. Rev. 1 (2003), 112 [in Hebrew]. See also *M. Halberthal/A. Margelit*, Liberalism and Cultural Rights, in: M. Mautner (ed.), Multiculturalism in a Democratic Jewish State: Memorial Book for Ariel Rozen-Zvi, 1998, 93-104 [in Hebrew]; for an opposing view see *J. Brunner/Y. Peled*, Autonomy, Capability and Democracy: A Critique of Multiculturalism, in: M. Mautner (ed.), *ibid,* 107-131[in Hebrew].

[31] *R. Hirschl*, Towards Juristocracy: The Origins and the Consequences of the New Constitutionalism, 2004, 67-68.

[32] *Shakdiel* (note 22) *supra*, at 154.

The fact that the WoW is an exclusively Jewish group is necessitated by the nature of the agenda. The WoW is also certainly largely composed of Ashkenazi women; furthermore many of these women are either from the Western world or influenced by practices brought from the Western world. The group's "exclusivity" as Ashkenazi is not, however, by choice. The group's aim was to be open to all religious Jewish women and indeed its insistence on prayer at the Wall rather than elsewhere was in large part based on the philosophy of inclusiveness. The group has been rejected and does not reject. The employment of liberal-pluralist arguments and processes in their struggle was not the philosophical choice of the WoW: their choice was to pray in their way and their way was barred by the secular arm of the State, including by the secular exercise of authority by the Supervisor of the Wall. The only way to remove that barrier was by taking legal proceedings to prevent violation of their human rights and to preserve the right of women to equal access to and use of a public facility, the prayer facility of the Wall Plaza. Thus, the choice of the liberal-secular playing field was in fact made by the Supervisor of the Wall and the Ministry for Religious Affairs and not by the WoW.

The ultra-Orthodox minority in Israel is far from the archetype of peripheral or socially excluded groups treated by human rights norms. They are not politically disempowered. They have, rather, for most of the history of Statehood, held crucial leverage power in coalition governments. They have used this political power to maintain their own school and higher education institutions subsidised by the state, the exemption of ultra-Orthodox yeshiva students from military service, the provision of special budgets for religious needs in education and housing and an Orthodox monopoly over marriage and divorce.

To address the WoW's fight for the right to pray in public as an issue of secularism versus religion is to ignore entirely the intra-religious agenda of Orthodox Jewish women. This is dismissive not only of the rhetoric of the WoW's claims but also of their consistent commitment to prayer by the Wall in their mode over a period of seventeen years. As already noted, the method forced on the women may have been secular but the agenda was religious. As McClain and Fleming remark in their critique of Hirschl, "… it seems inapt to characterize a dispute between groups of observant Jews over prayer rights as illustrating a secular-religious

cleavage."[33] Treating the women as an elitist hegemony over a discrete minority is disingenuous. The minority concerned is far from politically powerless and, in any case, women are a sub-group subjected to pervasive discrimination within that minority. Hence, the WoW provides a voice regarding the status of Orthodox and ultra-Orthodox women that should be heard.

Although she calls the opposition to the WoW a nationalist-religious alliance, Shakdiel delegitimises the WoW's project by making ambivalent claims as to whether the women challenge this alliance or whether they are maintaining nationalistic goals at the Wall. Hirschl delegitimises the WoW's project by labelling it an elitist haven. Despite their different emphases, Shakdiel and Hirschl share a common goal. They both attempt to recategorise the WoW's struggle, divorcing it from its religious-feminist hermeneutic roots, and they both seem to suspect the WoW of promoting elitist anti-religious secularism. Shakdiel does so by confusing it with nationalist issues, and Hirschl, by categorising the struggle as one between secularism and religion, and its proponents as an elitist group, delegitimising the whole project of women's hermeneutical reform of religion by branding its proponents as secular elitist outsiders.

VI. The Reach of the Law

The Western Wall is one of the sites governed by the Protection of Holy Places Law, 1967, which provides that necessary measures shall be taken to prevent desecration of holy places or behaviour which is likely to obstruct the freedom of access to the sites or offend the sensitivities of the members of the religious communities to whom they are holy.[34] The implementation of the Law is placed in the hands of a supervisor appointed by the Minister of Religious Affairs,[35] in consultation with the Chief Rabbis. The Wall is a Holy Place subject to public administra-

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[33] *L. C. McClain/J. E. Fleming*, Constitutionalism, Judicial Review and Progressive Change, lecture presented to the Maryland/Georgetown Discussion Group on Constitutional Law, March 4-5, 2005. On file with the author.

[34] The same provisions are included in the Basic Law: the Capital City of Jerusalem.

[35] Now the Minister of Tourism, subsequent to the closure of the Ministry of Religious Affairs.

tive law. This regulation of the legal status of the holy places is in a context of the promotionism of religion in the Israeli legal system. The *millett* system, introduced under the Ottoman Empire and adopted by the British Mandate, has been maintained in Israel. The *millet* system is pluralistic as regards the major religions in Israel: the various communities, Jewish, Moslem and Christian, have their own religious courts which have exclusive jurisdiction over questions of personal status of the members of their communities (i.e. the rights to marriage and divorce). They also have their own officially recognised days of rest and holidays and their own holy places. As regards the promotionism of the Jewish religion, there is in most contexts a monopolistic preference given to Orthodox Judaism over other streams of Judaism.

At the time of the initial violent reaction to the WoW, the Government intervened. Its intervention, however, was not to remove the violent fanatics from the Wall Plaza, but to banish the WoW, excluding the women from praying in their own manner by the Wall. The police, rather than protecting the women against attack and arresting their attackers, forced the women to leave, with female police officers dragging away those who resisted, claiming this was necessary to prevent a breach of the peace and desecration of the Wall. The Supervisor of the Wall, Rabbi Getz, an Ultra-Orthodox rabbi, issued an order preventing the WoW from praying by the Wall wrapped in prayer shawls and reading from a torah scroll. He issued this order despite his initial admission that their prayers were not prohibited by the *halakha*.[36]

In reaction, on March 21st 1989, the WoW petitioned the Supreme Court sitting as the High Court of Justice, challenging the prohibition of their mode of prayer. Their petition was based on their constitutional right to freedom of worship, their right of access to the Wall and their right to equality as women. They also claimed that the Supervisor of the Wall had acted beyond the limits of his statutory powers, as determined in the Regulations under the Holy Places Law. After the submission of the WoW's petition, the Minister of Religious Affairs promptly amended the Regulations in order to expressly "prohibit the conduct of a religious ceremony which is not according to the custom of the place and which injures the sensitivities of the worshipping public towards the place."[37]

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[36] *Chesler/Haut* (note 1) *supra*, at xx.

[37] Regulation 2(a)(1a), Regulations for the Protection of Holy Places for Jews, 1981.

The Supreme Court sitting as the High Court of Justice rejected the WoW's petition (*Hoffman I*, 1994). However, although rejecting the petition, Justices Shamgar and Levine, in a majority on this point, recognised in principle the WoW's right of access and freedom of worship by the Wall. They recognised the women's right to pray according to their custom in the Plaza of the Western Wall.[38] Justice Shamgar, then President of the Court, held that the common denominator for Jewish worship at the Wall should not be the strictest *halakhic* ruling but should allow good faith worship by all who wish to pray by the Wall. Shamgar recommended that the Government should find a solution which would "allow the petitioners to enjoy freedom of access to the Wall, while minimising the injury to the sensitivities of other worshippers." He based his recommendation on the need for mutual tolerance between groups and opinions and on the need to respect human dignity. He did not mention the disempowerment of women and the need to guarantee their constitutional right to participate equally in the public arena. He was silent on the issue of equality, even though he noted, with the most tentative of criticisms, one of the primary manifestations of that inequality, the objection to the hearing of women's voices:

> "The singing of the petitioners aroused fury, even though it was singing in prayer; and anyway is there any prohibition of singing by the Wall? After all, there is dancing and singing there not infrequently and it is unthinkable that the singing in dignified fashion of pilgrims, whether Israeli or foreign, soldiers or citizens, whether male or female, should be prevented. In view of this, it may be, and I emphasise "may be," that the opponents are confusing their opposition to the identity of the singers with their opposition to the fact of the singing, and this should not be."

Justice Levine based his recognition of the WoW's right to pray in their manner at the Wall on more liberal grounds, regarding the Wall as having not only religious but also national and historical importance to all the different groups and persons who come there, in good faith, for the purpose of prayer or for any other legitimate purpose.

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[38] There was subsequently much controversy as to the bottom line of Justice Shamgar's judgment, with the State claiming that he had not recognised this right and that he had given a majority opinion rejecting the right together with Justice Elon. The majority opinions in *Hoffman II* (*infra* note 39) and *III* (*infra* note 40) held that Justice Shamgar had, together with Justice Levine, recognised this right. The interpretation quoted here is from the judgment of Justice Cheshin in *Hoffman III.*

The majority judgments were, as said, devoid of any mention of the WoW's right to equality, upholding the need to protect pluralism but not addressing the issue of religious patriarchy. It was only in the minority opinion, written by Justice Elon, who was then the incumbent of the religious seat on the Supreme Court, that the issue of equality for women was discussed. Justice Elon examined in depth the various *halakhic* opinions on women's prayer groups. He concluded:

> "It is conceivable that the substantial change in women's status and position in the present century, in which also religiously observant women are full participants, will in the course of time bring about an appropriate solution to the complicated and sensitive issue of women's prayer groups. However, the area for prayer beside the Western Wall is not the place for a "war" of deeds and ideas on this issue. As of today, the fact is that a decisive majority of the *halakhic* authorities, including Israel's Chief Rabbis, would regard acceptance of the petition of the petitioners a travesty of the custom of a synagogue and its sacredness. … such is the case as regards the Western Wall which is the most sacred synagogue in the Jewish religion."

And so, Justice Elon examines the issue of religious women's right to equality in the modern world only to dismiss the possibility of addressing it at the Wall, which is, in his view, a synagogue and the most sacred in the Jewish religion.

In response to the High Court of Justice's recommendation, the Government set up a Committee of Directors General of various Ministries. This Committee, after deliberating for two years, finally made its recommendations: the WoW could pray in their manner. However, this prayer was to be outside the South Eastern corner of the battlements of the Old City – well away from the Wall – at the Wall they could not pray in their manner for reasons of internal security, i.e. a threat to the breach of the peace. The Government then appointed a Ministerial Committee which, after taking a year to deliberate, concluded that the WoW could not pray at the Western Wall for internal security reasons and, in addition, could not pray at any of the alternative sites considered because of external security reasons, that is the danger of causing a conflagration with the Palestinians who look down on these various sites from the Dome of the Rock (built on what was Temple Mount) and want to prevent any change in the status quo. The third committee to sit on the matter, the Neeman Committee, recommended Robinson's Arch as the most practical alternative. Robinson's Arch is further to the South and is entirely hidden from the Wall Plaza by a rampway up to the Dome of the Rock.

After the conclusions of the first committee were issued, the WoW retraced their steps to the Supreme Court. We argued that, since the Government had shown itself to be clearly incapable of implementing the recommendations of the Court and securing the WoW's rights of worship and their right of access to the Wall, the Court itself was the last resort. We also emphasised more strongly the issue of women's equality involved in the denial of ritual rights. Only after the conclusions of the third committee, did the repeated hearings before the Supreme Court and the repeated postponements requested by the Government and conceded to by the Court culminate, in May 2000, in a summing up and a decision.[39] Our arguments were heard by Justices Matza, Beinish and Strassberg-Cohen and they conducted a tour of the Wall and all the various alternative sites which had been considered by the various committees before rendering judgment. It is worthy of note that, while, in the first decision all the justices had been male, in *Hoffman II*, the Court was composed of two women and one man.

In *Hoffman II*, Justice Matza wrote the opinion of the Court and Justices Beinish and Strassberg-Cohen concurred. The Court held that the majority in *Hoffman I* had recognised the right of the WoW to pray in their manner at the site of the Wall itself. Hence, it concluded that the recommendations of the various governmental committees, in seeking alternative sites, had all been contrary to the directions of the Court. Indeed, the Court held, on the basis of its own impressions from the tour of the sites, that none of the alternative sites could serve, even partially, to implement the WoW's right to pray in the Wall Plaza. The Court directed the Government to implement the WoW's prayer rights in the Wall Plaza within six months.

The decision was a path-breaking opinion and constituted a significant step forward towards implementation of the WoW's previously abstract right. It clarified that the *Hoffman I* decision bestowed full recognition of the WoW's right to pray in accordance with their custom in the Wall Plaza. It also transformed the Shamgar recommendation into a judicial directive and concretised the government's obligation to implement the right as an obligation fixed in time and place. However, the Court refrained from actively intervening and itself establishing the prayer arrangements at the Wall. It held that it was, at this stage, refraining from doing so because the petition had been presented in the context of an expected Government decision and, in the event, the Government had

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[39] HCJ 3358/95 *Anat Hoffman v. Prime Minister Office*, Tak-Al 2000(2) 846 (Hereinafter: *Hoffman II*, 2000).

not actually issued a decision. This somewhat evasive conclusion is probably to be attributed to the Court's defensiveness in the face of ongoing attacks by politicians, religious elements and some academics, that the Court is too activist, particularly in matters of state and religion. None of the judges made a new analysis of the rights at issue and none of them referred to the question of women's right to equality.

In reaction to the decision in *Hoffman II,* the religious parties in the Knesset tabled a legislative proposal to convert the area in front of the Wall into a synagogue exclusively for Orthodox religious practice and to impose a penalty of seven years imprisonment on any woman violating the status quo of Orthodox custom at the Wall. This legislative proposal was also supported by a number of Knesset members from secular parties. In addition, the then Attorney General, Eliakim Rubinstein, asked the President of the Supreme Court to grant a further hearing of the case and to overrule *Hoffman II*, a surprising request in legal terms, since the decision had been unanimous. He claimed among other things that the Court had misunderstood *Hoffman I*. The decision of the Attorney General was a political decision demonstrating the reluctance of the Government to implement the human rights of the WoW in accordance with the Supreme Court's decision.

The President of the Supreme Court, Aharon Barak, granted the Attorney General's request and appointed an expanded panel of 9 Justices to reconsider the issue. In *Hoffman III*, the Court was divided and gave an ambivalent decision.[40] The majority judgment given by Justice Michael Cheshin, in which Justice Barak and Justice Or concurred, held that the right of the WoW to pray in their way at the Western Wall Plaza had been recognised but that it was not absolute and that the best way to implement it in a manner that would minimise offense to the sensitivities of other worshippers would be to provide the WoW with an alternative place of prayer at Robinson's Arch. Four members of the Court – Justices Mazza, Beinish, Strasberg-Cohen and Shlomo Levin – wrote a minority opinion advocating full and immediate acceptance of the WoW's petition to pray in the Wall Plaza. The two religious members of the Court, Justice Englard and Justice Terkal, opposed any recognition of the WoW's rights of prayer in the Western Wall Plaza. No member of the Court discussed the women's right to equality.

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[40] HCJ 4128/00 *Prime Minister Office v. Anat Hoffman*, P.D. 57(3), 289 (Hereinafter*: Hoffman III*, 2003).

The majority decision provided that, should the Government fail within 12 months to convert Robinson's Arch into a proper prayer area, the WoW would have the right to pray in their manner in the Wall Plaza. The way in which this rather strange, conditional judgment gained majority support in the 9 member Court was through tactical alliances. There was a majority of 5 in favour of the Robinson's Arch option: the two religious members of the Court, Justice Englard and Justice Terkal, opposing the WoW's prayer by the Wall, joined the Robinson's Arch option. Justice Englard remarked that he did so "regretfully," only because he knew that his was a minority view, and that had he had his way the decision in *Hoffman II* would have been overturned. There was a majority of seven for the default option of prayer in the Wall Plaza, if the Government failed to provide the proposed alternative: the three judges of the majority were joined in this by the four minority judges who supported this as the only option. The Court, in effect, returned the issue to the government playing field, placing the option and the onus of action on the executive branch.

Robinson's Arch is an archaeological site, which lies south of the Western Wall Plaza but out of direct eye contact with it and with a separate approach and entrance. It lies adjacent to the Wall but has not traditionally been a prayer site; it is, rather, a much valued archaeological site with huge Herodian stones which fell from the Temple mount in 70 AD, at the time of the Roman destruction and have lain there ever since. Robinson's Arch is not an area which has traditionally attracted Jewish worshippers. Such prayer, as is practiced there, is by Reform and Conservative Jews, who, unlike the WoW, cannot conduct their mixed-sex prayer in the separated prayer areas for men and women at the Western Wall Plaza. This site is hence not integrated into the historical site for communal prayer of the Jewish people. The significance of the consensus that the WoW should pray at Robinson's Arch is therefore the exclusion of rebellious women from the shared public space, which is regarded by religious consensus as sanctified.

Pursuant to the judgment, the Government spent considerable funds in order to convert the Robinson's Arch site into a prayer site, without damaging access to the site's important archaeological remains. The work was not however completed within the 12 months and, on the lapse of the Supreme Court's injunction, the WoW prayed in their manner – with the three Ts – at the Wall Plaza. The State Attorney returned to Court to ask for a prolongation of the injunction for a further month to allow completion of the work at Robinson's Arch and the request was accepted. The construction work at Robinson's Arch was

completed and at present there is no express court injunction in force. Presumably, should the State again request an injunction against prayer by the WoW in the Wall Plaza, the Court will accede. Hence, effectively, the WoW are not permitted to pray with the three Ts in the Western Wall Plaza but only at Robinson's Arch.

VII. Right to Equality and Identity as Religious Women

On the matter of equality, the WoW claimed from the outset that the denial of their right to pray with the three Ts violated their right to equality. We made this claim central in the *Hoffman II* and *Hoffman III* hearings. All the secular judges, including the female judges, entirely ignored the issue of women's right to equality. The secular judges based their recognition of the women's right variously on freedom of access, freedom of expression or freedom of worship and not on equality for Orthodox women. This choice is remarkable because, although it never appeared in either our pleadings or those of the State, the contingencies of recognising freedom of worship are problematic; thus, for instance, they might lead to claims by Jews for Jesus to worship with crosses by the Western Wall. The result is a preference for the threat of apostasy as compared to the threat of women's equality within the religion. This paradoxical motif in the secular judges' choices is unlikely to be the result of conscious preference. The refusal of the secular judges to engage the issue of equality can be more readily deconstructed in the light of the secular ethos regarding the autonomy of religion. Amongst the secular, the ways of religion seem to be outside the framework of secular ethical analysis. The religious are a closed community whose members act according to their own norms. Religious communities are entitled to autonomy and the Court will hesitate to interfere by imposing universalistic values on their internal organisation. This attitude may rest on a freedom of religion rationale or a multiculturalist conviction that abdicates responsibility for oppressed sub-groups within the autonomous religious community. The rights appropriate for the implementation of these attitudes are freedom of expression, of access or of worship and not the right to intra-religious equality. Sub-groups who belong to the religious community are taken to have consented to its entire set of mores, including their own inequality. This being so, the issue of equality for women within the religion becomes, for the secular, a non-issue. Indeed the rhetoric of the secular judges supports this conclusion as, beyond their studied disregard of the right to equality, it

shows no indication of awareness of the femaleness of the petitioners' identity.

The only judge to relate to the issue of women's equality was Justice Elon. As a progressive religious leader, he sees religion as a way of life that should provide solutions for current social problems, among them the status of women. In 1988, Justice Elon, adjudicating Leah Shakdiel's petition to have her election to a religious council enforced, had indicated his conviction that religious institutions should not fail to take account of the change in women's status over the past two hundred years. He ruled in that case that the *halakha* should not be interpreted as prohibiting women from being elected to public institutions (in the case at hand, religious councils). Justice Elon only hints at this view in the case of the WoW itself. Nevertheless, as regards the WoW petition, he holds that the Western Wall is an inappropriate place for the conflict which will accompany change in religious ritual. Ironically and significantly, he holds that the Wall is too important as a spiritual and religious center to be the site for the struggle over women's rights. The message is yet again the marginalisation of women's issues even by those male leaders who are the advocates of change within the Orthodox community.

The other religious judges involved in the case, Justices Tirkal and Englard did not mention the right to equality. However, they both related to the identity of the women as women. Justice Tirkal points out that the WoW can continue to pray in *ezrat nashim,* provided it is without the three Ts. Justice Englard, although attributing the accusation to "some who say," stigmatised the women with provocative behaviour and possible bad faith, apparently unable to visualise the possibility of a genuine spiritual need for religious women to express themselves as equals in Orthodox Judaism.

The identity of the WoW as Orthodox feminists was not established in the secular rhetoric and was rejected by the religious justices. In the remedy given by the Court, there is an ambivalent result. On one hand, the remedy might be seen as advancing the goal of Orthodox feminists by giving them a public "room of their own." The Court did confer on the group the right to pray in an important public space, with historical, cultural and religious significance, and required the Government to allocate considerable resources to making the site appropriate for prayer, within touching distance of the stones of the Western Wall. On the other hand, the Court did not empower the WoW to participate in the Orthodox prayer center of the Western Wall, in *ezrat nashim.* It refused to allow them to perform an egalitarian version of Orthodox ritual as

equal members of the Orthodox community. It hence denied them the identity and the heritage which they claim as Orthodox Jewish women.

VIII. International Law and Constitutional Balancing

The WoW's petitions raise the constitutional issue of the right of women to equality in their religious personhood. As regards conflicting rights to gender equality and religious freedoms, international human rights law has established a clear hierarchy. Article 5(a) of CEDAW imposes a positive obligation on states parties to modify social and cultural practices in the case of a clash: "The Parties shall take all appropriate measures … To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women."[30] Additional CEDAW articles can be regarded as supporting a strong application of Article 5(a). Article 2(f) imposes an obligation to "modify or abolish … customs and practices"[31] that discriminate against women.[32] Custom is the way in which the traditionalist cultural norms are sustained in a society. It is clear, then, that the combination of article 5(a) and article 2(f) gives superior force to the right to gender equality in the case of a clash with cultural practices or customs, including religious norms, thus creating a clear hierarchy of values.[41] As a Party to the CEDAW Convention, Israel is obliged to enforce this standard and it is notable that, although it has entered a reservation to sections dealing with the right to equality in the family, it has not entered any reservation to articles 5(a) and 2(f).

There are two different ways in which women members of traditionalist cultural or religious communities may seek constitutional equality: one is the attempt to ensure egalitarian alternatives outside the community, and the other is the attempt to achieve equal personhood within the community. While the first equality strategy requires constitutional

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[41] For full discussion of the international law regulation of the clash between cultural and religious tradition and the right of women to equality, see *F. Raday*, Culture, Religion and CEDAW's Article 5(a), in: Beate Schopp Schilling/Cees Flinterman (eds), The Circle of Empowerment: 25 Years of the UN Committee on the Elimination of Discrimination against Women, Feminist Press (forthcoming).

remedies which provide the right of exit,[42] the second requires a constitutional dictate of equality for the cultural or religious community itself.

The constitutional claim of the WoW is for equal personhood within the religious community. This is a more holistic claim and more far-reaching than the claim of a right of exit. It is a claim which reflects a new mood in the international community of religious women. There is a growing body of academic enquiry into the insider perspective of feminist religious reconstruction. Sharma and Young recently published a comparative study regarding the perspectives of female insiders within world religions: Hinduism, Buddhism, Confucianism, Taoism, Judaism, Christianity and Islam. From each and every one of the contributors comes the conviction that religious equality for women must and can be found within their religions. In none of them did the female insiders feel that this had yet been achieved.[43] In constitutional balancing, the claim against the State for full religious personhood is a more difficult claim to satisfy than the right to exit. This is because acceptance of the claim by the State will carry with it a greater potential for infringement of community autonomy. Nevertheless, constitutional support for a claim to equal religious personhood within the community is conceivable in some circumstances, as I shall show in the discussion that follows.

The purpose of the theoretical examination that follows is to discuss the way in which constitutional norms should, as a matter of constitutional principle, deal with clashes between the right to freedom of culture or religion, on the one hand, and the right to gender equality, on the other.[44] In order to ascertain the principles that should govern the role of constitutional law in regulating the interaction between religious and equality values, I shall examine the theoretical arguments that support deference to cultural or religious values over universalistic values. To the extent that such contentions fail, I argue that we should regard gender equality as a universalistic value entitled to dominance in the legal system and that on this basis women may, in some circumstances, pur-

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[42] The right of exit is beyond the scope of discussion in the present article. For fuller discussion, see *Raday* (note 9) *supra*.

[43] *A. Sharma/K. K. Young* (eds.), Feminism and World Religions, 1999, 18-22.

[44] For a fuller exploration of certain aspects of the hierarchy of values, see *F. Raday*, Religion, Multiculturalism and Equality – The Israeli Case, *Isr. Y.B. Hum. Rts*. 25 (1995), 193.

sue constitutional remedies for denial of equal religious personhood, including the rights to equal participation in the ritual and leadership of their religions.

A number of theories of justice have been advanced in support of deference to cultural or religious values. I will examine four. The first, or "multiculturalist" approach, contends that preservation of a community's autonomy is a sufficiently important value to override equality claims. The second, which I call the "consensus" approach, argues that if cultural or religious values have the sanction of political consensus in a democratic system, then this is enough to legitimate their hegemony. The third, which I label the "consent or waiver" approach, claims that where there is individual consent to cultural or religious values it must be respected. The fourth is the capabilities approach of Sen and Nussbaum. I will show that none of these theories defeat the right of women to equality and that the traditionalist cultural and religious values that they protect should be weighed in a proper constitutional balancing process. In this process, the principle of women's right to equality must prevail, not only by international law standards but also in accordance with constitutional logic. This will, in some circumstances, predicate women's right to equal religious personhood in leadership and ritual within the religious community.

1. Multiculturalism

Communitarian claims that adherence to the traditions of a particular culture is necessary in order to give value, coherence, and a sense of meaning to our lives are used to justify traditionalist cultural or religious hegemony over universalistic principles of equality. Alasdair MacIntyre argues that the ethics of tradition, rooted in a particular social order, are the key to sound reasoning about justice.[45] Communitarianism of this kind is closely allied with anthropological concepts of enculturation and cultural relativism – the idea that moral consciousness is unconsciously acquired in the process of growing up in a specific cultural environment.[46] From this description of the way human morality evolves, some have concluded that there is no objective social justice and that each cultural system has its own internal validity that should

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[45] *A. MacIntyre*, After Virtue: A Study in Moral Theory, 1981.

[46] *M. J. Herskovits*, Cultural Anthropology, 1955, 326-29.

be tolerated.[47] The culture is identified by its existing patterns and standards, and recognition of the culture's intrinsic value seems to go together with a desire to preserve these standards.[48] Normative communitarianism is thus oriented to the preservation of tradition within the culture. Where the communitarian norms are based on religion, traditionalism often means deference to written sources formulated in an era from the sixth century B.C. (the Old Testament), to the first century A.D. (the New Testament), to the seventh century A.D. (the Qur'an).

Two aspects of the communitarian argument – cultural relativism and the preservation of tradition – deserve particular attention in examining the impact of communitarianism on women. First, the cultural relativism implicit in normative communitarianism must displace the value of gender equality as, by definition, traditionalist cultures and religions, in which gender equality is not an accepted norm, are in no way inferior to those social systems in which it is. This communitarian argument is, however, logically flawed. If cultural relativism is taken to its logical conclusion, it undermines not only the value of human rights and gender equality but also the value of communitarianism itself, since communitarianism is also the product of a particular cultural pattern of thinking.[49] Indeed, taken to extremes, cultural relativism is another name for moral nihilism; if cultural relativism were to be taken as the dominant value basis of a legal system, it would be impossible to justify any moral criticism of the system's norms.[50] At this level, multiculturalism could not be useful in any attempt to engineer legal policy in a positive legal system. Alternately, we could regard cultural relativism merely as a tool that helps us to distinguish ethnocentric from universal standards, so that we will be able to refrain from insisting on ethnocentric values as mandatory on a global scale. This form of multiculturalism would not, I contend, override the value of gender equality. This stems from the fact that gender equality is one of the universally shared

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47 *C. Kluckhohn*, Ethical Relativity: Sic et Non, J. Phil. 52 (1995), 663. "Morality differs in every society and is a convenient tenet for socially approved habits." *R. Benedict*, Anthropology and the Abnormal, in: R. Beehler/A. Drengson (eds.), The Philosophy of Society, 1978, 279 (286).

48 *A. MacIntyre,* Whose Justice? Which Rationality?, 1988.

49 See *A. Dundes Renteln*, International Human Rights – Universalism versus Relativism, 1990, 61-78

50 *Kluckhohn* (note 47) *supra.*

ideals of our time and, hence, its global application is neither ethnocentric nor morally imperialistic.[51]

Second, let us take a look at the way in which the preservation of tradition impacts on gender equality. If the preservation of tradition is an aspect of communitarianism, as some of its proponents suggest, then the legitimacy of the claims of communitarianism to override universal principles (such as the right to equality) must stand or fall along with the legitimacy of the claim that traditionalism itself should also override universal principles. There is a whole battery of reasons why traditionalism cannot legitimately be regarded as overriding the principle of equality. Traditional patterns cannot form the dominant foundation for contemporary meaningfulness, except in a static society. It may be that the ethical norms of a society are themselves a factor in determining the dynamism of the society, and it is not inconceivable that a society that believed in traditionalism as an ethical imperative might "choose" to be static. However, where and when, as an empirical fact, a society does change as a result of environmental or socio-economic developments not dictated by the ethical traditions of the society, a rigid application of traditional norms will produce dissonance. Communitarians do not tell us how we can continue to apply the community's traditional values to changed socio-economic institutions.[52] A central example demonstrating this dissonance is the clinging to traditionalist patriarchal norms that exclude women from the public sphere in a society where women, in fact, work outside the home and are often responsible for their own and their children's economic survival, in a world where, in fact, they are no longer "protected" and "supported" within the hierarchy of an extended traditional family. As a matter of political ethics, if traditional-

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[51] Evidence of the fact that gender equality is a universally shared ideal is to be found in the fact that 170 States have ratified CEDAW; while it is true that there are many reservations on religious grounds of Islamic States and of Israel – primarily to Article 16 which provides for equality in family law – the validity of these reservations is dubious, under the principles of international law.

[52] In his discussion of the changing meaning of child sacrifices, Peter Winch writes, "it would be no more open to anyone to propose the rejection of the Second Law of Thermodynamics in physics. My point is not just that no one would listen to such a proposal but that no one would understand what was being proposed. What made child sacrifice what it was, was the role it played in the life of the society in which it was practised; there is a logical absurdity in supposing that the very same practice could be instituted in our own very different society." *P. Winch*, Nature and Convention, in: Beehler/Drengson (note 47) *supra*, at 15-16.

ism is allowed to oust egalitarianism, it will be an effective way of continuing to silence any voices that were not instrumental in determining the traditions. As Susan Okin shows, the Aristotelian-Christian traditions chosen by MacIntyre to demonstrate the appeal of his communitarian theory are not women's traditions.[53] Women were excluded not only from the active process of formulating those traditions but also from inclusion, as full human subjects, in the very theories of justice developed within those traditions.[54] The same can be said for Judaism and Islam. Women's voices are silenced where traditionalist values are imposed.[55]

2. Consensus

If communitarianism does not justify the domination of religious/traditionalist patterns of social organisation in the legal system, might a broad social consensus become a legitimising factor? Michael Walzer has argued that justice is relative to social meanings and a given society is just if its substantive life is lived in a way faithful to the "shared understandings" of its members.[56] This view legitimises the adoption of particularist principles of justice in preference to universalistic ones. The process of reaching shared understandings is seen as a dynamic one based on a dialectic of affirmation by the ruling group and the development of dissent by others. Walzer's theory of justice has been criticised in so far as it applies to situations of "pervasive domination."[57] Okin points out that in societies with a caste or gender hierarchy, it is not just or realistic to seek either shared understandings or (a) dialectic of dissent.[58] Where there is pervasive inequality, the oppressed are unlikely to acquire either the tools or the opportunity to make themselves heard. Under such circumstances, it cannot be assumed that the oppressed participate in a shared understanding of justice. Rather, there would be two irreconcilable accounts of what is just. Application of a

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53 See *S. Okin*, Justice, Gender and the Family, 1989, 41-62.

54 See *ibid.*

55 See *Elshtain* (note 13) *supra.*

56 *M. Walzer*, Spheres of Justice: A Defense of Pluralism and Equality, 1983, 312-13.

57 *Ibid*.

58 Okin, *supra* (note 53), at 62-73.

shared understandings theory only could be justified if the dissenters were assured equal opportunity to express their interpretation of the world and to challenge the status quo. The principle and practice of equality are, hence, a prerequisite for the application of the shared understandings theory and the claim for gender equality must be immune to oppression by the dominant shared understanding if the system is to operate in a just fashion.

If the cultural practices or religious convictions of the community condone the unequal treatment of groups within it, at what level should "shared understanding" be ascertained? If there are slaves, Dalits (treated as untouchables), or women within the community, excluded from equality of opportunity, such subgroups cannot be taken to share in the community's shared understanding, even if it does not formulate its own dissent. The silencing of any such subgroup should pre-empt wholesale deference to community autonomy; such deference to the community's autonomy would defeat concern for the autonomy of oppressed subgroups within it.[59] This is true of the subgroup of women in traditionalist cultures and monotheistic religions. Their sharing of the community understanding, where that understanding is based on a patriarchal tradition, cannot be taken for granted, even if they do not express dissent. In the words of Simone de Beauvoir: "Now what peculiarly signifies the situation of women is that she – a free and autonomous being like all other human creatures – nevertheless finds herself living in a world where men compel her to assume the status of the Other … How can independence be recovered in a state of dependency? What circumstances limit women's liberty and how can they be overcome?"[60] More recently, in the words of Okin: "When the family is founded in law and custom on allegedly natural male dominance and female dependence and subordination, when religions inculcate the same hierarchy and enhance it with the mystical and sacred symbol of a male god, and when the educational system... establishes as truth and reason the same intellectual bulwarks of patriarchy, the opportunity for

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[59] In John Cook's words: "[Cultural relativism] amounts to the view that the code of any culture really does create moral obligations for its members, that we really are obligated by the code of our culture – whatever it may be. In other words, Herskovits's interpretation turns relativism into an endorsement of tyranny." *J. Cook*, Cultural Relativism as an Ethnocentric Notion, in: Beehler/Drengson (47) *supra*, at 289 (296).

[60] *S. de Beauvoir*, The Second Sex, H. M. Parshley (trans. & ed., 1989), 1952, 688-89.

competing visions of sexual difference or the questioning of gender is seriously limited."[61]

Nevertheless, multiculturalist and consensus philosophers present the clash between the religious and liberal agendas on human rights as symmetrical. On this basis, both Charles Taylor and Paul Horowitz critique the impact of the liberal state on religious subgroups.[62] Arguing for a more supportive and accommodating approach toward religious belief and practices, they claim that liberalism is not value-neutral – it is a "fighting creed": "At the very least, liberalism's focus on the autonomous individual and on the maximisation of individual concepts of the good tends to give it in practice an emphasis on freedom over tradition, will over obligation, and individual over community."[63] The impression given is of symmetry between religious and liberal values.[64]

There are good grounds for rejecting the symmetry thesis. There is no symmetry between religious and liberal human rights values. Inverting Taylor's and Horowitz's critique of liberalism will emphasise the values of tradition over freedom, obligation over will, and community over individual. While liberal values leave space for the religious individual and, to a considerable extent, the religious community, religious values do not recognise the entitlement of the liberal individual or community. There is no symmetry between the normative dominance of liberal values (freedom, will, individual) and the normative dominance of religious values (tradition, obligation, community) because the latter does not even acknowledge the private space of the dissident, the heretic, or the silenced voice within its jurisdiction. These values are primarily tools for the perpetuation of existing power hierarchies. The claim for symmetry is, therefore, based on tolerance of inequality and lack of liberty for those deprived of a voice within the religious community. This is a flawed basis for communitarian theory.

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61 *Okin* (note 53) *supra*, at 66.

62 *C. Taylor*, Philosophical Arguments, 1995 249; *P. Horowitz*, The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond, U. Toronto Fac. L. Rev 54 (1996), 1 (14).

63 *Horowitz*, *ibid*; *Taylor* (note 62) *supra.*

64 Logically, in the case of an irresolvable clash of values, the outcome of symmetry would be stalemate and not, as suggested by Taylor and Horowitz, justification for accommodation and support for religious values that otherwise clash with human rights.

There is a flaw in the reasoning that calls for the autonomy of communities, where that autonomy denies or reduces the right of some to equality and liberty, since the basis for the community's claim to autonomy rests on these very norms of equality and liberty.[65] Autonomy demands by minority communities have been organised in a useful typology by Jack Levy. Under this typology, Levy describes various minority claims for external rules limiting the freedom of non-members and for internal rules limiting the freedom of members, all in order to protect an endangered culture or cultural practice.[66] However, the legitimacy of the claim to pluralistic freedom of religion is itself dependent in a constitutional framework on the very concepts of equality and liberty that patriarchal religious regimes deny women. Hence, were the rules of Levy's typology used to defeat gender equality claims; they would use the value of liberty to defeat liberty and of equality to defeat equality.

The premise to be derived from an analysis of the divide between the cultural and the religious versus equality and human rights is that, in constitutional societies, equality and liberty should be the governing norms – the *Grundnorm* on which the whole system rests, including the right to enjoy one's culture and religion. Constitutional democracy cannot tolerate enclaves of illiberalism whose inhabitants are deprived of access to human rights guarantees.

3. Individual Consent

Even if we reject the arguments of multiculturalism and consensus as justifying the imposition on individuals of inegalitarian cultural or religious norms, this will not invalidate direct individual consent to those norms. The autonomy of the individual is the ultimate source of legitimacy. It seems clear that a genuine choice to accept certain cultural practices or religious norms should be accepted as valid even if they are to the disadvantage of the consenting individual. This liberty to choose is an essential part of the freedom of religion and of the right to equal autonomy of the individual.[67] The need to recognise the autonomy of

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[65] See *Renteln* (note 49) *supra*, at 62-65; *M. J. Herskovits*, Cultural Relativism: Perspectives in Cultural Pluralism, 1972, 11-34.

[66] See *J. T. Levy*, Classifying Cultural Rights, in: I. Shapiro/W. Kymlicka (eds.), Ethnicity and Group Rights, 1997, 39.

[67] See *N. Duclos*, Lessons of Difference: Feminist Theory on Cultural Diversity, Buff. L. Rev. 38 (1990), 325.

the individual is a practical as well as a theoretical matter because, in situations of genuine consent, there will be no complaint emanating from women disadvantaged by the patriarchal community, nor much opportunity to intervene. However, recognition of individual consent to patriarchy and concomitant disadvantage as a woman is problematic. Subjection to patriarchal authority inherently reduces the capacity for public dissent. Thus, consent is suspect, and it is incumbent on the state both to increase the opportunity for and to verify the existence of genuine consent by a variety of methods. I shall indicate some of them.

Consent cannot be recognised as effective when inegalitarian norms are so oppressive they undermine, at the outset, the capacity of members of the oppressed group to exercise an autonomous choice to dissent. In such a situation, no consent can be considered genuine. Such oppressive practices can properly be classified as repugnant, and consent will not validate them.[68] In such extreme cases, mandatory legal techniques should be employed to protect individuals from their inegalitarian status.[69] Thus, the invalidation of consent may be applied in cases of extreme oppression – examples of which include slavery, coerced marriage, and mutilation, including FGM, as well as polygamy, where it forms part of a coercive patriarchal family system.[70]

Moreover, absent repugnant practices, consent to inequality, though not automatically void, will still be suspect. In the context of pervasive oppression or discrimination, consent cannot be assumed from silence and even express consent is not necessarily evidence of genuine consent. In such situations, all consent must be suspect, since pervasive oppression

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[68] See *S. Poulter*, Ethnic Minority Customs, English Law and Human Rights, Int'l & Comp. L.Q. 36 (1987), 589. Indeed, even those writers who regard autonomous choices to forfeit autonomy as irrevocable impose a strict test of voluntariness on consent to such severe forms of self-harm. See *J. Feinberg,* Harm to Self: The Moral Limits of the Criminal Law, 1986, 71-87, 118-19.

[69] Thus, for instance, in the case of polygamy, wives should be released of all marital obligations but their rights to maintenance, property, and child custody should be protected.

[70] But see *M. C. Nussbaum*, Women and Human Development: The Capabilities Approach, 2000, 229-30. Joel Feinberg, in reviewing the writings of John Stuart Mill on the issue of polygamy, concentrates on the impact of the voluntary decision of the woman to marry on her future autonomy, stating: "… but it would be an autonomously chosen life in any case, and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice." *Feinberg* (note 68) *supra*, at 78.

seriously diminishes the possibility of dissent and hence the probability of genuine consent. Individuals who consent to the perpetuation of their inequality, within the religious/cultural community to which they belong, often have little real choice but to accept their oppression. Because of their socio-economic status, their alternatives to acceptance of the group's dictates may be very limited or non-existent. Where individuals are compelled by socio-economic necessity to accept an inferior status, their consent cannot be freely given. Ascertaining that consent is genuine, without negating the right of women to choose cultural diversity at the cost of gender equality, presents a difficult challenge for normative systems. Nevertheless, some measures can negotiate this precarious divide and enhance women's autonomy, thus facilitating their power to give or withhold genuine consent.

States must take a priori measures to augment women's autonomy and their power to dissent. Women's ability to withhold consent should be buttressed by provision of an educational and economic infrastructure that will nurture their autonomy and ability to dissent from discriminatory norms or practices. The state, endeavouring to ensure that consent is informed, should insist on the disclosure of options so that all members of society, including girls and women, will be able to make their decisions on the basis of full information. Ensuring women's literacy and free access to information is a primary requirement. Beyond this, compulsory education laws should incorporate a core curriculum requirement that all children be exposed to information regarding fundamental human rights, including the right to gender equality.[71] However, information alone is not enough. In order to be able to dissent from patriarchal family patterns, women need to have feasible economic options. Socio-economic alternatives to consent must be made available. Thus, the state must, of course, provide women with the right to own resources and to inherit property, including land. The state should also provide training to girls and women for income-generating occupations, which will allow women the economic option of not remaining totally dependent on patriarchal family support, thereby increasing their ability to dissent.

The state should also scrutinise, ex posteriori, individual women's consent to inequality within a strongly patriarchal context and should be able to void it where it is not genuine. If the inequality is not repugnant, the state cannot intervene to void consent unless requested by women

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[71] Compare *Wisconsin v. Yoder*, 406 U.S. 205 (1972) with Re State in Interest of Lack, 283 P. 2d 887 (1955).

to do so. However, acknowledging that consent to inequality is suspect, the state should be highly responsive to women's requests to void their consent. Thus, where women wish to withdraw prior consent to inequality within a traditionalist cultural or religious community, their subsequent dissent should be given full recognition.[72] In legal terms, this would mean that the consent to inequality should be considered voidable.[73] Since the possibility of legitimising inequality rests primarily on consent, which, in situations of pervasive inequality, is suspect, the voidability of consent is an effective ex post facto way of ensuring that women are not being forced to consent. Consent to a patriarchal marriage regime, for instance, will usually be made when a woman is young and dependent on her own traditionalist family; such consent should be able to be voided at any later stage, if and when the woman finds the terms of her traditionalist marriage unacceptable.

4. The Capabilities Approach

Martha Nussbaum, in her outstanding work on women and culture, shows some understanding of the view that the disadvantage of women in traditionalist cultures should not be examined on the basis of universalistic norms, which undermine cultural diversity. Documenting the widespread existence of dissent among women in traditionalist cultures or religious communities and "anti-universalistic conversations" regarding those communities, she concludes: "Each of these objections has some merit. Many universal conceptions of the human being have been insular in an arrogant way and neglectful of differences among cultures and ways of life."[74] For this reason, she attempts to reconcile the clash between liberal values and cultural or religious norms, without relying on the priority of the right to equality. Accordingly, she adopts the "capabilities approach" of Amartya Sen to provide "political princi-

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[72] See *Okin* (note 53) *supra*, at 137. The liberal notion of freedom of religion includes the right of each individual to change his religion at will; people have a basic interest in their capacity to form and to revise their concept of the good. See *W. Kymlicka*, Two Models of Pluralism and Tolerance, 1993 (unpublished manuscript). This is especially so where the revised concept of the good that is being chosen is the fundamental human right to equality.

[73] See F. H. 22/82, *Beit Yules v. Raviv*, 43(l) P.D. 441, 460-64. Consent to inequality may be held contrary to public policy.

[74] *M. Nussbaum*, Sex and Social Justice, 1999, 39.

ples that can underlie national constitutions" in a way specific to the requirements of the citizens of each nation.[75] Nussbaum's sensitivity to cultural diversity is extremely important. There can be no denying that traditionalist cultural and religious ways of life have been an important source of social cohesion and individual solace for many people. There is also no doubt that, in the foreseeable future, these traditions are not going to disappear. Hence, on both an ideological and a pragmatic basis, efforts to achieve equality for women should work, as far as possible, within the constraints of the traditionalist or religious culture as well as outside them.

However, that said, the important condition is that all such efforts should respect cultural diversity only up to a certain extent. Such respect cannot be at the cost of women's right to choose equality. Indeed, Nussbaum herself adds this condition. Although Nussbaum's approach rightly emphasises the need for sensitivity to cultural and religious differences, the solution that she provides for the dilemma of the struggle between liberal values and cultural or religious norms, in fact, takes us back to the dominance of equality rights over religious norms. She proposes a universally applicable model for dealing with the religious dilemma: "The state and its agents may impose a substantial burden on religion only when it can show a compelling interest. But … protection of the central capabilities of citizens should always be understood to ground a compelling state interest."[76] This required protection of central capabilities extends to those functions particularly crucial to humans as dignified, free beings who shape their own lives in co-operation and reciprocity with others. Nussbaum's list of central human functional capabilities includes many of the capabilities denied women by traditionalist cultures and religious norms: e.g., the right to hold property or seek employment on an equal basis with others; to participate effectively in political choices; to move freely from place to place; to have one's bodily boundaries treated as sovereign; to be secure against sexual abuse; to have, in Nussbaum's formulation, the social bases of self-respect and non-humiliation; and to be treated as a dignified being whose worth is equal to that of others, which, as she adds, "entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin."[77] For legal or constitutional purposes, this all translates with some ease into

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[75] *Nussbaum* (note 70) *supra*, at 105.

[76] *Ibid*. at 202.

[77] *Ibid*. at 79.

the language of human rights protected under the UN treaties; indeed, as a constitutional matter, the way to give substance to the Nussbaum/Sen capabilities approach is to guarantee them through rights, whether political and civil or economic and social. Nussbaum herself acknowledges the closeness of the connection between the two and the importance of rights per se.[78]

I would agree with Nussbaum's emphasis on the need for sensitivity to cultural and religious differences, but I would also contend that the role of constitutional law is to give expression to the bottom line of her argument, according to which "[w]e should refuse to give deference to religion when its practices harm people in the areas covered by the major capabilities."[79] There is a difference of emphasis in this approach from Susan Moller Okin's position that "no argument [should] be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed they might be better off if the culture into which they were born were either to become extinct (so its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women."[80] In my view, there is an argument to be made – on the basis of freedom – that some female members of a traditionalist culture may have an interest in its preservation. That is the reason why, as Okin adds, the preferable course is to encourage the reform of cultures and religions in order to accord equality to women who wish to live within them.

IX. Constitutional Balancing and the Case of the WoW

The case of the WoW is clear evidence of the growing body of feminist thought within religions which demands redefinition and reconstruction of religious hierarchies in order to secure equality for religious women within their religions. There has been little attempt, practical or theoretical, to translate this religious dissent into constitutional right. Such claims have been made as regard traditionalist cultures. Equal cultural personhood was the kind of claim made by tribal women, in the United States and Canada, for example, who wished to retain their

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78 *Ibid*. at 96-101.

79 *Ibid*. at 192.

80 *Okin* (note 53) *supra*, at 22-23.

tribal membership when marrying persons outside the tribe. It is the kind of claim made by the Women of the Wall in their demand to be allowed to pray in the public space, in an active prayer mode, customarily reserved for men. The claim of the women within these groups is absolutely valid – it is an attempt to improve their terms of membership and to bring their communities into line with modern standards of gender equality. However, there is also an apparent anomaly in this claim; on the one hand, it is based on the right to membership, and, on the other, on a rejection of the terms of membership as offered.

Where women members of traditionalist cultural or religious communities seek to achieve equal personhood within the community, theirs is a holistic and far-reaching claim and a state response to the claim carries with it a negative potential for intervention in community autonomy. The claim of women for equality within a traditionalist group may transform the *modus vivendi* of the group in a way that conflicts with the wishes of the vast majority of members of the group, both men and women. Thus, it seems that states should be more reluctant to intervene in religious or cultural groups and, for the most part, should not act on their own initiative to invalidate the community rule per se. Indeed, one individual woman's dissent will not necessarily justify state intervention to prohibit the internal norms and practices of traditionalist communities.

Nevertheless, there are ways in which the state may and should intervene. As said, if the religious discrimination results in the infringement of women's human dignity, in violence, or in economic injury, active intervention is justified and, furthermore, required. Furthermore, even in cases of functional or ceremonial discrimination, there will be situations in which the state should take a constitutional stance as, for instance, where the claim for equality is consonant with an egalitarian internal interpretation of the group norms by its hermeneutic authorities or, alternately, where a critical number of women within the group support the claim for equality. Additionally, although states should be circumspect in intervening to invalidate functional or ceremonial discrimination, they should be decisive in denying state support, facilities, or subsidies for the discriminatory activities of the traditionalist groups.

In the case of the WoW, all the criteria for intervention apply. First, though this is controversial, their mode of prayer is consonant with some authoritative internal interpretations of the group religious norms. Second, there is a critical mass of women who either participate in or support the WoW's mode of prayer. Third, the WoW are asking the State of Israel to deny state facilities and subsidies to discriminatory

practices, in this case backed up by violent fanaticism. Furthermore, they are asking the State to deny the cooption of its symbolic center for patriarchal goals.

As regards the probability of judicial intervention in constitutional issues of women's equality and religion and the effectiveness of such intervention, this is a difficult issue. Although the normative hegemony of gender equality where there is a clash with cultural or religious norms has been established at the international level, in international treaties and in decisions of international treaty bodies and tribunals, thereby establishing state obligations at the constitutional level, this principle is only unevenly applied. The application depends on political will. Some constitutional courts have attempted to implement gender equality in the face of religious resistance, but such efforts have usually been transient or ineffectual where the government has not supported them. It is apparent that the courts cannot be left with the sole burden of securing the human rights of women and that both international obligation and constitutional theory require the intervention of government .[81]

The WoW form a case that may be seen as substantiating this conclusion regarding the limits on the effectiveness of judiciary in the absence of governmental support. In spite of the fact that out of the eleven Supreme Court judges who sat on their case in three separate proceedings, eight fully recognized their right to pray in their mode in the Western Wall Plaza, they were not, finally, given that right. However, the WoW saga also demonstrates the importance of the contribution of the judiciary. The WoW received recognition from the State far beyond the recognition that they received from the Israeli Orthodox Jewish leadership. The continuing debate in the public forum provided by the Court gave their mode of prayer and the dialectic surrounding it a visibility which it would not otherwise have had. The judicial proceedings have been parallel to the increase in the number of women's prayer groups with the three Ts who are actively carrying out their ritual in synagogues throughout Israel. Though cause and effect cannot be proved, it seems that the judicial proceedings contributed to the cultural and social development of the WoW's message.

The case of the WoW is heavy with symbolism. The violent opposition they aroused, condoned by the Government and with public collusion, symbolizes the silencing of women through the ages; it speaks of tradi-

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[81] This conclusion is based on research into comparative constitutional and international legal regulation of the clash between religion and culture and women's right to equality: *Raday* (note 9) *supra*.

tion and patriarchy at the heart of nationhood. The WoW petitions pursue a universalistic and feminist ethic. Their demand is for full and equal religious personhood. Their fate is of great significance not only for religious women and men but also for the secular world and constitutional values. Their success would have signified the victory of pluralism and tolerance over fundamentalism. The ambivalent outcome is illustrative of the weakness of courts to uphold women's human rights in the face of violent religious opposition and in the face of governmental collusion with the religious opposition. The saga of the WoW is a saga for us all – to redefine and transform the patriarchal public space so that women share it and fill it with their voices, intermingling with those of men.

Does the Establishment of Religion Justify Regulating Religious Activities? – The Israeli Experience

Barak Medina[*]

Abstract

The extent of public sector involvement in providing religious services is an important factor in determining the scope of legitimate regulation of relevant religious activities. However, I argue that the existence of a government role is not a sufficient justification for such regulation. Participation in the supply of religious services does not exempt the government from the constraints of its duty to respect freedom of religion. I point to two main considerations in this respect. First, in certain cases, accomplishing the purpose of government involvement – securing reasonable access to religious services – entails government intervention in religious activities. Second, more extensive regulation can be justified when involvement of the public authority intensifies the harm that the relevant religious practice imposes on other interests. These and related arguments are illustrated through a case-study – the Israeli experience of almost six decades of intensive involvement of a democratic state in supplying religious services.

Among other things, I explore the issue of regulating practices in holy sites, by comparing two decisions of the Israeli Supreme Court: The decision not to intervene in conflicts regarding religious rituals in the Church of the Holy Sepulcher, and the decision to impose "secular"

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norms of tolerance and impartial balance of interests in the case of the Western Wall Plaza in Jerusalem. Other issues discussed are the qualifications necessary to serve in state-run religious institutions; issuing kosher food certificates and regulating the activities of Jewish burial societies.

The discussion demonstrates the important role of government involvement in supplying religious services and in regulating religious activity as a means of enhancing – rather than restricting – religious freedom. The Israeli case is useful in illustrating the potential benefits of supplying religious services by the government, as well as in understanding the limits of this policy.

I. Introduction

Maintaining a strict separation between state and religion is conceived by some as a safeguard against the supposedly harmful effects of the intolerant, undemocratic nature of religion.[1] Advocates of a more relaxed separation of the two realms are often more sympathetic toward religion.[2] These two conflicting positions share the premise that government involvement in supplying religious services promotes the interests of religious people and of religious institutions. By contrast, others suggest that it is strict separation that benefits the practice of religions.[3] As fa-

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[1] See, e.g., *K. M. Sullivan*, Religion and Liberal Democracy, U. Chicago. L. Rev. 59 (1992), 195; *Paul E. Salamanca*, Civil Rights: Looking Back – Looking Forward: The Liberal Policy and Illiberalism in Religious Traditions, Barry L. Rev. 4 (2003), 97; *M. Mutua*, Human Rights: A Political and Cultural Critique, 2002 (The establishments of Christianity and Islam in Africa perpetrated major human rights violations).

[2] This is the underlying premise of the view that the Establishment Clause of the US Constitution does not prohibit government aid of religion if the aid is "neutral" and there is "genuine and independent private choice." See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Upholding the constitutionality of school vouchers program that included religious schools); *R. L. Cord*, Separation of Church and State: Historical Fact and Current Fiction, 1982; *M.M. McConnell*, Religious Freedom at a Crossroads, U. Chi. L. Rev. 59 (1992), 115.

[3] McConnell offers a related classification between three possible purposes of the Religious Clauses: (1) the "separationist ideal," under which "religion is deemed to be irrelevant to determination of the citizens' civic obligations"; (2) the "ideal of neutrality," under which "religion is understood as one form of voluntary association … neither feared nor favored"; and (3) the "ideal of reli-

mously stated by Justice Jackson in *Everson v. Board of Education*, "[i]f the state may aid … religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political control with it."[4]

The aim of this article is to challenge the latter premise. My interest is not in the unfortunate reality of "political control" in the sense of nominating office-holders in religious institutions on the basis of political, partisan considerations. Rather, the discussion focuses on the argument that a policy of supplying religious services by the state should and will result in an extensive regulatory regime of religious institutions and practices, based on norms of liberal democracy.

A model of separation of state and religion is indeed often characterized by significant legal and judicial deference to religious practices. For instance, in the U.S. it is generally assumed that in choosing clerics, religious groups may discriminate even on grounds of gender, race or sex-

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gious liberty," according to which "the Establishment Clause protects against government action that may coerce, induce or … even endorse religion." See *M. W. McConnell*, Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine, in: R. J. Ahdar (ed.), Law and Religion, 2000, 63 (64). Clearly, the Establishment Clause may serve multiple functions. See, e.g., *S. H. Shiffrin*, Liberalism and the Establishment Clause, Chi.-Kent. L. Rev. 78 (2003), 717.

[4] *Everson v. Board of Education*, 330 U.S. 1, 27 (1947) (Jackson J., dissenting). See also, e.g., *G. Ivers*, Redefining The First Freedom – The Supreme Court and The Consolidation of State Power, 1993, 133 ("[The Establishment Clause was created] to ensure robust protection for religious freedom … The separation of church and state is a necessary predicate for religious free exercise."); *L. W. Levy*, The Establishment Clause – Religion and the First Amendment, 1986, 174 ("The same authority that can incidentally benefit religion by the exercise of legitimate powers may also injure religion. A power to help is also a power to hinder or harm … Those who clamor for additional government support of religion should beware of the risks to religion from government entanglements."); *J. E. Wood, Jr.*, Government Intervention in Religious Affairs: An Introduction, in: J. E. Wood, Jr./D. Davis (eds.), The Role Of Government in Monitoring and Regulating Religion in Public Life, 1993, 1 (5) ("while the concern of the Founding Fathers was primarily over the possible domination of the state by the church, today there is increasing concern … over the domination of the church by the state."); *I. C. Lupu/R. W. Tuttle*, Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism, B.C. L. Rev. 43 (2002), 1139 (Invoking a principle of Religion Clause symmetry – what the government may regulate it may also subsidize and vice-versa).

ual orientation.[5] However, a policy of non-establishment also burdens religious freedom, by denying – or seriously limiting – public finance of cultural, educational and other activities of religious groups and by prohibiting certain forms of religious practices and symbols in public.[6] Often, securing reasonable access to certain religious services requires government participation or management of the supply of these services.[7] The question is will such public aid result in government *intervention* in religious practices and can it thus be expected to reduce, rather than enhance religious freedom?

Two main considerations should be addressed in this respect. First, normatively, does government involvement *justify* – or even *compel* – regulating the relevant religious institutions or practices? And second, more practically, will government involvement result in such regulation, irrespective of the normative considerations? I focus on the former con-

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[5] Title VII of the federal Civil Rights Acts explicitly allows religious organizations to discriminate on religious grounds in employment (42 U.S.C. 2000e-2(e)(1)(§702(e)(2))). See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ v. Amos*, 483 U.S. 327 (1987) ("Section 702 served a permissible secular purpose by minimizing government interference with a religion's decision-making process.").

[6] A prominent example is the French Article 1 of the Act on the Application of the Principle of Laicisim of March 15 2004 (amending the Code of Education): "In public schools, colleges and high schools the wearing of insignia or dresses by which the students manifest their adherence to a religion is prohibited." In the US, applying the view that the Establishment Clause does not prohibit government aid to religion if the aid is "neutral" (see note 2 *supra*) mitigates – but not eliminates the – the harm to freedom of religion that results from the church-state separation.

[7] See *S. D. Smith*, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement Test," Mich. L. Rev. 86 (1987), 266 (277) ("government might acknowledge that many individual citizens care deeply about religion and that the religious concerns of such citizens merit respect and accommodation by government."); *M. S. Paulsen*, Religion, Equality, and the constitution: An Equal Protection Approach to Establishment Clause Adjudication, ND L. Rev. 61 (1986), 311 (Denying financial benefits to religious institutions is accounted as disparaging them); *J. Edelstein*, Zelman, Davey and the Case for Mandatory Government Funding for Religious Education, Ariz. L. Rev. 46 (2004), 151 (The government should be mandated to fund religious schools equally with public schools); *G. Sapir*, Religion and State – A Fresh Theoretical Start, Notre Dame L. Rev. 75 (1999), 579 (State support of religious activity is justified based on the important role of religion as an all-encompassing culture).

sideration, as the latter must be assessed based on a detailed analysis of the efficacy of formal and informal constraints on the government and other case-specific considerations. I posit that, normatively, the extent of public involvement in the provision of a religious service is indeed a relevant factor in determining the scope of legitimate regulation of the relevant religious activity. However, I argue that government involvement is not in itself *a sufficient justification* for such regulation. The involvement of a public authority in the supply of religious services does not exempt the government from the constraints of the duty to respect freedom of religion.

The aim of government involvement is to facilitate religious freedom by securing reasonable access to religious services. The relevant inquiry probes into what sense public involvement justifies a more extensive regulation than is otherwise legitimate. I point to two main considerations in this respect. First, in certain cases accomplishing the purpose or intent of the government involvement – securing reasonable access to religious services – necessarily entails government intervention in religious activities. Second, a more extensive regulation can be justified when involvement of the public authority intensifies the harm that the relevant religious practice imposes on other interests.

These and related arguments are demonstrated through a case-study – the Israeli experience of almost six decades of intensive involvement of a democratic state in supplying religious services. The state of Israel financially supports numerous religious activities. It also supplies through government agencies several religious services, and certain religious entities hold government-like authority.[8] From a comparative law perspective, this serves as a thought-provoking, hypothetical case of the consequences – and thus of the desirability – of adopting a model of extensive establishment of religion(s) by a democratic state.

Part II discusses regulation that aims at *facilitating and protecting religious freedom*. The discussion demonstrates the important role of gov-

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[8] For a review of the scope of supplying religious services by the state in Israel see *G. Sapir*, Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment, Hastings Int'l & Comp. L. Rev. 22 (1999), 617 (620-625); *C. S. Liebman/E. Don-Yehiya,* Religion and Politics in Israel, 1984; *I. Englard*, Law and Religious in Israel, Am. J. Comp. L. 35 (1987), 185; *S. Shetreet*, State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective, ND J. L. Ethics & Pub. Pol'y 13 (1999), 421 (435-443); *F. Raday*, Religion, Multiculturalism and Equality: The Israeli Case, Israel Yearbook on Human Rights 25 (1995), 193.

ernment involvement in supplying religious services and in regulating religious activity as a means of enhancing – rather than restricting – religious freedom. I first explore the issue of regulating practices in holy sites, by comparing two decisions of the Israeli Supreme Court: the decision not to intervene in conflicts regarding religious rituals in the Church of the Holy Sepulcher in Jerusalem; and the decision to impose "secular" norms of tolerance and impartial balance of interests in the case of the paved area in front of and adjacent to the Western (Wailing) Wall. These decisions correspond to the form of governance at each site – the former is run privately whereas the latter is publicly administered. Nevertheless, I argue that this distinction is not, in itself, a sufficient reason to account for the difference in the judicial decisions. The distinction is based on a lack of sufficient justification to regulate religious practices in the case of the Church of the Holy Sepulcher and the existence of such justification and legitimacy in the case of the Wall plaza. Government involvement in administrating the Wall plaza does not furnish a decisive basis for intervening in the religious practices in the area, but it does contribute to its legitimacy.

A second issue discussed in Part II is that of the qualifications necessary to serve in state-run religious institutions. According to Jewish law, as interpreted by the Jewish Orthodoxy, neither women nor non-Orthodox Jews are allowed to serve in official offices. Here I discuss the Israeli Supreme Court's position that whereas nominations to offices that are religiously authoritative are exempted from "secular" norms of gender equality and fair representation, such norms govern in the context of qualifying members to serve in publicly administered bodies whose role is to administer the supply of religious services or to elect religious office-holders.

Part III assesses regulations and legislation aimed at protecting individuals' *freedom from religion*. I refer here to two cases: issuing kosher food certificates, and regulating the activities of Jewish burial societies. The discussion demonstrates that the regulation can be justified on the basis of the extent of government involvement in empowering religious authority and on the concern that these authorities will violate the individual's right to freedom from religion. Part IV concludes the study by briefly addressing the related question – whether a policy of government involvement in supplying religious services is desirable from the perspective of religious freedom. I suggest that the exercise of religious freedom requires an active role by government, whenever the voluntary formation of the religious communities fails to effectively provide the required religious services. In some cases, the governmental role may

well result in an infringement of religious freedom, but this in itself does not guarantee that public involvement is detrimental to religious freedom.

II. Intervention Aimed at Promoting Religious Freedom

Freedom of religion is typically conceived as a restraining factor in government decisions. Thus, the right to freedom of religion is often invoked in cases in which governmentally implemented norms restrict individuals from freely practicing religious rituals or where such norms compel them to take part in activities which are forbidden according to their religious belief or might seriously confound these beliefs. However, in many cases religious freedom is threatened by individuals. Often, the threat results from conflicts within a specific religion as a consequence of intolerance towards different beliefs and religious practices internal to that religion.[9] In some cases, religious freedom can be protected by merely prohibiting one individual from interfering with the religious activities of others. In other instances, however, such prohibition is insufficient. An example of such a situation is in cases of competition over scarce or shared resources. I refer here to two such cases: regulating behavior at holy sites, and qualifications required to serve in entities that supply religious services.

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[9] For a discussion of the reality of internal cultural fissures in recent years see, e.g., *M. Sunder*, Cultural Dissent, Stan. L. Rev. 54 (2001-2002), 495 (Arguing that an approach which recognizes dissent within culture would prevent law from becoming complicit in the backlash project of suppressing internal cultural reform); *A. Shachar*, Multiculturalism Jurisdictions – Cultural Differences and Women's Rights, 2001; *S. Moller Okin*, Is Multiculturalism Bad For Women? in: J. Cohen/M. Howard (eds.), Is Multiculturalism Bad for Women?, 1999 ("When liberal arguments are made for the rights of groups, special care must be taken to look at within-group inequalities … Moreover, policies aiming to respond to the needs and claims of cultural minority groups must take seriously the need for adequate representation of less powerful members of such groups."); *Raday* (note 8) *supra* (A legal deference to discriminatory religious practices cannot be justified based on multiculturalism); *G. Stopler*, The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality, Wm. & Mary J. of Women & L. 10 (2004), 459.

A. Regulating Behavior at Holy Sites

When a historical space is declared "holy," the question often arises as to which rules of behavior are appropriate to the site, and whether it will be *exclusively* governed by one set of norms internal to the religion that holds the place holy. Activities that violate these norms are considered to be a desecration of the sanctity of the place and might seriously offend the believers' feelings. However, this interest may conflict with the freedom of religion of others, who wish to conduct alternative accepted forms of worship in the same sacred place. In such a case, facilitating freedom of religion and freedom of worship may justify – or even oblige – government regulation of religious activity at the holy site. My focus here is less with the issue of how the conflicting interests should be balanced, but with two other issues. First, when should the government intervene in the governance of a holy site? Second, to what extent does government participation in administrating the holy site affect the legitimacy of such an intervention in setting the norms of behavior in the place?

For illustration, consider two of the holiest sites of two religions in Jerusalem: the plaza area near the Western Wall, which is a Jewish site. The Wall is a remnant of the outer perimeter wall of the Second Temple, destroyed by the Romans in 70 AD; And the Church of the Holy Sepulcher, which according to many Christian sects, including Catholics, contains the tomb of Christ. The Church is privately administrated, whereas the Wall Plaza is administered by an official government office – the Supervisor of the Western Wall, an ultra-Orthodox Rabbi. At each site, religious groups from within the community have conflicting demands over religious rituals. In the case of the Church of the Holy Sepulcher, the conflict is between different congregations.[10] In the case of the Wall Plaza, a conflict emerged when a group of religious Jewish women, known as the Women of the Wall (WoW), tried to pray in the area in a form that other Orthodox Jews believe is allowed only to men.[11] A similar conflict emerged between Jews from the Reform and Conservative streams when the former attempted to pray near the Wall

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[10] See *W. Zander*, On the Settlement of Disputes about the Christian Holy Places, Is. L. Rev. 8 (1973), 331.

[11] The members of the group wear ceremonial prayer shawls, read aloud from the Torah Scroll and pray aloud in a group, practices that are traditionally conducted only by men. See P. Chesler/R. Haut (eds.), Women of the Wall: Claiming Sacred Ground at Judaism's Holy Site, 2003.

in mixed-sex prayer groups, something which the latter (Orthodox Jews) saw as forbidden.

In both cases, the groups whose attempts to worship according to their required mode of prayer were thwarted by the ruling of the Supervisor who petitioned the Israeli Supreme Court, sitting as the High Court of Justice. In the case of the Church of the Holy Sepulcher, the Court rejected petitions to intervene or to order the government to do so.[12] The Court reasoned that such a conflict between religious groups over practices at a sacred site is non-justiciable.[13] In contrast, in the case of the Western Wall, the Court rejected the argument that since the decision of the Supervisor of the Wall to ban the WoW's form of prayer is based on religious norms, it is non-justiciable. Instead, the Court ruled that the Supervisor of the Wall is not authorized to employ his powers in order to enforce what he regards as the legitimate form of prayer according to Jewish law. An impartial consideration of all related interests must be conducted in setting the rules of behavior for the site.[14] The Court ordered that a separate area be marked for the prayers of the WoW or, if this solution is not feasible, the Supervisor must set specific time peri-

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[12] See HCJ 633/05 *The Armenian-Patriarchy of Jerusalem v. The Government of Israel*. The Court stated that the Government should mediate between the parties but rejected the petition to order the Government to implement a particular solution. The Court issued a similar decision in another conflict, which dealt with the Parvis of the Church of the Holy Sepulcher: HCJ 188/77 *The Orthodox Coptic Patriarchate v. The Government of Israel*, 33(1) P.D. 225.

[13] This view is supported by an Act that was enacted during the British Mandate over Palestine, which is still valid in Israel – Section 2 of the Palestine (Holy Places) Order, 1924 – that explicitly classify such conflicts as non-justiciable: "…[N]o cause or matter in connection with the Holy Places or religious buildings or sites in Palestine or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any Court in Palestine." This provision was implicitly qualified by Section 1 of the Protection of Holy Sites Act, 1967, as discussed below.

[14] HCJ 257/89 *Hoffman v. The Rabbi in Charge of the Western Wall*, 48(2) P.D. 265; HCJ 3358/95 *Hoffman v. The General Manager of the Prime-Minister's Office*, 54(2) P.D. 345; FHCJ 4128/00 *The General Manager of the Prime-Minister's Office v. Hoffman*, 57(3) P.D. 289. The Court based its decision to adjudicate the case by classifying it as referring to the petitioners' freedom of access to the Wall Plaza, and thus subject to Section 1 of the Protection of Holy Sites Act, 1967 and not to Section 2 of the Palestine (Holy Places) Order, 1924 (see note 13 *supra*).

ods for their prayers.[15] The Israeli Supreme Court did not explain the basis of the distinction between the two cases.

As indicated above, the two cases differ in the manner of administrating each of the sites, with the Church of the Holy Sepulcher being *privately* managed whereas the Wall Plaza is *publicly* administered. The Israeli government has set, in a by-law, detailed rules of behavior in the Wall Plaza, and it appoints the supervisor of activities at the site (the Supervisor of the Wall).[16] However, this difference in the degree of government involvement in administrating the sites supplies only a partial explanation of the difference in government (as well as judicial) involvement in determining the permitted forms of religious worship at each site.

According to Section 1 of the Protection of the Holy Sites Act, 1967, "the holy sites shall be protected from desecration … and from anything that might violate the freedom of access of members of all religions to the sites that are sacred to them or that might upset their feelings towards such sites."[17] This provision, together with the basic human right to religious freedom, prohibits the government from desecrating holy places. Criminal law provisions supplement this rule by forbidding individuals to commit acts of "desecration of a Holy Site" or that "might violate the freedom of access of members of all religions to the sites that are sacred to them …" (Section 2 of the Protection of the Holy Sites Act, 1967). A person's "freedom of access" to the holy site may be reasonably construed as containing her freedom to pray there according to her interpretation of the obliged mode of prayer. Thus the State may be allowed – or even obliged – to intervene in cases of conflicts over modes of prayer at the site, even if the government is not involved in its administration. Equally, the right to religious freedom may well be construed as requiring the government to set the rules of behavior in a site it administers exclusively according to the religious norms as defined by the recognized institutions of the relevant religion.

The question is thus whether the rules of behavior at the site should be governed by the prevailing religious norms or should the government

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15 The area designated for the prayers of the WoW lies adjacent to and is technically part of the Western Wall, but has not traditionally been a prayer site. Thus, the Court's decision has resulted in the actual exclusion of the WoW from the shared public sanctified space.

16 The Protection of Jewish Holy Sites By-Law, 1981.

17 This provision is repeated in Basic Law: Jerusalem, Capital of Israel, Section 3.

intervene to appropriately balance between conflicting religious interests in the site? At issue is *not* the legitimacy of judicial or other forms of government inquiry into religious questions.[18] Rather, the question is whether the religious norms should be applied where judicial or government action is under consideration? Specifically, the question in the case of the WoW was that of the proper interpretation of the provision set by the Government in a by-law that prohibits an act of worship in the Wall Plaza which contradicts "the traditional practice in the area [*minhag ha-makom*]" and offends the feelings, beliefs and sensibilities of the people who pray there. Assuming that the term "the traditional practice in the area" should be interpreted based on its religious meaning, the decision of the Supervisor of the Wall that the specific form of prayer by women is prohibited according to Jewish law may well be non-justiciable. However, this underlying assumption is not self-evident. The basic question is: should Jewish law, as interpreted by the Rabbi in-Charge of the Wall, govern?

The decision whether government intervention in setting the norms of behavior in a sacred site is justified – and thus the decision whether the conflict is justiciable – rests on two main factors. One factor assesses the *necessity* of government intervention for securing sufficient access to worship at the holy site to all interested parties. The second factor is the scope of *legitimacy* of guarding freedom of religion through gov-

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[18] A dispute regarding the interpretation of the religious norms of behavior in the site may indeed be viewed as non-justiciable. See, e.g., *K. Greenawalt*, Hands Off! Civil Court Involvement in Conflicts over Religious Property, Colum. L. Rev. 98 (1998), 1843 (Courts may settle disputes over church property, so long as they employ standards of interpretation that do not call for religious judgments.); *P. Gerstenblith*, Civil Court Resolution of Property Disputes Among Religious Organization, Am. U.L. Rev. 39 (1990), 513 (In the resolution of internal religious disputes courts must apply a "truly neutral" set of legal principles); *B. Roberts*, The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause, Yale L.J. 101 (1991), 211 (226) ("The model of a religious question doctrine, … help to illuminate the civil courts' habit of refraining from inquiry into matters of religious law."). Compare *J. A. Goldstein*, Is there a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs, Cath. U.L. Rev. 54 (2005), 497 ("Courts are barred from resolving normative questions about religion, such as the validity or truth of religious beliefs or the wisdom or efficacy of religious practices, but… [are allowed to resolve] positive religious questions, such as assessments of the content of religious doctrine. … [Courts] may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.").

ernment intervention, which is determined by the extent of the element of "self-governance" in the right to religious freedom.

The first factor deals with the concern that some individuals' freedom of religion will be infringed upon if the rules of behavior at the holy site are exclusively set by religious institutions, according to their interpretation of the relevant religious norms. Empowering religious entities to regulate the activity at the holy site with no vehicle for government scrutiny in cases of competing religious interests over the practices in the same site is a plausible alternative – but only when a culture of dialogue and concessions between the competing religious groups (or within a religious group) exists. Conversely, if the prevailing culture is that of dominance and supremacy of one group over another, government deference might seriously harm the interests of the weaker competing religious groups.

These two divergent approaches are demonstrated by the two abovementioned Israeli judicial decisions. In the case of the Church of the Holy Sepulcher, the two competing congregations have managed, in most cases, to settle their disputes peacefully, or at least unobtrusively.[19] As such, the decision to empower the religious groups, through their recognized institutions, to regulate behavior at the site according to their religious norms seems justified and appropriate. By contrast, the consequences of applying such a model in the case of the Wall Plaza are less promising. Many in the Orthodox Jewish community, which is the largest of the religious Jewish communities in Israel, are unwilling to accommodate or even to respect the beliefs of members of other movements within Judaism, or even those of believers within the Orthodoxy Judaism who question some of its traditions, such as the WoW group.[20] The practices of worship that some Jewish congregations consider as obligatory are considered by the Orthodox movement as forbidden. As a result, empowering the Supervisor of the Wall to set the norms of behavior at the site based on the religious norms as he interprets them led to the denial of freedom of worship to persons who follow other interpretations of Judaism. Government regulation, which is based upon an impartial balance of interests and on judicial review, seems both necessary and inevitable.

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[19] See *Zander* (note 10) *supra*.

[20] See, e.g., *P. Lahav*, Up Against the Wall: The Case of Women's Struggle to Pray At the Western Wall in Jerusalem, Israel Stud. Bull. 16 (2000), 19 (Suggesting that the case of the WoW is an expression of Israel's public general hostility to feminist causes).

This line of reasoning is only one part of the story. One must also account for a second factor – the scope of *legitimacy* of government intervention in setting the rules of behavior at a holy site. The right to freedom of religion has important characteristics of a collective right, which ascribe to religion as a culture.[21] In the case of the Wall, the right to freedom of religion is not only the right of the individual to pray at the holy site according to the mode of prayer she believes in. It is also an autonomous collective right – the freedom of *the group* to determine, through its recognized institutions, the accepted and permissible modes of prayer at the site. It is the right to determine not only which acts of worship the members of the group should conduct, but also which types of activities are considered to be a desecration of the holy site and are thus prohibited. This collective dimension of the right to religious freedom is important because measuring and comparing conflicting religious interests and sentiments by the government or judicial authority is a sensitive and intricate task. Governmental regulation might be – or perceived as – biased, sectarian, or aimed at secularization and promoting values of liberalism, merely disguised as protecting freedom of religion.

The essential consideration is thus what weight, in each respective situation, should be given to the role of "collective" self-governance in exercising the right to religious freedom. The weight of this component is determined by assessing its importance in preserving religious freedom. It is a function of the level of *trust* in the government by the members of the relevant religion(s) and religious groups, if its involvement in setting the rules of behavior at the holy site will ultimately enhance rather than diminish the exercise of freedom of religion and freedom of worship. In this respect, the scope of government involvement in administrating the holy site plays an important role. The extent of involvement indicates the prevailing perception regarding the scope of trust in government intervention as a means to facilitate the exercise of religious freedom. The practice by which the Government appoints the supervisor of the sacred place and sets the rules of behavior at the site *indicates* a perception of legitimacy in facilitating freedom of religion through

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[21] *Sapir* (note 7) *supra* (Religion has an important role as an all-encompassing culture); *A. C. Carmella*, The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion, in: J. E. Wood, Jr./D. Davis (eds.) The Role of Government in Monitoring and Regulating Religion in Public Life, 1993, 21 (31-33) ("virtually all churches … engage in acculturated religious conduct.")

government intervention and a relatively light weight attributed to the significance of self-governance on the right to religious freedom. Similarly, private administration of the holy site reflects a presumption of *illegitimacy* of state intervention in religious activities at the site, and thus a greater significance given to the collective self-governance component of the religious right in question.

The Israeli cases illustrate this consideration nicely. Israel's self-proclamation as a Jewish state results in a fundamentally different scope of legitimacy in facilitating freedom of religion through government intervention in the case of Jews and that of non-Jews. The intensive association of the State with the Jewish people induces recognition of relatively extensive collective rights of non-Jewish minorities.[22] A central manifestation of this policy is the recognition of the importance of the self-governance component of the right to religious freedom for non-Jewish communities in Israel. The different congregations within Christianity are formally recognized as a "religious congregation" (*'eda datit*) in Israel. As such, they are entitled to several group rights, which reflect their freedom from government authority.[23] The state finances religious activities for members of these religions (largely because it finances religious activities of Jews, and it is compelled to equally distribute financial support in religious activities among all religions).[24] In other re-

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[22] See, e.g., *I. Saban*, Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel, N.Y.U. J. Int'l L. & Pol. 36 (2004), 885.

[23] The status of non-Jewish religious entities (with the exception of the Druze) is mostly based on practices which were set under the British Mandate. See, e.g., *Englard* (note 8) *supra*, at 189-190; *A. Rubin-Peled*, Debating Islam in the Jewish State – The Development of Policy Toward Islamic Institutions in Israel, 2001; HCJ 963/04 *Loyfer v. The Government of Israel*, 58(1) P.D. 326 (The Government is not involved in the choice of the Patriarch of a Christian congregation). See also HCJ 7351/95 *Nevoani v. The Minister of Religious Affairs* 50(4) P.D. 89; HCJ 282/61 *El Saroji v. The Minister of Religious Affairs*, 17(1) P.D. 188 (An English translation of this judgment is available at www.court.gov.il).

[24] The Government did not always keep this obligation, and on several occasions was compelled by the Supreme Court to supply equal support to non-Jewish religious activities. See, e.g., HCJ 200/83 *Wattad v. Minister of Finance*, 38(3) P.D. 113 (The Court upheld a policy of supporting only Jewish religious studies); HCJ 240/98 *Adala v. The Minister of Religious Affairs*, 52(5) P.D. 167 (The Court recognized the State's duty to supply equal support to all religious activities); HCJ 1113/99 *Adala v. The Minister of Religious Affairs*, 54(2) P.D.

spects the non-Jewish religions enjoy substantial self-governance rights.[25]

Based on this policy, the government does not administer non-Jewish holy sites. It neither nominates the supervisors of these sites nor does it set the rules of behavior. This background explains the decision to classify the conflict in the Church of the Holy Sepulcher as non-justiciable. The private – rather than public – administration of the site indicates the general perception in Israel regarding the illegitimacy of intervention by the Jewish State in non-Jewish religious activities.[26] The legitimacy of government intervention is limited to instances in which intervention is essential to secure vital interests, such as in cases of violent conflicts. In other cases, the lack of government involvement in administrating the site – as well as the status of non-Jewish religions in Israel – suggests that the aim of positively influencing freedom of religion is not considered as a sufficient justification of government, including judicial intervention.

The case of Jewish sacred sites is radically different. Here, the public administration of the Wall Plaza demonstrates the prevailing perception that government involvement is a legitimate means to promote and protect religious freedom. The Jewish religion is not formally recognized in the Jewish state as a "religious congregation,"[27] indicating the view that group rights of Jews are mostly realized by the government.[28]

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164 (The Court compelled the government to supply equal public funds to maintain Jewish and non-Jewish cemeteries).

25 These include, among others, the right to establish "religious councils" (Section 2 of the Religious Congregations Act), and to impose levies on the members of the religious congregation. In addition, religious courts, which apply religious norms, hold exclusive jurisdiction in matters of personal status (marriage and divorce) of the members of the religion.

26 See *Zander* (note 10) *supra*; *W. Zander*, Jurisdiction and Holiness: Reflections on the Coptic-Ethiopian Case, Isr. L. Rev. 17 (1982), 245.

27 See, e.g., HCJ 5070/95 *Na'amat v. The Minister of Interior*, 56(2) P.D. 721 (752) (President Barak): "The Jews in Israel are not considered as members of one religious congregation. … Considering the Jews as a 'religious congregation' is a Mandatory-Colonial approach. It is invalid in the State of Israel. Israel is not the state of the 'Jewish congregation.' It is the state of the Jewish people."

28 For this reason, recognizing a group right of religious Jews – such as the right to exemption from military service based on religious beliefs – can be classified as negatively influencing the "Jewishness" of the state rather than enhancing it.

As argued above, the public administration of the Wall Plaza does not itself necessarily justify government intervention in setting the rules of behavior at the site. Empowering the government to appoint the Supervisor of the Wall and to set the rules of behavior at the site is intended to enhance religious freedom and worship. The Rabbi-in-Charge of the Wall is appointed based on his religious position, with the approval of the Chief Rabbis of Israel. Generally, it cannot be ruled out that the aim of enhancing religious freedom and worship may be best achieved by classifying the decisions of the Supervisor of the Wall, who implements the rules set by the government, as exclusively based on religious norms and thus as non-justiciable.[29]

The Knesset (the Israeli parliament) has explicitly avoided obliging the government or the Supervisor of the Wall to account for all relevant conflicting interests. However, the government's involvement in administrating the Wall Plaza reflects the prevailing perception regarding the *legitimacy* of promoting freedom of worship at the site through an alternative model – that of impartial consideration of the conflicting interests.[30] According to this model, the Supervisor of the Wall is obviously expected to be familiar with the needs of religious people and with the religious norms of behavior at the site. However, the Rabbi-in-Charge of the Wall should not base his decision solely on religious norms but on an impartial balance between the conflicting interests of all interested parties. As argued above, it seems that the choice of this latter model in the case of the Wall Plaza is justified on the basis of the

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[29] Indeed, Section 2 of the Palestine (Holy Places) Order, 1924, that classifies conflicts over practices in sacred sites as non-justiciable (see note 13 *supra*), does not include an explicit exclusion for Jewish sites. In an early case the Court explicitly rejected the argument that this provision does not apply in the case of Jewish sacred sites: HCJ 222/68 *Hoogim Leomyim v. The Minister of the Police*, 24(2) P.D. 141. For this reason, Judge Englard decided, in a dissenting opinion, that the petition against the Rabbi in Charge of the Wall should be dismissed, as non-justiciable: FHCJ 4128/00 *The General Manager of the Prime-Minister's Office v. Hoffman*, 57(3) P.D. 289 (330).

[30] It should be noted that the Court's decision in the case of the WoW generated fierce reactions from many Orthodox Jews in Israel, challenging the legitimacy of regulating freedom of religion for Jews through government intervention (see, e.g., *Lahav*, note 20 *supra*). However, these reactions did not translate into official decisions – such as changing the scope of government involvement in administering Jewish holy sites – and it is doubtful whether they signify any substantial shift in the prevailing perception regarding the level of trust in the government in this respect.

need to secure freedom of worship at the site for Jewish minority groups.

The preceding analysis has left at least two questions unresolved. First, is government involvement in administrating sacred sites desirable? Specifically, referring to a current debate in Israel, should sites that are sacred to non-Jews also be publicly administrated, as the sites that are sacred to Jews?

The answer must be based primarily on a comparison of the potential gains versus the conceivable risks to the interests of the members of the religion that would result from government intervention in the administration of the site. In the context of the current discussion, government involvement in administrating a holy site does not supply, in and of itself, the required legitimization of intervention in conflicts regarding activities at a holy site. Nevertheless, public administration of the site, such as that employed in the Wall Plaza, may generate, in a gradual process, a greater trust among the relevant congregation(s) that government regulation will not be sectarian or aimed at secularization but at facilitating freedom of religion and freedom of worship. Successful interventions can thus contribute to the legitimacy of supervising religious freedom through government involvement. Initiating such a process is important in circumstances in which securing all interested individuals' access to the holy site and to realize their freedom of worship requires government intervention.[31]

A second question refers to the *scope* of legitimate state intervention in religious practices. The decision of the Supervisor of the Wall in the case of the WoW manifested an instance of discrimination against women – the form of prayer required by the WoW was allowed only to men in the Orthodox tradition.[32] Should the government intervene in

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[31] An interesting question is who should decide – the relevant religious congregation(s) or the government? The decision may (indirectly) affect the scope of government intervention in religious practices, in order to enhance the interests of some, who are typically the minority (or otherwise subaltern) among the members of the religion, at the expense of the majority. See, e.g., *Okin* (note 9) *supra* (Accentuating the importance of adequate representation of less powerful members of minority groups).

[32] See *F. Raday*, The fight against Being Silenced, in: P. Chesler/R. Haut (eds.), Women of The Wall: Claiming Sacred Ground at Judaism's Holy Site, 2003, 115 (Arguing that the "furious opposition and fanatical violence" against the attempt of the WoW to pray in their manner is based on "the desire of the Orthodox Jewish establishment to preserve religious patriarchal hegemony against the challenge of religious feminism."); *Lahav* (note 20) *supra* (The op-

religious practices at holy sites in order to prevent violations of basic human rights such as gender equality?

In the case of the WoW, the Court did not explicitly address this issue, since it classified the case as a conflict between the freedom of religion and worship of the two groups. As such, the legal intervention was based on the goal of protecting freedom of religion rather than on anti-discrimination. However, in other cases, such classification is less plausible. For instance, the practice of setting different zones for men and women in the Wall Plaza infringes the right to equality (given that separate is inherently unequal), but it may be argued that it only remotely infringes the women's freedom of religion and worship. In such cases, the decision should be based on a balance between the conflicting interests. My concern here is with a specific aspect of this dilemma: What is the effect of government involvement in administrating the sacred site on this balance of the competing interests?

According to one view, government involvement in administrating the holy site characterizes the activity there as "public," meaning that it must comply with the secular norms of public law, including gender equality. This view is based on a formalistic distinction between "private" and "public" activities, under which private actors – such as religious institutions – may to a considerable extent discriminate against women, whereas the government is not allowed to take part in such activity. The required assessment is thus of the scope of government involvement in administrating the holy site and in setting the rules of behavior. If this involvement exceeds a certain threshold, the activity is classified as "public," and public law norms, such as gender equality, prevail. Under this premise, government involvement is necessarily at odds with religious freedom, such that facilitation of the latter compels a strict separation between state and religion. I find this view unpersuasive.

As argued above, in some cases the preservation and promotion of religious freedom compels government intervention. It may well compel the government to set the rules of behavior in the holy site, in order to

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position to the struggle of the WoW is another expression of the Israeli public's general hostility to any feminist cause). See also *L. Shakdiel*, Women of the Wall: Radical Feminism as an Opportunity for a New Discourse in Israel, Journal of Israeli History 21 (2002), 126; *R. Hirschl*, Toward Juristocracy: The Origins and the Consequences of the New Constitutionalism, 2004, 67-68 (Classifying the case as a contest for cultural hegemony between a secularist-liberal elite and the Ultra-Orthodox community).

ensure free access and to facilitate exercising the right to freedom of worship at the site to the full range of interested parties. This aim cannot be achieved unless the government is allowed – or even obliged – to account for the relevant religious norms of behavior in the site, including those that violate the "secular" norms of public law. Thus, given the view that facilitating the right to religious freedom may require government involvement, a procedure for legitimizing an account of religious norms in setting the rules of behavior seems inevitable.

A related argument entails the obligation to respect freedom of religion. The government is obligated to take into account the interest of freedom of religion not only when deciding whether to intervene in a privately administered holy site, but also in the event the site is "publicly" administered.[33] Government involvement does not eliminate the religious interest of those people who consider the site to be sacred. Freedom of religion is not an absolute interest. It does not exclude other relevant interests, and the government is clearly required to balance between the interest of freedom of religion and other, possibly conflicting interests, such as gender equality. Striking a different balance in the case of public, as opposed to private, administration of the site is justified only if the government involvement actually results in imposing a greater harm to the conflicting interests. Governmental involvement in administrating the site may ensure a more effective enforcement of the prohibition against desecrating holy sites. However, it does not seem to significantly augment the scope of infringement on competing interests. If this is the case, government involvement does not justify striking a different balance between the conflicting interests than those normally considered when referring to private activities.

In summary, governmental intervention in religious activities at holy sites is not aimed, at least not explicitly, at enforcing compliance with liberal norms such as gender equality or freedom of expression, but at facilitating the collective and individual exercise of freedom of religion. It is aimed at protecting the worshippers' interest, that acts that they regard as desecrations of the place's sanctity are not committed in the holy site, and also at safeguarding the freedom of access and worship for all worshippers. The latter purpose is directed at securing the individual's right to religious freedom at the expense of the collective, self-

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[33] See *R. Gavison*, Feminism and the Public/Private Distinction, Stan L. Rev. 45 (1992), 1 (Arguing that the relevant distinction is not the public/private one, but a distinction between cases in which government intervention is justified and those in which it is not).

governance facet of the right to religious freedom. As such, it often results, although indirectly, in promoting other interests, such as gender equality. For these reasons, promoting religious freedom through government involvement in setting the rules of behavior in sacred sites is an intricate task, and should be applied only when it is both a necessary and a legitimate means. Active government participation in administrating a site may indicate such legitimacy, but this cannot alone serve as a sufficient reason for intervention in religious practices.

B. Qualification to Serve in Entities that Supply Religious Services

Several Jewish religious services are supplied in Israel through four main official entities – the Chief Rabbinate of Israel, regional Religious Councils, Regional Rabbis, and Rabbinical Courts. According to Jewish law, as interpreted by the Jewish Orthodoxy, neither women nor non-Orthodox Jews are allowed to serve in official Jewish offices. Should qualification to serve in these offices be determined according to the religious norms, as interpreted by religious authorities, or according to the secular norms of public law?[34]

This issue resembles the case of regulating activity in holy sites in a number of ways. In both cases, the government's involvement is aimed at facilitating religious freedom, and the scope of legitimate government intervention in the religious activity is shaped according to this aim. On the one hand, the religious services that the government supplies must comply with the relevant religious norms. In the current context, the purpose of establishing the government offices under discussion – which supply certain religious services – cannot be achieved unless the qualification to serve in these offices is set up based upon the religious norms. For instance, the decisions of a judge in a Rabbinical Court, who is not qualified to fulfill this role according to the religious norms, are not binding according to these norms, and thus his actions cannot supply the service of religious adjudication. On the other hand, as in the case of holy sites, the government supply of religious services

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[34] As indicated in note 5 *supra*, in the US, Title VII of the federal Civil Rights Acts allows religious organizations to discriminate on religious grounds in employment, even for non-leadership positions. By contrast, Article VI of the US Constitution states that "no religious Test shall ever be required as a Qualification to any Office or public Trust."

should serve the needs of all movements and factions within the relevant religion.

Except for specific areas that are discussed below, the Israeli Supreme Court does not require the government to account for this second factor of protecting the needs of internal movements and factions. The qualifications to serve in public entities that carry out religious functions and are considered as authoritative according to the religious norms are exclusively set according to the religious norms. The Chief Rabbinate, which represents the Jewish Orthodoxy, is the sole legally empowered authority to accredit such office holders as Regional Rabbis, Rabbis who are authorized to conduct weddings, and judges in Rabbinical Courts (Section 2 of the Chief Rabbinate of Israel Act, 1980).[35] The interest in supplying religiously-valid services is considered decisive in setting the norms of qualification to serve in the relevant offices. The result is a significant violation of the right to freedom of religion of the members of the other movements. For instance, weddings of Jews in Israel are formally recognized only if they are conducted by a Rabbi accredited by the Chief Rabbinate, such that the right of non-Orthodox Jews to get married according to their religious belief is violated.[36]

In my view, this position is unjustified. As we have seen above in the case of the Wall Plaza, the Court rejected the argument that the fact that one group of people considers certain activities as desecration of the site's sanctity is sufficient to prohibit such activities. The Court decided that other peoples' interest in freedom of access and worship should also be considered in setting the rules of behavior at the site. One possible reason for applying a different approach in the current context is a formal one. In the case of the holy sites, it is the government that is authorized to set the rules of behavior, whereas in the current context it is the Chief Rabbinate that is empowered to accredit the relevant office holders. However, this reasoning is insufficient. As in the case of the Supervisor of the Wall, the Court can direct the Chief Rabbinate to account for the interests of all movements and factions within Judaism when accrediting candidates.

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[35] The Supreme Court was willing to strike down the Chief Rabbinate decisions in this respect only when they were based on non-religious considerations, such as political ones: HCJ 47/82 *The Progressive Jewish Movement in Israel v. The Minister of Religions*, 43(2) P.D. 661.

[36] Such marriages are not legally forbidden, but they are not formally recognized by the state.

It seems that the main reason is the Court's reluctance to intervene in a politically disputed issue. In the case of the Wall Plaza, striking a balance between the conflicting interests is possible by setting specific areas or times to the prayers of the WoW. However, in the current context, such compromise is unfeasible. If a Regional Rabbi or a Judge in the Rabbinical Court is not qualified to serve in the relevant position according to the Chief Rabbinate's interpretation of Jewish law, the office holder does not supply the required religious services to the Orthodox Jews who follow the Chief Rabbinate's interpretation. The only feasible solution is to demand that the Government supply separate religious services to other movements within Judaism. However, such an approach would require the government to formally recognize the existence of different factions and movements within Judaism – since it would require the establishing of a Rabbinate of the other movements that would accredit candidates – a move which is politically highly controversial in Israel. This deference by the Court is in my view unjustified, given the significant negative effect of the current policy on the right to freedom of religion of non-Orthodox Jews in Israel.[37]

The Court does intervene in cases of office holders whose role is to administer the supply of religious services or to elect religious officeholders. Among these instances are the regional Religious Councils, whose role is to supply various religious services and to allocate government funds, and the members of the council that elects the Regional Rabbi. Appointing to these offices only those who are qualified according to the religious norms is not a necessary condition for these bodies to fulfill their functions. For instance, the fact that some members of the regional Religious Council are not qualified to serve on this body according to Jewish law does not invalidate (in terms of the religious law) the religious services that they supply.

The Court ruled that the members of these councils be appointed on the basis of the doctrine of fair representation of relevant views, and that candidates should not be disqualified based on their gender or reli-

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[37] For a similar view see *B. Neuberger*, Israel – A Liberal Democracy with Four Flaws, in: J. E. David (ed.), The State of Israel: Between Judaism and Democracy, 2003, 361 (365-376). See also *Raday* (note 8) *supra* at 227-230 ("…the Court's rhetoric puts the balancing of religion and equality beyond the reach of secular rationality and subjects it to a religious analysis which silences … the very group whose rights are at issue.")

gious belief, notwithstanding the religious norms in this respect.[38] A Religious Council whose members represent all residents of the relevant community that are interested in religious services is more likely to account for the interests of all relevant factions in the community, and thus to enhance freedom of religion.

These judicial decisions have not been easily accepted by the Chief Rabbinate and by certain members of regional Religious Councils, and the Court must repeatedly review the enforcement of these decisions.[39] Moreover, in response to the judicial decisions, the Knesset enacted a provision stating that "the Religious Council and its members will act according to the decisions of the Chief Rabbinate"[40] (the Knesset however avoided empowering the Chief Rabbinate to accredit candidates to the Religious Council). This provision accentuates the collective aspect of the right to freedom of religion by empowering an institution that reflects the views of the majority among religious Jews in Israel – Jewish Orthodoxy – to direct the activities of the Religious Councils that are aimed at advancing the interests of all religious Jews in Israel. This position is, in my view, unjustified. In light of the poor record of the Jewish Orthodoxy in Israel in accounting for the interests of other Jewish movements, applying the doctrine of fair representation in appointing the members of the Religious Councils, as well as securing their independence, seems essential in order to enhance freedom of religion.

III. Intervention Aimed at Protecting Freedom *from* Religion

Public supply of religious services that is restricted to "religious" activities, such as setting the rules of behavior in holy sites only marginally –

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[38] For cases referring to women see, e.g. HCJ 953/87 *Poraz v. The Mayor of Tel-Aviv*, 42(2) P.D. 309; HCJ 153/87 *Shakdiel v. The Minister of Religious Affairs*, 42(2) P.D. 221 (An English translation of this judgment is available at www.court.gov.il). For cases referring to non-Orthodox Jews see HCJ 4733/94 *Naot v. The Municipal Council of Haifa*, 49(1) P.D. 111; HCJ 699/89 *Hofman v. The Municipal Council of Jerusalem*, 48(1) P.D. 678; HCJ 3551/97 *Brenner v. The Committee of Ministers*, 51(5) P.D. 754.

[39] See, e.g., HCJ 4247/97 *Meretz v. The Minister of Religious Affairs*, 52(5) P.D. 241.

[40] Section 6A of the Jewish Religious Services Act, as amended in 1999.

if at all – harms individuals' freedom *from* religion. However, in other cases, the threat to the interest of freedom from religious norms may be significant. Protecting this interest serves as an important justification for regulating publicly supplied religious activities.

The main area where this concern is manifested in Israel is that of applying religious norms to the law regarding personal status of residents. According to Israeli law, matters of marriage and divorce are governed by religious norms, and the religious courts (Rabbinical Courts in the case of Jews) hold exclusive jurisdiction in applying the religious law in these matters. This practice raises unique (and difficult) issues, which are beyond the scope of this paper.[41] A related issue, which likewise cannot be discussed here, is the scope of legitimate intervention in state supplied religious activities aimed at securing the practical ability of those who are part of the religious culture to exit from it. One example of this dilemma in Israel is the scope of intervention in the curriculum of religious schools that are publicly financed.[42] Another example is the decision to prohibit religious courts from issuing "writs of refusal" that are aimed at inducing parties to accept the jurisdiction of the religious courts – rather than those of the State – by imposing informal sanctions on a party who refuses to accept the jurisdiction of the religious court.[43]

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[41] See, e.g., *F. Raday*, Israel – The Incorporation of Religious Patriarchy in a Modern State, International Review of Comparative Public Policy: Family Law and Gender Bias – Comparative Perspectives 4 (1992), 209; *Raday* (note 8) *supra*; *Shetreet* (note 8) *supra*; *Neuberger* (note 37) *supra*.

[42] See HCJ 10296/02 *Teachers' Association v. The Minister of Education*, in which the Supreme Court forced the government to implement the law that compelled every school that is publicly financed to comply with a plan of "core studies," set by the state, aiming at ensuring a sufficient level of studies in areas such as democracy and tolerance, as well as mathematics, English, etc. See also *S. Goldstein*, The Teaching of Religion in Government Funded Schools in Israel, Is. L. Rev. 26 (1992), 36. Cf., *E. A. DeGroff*, State Regulation of Nonpublic Schools: Does the Tie Still Bind?, BYU Educ. & L. J. 2003 (2003), 363 (Whereas the states have well established authority to reasonably regulate nonpublic education, including religious education, the tendency is to de-regulate private schools or significantly lessen their level of oversight).

[43] The "writ of refusal" (*ktav seruv*) does not have any formal status, but in certain religious communities it might trigger social excommunication. The Israeli Supreme Court ruled that the Rabbinical Courts are not authorized to issue such an order: HCJ 3269/95 *Katz v. The Rabbinical Court of Jerusalem*, 50(4) P.D. 590. This case reflects a fundamental dilemma in multi-culturalism and communitarianism. The competition that minority groups face from the

The focus in this Part is on instances in which government regulation of the religious activity is aimed at protecting those who are not part of the religious culture from the burden of complying with religious norms.[44] In this respect, the extent of government involvement in supplying the relevant religious services plays an important role in justifying the regulation of these services. I refer here to two cases: issuing kosher food certificates and regulating activities of Jewish burial societies.

A. Issuing Kosher Food Certificates

The Chief Rabbinate of Israel, a public authority, is authorized, amongst other things, to issue kosher food certificates. According to the Prohibition of Fraud in Kosher Food Act, 1983, a business is allowed to present itself as selling kosher food only if it holds a certificate issued by the Chief Rabbinate. A criminal sanction is imposed on a business that deceptively presents itself as selling kosher food.

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dominant culture in general, and the forces of secularization in the case of religious groups in particular, may pose an existential threat to the minority's culture and traditions. Thus, preserving the minority's culture may justify legitimizing a limited coercion by the group towards its members. However, the community's interest in preserving its culture must be weighted against the individual rights of the members of the community, which are reflected in recognizing the importance of ensuring a reasonable level of a right to exit from the communal coercion. The practice of social excommunication which is triggered by issuing a "writ of refusal" by the Rabbinical Courts substantially exceeds the limits of reasonable social pressure.

[44] It is disputed whether a right to freedom *from* religion should be established, or does it suffice to recognize a person's right that her freedoms are not infringed, regardless whether the "border-crossing" is based on religious or on "secular" norms. See, e.g., *Sullivan* (note 1) *supra*, at 197 ("The right to free exercise of religion implies the right to free exercise of non-religion"); *M. Troper*, Religion and Constitutional Rights: French Secularism, or Laicite, Cardozo L. Rev. 21 (2000), 1267 ("One cannot speak of the freedom of secularism … Because secularism is a characteristic of the state, one can say that freedoms are better guaranteed if the state is secular … It is, therefore, to be treated not as a civil right, but as a public freedom."); *D. Statman/G. Sapir*, Why Freedom of Religion does not Include Freedom from Religion, Law and Philosophy (forthcoming) ("restrictions on liberty motivated by religious considerations do not violate, per se, any separate right beyond the regular rights granted in a liberal democracy."). The term "freedom from religion" is used here to describe a person's interest that her freedom is not infringed based on religious norms.

According to Section 11 of this Act, in issuing a kosher food certificate the Chief Rabbinate should consider "exclusively kosher food norms". Nevertheless, the Chief Rabbinate refuses to issue kosher food certificates to businesses that sell kosher food but violate other religious norms. For instance, it rejects applications from businesses that operate on the Sabbath, show "indecent" performances or sell the non-kosher by-product of their activity to other businesses. Such activities violate norms which are considered, according to the Chief Rabbinate's interpretation, an integral part of the Jewish law kosher food norms. The Israeli Supreme Court has invalidated this policy. The Court decided that even if the Chief Rabbinate's interpretation is correct, such that other aspects of the business' activity are an integral part of Jewish law kosher food norms,[45] the term "kosher food norms" should be interpreted based on its "secular" meaning. According to the latter meaning, this term refers only to those religious norms which deal directly with food.[46] The Court has thus compelled the Chief Rabbinate to issue kosher food certificate to every business that sells kosher food, regardless of the business's other practices.[47]

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[45] This issue is undecided. In several cases the Court rejected this assumption, based on an inquiry into the norms of the religious Jewish law: HCJ 6111/94 *Ha'Vaad Leshomrey Masoret v. The Council of the Chief Rabbinate of Israel*, 49(5) P.D. 94 (101); HCJ 5009/94 *Meatrael v. The Council of the Chief Rabbinate of Israel*, 48(5) 617 (627-628); HCJ 359/66 *Gitia v. The Council of the Chief Rabbinate of Israel*, 22(1) P.D. 290 (297-298); HCJ 44/86 *The Butcheries Section in Jerusalem v. The Council of the Chief Rabbinate of Israel*, 40(1) P.D. 4 (6).

[46] The Chief Rabbinate is allowed to account indirectly for other aspects of activity in the business as far as these elements seriously obstruct the Chief Rabbinate's supervisors' ability to conduct their work. Based on this rule it is allowed to disqualify businesses that operate during the Sabbath from getting the certificate. In several cases the Court has strictly scrutinized attempts to rely on such an argument, in order to verify that it is not served as pretext to bypass the Court's interpretation of the term "kosher food norms."

[47] HCJ 465/89 *Raskin v. The Religious Council of Jerusalem*, 44(2) P.D. 673 (Presenting "indecent" shows is irrelevant in deciding whether to issue kosher food certificate); HCJ 509/88 *Machlof Bros. v. The Council of the Chief Rabbinate of Israel*, 44(4) P.D. 617 (The scope of observance of Jewish law norms by the owners of the business is irrelevant in considering an application to issue a kosher food certificate); HCJ 5009/94 *Meatrael Ltd. v. The Council of the Chief Rabbinate of Israel*, 48(5) P.D. 617 (625); HCJ 7203/00 *Aviv Osoblansky Ltd. v. The Council of the Chief Rabbinate of Israel*, 56(2) 196 (Selling the non-

This judicial policy results in a conflict between the Court and the Chief Rabbinate. The latter is compelled to issue kosher food certificates to businesses that, according to its interpretation of Jewish law, sell non-kosher food. On several occasions the Chief Rabbinate published a caveat along with the kosher food certificate, stating that the certificate is issued only due to the Court's order. The Court prohibited this practice based on the view that a reasonable person interprets such notice as stating that the food that the business sells is not kosher, and it thus practically undermines the Court's decision.[48]

In my view, the Israeli Supreme Court's approach of restricting the Chief Rabbinate's discretion is justified. The underlying assumption is that government involvement in issuing kosher food certificates is required in order to facilitate freedom of religion, by establishing a reliable certification authority. Presumably, the concern is that a private market for kosher food certificates might not be sustainable, based on the difficulty of private, for-profit issuers of kosher food certificates to reliably commit to disregard financial, non-religious considerations.[49] Empowering a government, not-for-profit agency to issue certificates and enforcing the prohibition of fraud through the threat to impose criminal sanctions are aimed at solving this possible market failure. These actions are aimed at ensuring sufficient access to kosher food.

However, the involvement of the State in issuing the kosher food certificates generates a risk of infringement of another vital interest – freedom *from* religion. The certificate has an important economic value, since a substantial portion of the Jewish population in Israel avoids purchasing food which is not certified as kosher.[50] The Prohibition of

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kosher by-product of the business' activity to other businesses is irrelevant); HCJ 3944/92 *Marbek v. The Chief Rabbinate of Israel*, 49(1) P.D. 278.

[48] HCJ 77/02 *Aviv Osoblansky Ltd. v. The Council of the Chief Rabbinate of Israel*, 56(6) 249. See also HCJ 195/64 *The South Company Ltd v. The Council of the Chief Rabbinate of Israel*, 18(2) P.D. 324 (332).

[49] It seems that this concern is unsubstantiated. In Israel, private issuers of kosher food certificates are considered by some congregations to be more reliable than the Chief Rabbinate certificate. For the practice in the U.S. see *S.M. Sigman*, Kosher without Law: The Role of Non-Legal Sanctions in Overcoming Fraud within the Kosher Food Industry, Fl. St. U. L. Rev. 31 (2004), 509.

[50] According to a recent study, about two thirds of the Jewish population in Israel always eats kosher food: *S. Levy, H. Levinsohn & E. Katz*, Beliefs, Observances and Social Interaction among Israeli Jews, in C. S. Liebman & E. Katz (eds.), The Jewishness of Israelis, (1997), 3.

Fraud in Kosher Food Act, 1983, does not prohibit issuing private kosher food certificates, but it allows a business to "present" itself as selling kosher food only if it is certified to do so by the Chief Rabbinate. This quasi-monopolistic status that the law imparts to the Chief Rabbinate, in conjunction with the important economic value of the kosher food certificates, empower the Chief Rabbinate to compel business owners to observe Jewish law norms in excess of those actually required according to the religious law to qualify for the certificate. The concern is that the Chief Rabbinate violates the business-owners' freedom from religion, by compelling them to comply with religious norms that are not necessary to satisfy the purpose of ensuring access to kosher food. The Court's regulation of the Chief Rabbinate's discretion, by interpreting the term "kosher food norms" according to its "secular" meaning, is applied primarily in order to deal with this concern.

One should not ignore the possibility that the Chief Rabbinate's position is based on an honest interpretation of Jewish law "kosher food norms." Regulating the Chief Rabbinate's discretion may thus impede achieving the purpose of the government involvement in issuing kosher food certificates – ensuring access to kosher food – whenever the Court errs in its interpretation of the content of the religious kosher food norms. Given the assumption that the right to freedom of religion not only restrains the government from restricting religious activities but also compels it to ensure reasonable access to religious services, the regulation does indeed infringe on the freedom of religion. Moreover, according to Jewish law, the interpretation of the "Rabbi of the place" (*mara atra*) is binding, even if other religious authorities support an alternative interpretation.[51] As a result, as far as religious people who live in Israel consider the Chief Rabbinate as the *mara atra*, a judicial intervention infringes the right to religious freedom, even if the Court prevents the Chief Rabbinate from applying an arguably wrong interpretation of the religious norms.[52]

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[51] See, e.g., *G. Sapir*, Two Learned Scholars Among Us, Tel-Aviv U. L. Rev. 25 (2001), 189 (197-198) [in Hebrew].

[52] Under a regime of non-Establishment of religion, such judicial involvement raises other concerns as well. In the U.S., the Courts invalidated kosher fraud statutes that require the State to refer to "Orthodox Hebrew religious requirements," since such laws excessively entangle state and religion, and since these laws have the impermissible effect of advancing Orthodox Judaism. See, e.g., *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2nd Cir. 2002); *Ran-Dav's County Kosher Inc. v. New Jersey*, 608 A.2d 1353 (N.J. 1992),

The assessment as to whether the regulation of the Chief Rabbinate's discretion is justified should be based on two main considerations. The first assessment refers to one type of judicial error – namely, unjustifiably enabling the Chief Rabbinate to impose restrictions that are in excess of the kosher food norms. The main factors in this respect are the actual powers that the Chief Rabbinate holds and the level of trust that it does not abuse this power. The "cost" of this type of error is determined by the type of requirements that the Chief Rabbinate actually imposes on applicants of kosher food certificate and their effect on business-owners. A second consideration refers to another type of error – preventing the Chief Rabbinate from imposing "justified" restrictions on business owners. The relevant assessments in this respect are the Court's capacity to accurately verify the content of the relevant religious norms and to distinguish between honest interpretation and abuse of power; and the actual harm done to the exercise of freedom of religion in case of such judicial error. The existence of a reasonably reliable private certification system mitigates the harm that the regulation of the Chief Rabbinate's discretion inflicts on the right to freedom of religion, since interested parties can "opt-out" from the state-supplied religious service to an unregulated supply of this service.[53]

Applying these considerations in the Israeli context supports, in my view, the approach of the Israeli Supreme Court described above. The provisions of the Prohibition of Fraud in Kosher Food Act considerably empower the Chief Rabbinate to impose restrictions on business owners. The Chief Rabbinate is plainly interested in enhancing compli-

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cert. denied, 507 U.S. 952 (1993); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.ed 1337 (4th Cir. 1995). For a discussion see, e.g., *K. Greenawalt*, Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance, S. Cal. L. Rev. 71 (1998), 781 (The state can be involved in enforcement against fraudulent assertions of selling kosher food only if there are no disagreements about religious standards); *K. R. Lavy Lindsay*, Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes, Dayton L. Rev. 23 (1998), 337 (Kosher fraud statutes are valid only if they require vendors of kosher products to display the basis for their assertion that the products are kosher, such that the government removes itself from having to determine whether the product is kosher); *G. F. Masoudi*, Kosher Food Regulation and the Religion Clauses of the First Amendment, U. Chi. L. Rev. 60 (1993), 667.

53 As indicated above, the Prohibition of Fraud in Kosher Food Act, 1983 does not prohibit issuing private, unregulated kosher food certificates.

ance with Jewish legal norms[54] and the possibility that it uses its quasi-monopolistic status to coerce is not inconceivable. Given the rather wide-ranging restrictions that the Chief Rabbinate imposes on businesses that apply for a kosher food certificate and the efficacy of the private system of certification, it seems justified to prefer the interest of freedom from religion over that of freedom of religion by regulating the Chief Rabbinate's discretion.

More generally, the discussion demonstrates that government involvement in supplying a religious service is not a sufficient justification for regulating the discretion of the entity that supplies the service. The regulation can be justified only if the government involvement empowers the religious authority to substantially violate the individual's freedom from religion, and there is a considerable risk that this potential will be realized.

Thus the difficult question remains: when is government involvement in supplying a religious service justified? The answer to this question should be based on an assessment of whether government involvement is expected to facilitate and safeguard freedom of religion. In those cases in which the government involvement is such that it compels regulation of the supply of the religious service, it is necessary to compare the enhancement of freedom of religion that results from government involvement – securing reasonable access to the specific religious service – with the infringement that results from the regulation. In addition, government involvement may also be warranted in cases where it is justified to regulate a certain religious service even if it is privately supplied. In such cases, government involvement may reduce the scope of infringement on freedom of religion that results from intervention in a religious activity.

B. Regulating Activities of Jewish Burial Societies

Jewish burial societies are private religious entities. Their members are Orthodox Jews, who bury Jews according to Jewish law. These societies receive public financing and in many cases the cemeteries they adminis-

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[54] In fact, this aim is explicitly addressed in Section 2(2) of the Chief Rabbinate of Israel Act, 1980, which provides that one of the roles of the Chief Rabbinate is to initiate "activities for exposing the population to the values of the Torah." Obviously, this provision does not authorize the Chief Rabbinate to achieve this aim through coercion.

ter are located on public lands, which are leased to these societies free of charge. Until recently, government support for burial activity was channeled only to these religious burial societies, and as a result, they dealt almost exclusively with the burial of Jews in Israel.

Based on this unique status of the religious Jewish burial societies, the Israeli Supreme Court has classified them as "quasi-public" entities, which are subject to norms of public law. This decision was applied in reviewing the practice employed by some of these burial societies of refusing, on religious grounds, to allow an inscription on tombstones which records the dates of birth and death according to the Gregorian, rather than the Hebrew calendar. The Court rejected the argument that the burial society should be free to set the rules of behavior in its cemetery according to the religious norms, based on its right to freedom of religion. The Court decided that in setting the rules regarding inscription on tombstones, the burial society is obliged, as a "quasi-public" entity, to impartially account for the interests of all those who use its services. It should prohibit inscriptions that seriously upset the feelings of some individuals who visit in the cemetery – for instance, it should prohibit erecting a cross over a grave in the Jewish cemetery – but avoid imposing other restrictions that violate a person's freedom to choose the form of commemorating loved ones. The Court ruled that the inscription of the dates of birth and death according to the Gregorian calendar is not expected to significantly upset, if at all, the feelings of some visitors to the graveyard, and thus invalidated the practice of prohibiting such inscriptions.[55]

In a dissenting opinion, Judge Englard criticized this approach, arguing that "[the] court is not authorized to force a religious body – be it public or private – to act in contravention of religious law … If a Jewish legal ruling infringes on the ideology of people who need the services of a religious body, it is appropriate to find a solution that satisfies all parties. But forcing the body to transgress religious law cannot be the correct solution in a democratic country that respects freedom of religion. The solution of coercion is especially problematic when the Court assumes the task of evaluating the importance of a certain religious precept and the degree of damage that its transgression will cause to the

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[55] CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum*, 46(2) P.D. 464; CA 6024/97 *Shavit v. Rishon Lezion Jewish Burial Society*, 53(3) P.D. 600 (An English translation of this judgment is available at www.court.gov.il).

sensibilities of the religious public."[56] However, this approach, which classifies the Jewish burial society as a "religious body," that should be free to set the rules of behavior in its cemetery based on religious norms, disregards the unique "quasi-public" status of the Jewish burial societies in Israel. As reasoned by President Barak, "[Judge Englard's] approach is worth considering in a case where the religious body imposes its religious authority on a group of believers who accept its instructions … This approach is certainly not acceptable … when a religious body imposes its public authority on a group of the population that does not subscribe to its beliefs but is subject to the body's authority only because it has no other choice."[57]

The dilemma arises from the policy of empowering religious bodies by providing differential allocation of public resources to exclusively supply a service that is essential to all members of society. The result is either an infringement on the religious freedom of these bodies – when the Court regulates their activity – or on the freedom from religion – when the Court does not intervene.[58]

IV. Concluding Remarks

The relatively extensive judicial intervention in the activities of religious bodies has led prominent supporters of religious freedom in Israel to challenge the desirability of the intensive involvement of the Government in supplying religious services. A notable voice in this respect is Izhak Englard, an academic scholar and retired Supreme Court Judge. Englard argues that "[the] integration [of the established Orthodox Rabbinate into the State's organization], viewed by the Zionist religious parties as a positive manifestation of the State's identification with Judaism, has exacted a rather high price of lost independence vis-à-vis the government and a corresponding loss of moral stature."[59] Several schol-

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[56] *Shavit* (note 55) *supra*, para. 21.

[57] *Ibid.*, para. 17.

[58] Indeed, in recent years the Government has started to implement a new policy of funding secular burial societies as well.

[59] *Englard*, *supra* note 8, at 197. See also *I. Englard*, Law and Religion in Israel – the Historical-Philosophical Background, Tel-Aviv U. L. Rev. 19 (1995), 741 (757) [in Hebrew]; *G. Sapir*, The Boundaries of Establishment of Religion, Mishpat Umimshal 8 (2005), 155 [in Hebrew] (Arguing that whereas the state

ars have even argued that the adoption of a policy of intensive involvement of the state in supplying religious services was not a result of an ideological and pragmatic compromise of the secular Zionist leadership[60] but was rather aimed at ensuring government control over prominent religious leaders.[61] In this respect, it may be observed that the religions that thrive are those that are not institutionalized within the state and which preserve their independence.[62]

I suggest a different perspective: Government supply of religious services serves primarily to enhance the exercise of freedom of religion. The state's duty to treat people as equals requires it to strive to ensure that all citizens enjoy a reasonable (or at least a minimal) access to religious services, irrespective of the available resources of the members of their religious community. Under this view, the exercise of religious freedom requires an active role by the government, in providing public monies to religious institutions and even to supply some religious services, whenever the voluntary formation of the religious communities

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should support religious activities, a functional separation between the state and the supply of religious services must be maintained, in order to prevent state intervention in religious practices).

[60] This view is supported by the historic research: *Z. Zameret*, Yes to a Jewish State, No to a Clericalist State: The Mapai Leadership and Its Attitude to Religion and Religious Jews, in: Z. Zmeret/M. Bar-On (eds.), On Both Sides of the Bridge – Religion and State in the Early Years of Israel, 2002, 175 [in Hebrew].

[61] *I. Englard*, Law and Religion in Israel – The Historic-Ideological Background, Tel-Aviv U. L. Rev. 19 (1995), 741 (758) [in Hebrew] (Quoting a revealing moment in the debate between Yishayahu Leibovitz with David Ben-Gurion in the 1950s, in which the then Prime Minister of Israel explicitly argued "you demand a separation of state and religion in order to revive religion as an independent element, with which the state should compete. I oppose such a separation – I want the state to keep the religion tight.")

[62] For instance, one of the explanations offered for the relative decline of religion in Europe and its flourishing in the US is the institutionalized nature of religion in many countries in Europe as opposed to the institutional separation in the US. See, e.g., *G. Davie*, Europe: The Exception that Proves the Rule?, in: P. L. Berger (ed.), The Desecularization of the World: Resurgent Religion and World Politics, 1999, 65 (78-79). For an opposing view see *McConnell* (note 2) *supra* (Arguing that religion has been "shoved to the margins of public life" in the US, as a result of, among other things, the Supreme Court's policy of "too often excluding religion from public programs in the name of preventing establishment.").

fails to effectively do so. Indeed, intervention in religious practices may undermine this aim. However, I challenge the premise that the scope of government involvement in the supply of religious services determines the extent and the legitimacy of intervention in religious practices.

The relationship between government involvement and the legitimacy of intervention is much more complex. In certain cases, the intervention in religious practices is justified by reasons that are unrelated to the scope of government involvement in the supply of the religious service.[63] A prominent example is the case of competition between different religious congregations and communities over limited resources, in which government regulation of activity is required in order to ensure reasonable access to the relevant resources – such as space and time at a holy site – and thus reasonable fulfillment of their obligation to protect and facilitate the religious freedom of its citizens. In such cases, government involvement may lessen the scope of infringement on freedom of religion that results from the intervention in the religious activity.

In other cases, the intervention is justified based on the existing government involvement in the supply of the religious service. These are cases in which the government enhances the powers of religious bodies, thus generating a concern of government involvement or complacency in cases of religious coercion. In these cases, the governmental role in the supply of the religious services may well result in an infringement of religious freedom. However, such a conclusion is not self-evident, and a detailed assessment of the over-all effect of government involvement is required in order to determine whether the involvement – and what type of involvement – is desirable.

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[63] For a discussion of the proper scope of tolerance toward religious practices see, e.g., *J, R. Beattie*, *Jr*., Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill, Catholic Law 43 (2004), 367 (Intolerance toward intolerant religious practices is justified only when there is imminent harm to others); *P. Schuck*, Diversity in America: Keeping Government at a Safe Distance, 2003 (Supporting a greater legal deference to religious practices); *M. A. Hamilton*, Religious Institutions, the No-Harm Doctrine, and the Public Good, B.Y.U.L. Rev. 2004 (2004), 1099 (Religious conduct that harms others must be capable of being regulated). See also *J. Habermas*, Intolerance and Discrimination, Int'l J. of Con. Law 1 (2003), 2 (Tolerance based on mutual recognition and mutual acceptance of divergent worldviews allows religions and democracy to coexist in a pluralistic environment).

The "Other" Religion and State Conflict in Israel: On the Nature of Religious Accommodations for the Palestinian-Arab Minority

Michael Karayanni[*]

I. Introduction

Israel is a diverse country. Nearly one-fifth of the total population, composing about 1.2 million of its citizens, are Palestinian-Arabs – the rest of the population being predominantly Jewish.[1] The religious composition of the non-Jewish population is made up of Muslims, Christians and Druze.[2] Moreover, this multiplicity is evident within the dif-

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[1] The total population of Israel was estimated for the year 2001 to be 6,439,000, of which 1,227,500 (18.76%) is Palestinian-Arab. See 53 Statistical Abstract of Israel 2002, table 2.1 (2002). The full tables are available at www.cbs.gov.il/shnatonenew.htm.

[2] The Jewish population for the year 2001 was an estimated 4,990,200 (77.50%), the Muslim 987,300 (15.33%), the Christian Arab 112,200 (1.74%), other Christians 24,600 (0.38%), Druze 105,000 (1.63%) and a total of 216,200 (3.35%) "unclassified". Statistical Abstract, note 1 *supra*. An additional recognized religious community is the Bahai. The official statistics do not have any specific category for the Bahai, but their number barely exceeds a couple of thousand.

ferent religious groups themselves. The Jewish community is divided into secular, traditional and religious groups,[3] the latter containing a well defined Ultra-Orthodox camp.[4] In addition, Reform and Conservative Judaism have gained force recently, creating new challenges to the dominant Orthodox establishment.[5] The Christian population is divided into ten recognized religious congregations,[6] each with its own body of institutions that include a court system and in some cases even have substantial ties to foreign governments.[7]

The existence of different national and religious groups in Israel has been a constant cause of tension. On the national level, the most obvious tension is between the Palestinian-Arab minority on the one hand, and the Jewish majority on the other hand. Moreover, since Israel as a state is officially defined on national, ethnic and religious grounds as a Jewish state, this national conflict has, in many cases, also turned into a conflict between the Palestinian-Arab minority and the Israeli establishment as a whole.[8] Underlying this national tension is of course the overall Israeli-Arab (Palestinian) conflict, with the Palestinian narrative stressing the tragic outcome in which the majority of the Palestinian people were deprived of their homeland, and the Jewish (Zionist) na-

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3 See *S. Levy et al.*, A Portrait of Israeli Jewry, Beliefs, Observations, and Values among Israeli Jews 2000 (2002), 5-6.

4 *G. Barzilai*, Communities and the Law, Politics and Cultures of Legal Identities, 2003, 10-11, 55-56.

5 See *E. Tabory*, The Israel Reform and Conservative Movements and the Market for Liberal Judaism, in: U. Rebhun and C. I. Waxman (eds.), Jews in Israel: Contemporary Social and Cultural Patterns, 2004, 285.

6 *M. Edelman*, Courts, Politics, and Culture in Israel, 1994, 133 n.1.

7 See *U. Bialer*, Cross on the Star of David, The Christian World in Israel's Foreign Policy, 1948-1967, 2005.

8 See e.g., *J. M. Landau*, The Arabs in Israel, A Political Study, 1969; *E. Zuriek*, The Palestinians in Israel: A Study in Internal Colonialism, 1979; *I. Lustick*, Arabs in the Jewish State: Israel's Control of a National Minority, 1980; *S. Smooha and D. Peretz*, The Arabs in Israel, J. Conflict Resol. 26 (1982), 451; *C. Klein*, Israel as a Nation-State and the Problem of the Arab Minority: In Search of a Status, 1987; *S. Smooha*, Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel, Ethnic & Racial Stud. 13 (1990), 389; *J. M. Landau*, The Arab Minority in Israel, 1967-1991: Political Aspects, 1993; *N. N. Rouhana*, Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict, 1997.

tional narrative stressing the emancipation of the Jewish people by becoming sovereign in a state of their own. [9]

On the religious level, the most apparent field of tension is intra-Jewish, and it is manifested in many ways. One of these is the application of Jewish religious norms, particularly those of the orthodox approach, to regulate the personal legal status of Jews, whether in matters pertaining to the law of marriage and divorce,[10] or in setting the standards in defining who is a Jew, mainly for immigration purposes and public records.[11] Another facet is the extent to which Jewish religious norms regulate the public domain, as in the case of Sabbath laws penalizing Jewish shop owners who operate their business on the Sabbath or preventing public transportation from operating on the Sabbath.[12] A third facet is the public funding of Jewish religious institutions, be they religious councils or school systems of the various religious streams. [13]

The secular-religious friction among the Jewish community has often been the cause of intense debate.[14] Protagonists within the secular camp have argued against the coercive nature of the religious norms, especially in matters pertaining to marriage and divorce, and have persistently called for limiting public funding for Jewish religious institutions. The Jewish religious camp, on the other hand, has called for a tolerant stance toward Jewish religious norms and Jewish religious institutions, frequently invoking in this endeavor the need to preserve Jewish religious heritage and the fostering of Jewish unity.[15] Interestingly, an

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[9] *Y. Peres*, Ethnic Relations in Israel, Am. J. Soc. 76 (1971), 1021 (1028) ("It is a commonplace that the relationship between Israeli Jews and Arabs as ethnic groups has to be understood in the context of the wider Arab-Israeli conflict.").

[10] *E. R. Clinton*, Chains of Marriage: Israeli Women's Fight for Freedom, J. Gender Race & Just 3 (1999), 283 (291).

[11] See *A. Shachar*, Whose Republic?: Citizenship and Membership in the Israeli Polity, Geo. Immigr. L.J. 13 (1999), 233 (245-247); *M. J. Altschul*, Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining its Present Language, U. Ill. L. Rev. (2002), 1345 (1352-1355).

[12] *A. Rubinstein*, State and Religion in Israel, J. Contem. Hist. 4 (1967), 107 (110-111) [hereinafter: *Rubinstein*, State and Religion].

[13] *S. Goldstein*, The Teaching of Religion in Government Funded Schools in Israel, Isr. L. Rev. 29 (1992), 36.

[14] See *M. Edelman*, A Portion of Animosity: The Politics of the Disestablishment of Religion in Israel, Israel Stud. 5 (2000), 204.

[15] See *G. Shafir and Y. Peled*, Being Israeli: The Dynamics of Multiple Citizenship, 2002, 142; *P. J. Woods*, Gender and the Reproduction and Maintenance

unofficial pact has been reached between political leaders representing both camps, which has managed so far to maintain the various religious normative institutions. Referred to in Israel as the "status quo,"[16] this reality has been challenged over the years, thereby making the relationship between *halachic* principles and the State of Israel a persistent matter of debate among all factions of the Jewish community.[17]

Although both the Jewish-Arab tension within Israel and the religious-secular strife within the Jewish community have been widely discussed, little attention has been paid to "religion and state" issues among the Palestinian-Arab minority in Israel. Specifically, matters pertaining to public accommodations for non-Jewish religious institutions, including such institutions that administer community religious norms to members and the possible conflict of such accommodations with secular and liberal norms, have escaped the sharp scrutiny associated with religion and state in Israel in general. Religion and state in Israel is often reduced to a conversation about synagogue and state.[18]

Discussion associated with the Palestinian-Arab minority status in Israel has similarly excluded issues pertaining to conflicts between group

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of Group Boundaries: Why the "Secular" State Matters to Religious Authorities in Israel, in: J. S. Migdal (ed.), Boundaries and Belonging, States and Societies in the Struggle to Shape Identities and Local Practices, 2004, 226 (235-242).

[16] Actually, the *status quo* agreement precedes the establishment of the State of Israel. It was first formulated in a letter of June 19, 1947 by David Ben-Gurion, then the Head of the Jewish Agency, to Agudath Israel, an Ultra-Orthodox and anti-Zionist religious organization, in which an outline was made in respect of the attitude to be adopted by the future Jewish state towards religious demands. While the letter stated that the future state will essentially be a secular state, it nevertheless stated the following four guarantees: (a) The Sabbath will be the official day of rest, while the non-Jewish population will be entitled to it own days of rest; (b) Dietary laws of *Kosher* food will be observed in any state-owned establishment to which Jews resort; (c) The continuation of rabbinical courts' jurisdiction over personal status matters; (d) A separate system of religious schools to be maintained. See *Rubinstein*, State and Religion, note 12 *supra* at 113.

[17] See *G. M. Steinberg*, Interpretations of Jewish Tradition on Democracy, Land, and Peace, J. Church & State 43 (2001), 93 (98-101).

[18] See *L. Endel Bassli*, Note, The Future of Combining Synagogue and State in Israel: What have We Learned in the First 50 Years?, Houst. J. Int'l L. 22 (2000), 477; *A. Maoz*, State and Religion in Israel, in: M. Mor (ed.), International Perspectives on Church and State, 1993, 239 (239) [hereinafter: *Maoz*, State and Religion].

norms and individual welfare. Issues of religion and state were discussed in regard to the Palestinian-Arab minority only when relevant to the national context of the discussion, i.e., the status of a non-Jewish population in the Jewish state.[19] As a result, the possible tension between individual liberal norms and group accommodations once again escaped the attention of those deliberating over the national status of the Palestinian-Arab minority in Israel.

The aim of this article is to explore the "religion and state" tension among the Palestinian-Arab minority in Israel, with special emphasis on the interplay between group accommodations in matters pertaining to personal status and individual liberal norms.[20] This article claims that issues of conflict between the religious norms of the Palestinian-Arab minority in Israel and liberal notions of individual well-being are not treated as part of the religion and state conflict due to an underlying paradigm, and not merely by accident or due to ignorance. This paradigm classifies religious accommodations granted to the Palestinian-Arab religious communities as a sort of minority (group) accommodation, which is autonomous in nature and depends on a pluralistic or even multicultural attitude by the State of Israel. In a sense, religious accommodations granted to the Palestinian-Arab minority are themselves derived from a notion of liberalism, albeit of the group accommodation type. Such accommodations are simply the "private" matter of the religious group as such. Thus, in terms of normative justification the religious accommodations for the Palestinian-Arab minority in Israel are a continuation of the long-standing Ottoman *millet* system by which minority religions were tolerated by the state through the grant of jurisdictional powers over their members. This ontology is inherently different from the one that characterizes the religious accommodations relevant to the Jewish majority. Given the Jewish nature of the State of Israel, such accommodations were configured as yet another public feature, albeit controversial at times, of the State of Israel as a Jewish state.

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[19] See *A. Layish*, Women and Islamic Law in a Non-Muslim State: A Study based on Decisions of the Shari'a Court in Israel, 1975; *A. Rubin-Peled*, Debating Islam in the Jewish State, The Development of Policy toward Islamic Institutions in Israel, 2001.

[20] As has been noted, the granting of jurisdiction in matters of personal status to the various religious communities "is the main manifestation of the connection between religion and state" in Israel. See *D. Kretzmer*, Constitutional Law, in: A. Shapira and K. C. DeWitt-Arar (eds.), Introduction to the Law of Israel, 1995, 39 (48).

Obviously a great deal of this entanglement is an inherent part of the entanglement of religion and nation within Judaism itself.[21] Consequently, after the establishment of the State of Israel as a Jewish state it can no longer be said that the Jewish community in Israel is just another *millet*. Rather, the matter of Jewish religious accommodations has essentially been "nationalized", thus becoming part of Israel's "public" sphere.[22] This schism in the nature of the religious accommodations relevant for each of the two communities is what I have chosen to call the "paradigm of separateness" in religion and state relations in Israel.

II. The Paradigm of Separateness

1. Religious Accommodations and the Legal Environment

For Israelis, religious affiliation is much more than an expression of freedom of conscience.

A person's religion in Israel will serve to identify the governing law in a number of family law matters just as the place where a tort has been committed, the place of a contract, or the place of domicile can serve as factors identifying the governing law of a certain relationship.[23] The most evident example is the law governing matters of marriage and di-

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[21] *Maoz*, State and Religion, note 18 *supra* at 243 ("[d]ivest Jewish culture and heritage from religious elements and one is left rather empty handed."). Therefore, scholars in Israel who seek to legitimize the Jewish character of the State of Israel go out of their way to stress how wrong it is to impose Jewish religious norms on members who do not opt for a religious lifestyle. See *A. Yakobson and A. Rubinstein*, Israel and the Family of Nations, Jewish Nation-State and Human Rights, 2003, 150-165 [in Hebrew]; *A. Kasher*, Spirit of a Man, Four Gates, 2000, 19 [in Hebrew].

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

[23] See *M. Galanter and J. Krishnan*, Personal Law and Human Rights in India and Israel, Isr. L. Rev. 34 (2000), 101.

vorce: Israeli citizens are governed by their religious community law.[24] Moreover, when it comes to adjudicating marriage and divorce controversies among members from the same religious community, such members have no choice but to bring their matter before that community's court, which is considered to have exclusive jurisdiction in matters of marriage and divorce of Israeli citizens.[25] In other personal status matters, such as child custody, maintenance and alimony of spouses and children, matrimonial property and inheritance, religious courts possess a concurrent jurisdictional capacity to handle such issues. In practical terms this means that in order for religious courts to acquire jurisdiction and apply their own religious law, some preconditions must be met, the most dominant being the consent of all concerned parties to this jurisdictional authority. If the consent of one concerned party is lacking, jurisdiction lies in the regular civil court (today the Court for Family Affairs).

However, even in the latter case, the civil court might still be obliged to administer the relevant religious norms to resolve the dispute, notwithstanding the lack of adjudicative jurisdiction on behalf of the relevant religious court. In certain matters of personal status, religious law is regarded as the governing law even when the dispute is brought before a

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[24] See *A. Rubinstein*, Law and Religion in Israel, Isr. L. Rev. 3 (1967), 380 (384-388) [hereinafter: *Rubinstein*, Law and Religion]. See also, *A. Maoz*, Religious Human Rights in the State of Israel, in: J.D. Van der Vyvert and J. Witte, Jr. (eds.), Religious Human Rights in Global Perspective: Legal Perspective, 1996, 349, (355) [hereinafter: *Maoz*, Religious Human Rights]; *A. Maoz*, Enforcement of Religious Courts Judgments Under Israeli Law, J. Church & St. 33 (1991), 473.

[25] This also means that when litigating matters of marriage and divorce before the religious courts, the parties need to abide by the procedure devised by that particular court that could also be influenced by religious notions. This is particularly relevant to rules dealing with the capacity of witnesses to testify before a religious court, rules which explicitly discriminate on the basis of gender and religious affiliation. In this respect, local rules dealing with the conflict of jurisdictional authority of the different religious courts or between religious and civil courts follow a logic and a methodology parallel to that in the sphere of private international law. In the latter discipline forums follow their own local law (the *lex fori*) in matters of procedure even when the governing law (*lex causae*) happens to be that of a foreign country. See *I. Englard*, Religious Law in the Israel Legal System, 1975, 177-198.

civil court. Such is the case for example in a maintenance action brought by a wife against her husband in a civil court.[26]

The possibility of applying one's religious law to personal status affairs is problematic in many respects, at least from a liberal point of view.[27] First, the individual member might be secular and thus not interested in conducting his or her matrimonial life under a religious regime. The exclusive control of religious law in matters of marriage and divorce thus compels Israeli citizens to tolerate a body of norms that might be completely foreign to their inner beliefs.[28] Second, within the religious laws of the different religious communities there exist a number of norms that are discriminatory in nature, especially in terms of gender. In fact many religious norms still applicable by the different religious communities discriminate explicitly against women and work to preserve the internal patriarchal hierarchy.[29]

One extreme example can be found in the Code of Family Law of the Greek Orthodox community, compiled in the fourteenth century under the Byzantine Empire.[30] The Code allows for only a limited number of causes for divorce that are asymmetric in terms of gender. Thus, for example, under the Code the husband can petition the Greek Orthodox court for divorce if his wife slept outside of their house without his permission. However, such a cause does not apply when the husband chooses to do the same without his wife's consent.[31] A special section

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[26] The Law for the Amendment of Family Law (Maintenance) 1973, Section 2.

[27] See *Rubinstein*, State and Religion, note 12 *supra* at 117; *Bassli*, note 18 *supra* at 491, 516.

[28] In his recently published autobiography, Haim Cohn, a pre-eminent Israeli jurist, Supreme Court Justice and a champion of human rights called the rabbinical courts' jurisdiction to adjudicate matters of personal status (but interestingly just the rabbinical courts' jurisdiction) "a blot on Israel's democracy". *H. Cohn*, Personal Introduction – Autobiography, 2005, 242.

[29] *F. Raday*, Culture, Religion and Gender, I. Con. 1 (2003), 663 (669-676); *F. Raday*, Israel – The Incorporation of Religious Patriarchy in a Modern State, Int'l Rev. Comp. Pub. Pol'y 4 (1992), 209 [hereinafter: *Raday*, The Incorporation of Religious Patriarchy].

[30] See *F.M. Goadby*, International and Inter-Religious Private Law in Palestine, 1926, 134-135.

[31] *M. M. Karayanni*, "Jewish and Democratic": Multiculturalism and the Greek Orthodox Community, in: N. Langental and S. Friedman (eds.), The Conflict, Religion and State in Israel, 2002, 227 [in Hebrew].

spells out what actions are not grounds for divorce, e.g., a wife cannot petition for divorce if she was whipped by her husband with a lash or hit by him with a stick. This is an extreme example of religious norms that do not treat men and women equally in matters of matrimony.[32]

In the Jewish community, women suffer from the status of *agunah*, which literally means "anchored"[33] in Hebrew. Under Jewish law, divorce can take place only if the husband grants the divorce (*get*) and the wife accepts it.[34] If the husband refuses to grant the divorce, the wife cannot be divorced. However, if the wife chooses not to accept the divorce, the husband can be granted permission to marry another woman (though under rather limited circumstances).[35] But probably the more severe outcome concerns the status of children of the Jewish woman under Jewish law if she, for example, chooses to unilaterally release herself from the marriage and conceives a child with another man. This child is considered "illegitimate" (*mamzer*) and will carry severe restrictions on his or her capacity to marry. However, no such restrictions are necessarily borne by the similarly "illegitimate" children of a married man. This one-sided relationship also exists within Islam; Islamic *Shari'a* usually allows the husband to marry another wife and to dissolve the marriage unilaterally.[36]

The Israeli legislature (the Knesset) has tried to lessen the effect religious norms might have on liberal ideals. The first material step in this regard was the enactment of the Women's Equal Rights Law, 1951, which specifically states that men and women are to enjoy equal rights (section 1). In section 5, however, the law also states that none of its provisions are to affect the law of marriage and divorce as applied by the relevant religious courts.[37] Another important step towards limiting

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[32] See also *R. Cohen-Almagor*, Israeli Democracy, Religion, and the Practice of Halizah in Jewish Law, UCLA Women's L.J. 11 (2000), 45.

[33] *R. Baile*, Women and Jewish Law, 1984, 102-113.

[34] *Edelman*, note 6 *supra* at 65; *Bassli*, note 18 *supra* at 517.

[35] *P. Strum*, Women and the Politics of Religion in Israel, Hum. Rts. Q. 11 (1989), 483 (494).

[36] *J. L. Esposito*, Women in Muslim Family Law, 1982, 15-36.

[37] Some legal restrictions were, however, made in respect of polygamy, unilateral dissolution of marriage and age for marriage. In spite the fact that these are in fact issues of marriage and divorce, the Knesset enacted civil norms that were repugnant to those of some religious communities. See *Layish*, note 19 *supra* at 14-25, 72-85, 142-153. But still the policy in regulating such matters was to avoid altering directly the religious norm itself, criminalizing instead the re-

the application of religious norms in matters of family law and personal status was the enactment of a number of laws regulating such matters that do not differentiate between Israelis on the basis of religious affiliation, but rather are applicable on a territorial basis; such is the case with respect to inheritance laws.[38] A third important source that attempts to limit the influence of religious norms is the judiciary, generally seen as a branch of government committed to liberal ideals. In matters of religious versus individual liberties, courts in Israel, headed by the Supreme Court, have slowly but steadily and forcefully adopted decisions that have further limited the application of religious norms.[39] For example, the Court determined that a civil marriage celebrated in a foreign country can be registered in public records and thus entitles certification of marriage for both spouses to this effect.[40] The scope of jurisdiction of religious courts to adjudicate matrimonial property disputes according to religious law also has been curtailed. [41]

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ligiously sanctioned, but unwanted, acts. See *A. Layish*, Communal Organization of the Muslims, in: *A. Layish* (ed.), The Arabs in Israel, Continuity and Change, 1981, 104 [in Hebrew].

[38] Inheritance Law, 1965. It is also worth mentioning that under this law, equality on the basis of gender among heirs is guaranteed, giving men and women heirs equal shares. However, the law makes it possible to file inheritance proceedings before the religious court of the parties if all of the concerned parties agree to such jurisdiction. Eventually, this could lead to an unequal division of the estate among the heirs, since according to the religious norms of the major religions, the female heir is entitled to less than the share of the male heir, if at all. The Inheritance Law limited the application of the discriminatory religious norm when a matter is brought before the religious court only when it operates in respect of a minor, in which case the religious court is under obligation to grant the minor the share he or she is entitled to under the regular norms of the Inheritance Law.

[39] *Rubinstein*, State and Religion, note 12 *supra* at 120 (characterizing the Israeli Supreme Court as a "staunch supporter of liberal ideals" that will most certainly work to limit religious coercion, whether in the form of administrative measures or instruments issued by local government agencies). See also *Edelman*, note 6 *supra* at 18 (pointing to the fact that in the absence of a formal constitution, the Israeli Supreme Court has worked to provide protection for human rights).

[40] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*, 17 PD 225 (1963). *Maoz*, Religious Human Rights, note 24 *supra* at 363; Bassli, note 18 *supra* at 516-517.

[41] *M. Cohn*, Women, Religious Law and Religious Courts in Israel, Retfaerd: Scandinavian J. Soc. Sci. 27 (2004), 57.

The discussion up until now may be understood as suggesting the antithesis of this article: All religions are at par in Israel, each with more or less the same jurisdictional authority to apply its own religious law to its community members; all have anti-liberal norms (especially such norms that discriminate against women), and the trend towards limiting the applicability of religious norms is intended for and affects equally all religious communities, Jewish and non-Jewish alike. Moreover, the system of devising a religious authority that applies religious norms in matters of personal status is not a recent creation of Israeli law, but is based on the Ottoman *millet* system devised during the four hundred years of Ottoman rule (1517-1917).

However, I still claim that the nature and type of religious accommodations granted to the Palestinian-Arab religious communities in Israel are different from those granted to the Jewish community. Legal norms exist after all in a legal and a political culture, and are therefore influenced by them.[42] Moreover, in a state with a dominant Jewish majority, which is also officially defined as a Jewish state, and is in fact in armed conflict with a nation to which most of its religious minorities belong, it is almost natural to view religious accommodations of the Jewish majority as being of a different type and nature from the religious accommodations granted to the Palestinian-Arab minority. In a sense this observation is also a continuation of the long-standing *millet* system.

As is well known, the Ottoman Empire officially adopted Islam as the state religion and the source of its laws, thus granting the *Shari'a* courts the special status of state courts.[43] Although the Ottoman Empire recognized the judicial capacity of the religious courts belonging to minority religions, the authority granted to such courts never reached the scope and breadth of the jurisdictional capacity granted to the *Shari'a* courts.[44] Indeed, the favorable status accorded to Islam and to *Shari'a* courts was a pretext for European powers to infiltrate Ottoman sovereignty, using as an excuse the protection of non-Muslim religious com-

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[42] *Rubinstein*, Law and Religion, note 24 *supra* at 380 (noting the difficulty in understanding the law relating to religion and state in Israel "without some knowledge of politics and society in Israel").

[43] *J. Starr*, Law as a Metaphor: From Islamic Courts to the Palace of Justice, 1992.

[44] See *B. Braude*, Foundation Myths of the Millet System, in: B. Braude and B. Lewis (eds.), Christians and Jews in the Ottoman Empire, 1982, 69; *W. F. Weiker*, Ottoman Turks and the Jewish Polity, 1992; *C. A. Frazee*, Catholics and the Sultans: The Church and the Ottoman Empire, 1983.

munities.[45] In essence, a similar configuration of a majority religion vis-à-vis minority religions can also be detected in Israel today, although its manifestation and its normative effects are different from those operative during the Ottoman Empire. Unlike the Ottoman practice, at least until the mid-nineteenth century, whereby Islamic *Shari'a* was also applied to non-Muslims, Jewish law in Israel has not been applied to the non-Jewish population. However, Jewish religious institutions in Israel have received differential treatment in terms of statutory recognition and budget allocations in light of the Jewish nature of the State of Israel.[46]

Secondly, unlike the political practices dominant among the Muslim majority in the Ottoman Empire which accepted Islam as a major source of law, political parties within the Jewish community in Israel have had a secular agenda from the start, and in some cases even an anti-religious ideology, thus creating a constant political drive for secularism within the Jewish majority that came from within the community itself instead of through foreign pressure. One other important factor worth noticing in this respect is the absence of a parallel secularist movement among the political parties representing the Palestinian-Arab minority in Israel, who might have a secular platform but have so far abstained from positively and actively promoting secularism among their constituency in matters pertaining to family law.[47]

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[45] *H. J. Liebesney*, The Development of Western Judicial Privileges, in: M. Khadduri and H. Liebesney (eds.), Law in the Middle East, 1955, 309.

[46] See *F. Raday*, Religion, Multiculturalism and Equality: The Israeli Case, Israel. Y.B. Hum. Rts. 25 (1995), 193 (213) ("Israel was established as a 'Jewish State' and this results in a preferred status for Judaism…") [hereinafter: *Raday*, Religion, Multiculturalism and Equality].

[47] See *D. Rubinstein*, The Religious-Secular Rift among Israeli Arabs, in: A. Horvits (ed.), State and Religion Yearbook 1993, 1994, 89, (95) [in Hebrew] (noting that within the Palestinian-Arab community in Israel there is no "secular activism" in matters pertaining to family and social life and no real political agenda in this respect on behalf of the main political parties, not even the communist party that has traditionally had a strong national program). See also *R. Lapidoth and M. Corinaldi*, Freedom of Religion in Israel, in: A. M. Rabello (ed.), Israeli Reports to the XIV International Congress of Comparative Law, 1994, 273 (289) ("[a]lthough the jurisdiction of the Rabbinical tribunals is not broader than that of some of the other communities, it has given rise to special problems and strong opposition from many Jews, while it seems that no such resentment with regard to tribunals of other religious communities has been recorded.").

While in essence the specific granting of religious authority to the Jewish and Palestinian-Arab religious communities might be similar, the political and constitutional milieu in which they exist is very different. As will be discussed later on in this article, this difference is particularly noticeable when various branches of government seek to promote a religiously-oriented norm or to intervene in existing religious practices, in which case there can be enormous differences in outcomes depending on whether the community is Jewish or Palestinian-Arab. Once again, the considerations underlying the religious accommodations for the Jewish community are fundamentally different from those underlying the religious accommodations of the Palestinian-Arab minority.

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

The constitutional definition of Israel as a "Jewish and democratic state" has been at the forefront of legal debates for over a decade now.[48] Passionate arguments have been put forward claiming that the two concepts are indeed compatible,[49] and are in fact a variation of the nation-state structure existing in many other countries.[50] Others have claimed

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However, as will be argued later on in this article, the absence of a secular agenda on part of the Palestinian-Arab community should not be taken as implying that no resentment actually exists among members of the Palestinian-Arab community towards religious institutions and religious norms. The lack of secular activism in matters pertaining to family law does not necessarily point to total agreement with all aspects of the present state of being.

[48] See e.g., M. Mautner et al. (eds.), Multiculturalism in a Democratic and Jewish State, The Ariel Rosen-Zvi Memorial Book, 1998 [in Hebrew]; *A. D. Danél*, A Jewish and Democratic State, A Multiculturalist View, 2003 [in Hebrew].

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

[50] A frequently cited passage in this respect is that of the previous President of the Supreme Court, Meir Shamgar: "[t]he existence of the State of Israel, as

that the two terms are inherently at odds.[51] A state that defines itself as a Jewish state will necessarily undermine the rights of non-Jews and even Jews themselves if the Jewish nature of the state embodies principles that stand against their own personal ideals. Yet a third camp has claimed that while there is an apparent tension between the two concepts, they could be made consonant through the instrument of interpretation. As the argument goes, this is possible due in a large part to the flexible nature of Jewish and democratic norms, for if both are brought to their minimal core values, a Jewish state can still be considered to be democratic.[52]

The (mini-)constitutional revolution that took place in Israel in 1992 and the enactment of two major Basic Laws[53] – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty – accelerated this debate.[54] While these laws were not the first basic laws enacted by the Knesset,[55] they were unique as they related specifically to basic, al-

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the State of the Jewish people, does not negate its democratic character, just as the Frenchness of France does not negate its democratic character." Election Appeal 1/88, *Neiman v. Chairman of the Central Elections Committee for the Twelfth Knesset*, 42(4) P.D. (1988), 177. See also *Yakobson and Rubinstein*, note 21 *supra*.

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

52 See *R. Gavison*, Can Israel be Both Jewish and Democratic? Tensions and Prospects, 1999 [in Hebrew].

53 *Cf. D. Kretzmer*, The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?, Isr. L. Rev. 26 (1992), 238.

54 See *D. Barak-Erez*, From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, Colum. Hum. Rts. L. Rev. 26 (1995), 309: *R. Hirschil*, Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order, Am. J. Comp. L. 46 (1998), 427.

55 In addition the following basic laws exist: Basic Law: The Knesset (enacted in 1958); Basic Law: Israel Lands (1960); Basic Law: The President of the State (1964); Basic Law: The Government (1968), replaced in 1992; Basic Law: State Economy (1975); Basic Law: The Army (1976); Basic Law: Jerusalem, Capital of Israel (1980); Basic Law: Judicature (1984); Basic Law: The State Comptroller (1988). For background information about the entire enterprise of basic law enactment in Israel, see *A. Maoz*, The Institutional Organization of

beit not all, human rights such as human dignity, liberty, mobility, privacy, and property.[56] Furthermore, these basic laws have also elevated the status of the norms they protect to a higher level in the general hierarchy of laws by providing the courts with some level of judicial review.[57] However, relevant to our discussion is the fact that in both of these laws, the values of the State of Israel as a Jewish and democratic state are also explicitly stated as a purpose these laws seek to promote.

The tension between the Jewish nature of the State of Israel and democratic norms has not surfaced only recently. Ever since the State's inception, the comprehensive structure of the Israeli legal system has evolved and continues to evolve around these two ideals: the existence of a Jewish state that provides more than lip service to Jewish religious norms and Zionist teachings, and that also respects democratic principles and freedoms for all citizens of Israel, Jewish and non-Jewish alike.[58] This agenda is already evident in Israel's Declaration of Independence, which simultaneously recognized Israel as a Jewish state that would open its doors to every Jew, granting the Jewish people the status of a nation with equal rights among the family of nations, yet promised to develop the country for the benefit of all its inhabitants, maintaining complete equality of political and social rights for all citizens, irrespective of race, religion, or gender.[59]

Legal landmarks that worked to give substance to the Jewish nature of the State, while still working to guarantee certain democratic freedoms, also characterized the development of Israeli law in the ensuing formative decades. Thus, while the Knesset enacted the Law of Return, 1950, in which every Jew in the world was granted the right to immigrate to

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the Israeli Legal System, in: A. Shapira and K. C. DeWitt-Arar (eds.), Introduction to the Law of Israel, 1995, 11, (12-13).

[56] See e.g., *A. Barak*, The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law, Isr. L. Rev. 31 (1997), 3.

[57] See *G. J. Jacobsohn*, After the Revolution, Isr. L. Rev. 34 (2000), 139. On the nature of judicial review in Israeli constitutional law after the enactment of the two mentioned basic laws, see *M. Hofnung*, The Unintended Consequence of Unplanned Constitutional Reform: Constitutional Politics in Israel, Am. J. Comp. L. 44 (1996), 585.

[58] See *Kretzmer*, note 20 *supra*, at 39; *D. Avnon*, The Israeli Basic Laws' (Potentially) Fatal Flaw, Isr. L. Rev. 32 (1998), 535.

[59] See Proclamation on the Establishment of the State of Israel, 5708 Official Gazette 1 (1948).

Israel and thereupon, through the working of the Nationality Law, 1952, become an Israeli citizen, a law considered by many to represent the central ethos of the Jewish state,[60] the judiciary worked relentlessly to carve out, almost from scratch, such basic rights as freedom of expression, freedom of association, and others.[61] Similarly, while the Knesset worked to enact a general law guaranteeing equal treatment of all women in Israel,[62] the legal system, guided by the Israeli Supreme Court, realized the necessity to create, also from scratch, a legal doctrine that forbids the participation in parliamentary elections of a party that adopts a political agenda purporting to negate the Jewish nature of the State of Israel, which the court has proclaimed to be a basic constitutional fact.[63]

The debate over the Jewish and democratic nature of the State of Israel will certainly continue well into the future. However, I believe that the debates and arguments already held have established a number of constitutional paradigms. A major paradigm concerns the public sphere in

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[60] See *Rubinstein*, Law and Religion, note 24 *supra* at 413 (characterizing the Law of Return as the *raison d'être* of Israel as a Jewish state). See also *H. M. Sacher*, A History of Israel: From the Rise of Zionism to Our Times, 1996, 395 (noting that the very *raison d'être* of Israeli statehood was to provide "a homeland for the Diaspora and their national homeland").

[61] See *A. Zysblat*, Protecting Fundamental Rights in Israel without a Written Constitution, in: I. Zamir and A. Zysblat (eds.), Public Law in Israel, 1996, 47; *A. Maoz*, Defending Civil Liberties without a Constitution – The Israeli Experience, Melb. U. L. Rev. 16 (1988), 815; *A. Shapira*, The Status of Fundamental Individual Rights in the Absence of a Written Constitution, Isr. L. Rev. 9 (1974), 497.

[62] Equal Rights of Women Law, 1951.

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

the State of Israel, which is principally committed to Jewish collective ideals.[64] Thus it was natural that the flag, the national emblem, the anthem and official holidays of the State would be identified, as a matter of course, with the Jewish tradition.[65] Jewish Zionist organizations, such as the World Zionist Organization and the Jewish Agency, received official status,[66] and under the auspices of the law they are "to continue acting within the State of Israel for developing and settling the land, absorption of immigrants from the Diaspora and coordination in Israel of Jewish institutions and organizations active in the field."[67] But the Jewish domination of the public sphere goes beyond such symbols. The concept of citizenship, for example, has also been influenced by the Jewish nature of Israel.[68]

There are two types of citizenship: The first type is republican in nature and has strong collective goals of a shared moral purpose, a perception of the common good and core civic values.[69] The second type, individ-

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[64] See *M. A. Tessler*, The Middle East: The Jews in Tunisia and Morocco and Arabs in Israel, in: R. G. Wirsing (ed.), Protection of Ethnic Minorities, 1981, 245 (247) (noting the official commitment of the State of Israel to its Jewish identity and how the State of Israel is officially committed to perpetuating and enriching the Jewish heritage and to meeting the needs of Jews throughout the world).

[65] For a survey of laws that deal with state symbols, see *D. Kretzmer*, The Legal Status of Arabs in Israel, 1990, 17-22. See also *Barzilai*, note 4 *supra* at 110 ("[s]tate law officially recognizes no Arab-Palestinian festival.").

[66] The World Zionist Organization – Jewish Agency (Status) Law, 1952.

[67] It is also worth mentioning that the specific role and function of WZO and the Jewish Agency were defined in covenants signed between them and the Government of Israel. Such covenants enabled WZO and the Jewish Agency to perform semi-governmental activities which in light of their statutory mandate were restricted to the Jewish community, whether in Israel or in the Diaspora. Foremost among these functions is the responsibility for agricultural settlement. As a result, "while many new agricultural settlements have been created for the Jews, none have been established for Arabs." *Kretzmer*, *supra* note 20 at 50.

[68] See Gershon Shafir and *Y. Peled*, Citizenship and Stratification in an Ethnic Democracy, Ethnic and Racial Stud. 21 (1998), 408; *Shachar*, note 11 *supra* at 260-62.

[69] See *Y. Peled*, Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State, Am. Pol. Sci. Rev. 86 (1992), 432. See also *R. Cohen-Almagor*, Cultural Pluralism and the Israeli Nation Building Ideology, Int'l J. Middle East Stud. 27 (1995), 461 (462).

ual in nature – relevant to the non-Jewish population – builds on liberal ideals of personal (not collective) rights. Another example concerns the official State language. Though under the letter of the law, Arabic and Hebrew are considered the official languages, it is Hebrew that dominates the public sphere.[70] Indeed, on some occasions courts have even compelled public bodies to add Arabic inscriptions to signs and documents.[71] But this is to be done, as the Israeli Supreme Court made clear, only as long as it does not undermine the hierarchical relationship existing between the two languages, under which Hebrew is regarded as the "senior sister."[72] Thus it has been stated that the Palestinian-Arab community in Israel is "the most remote, excluded community from the state's meta-narratives,"[73] and enjoys the status of "second"[74] or even "third"[75] class citizenship. In many respects this hierarchical structure has determined the boundaries of the public sphere in Israel,[76] thereby also making it possible to characterize the Palestinian-Arab community in Israel as "the invisible man,"[77] or as "the odd man out."[78]

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[70] See *I. Saban and M. Amara*, The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Changes, Isr. L. Rev. 36 (2002), 5.

[71] See *A. Harel-Shalev*, Arabic as a Minority Language in Israel: A Comparative Perspective, Adalah Newsletter 14 (2005), 1 (5-6); *Barzilai*, note 4 *supra* at 111-113.

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

[73] *Barzilai*, note 4 *supra* at 7, 42. See also *A. Ghanem*, State and Minority in Israel: The Case of the Ethnic State and the Predicament of its Minority, Ethnic and Racial Stud. 21 (1998), 428 (432-34) (stating that as a result of Israel's structural identification with its Jewish ethnic ideals the Palestinian-Arab minority was collectively excluded from the official public domain of the state).

[74] *A. H. Saidi*, Israel as Ethnic Democracy: What are the Implications for the Palestinian Minority, Arab Stud. Q. 22 (2000), 25.

[75] *Shafir and Peled*, note 15 *supra* at 110.

[76] *B. Kimmerling*, Sociology, Ideology, and Nation-Building: The Palestinians and their Meaning In Israeli Sociology, Am. Soc. Rev. 57 (1992), 446 (450) ("Arabs [in Israel] remained … outside of the collectivity's boundaries as non-members of 'Israel.'"); *M. Walzer*, On Toleration, 1997, 41 (noting how the Palestinian-Arab minority in Israel, though citizens of the state, nevertheless "do not find their history or culture mirrored in its public life.").

[77] *Smooha and Peretz*, note 8 *supra*, 451 (adding that this characterization is also true in respect of the surrounding Arab countries who have also absented the Palestinian-Arab minority in Israel from the overall Israeli-Arab conflict).

By virtue of the same process, the Jewish nature of the State of Israel, this time in its religious form, also came to dominate Israel's public sphere. [79] Accordingly, the entity of the State of Israel itself has become both the domain as well as the instrument for the handling of religion and state relations in respect of the Jewish community.[80] Moreover, the entire state political apparatus has been recruited to help ease religion and state tensions among the different factions of the Jewish community, from secular to ultra-orthodox camps.[81] Since religion and state matters concerning the Palestinian-Arab minority were by definition excluded from such a constitutional configuration of religion and state relations, what happened was that such matters simply continued to be regarded as being of the same nature as they had been regarded before

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[78] *J. S. Migdal and B. Kimmerling*, The Odd Man Out, Arabs in Israel, in: J.S. Migdal (ed.), Through the Lens of Israel: Explorations in State and Society, 2001, 173.

[79] See *C. S. Liebman and E. Don-Yehiya*, Civil religion in Israel: Traditional Judaism and Political Culture in the Jewish State, 1983, 12, 161-162 (stating that the conception of civil religion in Israel that came to dominate the public sphere builds on the Jewish identity of the state of Israel and thus excluded the Arab population in Israel).

[80] *I. Englard*, The Conflict Between State and Religion in Israel: Its Ideological Background, in: M. Mor (ed.), International Perspectives on Church and State, 1993, 219 (explaining how the tendency to integrate Jewish religious institutions into the framework of the State of Israel did not meet any substantial opposition, though motives of the secular and Orthodox camps varied).

Interestingly, in a relatively recent article it was stated that in the first two decades after the establishment of the State of Israel, the Jewish religious camp was not successful in transforming the public domain of Israel into a Jewish religious one. See *A. Hacohen*, 'The State of Israel – This is a Holy Place': Forming a 'Jewish Public Domain' in the State of Israel, in: M. Bar-On and Z. Zameret (eds.), On Both Sides of the Bridge, Religion and State in the Early Years of Israel, 2002, 144 [in Hebrew]. Even if we set aside the problematic classification that Dr. Hacohen proposes in his article in terms of differentiating between the "public" and "private" domain, his analysis is irrelevant to the context of this study. Hacohen does not compare the recognition that was nevertheless accorded to Jewish religious institutions with the recognition accorded to the non-Jewish population. Like the vast majority of the scholarly work that deals with religion and state in Israel, his analysis is restricted to the intra-Jewish context.

[81] *C. S. Liebman and E. Don-Yehiya*, Religion and Politics in Israel, 1984; *A. Cohen and B. Susser*, From Accommodation to Escalation, The Secular-Religious Divide at the outset of the 21st Century, 2003 [in Hebrew].

the establishment of the State of Israel – a group accommodation of a religious community that the state seeks to tolerate as a group.[82] Such accommodations were to stay a "private" matter rather than one of the state.[83]

This assessment is substantiated by two revealing pieces of evidence. The first concerns public accommodation and state funding of Jewish religious institutions, and the second concerns the pervasive methodology of texts dealing with religion and state in Israel that clearly shows its Jewish centrality.

As far as public accommodation and state funding of religious institutions go, the Jewish community is far more privileged.[84] The Chief Rabbinate of Israel is an institution that is statutorily recognized, regulated[85] and fully supported by public funds.[86] Specific legislation regulates Jewish religious services,[87] Jewish religious councils,[88] and Jewish

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[82] *H. Rosenfeld*, The Class Situation of the Arab National Minority in Israel, Contemp. Stud. Soc'y & Hist. 20 (1978), 374 (400) (stating that the State of Israel "fosters a Jewish-nation ethos and economy and therein sees the Arab strictly as a minority, or a series of minority groupings, and regards development as relating specifically to Jews."); *M. A. Tessler*, The Identity of Religious Minorities in Non-Secular States: Jews in Tunisia and Morocco and Arabs in Israel, Contemp. Stud. Soc'y & Hist. 20 (1978), 359 (360) (noting that the Arabs in Israel are viewed as a religious minority). See also *Barzilai*, note 4 *supra* at 107 ("State law has mainly defined Arabs residing in Israel in terms of religious groups").

[83] *M.M. Karayanni*, A Constitutional Ontology of the Religious Accommodations of the Arab Minority in Israel: General Topics for Discussion, in: Shlomo Hasson and Michael M. Karayanni (eds.), Arabs in Israel, Barriers to Equality, 2006, 43 [in Hebrew].

[84] Even official Israeli Government reports admit the great gap between state funding of Jewish and non-Jewish religious institutions. 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 (1998), 228 [hereinafter: Israeli ICCPR Report] ("[i]n comparison with funding of Jewish religious institutions, the non-Jewish communities are severely under-supported by the Government.").

[85] Chief Rabbinate of Israel Law, 1980.

[86] See *Goldstein*, The Teaching of Religion, note 13 *supra* at 39 ("State law regulates the appointment of central and local rabbinic bodies, administrative as well as judicial, with all such bodies being financed by state funds.").

[87] Kosher Food for Soldiers Ordinance, 1949; Jewish Religious Services Law (Consolidated Version), 1972; Prevention of Fraud in Torah Books, Prayer

religious sites.[89] In the area of foreign diplomacy, the Chief Rabbis of Israel receive protocol priority over the heads of other religious communities in Israel.[90] The Ministry of Education in Israel operates a religious Jewish school system alongside the regular one.[91] There is no equivalent legislative recognition of non-Jewish religious institutions.[92]

Additionally, outright disparity exists at times between the budgets available to Jewish religious institutions as opposed to non-Jewish ones,[93] although in reading some authorities one might think that support is divided equitably.[94] For example, it was noted by one scholar that in 1981 the salary of a Rabbinical Court judge (*dayyan*) was raised to the equivalent of "a magistrate in the civil court system, but the sal-

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Scrolls and Mezuzut Law, 1974; Prevention of Fraud in Kashrut Law, 1983; The Prohibition of Opening Places of Entertainment On Tisha'a B'av (Special Authorization) Law, 1997; Residence of Rabbis in their Place of Service Law, 2002; The Counsel for the Perpetuation of the Heritage of Sephardic and Oriental Jewry Law, 2002.

88 These religious councils work to minister to the religious needs of the Jewish community in such matters as maintenance of Synagogues, cemeteries, ritual baths, supervision of *kashrut*, and the appointment of marriage registrars. See *Edelman*, note 6 *supra* at 52.

89 See *Barzilai*, note 4 *supra* at 109 ("Formally, state law protects all religious sites in Israel without distinction [referring to Protection of Holy Sites Law, 1967]. Yet in a regulation issued by the Ministry for Religious Affairs [Protection of Holy Sites Regulations, 1981], only Jewish religious places were mentioned as protected sites".

90 *Rubinstein*, State and Religion, note 12 *supra* at 117.

91 See *Goldstein*, The Teaching of Religion, note 13 *supra*.

92 *Rubinstein*, Law and Religion, note 24 *supra* at 400.

93 *I. Saban*, Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel, N.Y.U. J. Int'l L. & Pol. 36 (2004), 885 (943) ("[t]hroughout 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.").

94 *Rubinstein*, Law and Religion, note 24 *supra* at 388 (noting that though the affairs of the non-Jewish religious communities in Israel are not all regulated by law, they still "enjoy governmental support in maintaining religious services"); *Maoz*, Religious Human Rights, note 24 *supra* at 360 (stating that the state heavily supports religious education and that "[v]arious regulations enable non-Jewish believers to carry out their religion practices without suffering any disadvantage").

ary of a Muslim *qadi* remained that of a Justice of the Peace."[95] Only in the mid-1990s did such patterns of disparity receive some legal attention from the courts, when a civil rights organization, *Adalah*, The Legal Center for the Rights of the Arab Minority in Israel, proved to the Supreme Court that despite the fact that the Palestinian-Arab minority composes approximately 20 percent of the total population of Israel, its portion of the Ministry for Religious Affairs budget amounts to only 2 percent.[96] However, even with this proof, the Court was still unprepared to intervene until offered further evidence from the petitioner showing that the unequal treatment is detectable with respect to specific religious services provided by the Ministry for Religious Affairs for each of the religious communities.[97] This evidence was found in the Ministry for Religious Affairs' 1999 fiscal year budgetary allotment to cemeteries operated by different religious communities.[98] While a sum of NIS 16.658 million (equivalent to approximately US $3.7 million) was allocated to cemeteries in the Jewish communities, the sum of only NIS 202,000 (equivalent to approximately US $44,888) of the standing budget for cemeteries was allotted to the non-Jewish population. In light of these findings, the Supreme Court instructed the Ministry for Religious Affairs to divide its budget in accordance with the principle of equal treatment.[99] As noted by Professor Asher Maoz, the reality in

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[95] *Edelman*, note 6 *supra* at 78.This practice has since stopped. A table of the current salaries of judges of all courts, including those of the Rabbinical and Shari'a courts, can be found at http://www.hilan.co.il/moked_yeda_lesachar/laws/mskchk66t.htm.

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

[97] *Ibid.* at 171.

[98] HCJ, 1113/99 *Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Religious Affairs*, 54(ii) P.D. 164 (2000).

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

which Jewish religious institutions enjoy substantially more state funding than other religions "is more than just a matter of demography, that is, the vast preponderance of (Orthodox) Jews in Israel."[100] It is attributed to "[n]ational, historical and political factors."[101] Maoz adds:

> Israel, as the homeland of the Jewish people, has assumed as one of its major tasks the maintenance and development of Jewish culture and tradition, which naturally have religious dimensions. Moreover, following the Holocaust that destroyed the world center of Jewish learning, Israel assumed the task of replacing those centers in Israel, and rebuilding the institutions of learning destroyed in Europe.[102]

As to the pervasive methodology of texts relating to matters of religion and state in Israel, there is wide admission of the fact that the context of the discussion as well as the normative implications are primarily Jewish.[103] I was first struck by the entrenchment of this phenomenon when looking into a legislative initiative undertaken by a Member of Knesset (MK) from the National Religious Party, Nahum Langenthal, in 2000. The title of the bill proposed by MK Langenthal was "Religion and State." However, as section 2, entitled "Objective", states, the purpose of the bill is "to mold, regulate and determine rules and principles in the matter of compatibility and relation of the Jewish religion in the State of Israel." Reviewing the provisions of the draft bill dismisses any doubt whether the initiative may have accidentally overlooked the religious issues of the other religious communities in Israel. For example, section 10 of the draft bill, in the chapter discussing the Sabbath as the official day of rest, specifically refers to regions in Israel populated by a non-Jewish majority in which exemptions with respect to the ordinary rules may apply.

Another striking example is an article published by two researchers from the social sciences under the title: "Interreligious Conflict in Israel: The Group Basis of Conflicting Visions."[104] The discussion, however, is in fact solely intra-Jewish, focusing on the tension between the Jewish Orthodox establishment and the secular camp. Nowhere in the article is there any awareness that in the Israeli context the title may be

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[100] *Maoz*, Religious Human Rights, note 24 *supra* at 369.

[101] *Ibid.*

[102] *Ibid.*

[103] See, e.g., *Langenthal and Friedman*, note 30 *supra*, at 9, 13-14.

[104] *K. D. Wald and S. Shye*, Interreligious Conflict in Israel: The Group Basis of Conflicting Visions, Pol. Behavior 16 (1994), 157.

misleading, that the inter-religious conflict might be among the Jewish community and the other 13 recognized religious communities in Israel. These samples reflect a general trend in research conducted on religion and state in Israel. For example, in a recent survey that reviewed trends in research conducted on major subjects concerning communities and state in Israel,[105] the section on religion and state was written by a renowned Israeli academic in the field of religion and state, Professor Eliezer Don-Yehiya,[106] whose previous work was mainly concerned with political aspects associated with Jewish religious accommodations.[107] In his introduction to the survey, Professor Don-Yehiya pointed to the complexity in the definition of the topic of religion and state in Israel given the relation the topic has to the national identity of Israel and its society and the inter-communal relations existing among the different groups. This conjures up Zionism, Israeli political culture, the relationship between Israel and the Jewish Diaspora and between Jews and Arabs.[108] But the survey itself is Jewish-oriented and in this respect is indeed homogenous in terms of the communities it surveyed. Consequently, it was natural for one of the commentators on Don-Yehiya's paper to caution against the possibility of researchers on the subject of religion and state in Israel not having a sufficient knowledge of Jewish *halacha*.[109]

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[105] M. Naor (ed.), State and Community, 2004 [in Hebrew].

[106] *E. Don-Yehiya*, State and Religion in Israel: Developments and Trends in Research, in: Naor (ed.), State and Community, *ibid.*, at 151.

[107] See e.g., *C. Liebman and E. Don-Yehiya*, Civil Religion in Israel, note *supra* 79; *C. Liebman and E. Don-Yehiya*, Religion and Politics in Israel, note 81 *supra*; *E. Don-Yehiya*, Religion and Coalition: The National Religious Party and Coalition Formation in Israel, in: A. Arian (ed.), The Elections in Israel, 1975, 255; *E. Don-Yehiya*, Jewish Messianism, Religious Zionism and Israeli Politics: The Impact and Origins of Gush Emunim, Middle Eastern Stud. 23 (1987), 215; *E. Don-Yehiya*, Religion, Social Cleavages and Political Behavior: The Religious Parties in the Israeli Elections, in: D. J. Elazar and S. Sandler (eds.), Who's the Boss? The Elections in Israel, 1988 and 1989, 1993, 83; *E. Don-Yehiya*, Religion, Ethnicity and Electoral Reform: The Religious Parties and the 1996 Elections, in: D. J. Elazar and S. Sandler (eds.), Israel at the Polls 1996, 1998, 73.

[108] *Don-Yehiya*, note 106 *supra* at 151.

[109] *A. Cohen*, Discussion, in: Naor (ed.), State and Community, note 105 *supra*, at 183.

This same trend found its way into the political and legal literature as well. Major scholarly works on religion and state in Israel have also focused on the tension existing between Jewish religious norms, accommodations given to Jewish religious institutions, and secular-liberal ideals.[110] Treatises and surveys on family law – a discipline traditionally influenced by religious law – have also tended to restrict their discussion to the Jewish community although their titles convey the idea that they are relevant for Israel in general.[111]

All of this cannot be coincidental. The underlying premise seems to be that given the Jewish nature of the state, the subject of religion and state conflict can be restricted to a conflict between Jewish religious ideals and secular-liberal norms. The shape and type of the public sphere that has developed in Israel over the years, centered around Judaism, seem

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[110] See *N. Rothenstreich*, Secularism and Religion in Israel, Judaism 15 (1966), 259; *A. Lichtenstein*, Religion and State: The Case for Interaction, Judaism 15 (1966), 387; *E. Birnbaum*, The Politics of Compromise: State and Religion in Israel, 1970; *S. Clement Leslie*, The Rift in Israel, Religious Authority and Secular Democracy, 1971; *E. Tabory*, Religious Rights as a Social Problem in Israel, Israel Y.B. Hum. Rts. 11 (1981), 256; *Liebman and Don-Yehiya*, Civil Religion in Israel, note 79 *supra*; *Liebman and Don-Yehiya*, Religion and Politics in Israel, note 106 *supra*; *C. S. Liebman*, Religion, Democracy and Israeli Society, 1997; *I. Englard*, The Relationship between Religion and State in Israel, Scripta Hierosolymitana 16 (1966), 254; *S. Shetreet*, Freedom of Religion and Freedom from Religion: A Dialogue, Israel Y.B. Hum. Rts. 4 (1974), 194; *A. Rosen-Zvi*, Freedom of Religion: The Israeli Experience, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 46 (1986), 213; *N. L. Cantor*, Religion and State in Israel and the United States, Tel-Aviv Stud. L. 8 (1988), 185; *G. Sapir*, Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment, Hastings Int'l & Comp. L. Rev. 22 (1999), 617; *S. Shetreet*, State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective, Notre Dame L.J. Ethics & Publ. Pol'y 13 (1999), 421; *Z. R. Markoe*, Note, Expressing Oneself without a Constitution: The Israeli Story, Cardozo J. Int'l & Comp. L. 8 (2000), 319 (327-328); *E. Kopelowitz*, Religious Politics and Israel's Ethnic Democracy, Israel Stud. 6 (2001), 166; *S. Shetreet*, Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset, Tul. L. Rev. 77 (2003), 659.

[111] See e.g., *B. Schereschewsky*, Family Law in Israel, 4th ed., 1992 [in Hebrew]; *P. Shifman*, Civil Marriage in Israel: The Case for Reform, 1995 [in Hebrew]; *B. Kraus*, Divorce, A Guide to Family Law, 4th ed., 1998 [in Hebrew]; *M. Corinaldi*, Status, Family and Succession Law between State and Religion, 2004 [in Hebrew].

to demand this treatment of the religion and state controversy. Just as Israel's national symbols and ethos, concepts of citizenship, and legislation of religious institutions are Jewish-centered, so all other issues that relate to religion and state came to be similarly focused.

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

Yet the thesis of this article is not about the religious freedoms of the non-Jewish communities in Israel to practice and apply their religious norms through their religious courts. Rather, it is principally about the nature and implications of religious accommodations accorded to such communities in a state that is officially defined as a Jewish state, with special emphasis on the individual well-being of the Palestinian-Arab citizens of the State of Israel. It is my argument that religious accommodations for the Palestinian-Arab religious communities in matters of personal status are perceived as accommodations justified on the basis of a minority group right, and thus are fundamentally different in nature from the religious "accommodations" allotted to the Jewish community. The latter are commonly justified in terms of the nature of the State of Israel as a whole.

This fundamental difference in the nature of the religious accommodations granted to the Jewish community as opposed to those granted to the Palestinian-Arab communities is evident first and foremost in the justification of the continuation of the Ottoman *millet* system by Israel. Israel's arguments for preserving this system vary, depending on the community. The argument associated with the Jewish community (cumulatively or alternatively) stresses the political necessities derived from the *status quo* document, the need for the major parties to unite with the Jewish religious parties in order to form government coalitions, and the need to preserve Jewish unity and the Jewish heritage.[112]

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[112] See *Rubinstein*, State and Religion, note 12 *supra* at 115, 121; *Maoz*, Religious Human Rights, note 24 *supra* at 363; *Bassli*, note 18 *supra* at 488-490.

Israel's argument with respect to the Palestinian-Arab community is based on the desire not to interfere in this community's internal religious affairs,[113] especially in light of the fact that the "interfering" establishment is identified with a group that differs religiously and faces national tensions with the nation of the Palestinian-Arab minority. In addition, such a perception might even be beneficial to the establishment, for it maintains the Palestinian-Arab community as a fragmented society, thus making it less of a threat.[114]

Reference on this point is to be made first and foremost to an article written by Professor Frances Raday in which she attempted to show how the incorporation of the Ottoman *millets* in the Israeli legal system, especially in terms of granting judicial capacity to the various religious courts to apply their religious norms, made it possible to preserve the existence of what she called "a patriarchal legal system." According to Professor Raday, Israel inherited the *millets* from the British Mandate; her reasoning was based on the following:

> There was a national consensus that there was a need to salvage the remnants of a Jewish people and culture after these had been on the verge of annihilation in the holocaust. In addition, this was the price exacted by the religious political parties for giving coalition support to the party in power. Furthermore, there was a reluctance to intervene in the internal social organization of minority communities.[115]

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

An additional statement that embodied a contrast with respect to the religious accommodations granted to the Palestinian-Arab minority in Israel as opposed to the accommodations granted to the Jewish com-

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[113] As noted by Ori Stendel, at one time the Deputy Advisor in the Office of the Advisor to the Prime Minister on Arab Affairs, the principal governmental office that articulated the official policy towards the Palestinian-Arab community in Israel: "[f]rom the establishment of the State, the government policy has been not to interfere in the religious affairs of the various communities." *O. Stendel*, The Minorities in Israel, Trends in the Development of the Arab and Druze Communities 1948-1973, 1973, 8.

[114] See *infra*.

[115] *Raday*, Israel – The Incorporation of Religious Patriarchy, note 29 *supra* at 210.

munity is that of Izhak Englard, a former Supreme Court Justice and Professor of Law:

> The problem faced by the substantial non-Jewish minority – mainly Muslim and Christian Arabs – differs fundamentally from that of the Jewish inhabitants. Their position is inevitably influenced by the broader and age-old Israeli Arab conflict over Palestine. For them the issue is not merely the place of religion in the modern state, but that the very existence of the Jewish state has created a deeply felt national, and, for some, religious dilemma… this politically delicate background has caused a shifting of concern from individual freedom of religion to collective autonomy. This tendency is probably one of the main reasons why the traditional system of legally recognized religious communities exercising jurisdiction over their members has been rigorously maintained in contemporary Israel in relation to non-Jewish minorities. In fact, any proposal to change the status quo in this field runs the risk of being interpreted as an attempt to reduce the national cultural identity of the Arab population. The whole problem of law and religion in relation to the non-Jewish minority has, therefore, to be understood in the light of that particular sensitivity and concern for collective Arab identity.[116]

Clearly, religious accommodations to the Palestinian-Arab minority are of a separate type and are in the nature of a minority accommodation that is also underpinned by the national conflict. When referring to such accommodations, it is the common practice to highlight the fact that they are given to a certain group, say the Muslim community, in a state that is identified as Jewish.[117] However, as seen earlier, scholars can supposedly refer to religious accommodations in Israel generally, and nonetheless feel secure enough, almost as a matter of course, to confine their discussion to the Jewish community only. It is also a commonplace, when discussing the religious accommodations granted to the Palestinian-Arab community in Israel, to refer to them in terms and phrases that suit group-based accommodations,[118] without even asking

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[116] *I. Englard*, Law and Religion in Israel, Am. J. Comp. L. 185 (1987), 185 (189-190).

[117] See note 19 *supra*.

[118] See *Saban*, note 93 *supra* at 900, 942-948, 954-960 (characterizing the religious accommodations granted to the Palestinian-Arab minority in Israel as a "group-differentiated right" and as a "modest form of self-government"); *Kretzmer*, note 68 *supra* at 163-168 (discussing the religious organization of the Palestinian-Arab religious communities under the heading of "group rights").

whether they really qualify as such. It thus became popular in the literature discussing religious accommodations for the different religious communities in Israel to portray such accommodations as a sort of "autonomy,"[119] a "multicultural entitlement,"[120] and as a sign of "pluralism."[121] Yet on the other hand a discussion regarding religious norms applied by Jewish religious institutions, if justified, is justified in terms

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See also *I. Zamir*, Equality of Rights for Arabs in Israel, Mishpat Umimshal 9 (2005), 11 (26, 30) [in Hebrew]; *A. Rubinstein and B. Medina*, The Constitutional Law of the State of Israel: Basic Principles, 6th ed. 2005, 429-435 [in Hebrew].

[119] See *Goldstein*, The Teaching of Religion, note 13 *supra* at 40 (characterizing the judicial jurisdiction of the non-Jewish religious communities to administer their religious law in matters of personal status as a form of "communal autonomy of minority groups"); *Landau*, The Arab Minority in Israel, note 8 *supra* at 24 (noting that the autonomous administration historically enjoyed by the different religious communities continued to persist in the State of Israel); *Stendel*, note 113 *supra* at 8 (stating that all Palestinian-Arab religious communities "maintain a considerable measure of internal autonomy"); *Birnbaum*, note 110 *supra* at 113 (noting how the Ministry for Religious Affairs in Israel has "carefully safeguarded" the "autonomy" of the non-Jewish religious minorities); *Rubinstein*, Law and Religion in Israel, note 24 *supra* at 390 (characterizing the government's attitude towards the Christian communities in Israel as "liberal" given the fact that such communities are in some cases even directed and controlled from Arab countries). Some authorities refer to all accommodations in respect of the religious communities, Jewish and non-Jewish alike, in terms of a group accommodation which is a form of an autonomy or a multicultural accommodation. See also *A. Shachar*, The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority, Harv. C.R.-C.L. Rev. 35 (2000), 385 (387) (stating that the concept of differentiated citizenship, a synonymous concept of multicultural citizenship, is currently adopted in a variety of different forms in Israel as well as in Canada, England, the United States, India and Kenya); *Shachar*, note 11 *supra* at 263 (indicating that "[t]he communal autonomy granted to the various recognized religious communities in Israel is important in terms of permitting different citizens to preserve their cultural and religious group identity."); *Galanter and Krishnan*, note 23 *supra* at 105 (indicating that personal laws, including those of religious segments, are designed to preserve each community's laws).

[120] See *A. Shachar*, Multicultural Jurisdictions, Cultural Differences and Women's Rights, 2001, 8 (indicating that Israel together with India and Kenya have adopted expansive accommodation policies in various social arenas).

[121] See *R. Lapidoth*, Religious Pluralism in Israel, Studi Parmensi 37 (1988), 45 (57).

of necessity,[122] compromise and the need to preserve unity.[123] But the same discussion has also highlighted the coercive nature of such norms with respect to the substantial Jewish secular community whose perceived majority status[124] "turns the conventional multicultural dilemma on its face, from a question of awarding respect and rights to patriarchal minority culture at the expense of its own members, into a question of imposition of the patriarchal minority culture over the liberal majority, at the expense of the members of the majority."[125]

In summation, the contrast between the manner in which religious accommodations in matters of personal status are perceived with respect to the Palestinian-Arab community (the minority group accommoda-

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[122] See *S. Goldstein*, Israel: A Secular or a Religious State? St. Louis L.J. 36 (1992), 143 (149) ("Secular Zionists have sought to unify the Jewish population in Israel by constructing public life in a manner that ensures full participation by religious Jews."). See also *Edelman*, note 6 *supra* at 51 (in the context of the jurisdiction ascribed to the rabbinical courts in Israel and the religious accommodation accorded in accordance with the *status quo* agreement identifies the "extremely high value placed on the need for unity", especially in light of the fact that "the external threat to Israel has not disappeared"); *Englard*, note 116 *supra* at 192-193.

[123] *Cohen and Susser*, note 81 *supra*; *Sapir*, note 110 *supra*.

[124] *Cohn*, note 41 *supra* at 58 (characterizing the problem of institutionalizing religion in respect of the Jewish community as an infringement on the rights of a liberal majority instead of the right of a religious majority to express their beliefs); *Edelman*, note 6 *supra* at 60-61 (noting the troublesome fact that rabbinical courts in Israel decide matters of personal status on the basis of *halachic* norms to which the majority of the Jewish community does not subscribe).

The division of the Jewish community between a secular majority and a religious minority has been made on the basis of surveys inquiring as to whether the Jewish public accepts the compulsory nature of Jewish religious norms, such as having only orthodox religious marriage, the closing of shops and restaurants on the Sabbath, restricting public transportation on the Sabbath and the funding of Jewish religious institutions. When asked, there seem to be a considerable portion within the Jewish community against such religious accommodations. See *Levy et al.*, note 3 *supra* at 8.

[125] *R. Halperin-Kaddari*, Women, Religion and Multiculturalism in Israel, UCLA J. Int'l L. & For. Aff. 5 (2000), 339 (343). See also *Rubinstein*, Law and Religion, note 24 *supra* at 408 (noting that while under the Ottoman rule and the British mandate the religious accommodations granted to the Jewish community were motivated by the value of autonomy and the interest of not intervening in the internal affairs of the Jewish community, the reason today is the reverse, "preserving the unity of the Jewish People").

tion perspective) as opposed to the manner in which the same accommodations are perceived with respect to the Jewish community (the imposed public unity perspective) is essentially what stands at the heart of the suggested paradigm of separateness. This discord creates the separate nature and also the different genre, existing with regard to the religious accommodation in matters of personal status as granted to the Palestinian-Arab religious communities. Consequently, the Palestinian-Arab religious communities are predisposed to a different set of considerations when reform or even change is proposed. And indeed, as the next section demonstrates, governmental agencies and the Palestinian-Arab leadership have worked to strengthen, even further, this paradigm of separateness.

III. The Paradigm of Separateness Re-enforced

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

It is important to note that the implementation of state policies regarding the Palestinian-Arab minority has underscored the presumed security threat posed by the Palestinian-Arab minority remaining within the 1948 borders.[126] After all, this population not only lost its majority status in what they considered their homeland, many members were also displaced from their homes.[127] Moreover, many of the Palestinian-Arab minority members were detached from close family relatives and some were even considered legally absent, though physically present, making it possible for the government to take over their possessions.[128] This minority was also an ethnic and national continuation of a nation

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[126] *Kimmerling*, note 76 *supra* at 447 ("Arabs inside of Israel were suspected of being 'a fifth column' or a 'Trojan Horse'").

[127] See *D. Peretz*, Israel and the Palestinian Arabs, 1958, 91.

[128] Over time, this odd legal status of present but legally absent *personas* came to be regarded as a metaphor of the absence of the Palestinian-Arab minority from many facets of Israeli society. See *D. Grossman*, Sleeping on a Wire (1992) (the Hebrew title of the book is *Nochahim Nifkadim* literally meaning "Present Absentees").

at war with the state in which they became citizens.[129] Consequently, a number of measures were taken by State authorities with the intention of controlling the Palestinian-Arab minority, thereby mitigating their threat to state security.[130] One such measure was the military government imposed on the Palestinian-Arab population for over 18 years (1948-1966).[131] Another method used was fragmentation – to create new and strengthen existing barriers – within Palestinian-Arab minority groups, under the premise that a segmented society could be controlled better. The separate religious communities of the Palestinian-Arab minority in Israel provided abundant material for this fragmentation policy, and thus assisted Israeli policy.[132]

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[129] See *Liebman and Don-Yehiya*, Civil Religion in Israel, note 81 *supra* at 164 ("Israeli encouragement of an Arab national identity, including a measure of Arab autonomy, is fraught with the danger of turning the population into agents of enemy countries, of encouraging them to demand territorial separation from Israel and unification with a neighboring state."). See also *R. Kook*, Dilemmas of Ethnic Minorities in Democracies: The Effect of Peace on the Palestinians in Israel, Pol. & Soc'y 23 (1995), 309 (312).

[130] See *Lustick*, note 8 *supra*.

[131] *S. Haddad et al.*, Minorities in Containment: The Arabs of Israel, in: R.D. McLaurin (ed.), The Political Role of Minority Groups in the Middle East, 1979, 75 (84) ("The principal tool employed to control the Arab sector was the military government."). In daily terms,

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

Ibid. at 79.

[132] *Ibid.* at 80-81; *Lustick*, note 8 *supra* at 133; *N. Shepherd*, Ploughing Sand, British Rule in Palestine 1917-1948, 1999, 245 (notes how preserving the Ottoman *millet* system suited Israel's interests, *inter alia* for maintaining the status of the Palestinian-Arab population not as one but several minority groups); *K. M. Firro*, The Druzes in the Jewish State, A Brief History, 1999, 99-104 (depicting the formation of government policy in preventing the creation of a single

One characteristic mark of this policy is to view the Palestinian-Arab community as religious groups while making every effort to deny this community's collective national rights.[133] Thus, while on the national front of state-minority, the Palestinian-Arab citizen is viewed in his or her individual capacity, in the religious sphere the Palestinian-Arab citizen is contemplated in his or her collective religious identity.[134]

In my opinion, there is another purpose behind the interest of the Israeli establishment in maintaining the *millet* infrastructure among the Palestinian-Arab minority, strengthening yet further their separate and different nature. The system enabled the government to formalize differential treatment among the different Palestinian-Arab religious communities that suited pre-conceived policies toward each one of them.[135]

The Christian communities, which have not been politically active, at least not in their religious capacity, were not supervised by the government.[136] Such communities appoint their own clergy to serve as judges in their ecclesiastical courts and determine their internal court structure

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Arab group and in the interest of maintaining the different Palestinian-Arab religious communities as divided groups).

[133] See *G. Barzilai*, Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics and the Israeli Arab Palestinian Community, Isr. L. Rev. 34 (2000), 425 (436) ("The State inherited the mandatory colonial recognition of religious communities or tribes, and has formally respected it so as not to be domestically and internationally delegitimized. Yet by formalizing and legalizing the religious aspect of the minority, the minority's other identities have been marginalized, enabling the State to control it better."); see also *Barzilai*, note 4 *supra* at 97 ("State law excludes the [Palestinian-Arab] minority by framing it as religious groups that are entitled to a confined religious and juridical autonomy").

[134] Yitzhak Rabin, in his first term as prime minister, specifically stated that Arabs in Israel constituted only a cultural-religious minority rather than a political or national one, a statement that elicited criticism from Palestinian-Arab political leaders. *Haddad et al.*, note 131 *supra* at 93.

[135] *Edelman*, note 6 *supra* at 76 ("[w]hile all Palestinians who are Israeli citizens share a common linguistic and ethnic background, the Jewish authorities tend to treat each religious group as culturally, economically and politically distinguishable").

[136] Some churches operating in the State of Israel are in fact directed and controlled from Arab countries, even though Israel has no diplomatic relations with these countries. See *Rubinstein*, Law and Religion, note 24 *supra* at 390.

as they see fit.[137] Moreover, each of the Christian religious communities appoint local clergy who provide various religious services to their community members according to the mandates of the heads of the relevant religious community. It is also worth noting that most of the property held by the different churches prior to the establishment of the State of Israel was retained in their possession.[138]

On the other hand, the government's policies regarding the Muslim community are genuinely different. First, all Muslim *qadis* to the *Shari'a* courts are appointed by a special statutory committee.[139] Although the committee has representatives from the Muslim community, its agenda was controlled by the Minister of Religious Affairs, today the Minister of Justice.[140] In addition, local *Imams* are appointed by the state and are in essence state officials. A substantial portion of Muslim religious endowments (*waqf*), regarded as absentee property,[141] was transferred to the hands of the Israeli government. All of this is not coincidental. The Muslim community is the largest Palestinian-Arab religious community in Israel, and is perceived as posing a security threat due to its religious affinity with the surrounding Arab countries.[142] As a result, government agencies endeavored as a matter of course, as seen by the various statutory differences, to gain a stronger grip on the Mus-

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[137] See Israeli ICCPR Report, note 84 *supra* at 227 (stating how the Christian communities actually maintain the highest degree of independence in conducting their internal affairs). *Maoz*, Religious Human Rights, note 24 *supra* at 357.

[138] It was noted that this policy was motivated by the effort to gain the political and financial support of the Christian West. See *Rubin-Peled*, note 19 *supra* at 7.

[139] Qadis Law, 1961.

[140] *Barzilai*, note 4 *supra* at 107; *Edelman*, note 6 *supra* at 77-78.

[141] See *Kretzmer*, note 118 *supra* at 167-168. See also *I. Saban*, The Minority Rights of the Palestinian-Arabs in Israel: What Is, What Isn't and What Is Taboo, Tel-Aviv U. L. Rev. 26 (2002), 241 (282-285) [in Hebrew] (stating that government policy towards the Muslim community's religious endowments was conducted with a clear view to weaken the community through diluting its power to control its property).

[142] *Edelman*, note 6 *supra* at 76 ("[t]he Jewish majority generally considers the Muslims as the greatest security risk. Their religion is perceived as yet another bond with the surrounding Arab forces threatening Israel's survival.").

lim community as opposed to the regulation, or more precisely the lack of regulation, of the Christian communities.[143]

The relationship between the Druze community and the Israeli government is completely different. With the establishment of the State of Israel, an arrangement was reached between the Israeli government and the leadership of the Druze community.[144] The precise outcome was that Druze males were conscripted to the Israel Defense Forces. In due course, the Israeli establishment came to consider the Druze as having a national identity and not a merely religious attribute, making the Druze community even more distinct from their fellow Palestinian-Arab citizens. On these terms, the Druze community was the most favored minority in Israel and received full recognition as a separate and independent religious community shortly after the establishment of the State of Israel.[145] Consequently, the Druze religious courts became important political institutions controlled entirely by the Druze community, including the process of selecting judges.[146]

The paradigm of separateness was strengthened yet further as a result of internal Palestinian-Arab minority conceptions of the nature of its religious accommodations.[147] The discourse among community leaders,

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[143] *Barzilai*, note 4 *supra* at 108 ("The state is not interested in having a professional non-Jewish juridical body [the Muslim Sharia courts], which would be autonomous from direct state political control. The state is interested in a religious body with partial religious autonomy, the Sharia court, which in actuality is subject to supervision by the Jewish Orthodox and ultra-Orthodox establishment in the Ministry for Religious Affairs.").

[144] See *L. Parsons*, The Palestinian Druze in the 1947-1949 Arab Israeli War, in: K. Eshulze et al. (eds.), Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East, 1996, 144.

[145] *A. Layish and S. Hamud Fallah*, Communal Organization of the Druze, in: A. Layish (ed.), The Arabs in Israel, Continuity and Change, 1981, 123 [in Hebrew].

[146] *Edelman*, note 6 *supra* at 90-92.

[147] See *Raday*, Religion, Multiculturalism and Equality, note 46 *supra* at 194 ("[a]fter the founding of the State, the religious autonomy retained by the non-Jewish minorities has continued to be regarded, from the perspective of these communities, as a central element for their national cultural autonomy, representing, in a wider sense, a form of community autonomy."); *L. Hajar*, Between a Rock and a Hard Place: Arab Women, Liberal Feminism and the Israeli State, Middle East Report 207, available at http://www.library.cornell.edu/colldev/mideast/lisa207.htm ("as long as Israel is a Jewish state, the Muslim, Christian and Druze religious institutions will remain important sources of communal

even those belonging to secular political parties, tends to focus on the religious matters of the Palestinian-Arab minority as minority affairs, autonomous in nature and distinct from those of the Jewish majority.[148]

This conception became evident immediately after the establishment of the State of Israel when calls were made for abolishing the *millet* system altogether. Representatives of the Muslim community argued that such a move will amount to a historical injustice, for when the Jews were a minority under Ottoman rule they were accorded exclusive jurisdiction in matters relating to personal status. A similar argument was made by representatives of the Christian churches who also stressed the long-standing ecclesiastical jurisdiction in the country.[149]

This trend was also evident in the struggle of community leaders to release *waqf* property from government authorities, which as mentioned earlier, was taken into Israeli government custody as absentee property. Political leaders of the Palestinian-Arab minority linked this struggle with the larger conflict between the State and its Jewish majority and the Palestinian-Arab minority, whereas through this struggle the State was working to weaken the Muslim community. The connection thus made was that by encroaching on the property of the Muslim community the State of Israel was also encroaching on that community's long-standing religious autonomy.[150] This was also evident in the reaction of Muslim community leaders who argued vigorously against the State's attempts to criminalize polygamy[151] in limiting the jurisdiction of the *Shari'a* court with respect to maintenance claims made by women

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identity for Israel's Arabs (women and men) since the civil state is not really 'theirs'.").

[148] *Edelman*, note 6 *supra* at 88 (noting how the Muslim *Shari'a* courts through their *Qadis* worked to nourish the sense of their community's collectivity and separateness).

[149] *H. H. Cohn*, Religious Freedom and Religious Coercion in the State of Israel, in: A. E. Kellermann et al. (eds.), Israel Among the Nations, 1998, 79 (94).

[150] See *M. M. Karayanni*, On the Concept of "Ours": Multiculturalism with Respect to Arab-Jewish Relations, Tel-Aviv U. L. Rev. 27 (2003), 71 (97-98) [in Hebrew].

[151] See *U. Benziman and A. Mansour*, Subtenants (1992), 136-137 [in Hebrew].

against their husbands,[152] and the initiative to abolish the practice of dowry among members of the Muslim community.[153]

The Palestinian-Arab religious leadership understandably internalized the group right perception with respect to their respective religious communities, for such a perception happens to preserve and legitimize the incumbent power structure.[154] The political leadership contributed to the internalization process primarily through acquiescence.[155] From their point of view, challenging existing religious authority would cause internal frictions among community members, which might in turn jeopardize their standing among their constituencies. Patriarchy is still central to the social structure of the Palestinian-Arab society in Israel, to a large extent embedded and nourished by the existing religious institutions.

What makes the position taken by the Palestinian-Arab leadership, both religious and political, particularly interesting, is that in accordance with actual normative standards there is serious doubt whether the existing religious authority of the different Palestinian-Arab religious communities qualifies as autonomous, or as a group right of any sort for that matter. Not all group-based normative entitlements qualify as "autonomous", "multicultural" or "pluralistic" accommodations, at least when judged in terms of liberalism.[156] For that to happen, certain "qualifying factors" must be met. Indeed, in the literature dealing with multiculturalism, scholars have already touched on such factors when dealing with the question whether a multicultural accommodation can be considered legitimate when it also entails the application of norms

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

[153] See *Edelman*, note 6 *supra* at 80 (noting the objection of the Muslim judges to the idea of reform through "the predominantly Jewish Knesset").

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

[155] See *R. Halperin-Kaddari*, Women in Israel, A State of Their Own, 2004, 277.

[156] See *W. Kymlicka*, Two Models of Pluralism and Tolerance, in: D. Heyd (ed.), Toleration, an Elusive Virtue, 1996, 81.

that violate basic conceptions of individual well-being. In an effort to help differentiate between "good" and "bad" group-based entitlements, a basic classification was offered between accommodations that entail only "external protections" which are "good" (i.e. claims of the group against the larger society – such as when allocating a representation quota for a minority group in governmental bodies) and those accommodations that entail "internal restrictions" and thus legitimize group practices that violate basic human rights which are "bad" (i.e. claims of the group against their own members – such as in the case of granting autonomy to a group that prescribe norms that systematically discriminate on the basis of gender).[157] Some have argued that a group accommodation of the latter kind can in some cases be tolerated if individuals belonging to the group have the option to "exit" from the group, thereby relieving himself, or most probably herself, of the internal restrictions.[158] If we judge the existing group accommodation granted to the Palestinian-Arab religious communities by these standards, serious questions arise as to whether they qualify as a multicultural accommodation. As seen earlier, the applicable religious norms discriminate against women, and are thus suspect as being of the "internal restriction" kind. Moreover, in the absence of a civil regime of marriage and divorce in Israel, it is also questionable whether there is an option to exit from the group, for there is simply nowhere to exit to.

However, in my opinion there is a yet more serious impediment to regarding the religious authority granted to the different Palestinian-Arab religious communities in Israel as a sort of an "autonomy" or a group right of a "multicultural" or "pluralistic" nature. To be regarded as such, one fundamental qualifying factor needs to be met. This qualifying factor concerns the "will" of the group itself. It is essential, in my opinion, that the group granted the accommodation be interested in receiving it. Otherwise, especially if the accommodation is in the interest of a minority within that group, the group accommodation is no more than a group accommodation, and at worst a product of coercion. This fundamental qualifying factor is derived not only from basic notions of

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[157] *W. Kymlicka*, Multicultural Citizenship, A Liberal Theory of Minority Rights, 1995, 37 (arguing that "liberals can and should endorse certain external protections, where they promote fairness between groups, but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices.").

[158] See *O. Reitman*, On Exit, in: A. Eisenberg and J. Spinner-Halev (eds.), Minorities within Minorities, Equality, Rights and Diversity, 2005, 189.

justice,[159] but also from the rationale of having multicultural and autonomous accommodations in the first place. If such accommodations are justified in terms of serving the interests of the group members themselves, whether because individuals are embedded in their community or because they need their community in order to realize their individual virtues and aspirations,[160] it becomes essential that the group accommodation accord with their interests instead of with those of some group within the minority. If this is so for the existing religious accommodations granted to the Palestinian-Arab religious communities in Israel, then they are suspect of not being a form of autonomy or of multicultural accommodation with respect to this qualifying factor as well. This is the case in at least two major religious communities: the Greek Orthodox and the Muslim. As for the Greek Orthodox community, it is controlled by clergy from Greece, who barely speak the mother tongue of the local Palestinian-Arab Greek Orthodox community, which is Arabic. The judges of the Greek Orthodox ecclesiastical courts are appointed at the sole discretion of the Church's administration, without any input or supervision from either State authorities or community members. It is worth mentioning that this was the case in the past in a number of other Middle Eastern countries, such as Egypt, but was changed through reform that abolished foreign control of local churches. However, calls from the local Palestinian-Arab community for change have not been very successful, neither before nor after the establishment of the State of Israel.[161] Thus, serious questions arise as to whether the existing accommodation granted to this community is really autonomous or multicultural, given the fact that its form and practice runs against the wishes of the constituency.

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[159] See *I. Marion Young*, Justice and the Politics of Difference, 1990, 34 ("For a norm to be just, everyone who follows it must in principle have an effective voice in its consideration and to be able to agree to it without coercion.").

[160] See *W.Kymlicka*, Liberalism, Community and Culture (1989); *A. Margalit and M. Halbertal*, Liberalism and the Right to Culture, Soc. Research 61 (1994), 491.

[161] See *D. Tsimhoni*, The Greek Orthodox Community in Jerusalem and the West Bank, 1948-1978: A Profile of a Religious Minority in a National State, Orient 23 (1982), 281. Indeed it is because of this distance between the local Greek Orthodox community and the Greek clergy that associations and clubs, governed by community members, have developed among the Greek Orthodox community. See *D. Tsimhoni*, Continuity and Change in Communal Autonomy: The Christian Communal Organizations in Jerusalem 1948-80, Middle Eastern Stud. 22 (1986), 398.

As to the Muslim community, although their community affairs have been handled over the years by *Qadis* and *Imams* from the ranks of the community itself, State authorities have applied different control policies over the handling of community affairs. This policy was evident in the appointment process of religious figures, always conducted under the close supervision of government authorities.[162] A request made by Muslim leaders to have a Muslim as head of Muslim affairs in what used to be the Ministry of Religious Affairs was denied, the position passing "from one Jew to another."[163] What most curtailed the control of the community over its own affairs was the handling of the Muslim religious endowments (*waqf* property) by state authorities.[164] Through legal constructs, such property was characterized as absentee property, based on the fact that members of the Supreme Muslim Council, the body that administered such property in Mandatory Palestine, left the country.[165] This in turn made it possible for the Custodian of Absentee Property in effect to confiscate such property.[166] Again, in this case, it is questionable whether the jurisdiction and authority granted to the Muslim community in Israel is really a form of autonomy or a type of multiculturalism, leaving aside the question of internal restrictions and the option to exit. Moreover, a comparison between the two cases shows inconsistency in handling residentiality requirements. The Greek Orthodox community is not permitted or encouraged to handle its own affairs because they are to be handled by authorities abroad, while the Muslim community cannot manage its affairs because they are not to be handled from abroad.

Arguably, if the majority of these religious communities are not interested in the accommodations granted, they could leave their group, or

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[162] See *supra*.

[163] *Tessler*, note 64 *supra* at 265.

[164] See *Peretz*, note 127 *supra* at 121 (noting how the appointment of a Jewish official by the Ministry of Religious Affairs to control *waqf* property and to be in charge of other functions in respect of the Muslim community "aroused much resentment" among the Muslim community religious leadership).

[165] *Kretzmer*, note 118 *supra* at 167-168.

[166] *Ibid.* It was once held that the Custodian of Absentee Property transferred the income received from administering *waqf* property to the Ministry of Religious Affairs who in turn distributed it back to community members according to the recommendations of an advisory committee. See *Rubinstein*, Law and Religion, note 24 *supra* at 389. However, only a small portion of such income returns back to the Muslim community. See *Rubin-Peled*, note 20 *supra*.

at least mobilize for change and reform. In the absence of such action, the groups are taken as accepting the present state of affairs, thus making it possible for the group accommodation to qualify as autonomy, or as a multicultural arrangement subject to the "will" of the group.[167] But such an argument overlooks both the social and legal reality that exists with respect to the Palestinian-Arab community as well as the control policy exerted by State institutions. As noted earlier, since religious reform may run the risk of further fragmentation of the society itself, it is questionable whether there is a viable option to exit in a patriarchal society, and if so, whether there is a sphere into which one can exit to. What makes the validity of interpreting the apparent quiescence mode as acceptance even more questionable is the fact that this is exactly what the control policy of Israel over the Palestinian-Arab community sought to achieve in the first place.[168]

IV. The Paradigm of Separateness and its Normative Implications

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

My argument in this respect goes further and suggests that this paradigm of separateness carries with it a number of normative implications. For the sake of succinctness, I will briefly examine four of these impli-

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[167] See *Saban*, note 92 *supra* at 945 (contending that the continuing *millet* regime in Israel "is a manifestation of 'segregation by will' of the communities in the area of personal status"). However, even Saban himself seems to question whether this "segregation by will" makes it possible to recognize the existing jurisdictional authority granted to the different religious communities as a form of multicultural accommodation, given the internal restrictions embodied in the administrative norms of such communities. *Ibid.* at n. 221.

[168] See *Lustick*, note 8 *supra* at 25 (noting that the "failure of Israel's Arab minority to 'organize itself'"…is "due to the presence of a highly effective system of control which, since 1948, has operated over Israeli Arabs.") (italics omitted).

cations. The first implication is dominance. The official Jewish nature of the State of Israel on the one hand and the internalization of the paradigm of separateness by the Palestinian-Arab community with respect to religious accommodations on the other has created an environment that makes it possible to devise public norms with religious implications as well as legal reforms intended to benefit individual members shaped first and foremost according to the interests of the Jewish community. I chose to term this type of normative implication "the dominance effect." As I have demonstrated elsewhere,[169] this notion of dominance can be found in the Israeli adoption law, particularly the stipulation that demands that the adoptee be of the same religion as the adopting parents. This strict and uncompromising requirement was originally implemented in Section 3 of the Adoption of Children Law, 1960, and was strongly influenced by the sensitivity of the Jewish community to the possibility of Jewish children being adopted by non-Jewish adopters. The dominance was so strong that this norm became the law of the land, overlooking the possibility that the local Palestinian-Arab community might not be equally opposed to inter-religious adoption among their community members.

The second implication is what I call "the distancing effect". This paradigm of separateness has a distancing effect on the individual members of the Palestinian-Arab religious communities when it comes to liberal norms concerned with the individual-secular welfare of these members. It is hard to reach the individual member and care for his, but mostly her, individual liberal rights, and the paradigm shows this by requiring justification for infiltrating the outer and well-guarded limits of an existing autonomy of a minority group on behalf of such an individual.[170] This barrier does not exist within the Jewish community; for once again, its religious accommodations are not a minority accommodation. On the contrary, many of the religious accommodations within the Jewish community are viewed as a minority imposition made on the

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[169] *M. M. Karayanni*, A Historical Analysis of the Religious Matching Requirement under Israeli Adoption Law (Forthcoming).

[170] The effect of group-based norms on individual members has received particular attention in the literature dealing with multiculturalism, where it becomes particularly important to find a mechanism that can lessen this group-individual tension. See e.g., A. Eisenberg and J. Spinner-Halev (eds.), Minorities within Minorities, 2005; *S. Moller Okin*, Is Multiculturalism Bad for Women?, 1999, 9-24; *L. Green*, Internal Minorities and their Rights, in: W. Kymlicka (ed.), The Rights of Minority Cultures, 1995, 257 (258).

majority, who prefer freedom from religious norms and have strong secular tendencies, or at least support the right to choose in regard to their own religious accommodations. Thus in the case of the Jewish community, changes in religious accommodations can potentially occur once the liberal norm is preferred over the religious norm. In the case of the Palestinian Arab community there is an additional step: to penetrate a group accommodation that is considered to be of an autonomous nature.

Telling proof of the difference in respect of religious accommodation may be found in the historical tendencies of courts and government agencies to intervene in religious practices within each of the communities. While with respect to the Jewish community the tendency has been to curtail and restrict the jurisdiction of the religious institution and their ability to apply religious norms, the tendency with respect to the Palestinian-Arab community was one of reluctance to intervene and effectuate changes.[171] A tangible example is the wife's legal right to bring a maintenance claim against her husband before a civil court. This right was granted to Jewish women in 1953, but the same right was granted to Muslim and Christian women only in 2001.

The third implication concerns the internal dynamics within the Palestinian-Arab community, the result both of its perception of the nature and type of the religious accommodations accorded to its different religious communities and of the national conflict that exists between the State of Israel and the Palestinian-Arab community as a whole. On a

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[171] Compare *Steinberg*, note 18 *supra* at 100-101 ("[o]ver time, the combination of religious/ideological and political/cultural factors gradually led to a weakening of the consociational structure, and the clash between secular and religious norms has become particularly pronounced. The expanded authority and scope taken on by the secular court system in the past decades has contributed to the undermining of the status quo. Under the influence of Judge Aharon Barak (Chief Justice of the High Court of Appeal [Sic]), the courts have entered into areas and assumed powers that had, in the past, been rejected by the secular courts as outside their areas of jurisdiction."), with *Edelman*, note 6 *supra* at 87 ("[f]or their part, the Jewish majority has not been anxious to upset Muslim sensibilities on matters of personal status. There have been only isolated legal actions to bring the *Shari'a* Courts into strict compliance with Israeli law… On matters of personal status, the Jewish elite is more concerned with modernizing the practices of their fellow Jews who came to Israel from Arab lands. The governing elite's priorities are reflected in the more restricted jurisdiction of the Rabbinical Courts and the greater administrative-legal supervision of personal status practices within the Jewish population.").

number of occasions, calls for liberal reforms from within the Palestinian-Arab community were suppressed for fear of arousing internal conflicts within the religious communities that would eventually work to weaken the national struggle.[172] This effect is termed here "the internal barrier effect." An extreme example of this implication can be found in the notes of a Palestinian-Arab sociologist studying the phenomenon of the murder of Palestinian-Arab women for the alleged shame they brought upon their family or clan ("honor killing"). A recurrent admonition she heard from community leaders, was that this was not the time for raising such an issue, even though the speakers were against the phenomenon.[173]

The fourth normative implication of the paradigm of separateness is genuinely different from the previous three because it implies the possibility of greater reform in the religious accommodations granted to the Palestinian-Arab community. Because such accommodations are taken to be of a different type than those granted to the Jewish community, there is at least the possibility of making such accommodations susceptible to different sets of considerations and norms than the ones relevant with respect to the Jewish community. I would particularly like to emphasize that in the current socio-political reality in Israel there are a number of spheres in which the Palestinian-Arab community can move for more liberal reforms than those possible with respect to the Jewish community. The paradigm of separateness can work to facilitate such reforms, for it also implies that the impediments to reform within the Jewish community should not function with respect to the Palestinian-Arab community. One example, which can serve as a meaningful precedent in this respect, is the basic legal instrument regulating surrogacy agreements in Israel: Surrogate Mother Agreement (Approval of

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[172] See *R. Hirschl and A. Shachar*, Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress through the Obstacle Course, in: B. Baines and R. Rubio-Marin (eds.), The Gender of Constitutional Jurisprudence, 2005, 205 (224-225).

[173] *M. Hasan*, The Politics of Honor: The Patriarchy, the State and the Murder of Women in the Name of Family Honor in: D. N. Izraeli et al. (eds.), Sex Gender Politics, 1999, 267 (297-301) [in Hebrew]. See also *A. Touma-Sliman*, Culture, National Minority and the State: Working Against the 'Crime of Family Honour' within the Palestinian Community in Israel, in: L. Welchman and S. Hossain (eds.), 'Honour' Crime Paradigms and Violence against Women, 2005, 181 (182).

the Agreement and the Status of the Child) Law, 1996.[174] The framing of the enactment was heavily influenced by Jewish *halacha*, especially in determining the kind of preconditions necessary for making surrogacy agreements legal and valid under the Law.[175] One such precondition is the requirement contained in Section 2(5) of the Law under which the carrying mother must be of the same religion of the intended mother.[176] However, it was apparently realized that since the dictates of the Jewish *halacha* are irrelevant when it comes to the non-Jewish population, the same section continues to prescribe that the statutory committee in charge of approving surrogacy agreements can deviate from the religious matching requirement "where all parties to the agreement are non-Jews." Thus, less restrictive religious matching can also be suggested in adoptions taking place in Israel, for once again the importance of religion in preserving national unity and the interests of Palestinian-Arabs are separate and different from the ones relevant for the Jewish community.

V. Conclusion

The discussion in this article has tried to offer a legal diagnosis of how religious accommodations for the Palestinian-Arab minority in Israel are perceived through dominant views. I suggested that a legal paradigm is apparent in matters concerning the Palestinian-Arab religious communities that are perceived as an autonomous accommodation for a minority group. As I endeavored to show, the paradigm of separateness is closely linked to Israeli constitutional and political conceptions. It is important to note, however, that if my arguments are valid in the context of Israel, they may also be helpful in understanding the nature of the religion and state relationship in a number of other countries in which the majority religion acquires some form of constitutional and political dominance.

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[174] It should be noted that the terms "surrogate motherhood" or "surrogacy" are not used in the Hebrew title of the law. The literal translation would be "Embryo-Carrying Agreements". See *C. Shalev*, Halakha and Patriarchal Motherhood – An Anatomy of the New Israeli Surrogacy Law, Isr. L. Rev. 32 (1998), 51, (60 n.26).

[175] *Ibid.*

[176] *Ibid.*, at 66-67.

Days of Worship and Days of Rest: A View from Israel

Ruth Gavison[*]

At least two governments in Israel fell over debates on state and religion issues. In one case the issue was an alleged desecration of the Sabbath.[1] *Another government was significantly weakened over the same issue.*[2]

On the 25th of June 2005, a Sabbath, a large number of religious people protested the decision to open for traffic a central route in a religious neighborhood in Haifa which had been closed for decades. As the amount of traffic increased over the years, the alternative routes used on the Sabbath became congested, causing many accidents. The Ministry of Transportation decided that the road needed to be reopened until an alternative route was prepared. As a result of the protest, PM Ariel Sharon decided that the road should remain

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[1] In 1977 the first Rabin government fell after the resignation of ministers from the National Religious Party (NRP) over the arrival of several F15 fighter planes from the US, which landed in Israel after the Sabbath had already started. In 1958 the government fell and elections were held over a controversy about the question of determining who is a Jew.

[2] In 1999, an ultra-Orthodox party resigned from Ehud Barak's government in protest over the fact that the rules prohibiting work on the Sabbath were broken when a large piece of electrical equipment was transported on a Sabbath to reduce interference with traffic.

closed, as it did on the following Sabbath, July 2nd. Tommy Lapid, the chair of the opposition and of the 14-member Shinui (Change) faction, elected mainly on an anti-religious coercion ticket, declared this was an instance of giving in, again, to the religious establishment and its coercion.[3]

I. Introduction

The two excerpts above where quoted to illustrate that debates over state and religion in general, and over the status of religious "days of worship" in particular, are anything but marginal in contemporary Israel.

States in which there is a uniform and religious society that has a tradition of a weekly day of rest coupled with special religious meaning and ceremonies often find it very natural to establish a legal order where the religious days of worship are also the social days of rest. In fact, such an identity of religious and social practices may be natural and does not even require laws. This indeed was the case in most Western countries before the onset of deep secularization and before trends of massive immigration have made most of them multicultural. Thus, most Christian countries had "Sunday Laws" which limited commerce and other forms of work on Sundays, consequently creating a religious, cultural and legal continuum. Some had the same social reality without needing laws to enforce it. Similarly, Moslem countries that adopted the tradition of a shared weekly day of rest often made Friday that day.[4] Minority religious communities had to respect the norms of the majority. If

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[3] A *Shinui* MK, Roni Brison, wrote in the daily Haaretz on June 29th that the struggle is not over the opening of the road but over the Jewish character of the state, about Israel as a free country vs. Israel as a country ruled by religious fanatics. For the Hebrew version see http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=593499.

[4] Interestingly, this is not always the case. In Turkey and Morocco, days of rest follow the European West. In Algeria, the days of rest are Thursday and Friday, and some suggest that they should be moved to suit the West while others object, saying that to do this would be to lose their culture and soul (International Herald Tribune 7, Sep. 27, 2005). This probably stems from the fact that unlike Judaism and many interpretations of Christianity, Islam does not include a religious commandment concerning a day of rest. See *R. Gavison*, Days of Rest: A Challenge for Multiculturalism (forthcoming 2007).

their day of religious worship and rest did not coincide with that of the majority, religious communities sought at least permission to keep their own holidays in addition to the general ones. Preferably, they sought permission to keep their own day of rest and worship and work on the religious day of rest maintained by the majority.

There are two main challenges to this way of doing things. The first comes from multi-religious societies in which there is no clear majority and minority, or which are committed to multiculturalism in the strong sense, which bestows equal status to all cultures and religions, or neutrality among them. Each religious group then wants not only the freedom to keep its own holidays, but also to have them affect, and be reflected in, the public sphere. The second is from groups that become secularized and sometimes resent the identification of mandatory days of rest with religious days of worship, because they resent religious limitations on their freedom and see them as violations of their rights to freedom from religion or freedom of conscience.

Many societies witness a combination of both challenges. This is also the case in Israel.

I will start with a short account of the social and legal situation regarding days of worship and days of rest in Israel. This reveals many different complexities. I will then describe a proposed new arrangement of the issue of the regulation of the Sabbath. This new arrangement is deeply resisted by some liberal and commercial forces, who often invoke the rights to freedom of conscience and freedom from religion, despite the fact that it is much more liberal than the present legal arrangement, because the legal arrangement is extensively violated and enforcement is very limited. Another anomaly is the objection of religious groups to the proposed new arrangement, although the present reality "violates" the Sabbath more than the proposed one. Some of them also invoke rights, claiming that religious people who observe the Sabbath are effectively discriminated against if others are allowed to work and trade on that day. I will argue that these anomalies reveal important points about the relations between religion, culture, society and state. They also illustrate the limits of law, and the fact that the popular rights discourse has only very limited application to what is often called state-and-religion issues. Most of these controversies are not matters of rights and should be regulated through the social, cultural and political system. It follows that most of these issues should be a matter of political and social negotiation and not of judicial determination, and that they should have important local elements and should not be decided once

and for all by courts as if they are dictated by universal principles of human rights.

Because the visibility in Israel of internal Jewish debates on these issues is much greater than issues stemming from the fact that the population includes many religious groups, I will mainly discuss these issues. They have been the subject of legislation, litigation and public debate. This fact should not lead us, however, to disregard the complexity of these issues in the non-Jewish sectors of Israeli society.[5]

II. History

Israel was established in 1948, at the end of a British Mandate, and as a consequence of the UNGA resolution 181 which determined that Palestine/Israel should be divided into two states, one Jewish and one Arab. In fact, a war erupted after that resolution was made, and as a result the Jewish state was indeed established, while the Arab parts of the territory not occupied by Israel were held by Jordan and Egypt respectively. My paper will deal with Israel alone.

Regulation of the question of days of rest and worship was one of the very first issues the new Israeli government dealt with.[6] The decision reflected a broad consensus within the Jewish *Yishuv* (community) and a famous agreement between the Zionists and the leaders of *Agudat Yisrael* (a religious political party) on maintaining the *status quo* between religious and secular Jews in Israel.[7] In 1951, a labor relations law was

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[5] I will make a few comments on this below. In general, it is not easy for Jews to research this aspect, because Jewish media do not regularly report events and internal debates within the non-Jewish communities, especially the ones not related to the political dimensions of the conflict. The political conflict, in turn, makes it hard for secular liberal forces within the different communities to cooperate in struggles against the religious establishments of their respective communities. For this point see the present paper by *M. Karayanni*. I look more closely at these aspects in *Gavison*, note 4 *supra*.

[6] See The Days of Rest Ordinance 1948, which added section 18A to the Government and Law Ordinance, specifying in detail the Jewish days of rest, and the principle that non-Jews are entitled to days of rest according to their tradition. A special government decision of May 31, 1954 established 8 recognized holidays for Christians, 4 for Moslems and 2 for Druze.

[7] In fact, it is not clear what the *status quo ante* on the Sabbath was before the state was founded, because Jews did not control the arrangements of the

passed, detailing regulation of days of rest: Working and Resting Hours Act, 1951. These arrangements and laws reflected an agreement based on a firm distinction between private and public. Jewish days of worship and rest would be the official days of rest in Israel. There would be no obligation to observe religious commandments, nonetheless employing others on a day of rest was declared a criminal offence. The laws explicitly exempted non-Jewish communities, and specified that people of other religions were entitled to rest on their religious day of rest.[8] According to the legal arrangements adopted, people were allowed to use their cars and drive on the days of rest, but public transportation was not available.[9] While the radio operated on the Sabbath, it too shut down transmission on Yom Kippur, the holiest day in Jewish law.

While declaration of days of rest was regulated by national legislation, the regulation of business hours was delegated to local authorities. Most Jewish cities have laws requiring that all businesses and shops be closed on the Sabbath.

Initially, this arrangement worked quite smoothly. Most of the 150,000 Arabs who were left in Israel lived in their own communities and were not affected by the Jewish practices. Secular Jews often accepted that singling out the Sabbath in this way was not "religious coercion" and reflected a shared cultural tradition.[10] Israel maintained the Millet sys-

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state. The Orthodox insisted on the arrangement because they feared that the secular Zionists would not seek to enforce limitations on work and trade on the Sabbath. See *M. Friedman*, The History of the Status Quo: Law and Religion in Israel, in: V. Pilavsky (ed.), The Transition from Yishuv to the State 1947-1949: Continuity and Change, 1990 [in Hebrew].

8 Section 7 of the law requires that the weekly rest will be at least 36 hours, and will include Saturday for Jews, and for non-Jews one of the three days Friday to Sunday "according to what [the worker] sees as his weekly day of rest."

9 This was the case in most Jewish communities. However, Haifa, which had been a mixed Arab-Jewish city and had public transportation in the British period, was allowed to operate limited public transportation. We shall see later that issues of transportation and driving are central and unique to debates in Israel. This illustrates the fact that discussion of many state and religion issues, including those of the way the state deals with days of worship, depends on the content of the relevant religion. Judaism imposes rigorous religious limitations on conduct on the Sabbath, to a degree unknown in Christianity or Islam.

10 See the discussion of *Z. Zameret*, in: G. J. Blidstein (ed.), Sabbath – Idea History Reality, 2004 [in Hebrew], on the way the major secular Zionist thinkers thought about the Sabbath. These thinkers, including Berl Katzenelson and

tem, and recognized the establishments of the many religious groups within it. The major holidays of the Moslem and Christian communities were recognized by the State, but there was no special break of the regular life rhythm in Jewish communities for them. The laws did cover the issues, but one did not really need legal norms to maintain social stability. The general atmosphere was one of acceptance by secular Jews of the limitations as natural and right. Obviously, there were differences among communities. But even in the most secular of secular *Kibbutzim* the Sabbath day had a special aura.[11] The internal debate among Jews on the meaning of the Jewishness of the state was intense. Many of the Zionists were secular Jews, at times anti-clerical. There were struggles that reached the courts concerning attempted efforts to prohibit or seriously limit the sale of pork in Jewish communities.[12] There was a debate concerning the 1953 decision to maintain the religious monopoly over matters of marriage and divorce. But a general day of rest on Saturday was never contested.

Slowly, the mood changed. The first noticeable change came towards the end of the 1960s. A number of public debates and court cases came to a head after the 1967 war. Some secular Jews grew more impatient with limitations of their freedom on the Sabbath. Some religious Jews

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Ahad Ha-am, put great stress on the culture and heritage of Judaism, and especially on the elements of social justice in Jewish heritage. The Sabbath was a central element in the social regime established by Judaism, and Judaism itself stresses both the religious element (because God created the world in six days and rested on the Sabbath, the seventh day: *Exodus* 20, 8-11) and the social element (a day of rest for all, including worker, animal and slave, because one should remember that one was a slave in Egypt: *Deuteronomy* 5, 12-15).

[11] In fact, a very interesting development happened in the religious *Kibbutzim*. Jews in the Diaspora often relied on non-Jews to do for them what they themselves could not do. Religious agricultural communities had to develop rules that would permit them to observe the Sabbath and take care of their responsibilities, including those to animals.

[12] The High Court of Justice (HCJ), which is the Supreme Court sitting as administrative court as a first and last instance, was active in these cases, holding that the fact that shops sold pork could not be used as a reason for not letting them have the required licenses, because such state and religion issues should not be decided by local authorities. It was further held that the local authority did not have the power to prohibit such sale without express authorization in statute. The Knesset then passed a general authorization law and some cities did indeed enact such statutes. Laws against non-Kosher butchers were never enforced effectively.

became even more convinced that the existence of Israel was a matter of a religious miracle. Many of these court cases concerned the Sabbath.[13] It is interesting to note different clusters of Sabbath litigation.

The first cluster concerned challenges of attempts to enforce the Sabbath prohibition against working on the Sabbath when applied to gas stations.[14] In 1968 the Israel Supreme Court acquitted a person charged with violating the law by operating a gas station on Saturday.[15] The Court held that a law to close gas stations on Saturdays, especially since there was no public transportation on that day, was unreasonable.[16] One of the Judges, in dissent, wrote a lengthy opinion explaining how Sunday (or Saturday) Laws were not an instance of religious coercion, based on an extensive comparative study of other countries. As a result, Israel has joined the rest of the world, and the availability of open gas stations on the Sabbath now depends on the community. Many are closed, but some are always open, even in very religious cities such as Jerusalem.

At roughly the same time, in 1969, the Hours of Work and Rest Law was amended: section 9A now states that it is prohibited for a person to work on the Sabbath in their own shop or plant. The amendment was intended to close a gap that existed under the old law, which only made it an offence to employ others on the Sabbath. If gas stations could now be opened, at least Jews would not be allowed to work in them unless the business had a special permit.

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13 Many – but not all. The most famous "Who is a Jew" case, that of Benjamin Shalit, was litigated in 1968 and decided in 1969, with a majority of the Israel Supreme Court ordering the government to register the children of a Jewish father and a non-Jewish mother as Jews in their nationality: HCJ 58/68 *Shalit v. Minister of Interior*, PD 23(2) 477.

14 This was unique to Israel since in all other places, some gas stations may decide not to operate because of reduced demand or desire for rest, but it was clear that there could be no total ban of this service.

15 Cr.App. 217/68 *Yizramex Ltd. v. S.I.*, PD 22(2) 343.

16 Another argument, based on the principle of legality and a more formal legal analysis, was that the municipality did not have the power to regulate the closure of gas stations because the law specified that municipalities had the power to "regulate the opening and closing of shops and factories, restaurants, coffee houses, tea houses, pubs, bars, canteens, and similar places, and of cinemas, theatres, and other places of entertainment…," and that a gas station did not fall under any of those descriptions.

A second cluster of litigation came from the opposite direction: It involved the legal-political drama around the decision to move TV programming from six to seven days a week at the end of 1969.[17] At first, petitioners sought to challenge the decision to broadcast on Saturday as a matter of principle, and were rejected based on the claim that they did not have standing.[18] Petitioners then argued that religious workers would be discriminated against because they will not be able to work like their colleagues. Now their standing was accepted, and the petition was presented as one involving rights and not just policies, but it was nonetheless rejected. In the end, the court refused to help the objectors to the decision, and thus contributed to the fact that TV broadcasts have operated, since then, seven days a week.[19] In terms of the public sphere, however, it was usually accepted at that time that there was hardly any shopping or even commercial entertainment activity on Saturdays. In most Jewish settlements, including towns, even restaurants were hard to find.[20]

A little later on, in the mid-1980s, a third cluster of public debates concerned the operation of commercial movie theatres on Friday nights. The arguments also brought up the vexed relationship between local authorities and the Minister of Interior, who has the power under law to approve or decline to approve local bylaws. In the mid-1980s there was a long political struggle over this in Petach Tiqva, when the Minister (a member of a religious party) declined to approve a law passed by the municipality authorizing the opening of a cinema on the Sabbath. Ultimately, the Supreme Court permitted the operation of the theatre, holding that the minister was not acting within his powers.[21] In 1987 the operators of a movie house in central Jerusalem were prosecuted for violating the local bylaw that prohibited such operation. The court acquitted the defendants, holding the laws were too sweeping and thus reflected an unreasonable balance between religious sensibilities and other interests and that freedom from religion was beyond the power of local

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17 HCJ 287/69 *Meron v. Minister of Labor*, PD 24(1) 337.

18 In the 1980s the HCJ practically abolished the requirement of standing.

19 Some commentators see this as early proof of the bias of the HCJ against religious interests and concerns.

20 Jews who lived close to Arab settlements easily avoided the limitations by a relatively short drive. After 1967, secular Jerusalemites could shop and dine in the old city as well as in neighboring Bethlehem.

21 HCJ 347/84 *The Municipality of Petach Tiqva v. Minister of Interior*, PD 39(1) 813.

legislation in the absence of explicit authorization.[22] The decision, which was criticized in religious circles, was not appealed, but a special Authorization Law was enacted in 1990, explicitly authorizing municipalities to regulate the opening of places of entertainment on the Sabbath.[23] While the law explicitly authorizes regulation of movie houses and other places of entertainment, most municipalities, including Jerusalem, allow some places to open on Sabbath.

At about the same time, another central issue concerning the Sabbath – one that had mainly been regulated through social negotiations and conventions – reached the courts: the closing of certain roads to cars on the Sabbath (when, according to Jewish law, no form of aided transportation is permitted). These debates arose in various areas in Jerusalem, as well as in religious areas in the Tel Aviv region. The most recent and prolonged debate concerned a main traffic artery in Jerusalem – the Bar-Ilan Road, connecting the entrance to Jerusalem to the Northern part of the city, including the Mt. Scopus Hadassah hospital, which passes neighborhoods populated mostly by ultra-Orthodox families. For weeks, every Saturday, there were riots between the inhabitants, who closed the road, and demonstrators who came in cars to make a point of passing, with the police seeking to keep order and allow traffic to flow. After many attempts to negotiate the issues and through public committees, this matter too was decided by the court.[24] For my pur-

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22 Cr.F. 3471/87 *State of Israel (SI) v. Kaplan*, PM 1988(2) 1531.

23 Amendment to the Municipalities Ordinance (no. 40) 1990. The explanatory comments to the Bill expressly stated that the legislation sought to restore the *status quo ante* that had been interrupted by the Kaplan decision. When a similar issue was raised in another case in 2000, the court ruled that the Authorization law covered the prohibition to open shops on Sabbath. The court added that the law was in fact justified because the secular public too was interested in keeping the Sabbath distinct, and this was of special importance in Jerusalem, which was the capital of the Jewish people in addition to its being the capital of Israel: MA 2592/00, *SI v. Keshuel* (unpublished, 12/12/2000). It is unclear what the decision would have been had this case related to a restaurant or a place of entertainment, which are seen as different from 'mere' shops.

24 HCJ 5016/96 *Horev v. Minister of Transportation*, PD 51(4) 1. The Court decided 4 to 3 that the decision of the Minister of Transportation to close the road during hours of prayer could stand only if a proper arrangement can be found for the needs of secular residents of these neighborhoods (which was in fact done by finding there were no such needs). Three judges held the decision was void, being unreasonable, *ultra vires*, or to be decided in primary legislation. One (religious) judge in fact thought the street should be closed for the

poses it is important to note that the decision was cast by some judges in terms of rights – the balance between the right to freedom of movement and the religious sensibilities of the religious residents of the region. As we saw, this issue is still very much alive in Israel to this very day.

The decision on the Bar-Ilan Road, *Horev*, was decided after the "constitutional revolution": In 1992 two basic laws dealing with human rights were enacted in Israel.[25] Based on these laws, the Israel Supreme Court held that it now has the power to invalidate statutes which violate rights included in these laws. One of these laws establishes a right to freedom of occupation, and naturally Sabbath laws were challenged as inconsistent with these laws. Both the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Freedom state that they are designed to protect the values of Israel as a "Jewish and democratic state." Interestingly, *Horev* does not discuss the question whether closing the Bar-Ilan Road is either required by or consistent with Israel as a Jewish and democratic state. The analysis is based on universal rights discourse, with the right of secular people to freedom of movement balanced against the wishes and sensibilities of the Orthodox residents of the street.

While struggles over traffic in religious neighborhoods are still common, *de facto* Sabbath limitations in Israel have been dramatically reduced, despite the fact that the laws have not changed (or have even become stricter). In addition to entertainment and restaurants which are now available in most places, including Jerusalem, there are now many

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whole day, but joined the majority. The decision came after an attempt to resolve the issue through a public committee including representatives of all relevant groups did not yield an agreement. For a detailed account of the work of the committee and its lessons, see *Z. Zameret*, The Bar Ilan Road, The Conflict, and Ways to Resolve it, in: U. Dromi (ed.), Sitting Together: Secular-Religious Relationships: Positions, Proposals, Covenants, IDI (2005), 234-248 [in Hebrew] (Zameret was the secular chairman of the public committee).

[25] Israel does not yet have a full constitution with a bill of rights. For a general description of the legal situation, see e.g. *D. Kretzmer*, Constitutional Law, in: A. Shapira and K. C. Dewitt-Aror (eds.), Introduction to the Law of Israel, 1995; *A. Maoz*, Constitutional Law, in: I. Zamir and S. Colombo (eds.), The Law of Israel: General Surveys, 1995; and *A. F. Landau*, The Constitutional Status of Basic Laws, in: A. Gambero and A.M. Rabello (eds.), Towards a New European Ius Commune, 1999.

shopping malls outside the main towns, whose busiest day of trade is the Sabbath.[26]

This commercial activity generated different responses, depending in part on the identity and ideological affiliation of the persons serving as Minister of Interior or the Minister of Commerce and Industry (who are in charge of the enforcement of the relevant laws). Some ministers sought to enforce the laws by using non-Jewish officers to inspect and fine those who open their shops on Saturdays. At times, courts found creative ways to acquit the defendants, who were represented by NGOs ideologically committed to "fight religious coercion." [27] Mostly, those convicted of offences pay the fines and continue to do business on Sabbath. Recently, one such defendant chose to make a principled challenge to the law itself. While the court upheld the laws restricting work on the Sabbath and making it an official day of rest, it did not make any statement concerning the extensive non-enforcement of the law and the resulting extensive infringement of the prohibitions.[28]

This reality, with the great gap between legal arrangement and actual practice, triggered a wave of attempts to reach agreements on the Sabbath. The hope was to reach an agreement on a law that will not be seen as a form of religious coercion but that will maintain an effective shared day of rest and the special character of the Sabbath as part of ancient Jewish culture. I was party to one such attempt in the framework of the comprehensive Gavison-Medan *New Covenant for State and Religion*

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[26] According to a survey made by the Guttman Center, 17% of Israelis shop on the Sabbath, and 70% support opening shopping malls outside of the cities. Other surveys show that 7% of the Israelis shop every Sabbath, and that the average frequency of Sabbath shopping is 1.6 a month, which means that Israelis go shopping on Sabbath every second or third Sabbath.

The Human Resources Authority estimated that 5.2 billion shekels were spent on Sabbath shopping over 2002, double the amount for 2001. Surveys show that the average expense on Sabbath is 340 Shekels, and that 64% of the Sabbath shoppers buy food, 56% buy clothing, 38% buy cosmetics and medications, and 27% buy Do It Yourself products.

[27] In a number of cases, charges were voided claiming that the prosecution failed to prove or argue that the workers or the employers (a Kibbutz) were 'Jewish,' as the law requires.

[28] In Cr.App. 10687/02, *Handiman v. SI*, PD 57(3) 1 of 2003, the court held that specifying that the weekly day of rest is the Sabbath is reasonable. The Israel Supreme Court elaborated on this issue in the recent *Design 22* case of 2005: HCJ 5026/04 *Design 22 v. Rosenzweig* (unpublished, 04/04/2005). For a detailed analysis of the *Design 22* decision, see below.

Issues among Jews (2003).[29] In addition, religious groups now seek new ways of fighting commerce on the Sabbath. Notably, they are issuing a *Hareidi* Card – a card to identify shops and businesses that do not operate on Saturday. The belief is that their growing number will create an economic incentive for businesses to stop commercial activities on the Sabbath. To date, the initiative has not led to a reduction in the commercial activity on Saturdays.

There are additional aspects of the Sabbath regime that should be noted. Many special activities are planned for the weekly day of rest because most people are available then. Most sports events in Israel are held on Saturdays, because this is the shared day of rest. Athletes as well as spectators have to violate the Sabbath, so that Orthodox people in Israel cannot be serious, professional, competitive athletes. Orthodox people also complain that they cannot effectively compete in the job market or in business because their competitors operate on the Sabbath. These claims are made in political debates but have not reached the courts, unlike in the case of Bar-Ilan Road, where Orthodox residents petitioned the court to close the road throughout the Sabbath (and not only during prayer times).[30]

We can take stock now. Gas stations and movie theatres, and more recently restaurants and bars, are no longer an issue. Many gas stations are still closed on Saturdays, but this is a function of choice and demand, not of legal coercion. Demands to close, or to refrain from opening closed streets, are still very much with us. But these issues are raised mainly in main roads within or close to very religious neighborhoods. Internal roads within these neighborhoods are not used anyway. Even though most roads are open, and people do seem to travel a lot on the Sabbath, there is still no public transportation in most of the Jewish part of the country, and it is fascinating to see that this issue never reached the courts, and was not very visible on the agenda of anti-clerical politicians. It is also interesting to note that on all the current issues, public positions cut across the religious-secular divide.

The main issue is Sabbath commerce. On this issue, the law provides full protection to workers and imposes prohibitions on employing peo-

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[29] Similar bills were offered by the Israel Democracy Institute (IDI) as a part of its constitutional drive and by some MKs. I myself was a party to a similar agreement with R. Yoel Bin-Noon in the early 1980s.

[30] We saw above that in the 1970s a religious initiative to petition the court to prevent the operation of radio and TV on Saturdays failed.

ple. Nonetheless, about 20% of the work force is employed on the Sabbath regularly or occasionally. And it is now possible to find open shopping malls both on the highways and within some cities. Advocates of freedom of commerce on Saturdays and advocates of Sabbath as a shared day of rest both talk in terms of rights. The matter has now been determined as one of rights by the Supreme Court in both the context of traffic in religious neighborhoods and in the context of commerce on Sabbath. In both contexts, the court reached the conclusion that the rights invoked by the secularists do not support the overruling of the decision to close Bar-Ilan Road during hours of prayer, or the statute prohibiting work and employment on Sabbath. The rights discussed in the courts, however, were not the right to freedom of religion or from religion but rights to freedom of movement, freedom of occupation, and the right to have one's sensibilities respected by others.

III. A Matter of Rights?

The legal and social situation in Israel is a complex combination of arrangements and patterns. It may be used as a fascinating study of the interaction between law and society in a country with many religions and many attitudes to religion. In the case of Israel, the interaction between national culture and heritage, viewed as central to the modern nation-building of Jewish civilization and self-determination, and religious traditions of various intensities, presents special complexities.[31]

Yet I want to devote the rest of this essay to a single question: can these matters be reduced to discussions about rights? Should they be conceived in this way? It is known that, starting in the second half of the twentieth century, many controversial issues of public policy have been discussed in terms of rights discourse, especially human rights discourse. The choice of discourse has important implications. Notably, matters of rights are decided by courts, as the "forum of principle" and not by the political system as a matter of policy. Moreover, human rights are seen as pre-legal constraints on majorities, so that if something is defined as a human right, it may defeat not only a policy determination by a competent authority but even a statutory arrangement

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[31] For an extended discussion of various aspects of the debate on the Sabbath in Israel see *Dromi*, note 24 *supra*, at 172-262, and M. Gerzy and B. Zimmerman (eds.), The Seventh Day, 2001 [in Hebrew].

enacted by a majority in the legislature. This is as it should be. Human rights are seen in this way so they can function effectively as constraints on the power of states, and of majorities within states, to violate the dignity of individuals and groups. At the same time, individuals and groups often use the special strength of rights to promote their own vision of the good life. There is also the danger of an "imperialism of rights" and a resulting impoverishment of politics and the processes that usually go with political determinations. It is thus important to analyze issues in a way that helps identify whether they should be seen as matters to be decided by the analysis of rights, typically best done by independent courts; or whether they are the proper matter of policy determinations by political forces.[32]

Indeed, in the two clusters of matters that have reached the Israeli courts in the last decade – the closure of Bar-Ilan Road in Jerusalem for part of the Sabbath and the constitutionality of the laws prohibiting the employment of people on the Sabbath – the court conducted a full rights-based analysis. In both cases, the court upheld the challenged arrangement. Yet when we examine these situations more closely we can see that it is not at all clear that this is indeed the most productive conceptual scheme of dealing with the issues involved. It is not clear, in other words, that the rationales that make human rights such an important element of international law and morality, and such an important element of liberal democracies, apply to the kinds of issues and situations that we have been discussing so far.

IV. International Human Rights Law

Since we are talking about days of worship and about issues of state and religion, let us start with rights connected with religion. International human rights law of course recognizes freedom of religion and of conscience as rights. We can say that these two rights were some of the earliest rights to emerge in the struggles of individuals and groups against persecution. These rights require that people be allowed to perform their religious duties. It implies that people should be legally free to keep their religious day of rest even if it is not the day of rest recog-

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[32] I develop these points in *R. Gavison*, The Relationships between Civil and Political (CP) Rights and Social and Economic (SC) Rights, in: J. M. Coicaud, M. W. Doyle and A. M. Gardner (eds.), Globalization of Human Rights, 2003, 23-55.

nized by the society in which they live.[33] Obviously, having one's day of worship (and one's mandatory religious day of rest in Judaism) recognized as the general mandatory day of rest of the state (or even as one of the two days of the weekend in a five-day work week) helps religious people exercise their freedom of religion. It means that their burden, due to keeping their religion, is reduced, and it is easier for them to meet their religious duties or customs. It is therefore in the deep interest of religious people to live in a society that generally treats their religious day of rest and worship as an official day of rest. It also helps religious people (and traditional people) to identify with the society and feel at home in it. It may further help that cultural groups maintain their cultural cohesiveness. Yet none of these seem to be required by the rights of freedom of religion under international human rights law.

Thus, international human rights law seems to be silent as to the question whether it is permissible to impose a burden on persons who wish to keep their own day of rest, for instance by refusing to hire them or promote them or grant them welfare. It does not seem to include duties imposed on employers not to take into consideration the fact that certain workers will not work on their religious day of rest.[34]

Furthermore, international human rights law does not *prohibit* the choice of a day of rest of public offices on the religious day of rest and worship of the majority religion and does not see this practice as a violation of freedom of religion or conscience. Equally, it does not *demand* that the day of rest will be general or that it should be the day of rest

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[33] When most businesses did not work on religious days of worship, laws did not regulate the right of an employee to refuse to work on them. However, when the practice of Sunday work became more extensive, many countries did enact laws explicitly permitting individuals to refuse to work on their religious days of rest. Great Britain relaxed its Sunday laws and enacted the protective laws together in 1994. Scotland provides an interesting case because it never had Sunday laws but shops were in fact closed. When Scotland followed the British practices in the late 1990s, its workers were not protected until it granted them the right to refuse to work on Sundays in the Sunday Working Bill of 2003.

[34] Here we see again that one cannot talk generally of freedom of religion in this context. The right to freedom of religion means, at its core, that a person cannot be required to perform an action prohibited by his religion. But different religions impose different limitations on days of worship. Judaism seems the most limiting in that it imposes a total prohibition of any kind of work on the Sabbath. For the difference among religious traditions on the day of worship/rest see *Gavison*, note 4 *supra*.

identified by the culture or religion of the majority. It seems to be agnostic on this question.

International human rights law recognizes some rights of minorities, among them the right to keep their religion.[35] However, there is no specification whether this only means that people will be allowed to pursue their religions without interference, or whether the state has to recognize their customs in any way or to positively facilitate their ability to maintain their culture.

In fact, the *worship* aspect of these days does not seem to be protected by human rights law. But there is a second element of our subject – days of *rest*. This belongs to the realm of rights of workers. While the details of the rights of workers are not among classical human rights, international law has developed to include significant international standards in this field. The Convention of Weekly Rest in Industry of 1921 of the ILO establishes that any worker in private or public industry should enjoy a weekly rest of no less than 24 consecutive hours. Appendix 2 of the convention recommends that this weekly rest will be common to all workers and be granted in the customary or traditional day of rest in that state or region. It is in fact recommended that the weekly rest will be extended to 36 hours where possible. The convention was signed and ratified by 113 states, including Israel.

Another convention that deals with the rights of workers is the Convention Concerning Weekly Rest in Commerce and Offices of 1957, which was also signed and ratified by Israel. Article 6 of the convention states that (almost) every worker is entitled to an uninterrupted weekly rest period of at least 24 hours, and it recommends that the weekly rest period will be common to all the workers in one working place. It also recommends that the weekly day of rest will be the day of rest according to the traditions or customs of the country, while respecting the traditions and customs of religious minorities.

And in November 1993, the European Council published a directive concerning the organization of work time. Section 5 provided:

> Article 5: weekly rest
>
> Member states shall take the measures necessary to ensure that, per each seven days period, every worker is entitled to a minimum unin-

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[35] The primary source is section 27 of the Covenant on Civil and Political Rights, and there are more detailed treatments of the rights of minorities in other international documents.

terrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

The minimum rest period referred to in the first part shall in principle include Sunday.

Yet the second paragraph was nullified by the European Court of Justice,[36] saying that "the council has failed to explain why [Sunday] is more closely connected with the health and safety of workers than any other day of the week." Nonetheless, nine of the then 15 EU states had Sunday as their weekly day of rest.

The indeterminacy of international human rights law on this subject can be seen by the fact that legal arrangements of this sort vary widely among states.[37]

We can conclude that the constraints of international human rights law on our questions are very limited: people should not be legally required to violate their religious law and work when their religions forbid them to work. Workers are entitled to a weekly rest of 24 to 36 hours. It follows that arrangements which require by law that persons will work on days in which their religion forbids working, or arrangements not allowing workers the minimal weekly rest, can be faulted as violations of human rights. It also follows that other arrangements are all permitted, *as far as human rights go*. It is permitted to specify that the country will have shared days of rest – but it is also permitted to allow social and

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[36] Case C-84/94 *United Kingdom v. Council*, European Court Reports, 1996, page I-05755. It can be found at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0084.

[37] In the US the federal Fair Labor Standards Act mentions that in general the work week will be of five days, preferably Monday to Friday. Many states do not regulate the subject at all. Others define Sunday as a day of rest. The German 1994 Act on Working Time includes a general prohibition of work on Sundays. Work permits can be granted for various reasons, including international competition. In fact, shops and businesses are all closed on Sunday due to the demand of powerful labor unions. England does not have a national statute regulating the issue, and has not accepted the ILO convention. Usually, the work week is Monday to Friday, but 50% of the workers work Saturdays and 40% work on Sundays. The weekly day of rest is regulated in detail in the French Labor Code. Sunday is a 24-hour day of rest, with some exceptions (including shops, culture and entertainment). Workers in these industries get one free Sunday every two weeks, and an alternative day of rest in the week they work on Sundays. In Denmark a weekly day of rest is of 36 hours, preferably Sunday. Shops must be closed on Sunday unless they are given a special permit.

cultural forces to determine this. It is permitted to set a five- or six-day work week. And it is permitted, but not required, that the shared day(s) of rest will coincide with the weekly day of rest and worship under the majority religion or according to the majority culture.

Many states specify that there is an official day of rest, and many states choose that day according to the day of rest of their majority religion. Moreover, even in the states that do not have such declarations, it is often the case that there is a clear social distinction between the day of rest identified by the majority religion and other days of the week. This situation may be clearer in countries and communities which are more deeply religious, but it is usually noticeable in all countries and all communities.

For my purposes, it is important to note that the enforcement of an official day of rest involves much more than protecting people's rights to freedom of religion or workers' rights to a weekly extended rest. It means that on a certain day, all or most working activity ceases. This includes private businesses operated by their owners, or workers who prefer to work either 7 days a week or to work on the day of rest of most others. Families can spend the day together, and parents are at home on the same days that their children are off from their schools. The cultural significance of these facts is very strong. It goes much further than the question of the protection of rights. We saw that the Israeli Supreme Court held that this arrangement does not offend human rights. At the same time, the court failed to mention that the law is honored more in its breach.

V. Should the Situation in Israel Be Changed?

As we have seen, debates about the nature of the Sabbath in the public sphere are many and often deteriorate into violent clashes between religious groups and those who resent the limitations that are imposed by them. In addition, these debates often translate into legal debates which are taken to the courts as either criminal prosecutions or petitions against the authorities.

Many Israelis feel that tensions between religious and non-religious Jews are among the deepest and most dangerous rifts in Israel. Some Jews are willing to resort to violence in the struggle against religious coercion, in the form of closing streets or prohibiting cinemas on Sabbath, while other Jews are equally willing to prevent others from driving or

shopping on the Sabbath. Days of worship and of rest do not converge in Israel not just because of intense debates about the meaning of the Jewishness of the State, but also because of cultural and economic tensions between religious and secular Jews. Those who are not observant and are therefore not limited in their conduct on the Sabbath often advocate that all legal limitations on freedom of commerce should be removed.[38]

These tensions also create great gaps between the law on the books (which on the whole respects the Sabbath and seeks to prohibit commerce and trade on the day, although it does not command worship of any kind) and social reality.

Against this background, the debate concerning the proper regulation of the Sabbath has become more complex. While Orthodox Jews clearly hoped to have full observance of the Sabbath in Israel, they were willing to accept the original distinction between private and public and accept that the law would only seek to structure the different nature of the Sabbath in public. Now, the observance of the Sabbath in public has been seriously eroded, and they debate among a few *bad* alternatives: they can concede to the new reality, accept that their lifestyle on Sabbath is going to become very different from that of the non-observant; or they can seek to enact laws that may be impossible to enforce. There are also nuances in the internal observant debate, over whether to seek agreement on permitting cultural activity, for example, but not commercial activities, or whether to forgo the distinctions altogether, since as far as religion goes both of these kinds of activity may involve work which is equally prohibited on the Sabbath. Moreover, these agreements are seen by some in the religious community as forbidden cooperation with violation of the Sabbath, as if its rules could be bent or softened. When we add skepticism about enforcement, some Orthodox people prefer not to reach such agreements. On the non-observant side, the debate is whether to cooperate in maintaining the distinctness of the Sabbath as a cultural form of Jewishness by agreeing to some legal limitations of action on the Sabbath or whether to seek full individual freedom to treat that day of rest as one wishes, refusing to accept any limitation of freedom imposed for religious reasons. Interestingly, both

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[38] It is important to note that most politicians who voice anti-clerical and anti-religious sentiments do not challenge the fact that schools and government are closed on the Sabbath. They resent the fact that people are not allowed to decide how to spend their day of rest because their available options are reduced.

sides feel that the *status quo* has been eroded against them. So the road towards a social agreement that might make the enforcement of the laws easier is not so easy. At the same time, many believe that the tensions surrounding differences in religious observance are extremely unfortunate and want to lower these tensions which create antagonism and alienation between the groups. They believe that the struggles over commercial activities in the Sabbath do not succeed in reducing 'religious coercion,' and that they weaken the strong cultural bonds of Israeli society, making it more individualistic, commercialized, and less attentive to the interests of weak populations, who are those that have to work seven days a week and miss the benefits of resting with their families and friends.

The challenge is thus both to find the best arrangement and to find a way to persuade the various groups that this arrangement is indeed better for them than the *status quo*, with its great gap between the law on the books and the law in action.

There have been a number of attempts to deal with this issue. I want to present here the arrangement proposed in a special covenant on state-and-religion issues among Jews in Israel proposed by an Orthodox Rabbi – Rav Yaakov Medan – and myself – the so-called Gavison-Medan proposal. I then discuss the forces preventing the adoption of this (or a similar) proposal, and compare them with the rhetoric of the *Design 22* opinion. I conclude with an analysis of the Israeli situation (within the Jewish community) as regards the relations of religion and state, society and culture, and rights and policies.

1. The Gavison-Medan Proposal

An edited version of the chapter dealing with the Sabbath is presented here to exhibit the special structure of the document and the texture of its reasoning. [39] The basic tenets of this proposal are shared by most at-

[39] As mentioned above, the New Covenant on State and Religion Issues among Jews in Israel (2003) is a comprehensive attempt to reach agreement on these matters. Each chapter includes a joint proposal and explanatory notes by the two authors. Rabbi Medan seeks to argue that the proposal does not violate Jewish law, while I show how it is consistent with liberalism and the human rights tradition. Chapter One deals with the Law of Return and who is eligible to immigrate to Israel under its provisions, Chapter Two with marriage and divorce, and Chapter Three is devoted to the Sabbath. Condensed versions of the

tempts to reach an agreement on the Sabbath. What is unique about the Gavison-Medan covenant is its scope, comprehensiveness, detail and structure.[40]

Chapter Three: The Sabbath

1. A Basic Law will establish the Sabbath as the official day of rest of the State of Israel.

2. Government offices, educational institutions, factories, banks, services and commercial establishments will be closed on the Sabbath. The prohibition will apply in all places. Essential industries, hospitals and services will operate under a limited regime.

3. Employees have the right not to work on the Sabbath. Non-Jewish employees have the right not to work on their religious days of rest. No Sabbath-observing individual will be discriminated against in terms of hiring or promotion in the workplace. A self-employed person will not ask employees to work on the Sabbath. Workplaces operating on the Sabbath will engage employees to work on that day on a rotating basis, and to the extent possible will give Sabbath-observing employees the opportunity to perform higher-paid work during the week.[41]

4. It will not be forbidden for restaurants and places of entertainment to operate on the Sabbath, provided they do not disturb public peace. It will not be forbidden for a limited number of small grocery stores, gas stations and pharmacies to operate on the Sabbath.[42] A permission to operate on the Sabbath will be awarded on a

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document in Hebrew, English and Russian are available at www.gavison-medan.org.il. This text is an edited version of the text on the site. It has been shortened to give just the gist of the proposals. Notes were added by this author.

40 For a discussion of the Gavison-Medan Covenant in context of other attempts to reach agreements see *Dromi* (ed.), note 24 *supra*.

41 This provision is meant to deal with the fact that under Israeli law, people who work on the Sabbath are entitled to higher pay (to compensate for agreeing to work on the day of rest).

42 The special formulation was adopted so that the proposal does not include explicit permission to desecrate the Sabbath, which is forbidden under Jewish law. R. Medan's view was that he could not sign a proposal that seems to endorse the *permission* to desecrate the Sabbath on its merits, but he could accept that *state law does not prohibit* such activities.

rotating basis, for a special fee.[43] Restaurants, museums and other places of entertainment that are open on the Sabbath will close on another day of the week.

5. Transportation routes will remain open during all hours of the day and all days of the week. In towns or neighborhoods having a solid majority of Sabbath-observing residents, or in other locations where traffic should be limited to certain times, transportation routes may be closed for all or part of the Sabbath as per an authorized decision of the local authority. Transportation arteries will not be closed for reasons of Sabbath observance.

6. Limited public transport will be permitted on the Sabbath on a reduced schedule, in order to afford mobility to those who depend on public transport while preserving to the extent possible the character of the Sabbath in the public domain and restricting the need to work on the Sabbath. It is recommended that Sabbath public transportation will not be operated by the companies operating during weekdays, and that the vehicles used be smaller than regular buses.

7. The possibility of transferring sporting and other events which are currently held on the Sabbath to weekdays will be examined.

8. A comprehensive effort will be made to adopt a five-day work week, in order to enable joint social, family, sporting and cultural events on days other than the Sabbath. An employee required to work on the Sabbath will not be required to work on the other general day of rest as well.

9. Sabbath arrangements will not apply to local authorities with a majority of non-Jewish residents.

10. Particulars of the arrangements, the specification of essential institutions and Sabbath frameworks will be determined by special local committees. For arrangements on the national level, the committee will be chosen by the Prime Minister. With regard to local arrangements, the committee will be chosen by the head of the local authority and the Interior Minister, in consultation with representatives of all municipal parties. The above arrangements will be strictly and systematically enforced in order to effectively preserve the character of the public domain on the Sabbath.

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[43] The idea behind this section is that the fee should balance the financial gain made by places open on the Sabbath, so that there will be less of an unfair competition between places open on Sabbath and those that are not.

Main Points of Ruth Gavison's Explanatory Notes

I do not see the proposed Sabbath arrangements as a form of religious coercion. My reason for assenting – as a secular Jewish woman living in a state that wishes to preserve its Jewish-Hebrew public culture – is my own independent wish for a prominent and significant expression of the uniqueness of the Sabbath within the Israeli public domain. I concede that in this matter the proposal is paternalistic. The proposal does limit people's freedom. But the limitation is not based on religious grounds, but on a combination of cultural and social concerns and the rights of workers.

The proposed arrangement is important because it bases the legal rules on a social agreement rather than on laws and the determinations of courts. This is part of the attempt to regulate matters concerning state and religion by agreement rather than adjudication. In addition, there are five key gains for the non-observant public:

1. It is made clear that the public discussion of the Sabbath in the public sphere in Israel is a matter of shared culture and not of the enforcement of religious law.

2. There is an explicit agreement that Sabbath arrangements are not designed to compel Sabbath observance.

3. In the agreement, for the first time, there is reference to those whose freedom of mobility on the Sabbath is curtailed for lack of public transportation (clause 6).

4. There is an explicit recognition that the operation of restaurants and commercial places of entertainment on the Sabbath is not anomalous, but appropriate in view of the character of the day (clause 4).

5. Decisions regarding the form of the Sabbath in a given town or neighborhood are made by residents and their local representatives, so that they do not become pawns of national politicians.

True, the secular public will be obliged to organize their purchases somewhat differently and to forgo shopping on the Sabbath (other than at a small number of convenience stores that will be open), but I believe the gain in this case far exceeds the loss. Large scale commerce on the Sabbath is inconsistent with my view of workers' rights and the cultural importance of the Sabbath.

Does the proposed arrangement offend Israel's Basic Laws on human rights? I do not think our proposal is inconsistent with the Basic Laws. There is no right to conduct commercial activity seven

days a week or 24 hours a day. Even if there is such a right, the restriction for purposes of enforcing a general day of rest, which is the same day as the traditional Jewish day of rest and worship, is for the sake of a worthy objective, and the proposed limitations do not exceed what is required. There may be disagreement with one or another component of the restrictions, but there is no sweeping constitutional claim here.

Would it be appropriate to designate a different general day of rest? The argument has been made that in a multi-cultural society a religiously "neutral" day of rest should be selected, in order to encourage "civic nation building" as against tendencies to emphasize ethnic or religious "nations." It may well be that in principle this is indeed the appropriate solution for strong multi-cultural societies, but it does not seem practical for any existing society. In all such societies, it is not practical to have a "neutral" day of rest because many people might not work on both that day and on their cultural day of rest, and the working week might be divided into two short working parts. The solution does not seem fitting for the only country in the world with a Jewish majority and which was established in order to enable Jews to live in the only society having a Jewish-Hebrew public culture.

In my view the proposal is also advantageous from the standpoint of the religiously observant. They are not required to approve or validate the activities of others on the Sabbath, only to accept that the common legal framework is not designed to enforce religious commandments on those who do not wish to keep them. While our proposal is more liberal than the current legal situation, it keeps the uniqueness of the Sabbath much more than the present social reality does, in which there is extensive commercial activity on the Sabbath.

Main Points of Rav Yaacov Medan's Explanatory Notes

The importance of the Sabbath for the religious public is clear. For the secular public, the Sabbath can have at least three values:

1. It gives them respite from the daily involvement in work and the pursuit of money and a livelihood.

2. It is a central mode of expression of an overall Jewish – not necessarily religious – identity. Even Ahad Ha'am, a thoroughly secular Zionist thinker, viewed Sabbath observance as a national

value, coining the phrase: "More than the Jewish people kept the Sabbath the Sabbath kept watch over them."[44]

3. Mutual concessions on the issue of the Sabbath, which has been a perennial stumbling block in religious-secular relations, may serve as an opening for a renewed healing process in Israeli society.

As an observant Jew, I accept the fact that the value of keeping the Sabbath in the public arena does not nullify, at least from a practical point of view, the value of respecting the individual's freedom to act in accordance with his own beliefs on the Sabbath, or in any other disputed sphere (clause 4). Nevertheless, the Sabbath should take precedence over the economic interests of commercial bodies – so factories and commercial establishments will be closed on the Sabbath (clause 2).

In order to prevent discrimination against salaried or self-employed observant individuals in favor of the secular, the agreement stipulates that in principle employees will not work on the Sabbath – and in workplaces that do operate on the Sabbath, such as places of entertainment, as specified in clause 4, Sabbath employment will be conducted on a rotating basis (clause 3).

When formulating the proposal regarding the Sabbath, I had three principles in mind:

First principle – To instill in the public mind the conviction that *there is a solution to the perpetual war between observant and secular Jews in Israel that is not oppressive and coercive*.

Second principle – To refrain as much as possible from violating the religious prohibition against "creating pitfalls for others." Nowhere does the covenant grant permission or exoneration for desecrating the Sabbath. What it does do is *reduce state intervention in the form of restrictions on the Sabbath*. Accordingly, in my opinion, the proposal does not pose a distinct halakhic problem.

Third principle – To weigh the damage the proposal inflicts on the character of the Sabbath, not only against the ideal image of the Sabbath but also against existing reality. This reality can be measured on two planes: the common situation at present on the streets of most cities reflects an extensive amount of Sabbath desecration;

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[44] For a detailed account of the thinking of early Zionist leaders, mostly secular, on the Sabbath and its importance for Jewish identity, see *Zameret*, in: Blidstein, note 10 *supra*.

and contemporary judicial decisions presage a trend towards expanded Sabbath desecration.

I am aware of the serious concerns regarding the future if the proposal on the Sabbath is adopted (the price is high, in terms of Sabbath observance) and I have given them a careful consideration, while weighing them against the dangers of a future in which no effort is made to reach an agreement with the secular public, and affairs are allowed to gather momentum. There are dangers in both scenarios, but my conclusion was that the hazards of quietism are not only more palpable, they are more severe.[45]

2. Prospects and Arguments Regarding the Gavison-Medan Proposal

The Gavison-Medan proposal in general, and the section concerning the Sabbath in particular, were warmly received by many secular and religious leaders, who shared the view that it was important to base regulation of these issues on agreement rather than on laws and judicial determinations. One private bill called for the implementation of the

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[45] Rav Medan was criticized by religious leaders for joining in an agreement that at least implicitly legitimizes non-observance of the Sabbath by Jews. The critics said that in the long term the costs of such an agreement will be higher than its alleged benefits. Medan responded that the refusal of the religious leaders in the 1980s to reach a similar agreement when it was proposed created the reality that today so many malls are open. At that stage, the secular stood to gain more because the legitimation of movies and restaurants was not yet taken for granted. He argues that if a social agreement among leaders would have been reached then, the commercial picture today would have been different. This is of course speculative. The trend towards commerce on the religious day of worship has been universal. At the same time, there are differences among states as to the extent of Sunday commerce, and Israel seems to be among the most expansive. To the claim that it is impossible to reverse the trend and effectively close commerce on the Sabbath, Medan says that it should not be more difficult than evacuating the settlers from their homes in the framework of the disengagement plan…. Indeed, in September 2005 Israel pulled out from the Gaza strip, evacuating thousands of people and destroying their settlements. The disengagement was very difficult, but it was a one-time event. It is not clear that it can be compared with a weekly struggle against deeply held habits. For a more cautious approach see *J. Shulevitz*, Slate Magazine, July 2005, available at http://www.slate.com/id/2123283/?nav=navoa.

Sabbath proposal,[46] and it was endorsed by the Forum of Mayors. The Israel Democracy Institute (IDI) has advanced a similar Sabbath Bill as a part of its proposal for a constitution for Israel.[47]

Despite this activity, and despite the apparent broad agreement, it seems unlikely that this proposal or a similar one will be enacted in the near future. The religious parties are, for the most part, interested in the initiative but are reluctant to appear to be the sole or main movers. For them, pushing for this kind of legislation could be construed as legitimizing what should not be legitimized. They would much rather accept this as law initiated by others. Secular forces are mostly not willing to bargain for a law limiting commerce for the sake of gaining legality to culture and entertainment simply because the *status quo* in reality gives them both, albeit due to non-enforcement, or through fines which are anyway much less than the proceeds of Sabbath trade. The official recognition of the legality of restaurants and entertainment on Sabbath is not worth the political concession in terms of commerce. As Medan indicates, it is not so much the secular liberal politicians as the economic interests who stand to lose their best day of trade. Interestingly, the Labor Union has not joined in this "culture" war.

So we do not have a real debate concerning the legal arrangements. Rather, it is a debate about social reality. The "state" awarded the religious sector a choice asset by enacting laws that restrict work and commercial activities on Saturdays. Now the same "state," via its enforcement mechanisms, undermines the legal arrangement that it has itself enacted. This may suggest that the past reality, too, was not really a matter of state enforcement but a public willingness to maintain the social practices involving limited activity on the Sabbath.

This becomes even more intriguing when we look closely at the *Design 22* opinion given on April 4th, 2005.

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[46] Sabbath Day Bill, Draft Bills 3980 by MK Naomi Blumenthal and Amram Mitzna. For Hebrew version of the draft bill see http://www.knesset.gov.il/privatelaw/data/16/3980.rtf.

[47] For the constitutional drive of the IDI see their site, available at www.idi.org.il.

3. The *Design 22* opinion

When I was writing my explanatory notes to the Gavison-Medan proposal in 2003, the question of the relationship between the statutory Sabbath regime in Israel and the human rights basic laws was still theoretical – Basic Law: Human Dignity and Freedom only applies to new legislation, and Basic Law: Freedom of Occupation had a long grace period. The *Design 22* decision was the first in which this challenge was faced squarely. [48]

Petitioner, a company convicted for employing people in violation of the Work and Rest Hours Law 1951, claimed that the law was inconsistent with the right to freedom of occupation, and that it did not meet the conditions of the limitation clause. Petitioners agreed that workers were entitled to a weekly day of rest but argued that they should be allowed to choose their day of rest in a flexible way and that there should not be a shared day of rest for Jewish communities in the country as a whole. Alternatively, petitioners asked that their business be recognized as deserving a special permit to work on the Sabbath based on their need to withstand competition.

The President of the Israel Supreme Court, Aharon Barak, delivered the main opinion. The right of a person to choose his occupation unless restricted by law, he writes, was recognized by Israeli law before 1992 (par. 5). After the "constitutional revolution" the right received constitutional status (par. 6). The grace period under the law having elapsed (par. 7), he therefore moves to examining the case through the mechanism established by the Basic Law, consisting of three questions:

1. Does the arrangement infringe on the right?
2. If so, is its purpose legitimate?
3. Is the infringement proportional?

When the answers to the second or third questions prove negative, the question becomes:

4. What is the constitutional remedy?

1. Barak gives a quick positive answer to the first question in pars. 9-10. The law states that "every citizen or resident of the state has the right to practice any occupation, profession or business." His test for this conclusion is quite broad. Any arrangement that limits the freedom of a person to pursue an occupation in the way and manner he wishes

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[48] Note 26 *supra*.

to do so constitutes a *prima facie* infringement of the right, generating a full constitutional analysis. That includes even a technical statute specifying hours of opening shops etc.[49]

2. Barak then discusses whether having one day of rest, and letting people choose the one that fits their religion, fits the values of Israel as a Jewish and democratic state. Barak affirms that Israel is indeed Jewish as well as democratic, and states that the choice of the days of rest fits the values of the state as both Jewish and democratic, because within the Jewish tradition itself the rationale of the Sabbath is both religious and social. Barak also refers to international agreements and the customs of other nations in which the national day of rest is determined by the majority's religion with recognition of the freedom of people to choose as their day of rest the day under their own religion or culture.

The combination of the social and the religious-national goals of the legal arrangement, says Barak, meets the requirement of being an acceptable goal of the legislation (par. 19-21). He adds that the wish to maintain a national, shared, day of rest, beyond giving workers the right to have a day of rest each week, is also legitimate, and is reflected in the legal arrangements of many countries (par. 22). Finally he rejects the claim that designating the day of rest by the religion of the majority constitutes religious coercion (par. 23).

3. Barak further finds that the arrangement of the law is proportional (pars. 24-26). Finally, Barak rejects the claim that petitioners are entitled to a special permit to operate on Sabbath.

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[49] The court ultimately upholds the legal arrangement in this case. However, the test seems too broad. It means that every regulation of business, including the most technical and obvious, will be seen as a *prima facie* infringement of the right to freedom of occupation, and will thus be examined under the special mechanism of rights violations, including questions of "proportionality." Such an expansive interpretation of the first question may mean that the power to evaluate and adjudicate all such arrangements is relegated to unaccountable courts. Such a broad interpretation of the right to freedom of occupation means that every conceivable legal arrangement will become uncertain until it is upheld by the court after a full constitutional evaluation. Does a law stating that no one can practice medicine without graduating from a medical school (and passing an examination) constitute an infringement of the right to freedom of occupation, or is it a legitimate policy that does not constitute even a *prima facie* infringement of the right? The main difference between the formulations is the scope of *prima facie* rights and therefore the institutional implications to the division of labor between legislatures and courts.

Judge Miriam Naor concurs and adds that a flexible weekly day of rest is unacceptable because it will in fact relegate the power to determine the workers' day of rest to the employer, and will create potential for discriminating against observant Jews who will be less likely to be hired by an employer who operates their business on Saturdays.[50]

Judge Procaccia (who had given the decision in *Kaplan*) also concurs and adds that the two goals of the legislation – the social and the national-religious – need themselves to be balanced so that people will have the effective liberty to give their day of rest a content of their choice, suitable to a pluralistic and tolerant society. In fact, Procaccia recommends that something like the Gavison-Medan proposal be implemented via the section of the law authorizing the minister to give permissions to operate on Sabbath to various businesses connected with culture and entertainment. She agrees that commerce on Sabbath should not be included under that section.

While all the judges agree that the Sabbath laws serve a combined cultural, religious and social function, none of them addresses the fact that the social aspect is in fact disregarded in practice, and they do not really address the petitioners' claim that Sabbath limitations create an unfair advantage to those who employ people seven days a week.

4. Analysis

Design 22 and the other petitioners will continue to trade on Sabbath and pay fines. Alternatively, they will look for non-Jewish workers.[51] The law, held constitutional in the opinion, is simply irrelevant for out-

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[50] Creating cogent or mandatory arrangements and not discretionary ones is common as a way to protect vulnerable workers against more powerful employers. Thus, Israeli law gives women after having given birth a *mandatory* maternity leave of three months. A group of women petitioned for the leave to be optional, but the legislature declined to change the arrangement, saying that this might be used to pressure mothers to return earlier than they would choose.

[51] Out of town malls are less vulnerable to the pressures of municipalities who have Sabbath legislation limiting the opening of businesses on Sabbath. Yet even within towns, there are big differences between places where there is a large proportion of observant Jews and those places where non-observant Jews are the majority.

of-town shopping malls and for a growing number of malls within cities.

It follows that the goals held worthy and justified are not achieved – and the law and its enforcers do not enforce it. The goals which are undermined by non-enforcement are not only the national-religious-cultural ones of maintaining the Jewish character of the public sphere, but also the aspect of the rights of workers and the interest of the community in a shared day of rest devoted to matters other than toil, routine and preoccupation with material matters.

It seems that the flag of the fight against religious coercion is being mobilized to promote a commercial society, whose shared public culture is impoverished. The struggle is not mainly a matter of religion, not even of Jewish particularism, but simply a matter of the ever growing power of market forces and commercial interests.

Litigation cannot change the patterns of enforcement.[52] The present situation is not in fact a struggle between state and religion or between religious and secular militants. It is a decision by default of a cultural quest for identity in Israeli society. Religious people may resent having to pass through a busy street on the Sabbath. It is unlikely that a shopping mall will be opened in their neighborhoods. So this is not about people's right to practice their religion or about people's right to spend their day of rest in any way they choose. It is about whether or not Israel will maintain a distinct cultural public sphere, and whether this distinct public sphere will include a weekly cycle that gives the Sabbath a special place.

In a way, the mere fact that Saturday is Israel's official day of rest means it is different. Children do not go to school, and most parents are also home with them. The debate is on whether it should be different in additional ways. In particular, the question is whether Sabbath can indeed be a shared day of rest and recreation for all, and a day fitting religious duties for those who observe. All, including religious people, agree that the law of the state should not require anyone to observe the religious duties of the day. But should the state undertake the somewhat pater-

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[52] The fact that some courts found creative ways to nullify prosecutions against those who employed Jewish workers on Sabbath led to making the offences under the law administrative offences, where offenders can be fined without trial unless they ask to be tried. *Design 22* in fact did take this route and was indeed convicted. The petition resulted from the conviction. While this principled decision may have simplified prosecutions for violation of the Sabbath regime, enforcement is minimal and has no deterrent effect.

nalistic function of structuring the Sabbath in such a way that will facilitate a consistent difference between the work days of the week and the one day which is different? Should it be permitted, or obliged, to expend resources on enhancing the feasibility and the availability of specifically Jewish ways of making the day distinct?

I believe these are important questions. For my purposes here it is important to note that they are not *legal* questions at all. They have to do with the role of the state, as the political framework, in maintaining or encouraging not only individual (and even collective) rights but also the fabric of society and its cohesiveness. It is not surprising that the court in its *Design 22* decision does not address them. What is needed here is not the declarative upholding of the laws as not inconsistent with the right to freedom of occupation. If there is an aspect of human rights here, it is not mainly about rights to religion or from religion. [53] We do need a much more decisive analysis of the situation in terms of social rights and the rights of workers. We also need to recognize that a central issue of the identity and nature of the shared day of rest is cultural. Most cultures, Judaism included, are (at least) strongly connected with religions.[54] Yet a public culture cannot exist without social practices. Most social practices cannot endure if they are not enforced even against the wishes or interests of some who want to change them. Thus, the issue is mainly a matter of the decision of society, a majority of which is no longer religious, about the kind of social norms and public culture it wants.

VI. In Conclusion: Some Notes for Further Thought

I have mainly discussed legal and social issues stemming from the fact that within the Jewish majority in Israel there is a long and complex debate about the identity of Jewish society in Israel. Orthodox Jews keep the Sabbath because this is a part of their religious way of life. I argued

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[53] The right to freedom from religion, which is the right invoked by most challenges of Sunday laws in the USA and Canada, is probably not included in Basic Law: Human Dignity and Freedom, which anyway cannot be invoked to challenge a 1951 statute. Nonetheless, Barak's analysis included a paragraph dealing with that right and he mentions foreign decisions which concern these other challenges.

[54] I say "at least" because my colleague, R. Medan, would say that Judaism is, and has always been, defined by religion.

that the debate about the public character of the Sabbath is not about religion or about the sensibilities of Orthodox people. Orthodox Jews have lived for hundreds of years among non-Jews, and they are well accustomed to living among people who do not observe the Sabbath. The practices in Israel, even as they are now, are more suited to the interests and needs of observant Jews than life in any other Western democracy. Orthodox Jews do not claim that their situation in the USA or in Europe is a violation of their rights. It is obviously true that life in Israel is more limiting on the Sabbath than life is on Saturdays in the West. But life in Israel on the Sabbath is not more limited than life is on Sundays in a number of Christian countries. The countries who decide to keep strict Sunday laws do not violate the rights of their residents, including those which are not Christians or those who do not observe. This, too, suggests that this is not really a matter of human rights or freedom of religion or from religion.

The intensity of the debate in Israel is connected both to the strength of economic forces and individualistic tendencies but also to the political undercurrents of the debate among Jews about the implications of the Jewishness of the state, and the very legitimacy of maintaining this distinctness. While most Jews – Orthodox and secular alike – believe that Jews have a right to national self-determination in Israel, it is not always clear what makes non-Orthodox Jews distinct, and whether they do belong to the same "nation" as Orthodox Jews. Ethnic nations are assumed to have some primordial, cultural, historical characteristics that make them distinct from other nations. In part, the debate about the Sabbath is also one about the cultural identity of non-Orthodox Jews and the nature of their ties with other Jews, in Israel and abroad. This context gives the debate about culture an additional dimension, both among Jews and in the relationships in Israel between Jews and non-Jews.

The limits of law and the inapplicability of rights discourse are relevant when debates are among people of the same culture, identified in our context by the same accepted weekly cycle. They are doubly relevant in states, including Israel, where there are a number of distinct cultural and religious communities. If we concede that the state may encourage the cultural cohesion of its majority – does this impose obligations on it towards its minority groups and cultures? Are these obligations exhausted by rights, individual and collective? Do they include an obligation of equal treatment or funding of all cultures? Do numbers matter? How do we answer these questions regarding communities which have

a different time cycle than the majority, whose day of rest/worship is different and has different customs?[55]

I think the courts in many countries were right to reject the claim that the best arrangement is to guarantee workers at least one day of rest a week according to their choice and the needs of the workplace. However, choosing Sabbath may make sense for an all-Jewish society, while Israel has a large indigenous population (composed mainly of Moslems, Christians and Druze) and many non-Jewish immigrants. The West has solved some of the difficulty by moving to a five-day work week, which was quite convenient for Jews.[56] Accommodating all groups by recognizing all their days of rest on an equal basis may cause serious practical problems, as well as tensions about symbols and fears of social disintegration. We should add to this the benefit in having one shared day of rest across the whole civic group that enables joint cultural activities across religious and cultural lines.[57]

On the other hand, although there are important social and cultural gains to be made by choosing as a day of rest the one identified by the majority's religion it is easy to see how alienating it may be to live in a society which views with deep significance a day different than one's own religious day of rest. Even if the connotations of the day are not exclusively religious, some respect for the rights of individuals to maintain their distinct culture should be given to minority groups. In some cases, these should be aspects of a voluntary freedom of association, in others it may include further recognition.[58]

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[55] I talk more about this aspect of religion and culture in *Gavison*, note 4 *supra*.

[56] Convenient in the sense that Jews could stay at home on Saturday without being perceived as different. The commercial aspect is still problematic, for the kinds of limitations imposed by Judaism mean that many options available to others are closed for Jews.

[57] One shared day may be good in a society where religion does not impose heavy limitations on believers. Thus the shared day of non-work may be a day in which all people may be free to join in other activities, irrespective of religion or denomination. Islam and Christianity to a lesser extent may permit this. Judaism's Sabbath regime, with its limitation on travel, writing and using electricity, is more complex.

[58] Rights to culture are notorious in creating internal difficulties for members who are discriminated against within the group. This applies to women and children but may also apply to those who want to become secular or less traditional in a minority community defined by its traditional norms. It seems

Above I stressed the limits of the law, but law may prove to be indispensable. If it is true that we cannot leave the choice of a shared day of rest to individual patterns of preference and to market forces, these must be enforced by effective social norms and forms. If and when social norms are effective enough, laws may indeed become redundant. But if these norms are weakened, among other things because many people do not observe the religious traditions involved, the laws of the state may be needed for society to maintain the level of cultural cohesion which is necessary for its continued health. The laws cannot replace the culture or force people to keep it. Nonetheless, the laws may be necessary to maintain the culture. If we concede that a robust culture may be important for individuals and societies, the limitations such laws may impose on individuals who are not concerned about the culture themselves may nonetheless be justified. Naturally, the culture will be more robust if more of its members do not need legal constraints to follow the rules and the traditions. It will be stronger when individuals feel that they are enriched by the culture and that keeping its traditions makes their lives fuller and more meaningful. Religious leaders want people to feel the same way about religion itself. But in a free democracy they cannot enlist the power of the state to provide the legal bolstering that may facilitate observance of a religion in the same way that they can enforce and reinforce some aspects of social culture. This is as it should be. While religion often does not see itself as a matter of choice at all, it must be seen as voluntary by the state. This is the case irrespective of the question whether the state has strong separation (including non-establishment) or only weak, neutral separation (privatizing religion but permitting equal support of religion by choice).

I have argued that, on closer inspection, it seems that it is wrong and misleading to cast the current controversy over Saturday commerce in Israel in terms of state and religion, or the tension between days of worship and days of rest. The issues involved are not freedom of religion or freedom from religion. They raise a central, often overlooked, question of the role of the law and the state in maintaining public culture(s); the complex relationships between different conceptions of the "correct" public culture, informed by a variety of religious, cultural, national and ethnic considerations; and the need of a state to create a bal-

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that this is indeed the case in some contexts within Israel. The political conflict between Jews and Arabs, for instance, makes internal debates among Arab communities about religion vs. secularism or conservatism vs. liberalism more fragile and low-key.

ance between strengthening the cohesion of its civic population as a whole while needing to recognize the pluralism of cultures and lifestyles among various groups.

In some ways, public culture cannot be divided (while in most cases it can, and should be). When this is the case, the single public culture cannot usually fit all groups equally well. How to construct the public sphere in such societies is above all a matter of deep political prudence. Framing the issues in terms of rights in general, or freedom of and from religion in particular, may be misleading and inefficacious.

Human Rights and Religious Duties: Informed Consent to Medical Treatment under Jewish Law

Ofra G. Golan

I. Introduction

The tension between religion and human rights is usually expressed in relation to issues of freedom of religion or freedom from religion. In Israeli law this is just one aspect of the relations between these two realms, since Judaism is a religion that governs all facets of life. This means that Jewish law is relevant to and has a say in every issue that involves human rights. Doctor-patient relationships and decision-making about medical treatment constitute an entire realm of their own. Such relations are fraught with moral and religious issues, and this might be expected to raise contradictions between Jewish and state law. This paper examines the issue of informed consent to medical treatment, in which it has been argued that there is a collision between Jewish law and the secular notion of human rights.[1]

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[1] *S.M. Glick*, "Who decides – the patient, the physician or the Rabbi?," in: M. Halperin, D. Fink and S. Glick (eds.), Jewish Medical Ethics, The Dr. Falk Schlesinger Institute for Medical-Halachic Research, Jerusalem (2004), Vol. I, 142-162, 144 (Source: ASSIA – Jewish Medical Ethics, VI(2) (2004), 20-30, available at http://www.medethics.org.il/articles/JMEB.1.10.pdf).

II. The Role of Jewish Law within the Israeli Legal System

Jewish Law (also called "Hebrew Law") is one of several sources from which the Israeli law derives. In certain acts this is done by direct adoption of the Jewish law by the Knesset. "But beyond this, the values of Jewish Law constitute part of the values of Israeli Law. The fundamental concept of Jewish Law – the national asset of the Jewish people is the fundamental concept of Israeli law. These values of Israeli Law, which encompass the values of Jewish Law, constitute part of the general purpose of every piece of legislation."[2]

Prof. Aharon Barak, President of the Israeli Supreme Court, explains the role of the Hebrew Law in the interpretation of Israeli legislation: "… I accept the view that Jewish Law has, for us, a special interpretative status that is different from every other legal system. This status does not entail a prioritized interpretative position that must be applied first and foremost; rather, it means that Jewish Law reflects the fundamental principles and values of our culture, whereby part of them comprise the fundamentals of our modern law. Indeed, we are a young state, yet an ancient people. Our roots are embedded in our long years of tradition. The fundamental values of Jewish Law shape our character, both as a people and as a state. This finds expression in our being not only a democratic state, but also a Jewish state. As such, the uniqueness of Jewish Law is not in Jewish Law as a system, but in the basic principles underlying Jewish law as a legal culture."[3]

Following the same reasoning, the Israeli Basic Laws concerning human rights[4] contain a declaration that their goal is to protect the relevant human rights "in order to establish in a *Basic Law* the values of the State of Israel as a Jewish and democratic state." However, this combination is not always easy to apply. There are cases which show differences in values between modern, democratic views and those of Hebrew law. Such seems to be the case with regard to certain medical procedures, and yet as this paper shows, a thorough study of the values of Hebrew law itself can solve the apparent contradiction between the

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2 *A. Barak*, "The Role of the Supreme Court in a Democracy," Israel Studies 3(2) (1998), 6. (17-18).

3 *Ibid.*, 18.

4 Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.

"Jewish and democratic" values, and may even claim to be an ancient expression of these modern principles.

III. The Concept of Informed Consent

"Informed consent" is a term referring to medical treatment. "An informed consent is an *autonomous authorization* of a medical intervention or of involvement in research by individual persons."[5]

The concept of informed consent can be defined as the idea that the patient's free consent, based on all relevant information necessary for the decision whether to undergo treatment, is a prerequisite to any medical intervention (excluding exceptional circumstances). Informed consent is regarded as a primary and almost absolute requirement in both current bioethics and in the changed laws of societies that ended years of paternalistic doctor-patient relationships.

The legal concept of informed consent means that consent to medical treatment is no longer a simple matter of consent to a technical assault; it must be based on knowledge of the nature, consequences and alternatives associated with the proposed therapy.[6]

This concept was developed during the second half of the 20th century. It started as a legal doctrine in American jurisprudence,[7] but the underlying idea and basic principles of this doctrine have been widely accepted by other legal systems over the years, regardless of certain variations in its application.

IV. The Underlying Concept in the Requirement of Informed Consent

The prevailing ethical view is that the primary function of informed consent is to protect and enable autonomous individual choice.[8] "It is

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5 *T.L. Beauchamp and J.F. Childress*, Principles of Biomedical Ethics, 1989, 76.

6 *J.K. Mason and A. McCall-Smith*, Law and Medical Ethics, 1994, 238.

7 *Salgo v. Leland Stanford Jr. University Board of Trustees*, 317 p. 2d 170 (Cal. Dist. Ct. App. 1957).

8 *Beauchamp and Childress* (note 5) *supra*, at 75.

respect for people's autonomy, or self determination … that morally underpins the requirement of consent."[9] This concept has also been widely adopted by the law. As explained by the US President's Commission, the foundation of the requirement of informed consent is the fundamental recognition "that adults are entitled to accept or reject health care interventions on the basis of their own personal values and in furtherance of their own personal goals."[10] "This right is part and parcel of … (the patient's) autonomy, of sovereignty over one's own body."[11]

The idea of self-determination in medical decision-making is deeply rooted in legal sources. It was already recognized in 1914, in Judge Benjamin Cardozo's well-known opinion:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages.[12]"

Thus, the rationale for the requirement of informed consent is based on two prevailing concepts:

1. The patient's right to autonomy;
2. The patient's rights over his or her body.*

V. The Attitude of Hebrew Law towards the Concepts of "Autonomy" and "Bodily Rights"

These concepts, so obvious and fundamental in modern liberal thinking, contrast with the world view of Jewish law in three main points:

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[9] *R. Gillon*, Philosophical Medical Ethics, 1986, 114.

[10] President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions (Washington D.C. Government Printing Office, 1982), 3.

[11] *M. Brazier*, "Patient Autonomy and Consent to Treatment," Legal Studies 7 (1987), 169 (173).

[12] *Schloendorff v. New York Hospital*, 211 N.Y. 127, 129, 105 N.E. 92, 93 (1914).

* For convenience, from now on, both doctor and patient will be related to in this paper in masculine gender.

1. Jewish jurisprudence is concerned with duties or obligations, rather than with "rights."
2. The notion of autonomy and freedom of choice in Jewish philosophy and law is different from its current understanding in other legal systems.
3. There is a major philosophical difference between the Jewish and the secular world views in relation to the ownership of the body.

1. Human Rights in a Culture of Obligations

The concept of rights in its modern form does not exist in the Jewish tradition. This does not mean that basic ideas of human rights are not powerfully expressed in the Hebrew law – in fact, on the contrary. As will be shown below, it only means that the Jewish legal system has different ways to express ideas of human dignity and worth, and to achieve these goals.[13] Furthermore, "paradoxically, the development of the concept of human rights is a product of the Jewish tradition."[14] For example, the employee's right for days of rest, a universal right, is based on the Jewish law of the Sabbath. However, in the Bible, this law is not presented as a right; rather, it is one of the Ten Commandments. The Torah says: "Remember the Sabbath day by keeping it holy. Six days you shall labor and do all your work, but the seventh day is a Sabbath to the LORD your God. You shall not do any work, neither you, nor your son or daughter, nor your manservant or maidservant, nor your animals, nor the alien within your gates."[15]

In order to understand the Hebrew law concept of obligations rather than rights, it is apposite to quote the late Prof. Moshe Silberg, Senior Judge of the Israeli Supreme Court: "Jewish law in its totality, in its criminal as well as its civil parts, is a legal system addressed primarily to the citizen and not to the judge…. It is not the right of a person to

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[13] For further reading see *R. Cover*, "Obligation: a Jewish jurisprudence of the social order," J. Law and Religion 5 (1987), 65.

[14] *S.M. Glick*, "Who decides – the patient, the physician or the Rabbi?," in: M. Halperin, D. Fink and S. Glick (eds.), Jewish Medical Ethics, The Dr. Falk Schlesinger Institute for Medical-Halachic Research, Jerusalem (2004), Vol. I, 142-162, 146 (Source: ASSIA – Jewish Medical Ethics, VI(2) (2004), 20-30, available at http://www.medethics.org.il/articles/JMEB.1.10.pdf).

[15] Exodus 20:8-10.

something which is the determining and determined thing, but the duty of the person under obligation – how and under what conditions he has to fulfill his religious or moral duty toward another."[16] "(T)he goal envisioned by the legislator, the ideal toward which he aspires, is not the *post factum* solution of conflict between man and man but the prospective ruling for moral behavior by each individual…."[17]

"As we learn from Hobbes and from John Locke, all the rights of man, given by nature, presuppose our self-interested attachment to our own lives. All natural rights trace home to the primary right to life, or, better, the right to self-preservation…."[18] Whereas Western legal systems perform the function of protecting individual life and liberty within the realm of basic human rights, the Hebrew law achieves it through compelling duties. The Jewish law model of duties protects these values not only by determining behavior between persons – to protect other people's lives and refrain from harming them – but also by commands regarding oneself, in particular the duty to protect one's own life and health; the obligation of self-preservation.[19]

2. The Notion of Autonomy and Freedom of Choice in Jewish Philosophy

The range and application of the notion of autonomy in Jewish philosophy is significantly different from in current secular philosophy and Western jurisprudences. The basic principle of self-determination, and the notion of autonomy as a concept of respect for other human beings, is highly advanced in Jewish thought. According to one of the Talmudic sages, the biblical verse: "Love thy neighbor as thyself" – which has been interpreted as "Do not do unto others as you would not have others do unto you" – is the essence of the whole Torah.[20] However, autonomy in the sense of self-determination has significant restric-

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16 *M. Silberg*, "Law and morals in Jewish jurisprudence", Harvard Law Review 75 (1961), 306 (326-7).

17 *Ibid.*, at 325.

18 *L.R. Kass*, Life, Liberty and the Defense of Dignity – The Challenge for Bioethics, 2002, 213.

19 Deuteronomy, 4:9: "Only take heed to thyself, and keep thy soul diligently"; *ibid.* 4:15: "Take ye therefore good heed unto yourselves."

20 Talmud, Shabbat, 31a.

tions and limitations; autonomy is virtually restricted to actions that are morally indifferent.[21] Unlike other schools of thought that recognize self-determination as the paramount human value, Judaism gives precedence to other moral principles. "Judaism places great importance on self-fulfillment and refinement in the spirit of moral and religious commandments. Therefore, values directed to achieve this goal are superior to the principle of autonomy when in conflict."[22] Autonomous decisions should comply with the religious and moral obligations which are required from the individual and society. In the Torah, the very same verse that records the giving of free choice, commands us to choose life: "I call heaven and earth to record this day against you, that I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live."[23]

The patient's autonomy, more than any other individual autonomy, entails decisions of life and death. In these cases, there is an apparent contradiction between the right for self-determination and the command, above all things, to choose and preserve life. This can explain why "Jewish law has been accused by ethicists and reform-minded secularists of being paternalistic. In their opinion, patient autonomy in *halacha* is non-existent."[24] However, as mentioned above and will be shown later in detail, these claims are misleading. Hebrew law generally recognizes and supports the concept of patient autonomy – only not as a paramount and overriding principle like life and the preservation of life, which this law explicitly includes among the fundamental moral values.

This view conforms to the original notion of autonomy, as set out by Immanuel Kant. According to Kant, rights are founded not in nature but in reason, therefore he "holds that the self-willed act of self-destruction is simply self-contradictory."[25] Prof. Leon Kass, the Chair of

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[21] *A. Steinberg*, "Free Will vs. Determinism in Bioethics: Comparative Philosophical and Jewish Perspectives", in: M. Halperin, D. Fink and S. Glick (eds.), (note 14) *supra*, at 88-97 (93) (Source: ASSIA – Jewish Medical Ethics, II(1) (1991), 17-20, available at http://www.medethics.org.il/articles/JMEB.1.6.pdf).

[22] *Ibid.*

[23] Deuteronomy, 30:19.

[24] *Z. Schostak*, "Is There Patient Autonomy in Halacha?", in: M. Halperin, D. Fink and S. Glick (eds.), (note 14) *supra*, Vol. I, at 98 (100) (Source: ASSIA – Jewish Medical Ethics II(2) (1995), 22-27, available at http://www.medethics.org.il/articles/JMEB.1.7.pdf).

[25] *Kass* (note 18) *supra*, at 215.

the US President's Council on Bioethics, criticizes the expansion of the notion of autonomy to its current liberal concept. He says that "Being autonomous means not being a slave to instinct, impulse or whim, but rather doing as one ought, as a rational being".

But "autonomy" has now come to mean "doing as you please," compatible no less with self-indulgence than with self-control.[26]

3. The Ownership of the Body

In Jewish thought and law, the human being is not the owner of his or her body. Human beings are merely the custodians of their bodies, charged to preserve them from any physical harm and to promote their bodies' health whenever necessary.[27] "Like everything else in the world, the body is the property of the Almighty. We are but stewards or guardians of someone else's property, as it were." This does not remove all rights from a person to determine what will be done to him, "but clearly, limitations are set by the owner of the body, the Almighty, as to the boundaries of authority granted to the user. It is somewhat like renting a car or an apartment – to be used, but not abused, in accord with the rental contract."[28] Some Jewish scholars support the view that man has a partial ownership over his body, which is a shared ownership with the Creator, but this does not grant him the right to harm his own body.[29]

Again, the Jewish-law view is compatible with the original philosophy of Locke, as explained by Leon Kass: "Unlike the property rights in the fruits of his labor, the property a man has in his own person is inalienable: a man cannot transfer title to himself by selling himself into slavery. The "property in his own person" is less a metaphysical statement declaring self-ownership than a political statement denying ownership by another. This right moves each and every human being from the commons available to all human beings for appropriation and use. My

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[26] *Ibid.*, at 216.

[27] *I. Jakobovits*, "The doctor's duty to heal and the patient's consent in the Jewish tradition," in: G.R. Dunsten and M. J. Seller (eds.), Consent in Medicine: Convergence and Divergence in Tradition, 1983, 32.

[28] *Glick* (note 14) *supra*, at 146.

[29] "Informed Consent (*haskama mida'at*)" in: Entziklopedia Hilkhatit-R'fu'it, *A. Steinberg* (ed.), vol. 2, (1991), 2 (23) [in Hebrew].

body and my life are my property *only in the limited sense* that they are *not yours*. They are different from my alienable property … My body and my life, while mine to use, are not mine to dispose of. In the deepest sense, my body is nobody's body, not even mine."[30]

4. Informed Consent in Hebrew Law

Informed consent to medical treatment is a new concept, and as such is not found in *halakhic* literature (*Halakhah* is the generic term for the entire legal system of Judaism). Moreover, from the above analysis it is clear that as far as the concept of informed consent is recognized within the Hebrew law, the premises upon which it rests are different than the rights for patient autonomy and self-ruling, and that it should be much more limited than the almost absolute scope of this requirement in secular bioethics and law. Following the rationale of limited autonomy, restrictions to informed consent may be relevant only in circumstances in which there is a conflict between the value of patient autonomy and other overriding moral or religious values.

VI. Conflict of Values

Conflict of values with regard to informed consent can arise in the following circumstances, which will be examined below:

1. When the patient's autonomous choice may risk his life or health;
2. When consent to the proposed treatment entails violation of a religious imperative;
3. When respect for the patient's autonomous choice requires the physician to violate a religious imperative.

1. Patient's Autonomy vs. Preservation of Life and Health

In Jewish thought and law, human life enjoys an absolute, intrinsic and infinite value. A person is charged to preserve his/her body from any physical harm and to promote its health when it becomes impaired.

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[30] *Kass* (note 18) *supra*, at 214.

This principle overrides such personal freedoms when they conflict with it. Neither patient nor doctor has the right to refuse receiving or rendering such medical aid as is essential for the preservation of life and health.[31] Therefore, in theory, under Jewish law, when the patient's autonomous choice may put his life or health at risk it should be disregarded, and medical treatment should even be forced if necessary. However, this rule applies only "in black-and-white cases, where medical experience clearly sets the need for treatment at a maximum and the risk factor at a minimum … But the modification of the rule is weighty enough to take the patient's wishes into account when we deal with grey areas where the prospects of success are reduced and the chances of failure increased."[32] These "grey areas" include cases in which the effectiveness of the proposed procedure is unproven or controversial, or if it entails high risk. Moreover, if the proposed therapy "is intended only to improve the quality of life rather than save life – the patient may legitimately refuse treatment, thus executing his right to self-determination."[33]

Since the leading principle is the supremacy of the value of life, it applies to the medical decision-making, regardless of whose opinion takes precedence – the doctor's or the patient's. Usually, the doctor as the expert professional knows what is medically advisable for the patient. However, when the patient feels that adherence to the doctor's advice might cause him harm, or if he worries that the proposed treatment might put him at risk, or when the patient feels that he needs a certain therapeutic intervention that is not necessarily indicated by medical opinion, his opinion must be respected and accepted. This rule is derived from the verse "the heart knoweth its own bitterness" (in Hebrew, the bitterness of his soul).[34] What this actually means is that "in regard to anything required by the patient, his own assessment of his needs is supreme and overrides any medical opinion ... But in the reverse circumstances, when medical opinion requires a possibly life-saving action not deemed necessary, or rejected, by the patient, his wishes must be disregarded, even at the cost of his spiritual ideals … and *a fortiori* his physical considerations."[35]

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31 *Jakobovits* (note 27) *supra*, at 32.

32 *Ibid.*, at 34.

33 *Steinberg* (note 21) *supra*, at 96.

34 Proverbs, 14:10.

35 *Jakobovits* (note 27) *supra*, at 34.

The duty to preserve life and not risk it is not absolute. Medicine itself is dangerous, and it entails unavoidable risks;[36] still, the benefits of medicine generally outweigh these risks. Therefore, the Torah grants the physician a license to heal, i.e. a license to take unavoidable risks for a chance to heal. Following the same logic, patients are permitted to take unavoidable risks in medical or surgical procedures, which are tried and generally accepted. Where no known cures are applicable, experimental or doubtful treatments may be applied in a desperate gamble to save life, even if the chances of success are less than even.[37]

The permission to undertake and undergo risk to life is allowed also for alleviating great pain and suffering.[38] Jewish law permits the use of possibly fatal pain killers to relieve extreme suffering in terminally-ill patients. The duty to preserve life, it can be argued, may be modified even for the suspension of treatment serving only to prolong the dying agony.[39]

This requires some elucidation on the issue of respect for the patient's autonomy in those rare "black and white" cases.

2. Respect for Patient's Autonomy in Clear-Cut Cases of Life and Death

Although theoretically speaking, the patient's choice to refuse treatment may be overruled, as explained before, this option is restricted only to "black and white" cases, where the need for treatment and its benefits are undoubted and the risk is minimal. Moreover, this applies only when the patient refuses treatment even though he believes the doctors that this is for his benefit and that he will be healed by it. The reasoning for disregarding the patient's choice is twofold: a. the priority of the value of life; b. the patient's choice does not prove autonomy but is rather, as Rabbi Feinstein defines it: "a childish, irrational act."[40]

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[36] The Ramban's saying: "You have nothing in medical treatment but danger, that which heals one kills the other" is quoted in *B. Freedman*, Duty and Healing – Foundations of a Jewish Bioethic, 1999, 277.

[37] *Jakobovits* (note 27) *supra*, at 32.

[38] See discussion in *Freedman* (note 36) *supra*, at 279-293.

[39] *Jakobovits* (note 27) *supra*, at 32-33.

[40] *M. Feinstein* in Halakha Ur'fu'a 4, M. Hershler (ed.) (1985), 111-112 [in Hebrew] (for the English version see *Freedman* (note 36) *supra*, at 167-169).

It can thus be argued, paradoxically, that in these rare cases the very enforcement of treatment against the patient's momentary, questionably autonomous wishes is the only way to promote his autonomy. His choice will bring his death, while the treatment is demonstrably the only way to preserve the patient's life and his autonomy that derives there from.[41] Moreover, as long as the patient holds a Jewish moral worldview, the decision to force the treatment upon him is by definition consistent with his own values.

3. Medical Treatment vs. Violation of a Religious Imperative

Under Jewish law, virtually all religious imperatives and restrictions are overridden when there is a threat to human life.[42] It is a well-known rule that saving life overrides even the strict laws of Sabbath, even only on the strength of possible rescue. Therefore, whenever medical treatment is needed for rescue, or for the prevention of any life-threatening deterioration in the patient's health, it is the patient's duty to seek out appropriate medical care, and it is the health practitioner's duty to provide such care, regardless of all other religious imperatives. Thus, if the medical opinion is that a patient must comply with a doctor's orders, then the patient is not allowed to refrain from doing so only because it entails the violation of a religious imperative. A patient who disobeys the doctor's orders in order to be stricter is called "a pious fool," and must be forced to follow the doctor's orders.[43] A patient who refuses medical treatment out of piousness is regarded as one who commits suicide.[44]

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41 See examples in *Glick* (note 14) *supra*, at 153-158.

42 There are only three exceptions to this rule, which are the prohibition of bloodshed, incest and idolatry.

43 *Y. Shafran*, "*Lichpot o' Lachdol*," Hamoetza Hadatit Yerushalayim (1993), 15-16 [in Hebrew] and the sources in ref. 8 there. See also *Y. Green*, Mishpat u'Refua'h, 2003, 184-185 [in Hebrew].

44 *Steinberg* (note 29) *supra*, at 26.

4. Respect for Patient's Autonomous Choice vs. Violation of a Religious Imperative

Indeed, some of the most prominent rules in the issue of consent to medical treatment in Hebrew law are extrapolated from sources discussing cases in which the patient's autonomous choice entails the violation of a religious imperative, either by the patient or by those who care for him.

The classic Jewish source for the issue of patient consent and autonomy is to be found in the detailed regulations of the Day of Atonement.[45] On this day of fasting it is a grave offence to consume any food or drink. However, if fasting could cause the slightest risk to life, this prohibition is overridden. If a competent doctor advises that the patient's condition requires him to eat, he is obliged to do so, even if he himself feels confident that he can fast without any hazard. Moreover, if the patient himself feels that he cannot fast without risk, "his opinion must be respected in his favour and food must be served to him even if a hundred doctors unanimously say otherwise."[46] This rule is derived from the above mentioned verse: "The heart knoweth its own bitterness" (Heb. 'the bitterness of his soul').[47] This source broadens the meaning of the original permission to violate a ritual or a religious imperative for the protection and preservation of life. It states that under such circumstances, although there seem to be objective reasons for disregarding the patient's request (according to medical opinion there is no risk, i.e. there is no indication that would lead a doctor to order a violation of ritual) the patient's subjective assessment of his own condition and needs and of what might endanger him supersedes those of competent medical practitioners. It should be noted that this rule not only permits violation of a religious imperative by the patient himself (as in the case of eating when he should be fasting), but also by his caretakers, as in the case of a patient who requests medicine to be prepared for him on the Sabbath, since he feels he needs it, although the doctor denies its necessity.

What follows is that a physician might be asked to violate the Sabbath, or any other religious law, in order to give the patient the treatment of

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45 Talmud Bavli, Yoma, 83a.

46 *Jakobovits* (note 27) *supra*, at 34. (Source: Shulkhan Aruch, Orach Hayim, 618: 1). Proverbs, 14:10.

47 Note 33 *supra*; see also text to note 34 *supra*.

his choice, even though this is not indicated according to his own professional judgment. In such a case, the patient's choice, based on his own intuition, should be respected, and the violation by the doctor is permitted. However, when the doctor believes that the patient's choice would endanger his life or health, he should not respect it, not on the grounds that it violates a religious observance, but because it entails violation of the duty to heal and to preserve life.

5. Conclusions

Several conclusions may be drawn from the above discussion of patient autonomy and patients' rights.

1. The overriding value in Jewish law is the value of life.
2. Whenever in conflict with other values or legal/religious obligations, the duty to preserve life and health takes precedence.
3. Except for extreme end of life situations, preserving the patient's life is viewed to be in accordance with his best interests.
4. In consideration of the appropriate therapy, the leading value is beneficence, or non-malfeasance. What is most important is that the medical decision should aim to be in the patient's best interests.
5. The patient is held autonomous to determine his best interests, provided that his choice does not pose a disproportional risk to his life.
6. The patient's subjective assessment of the seriousness of his condition,[48] of what can relieve his symptoms and what can harm him, is legally definitive, unless expert medical opinion shows that proceeding according to the patient's assessment would be detrimental to his health.
7. The doctor is obliged to respect the patient's autonomous choice, as long as this does not require him to violate his duty to preserve life.

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[48] According to Benjamin Freedman – of his symptoms. *Freedman* (note 36) *supra*, at 313.

VII. Medical Decision-Making as an Ethical Dilemma

In the previous section I discussed cases in which there is a clear conflict between the patient's benefit (either objective or subjective) and other values. However, in modern medicine things are seldom clear-cut. As Prof. Benjamin Freedman wisely notes, "From the doctor's point of view, every aspect of care is riddled with uncertainty, guesswork, creative insights that leap beyond the evidence, and conscious as well as unconscious trade-offs. Diagnosis is almost always presumptive, rather than conclusive… Every treatment option carries with it the risk of side effects, which need to be weighed against the risks associated with alternative treatments and the risk of not treating at all. Treatment recommendations are constantly shifting, in response to factors ranging from new clinical studies to reimbursement patterns and patient demand."[49]

There are thus many situations in which medical decision-making, working in the patient's best interests, inherently involves an ethical dilemma, a conflict of values: The value of life vs. the risk of an operation, or the value of prolonged life in illness vs. the value of a shorter life of better quality. Should the patient take the risk of a dangerous operation in exchange for the chances of successful cure? How high should the chances be? Should the risk be taken when the proposed benefit is less than cure (i.e. relief, better quality of life, prolongation of life, etc.)? If the proposed therapy is intended "only" to improve the quality of life, the conflict that requires a value judgment may be between the future burdens of the treatment vs. the present reduced quality of life.

In such situations, when both options may benefit the patient, and both entail some risk, either option may be chosen, and the *halakha* leaves these value judgments to the sole discretion of the patient. "[I]n these cases, a patient-centered risk-benefit analysis serves as the basis for determining whether an action is permissible, rather than some other automatic formula."[50] Rabbi Moshe Feinstein sees this kind of choice as being character dependent, something like a willingness to take chances: "So we see in financial matters, there are some who for a chance of a great profit buy merchandise with the little money that they have, even though, if they do not succeed, they will lose the little they have; and there are some who do not wish to buy [merchandise] with the little

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[49] *Freedman* (note 36) *supra*, at 165.

[50] *Ibid,* at p. 274.

money they have when there is a chance that they will lose [it]; Similarly it is possible that there is a division of opinion because of the nature of persons with respect to survival."[51]

1. Informed Consent Required According to Hebrew Law

The above analysis shows conclusively not only that the concept of informed consent is not alien to Hebrew law – it is actually required by it; although for different reasons, and with reservations towards certain aspects of the common approach to this concept.

2. Informed Consent Required by the Demand to Respect Others

As Benjamin Freedman defines it, "'informed consent' serves as a kind of shorthand for a certain kind of relationship between patient and health care provider. A relationship that respects informed consent is one in which a doctor treats the patient seriously, as a mature, responsible adult with independent values. Acknowledging that the decisions to be reached are decisions about the life of the patient, the doctrine requires that the doctor provide information in the amount and manner that the patient will find most useful in thinking about and, ultimately, deciding upon medical choices."[52]

This definition applies to the approach required under the moral and religious demand to respect other human beings as you would have them respect you. In the words of the late Rabbi Jakobovits: "[O]ut of respect for his dignity and to encourage his cooperation, a patient is entitled to be informed of any treatment to be given him, so long as such information is calculated to help the patient. It should be withheld or modified only if there are well-grounded risks that, far from helping him, it would be liable to damage his interests, either mentally by his fear of the prospect of the treatment, or physically by inducing him to resist the treatment."[53] Though the final section of Rabbi Jakobovits' words expands the common notion of clinical privilege in a somewhat

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[51] *Feinstein* (note 40) *supra*, at 131-142, as quoted by *Freedman* (note 36) *supra*, at 270-271.

[52] *Ibid.*, at 155.

[53] *Jakobovits* (note 27) *supra*, at 33.

paternalistic way, his main claim is consistent with the basic requirement of informed consent.

3. Informed Consent Required for the Patient's Benefit

Aside from its interest in benefiting the patient, Hebrew law recognizes that the notion of benefit is both objective and subjective. Life is a *sine qua non* condition for having any interests at all, thus its preservation is by definition in the best interests of the patient. Health is another component of the person's well being, and hence objectively in the best interests of the patient. However, these can be assured with no risk only in extremely rare cases. In all other cases, the patient's best interests involve subjective judgments of benefit and cost. Therefore, Jewish law gives the patient's position, views and feelings a determining importance in medical decision-making. As Rabbi Feinstein writes: "Every person is the owner of his body and life in the sense that he can choose what is the best for his life. [For example,] he may accept the risk of immediate death in the hope of cure, and he may forgo treatment and cherish his certain, although short, life."[54]

Rabbinical authorities find several *halakhic* rules to support this statement.

1. As stated above, following the rules derived from the verse "The heart knoweth its own bitterness," the patient's assessment of his needs and of what might endanger him, based on his feelings or intuition, overrules the medical experts' opinion in this regard. Thus, if the patient is afraid that the treatment recommended by the physician may cause harm, the therapy should not be imposed.
2. When a medical decision must be made between two permitted options, or otherwise demands a value judgment – the decision should be made according to the patient's values and preferences.

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[54] Responsa Igrot Moshe, Vol. 5 (1973), Yoreh De'ah, no. 37, as quoted by *Y.M. Bar Ilan* in the section "Refusing Medical Care" at "Biomedical Ethics, Halakhic Approaches to" in: Encyclopedia of Judaism, J. Neusner, A.J. Avery-Peck and W.S. Green (eds.) (1999). See there also a summary of the entire *halakhic* approach to refusal of treatment.

3. If the patient refuses treatment because in his opinion the treatment is not effective, even in the face of a community of physicians, treatment is not imposed.[55]
4. The patient's trust in the doctor is considered necessary. If a patient refuses treatment due to distrust of his doctor, his refusal should be respected: "If the patient does not believe these doctors, then they must find him a doctor in whom he does believe."[56]
5. The patient's cooperation is most important. Rabbi Feinstein believes that an adult coerced into treatment will probably not benefit from it.[57]
6. If there are significant questions and doubts about the diagnosis and the treatment, the patient's opinion is given significant weight.[58]
7. If the medicine itself poses some risk, even though the danger of the medicine is much less than that of the illness, then under no circumstances should the patient be compelled to take it.[59]
8. When there is no substantial risk for life, if the patient refuses treatment because of anxiety related to the expected pain and suffering, the treatment should not be forced upon him.[60]

4. Informed Consent Required to Fulfill the Duty of Guardianship of One's Body

Another source for the requirement of informed consent in Jewish law was suggested by the late Prof. Benjamin Freedman.[61] He suggests that the duty of the individual as the guardian (or watchman – *shomer*) of his or her body and health requires that decisions concerning health will be made by the person affected following a thorough investigation

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55 *R. Y. Emden*, Mor u-Ketzi'ah, Orach Hayim 328, as quoted by *Shafran* (note 43) *supra*, at 16 (for an English version see *Glick* (note 14) *supra*, at 148).

56 *M. Feinstein* (note 40) *supra*.

57 *Glick* (note 14) *supra*, at 150.

58 *Ibid.*, at 149.

59 *M. Feinstein* (note 40) *supra*.

60 *Shafran* (note 43) *supra*, at 19-21.

61 Freedman's thesis is presented in his book, *Freedman* (note 36) *supra*.

of the physician's proposed treatment. This poses an obligation on the physician not only to obtain consent, but to provide the patient with all the information that a conscientious *shomer* needs to carry out his God-given responsibility fully. This virtually amounts to what the reasonable patient would need in order to give informed consent according to secular law.

VIII. Summary

Though there seems to be a contradiction between the patient's right to make an autonomous choice, and Jewish religious duty to seek and accept appropriate medical care, a thorough examination of Hebrew law regarding medical decision-making leads to the conclusion that the requirement of informed consent is inherent in this legal system, and that the patient has an important role to play in this process.

The analysis made above shows that Jewish law treats the patient with great respect, in a way that accords with modern ideas of informed consent, and promotes the patient's autonomy, although this goal derives from other values. In my view, in the approach taken by Hebrew law, the patient's autonomy serves more as a tool for determining the patient's benefit than as a substantive right *per se*. Nevertheless, this leads eventually to the same ideal of doctor-patient relationship as in the modern ethical approach, in which decisions are made in full cooperation between both parties, both having best interests of the patient at heart. In this mode, the doctor provides the medical-professional input, and the patient considers it according to his subjective preference and values.

Thus, if we look at the concept of "informed consent" from the point of view of Jewish law as required for the patient's benefit, rather than from a liberal point of view as required by the principle of autonomy, then the requirement of informed consent is not an obstacle, but a solution to the apparent contradiction between the patient's right to make autonomous choice and Jewish religious duty to seek and accept appropriate medical care.

It could be said that the actual difference between this approach and the patient's autonomy approach relates to situations in which the patient, with no reasonable explanation, refuses life saving treatments, which he agrees to be for his benefit. Such cases pose a problem for both patient and doctor when the doctor is an observant Jew, or otherwise commit-

ted to Jewish morals while the patient holds a different ethical view. In such circumstances it is perhaps advisable to transfer the patient to the care of another doctor, who has no conscientious problem with respecting the patient's wish. It should be noted that if this situation takes place within the realm of a jurisprudence that understands informed consent to be an expression of untrammeled individual freedom and requires physicians to act accordingly, then, and only then, the doctor might find himself in an insoluble conflict between his moral and religious obligations and his legal ones.[62]

[62] For a discussion of this conflict, see: *F. Rosner*, "An observant Jewish physician working in a secular ethical society: ethical dilemmas," IMAJ 7 (2004), 53-57; *J.D. Bleich*, "The Physician as a Conscientious Objector," Fordham Urban Law Journal 30(1) (2002), 245; *G.S. Fischer*, "Medical Ethics and Religion. The Limitations of Secular Medical Ethics", Community Ethics 2(1), available at http://www.llu.edu/llu/bioethics/medethlim.htm.

V. The American Point of View

Neutrality Between Church and State: Mission Impossible?

Mark S. Weiner

I. Introduction

As I sat at my desk in Connecticut to consider what I could contribute to this volume as a cultural historian of American law, I recalled a remarkable visit I took recently to Cincinnati, Ohio. My wife and I had visited Cincinnati immediately following a three-week stay in Germany, and because I hope it will shed light on how many Americans understand the relation between church and state, I wish to begin this essay by describing why I was in Ohio and painting a picture of some of the men and women I met there – a kind of American portrait in thick description. Before I do, however, I wish at the outset to state my basic view of the subject of religion and state neutrality. My view is that state neutrality toward religion can and should remain a guiding aspiration of American constitutionalism, but that the ideal has been complicated in practice by an old and continuing American tradition – one that I believe contrasts with socio-legal life in post-war Germany and, perhaps, Israel, in which universalistic liberal ideals and institutions are grounded in and viewed as inseparable from particularistic religious commitments. The U.S. Supreme Court, furthermore, has played an important institutional role in coping with the cultural tension to which this popular belief system has given rise, using the concept of neutrality as a tool of constitutional cultural management for a society that is at once highly religious, liberal, and increasingly pluralistic. Two further prefatory points are in order. First, I believe the ongoing tradition of popular religious thought about liberalism and the state implicates a central feature of American law as described in Edward Eberle's comparative work on Germany and the United States, namely its radical in-

dividualism – about which, more will come later.[1] Second, I wish to indicate that I not only begin these remarks with a story, but also conclude with one: a heuristic meditation, somewhat though not entirely tongue-in-cheek, on the popular narrative phenomenon whose infiltration of our everyday lexicon stands behind my title, the television series and motion pictures titled "Mission: Impossible."[2]

Cincinnati is a city of about two million people that lies at the southwestern tip of Ohio, a state of gently rolling hills and fertile plains and valleys. Once part of the Old Northwest territory, the region was opened for settlement in 1787, shortly before the drafting of our national constitution. Two legal and geographic facts about Ohio are especially significant for its history. The first is that the ordinance that set the terms of northwest settlement prohibited slavery there after 1800. The second is that on its southern frontier, carved by the majestic Ohio River, the state borders Kentucky, where in the early nineteenth century not only was slavery lawful but also, in some counties, slaves at times numbered over forty percent of the population. This proximity to a slave state had many consequences for Ohio and especially for Cincinnati (whose population in the early 1840s consisted of nearly thirty percent native-born Germans, and from which one can now reach Kentucky in a bus ride of about two minutes). For one, proximity meant that by virtue of economic and familial ties most Cincinnati residents were closely bound to the slaveholding south and viewed efforts to abolish slavery there as a dangerous threat to social stability. At the same time, it also meant that Ohio was home to a small but important community of activists who were passionate opponents of slavery, which they had seen with their own eyes, and who actively sought to assist runaway slaves on their flight north to freedom. These were courageous men and women and – significantly for the history of American relations between church and state – they generally were motivated by a common ideological commitment: they derived their liberal opposition to slavery from their evangelical Christianity. In this, they were very much in the American grain. Theirs was the same belief in the redemptive power of faith and the ability of individuals to enter into a personal relationship with Christ that drove most of the great American reform movements of the nineteenth century and that was central to those who

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[1] *Edward Eberle*, Dignity and Liberty: Constitutional Visions in Germany and the United States, 2002.

[2] "Mission: Impossible", CBS, 1966-1973; Brian De Palma, "Mission Impossible", 1996.

liberalized our national constitution and restructured the nature of American power after the Civil War.

In June, 2005, my wife and I traveled to Ohio to celebrate the life of a farmer and a Christian anti-slavery activist named John Van Sandt, whose ancestors had come to America from Friesland. In 1842, while helping a group of nine runaway slaves, Van Sandt was captured by pro-slavery bounty hunters, and all but one of the fleeing slaves was returned to bondage in Kentucky. Van Sandt was then sued by the slaves' owner, Wharton Jones, under the civil damages provisions of the national Fugitive Slave Law of 1793, a suit in which he was defended by the young Salmon Portland Chase, who twenty years later would become Chief Justice of the U.S. Supreme Court but who then was an attorney in the early stages of his career. Van Sandt lost the suit, known as *Jones v. Van Zandt*,[3] but he also was subject to a law over which Salmon Chase had even less persuasive authority, and that I suspect meant far more to Van Sandt as an activist and a man: the ecclesiastical rulings of his church, the United Methodist Episcopal congregation of Sharon. The congregation rescinded Van Sandt's membership and barred him from fellowship for "lying" because in his defense against Jones's suit he had claimed never to have "harbored," or hid, "a slave." Though it is perfectly obvious that Van Sandt did "harbor" quite a number of "slaves," at least as we commonly use the terms, for Van Sandt, this was a problem in the conflict of laws and it was easily resolved: from the abolitionist's higher jurisdictional vantage point, his denial was perfectly correct, for the New Testament states that there is neither slave nor free for all are one in Christ.[4] But the church would have none of it, and it expelled Van Sandt from the congregation he helped to found. Fast forward now one hundred and twenty years. The story is brought to the attention of the current pastor of Van Sandt's old United Methodist congregation, which is still going strong not far from its original location. Though the church had long forgotten about the matter, it now decides to do the right thing and honor the activist and his many descendants by posthumously reinstating him as a full member of the group and holding a ceremony of "repentance" and "reconciliation", inviting congregates of a variety of other local black churches to attend, as well as inviting me and my wife. The ceremony was filled with American preaching in high style, including the distinctive preaching of black evangelicals, and after a sermon that included many references to

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[3] *Jones v. Van Zandt*, 5 How. (46 U.S.) 215 (1847).

[4] Galatians 3:28.

American liberty and "our Constitution", especially the Fourteenth Amendment, the affair ended with three hundred people singing together and slowly swaying to every verse of "Amazing Grace" (the song was written by a nineteenth-century slaveholder who released his slaves after having a spiritual awakening; in the United States it has something close to the status of a national anthem).

The pastor of the congregation also took part in unveiling a new state historical marker commemorating Van Sandt, which was placed near the site of his former home. The residence lies just outside Cincinnati in what in current demographic terms is known as a "micropolitan" area; "micros" look something like suburbs but they have no connection to a major cosmopolitan urban center. These are the hotly contested communities that voted for George W. Bush in the 2004 national election and that, in particular, won him the State of Ohio, which in turn won him the presidency. The scene that morning could have been taken straight out of an old *Life* magazine or a Norman Rockwell painting. The Van Sandt historical marker was placed just at the edge of a road that snaked alongside a baseball diamond where, beneath a warm sun, a Little League game was in progress. The group who gathered around the marker included a number of local mayors, one of whom had dressed in nineteenth-century period costume for the occasion, and the Governor had sent a letter of warm congratulation. The audience was deeply interracial, with the unassuming comfort with each other evident most of all in the American South, and it also included many of John Van Sandt's descendants, who had arrived there from all over the country. The unveiling began when a minister led us in a nondenominational prayer, after which a member of the Boy Scouts asked all to rise and, as everyone placed their right hands over their hearts and turned toward a large American flag that had been brought there for the purpose, he led us in the Pledge of Allegiance. A few mayors spoke, as did a councilman and a state senator and another minister or two and a representative of the Ohio State Historical society, many again making personal reference to "our Constitution" and its liberties. After an unassuming piece of cardboard was hoisted off the gleaming new historical marker, a young woman sang "God Bless America" with the emotional force of a traditional black spiritual, and many in the audience joined her.

Naturally, it is difficult to imagine such a scene taking place in secularizing Old Europe. The event demonstrates the ways in which many Americans, including many in the audience of that wonderful tribute to liberal political progress in Ohio, combine highly particular religious commitments with equally tenacious commitments to liberal universal-

ism. One very American manifestation of this dual allegiance is the belief, held by the Mormon church as a matter of doctrine and by many Americans as a matter of civic faith, that our federal constitution was divinely inspired, that it was to some degree written by God. I venture to guess that while many citizens of the Federal Republic of Germany rightly express deep admiration for their elegant Basic Law (*Grundgesetz*), there are few who would suggest that God was working out his plan for humankind in the document (some might view it as part of the larger divine plan of Immanuel Kant, but surely not God himself). Nor does God's covenant with Abraham, which animates the political consciousness of at least some in Israel as a basis for the state, bridge the particular and the divinely universal in this way, for that covenant was made specifically with the Jews. Such has not been the case for the way many Americans traditionally have understood their law and institutions: as universalistic in scope not in spite of, but rather, precisely because of being rooted in particular religious commitments (or simply religious commitment in general: as President Dwight Eisenhower once sincerely remarked, "Our government makes no sense unless it is founded in a deeply-held religious faith – and I don't care [which faith] it is").[5] That view also is a close ideological cousin of a position advanced by the great antebellum Supreme Court Justice Joseph Story, who in the same year he published his *Commentaries on the Constitution* (1833) vigorously asserted that Christianity is a part of the common law.[6] The United States has a long tradition of popular Christian jurisprudence that has been central to the development of our liberal ideals and institutions and from whose perspective the particularity of religious life, the bounded community of those who share specific ritual practices or revealed knowledge, is viewed not as opposed to, but rather, as complementary or even foundational to constitutional principles that announce their universality. It is this vibrant tradition, I believe, that poses such an interesting political challenge for American constitutional law and that has made the search for state neutrality toward religion in First Amendment jurisprudence so difficult, so meaningful, and such an interesting phenomenon to observe – and, as I will suggest shortly, a "Mission Impossible" (by which I mean something different from what the phrase implies on its face). The challenge arises

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5 See *Will Herberg*, Protestant – Catholic – Jew, 1955, 97.

6 *Joseph Story*, Commentaries on the Constitution, Boston, Hilliard, Gray, 1833, § 1863-1871. See also *Vidal v. Girard's Executors*, 43 U.S. (2 How) 127 (1844).

because in a polity dedicated to individualism and conceptions of negative liberty, many citizens will push the state, against the ideal of strict neutrality, and especially against its full demands for public life in a pluralistic society, to recognize, support, and sanctify collective, group-based values and symbols otherwise absent from government, and these citizens can make a strong historical claim that their values are as much a part of the substantive meaning of the liberal state as "Amazing Grace" is a kind of national anthem.

II. State Neutrality toward Religion in US Constitutional Law

The idea of state neutrality toward religion enters American constitutional law because of an ambiguity. Religious freedom is protected in the United States against federal interference by the First Amendment, which was added to the federal constitution as part of the Bill of Rights in 1791. The First Amendment also protects individual rights of speech, press and political association, and it is the part of the Constitution that functions most powerfully as a common political symbol. The two Religion Clauses of the First Amendment state that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; they are known, respectively, as the Establishment Clause and the Free Exercise Clause.[7] Despite some very serious doctrinal difficulties, these clauses, originally meant to apply solely against the federal government, were held by the Supreme Court in the 1940s to apply against the states under the provisions of the Fourteenth Amendment, in a process of legal interpretation known as "incorporation".[8] The ambiguity of the Religion Clauses arises because its terms are not self-defining. What is an "establishment" of religion that the First Amendment forbids? What is included in the "free exercise" that the Amendment protects? While the former certainly includes the creation of a national religion, does it also include symbolic acknowledgements of the centrality of religion to a good society, for instance the words "In God We Trust" on federal currency or the phrase "one nation, under God" in the Pledge of Allegiance, or does it include the

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[7] US Constitution, Amendment 1.

[8] See *Everson v. Board of Education*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

transportation of children on state-funded buses to parochial schools, or laws that mandate shop closure on Sundays? And while the Free Exercise Clause certainly covers protection against the coercion of religious belief, for instance a requirement that all citizens swear a religious oath, does it equally exempt from penalty citizens engaging in rituals, practices, or behaviors sanctioned or mandated by religious command but barred by religiously neutral state law, such as plural marriage, animal sacrifice, or the refusal to provide children with medical care? Similarly, if a state government explicitly excepts religious groups from otherwise generally applicable laws, should the exemption be viewed as an establishment of religion? None of these questions are simple to answer under the terms of the First Amendment itself. Courts have thus looked to various sources for interpretive guidance, among them the history and "original understanding" of the Religion Clauses – and, even more, to the concept of state neutrality that is said to give succinct expression to that original understanding or to the principles of religious freedom that have developed in the United States over time under the ideal of the "living Constitution."

In American constitutional discourse, the concept of neutrality often is used synonymously with that of "equality", and one prominent view is that it mandates that government generally treat all religions equally, in a non-sectarian manner – and also, in the United States, that it must take the same position of equality between religion and non-religion. It should be said, though, that the concept of state neutrality toward religion narrows but does not fully overcome the problem of textual ambiguity in the Constitution. The concept can be understood in a number of ways, each of which demands different outcomes in First Amendment litigation. For instance, following the work of a number of scholars in the field, especially Douglas Laycock, we might make a distinction between a principle of formal neutrality and substantive neutrality analogous to the distinction in equal protection jurisprudence between facial discrimination and discriminatory effects.[9] A principle of formal state neutrality toward religion would prevent government from making any distinctions based on religious affiliation, or between affiliation and non-affiliation, on the face of a law, just as some argue that race can never be a legitimate basis for the distribution of public benefits or burdens (a principle the Court has largely followed, except in the case of educational affirmative action). A principle of substantive neutrality, in

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[9] *Douglas Laycock*, Formal, Substantive, and Disaggregated Neutrality Toward Religion, DePaul Law Review 39 (1990), 993.

turn, would note that a stance of formal neutrality between groups can lead to substantively unequal or discriminatory outcomes (as has been argued in the case of race and equal protection), and it would countenance or even demand that government take religion into account in such a way that laws would neither benefit nor burden religious life. Formal and substantive neutrality are just two prominent examples of a number of ways in which state neutrality toward religion might be more specifically understood.

But though these views of neutrality would lead to differences in state and federal lawmaking, from a broad historical perspective, it is worth emphasizing the common persuasion of interpretive positions based on neutrality in the United States: to varying degrees, most tend at least somewhat toward the "wall of separation" model of church-state relations associated with Thomas Jefferson, rather than those of nations that follow accommodationist principles. They tend toward the secularization of public life. They also tend toward the radical individualism of American constitutional law that Eberle views as a hallmark of our legal system (compared with that of Germany) and that is embodied in the Court's interpretation of the other primary provisions of the First Amendment – its protection of the freedom of speech and press. To push Eberle's model, under most neutrality approaches, the state can neither embody, enforce, nor widely support thick conceptions of the good, and if it does not fully approach what Eberle describes as a "freedom striving to transcend the social order", it does oppose what he characterizes as freedom that grows, as it does in Germany, "within the constraints of the value order."[10] This individualizing tendency of state neutrality toward religion as a protection of individual conscience, a minimization of government influence over personal choice, is in broad accord with the movement of mid-century and post-war liberal jurisprudence, which sought to develop ideals of neutrality in a variety of legal contexts and advanced broadly anti-communitarian positions that I believe find their root in the cultural transformation of modern consumer society.[11]

Whatever the ultimate cause, it is in keeping with the spirit of the time that in the post-war era in which the U.S. Supreme Court first began to grapple with state establishment and free exercise claims, it turned to the principle of neutrality as a guide, later articulating it more thor-

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[10] See *Eberle*, note 1 above, 235 and 260.

[11] This issue deserves more scholarly examination. For an early treatment of non-legal issues, see *Herberg*, note 5 above.

oughly in the 1971 case of *Lemon v. Kurzman*, which gave content to the principle through the highly contested standard known as the "*Lemon* test." The test indicates that government action can pass muster under the Establishment Clause only if it has a primarily secular "purpose" and if its "primary effect … neither advances nor inhibits religion" (a third inquiry, now incorporated into the second, required that a law not "foster 'an excessive government entanglement with religion'"[12]). Justice Sandra Day O'Connor, who was a critical swing vote on Establishment Clause issues and who announced her retirement from the Court on July 1, 2005, offered an important consolidation of the first two prongs of the *Lemon* test in the 1984 case of *Lynch v. Donnelly*: that government action violates the Establishment Clause if it "endorses" religion from the perspective of a reasonable observer, including symbolic endorsements that while not actually coercing or influencing religious belief send "a message to non-adherents that they are … not full members of the political community."[13] This approach has been influential, particularly on Justice Stephen Breyer, and those members of the Court who are liberals on establishment questions (Justices Stevens, Ginsburg, and Souter), tend to use it as a supplement to the standard set out in *Lemon*. In sum, whether narrowly applying *Lemon* or using Justice O'Connor's endorsement standard, five members of the Court long agreed that for the past fifty-plus years, "the principle of neutrality has provided a good sense of direction: [that] the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals"[14] – a good sense of direction, I should stress, an aspiration.

III. Observations on the Court's Approach(es)

At least two observations might be made about the Court's fifty-some year experience with the neutrality approach (and its thirty-plus years with *Lemon* and its progeny). First, since the incorporation of the Religion Clauses onto the states, religious life and religious diversity has flourished in the United States. "Flourished" in fact is far too weak a word to describe the pluralism of religious practice in America. Precise

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12 *Lemon v. Kurzman*, 403 U.S. 602, 612-613 (1971).

13 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

14 *McCreary v. ACLU*, 125 S. Ct. 2722, 2742 (2005).

statistics are a bit tricky (for instance, in counting religious adherents, does one count church membership or self-identified affiliation?), but here are some figures from a 2001 survey used by the U.S. Census Bureau.[15] Among the total population of the United States, about 76 percent identified themselves as Christian. Of these, about thirty percent described themselves as Catholic, twenty percent as Baptist, ten percent as Methodist, and five percent as Lutheran. The remaining thirty-five percent of self-identified Christians included over five million Presbyterians, four million Charismatic Pentecostals, three million Episcopalians, millions of Mormons, one million Jehovah's Witnesses, another million members of the Assemblies of God, another million Congregationalists (the descendants of the Puritans), and hundreds of thousands of Seventh-Day Adventists, adherents of Eastern Orthodoxy, Mennonites, Disciples of Christ, Dutch Reform and Quakers. This remarkable survey of Christian affiliation fails to capture as well the fascinating, politically-influential divisions within religious communities by ethnicity, country of origin (especially important today are Catholic Hispanics and black and Asian evangelicals), or the many other smaller Protestant congregations and schisms of which in my experience most west European intellectuals are very grateful never to have heard. In addition, twenty-four percent of Americans are non-Christian: not only 2.8 million Jews, and one million Muslims, but many outside the tradition of western monotheism – who will figure centrally in the future of the neutrality standard, which has tended to view broad expressions of monotheistic belief as expressions of ceremonial deism. These include a million Buddhists, as well as a great many Hindus, Sikhs, American Indians, Taoists, Baha'i, and over three-hundred thousand people who report that they are either pagans, druids or witches. Finally, there are approximately thirty-million Americans, or fifteen percent of the population, who report having no religion at all (a great many of them surely are university professors).

To this historical observation about the flourishing of religious life in the United States during the years the Supreme Court has been guided by the neutrality ideal, one can add a doctrinal observation with perhaps some troubling implications. During these same years, the Court also has adjudicated quite a number of Establishment and Free Exercise claims in ways that flatly contradict the principle of neutrality both in

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[15] U.S. Census Bureau, Statistical Abstracts of the United States: 2004-2005, Washington, Government Printing Office, 2005, 55-6 (available through http://www.census.gov/statab/www/).

the terms that the Court itself has used and as the idea is popularly understood. For instance, as Justice Antonin Scalia has noted, the Court has approved of the exemption of churches from the payment of property taxes; it has enabled public schools to allow students to be released during the day to take religious instruction; it has exempted religious organizations from federal prohibitions on religious discrimination in employment; it has allowed public funds to pay for the bussing of children to sectarian schools; and it recently sanctioned the distribution of public funds to the schools themselves through voucher programs.[16] Similarly, the Court has upheld as constitutional state payment of chaplains to lead legislatures in opening prayer, and it has cited the following items with approval: "presidential Thanksgiving proclamations that … [include] religious references and appeals, the Supreme Court's opening cry, 'God Save the United States and this Honorable Court', … our national motto 'In God We Trust', which became official [only] in 1956, and the inclusion of [the same] phrase on our money, a practice that began in the 1800s and that has extended to all currency since the 1950s; and the statutorily prescribed language 'one nation under God', which has been part of the Pledge of Allegiance since 1954."[17]

A similarly clear departure from the neutrality of the *Lemon* standard was evident in one of two important, closely-watched Establishment Clause decisions announced on June 27, 2005 (shortly before the conference that led to this volume), *McCreary v. ACLU* and *Van Orden v. Perry*, each of which concerned the public display of the Ten Commandments and each of which was decided by a 5-4 split. In *McCreary*, the Court held unconstitutional the display of the Commandments in the courthouses of two counties in southern Kentucky. The counties claimed they wished to show that the Commandments are part of the state's "precedent legal code", but guided by the neutrality standard, and in the highly context-specific analysis typical of Establishment Clause cases, the Court determined that the counties had an explicitly religious purpose. By contrast, in *Van Orden*, the Court upheld the constitutionality of a Ten Commandments display on the grounds of the Texas State Capitol. The display consists of a six-foot-high stone monolith inscribed with the King James text from Exodus, dominated by the phrase "I AM the LORD thy God" in especially large letters, placed just below an American flag and eagle. The text is framed by

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16 *McCreary v. ACLU*, see Justice Scalia 2751-2752.

17 *David Conkle*, Constitutional Law: The Religion Clauses 2003, 125, citing *Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1984).

"two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ."[18] As the dissent in *Van Orden* noted, in upholding the constitutionality of the display, the Court was allowing an official expression of monotheistic belief contrary not only to religious non-believers but also to the millions of Americans not part of the western monotheistic tradition that the Commandments represent and to which they explicitly demand adherence – a symbol of exclusion on the Capitol grounds that put government in the business of advancing a religious view. But the Court turned a deaf ear to this argument and, notably, among those upholding this display were not only those justices who reject the *Lemon* neutrality standard per se (especially Justices Scalia, Kennedy, and Thomas) but also Justice Stephen Breyer, who in upholding the display relied on Justice O'Connor's neutrality-driven, endorsement-test modification of *Lemon* (O'Connor herself dissented from the judgment). Justice Rehnquist saw the display as secular as much as religious (Moses was a law giver as much as a religious leader); Justice Scalia saw nothing wrong with endorsing religion generally; and Justice Thomas suggested undoing the incorporation of the Establishment Clause onto the states.

The Court has developed a number of doctrinal standards and strategies of factual characterization by which it justifies such rulings, many of which are more in keeping with an accommodationist model of church-state relations – most notably, a standard for generally rejecting establishment claims against expressions of religion in government that are held to be "traditional", as well as one for analyzing the range of permissible religious accommodations to generally applicable statutes. As a practical matter, these comprise a separate doctrinal track for adjudicating practices that under a strict neutrality standard would tend to be struck down. What can one make of a jurisprudence of state neutrality on religion that is riddled with both specific and general exceptions? Justice Scalia offers one response: a criticism of the neutrality ideal both as a matter of original constitutional understanding and as a contradiction of our national ideals. "[H]ow can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between religion and non-religion,'" he exclaimed in his *McCreary* dissent, "and that 'manifesting a purpose to favor adherence to religion generally' is unconstitutional?" Calling the *Lemon* standard "brain-spun" and

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[18] *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), Justice Souter dissenting, 2893.

"thoroughly discredited", he criticized the neutrality standard as an inappropriate judicial usurpation of power over majority will.[19]

IV. Justice Scalia

In his criticism of the ideal of state neutrality, it should be noted, Justice Scalia is part of a larger current of thought in law, the humanities, and social sciences that looks with suspicion on neutrality ideals, either as a matter of principle or because of the results that follow from their application. This diverse body of criticism of neutrality from both the left and right is an essential component of a broad critique of post-war liberalism, and it is part of the breakdown of the liberal establishment consensus in America that began in the 1970s and has been consolidated in the wake of the Cold War. And from this historical perspective, one might say that the criticism of the neutrality standard prompted by the Court's inconsistent application of it finds a certain iconic representation in American cultural life, for instance the film "Mission Impossible" (1996). The premise of the movie is that a team of government agents that performs all sorts of missions central to the survival of the state has been corrupted from within; it has a mole whose underlying consumerist selfishness and lack of national loyalty has grown apparent only in the wake of the fall of Communism. The hero, Tom Cruise, has to find and defeat the mole with the help of an agent who had previously been disavowed by the government, and in their success they find the mole, bring the disavowed agent back onto the team, and save America. The neutrality standard as the mole that corrupts First Amendment jurisprudence from within? Justice Scalia as Tom Cruise and the disavowed agent as the next jurist to replace Justice O'Connor on the bench?

Indeed, we might begin to develop an even more elaborate view of the matter by shifting our focus back to the Cold War liberal period in which the neutrality standard was developed – which is to say from "Mission Impossible" the movie to "Mission Impossible" the original television series of the 1960s. The premise of the series is that a team of five agents, including one woman (a Court majority), undertake various missions central to the security of the United States that seem impossible but that they achieve in the end; the title thus is ironic: missions im-

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[19] See *McCreary v. ACLU*, Justice Scalia dissenting, 2750.

possible always become missions accomplished, and the pleasure of the show is to watch the extraordinary ways in which the team attains its objective. The most important way it does so is through disguise – the thematic and philosophical core of the series. In one of its great episodes,[20] for instance, the Soviet Union creates a town in a remote part of East Germany that resembles in every precise detail an American suburb in Illinois, a state by the way once part of the Old Northwest territory (and surely if the town were depicted today it would be a "micro"); there, Communist agents are being trained to act exactly like Americans so that they can infiltrate the United States and induce mayhem. The camera pans lovingly over the Communists as they play basketball, wash their cars, and generally act casual, in a montage that begins with an image of an American flag and ends with one of the steeple of the white town church. To counter the plot, the inter-racial Mission Impossible team goes deep undercover, pretending to be Communist agents pretending to be Americans. They pass their first test when the director of the camp arranges for fake "American" police to storm the team's hotel room with guns drawn – exclaiming "we know who you are!" – and try to arrest them. To the camp director's warm approval, the head of the Mission Impossible team realizes what to do; he asks for the officers' badge numbers, and then starts talking aggressively about his constitutional rights.

The theme of disguise also figures implicitly in Justice Scalia's criticism of the Court's exceptions to the *Lemon* neutrality doctrine. There is indeed much that might seem disingenuous about aspects of the Court's decision-making. For instance, unless one approaches the matter from an exceedingly high level of generality, it is difficult to see how the Court can uphold many of the practices it does as part of national or state "tradition" given that many are products of the struggle against atheistic Communism that took place during the Cold War. More trenchantly, Justice Scalia condemns the Court's exceptions to the neutrality standard on the basis of their institutional significance. According to Justice Scalia, the Court's approach to neutrality indicates that it "has not had the courage (or the foolhardiness) to apply the neutrality principle consistently."[21] The reason, he argues, is institutional self-protection in a democratic society whose values the Court is slowly eroding and that would revolt in the face of the more direct assaults on its beliefs the neutrality ideal would otherwise dictate. "[I]t is the instinct for

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[20] *Sherman Marks*, "The Carriers", 1966 (Season 1, Episode 10).

[21] *McCreary v. ACLU*, Justice Scalia dissenting, 2751.

self-preservation", he explains, "and the recognition that the Court, which 'has no influence over either the sword or the purse', cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches."[22] In this view, the exceptions to neutrality serve to deflect criticism from (or even to legitimate) the Court's other Establishment Clause jurisprudence. To put the matter graphically: the last thing the Court wants is for a six-foot high granite monument of the Ten Commandments to be lifted from the lawn of the Texas capitol with a crane while thousands of fervently praying protestors throw themselves in front of the vehicle – and they would do so, I hasten to add, not because most would think they should live in a Christian rather than a liberal state (though some surely would think that), but rather because most would believe that the liberal state is inseparable from religious commitment.

Disguise for institutional self-preservation: Justice Scalia clearly is onto something in his criticism, but in taking cognizance of his view, I would like to suggest a more positive way of thinking about the issue. In a highly contested and difficult political situation, the Court can be said to have acted in a statesman-like manner, with prudence, to have used the principle of neutrality not so much as a mask or disguise to legitimate top-down secularization, but rather as an aspirational ideal in a jurisprudence whose full implications the American polity is not yet prepared to accept. In constitutional adjudication, culture and its history shape the possibilities of law, and in moving the nation toward the fulfillment of its underlying principles in an increasingly diverse society, it is appropriate for the Court to choose its battles and safeguard its authority. The task has not been an easy one, because the tensions at play in our culture of religion and law are so strong.

V. Conclusion

All of which brings me back to Edward Eberle's characterization of American law and to Ohio and to my final thoughts. American constitutional law, Eberle argues, is radically individualist, based on principles

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[22] *McCreary v. ACLU*, Justice Scalia dissenting 2752.

of negative freedom, with the state neither enforcing social rights nor, we can add, embodying larger common conceptions of the good. Religion is one of the most important arenas of lawmaking in which Americans attempt to counteract that legal tendency, seeking to have the polity facilitate or actively support common values and even asking the state to endorse a transcendent spiritual message. The constitutional strain this creates, I believe, is an inescapable part of American society. Because the universalistic liberal principles of the United States have and continue to arise from particularistic religious commitments; because so many Americans have a religious idea of the liberal state – just ask my friends in Cincinnati – there will almost inevitably be conflict between those espousing the essentially separationist principle embodied in the ideal of state neutrality and those who wish for a more accommodationist approach so that their religious views, or simply religion generally, can be recognized as foundational to the meaning of the polity (a recognition that, given the diversity of religious life in America, will almost always be civically exclusionary). This is a particularly interesting and complex way in which cultural history has placed limits on liberal legal development in the United States, and the Court has acted effectively in the role into which it was been thrust, using neutrality as an aspiration and following its star for the most part, in the process shaping and educating popular understanding of liberalism itself – shaping the popular American tradition of thinking about the state. In the context of the Religion Clauses, that is, the Court has acted with a view toward socio-legal governance, as a manager of the culture of the liberal rule of law.

A Comment on Mark Weiner's "Neutrality Between Church and State: Mission Impossible"

Edward J. Eberle[1]

I. Introduction

Much that Professor Mark Weiner has said about the role of religion in the United States, the role of the Supreme Court in attempting to enforce an ideal of neutrality in matters between church and state, and how those two forces greatly influence American society resonates well in the American populace and psyche. Church-state issues are among the most important, and divisive, in American society, a pivotal matter over what it means to be an American. Professor Weiner has offered a nice portrait of this part of Americana. I want to offer some perspectives on Professor Weiner's comments.

My comments consist of these points: First, I discuss briefly United States constitutional authority on religion, which primarily consists of First-Amendment religious protections.[2] Second, I illuminate some historical roots of the American conception of religious freedom – showing how even early on it consisted of pluralistic conceptions of at least separationism and accommodationism of church and state. Here I will show how these forces of separationism and accommodationism are still at work today. Third, I describe how the tension between separationist and accommodationist approaches to American religious freedoms plays out in the Supreme Court today over Professor Weiner's chosen topic of neutrality, as we can recognize formal and substantive

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[2] The First Amendment provides, with respect to religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... "

concepts of neutrality at work in the Court's doctrine. And fourth, and finally, I want to address Professor Weiner's comments on my *Dignity and Liberty*[3] book thesis – an American constitution of liberty and its tendency to encourage individualism, sometimes of a radical type, and whether that can be or is limited by communal or democratic forces searching for a more constraining value structure.

II. US Constitution

I start with the United States Constitution, which enumerates religious liberty in only two places: the First Amendment and Article VI [3]. The latter provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States", a legacy learned from the English experience of flushing out dissenters or those not loyal enough to the English Crown (mainly Roman Catholics, atheists or separatists). The other is always threatening. Most Supreme Court jurisprudence and Professor Weiner's presentation concern the Establishment Clause, and so I will limit my comments to that.

Textually, the First Amendment singles out religion in two ways. The Establishment Clause delimits governmental[4] power over religion by prohibiting it from establishing religion. The Free Exercise Clause highlights religion for preferred treatment by singling it out, over other topics, such as politics, commerce or property, as meriting freedom from governmental prohibition.[5] So, we can see there is an interesting relationship, if not tension, between the Establishment Clause and the Free Exercise Clause. The Establishment Clause would appear to single

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[3] *Edward Eberle*, Dignity and Liberty: Constitutional Visions in Germany and the United States (2002).

[4] With the incorporation of the Establishment Clause into the fourteenth amendment, which extended its reach against state actions, it is more appropriate to speak of 'government', and not the First Amendment's chosen word of "Congress," as the object of the Clause, see *Everson v. Board of Education*, 330 U.S. 1 (1947). My comments relate only to the post-incorporation period of the Establishment Clause, where the Supreme Court is the main source of Establishment Clause values, not state government, as had been the case before the incorporation of the Establishment Clause.

[5] The Free Exercise Clause was incorporated into the fourteenth amendment and made applicable against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

out religion for some form of disfavored official treatment; the Free Exercise Clause would seem to single out religious activity for some form of favored treatment.

There is both similarity and difference between the two religious clauses. Summarily stated, both the Establishment Clause and the Free Exercise Clause have in common a concern for protection of the individual voluntariness of religious choice and especially a guarantee of liberty of conscience and its concomitant guard against coercion of conscience. We might say liberty of personal conscience is a common religious ideal of the two Clauses. However, the two Clauses differ over strategy. The Establishment Clause is primarily institution-based; delimitation of governmental power over religion safeguards the voluntariness of individual and group choice over religion. The Free Exercise Clause is mainly individual-based; people, not government, are empowered to choose religious tenets as one of the score of natural rights enshrined in the Constitution.

Unfortunately, limitations of time and space do not allow working out the difficult tension between these Clauses. Let me leave you with Justice Kennedy's apt observation that the limits of the Free Exercise Clause lie in the Establishment Clause.[6]

III. The Establishment Clause

Turning more directly to the Establishment Clause, it seems fair to say the Court works with very limited textual authority. Not surprisingly, the Court has had much difficulty translating this majestic generality into workable law. For example, at the end of the 2004-2005 term, the Court ruled 5-4 each time that Texas could display a large monument of the Ten Commandments with explicit religious meaning on its state capitol grounds because it was surrounded by quite a few other monuments of various types and therefore it seemed more "historical" than "religious";[7] but a Kentucky court room could not display a framed

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[6] "The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

[7] *Van Orden v. Perry*, 2005 WL 1500276 (June 27, 2005).

copy of the Ten Commandments, even when later surrounded by other material, because that was too religious,[8] as Professor Weiner has spoken to. We can see that it is hard to reach agreement on what the Establishment Clause means. Maybe we can only come up with this commonly accepted meaning: 1) there can be no established church; 2) there can be no preference of one religion over another religion; and 3) there can be no coercion of conscience.

But this leads to my second point: Since the Court started applying the Establishment Clause vigorously in 1947,[9] it has vacillated uneasily between separationist and accommodationist stances. We can see this even in *Everson:* all nine members of the Court spoke separationist rhetoric, but the Court split 5-4 in applying the doctrine to the facts, upholding state-supported bussing of Roman-Catholic school children. The Court analogized state provided bussing to other safety and welfare services, like police or fire protection.

A deeper look at American history at the time of the Framing of the Constitution reveals a similar plurality of differing views. Looking only quickly to this history, we can paint in a broad brush to show four schools of thought, two religious and two political, that more or less align with one another – let me explain.

IV. Evangelicals and Separation

First, religious evangelicals (most prominently Baptists) echoed the essential teaching of Roger Williams (America's original religious thinker) that separation of church and state served the interests of each best by protecting the purity and integrity of each by guarding against the inevitable tensions arising from one infringing into the domain of the other. Roger Williams, after all, was the original source for the "wall of separation" metaphor,[10] not Thomas Jefferson. Most people view the evangelicals as advocating separation of church and state in order to protect the purity of religion as a voluntary, non-coerced exercise, but

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[8] *McCreary County, Kentucky v. ACLU*, 2005 WL 1498988 (June 27, 2005).

[9] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[10] *Edward Eberle*, Roger Williams's Gift: Religious Liberty in America, Roger Williams L. Rev. 4 (1999), 425, 427.

much of their thought was deeper than that, arguing also for a theory of the state and political independence.

Second, evangelicals naturally aligned with Enlightenment civic republicans (most notably Thomas Jefferson and James Madison) who advocated separation of church and state as well.[11] For Jefferson, separation was mainly a strategy to protect the fragility of the experiment in civic republicanism; for Madison, separation was designed to protect politics and religion, more like Roger Williams.

Now, this experiment in separationism resonates with most Americans, positively or negatively. For it was the philosophy of separationism that marked the Court's first entrée into policing the border between church and state, following Jefferson's metaphor of a "wall of separation."[12] Most of Establishment Clause law that has followed has been a battle over whether a "wall of separation" is the proper rubric within which to view church-state relations, as demonstrated by the two recent Ten Commandment cases.

The American experiment in separationism was unique, being the first such experiment in the world, with Roger Williams' experiment in Providence colony, in 1638, being the very first. The very first serious dispute faced by Providence colony was a dispute between a husband and wife over her attending worship services that resulted in Providence colony recognizing a woman's freedom of conscience, likely for the first time in recorded western history.[13] Even today, there are few experiments in serious separation of church and state; France and Turkey are probably the two other notable experiments. We also observe a decided movement toward adopting separationist elements to church-state relations, such as in Portugal and Spain, which officially disestablished an official church.

But separationism is not the only early American philosophy to demarcate church-state relations. The Puritan tradition advocated separation of church and state in institutional matters so that the internal governance of church and state could be preserved. But Puritans also advocated cooperation between church and state to aid religion and support

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[11] *John Witte, Jr*., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, Notre Dame L. Rev. 71 (1996), 371.

[12] *Everson*; and *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

[13] *Edward Eberle*, Another of Roger Williams's Gifts: Women's Right to Liberty of Conscience: Joshua Verin v. Providence Plantations, Roger Williams L. Rev. 9 (2004), 399.

the state. Under Puritanism, government could support religious education, pay the salaries of clergy and provide land to churches, among other aids.[14] Of course, only Christian, primarily Protestant and Congregational (the successor to the Puritans) churches received such state benevolence. And this Puritan tradition was carried forward by other prominent American civic republicans, such as George Washington and John Adams.[15] So, here we might speak of *de facto* state establishments of religion – Christianity, if not Protestantism – not unlike historical Massachusetts Bay and historical and contemporary Germany. My point, simply stated: the contest between separationism and accommodationism is a long-running one.

V. Separationism and Accommodationism

This leads to my third point: the contest between separationism and accommodationism plays out over Supreme Court doctrine as well. I will limit my comments to Professor Weiner's chosen theme of neutrality. And I concur in Professor Weiner's assessment: neutrality between church and state is mission impossible. Why it is mission impossible is worth exploring.

First, let us observe that we Americans are indeed "a religious people", as the Court declared in 1952[16] and Professor Weiner has so well depicted. Second, it seems fair to say the Establishment Clause suggests a separationist stance in church-state relations (of course, where to draw the line is a separate and difficult question). Thus, if we were positing clean, bright-line rules of law, the most sensible approach would be strict separation of church and state. Such a rule would have the advantage of clarity and consistency. But it would also create social revolution, for the reasons noted by Professor Weiner in referring to Justice Scalia.[17] Politicians in the United States have already excused the mur-

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[14] See *Witte, Jr.*, note 11 above.

[15] *Id.*

[16] *Zorach v. Clausen*, 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being".

[17] *McCreary County, Kentucky v. ACLU*, 2005 WL 1498988, Justice Scalia dissenting: "What, then, could be the genuine 'good reason' for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which 'has no influence over either the

der or attempted murder of federal judges as due to people's frustration with the judiciary[18] and called for the heads of federal judges they disagree with. If the Court went down the path of strict separationism – politicians may even conceivably call for the Court's disbandment.

The plain fact of social reality is that religion is a dominant force in American society, perhaps the dominant force today, as Professor Weiner has pointed out and as many others observe from abroad. Thus, the Court is well counseled to choose very carefully the matters meriting intervention in the democratic process.

VI. Neutrality

Let's see how this plays out with neutrality. I want to use the recent school voucher case of *Zelman v. Simmons-Harris*[19] as an example. In *Zelman*, there was substantial agreement among the Justices that neutrality was a core Establishment Clause principle. But the Court split dramatically over what neutrality means.

For the majority, neutrality only had a formal, facial meaning. What was relevant was that the state policy treated everyone equally or neutrally, regardless if religious or not. Once formal neutrality was established, government could channel aid to religious schools because religious schools stood in the same position as other claimants for government resources. Doctrinally, of course, the aid could officially so be channeled only indirectly through 1) neutrality and 2) private, genuine choice. This simply meant that school vouchers were accomplished by giving money to parents, who endorsed their checks over to religious schools.

Statistics did not matter. Ninety-six percent of the funds went to religious schools in support of the religious mission. The majority was not

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sword or the purse', The Federalist No. 78 ... cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches".

[18] New York Times, Texan with Bench Experience Wades Into Judicial Fray, July 17, 2005, at page A 11 (Senator John Cornyn, Texas-Republican).

[19] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

concerned about the effect of the aid – what we would call a closer, more careful, substantive evaluation of neutrality.

Substantive neutrality was what drove the dissent. In their view, state support of the religion missions of religious schools violated core principles of the Establishment Clause – neutrality and coercion of conscience. The dissent's position was the dominant one on the Court until 1983.[20] The Court's fight over neutrality illustrates our fight over religious freedom and why this may, indeed, be a mission impossible.

Another observation about *Zelman* seems pertinent. Government funding of religious education is substantial under the non-preferentialist doctrine of the Rehnquist Court, including government provision of school tuition,[21] remedial education,[22] computers, library and teaching materials,[23] and teaching aids,[24] among other forms of aid. Perhaps it is not too much of an exaggeration to observe that we have in the workings the erection of a system of parallel public financing of education, and this mainly for religious education. If so, we might observe that the United States is edging toward a church-state cooperative model, like present in Germany. Time will tell.

VII. Professor Weiner's Comments

Finally, I want to address Professor Weiner's comments on my thesis of an American constitution of liberty that encourages individualism. That a constitution of liberty encourages individualism, maybe radical individualism, still applies in some rights areas in the United States, most notably free speech rights, the right I chose as the archetypal American freedom. Even today, there is little difference between the Warren Court and the Rehnquist Court concerning core free speech questions.

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[20] *Mueller v. Allen*, 463 U.S. 388 (1983).

[21] *Zelman; Mueller*; and *Witters v. Washington Dept of Services for Blind*, 474 U.S. 481 (1986).

[22] *Agostini v. Felton*, 521 U.S. 203 (1997).

[23] *Mitchell v. Helms*, 530 U.S. 793 (2000).

[24] E.g. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), sign interpreter.

But in other claims to rights, there are differences. Most prominent would be privacy rights[25] and our topic of religion. Religion is, as Professor Weiner pointed out, a dominant cultural force in the United States. And if the impulse of the Warren Court was to bestow religious freedom as an essentially voluntary, individualistic choice, the impulse of the Rehnquist Court has mainly been the opposite and more constraining.

The Rehnquist Court has largely succeeded in converting First Amendment religious protections into vessels of community, democratic control. In the notable 1990 case of Employment Division, *Department of Human Services (Oregon) v. Smith*[26] the Court calibrated Free Exercise rights to the mores of the democratic process by judging their incursion according to whether a generally applicable neutral law was in place; if so, religious practices must conform to democratic law on pain of sanction. And in the non-preferentialist strain of Establishment Clause cases we have considered, such as *Zelman*, we can see majoritarian forces can bestow financial favors on the religions they prefer, so long as the program is designed in a facially neutral way and the aid is channeled indirectly through people. Neutrality – or facial neutrality – we might observe is the doctrinal common ground between Rehnquist Court Free Exercise and Establishment Clause jurisprudence.

And we might witness, thus, a reassertion of democratic majoritarianism in religious values, both culturally and constitutionally. Democracy is the source for value-formation which might constrain individual-based rights approaches.

This is just another way of saying that the United States still consists of a contest between different conceptions of neutrality – formal and substantive, which works out as a contest between separationism versus accommodationism. In the past, separationism had its day; today, accommodationism rules. As Professor Weiner said, stay tuned. We won't bore you!

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[25] *Troxel v. Granville*, 530 U.S. 57 (2000), no grand parental right to visit grandchild; and *Washington v. Glucksberg*, 521 U.S. 707 (1997), no right to die.

[26] *Department of Human Services (Oregon) v. Smith*, 494 U.S. 872 (1990).

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