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Localizing Religion in a Jewish State

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LOCALIZING RELIGION IN A JEWISH STATE

Yishai Blank†

Cities in Israel are regulating religion and controlling religious liberty. They decide whether to close down roads during the Sabbath, whether to limit the selling of pork meat within their jurisdiction, whether to prohibit sex stores from opening, and whether to allocate budgets and lands to religious activities. They do all that by using their regular local powers as well as special enablement laws which the Israeli parliament enacts from time to time. The immediacy of these issues, the fact that the traditional powers—business licensing, traffic and road control, spending and more—of local authorities touch upon many of them, and the inability of the central government to obtain a nationwide consensus over religious matters have caused the localization of religious liberty in Israel. In addition, some legal rules induce and even force religious-based residential segregation, thus resulting in a relative religious homogeneity of local population. Hence, cities are able to decide to advance a religious—or a secular—agenda much more easily than the national councils. This process, however, had gone unnoticed by most scholars and courts. As a result, religious liberty doctrine has failed to live up to the challenges Israel is now facing: growing religious and national extremism and the ensuing risk of fragmentation and oppression of minorities. This Article shifts the focus from the role of the central government in regulating religion to that of cities. I argue that the particular form of decentralization of religious liberty in Israel had mixed outcome: it helped weakening the monopoly of orthodox Judaism in some locations and enabled diverse communities to flourish and express their unique religious vision; but it also radicalized some religions, exacerbated tensions among competing religions and denominations, heightened religious-based residential segregation and jeopardized minorities.

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INTRODUCTION

Throughout the world, legal systems are required to accommodate religious diversity and manage heightened tensions that arise from radically conflicting religious beliefs and practices. The conflicts between religious and secular groups, as well as among different religious groups often take place in smaller polities, in the form of a battle over the shape and content of local public spaces, controlled and regulated by local governments. Such conflicts include, for example, the closure of stores and of roads dur-
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ing religious holidays and days of rest, the display of religiously offensive objects (such as pork meat or leavened dough on Passover) in streets and showcases, holding religiously contentious parading in streets (in the case of gay parades, for example), the allocation of municipal budgets and lands for religious activities, the presentation of religious symbols in town halls and city parks, and more. The immediacy of these issues, the fact that the traditional powers—business licensing, traffic and road control, spending and more—of local authorities touch upon many of them, and the inability of the central government to obtain a nationwide consensus over religious matters have caused the localization of religious liberty in Israel.

This reality, I argue in this Article, stands in stark contrast to the official legal doctrine of religious freedom in Israel. With few important exceptions, the study of the legal relationship between religions and the state has tended to focus on the role that central state organs have played in this regard, ignoring the complexities of the interplay between different levels of government. This Article shifts this focus by exploring the role local governments have been playing in structuring and regulating religious-secular tensions in Israel. Lacking meaningful constitutional constraints against the establishment of religion, Israel has a history of legislative impositions of religious norms, and of governmental efforts to give religious

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1 See H.C. 5016/96 Horev v. Minister of Transportation, 51(4) P.D. 1 (Isr. 1997) (holding that the closure of a major road in Jerusalem during the Sabbath was “unreasonable” since it gave too much weight to religious consideration). In the American context see McGowan v. Maryland, 366 U.S. 420 (1961) (ruling that state Sunday closing laws did not violate the Due Process or Equal Protection Clauses).

2 See H.C. 953/01 Solodkin v. City of Beit Shemesh, 58(5) P.D. 595 (Isr. 2004) (ruling that a local authority can limit the selling of pork meat to certain areas in order to balance between “religious feelings” and freedom of occupation);

3 See Jerusalem Open House v. (holding that the municipality’s refusal to let the gay parade march is unreasonable).


5 See, e.g., County of Allegheny v. ACLU, 492 U.S. 573 (1989) (ruling that the display of a crèche on government property violated the Establishment Clause, but that a menorah on display was not unconstitutional).


7 There are, however, limitations on government religious activities. Israeli courts have acknowledged and protected the freedom from religion—governments limitation to impose religious prohibitions and rules already in the 1950s. Since Israel had no constitutional limitations on legislative power until 1992—when two Basic Laws were passed—there was a crucial difference between legislative and executive power to establish religion and infringe on individual freedom from religion. While parliament was able to legislate religious laws and to infringe on basic liberties as it saw fit, the government was limited by judicially invented and enforced “fundamental rights” which only the legislator could infringe.

8 Prime examples for such religious pieces of legislation are Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 and the Law of Return, 1950. The first is of special importance as it sets up a religious system of marriage and divorce, prohibiting any marriage which
considerations priority over others. Local governments in particular have been trying to use their authorizations in order to advance religious interests and express religious norms. Trying to curb such local initiatives, the Israeli Supreme Court ruled in Axel v. Netanyah that religion is a “nationwide problem,” resting solely in the hands of the central government and outside of the jurisdiction of cities. And any attempt made by localities to use their powers in order to reflect religious beliefs or considerations was ruled *ultra vires* and null.\(^9\) Thus, the city of Netanyah was prohibited from banning the selling of pork by using its business licensing powers since religion “is a general, nationwide problem,” whose solution must rest on the shoulders of the national legislator.\(^10\)

Although this rule maintained its formal authority, it did not result in cities losing their crucial role in expressing religious beliefs and in translating religious norms into governmental action. In fact, local governments only grew more important in establishing religion—or disestablishing it, if they were secular in their inclination. Although the Court ruled that localities cannot take into account religious considerations when using their regular powers, it left a room for the legislator (the Knesset) to specifically empower them to do so. And since Israel had no constitutional prohibitions against establishing religion until 1992, the legislator was able to do just that.\(^11\) Indeed, since the 1950s, the Knesset enacted numerous “special enablement laws” granting localities with specific powers to limit or even prohibit the sale of pork meat in their jurisdiction,\(^12\) and to take into account “religious considerations” when granting various establishments business licenses and determining their ability to operate during religious holidays.\(^13\) Often the Knesset opted for this mode of legislation due to the political stalemate between religious and secular factions. Unable to reach an agreement at the nationwide level, empowering localities was the only attainable compromise.

In addition to these special enablement laws, localities have also been using other powers at their disposal to express the religious beliefs of their

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\(^9\) See H.C. 194/54 Axel v. Mayor, Councilors and Residents of Netanyah, 8 P.D. 1525 (Isr. 1954).


\(^11\) Until the enactment of Basic Law: Human Dignity and Liberty in 1992 there was almost no limitation on the power of the Israeli parliament to legislate religion. The only barrier between religious laws becoming state law was the political situation in which religious parties were a minority, unable to obtain a majority. Since 1992, however, the Israeli parliament is constrained by various constitutionally protected individual rights (including the right to a free exercise of religion, which the Court read into it), yet there is no general prohibition on establishing religion. I will discuss this in length *infra*.

\(^12\) Local Authorities Act (Special Enablement), 1956.

\(^13\) Section 249(21), The Municipalities Act (religious holidays and days of rest); Prohibition of Opening of Amusement Places (Special Enablement) 1997 (regarding Tish\'a Be\'av – the day of fasting and atonement marking the destruction of the Jewish Temple).
residents. If religious considerations were not “predominant” but only “additional,” ruled the Court in Lazarovitz v. Food Controller, governments—including local ones—could be influenced by them in their decision making. Thus, it was legal for a city to use its ordinary traffic and road control powers in order to close down streets and roads during the Sabbath in order to protect “religious sentiments,” even if the Knesset did not explicitly authorize it to take religious consideration into account. And localities were allowed to allocate land and budgets for religious activities as long as they did that on the basis of “equal and transparent” criteria. Thus cities regularly use their wide ranging powers—business licensing, road closures and traffic control, planning and zoning, control of speech (parades, marches, municipally-owned poster stands), spending and land allocation—in ways which express religious norms and beliefs, albeit in a limited fashion as they are still restricted by their residents’ “freedom from religion.”

But in order to better grasp the extent to which localities use their existing powers in order to establish religion within their jurisdiction we need to turn to another important fact which is the relative religious homogeneity of localities in Israel. This homogeneity enabled localities to reach a consensus where the national legislator failed. As compared with the religious diversity of the entire population of Israel and of the Knesset—being comprised of ultra orthodox Jews, modern orthodox Jews, secular Jews, Muslims, Christians, Druze and more—localities are extremely homogeneous. This relative homogeneity is a result of historical contingencies as well as of a uniquely Israeli legal structure, which forces and induces religious residential segregation. Historically, already in the nineteenth century, ultra orthodox Jews lived in separate neighborhoods, which were later on recognized by the British mandate authorities as independent localities. Christian Arabs and Muslim ones also often lived in separate villages and towns.

This historical spatial organization was perpetuated through market mechanisms, cultural preferences and governmental policies. While undoubtedly individual preferences to live with one’s peers and one’s economic abilities play a significant role in determining one’s decision where to live, the state of Israel adopted various mechanisms which also incentivized and even forced people to live “within” their communities. Much was written about the residential separation between Jews and Arabs, but very

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14 H.C. 98/54 Lazarovitz v. Food Controller, 10 P.D. 40 (Isr. 1954) (ruling that the exercise of power by government authorities cannot be guided chiefly by religious motivations, but can be influenced by it); Cr.A. 217/58 Isramax Ltd. v. The State of Israel, 22 P.D. 343 (Isr. 1962).
16 Jerusalem Open House.
17 The separation between Jews (secular and religious alike) and Arabs (Muslim and Christians alike) was obtained mostly through the allotting of lands exclusively to Jews. See Yi-
little attention was given to the fact that the state also induced the segregation among Jews, based on their religiosity. First, ultra orthodox Jews were formally excluded from many rural settlements since the vast majority of them do not serve in the military, and in many such settlements there is a screening committees—and restrictive covenants—that require military service as condition for land purchase. These committees and covenants are not “private” by any means, since the land in those settlements is owned and run by the state of Israel. Second, and perhaps even more striking, is the government’s policy that prohibits secular Jews from buying property in ultra orthodox cities that the state constructed on state-owned lands.

In Am Hofshi v. The Ministry of Building and Housing the Supreme Court ruled that as long as the state maintained a “separate but equal” treatment of secular and religious Jews, it was legitimate for it to sell apartments in the new city of Elad only to ultra orthodox Jews. Rejecting the challenge made by secular Jews, the Court reasoned that ultra orthodox Jews were a small minority with “unique ways of life” and it was legitimate for the state to create a segregated city for them, in order to “sustain their ways of life.” The Am Hofshi decision opened the gate for more and more state-constructed ultra orthodox new towns. This process exacerbated the segregation of ultra orthodox Jews from the rest of society, and seems to be now spilling over also to modern orthodox Jews. A question remains whether courts will be willing to extend the logic of Am Hofshi to other religious groups as well.

The fact that religious and secular Jews, ultra orthodox Jews and modern orthodox Jews, Muslims and Christians, Druze and others live in fairly segregated localities had a huge impact on the ability—and motivation—of local communities to express religious norms and beliefs through their local governments. Indeed, the various powers which I earlier mentioned were put in the hands of relatively homogeneous religious groups, enabling to overcome the stalemate at the national level. This also created an incentive for religious and secular communities, I argue in this Article, to further self-segregate—and exclude members of other religions—in order to obtain control over local governments. Thus, while Israeli law pretended to merely recognize the already-existing religious and secular communities, it in fact created, ossified and entrenched religious and secular divides. The localization of religion not only exacerbated the segregation between the antagonistic communities by inducing their members to actively create ho-


19 Am Hofshi, at 508-509.

20 This question arose in Saba'a. See infra note 85.
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homogeneous spaces where they would form a clear majority; these legal authorizations might have also transformed the very meaning of “religion” and what it meant to be religious (as well as secular) in various contexts in Israel.\(^2\) Furthermore, the delegation of different authorities from the central state to the local level enabled the former to maintain a semblance of secularity despite the fact that many localities—undoubtedly state agents—have been actively promoting a religious agenda. In addition, the fact that the Knesset specifically authorized local governments to act upon religious considerations in some matters spurred the competing parties to initiate political and legal battles which were targeted at convincing the state to expand (or narrow) the religious authorities of localities.

The Israeli case of the localization of religion indeed presents us with a most vivid example of the famous Madisonian “risk of faction.” Lacking constitutional constraints, localities might express—and enact into law—the most radical and violent religious views, often targeting weak and vulnerable minorities. As Susan Okin and other scholars noted, granting cultural communities—especially religious ones—control over their jurisdictions puts minorities-within-minorities at a greater risk of domination and abuse.\(^2\) Thus, instead of Madison’s “positive pluralism” we might in fact face what he termed the “violence of faction.”\(^2\) Indeed, Madison was concerned with the risk that the federation would deteriorate into a multitude of radical religious factions combating each other with ever increased zeal. In his view, a structure of weak federal institutions and too strong states (and localities) could bring about the deprivation of individual rights within states and localities, and the radicalization of the entire federation.\(^2\) Madison’s cure—“extending the sphere”—will potentially de-radicalize the local zeal and result in the moderation of extreme politics in light of the large number of people with opposing views throughout the federation that will balance each other and the restraining effect of federal elites.\(^2\)

But the localization of religion in Israel was also extremely beneficial. As Richard Schragger recently observed, the active role of American localities in the discourse and doctrine of religious liberty was of crucial importance as it provided an institutional safeguard—rather than a mere judicially enforced barrier—against the monopolization of one religion.\(^2\) That

\(^2\) It did so due to two important facts. First, not all religious communities received such recognition, thus only those communities which were recognized as deserving some degree of self-rule became to be identified with the concept of religion and religious freedom. Second, it actually turned religion into “culture.” This was the case since other communities, not religious but rather ethnic, national or ideological also received local autonomy. All these together were re-conceptualized as “cultural.” See infra.

\(^2\) SUSAN MOLER-OKIN, IS MULTICULTURALISM BAD FOR WOMEN?  

\(^23\) THE FEDERALIST NO. 10 (James Madison).  

\(^24\) See THE FEDERALIST NO. 10 (James Madison). See also discussion infra Part III.B.1.  

\(^25\) THE FEDERALIST NO. 10 (James Madison).  

\(^26\) Schragger, supra note 6.
Local governments in the United States are routinely involved in regulating matters pertaining to religious liberty—much like localities in Israel—has been crucial to the check both on government’s ability to establish one religion, and on religious power to spread through the entire federation. In Israel, too, I argue, the fact that localities have been able to exercise their powers in a way that benefitted their preferred religion is imperative given the monopoly that orthodox Judaism enjoys in the government. Other religions, as well as other Jewish denominations are discriminated against and suffer from chronic weakness and underrepresentation in the government, hence the only avenue left for them are local governments. Obtaining power at the local level allows such marginal and minority religions to use the coercive power of local governments to advance the interests of their member. An additional advantage of the localization of religion is that it facilitates and enables religious minorities to “dissent by deciding.”

Permanent minorities at the national level, argues Heather Gerken, are sometimes able to form local majorities (or powerful local coalitions) and if these jurisdictions are given decision making powers, they can express their views not only by “talking” but by “deciding.” Religious minorities, too, are thus able to form a local majority and express their radically different views by acting upon them at the local level. This ability makes for an extremely powerful dissent, exposing the hegemony of the majority religion and its oppression of other religions.

In order to benefit from the advantages of the localization of religion without, however, deteriorating into an all out war of factions, and without jeopardizing the individual liberty of persons who wish to live side by side despite their belonging to different religious communities I offer in this Article several broad brush principles. While maintaining, and even further empowering localities to deal with religious liberty, more stringent constitutional protections need to be given to individuals who happen to live in a locality where the majority belongs to a different creed. Furthermore, I argue, state-mandated segregation on the basis of religion must entirely cease. Ultra orthodox Jews are no longer a small minority in need of protection from cultural annihilation. This forced segregation only serves to perpetuate the economic weakness of religious communities and the separation between Jews and Arabs. Lastly, the various local powers described above need to be applied in a manner which will induce integration and interfaith dialogue rather than in a segregation-inducing fashion.

In Part One I [-----]. Part Two is [-----]. Part Three [-----].

I. RELIGIOUS FREEDOM IN ISRAEL

In this Part I present in very broad terms the basics principles of reli-

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gious freedom in Israel. I make no attempt to cover the topic in depth since this Article highlights a rather narrow and hidden aspect of religious freedom in Israel – the unique role local governments play in its development and application. While some scholars might argue that there is no real religious freedom in Israel since there is integration—rather than separation—between religion and state, the reality is far more complex. The fact that Judaism, as well as other religions are indeed established in various state laws and governmental policies is crucial for understanding the doctrine of religious freedom in Israel, but it is far from exhausting it. I now describe [four] fundamental principles that lie at the heart of Israel’s unique doctrine of religious freedom.

First, Israel is constitutionally defined as a “Jewish and democratic state” in two of its Basic Laws (Human Dignity and Freedom of Occupation) as well as in other pieces of legislation. Courts and scholars are divided over whether the term “Jewish” should be read as referring to Judaism as a religion, to Jewish nationality or to Jewish morality. The constitutional reference to the “Jewishness” of the state is therefore at the heart of endless legal debates pertaining to the ability of the state to enforce Jewish prohibitions or to express Jewish religious values. And while the majority of views is that this constitutional provision does not mandate the state to become a theocracy, but rather to “integrate” or “harmonize” the two poles—Judaism and democracy—this expression leaves ample room for competing interpretations, including religious-friendly ones.

Second, although there is no explicit mention of freedom of religion in either of Israel’s Basic Laws, the Supreme Court read it into the term “dignity” which is protected by Basic Law: Human Dignity and Liberty. The exact content and meaning of this constitutional freedom of religion is, however, unclear. Most agree that it has a negative and a positive aspect: The negative one being freedom of religion – a version of the free exercise clause, which prohibits the state from interfering with a person’s right to worship and express her faith; the positive aspect being freedom from religion – a version, albeit a diluted one, of the disestablishment clause, prohibiting the state from coercing people to worship or act religiously.

Third, until the enactment of two Basic Laws—enjoying the status of a constitution and enabling courts to quash Knesset legislation in 1992—the Knesset was able to enact any law that it wished to since there were no constitutional rights on the basis of which courts could review and strike down laws. The Knesset thus continuously enacted laws that reflected a perception of religion-state relationship that was radically different than the American notion of “disestablishment” (a “wall” between church and state)

or from the French principle of state secularism (the concept of “laïcité”). The most (in)famous example of the Israeli “integration” between religion and state is the lack of civil laws of marriage and divorce. As a continuation of the Ottoman “Millet” system and the British Mandate of Palestine, Israel only recognizes marriage and divorce that is performed by religious state officials—rabbis, priests or qadis—and according to the religious laws of the various “recognized” religious communities. While religious liberty is maintained in the narrow sense that a person is not forced to marry or divorce against his faith, it is severely jeopardized since there is no non-religious option for marriage or divorce within Israel. The only way to opt out of a religious ceremony is to either settle for common law marriage or to marry outside of Israel and ask the state to recognize this marriage (which the Supreme Court ruled it had to).

There are plenty of other examples of the enmeshing of religion and state in Israel. The state regularly appoints clergy and funds state religious activities according to explicit legislation which orders the transfer of money to religious schools and religious services. Jewish, Christian, and Muslim schools are almost fully funded by the state. The operation of the rabbinical and of the non-Jewish denomination religious courts is the responsibility of the state and fully funded by it. The Ministry of Religious Affairs is responsible for the operation of a huge system of religious courts and services. Indeed, Israel is anything but a “laic” country. It is important to note, however, that unlike other countries in which secularism is not a basic principle and which therefore can be described as theocracies, Israel is not a theocracy. There are only very few laws which explicitly endorse religious prohibitions or commandments. There are no laws forcing a certain dress code, impose modesty or prohibit sexual behaviors such as infidelity, homosexuality etc. What prevented the Knesset from enacting such laws even before 1992 were not legal constraints, but rather political ones: for decades the secularist political parties enjoyed a solid majority in the parliament, preventing the religious parties from enacting laws which

29 The French principle of “laïcité” establishes a strict prohibitions on an form of state establishment of religion. Obviously, the principle as well as its application have been criticized by many.
31 For a detailed analysis of this system see. See also Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953. The recognized religious communities are Judaism, Islam and several Christian denominations.
32 Some scholars also pointed to the fact that this system established de-facto anti-miscegenation since members of different religious denominations cannot marry each other in Israel.
33 Due to the serious infringement that the religious-only marriage system imposed on the liberty of individuals, the Supreme Court ordered the state, already in the 1960s, to recognize and register marriages that were performed outside of Israel. See Funk Slezinger v. Minister of Interior.
would explicitly endorse religious prohibitions. Attempts to entirely prohibit the selling of pork meat, for instance, have failed due to the opposition of secularist forces.\textsuperscript{34} This is one of the major reasons that have indeed caused the localization of religion: unable to reach nationwide consensus due to religious diversity and strong secular opposition, religiously-inspired groups opted for the local arena.

The fourth and last principle of religious freedom in Israel is that while parliament has been rather free to establish religion (save for the lack of political will to do so), the Supreme Court developed a jurisprudence which severely curtailed—but did not entirely eliminate—the ability of the administrative branch to do so. In a series of rulings dating back to the 1950s, the Court held that unless specifically authorized by the Knesset, state authorities cannot take into account “religious considerations” as “dominant factors” when using their powers.\textsuperscript{35} This basic principle prevented government officials from further enmeshing state and religion. The Court, however, did not prohibit any religiously-motivated use of governmental power. On the contrary, the decision would have been “deficient” had the administrative agency ignored the relevant religious considerations.\textsuperscript{36} Only when religious consideration became dominant, overshadowing the relevant professional considerations did the Court invalidate the action. It was often the case that state agents took such considerations into account not because they themselves shared the religious belief, but since they thought they were obligated to accommodate to the religious communities. Thus, for instance, certain roads were blocked by traffic authorities during the Sabbath since religious communities rioted, demanding their closure. The need to balance the religious “sentiments” or “feelings” (rigshot dat) of religious people with various other considerations became one of the dominant paths through which religious consideration were let into Israeli law.

Since Israeli local government jurisprudence views local governments as administrative agencies,\textsuperscript{37} these same general administrative rules applied to them, too. Indeed, localities played an important role in the evolution of the doctrine of religious liberty, since cities were at the forefront of secular-religious tensions, and they often took into account various “religious” consideration when closing down roads on the Sabbath, refusing to grant business licenses, allocating resources, and more. In the following Part I examine this local involvement in depth.

\textsuperscript{34} See BARAK-EREZ, supra note 6, at 43-57.

\textsuperscript{35} Lazarovitz.

\textsuperscript{36} Lazarovitz, at 55; Baruch, at 163

\textsuperscript{37} Israeli law in fact oscillates between viewing local governments as administrative agencies, mere “conveniences” of the state and conceiving them as semi-autonomous, democratic entities that represent local communities. See infra.
II. THE LOCALIZATION OF RELIGION

In this Part I describe the legal mechanism by which religion was localized in Israel. As I already indicated, when I argue that religion was localized I do not suggest that the central state gave up on its role as a regulator and legislator of religious matters; on the contrary, what marks the process of the localization of religion in Israel was that local governments became heavily involved in mediating religious tensions and in regulating religion in the public sphere alongside—and not instead of—the constant involvement of the state in these affairs. Furthermore, the authorization of localities to regulate religious matters and to express religious norms in their public spheres was often a result of concrete decisions of various central state organs, primarily the executive branch and the Knesset. Such acts were contested and fought over, and regularly challenged in courts, which had to determine the exact role of local governments in expressing religious beliefs and norms.

I argue that the significant involvement of local governments in the regulation of religious freedom and in expressing religious norms and beliefs was a result of a set of legal principles and of residential patterns of religious communities (themselves a result of legal rules, as I shall explain later). The set of legal principles was comprised of the regular powers which localities possess—business licensing, road closures and traffic control, planning and zoning, control of speech (parades, marches, municipally-owned poster stands), spending and land allocation—and of special enablement laws, individually legislated in order to allow localities to take religious consideration into account in various circumstances. What made the application of these powers by cities so unique and interesting, however, was that the religious identity of local communities was much more homogeneous than the religious identity of the nationwide population. When one studies the religious composition of localities in Israel, one can rather easily classify them as “ultra orthodox Jewish,” or “national Zionist orthodox,” or “Muslim,” or “Druze,” or “Christian,” or “secular Jewish,” etc. Indeed, theological dividing lines have somehow turned in Israel into municipal lines. While history and individual preferences explain some of this surprising overlap between local jurisdiction and religious population composition, there are some legal mechanisms that have contributed to it, too. These rules, which I document in the Article, are still incentivizing and even forcing people to live within their religious communities.

Thus, it was the combination of legal powers given to localities and of various government actions and court decisions that influenced the residential patterns of religious communities in Israel and which eventually resulted in the localization of religion. I begin by describing the powers vested in local governments which had given them such crucial role in the doctrine of religious freedom in Israel.
A. The Legal Principles that Enable Localities to Express Religious Norms and Regulate Religious Liberty

Whether expansively or narrowly authorized, local governments are uniquely positioned vis-à-vis tensions that arise from daily, mundane interactions between individuals and groups over the character of the shared spaces in which they live, study, work and rest. Indeed, the powers of local governments in many jurisdictions throughout the world often include the same cadre of authorities, enabling localities to promote “the peace and security” of a local jurisdiction: zoning, land use, business licensing, road and traffic control, sanitation, water, housing, safety, spending and more. Israel is divided into roughly 255 localities (and hundreds more sub-localities that are organized as local committees within larger regional councils), ranging in population from over half a million residents to less than two thousand. Each of these localities possesses a large variety of legal powers and duties, ranging from the duty to provide education, sewage and water, to controlling local planning and zoning, to managing local business licensing, to providing welfare services, to levying local taxes.

As I already indicated, these traditional powers are applied in many issues that touch upon religious freedom, and their application rests on the city’s attitude towards it. Whether to grant a special exception from a zoning law to a synagogue or a religious kindergarten, for example, depends on the local authority’s position regarding the desirability of synagogues. And when a coffee shop asks for a business license, the town might prohibit it from playing “western music” if it views such music as sacrilegious or it might easily allow it, if it holds a different view on the matter.

Cities did not just merely abuse their legal powers, however, when they were influenced by religious consideration. They were acting according to the legal guidelines laid down by the Supreme Court.

1. Cities Using their Powers While Taking into Account Religious

39 See Compulsory Education Law, 5719–1959, LSI (1959) (Isr.) (education); The Water Law (1950) (sewage and water); The Planning and Building Law, 1968 (planning and zoning); Business Licensing Law, 1968 (business licensing); The Welfare Law (welfare services); The Municipalities Ordinance (levying taxes). Most of these powers are determined in laws which date back to Mandatory Palestine (and in some cases even to the Ottoman period), and which were amended through the years quite significantly. Local powers can be changed in regular legislation with a regular majority of the Knesset, and localities can be established, abolished and local jurisdictions can be re-drawn by a simple act of the Minister of Interior.
40 Such zoning exceptions were the issue in the case of a religious kindergarten in Ramat Aviv Gimel, a secular neighborhood in the north of Tel Aviv, who became a “target” for ultra orthodox Jews. For an equivalent case in the United States see Bethlehem Christian Fellowship, Inc. v. Planning & Zoning Comm’n, 807 A.2d 1089 (Conn. App. Ct. 2002).
41 See H.C. 166/71 Halon v. The Mayor of Local Council Ussafiyyah, 25(2) P.D. 591 (Isr. 1971).
Considerations: Between a “Nationwide Problem” and a “Local Matter”

As a general rule, I already noted, the Supreme Court ruled that the state must abstain from giving dominance to religious considerations unless explicitly authorized to do so by the legislator.\footnote{Lazarovitz, at 55; Isramax.} The same rule applied also to cities, being thought of as administrative agents. The issue of cities taking into account religious considerations was raised most dominantly in the context of the selling of pork meat. Given the importance of the religious prohibition on pork eating in Judaism (and Islam), localities throughout Israel tried to limit its selling within their jurisdiction. Lacking any specific authorization to do so, they tried to regulate its selling by using their regular business licensing powers. In \textit{Axel v. Netanyah} that Court voided the city’s restriction of the selling of pork within its jurisdiction, ruling that it was not specifically authorized to do so by the legislator.

But the Court went further. Instead of merely repeating the formal rule according to which religious affairs required explicit authorization by the Knesset, President Olshen bases his decision on the fact that religious matters such as the prohibition on pork meat were not a “local” matter. In fact, Olshen rules, religion is “a general, nationwide problem that is not specific to a particular place, and its solution is within the exclusive purview of the national legislator.”\footnote{Axel, at 1528 (translation of the Hebrew in BARAK-EREZ, supra note 6, at 48-49).} Although the Court repeated this reasoning in other cases, it does not explain why pork selling is a “nationwide problem” that requires the attention of the Knesset.\footnote{H.C. 72/55 Freidi v. Municipality of Tel Aviv, 10 P.D. 734 (Isr. 1955).} Perhaps the Court hints to the fact that the entire nation is interested in the outcomes of the judicial battle over pork shops, and that every Israeli citizen has a strong opinion regarding pork selling. But are these considerations enough to centralize the issue and take it out of the hands of localities? Normally, other reasons are mentioned in order to legitimate central control over an issue: the existence of externalities and spillovers, the need to coordinate between several locations, and the need to protect minorities from abusive local majorities. While the first two reasons seem irrelevant to the consumption of pork meat (it involves no tangible externalities on other localities and there is no need to coordinate it nationally), it is possible that the Court wanted to protect secular minorities from local religious majorities.\footnote{This reading seems implausible in this concrete case, since the towns where such restrictions were enacted were in fact secular in their demographic composition, yet supportive of these restrictions due to the relative consensus—even among secular Jews—over the symbolic importance of the prohibition to sell and buy pork meat. However, the people who indeed wanted to consume pork were indeed a small minority, deserving the Court’s protection.}

\textit{Axel} thus establishes a \textit{structural} principle according to which religious liberty and the regulation of religious matters should not belong to
localities, but rather be seen as a nationwide problem, requiring central solutions. This principle, however, I argue, was severely undercut by competing principles which the Supreme Court developed.

This competing principle was that even though religion was a “nationwide problem” that required explicit authorization by the legislator was that the authorized governmental agency was in fact at liberty—and sometimes even under the duty—to take into account religious considerations, whenever they were relevant for the efficient and professional use of power. In *The League for the Prevention of Religious Coercion v. The City Council of Jerusalem*, the Court was faced with a challenge to the decisions of the city of Jerusalem and of the regional traffic controller to close several street sections in Jerusalem during the Sabbath. The petitioners argued that the city and the traffic controller were prohibited from taking religious considerations into account when using their professional authority to close down streets. The Court, rejecting this claim ruled that there is nothing wrong in considering the interests of the religious residents who live near the roads and balancing them against other considerations such as the volume of traffic, alternative roads, and other considerations. Although there is no doubt that the city and the controller “took into account interests which are religious by nature,” they were allowed to do that, opines the Court, as long as they pertain to a “significant” part of the population.

In *Baruch v. The Tel-Aviv District Traffic Controller*, also dealing with the closure of numerous roads and streets during the Sabbath, the Court affirmed a decision made by the professional traffic authorities since there was nothing wrong in taking into account religious sentiments and the need to protect the religious interests of individuals. In fact, citing *Lazarovitz* the Court reasoned, it is possible that had the authority failed to consider religious needs and interest its decision would have been invalidated. And in *Horev*, although the Court struck down the decision of the traffic controller and the city of Jerusalem to close down a major road during the Sabbath, it did so because they failed to balance the competing interests properly, not because they were prohibited from taking any religious considerations into account. Indeed, the Court rules that it is perfectly fine to consider the religious needs of the population, but that this consideration should not overcome all other considerations.

The tension between these two principles stands at the basis of the jurisprudence regarding the role of localities in the regulation of religious liberty in Israel. On the one hand localities are prohibited from regulating re-

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46 *The League for the Prevention of Religious Coercion.*
47 *The League for the Prevention*, at 2668
48 *Id.*
49 *Baruch*, at 164-165.
50 *Id.*, at 163.
51 *Horev.*
ligion since it is seen as a nationwide problem requiring the explicit mandate of the legislator; on the other hand, since many of these issues pertain to religious local populations on whose safety and interests the locality is responsible – local governments are necessarily empowered to take religious consideration into account. Thus, the Court oscillates between prohibiting localities from weighing religious consideration and allowing them to do so.

Such judicial oscillation is evident also in the area of sexual oriented businesses and other religiously-objectionable establishments. The Druze village of Ussafiyah decided to issue a business license to a coffee shop under the condition that it could not play “western music.” Despite clear evidence that the decision was based on religious prohibitions—no alcohol was allowed either at the coffee shop—the Court ruled in Halon v. Ussafi- yah that it was legal for the locality to do so, since “we see no justification to deny the elected body’s right to maintain the unique characteristics of their village… according to the spirit and the culture of the vast majority of its residents […].”52 Although the Court casts the religious prohibition in cultural terms, it is fair to assume that it saw nothing wrong in applying religious considerations if they reflected the religious sentiments of the residents, the majority of which are observant Druze. In another case, however, the Court refused to accept the legitimacy of such considerations. In S.Z.M. Ltd. v. The Mayor of Jerusalem, the Court invalidated the decision of the Mayor of Jerusalem, operating as the local licensing board, to give a sex shop a business license.53 Distinguishing the case from Halon, the Court reasoned that while the village of Ussafiyah is rural whose majority of residents share the same “culture and traditions,” Jerusalem is a “mixed and diverse” city that has no “unified life style.”54 The Court, however, did not only distinguish the two cases; it also qualified and modified the general principle, limiting the city’s ability to take into account religious and moral considerations. Such considerations were permissible only where there was a “serious harm to the religious sentiments of a majority of the people” living near the controversial establishment.55

2. Special Enablement Laws

The tension between the competing principles I articulated above have spurred different responses among localities, with some taking more active role in establishing religion and accommodating religious sentiments and

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54 S.Z.M., at 117.
55 S.Z.M., at 119, 121. In another, later, case, the Court upheld a decision by a locality to restrict the location of a sex store for similar reasons. See H.C. 809/86 Yanovitz v. Chair of the Council of Ramat Ha-Sharon, 41(4) P.D. 309 (Isr. 1987).
other cities either being inactive in this regard or even expressing their secularity and hostility towards religion. But another result of these evolving principles was that the Knesset enacted numerous special enablement laws that explicitly enable localities to shape the public space within their jurisdiction in a religious fashion. Thus, over the course of the years, the Israeli parliament enacted special permissions for localities to limit or even prohibit the sale of pork meat in their jurisdiction, and to take into account “religious considerations” when they grant business licenses and determine establishments’ ability to operate religious holidays and days of rest.

The decision to authorize localities to regulate the selling of pork and the closure (complete or partial) of shops on the Sabbath was a result of intense political fights between secularists, nationalists, moderates and religious politicians. Since the enactment of the Basic Laws in 1992—interpreted as protecting the freedom of and from religion—any religious legislation would be submitted to judicial review, but before that, I already noted, parliament was unlimited in its legislative capacity. The only restraint was political: religious parties were a minority in the Knesset and were unable to pass a nationwide prohibition on pork selling or on various activities during religious days of rest. Thus, these enabling laws were a compromise between religious and secularist members of Knesset. At the national level, this compromise seems to have worked: the Knesset has not attempted to legislate a nationwide prohibition on the selling of pork or on operating businesses on the Sabbath in almost over two decades.

The battle shifted elsewhere. Following these special authorizations, many localities throughout Israel enacted bylaws which severely limited the selling of pork within their jurisdiction and which put serious restrictions on the operation of various businesses during the Sabbath. Other localities, however, actually allowed more and more businesses to open during the Sabbath and were filled with butcheries that sell pork meat. Indeed, one of the most obvious effects of these special enablement laws was a growing divergence among cities regarding these religious prohibitions. While some became more religious, others simply did not use—or used minimally—these laws and expressed their overt secularism. At other cit-

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56 Local Authorities Act (Special Enablement), 1956.
57 Section 249(21), The Municipalities Act (religious holidays and days of rest); Prohibition of Opening of Amusement Places (Special Enablement) 1997 (Tisha’s Be’Av, a day of fasting and atonement marking the destruction of the Jewish Temple).
58 The reason for this is a combination of political reality and the legal structure. The religious parties in the Knesset believe that they cannot obtain the required majority in order to enact such nationwide prohibition. It is particularly true since such law would most probably require the amendment of a Basic Law, a measure which mandates a special majority of the Knesset. In the case of the importation of non-kosher meat such amendment to the Basic Law: Freedom of Occupation was obtained but it was a difficult process which only demonstrated the difficulty to enact such nationwide religious legislation.
59 See BARAK-EREZ, supra note 6, at 43-57.
60 See BARAK-EREZ, supra note 6, at 59-79; Rosen-Zvi, supra note 6, at 226-227.
ies, however, intense wars of religious broke out, with residents trying to impact the locality to adopt their view. These battles were particularly noticeable where the demographic composition of the population was less homogeneous.

Especially in the case of pork meat, “pig wars” broke out throughout the country since the 1990s, making this issue salient and alive at the local level (and thus also at the central level). The reasons for this were legal, political and social: first, religious parties increasingly wanted to use their political power to exert more influence over the shaping of public spaces in Israel (trying to pass laws that will prohibit the selling of pork throughout the state, rather than only in localities with a large religious majority). Indeed, the religious revival and the desire to re-inscribe religion into the public sphere did not leapfrog over Israel.61 This religious revival was strengthened by the high birth rate of the ultra orthodox Jews, which caused this previously almost-insignificant minority to become a visible and substantial minority: in less than two decades (from 1990 until 2008), the percentage of ultra orthodox Jews rose from only 3 percent to 9 percent of the Jewish population of Israel.62 While this fact enabled ultra orthodox Jews to exert more political power and influence in the national and local levels, it also created a backlash which was mobilized by “secularist” political parties that fed on the intensification of the conflict.

Second, massive waves of immigration from the former Soviet Union changed the demography of the Israeli society in an unprecedented manner. Within less than a decade, about a million immigrants arrived in Israel. These immigrants were highly secularized and shared very little religious customs with the “traditionalist” Jews (often of Mizrahi decent) or with orthodox Jews. Their distaste for religious prohibitions—pork laws, religious marriages, etc.—became a political agenda which the parties that represented them pursued. Moreover, many of the newcomers were housed in towns which were densely populated with ultra-orthodox Jews or traditionalists. This has caused the friction between two opposing views on public space to share a local space and a local jurisdiction.

Third, the enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty brought about not only judicial review of the Knesset; it also shifted the balance between various basic principles and values of the Israeli legal system, elevating some of them to a protected constitutional status. Thus, it became easier to challenge in courts local decisions which infringed basic liberties. And when cities balanced “religious sentiments” with other rights and interests (such as freedom of contract and commerce of pork sellers), it was argued that they had to modify

61 See Menachem Mautner, Law and Culture in Israel (2011).
62 See Uzi Rebhun and Gilad Malach, Demographic Trends in Israel 24 (Metzila Center, 2008).
this balance, following the enactment of the Basic Laws.

Fourth, a steady—though also contradictory—shift in the jurisprudence of the Israeli Supreme Court in favor of decentralization and delegation of powers to local governments took place since the 1990s. This shift has made the courts more susceptible to ideas according to which local governments could serve as locations for political action, democratic legitimacy, and norm setting no less—sometimes even more—than the central government.63

As a result of these new legal battles and the changing circumstances in Israel, the Supreme Court refined, perhaps entirely reformed, its jurisprudence regarding the local exercise of special enablement laws. In the case of Solodkin v. City of Beit Shemesh,64 secular residents and a Member of Knesset from a party identified with immigrants from Russia petitioned to the Court, challenging the legality of bylaws which limited, or entirely prohibited, the selling of pork in three localities. The Supreme Court ruled that there are two competing interests, which must be balanced by the local government when it regulates pork selling: on one hand, it needs to take into account the freedom of occupation of pork sellers and the right of pork eaters to consume whatever they wish to eat; on the other hand, local governments need to protect the religious beliefs and conscience of those who oppose the consumption of pork.

63 Israeli local government law oscillates between two competing conceptions of what localities are and what they should be: the first and the most dominant one is the bureaucratic conception. According to it, localities are mere subdivisions of the state, an administrative convenience, with little or no discretion over the functions they perform, almost entirely subordinated by the central state apparatus. The second conception, the democratic self-rule one, conceives localities as mini-governments which represent the will of the local populace, as voluntary associations of the communities residing within them, thus exerting significant discretion over a wide range of matters they deal with. Each of these conceptions has its own advantages and shortcomings, and each has its roots in the history and in legal doctrine. Even though the bureaucratic conception is far more intuitively accepted by jurists, political theorists, and the general public, the democratic self-rule idea has a wide support not only as a normative ideal, but also as describing historical and present processes as well as legal rules. See Yishai Blank, Local Frontiers: Local Government Law and Its Impact on Space and Society in Israel (2002) (unpublished S.J.D. dissertation, Harvard Law School); Issaichar Rosen-Zvi, Taking Space Seriously: Law, Space and Society in Contemporary Israel (2004).

The balance between the bureaucratic and the democratic conceptions has been slowly shifting over the past twenty-five years, not only at the ideological level but also as a matter of legal reforms, governmental policies and Court decisions. This shift has a contradictory character. On one hand, local governments were given more planning powers, more fiscal discretion, and their general authorities were expansively construed in some important court rulings; on the other hand, and especially since 2004, following the financial crisis that many localities experienced, the fiscal supervision over local governments tightened and it became easier for the Minister of Interior to interfere with the internal affairs of “failed” localities (including to put them under receivership, etc.). Despite this contradictory nature of the change, it is safe to say that the democratic-localist conception has been strengthened since the 1990s, and that the bureaucratic-centralist one, while still being very dominant, is no longer the hegemonic perception of Israeli local government theory. See, e.g., H.C. 2838/95 Greenberg v. Local Council of Katzrin, 53(1) P.D. 1 (Isr. 1997).

What is unique about this balance, the Court added crucially, is that the legislator vested it in the hands of the local authority, which means that a special balancing needs to be done: one which would take into account the unique demographic composition and geographic dispersion of the local populace throughout the local jurisdiction. The maps that the municipality draws—where pork can and cannot be sold—should reflect this demographic balance. The Court ruled that if there exists only a “tiny minority” of “pork eaters” or “pork haters,” the locality can prohibit it altogether, since it can either purchase pork in a nearby village, or they can choose to exit the locality and live in a another locality, where they would form a majority. The same goes to the internal division of the locality: if homogeneous neighborhoods can be found within the local jurisdiction, the local government can prohibit (or permit) the sale of pork within these neighborhoods.\(^65\)

The *Solodkin* decision thus further localized religion. It pronounced a very clear principle according to which the balancing between freedom from religion, freedom of occupation and religious sentiments is a “local matter,” which is to be based on local facts, such as demography and geography. Yet, it also localized religion in the sense that it fragmented each locality into smaller “locales,” mandating a more nuanced regulation, based on the character of each neighborhood within it. What is particularly striking about the test that the Court adopted is that it is based on social-science positive data regarding the demography and geography of the place, not on its history, context, and character or on real normative evaluation of the competing interests, values and rights.

Hence, the *Solodkin* decision incentivized religious and secular local groups to obtain a clear majority in the entire locality, or at least in the neighborhood where they lived. It has put premium on homogeneous, “pure” spaces and posited, perhaps unwittingly, an ideal of “geographic separatism,” as Rosen-Zvi claims.\(^66\) Following *Solodkin*, it was argued before courts that according to it, municipalities who wish to open synagogues and other religious public facilities should do so only in religious neighborhoods.\(^67\) Although the Supreme Court rejected this claim, the message sent by the Court in *Solodkin* was that if people want to have a residential environment that would fit their religious (or secularist) preferences, they should advance homogeneity in their locality or at least in their neighborhood.

3. **Taxing and Spending**

In the following paragraphs I turn to examine another extremely im-

\(^{65}\) *Solodkin*, *supra* note 64. For a detailed discussion of the decision see Rosen-Zvi, *supra* note 6, at 226-228.

\(^{66}\) Rosen-Zvi, *supra* note 6, at 228-231.

\(^{67}\) See H.C. 10907/04 Solodoch v. Municipality of Rehoboth (unpublished, 2010).
important area in which local governments constantly reflect and express their religious beliefs and sentiments: taxing and spending. Both spending and taxing lies well within the traditional powers of local governments in Israel and throughout the world. In their application of these powers, too, cities use religious consideration and try to benefit their favored religions, which provoke a fierce debate in courts, in the executive branch and in the parliament. In *Yekutieli v. The Minister of Interior*, local tax exemptions and deductions to residents of Jerusalem were challenged. The basis for these exemptions were regulations promulgated by the Minister of Interior—a member of the ultra orthodox Shas party—in which he enabled localities to exempt two groups of persons from local property taxes (called “Arnona”). The first group included persons who dedicate their entire time to the study of the Jewish religious texts; the second group included families with four or more children. Jerusalem decided to use its power to give these exemptions. Both exemptions benefitted ultra orthodox Jews, as families with that number of children almost exclusively belong to the ultra orthodox community. While the legal challenge was raised against the Minister of Interior as well as against Jerusalem, it was clear that the main problem was not with the way the city applied the regulations—they were very straightforward and clearly empowered the city to give such exemptions—but against the regulations themselves.

The Supreme Court invalidated the regulations, ruling that they violated the principle of equality which every governmental entity had to respect. Exempting ultra orthodox Jews from paying local taxes imposes a heavy burden on the rest of the local population. If the state wants to give ultra orthodox Jews or Jewish religious scholars tax benefits and exemptions, it should do so in primary legislation of the Knesset and not in executive regulations. This legislation, too, will be subject to judicial review, but what the legislator—that enjoys greater judicial deference—might be allowed to do is clearly impermissible for the executive branch. The Court explains in length why local government should not be allowed to decide for themselves on local tax breaks: since they are smaller and therefore depend on solidarity, they cannot afford alienating groups by discriminating against them and they have a tighter budget and therefore cannot afford any breaks at all.

Indeed, the issue of local tax exemptions and deductions has long been centralized and taken out of the hands of localities – whether the exemption is religiously motivated or not. The reasons for that are numerous, undoubtedly involving the fear that some localities will abuse these powers and simply go bankrupt, believing that the government will bail them out. But the fear of local majorities using their power to exempt themselves and milk minorities is also significant. Yet despite the formal prohibition on

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localities to grant tax exemptions and deductions, localities try to use their taxation powers to benefit various religious communities. For example, they can expansively interpret the tax break given to synagogues, churches and mosques (by the Knesset), or they can interpret it narrowly.\textsuperscript{69} Since the current exemption is given only to “synagogues” (and other places of religious worship), some localities impose local taxes on buildings who only partly serve as synagogues. Other localities, on the other hand, read the exemption very generously, thus giving tax breaks to wedding parlors and other establishments who dedicate a small room for a synagogue and claiming the exemption on its basis.\textsuperscript{70} Cities can also act informally: measure and assess religious property in greater lenience, refrain from collecting the taxes, and so on.

As compared, however, with the relative centralization of local taxing and the ensuing difficulty of cities to infuse taxing with religious motivations and preferences, cities are more easily able to use their spending power—and to allocate their property—in a manner that expresses their religious sentiments. As a legal matter, it is not only legitimate but also desirable that localities will spend their money on projects which they deem right. Indeed, except for municipal services which they are required to provide by law, local governments are expected to form a budget which is based on the unique local preferences and needs of their residents. And if those residents happen to be religious and wish to spend money on religious enterprises, it is legal for them to do so. However, once a locality decides to spend money on a religious enterprise, it must not discriminate between the different religions. This legal principle enables localities to express their religiosity by giving money to synagogues, churches, and other religious enterprises. And despite the requirement to allocate money and other municipal resources “equally and transparently,” this is a source for much contention and legal battles. And while some of these battles involve conflicts between different religions, many of them are actually among different denominations within the same religion, in particular between reform and orthodox Jews (the former often challenging the discrimination against them as compared with orthodox and ultra orthodox Jews).

Already in the early 1960s, the Supreme Court ruled that while a locality was allowed to let religious activities take place within its property, it could not discriminate between different denominations, and had to give them equal access. In \textit{Peretz v. Kfar Shemaryahu} the Court invalidated the

\textsuperscript{69} Over the past year there has been an attempt to amend the tax exemption given to synagogues, churches and mosques so that it will also include places “whose main use is for prayers.” This way, localities will have to give this break even to buildings that only partly serve as synagogues. See

\textsuperscript{70} See PROTOCOL OF SESSION OF THE KNESSET FINANCE COMMITTEE CONCERNING THE PROPOSED AMENDMENT TO THE LOCAL AND GOVERNMENT TAXES ORDINANCE (EXEMPTIONS) (SYNAGOGUES) OF MEMBER OF KNESSET NISIM ZEEV 2009 (P 622) (March 2, 2010). Available at http://oknesset.org/committee/meeting/52/.
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decision of a small and affluent Jewish suburb to refuse a group of reform Jews (a modern, non-orthodox Jewish denomination) to hold prayers in the suburb-owned synagogue.\textsuperscript{71} A city was under the duty to treat all its residents with equality, regardless of their religious denomination. Freedom of equality meant, the Court ruled, that each religious group was entitled to the same treatment by the locality; it meant that no one religion could be preferred over the other one.\textsuperscript{72} The fact that the religious sentiments of orthodox Jews might be hurt by a Reform prayer—since they find it offensive and sacrilegious—is insufficient to disallow reform Jews from holding prayer, as they have religious sentiments, too, that are obviously hurt when refused from using the suburb’s property.\textsuperscript{73}

Thus, alongside their support for religious activities which they favor, localities have made an attempt to refrain from budgeting activities which were offensive to their religion, even though they did could not explicitly admit that (as they were prohibited from doing that due to their duty to allocate budgets and lands equally). In the case of the Jerusalem Open House, such discriminatory local practices came under the scrutiny of the Supreme Court. The Jerusalem Open House, a local LGBT organization, has been leading a long and protracted legal campaign, challenging the refusal of the city of Jerusalem to fund its activities.\textsuperscript{74} Over the past two decades Jerusalem had undergone a tremendous demographic transformation of “ultra orthodoxization:” the percentage of ultra orthodox Jews in the city increased dramatically, a result of migration and natural growth of this community and of an exodus of secular and moderately religious Jews. Ultra orthodox parties form a rather solid coalition in city hall and from 2003 until 2008 the mayor of Jerusalem was an ultra orthodox Jew (Mayor Lopolyanski). Although Jerusalem denied that it was motivated by religious sentiments, the Open House’s requests for municipal support were consistently refused. The city argued that all the budgetary allocations that the Open House applied for were either irrelevant considering the activities of the organization, or that the organization simply did not meet the standard that the locality was aiming for. A District Court Judge accepted the city’s claims, ruling that the city had “equal and transparent” guidelines which did not discriminate gays and lesbians; they simply did not fit the specific activities that the Open House wished the city to fund.\textsuperscript{75}

\begin{footnotesize}
\textsuperscript{71} H.C. 262/62 Peretz v. The Chairman, the Council Members and the Residents of Kfar Shemaryahu, 17 P.D. 2101 (Isr. 1962).

\textsuperscript{72} \textit{Peretz}, at 2106.

\textsuperscript{73} \textit{Peretz}, at 2107.

\textsuperscript{74} The list of petitions to the District Court and to the Supreme Court is lengthy. The most important decision by the Supreme Court was delivered a few months ago. See A.A.C. 343/09 Jerusalem Open House v. The City of Jerusalem (unpublished) (Isr. 2010).

\textsuperscript{75} See A.C. 8187/08 Jerusalem Open House v. The City of Jerusalem (unpublished) (Isr. Dist. Ct. (Jerusalem) 2008). This decision itself reversed a previous District Court decision in which Justice Yehudit Tzur requested that the municipality reconsider its policy. See A.C.
The Supreme Court overruled the District Court’s ruling and ordered the city to revise its policy and allocate equal funds to the Open House. In a groundbreaking decision, Justice Amit adopts the American “strict scrutiny” test, finding that gays and lesbians are a “discrete and insular minority” deserving special protection. Historically oppressed, discriminated against, politically underrepresented and geographically dispersed, gays and lesbians are worthy of unique protection. The reason Justice Amit needed to adopt the special review test was that it was very difficult to find any intentional discrimination against the Open House. Indeed, the broad fiscal powers of cities enable them to reflect religious sentiments and to tailor the criteria for spending in a manner that will excludes activities which are abhorrent to its religious creed. Thus, Jerusalem refused the funding requests of the petitioner since its activities did not meet the “objective criteria” that it carefully crafted.

Although the Supreme Court ruled that the Open House was discriminated against and that it should receive budgets from the municipality, the Open House case actually manifests the ease with which local governments can overcome the prohibition to refuse budgets based on religious animus. By narrowly crafting the criteria for activities which deserve municipal, localities can tailor their funding scheme so that it excludes activities which it does not want, for religious reasons, to support. Other cities, on the other hand, can—and do—decide to allocate money to LGBT activities and to activities which reflect either secular or non-orthodox denominational activities.

The combination of their regular local powers, special enablement laws and fiscal powers (taxing and spending) make localities prime sites for the consideration of religious sentiments and for the regulation of religious liberty in Israel. Cities prohibit or allow selling pork meat, limit or permit the opening of stores on the Sabbath and other religious holidays, ban or sanction sex stores, close down or open up roads during the Sabbath, and spend money on and give tax breaks to synagogues or LGBT centers. Given their democratic structure, they are responsive to demands made by their residents. It is therefore imperative to understand the demographic composition of localities in Israel, and analyze how the law constraints and shapes them.

B. Formal Segregation and the Forced Creation of Pure Religious Communities

It is impossible to appreciate the impact of the localization of religion in Israel without giving due attention to the relative religious homogeneity


76 See A.A.C. 343/09 Jerusalem Open House, at § 53, 56-57.
of localities in Israel. This homogeneity enabled localities to reach a consensus where the national legislator failed. As compared with the religious diversity of the entire population of Israel and of the Knesset localities are extremely homogeneous. Only very few localities have representative portions of ultra orthodox Jews, modern orthodox Jews, secular Jews, Muslims, Christians, Druze etc. This relative homogeneity is a result of historical contingencies as well as of a uniquely Israeli legal structure, which forces and induces religious residential segregation. As a rule, thus, the map of local governments in Israel overlaps, to a large extent, the most basic divisions that exist in Israeli society: class, nationality (Jews and Palestinians-Arabs), ethnicity (Jews of different countries of origin), and religion (Jews, Muslims and Christians). Though there are many localities whose population is mixed, relative homogeneity along national, ethnic and religious lines is the rule rather than the exception. As many scholars have shown, this was a result of the historical background, market forces, but also of clear governmental policies.\(^{77}\)

While some of the separating lines were blurred over the years,\(^{78}\) the segregation between secular Jews and religious Jews have not weakened. If anything, it has strengthened. Several new purely ultra orthodox Jewish towns have appeared since the 1990s, and numerous ultra orthodox neighborhoods have appeared in mixed towns.\(^{79}\) In addition, religious-Zionist Jews, which used to live in fairly integrated environments, have developed new residential patterns, which are more segregated than before. In part a result of the expanding settlement project in the occupied territories, and in part a result of internal pressures to create religious environs, a growing number of religious-Zionist Jews form and live in majority-religious localities or in majority-religious neighborhoods.


\(^{78}\) I refer mostly to the segregation between Mizrahi Jews (Jews of oriental descent) and Ashkenazi Jews (Jews of European and American descent), which was extremely prevalent until the late 1980s. While a significant spatial segregation of impoverished Mizrahi Jews in development towns and poor neighborhoods in large cities still exists, the radical isolation of Mizrahis has been mitigated due to governmental policies and a gradual upward mobility of second and third generation Mizrahis. Another segregation which still exists, but which has begun changing recently, is that between Palestinian-Arabs and Jews. Though the vast majority of Arabs still live in localities which are purely Arab, and although most Jews live in all-Jewish localities, a new phenomenon started unsettling this clear divide. If until the late 1990s, there existed only very few “mixed towns”—in which Jews and Arabs lived together (albeit in different neighborhoods)—during the past decade a few more mixed towns began appearing, as a result of new residential patterns. Arabs started moving into previously all-Jewish towns, thus changing the demographic nature of these towns, and weakening the radical segregation which previously existed.

The overlap between religious affiliation and local jurisdiction is obtained in Israel in numerous ways. First, it is a result of historical organization. This historical spatial organization was perpetuated through market mechanisms, cultural preferences and governmental policies. I now turn to describe them. Much was written about the residential separation between Jews and Arabs, but very little attention was given to the fact that the state also induced the segregation among Jews, based on their religiosity.

1. History and Market Forces that Support Segregation

Historically, already in the nineteenth century, ultra orthodox Jews lived in separate neighborhoods, which were later on recognized by the British mandate authorities as independent localities. Christian Arabs and Muslim Arabs also often lived in separate villages and towns. The market prices of houses in Arab villages and neighborhoods (Christian as well as Muslim) and in ultra orthodox Jewish areas were significantly lower than that of houses in central Jewish secular communities. There were also vast discrepancies amongst the different social groups in funds available for purchasing an apartment; the income levels of Arabs and ultra orthodox Jews were significantly lower than those of secular Jews. The social capital of the former groups was similarly low. Accordingly, an Arab or ultra orthodox homeowner who sought to sell his or her house and purchase one in a Jewish town would be forced either to compromise on the size of the new house (if he or she succeeded in finding a smaller one, and live in crowded quarters), or else live in a poor neighborhood in which the schools and other municipal services are inferior.

Thus, ultra orthodox Jews, Christians and Muslims were economically “steered” to reside in communities where they could afford to buy or rent. Often, these localities were similar to those in which they were born, since they reflected their purchasing power. This is not to deny that individual preferences did not influence these choices, but merely to suggest that economy, too, played a role in the perpetuation of religious segregation in Israel.

2. Formal Exclusionary/Segregationist Mechanisms

While undoubtedly individual preferences to live with one’s peers and within one’s economic means play a significant role in determining one’s residential decision, the state of Israel adopted various mechanisms which incentivized and even forced people to live within their communities. First, ultra orthodox Jews were formally excluded from many rural secular set-

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80 The separation between Jews (secular and religious alike) and Arabs (Muslim and Christians alike) was obtained mostly through the allotting of lands exclusively to Jews. See Yi-shai Blank, Brown in Jerusalem: A Comparative Look on Race and Ethnicity in Public Schools, 37 Urb. Law. 367, 386-389 (2006).

81 See Blank, supra note 77, at 384-389.
tlements; Second, secular Jews were excluded from ultra orthodox towns.

The exclusion of ultra orthodox Jews from secular—and even modern orthodox—settlements was a byproduct of the unique legal structure of rural settlements with state-sanctioned screening boards. Concerned with the concentration of the majority of the population in the center of Israel, and worried about the scarce “Jewish presence” in its northern and southern parts, the state began establishing dozens of new settlements in the rural periphery of the country. Since the state owns 92% of the lands in Israel, it could easily implement this policy, by allocating lands in these remote areas to groups of individuals who organized themselves as collective associations. These associations would regularly appoint “acceptance committees” (screening boards) that interviewed candidates and decided who could become a member of the association and purchase land in the settlement. The contracts that the residents signed with the collective association and the Jewish Agency (the official owner of some of these state lands) regularly included restrictive covenants, requiring the consent of the screening board for any future land transaction. But most crucial was the condition that most association included in their minutes and founding documents, which was that the candidate served in the Israeli military.

While this condition was mostly aimed at excluding Arabs from these settlements, it incidentally excluded ultra orthodox Jews who, by and large, very seldom serve in the army. The military service requirement was voided by the Court as unconstitutional in the famous Qua’adan case for violating the principle of equality. However, although numerous petitions challenging the constitutionality of the screening boards themselves are pending in the Supreme Court, they are still alive and well. These boards use various mechanisms, including psychological evaluations and other tests aimed at examining the candidate’s “fit” for the settlement in order to exclude various individuals. Indeed, only recently the Knesset passed a law, formalizing the right of small settlements (i.e., with less than 250 families) to screen their residents based on their “fit for community life” and “fit for the social fabric” of the settlement. Various studies show that such screening processes serve to exclude individuals belonging to minority communities, including religious ones. In some cases, even religious communities living in such settlements—religious-Zionist communities

See Yiftachel and Kedar.


See H.C. 3522/08 Kempler v. Israel Land Authority (pending).

See Amendment to the Collective Associations Ordinance Act (no. 8), 2011. The Association for the Civil Rights in Israel filed a petition in the name of numerous individuals challenging the constitutionality of this amendment. See H.C. 2311/11 Sabach v. The Knesset (filed March 23, 2011), the petition is available at: http://www.acri.org.il/he/wp-content/uploads/2011/03/hit2311.pdf.
which do serve in the military—have used their screening boards to exclude ultra orthodox Jews.\textsuperscript{86}

Perhaps more surprising than the exclusion of ultra orthodox Jews from various rural settlements is the relatively new policy according to which secular Jews cannot buy property in new ultra orthodox cities. In the face of increased housing shortage among the growing ultra orthodox community, the Israeli government began, during the 1990s, constructing new towns to meet the demand. Both within Israel proper and in the west bank, the state allocated lands to erect new “ultra orthodox” towns. The state adopted a clear policy of allowing only ultra orthodox Jews to purchase apartments in these towns. The screening, it should be noted, was not done by using acceptance committees but rather by the contractors who won the governmental tenders and who built the various real estate projects.

When this governmental policy was challenged by secular Jews, the Supreme Court ruled in \textit{Am Hofshi v. The Ministry of Building and Housing} that as long as secular Jews could purchase an apartment with the same governmental benefits, it was legal for the state to adopt and implement a “separate but equal policy,” under the condition that it was aimed at enabling the religious community “to sustain its [unique] ways of life.”\textsuperscript{87} The Court stresses that recognizing the right of the religious community to sustain its lifestyle “represents a well accepted contemporary notion among jurists, philosophers, social scientists and educators according to which the individual is entitled—among his many other rights—to fulfill his belonging to a community and its unique culture, as part of his right for personal autonomy.”\textsuperscript{88}

This ruling proved to be of crucial importance, as it opened the gate for the establishment of more and more settlements for ultra orthodox Jews

\textsuperscript{86} This happened when an ultra orthodox family tried to be admitted to the religious-Zionist settlement of Bar Yochai. The screening board disqualified the family on the grounds that it didn’t “fit” its way of life. \textit{See} Neta Ziv, “An Appeal on the Rejection Decision in the Settlement of Bar Yochai” (letter to Israel’s Land Authority sent by the family’s lawyer, April 11, 2011) (on file with author).

\textsuperscript{87} H.C. 4906/98 \textit{Am Hofshi v. The Ministry of Building and Housing}, 54(2) P.D. 503, 508 (Isr. 2000). One of the sources of inspiration for the \textit{Am Hofshi} decision was another case in which state coerced segregation was challenged. In the \textit{Avitan} case, the Court affirmed the decision of Israel’s Land Authority to establish towns only for Bedouins. The Court ruled that it was a legitimate state interest to settle the nomadic Bedouins and that excluding Jews as well as other non-Bedouins was imperative for this policy’s success. The Court also mentions the unique history and culture of the Bedouins as legitimating the state segregation. In \textit{Am Hofshi} the Court ignores the uniqueness of the Bedouin community, extending the license to segregate between communities to any minority group with “unique ways of life.”

\textsuperscript{88} \textit{Am Hofshi}, at 508-9 (my emphasis). It is important to note that the Court in fact voided the Ministry’s decision as it found that the policy was separate and unequal. The Court ordered the ministry to establish an equally beneficial project for secular Jews.
only.\textsuperscript{89} In other cities, new ultra orthodox neighborhoods are being constructed. Although the ultra orthodox segregation is often presented as self-segregation—there is indeed no doubt that many ultra orthodox Jews seek such radical segregation—the fact that it is mandated by the government makes it hard to assess whether it is voluntary or not. It seems plausible that at least some ultra orthodox Jews would have chosen to have secular neighbors; and it is possible that some secular Jews would have liked to live near ultra orthodox Jews. Indeed, according to a recent survey, only 61\% of ultra orthodox Jews prefer to live in purely ultra orthodox settlements; the rest—a significant minority counting for 39\% of the community—would actually rather live in integrated localities. Among the general population there is even greater willingness to live in integrated areas, with only 48\% preferring not to live near ultra orthodox.\textsuperscript{90}

III. EVALUATING THE LOCALIZATION OF RELIGION

The localization of religion in Israel is one of the founding elements of Israel’s unique mode of state religiosity: it allowed the state to be theorized and understood as religious by some and as secular by others; it enabled the expression of religious sentiments and norms by public bodies, funded and established by the state; it produced the mitigation of some of the “religion wars” at the national level, while encouraging and inducing them at the local level; and although it was built upon an already existing residential segregation between persons of different creeds, it also exacerbated it. In this Part I evaluate the desirability of this specific Israeli legal structure.

A. The Advantages of Decentralizing Religion in Israel

1. Decentralization as Protection against One Religion’s Hegemony

The greatest promise of the dispersal of authority to express and reflect religious sentiments and beliefs to local governments is that it would counter and destabilize the monopoly that one dominant religion might have if all political power is held by central authorities. Richard Schragger noted that “political decentralization ensures that the national councils do not have a monopoly on the power to regulate religion” in America.\textsuperscript{91} The role of localities in the discourse and doctrine of religious liberty was of crucial importance as it provided incentive for the creation of religious groups, “a necessary precondition for the robust competition among sects that prevents any one sect from gaining political dominance in the

\textsuperscript{89} Such new towns include El’ad, Beitar Illit, Modi’in Illit, Kiryat Sefer, and Immanuel. Two additional ultra orthodox cities—Kasif and Harish—are currently planned by the government.

\textsuperscript{90} The survey was conducted by Geocartography Institute. \textit{See Avi Dagani, 61\% of the Ultra Orthodox Prefer to Live in Separate Settlements}, available at.

\textsuperscript{91} Schragger, \textit{supra} note 6, at 1815-1816.
Indeed, what Madison feared most—the violence of the religious faction—is, claims Schragger, the antidote against the dangers of one religious faction becoming all too dominant. Decentralization is an institutional safeguard—rather than a mere judicially enforced barrier—against the monopolization of one religion.

That local governments in Israel have been routinely involved in regulating matters pertaining to religious liberty—much like localities in the United States—has been crucial to the check both on government’s ability to establish one religion, and on religious power to spread through the entire federation. Theorized this way, we can begin to see that localities are in fact the only places where non-hegemonic religions are able to flourish and become powerful in Israel, and thus possibly challenge the hegemony that orthodox Judaism currently enjoys. Taking some of the power in religious matters away from the central government and vesting it in a multitude of local governments, each applying it somewhat differently, allocating budgets and jobs to non-orthodox strands of Judaism, might have actually weakened, at least to a certain degree, the monopolistic power of ultra orthodox Judaism. In this view, the greatest threat to religious liberty comes, of course, from the central government and the Knesset establishing religion, since it will always be one dominant religion: orthodox Judaism. Decentralization is the cure since it incentivizes people to form religious sects that would fight against such dominance.

2. Decentralization as Enabling Religious Dissent by Deciding

Given the monopoly that orthodox (even ultra orthodox) Judaism enjoys in the government and in parliament, there is very little hope that reform Judaism, other Jewish denominations and other religions will ever be able to express their beliefs and norms publically or to assume power positions. Other religions, as well as other Jewish denominations are discriminated against and suffer from chronic weakness and underrepresentation in the central government. However, in cities where religious minorities constitute a locally significant constituency—or even a local majority—that can exert meaningful political clout they are further empowered and might be thought of as exercising, to a certain extent, self-rule. This point lies at the heart of a compelling argument made by Heather Gerken. Permanent minorities—those that could never become a majority of the votes at the federal level—who radically differ from the majority, she claims, are often thought to be able to do nothing more than voice their dissent or compromise their radical views. They can “speak truth to power” but they can never be powerful.

The American structure of government argues Gerken, enables such

92 Id.
93 See Gerken, supra note 27.
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minorities to “dissent by deciding” thus act radically, and “speak truth with power.” Permanent minorities can do so since they are enabled to form local majorities, which the law grants with decision making powers. The strength of dissenting by deciding lies not solely with the immediate benefits and consequences of a particular action, say prohibiting pork meat within one local jurisdiction or allowing women to be elected for a religious council in another. Such a powerful local “disobedience” enables religious minorities to give their dissenting viewpoint salience on the national plane. The nationwide ripple effects caused by different religious governmental actions—closing of roads on the Sabbath, but also refusing to enforce religious laws in a case of a secularist locality—are felt at the national level as other communities with similar views follow suit.

3. Decentralization as De-Privatization

The localization of religion enables religious minorities to express their values not only in the private sphere but also publicly, albeit at close quarters. Indeed, one of the troubles with religious freedom is that in secular societies it is often limited to the private sphere, while the public sphere is shaped by the secular majority. And this sphere, although experienced by secular individuals as “neutral” is in fact experienced as profane by (some) believers. Streets, parks, and other public spaces are filled with expressions that are abomination for (some) religious people. Therefore, in order to create a public sphere which will be experienced as holy by ultra orthodox Jews, by observant Muslims or by other religious denominations, their localities need to be able to express their religious values in public, too.

The broad powers vested in the hands of localities in Israel indeed enable them to create such “holy communities.” Control over what shops and establishments operate within their jurisdiction, over the opening of businesses during religious holidays and days of rest, over the closure of roads during the Sabbath, over the presentation of Hammetz in public during Passover (levied dough that is prohibited from eating and presenting during Passover), and over many other public activities – all these afford religious communities to escape the privacy of their homes and engage in public religious lives. This is particularly true for “nomic” communities, to use Robert Cover’s term, whose mutual cultural world is not limited to a single and compartmentalized field of action, but rather stretches onto a wide range of human activities and which guides the group members in the most profound ways. For such communities, only self-regulated and segre-
gated spaces can serve as an approximation to their radically alternative utopia. The intense segregation which I have described also contributes to the de-privatization of religion, as it provides a safeguard against “surprises” in the public sphere. For instance, having only ultra orthodox around means that modest dress codes are kept also in the streets.

4. **Decentralization as Pluralism**

Since localities can use their powers to express their endorsement as well as rejection of religious values and beliefs, the range of religious and secular attitudes is broad, reflecting the real plurality that exists among Israelis. According to David Barron, towns and cities should be understood as “important political institutions that are directly responsible for shaping the contours of ordinary civic life in a free society.” Enabling cities to deal with religious matters is part of such pluralistic and democratic vision of society. Instead of viewing localities as mere instruments for the protection of individuals against governmental (or private) encroachment upon their negative liberties, we can see them as fostering “public freedom,” based on a positive rather than a negative conception of liberty.

Harnessing local governments’ powers to positively advance the goals, ideas and desires of religious communities and not merely to protect individual believers from discrimination goes beyond negative liberty, affording them with the capability to advance their shared worldview, and enriching the society with profound diversity. In Israel, especially, such pluralism can indeed be fostered through localizing religion, since religion often overlaps with other identity traits such as nationality and ethnicity. The majority of Muslims and Christians being Arab, and other denominations signifying ethnicities, localities’ use of their religious authorities can become an instrument for racial and ethnic pluralism. These minorities, put differently, make use of their religious powers to express not merely “religion” but also their cultures. It is therefore no coincidence that in the case of Halon which I previously discussed, the Supreme Court refers to the prohibition on western music which the Druze village imposed on a coffee shop, not as a religious prohibition but as an expression of “the spirit and the culture of the vast majority of its residents.” Their empowerment to express religion and the overlap between culture and religion thus enables such minority communities to be able to self construct and self regulate, at least to a degree, their shared spaces.

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97 Gerald Frug defines public freedom as “the ability to participate actively in the basic societal decisions that affect one’s life.” Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068 (1980). (Frug attributes the concept of “public freedom” to philosopher Hannah Arendt).

98 *Halon*, at 594 (my emphasis).
But there is a danger in the reconfiguration of religion into a culture, as it moves it from the realm of actions to the realm of identity: religion is beginning to be understood as an ethnicity or race, rather than as a set of codes, beliefs, norms or practices. Religious norms, practices and motivations are re-inscribed as expressions of “culture,” and religious freedom is re-conceived as cultural autonomy. Religion thus becomes immutable and impossible to change or transform, as this conceptual maneuver reifies individual choices and congeals fluid practices. Ironically, secularism is also re-conceived as a culture. As the percentage of secular Jews is dropping, and as their political power is in decline, there are more and more voices that try to conceptualize liberal secularism as a culture, perhaps one which is on the verge of being extinct. In the last round of battles between secular and ultra orthodox Jews, such claims were made in an attempt to grant secular Jews the desired status of a minority which is entitled to “separate” allocation of land or of an environment free of religious symbols altogether. Although until now such challenges were rejected by the courts, it is too early to tell what future lies for such attempts.

5. Decentralization as Pacification

In Israel, where radical disagreements exist between competing communities such as ultra orthodox Jews and seculars and between Jews and Muslims, decentralizing religion enables to sidestep those tensions, at least partly. Much like in federal regimes, where the decentralization of various decisions enables vastly different cultures and communities to enjoy some degree of cooperation while maintaining their different cultures, the localization of religion in Israel allows people of very different religious creeds to share the same national territory. Indeed, where it is impossible—or terribly painful—to reach a national agreement, it is sometimes better to let territorial subdivisions such as local governments decide for themselves. According to this argument, localizing religion in Israel mitigates some of the potential tensions between religious communities, thus weakening the violence that might occur had religion stayed entirely centralized.

As against this argument, it can be argued that in fact religious decentralization has exacerbated social tensions in Israel, since it strengthened negative stereotypes and weakened the civic bond among the different groups. The fact that Muslims and Jews do not live in the same localities

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99 In the city of Beit Shemesh, who is experiencing waves of ultra orthodox migration into it, secular residents demanded that Israel’s land authority allocate lands to a secular neighborhood, like it regularly does for ultra orthodox neighborhoods. The District Court of Jerusalem refused to intervene with the Authority’s refusal, reasoning that the logic of the Am Hofshi decision did not apply to secular Jews who were a majority group with no unique lifestyle worthy of protection. See A.C. 1888/09 Edri v. The Minister of Building and Housing (unpublished, 2009). The Supreme Court affirmed on the procedural grounds. See A.A.C. 68/10 Edri v. The Minister of Building and Housing (unpublished, 2011).
(or neighborhoods) and that secular Jews and ultra orthodox Jews live in entirely segregated areas only strengthens the fear, hatred and prejudices between individuals belonging to these groups. And as time goes by, and segregation becomes the rule, people are less and less able to imagine that secular individuals and religious ones ever lived together or that they could ever share a space again.

B. The Shortcomings of Localizing Religion in Israel

1. Decentralization as Radicalization and Fragmentation

Religion, Madison warned, was a particularly “virulent form of faction.” As such, it had the potential to do much more than merely curb centralized political power or dismantle religious monopolies; it was one of the greatest risks to the American federation, which needed to be met with crystal clear central norms (constitutional protections of individual rights) and powerful central institutions. Religion was able to move people in the wildest directions, and it could bring about the most destructive ideas. Thus the healthy inter-religious competition which we imagined earlier can deteriorate into multitude of radical religious factions combating each other with ever increased zeal. Madison’s cure—“extending the sphere”—is supposed to de-radicalize the local zeal and result in the moderation of extreme politics in light of the large number of people with opposing views throughout the federation that will balance each other and the restraining effect of federal elites.

Sadly, there is evidence that the Israeli combination of empowering localities to regulate religion and allowing—if not forcing—religious-based residential segregation is spiraling Israel into increased religious and political radicalization. Religious radicalization of the ultra orthodox Jewish communities has been recently documented. There are reports that segregation between men and women began seeping from the public and religious spheres into the privacy of their homes. And only recently the Su-

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100 Schragger, supra note 6, at 1815.
101 Madison argues: “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State”. The Federalist No. 10 (James Madison).
102 The Federalist No. 10 (James Madison).
103 According to the report, in various ultra orthodox communities families began separating between men and women even in small family gatherings, squeezing women in separate tables in the kitchen. Until very recently, such custom has never been observed and has very little religious basis. See Tamar Rotem, The Knights of the Double Table, HAARETZ (June 10, 2011)
preme Court was confronted with another case resulting from the growing religious extremity of the ultra orthodox community. In *Ragan v. Ministry of Transportation*, a group of orthodox Jewish feminists challenged the practice of public transportation providers to force gender segregation in busses that passed through ultra orthodox neighborhoods and localities: men were let in through the front door and allowed to sit at the front of the bus, while women had to enter through the rear door and sit at the back. The Court invalidated the practice, ruling that it violated the principle of equality and the antidiscrimination law, inasmuch as it was forced upon the passengers. However, if passengers were willingly entering these “Kosher buses” (as they became known) through different doors and voluntarily sitting in different parts of the bus, there was nothing wrong in bus companies accommodating this desire.

A thorough discussion of this extremely controversial decision and its problematic assumptions regarding voluntary behavior in such circumstances exceeds the limits of this Article. What is important to note, however, is that such radical—and new—practice could not have developed unless a fairly strict spatial segregation existed between ultra orthodox Jews and the rest of society. Indeed, only because these communities live in such insular localities and neighborhoods can bus companies cater to this desire. In a more integrated residential environments, secular and moderate orthodox Jews would have revolted or simply disobeyed the practice. Lacking meaningful internal opposition, the spatial insularity of the community enables the most radical elements within it to push forward their extreme policies.

As Madison predicted, unchecked by strong central powers, extremism can spread like fire. Once given the legitimacy of the law, the logic of segregation infiltrates deeper, into other domains of life and into other social groups. Residential segregation is now observed in Israel not only between ultra orthodox Jews and secular Jews. Modern orthodox Jews are available at http://www.haaretz.co.il/hasite/spages/1230686.html.

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105 *Ragan*. The Court therefore required that the buses put signs which made it clear that entering and getting off the bus through different doors was not mandatory and that so were the sitting arrangements. These signs, ruled the Court, will make it clear that it was illegal to force anyone to respect these practices. Many commentators have criticized this ruling, calling it naïve at best.

106 Many have criticized this decision, calling it a dangerous compromise and caving in to the most radical sections of the ultra orthodox communities.
starting to demand segregated environments,\textsuperscript{107} and so are secular Jews.\textsuperscript{108} Baffled by these developments, courts are oscillating between condemning such segregationist tendencies and accepting them as legitimate, desirable or simply unavoidable.\textsuperscript{109} The logic of segregation is particularly noxious where social solidarity collapses, and where the traditional majority seems to lose its majority status. According to recent data, secular Jews are losing their clear majority status, and religious Jews are becoming an extremely large minority. Indeed, it is no longer clear that a majority, demographically speaking, truly exists. In such an environment, every group begins to demand its own homogeneous spaces, from which it could exclude all the rest. Once such a dynamic of accelerated fragmentation begins, it becomes very hard to retract from it.

2. Decentralization and the Oppression of Minorities

The radicalization just described does not end, however, in theological extremism and growing disparity between the different parts of the country. One of the greatest dangers stemming from such radicalization is that it puts minorities who reside within religious communities at a risk of greater abuse and infringement of their rights. The danger lurking to “minorities within minorities” has been theorized already by Madison who was worried that radical religious factions would infringe on people’s property rights by coming up with “[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project […]”.\textsuperscript{110} But not only property owners are at risk under a structure of religious decentralization. Women, gays and lesbians and other minorities are also jeopardized by too powerful religious localities. As we have seen above, some of the most radical religious plans indeed involve the subordination of women.

3. Decentralization as Racial Steering and Discrimination

Spatially segregating between religious communities can be turned into a mechanism of “racial steering” which could be used in order to discriminate against racial or ethnic minorities. In the case of Israel, this risk is particularly high, since, as I already noted, religious distinctions overlap national ones. Instead of diverse and empowered communities, we might end up with minorities who are discriminated against on the basis of their

\textsuperscript{107} There are many projects throughout Israel that are currently marketed to national-religious families and individuals only. While some rely on market and social dynamics, in other cases the exclusion is overt and explicit. See, e.g., the website of “Be'emuna,” who prides itself for marketing its apartments only to the national-religious sector. available at http://www.bemuna.co.il/show.asp?id=5861.


\textsuperscript{109} Id.

\textsuperscript{110} THE FEDERALIST NO. 10 (James Madison).
places of residence. Exclusion on the basis of religion can thus serve as a
guide for exclusion on the basis of race, ethnicity or nationality. For exam-
ple, instead of explicitly excluding Arabs—a practice prohibited by law
since the ruling in Qua’adan—companies adopt a policy of selling apart-
ments only to “Zionist-religious” buyers, thus ensuring that no Arab will be
allowed to buy in the project. Surprisingly, this practice was affirmed by
the District Court of Tel Aviv, in a highly contentious decision.¹¹¹

Furthermore, in some cases, religion has been used to justify ethnic
discrimination, such as the discrimination of Mizrahi Jews (Jews of oriental
descent) in the schooling system.¹¹² Religious leaders claimed that the Mi-
zrahi girls were spiritually/religiously “inferior” thus justifying the separa-
tion between Mizrahi and Ashkenazi (Jews of European decent) girls in a
religious school in an ultra orthodox locality. The Supreme Court invali-
dated this repugnant practice (sending some of the parents who refused to
send their daughters to the integrated school), yet it was a telling example
of the ways in which religion can serve as pretext for racial and ethnic dis-

C. Where to Go From Here? Some Preliminary Suggestions

The various negative outcomes of mandated and induced segregation
that I just mentioned should not be understood, however, as reasons to en-
tirely oppose the localization of religion. Localizing religion has advan-
tages that could be kept, by attempting to counter the harmful effects of the
radical segregation and the separatist ideology that is currently underwrit-
ing it. In this article I will not specify the legal rules that should replace the
existing ones, yet I would like to broadly sketch several principles which
might overturn some of the detrimental effects which the specific form of
the localization of religion is Israel has had.

The first is that the starting point should indeed remain that local gov-
ernments should be authorized to express the religious norms of their resi-
dents, in a significant manner. As I demonstrated, there are advantages that
cannot be underestimated: the localization of religion provides a structural
protection, unmatched by any other judicially-enforced rule, against the
dominance and hegemony of one religion.

¹¹¹ Tel Aviv’s District Court recently held that a private development company was al-
lowed to refuse to sell apartments to anyone who was not “Zionist-religious.” The court ruled
that there was “nothing wrong in a group of people organizing in order to live next to each other
to be able to lead their life according to their ways of life.” See A.C. 2002/09 Saba’a v. Israel
Land Administration (unpublished, 2010). An appeal to the Supreme Court was rejected since
the project was already being constructed and the Court ruled that it was a “done deal.” However,
the Court made remarks which could be understood as expressing dissatisfaction with the District
Court’s ruling as well as with the practice. See A.A.C. 1789/10 Saba’a v. Israel Land Administra-

2011).
Second, that the state should be able to compel residential segregation only in rare and extreme cases. Not every religious community need to obtain the status of a minority worthy of a segregated locality of its own. If at all, only extremely small and extremely radical religious communities—nomic communities—that explicitly reject modern lifestyle (such as Satmar Haredi Jews, for instance) should enjoy such status.

Third, it is necessary to address the spatial and social context of the group which seeks segregation. It is different when a group wishes to establish a new city and when it wishes to construct a neighborhood or a project in an already existing area. For example, when a group of national orthodox Jews wish to settle in Jaffa (a predominately Arab neighborhood of Tel-Aviv), I argue that granting them the license to exclude non-religious persons is highly problematic given the possible motivation and the clear results of such exclusion.

Fourth, it is important to relax the connection between crude demography and clear legal outcomes. When one considers the nature of a neighborhood in order to decide whether, for example, pork could be sold in it or not, it is not enough to count how many secular and religious Jews live there. The history of the area, the symbolic meaning of the battle, the exact articulation of the positions in the specific context, and the importance of enabling minorities to settle in the neighborhood – all are crucial factors in determining the legal rule that needs to be applied.

Combined together, these various very broad principles are aimed at creating more heterogeneous localities and neighborhoods, which might begin the undoing of the radical segregation between different religious communities in Israel and the culturization of religion in Israel.

IV. CONCLUSION

The nature of public spaces in countries with multicultural societies is a highly contested political and legal issue. In different countries, this contestation takes different forms and is manifested in different activities: in some countries, there is a battle of whether some religious attire should be prohibited in public spaces (the Muslim veil, for example); in other places, it is debated whether certain religious symbols should be banned from public spaces (or at least from spaces which are governmental as in the case of the USA); while in other countries the fight is over architectural symbols of religion (the latest Swiss initiative to ban Muslim minarets is a case in point).

While these debates are not new, in present day Israel they are becoming increasingly intense due to profound social, demographic and political transformations that Israel has been undergoing over the past couple of decades. In this article I tried to analyze the legal conditions and the social changes that enable these struggles. A particularly alarming consequence of the particular type of localization of religion which took place in Israel, I
argued, is the spatial segregation which it induced between secular and religious Jews and between Muslims, Christian and Jews. The vision of “pure communities” which was advanced through the localization of religion needs to be replaced with a more integration-oriented vision.