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Groups in Context: An Ontology of a Muslim Headscarf in a Nazareth Catholic School and a Sephardic Ultra-Orthodox Student in Immanuel

Michael Karayanni

Two separate Israeli Supreme Court cases permitted a Christian school in Nazareth to exclude a Muslim student who insisted on coming to school with her headscarf, and denied an Ashkenazi ultra-Orthodox school in Immanuel permission to exclude Sephardic students. Intriguingly, the Israeli Supreme Court reached these apparently contradictory holdings using the same liberal ideals of equality and commonality. The article analyzes both holdings to show that the Court's resolutions cannot stand on their own terms. To reconcile these outcomes, we must locate the groups involved within the religious and ethnic power structure in Israel and determine the legal and social significance of defining the group as a minority or a majority. In general, we should be more tolerant of exclusionary measures practiced by a minority than those practiced by the majority. Ultimately, a constitutional evaluation committed to basic individual freedoms cannot refer to the individual without her or his group.

INTRODUCTION

The Israeli Supreme Court rendered two historic judgments defining the limitations on the right of publicly funded religious schools to exclude students from their ranks.[1] The first was that of *Mona Jabareen* (1993). Here, the Court upheld the decision of a Catholic school in Nazareth to deny admission to a Muslim female student who insisted on her right to come to school with her head covered by a headscarf. The Court highlighted the fact that the school has a diverse body of students and that it had operated within its prerogatives when seeking, in the name of pluralism, to de-emphasize the divides among them. The second case, known as *No'ar Kehalakha* (2009), concerned a Jewish religious school, Beit Ya'acov, in the occupied West Bank settlement of Immanuel. Here the Court deemed as discriminatory the actions of an all-girls ultra-Orthodox school to divide itself into two schools: one for girls of Ashkenazi heritage who abide by a specific religious code of

Michael Karayanni is the Bruce W. Wayne Professor of Law, Hebrew University of Jerusalem, Faculty of Law; Visiting Professor of Law, Georgetown University Law Center (Fall 2015). The author thanks the participants of the Berkeley Institute for Jewish Law and Israeli Studies Workshop, University of California, Berkeley, School of Law, and the Faculty Seminar at Faculty of Law at the Hebrew University Faculty of Law for an engaging discussion. The author also thanks Celia Fassberg, Barak Medina, Sarah Stroumsa, Guy Stroumsa, and Katya Assaf for their observations and comments, as well as Tammuz Abuelhaiga, Gladis Batshon, and Hadar Weinstein for their valuable research assistance.

1. On the funding of religious schools in Israel, see Blass (2012, 231, 278–79).

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conduct, the other for Sephardic girls who abide by a religious code considered less rigorous by the Ashkenazi group. The central holding of the Court was that the exclusion of students on the basis of ethnicity contradicts the principle of equality and therefore cannot stand.

Although the social and political settings in which the Nazareth and Immanuel schools operate are worlds apart, a common thread runs through the normative fabric that guided the Israeli Supreme Court—the value of neutrality and equality among students as a virtue of liberal thought.[2] Just as the headscarf in *Mona Jabareen* was an impediment to common and equal school activities, so was the actual physical divide in *No'ar Kehalakha*. The scarf on the student's head, setting her apart from the student body, is the counterpart, so to speak, of the fence dividing the campus. It is on these grounds that the Court denied the legitimacy of both. This normative outlook may appear defensible and to some in Israel may even seem admirable. *No'ar Kehalakha* was indeed perceived by one scholar as a "rightly ruled" decision (Spinner-Halev 2012, 58 n27; see also Blank 2012, 320), and the ethnic discrimination that triggered the legal battle was condemned by many intellectuals and public figures (Dahan Kalev and Ferber Tzurel 2013, 66). Interestingly, the holding in *Mona Jabareen* has not been the subject of a single critical analysis to this day,[3] even though the restrictions on wearing a veil or a headscarf in European schools have been the subject of heated scholarly debate and have caused great political turmoil.

However, a close examination of these cases reveals that their normative outlook is contradictory and insufficiently reasoned. In *Mona Jabareen* (1993), the Court explicitly held that the Catholic school can, if it so desires, restrict admission to Catholic students only (204). Yet when the Ashkenazi section of the Beit Ya'acov School sought to curb admission to Sephardic students, it was condemned as being discriminatory. Why is it that a Catholic school can exclude Muslim and even Greek Orthodox Christian students but an Ashkenazi ultra-Orthodox school cannot exclude Sephardic ultra-Orthodox students? This contradictory attitude is also highlighted by the fact that both St. Joseph and Beit Ya'acov enjoy the same status in terms of the Israeli Ministry of Education—both are "recognized unofficial" schools (*Mona Jabareen* 1993, 201; *No'ar Kehalakha* 2009, para. 1) and thus should ostensibly be subject to the same standards of judicial review in terms of courts and ministry authorities (see Maoz 2006, 697–709).

Moreover, ever since its establishment, the Israeli education system has defied commonality, since it is predicated on the divides and divisions that mirror the divides and divisions in Israel at large. Jews and Arabs go to different schools and have differentiated curriculums (see Shafir and Peled 2002, 85). Within the Jewish community there are three major educational divisions: public secular schools, public religious schools, and ultra-Orthodox institutions, with the latter divided along ethnic lines: one school system is dominated by the Ashkenazi ultra-Orthodox and

2. This liberal outlook in matters of religion and state is characteristic of the Israeli Supreme Court's approach from the 1980s and onward (see Mautner 2011, 99, 144).

3. The decision was noted incidentally when discussing other religion and state issues in Israel (see Maoz 2006, 703–04; Stopler 2009, 212–15).

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another by the Sephardic ultra-Orthodox (see Goldstein 1998, 121–22). So why did the *No'ar Kehalakha* decision condemn the separation as unequal, when separateness is what characterizes the Israeli educational system overall?

As to *Mona Jabareen* (1993), it was odd to see the Court defending commonality in the name of neutral identity among students when it was aware of the fact that prayer, religious classes, and the training of Catholic priests are regular activities at the school (202). Even stranger than the defense of neutrality in the face of facts is the way the Court defines pluralism as uniformity. In terms of *Mona Jabareen*, one can equally, if not primarily, make the case that pluralism is about respecting the difference rather than hiding it (Stolzenberg 1993, 581; Galston 2002, 20).

The Court's recourse to liberal values in *No'ar Kehalakha* leads to the same conundrum. As is discussed at greater length below, the circumstances here were that the Ashkenazi section of the school, which was more conservative and religiously strict, wanted to segregate itself from what it saw as the overly lenient Sephardic population. For a Sephardic girl to be admitted, she would have to refrain from, among other things, riding a bicycle or connecting in any way to the Internet. Arguably, therefore, the liberal values in *No'ar Kehalakha* should have supported the segregation rather than condemned it since, as far as their preparation for the complexities of modern life and their capacity to make autonomous judgments are concerned, the Sephardic students would have been rescued, not wronged (see Barry 2001, 221).

Serious normative flaws plague these two Israeli Supreme Court decisions. In *Mona Jabareen*, the Court relied on the argument for pluralism in order to support the school's interest in uniformity and to quash the student's freedom of conscience, while the school had the full right to maintain its own religious identity; in *No'ar Kehalakha*, the Court maintained the liberal right of individual equality in order to prevent the more religiously conservative Ashkenazi section in the school from separating itself from the Sephardic section, even though separate school systems are a major feature of the entire Israeli education system.

Despite these serious flaws, I argue that the resolution reached in each is normatively defensible. My argument rests on the power structure in which the group making the exclusionary measure exists. To be more specific, there is, or should be, a fundamental difference if the excluding group is a nonruling minority that seeks to preserve its own identity by its exclusionary act, as opposed to a case in which the exclusionary act is practiced by the hegemonic group. In *Mona Jabareen*, a minority group was seeking to maintain its collective identity by restricting admission to its ranks, whereas in *No'ar Kehalakha*, a minority group was fighting restrictions on admission imposed by a more powerful group. Ultimately, therefore, in both cases the Court was justified in intervening on behalf of the more vulnerable group.

In terms of political and legal philosophy, identifying groups in terms of their history and socioeconomic status as a point of reference makes this study one of critical theory (Young 1990, 5). As such, it seeks to highlight what group rights theories have been claiming all along: when individual rights are considered with reference to the status and identity of the groups to which they belong, we are

better able to determine the entitlements of groups as well as of individuals than when entitlements are considered from a liberal point of view concerned with formal neutrality and equality.[4] However, the analysis of the Israeli Supreme Court in both *Mona Jabareen* and *No'ar Kehalakha* did not relate to the existing power structure between the contending groups, and so it is not surprising that the two holdings emerge as inconsistent and unpersuasive.

My criticism of the Court's normative outlook in *Mona Jabareen* and *No'ar Kehalakha* does not suggest that liberalism is incompatible with group rights. Philosophers and political theorists have put forward powerful claims linking individual autonomy—a cornerstone concept in liberal thought—with the need to accommodate groups (Kelly 2002, 8). "Picking one's company is part of living as one likes," says George Kateb (1998, 36). He then goes on to determine that "living as one likes (provided one does not injure the vital claims of others) is what being free means" (1998, 36). So, even if the Court in both these cases is presumed to have been totally committed to liberalism, it could have found sufficient grounds to consider the groups involved, including the power structure that governs their relations. Arguably, limiting the power of exclusion by a nonruling minority will be more detrimental to the group identity of that group and its members than when limitations are imposed on the power of dominant groups. All of this must also be balanced with guarantees that make it possible for individuals such as Mona Jabareen to also practice their religion.

The following sections of this article detail the Israeli Supreme Court decisions in *Mona Jabareen* and *No'ar Kehalakha*, respectively, showing where the Court's holding is lacking, and then suggesting an analysis that better sustains the resolutions reached in the cases. In the last section, I offer two perspectives on why it matters, normatively speaking, to consider groups, their rights, and their entitlements in the historical, social, political, and legal contexts in which they exist.

MONA JABAREEN

The Case

Upon completing the eighth grade, Mona Jabareen, a religious female Muslim student from Umm al-Fahm, sought admission to the St. Joseph High School in Nazareth—locally known as the Al-Mutran (The Bishop) School. This school, highly acclaimed and selective,[5] is owned and operated by the Greek Melkite Catholic Church, which is one of the ten officially recognized Christian communities in Israel. Mona Jabareen passed the admissions exams and in March 1993 was notified of her acceptance. Before the school year began, Jabareen, like all other newly admitted students, attended an enrichment course. She came wearing a headscarf and maintained that this attire was mandated by her Muslim faith. The school informed the Jabareen family that under school regulations she cannot be admitted wearing a headscarf.

4. On the centrality of neutrality and equality in liberal thought, see Laden and Owen (2007, 8).

5. Within the Palestinian Arab community in Israel, Christian schools are generally regarded as affording a better education than the regular nonsectarian schools (see Okun and Friedlander 2005, 166).

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During the attempts to settle the dispute amicably, Jabareen made it clear that the headscarf was not the only issue with which she could not comply. Pursuant to her Muslim faith, she would not be able to participate fully in other school activities such as physical education classes and recreational trips. For example, she asked to be allowed to wear a special dress for sports activities, and refused to participate in swimming lessons at all if male students would be present (*Mona Jabareen* 1993, 201).

The school rejected these demands. This brought Mona Jabareen to petition the Israeli Supreme Court in its capacity as the ultimate administrative court of the country. Jabareen argued that the Israeli minister of education (the primary named respondent) and the director-general of the Ministry of Education (the second named respondent) have supervisory authority over St. Joseph and thus should instruct the school principal (the third respondent) to admit her to school without making her attendance dependent on removing her headscarf or participating in other school activities. Jabareen justified her claim by her legally guaranteed freedom of religion and conscience.

The justice who authored the leading opinion of a panel of three justices was Aharon Barak, at the time the Deputy President of the Israeli Supreme Court. Barak's normative evaluation starts off by stating that were Mona Jabareen to seek admission "with her headscarf, as mandated by her religion, in a public school, then it would have been appropriate to recognize her right to do so" (*Mona Jabareen* 1993, 203). But St. Joseph, he goes on to hold, "is a private school, owned and operated by a recognized religious community that enjoys educational autonomy" (204). According to Barak, students who come to this school choose to do so voluntarily, and the school would not be in violation of the principle of equality if it were to choose to deny admission to students who do not belong to the particular religious community of the school (204). Barak highlights the fact that 55 percent of the students who attend St. Joseph are not Greek Melkite Catholics, and that one-third of the student body is Muslim (202). Moreover, the school requirement for a shared dress code was not instituted in the name of uniformity alone—for if this were the sole motivation, then once again Barak discloses that he would have been prepared to rule in favor of the petitioner. In this particular case, Barak says, the Court is convinced that behind the requirement of a uniform dress code and shared student activities there are educational considerations that are related to the school's nature (204). By insisting on a uniform dress code and the need to take part in joint activities the school seeks to promote pluralism by offering an environment with a common denominator among its diverse student body, composed as it is of Christians from different communities as well as non-Christians (204).

In his concurring opinion, Justice Eliezer Goldberg adds that even if the school were public it is not certain that it would not be entitled to insist on a dress code. In a religious Jewish public school that insists on its male students coming to school with a skullcap, he hypothesizes, one student might contend that on the basis of his right to religious freedom and conscience he should be relieved of this duty (204). In this case, Goldberg says, it is not certain that the student's right would prevail, notwithstanding the principles of tolerance and pluralism (205).

Seemingly, the conflict in *Mona Jabareen* is defined by the Court in liberal terms, that is, the individual right of the petitioner to freedom of religion versus

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the liberal interest of the school to assert neutrality and commonality (see Stopler 2009, 29). It is true that Justice Barak, in his opinion, did highlight the fact that St. Joseph is privately owned by a recognized religious community. Yet, the minority or majority status of the specific religious community, the fact that it regularly conducts religious activities on its premises, and the fact that it is largely publicly funded did not figure in his analysis. Irrespective of all of these, the school could still exclude or set conditions for admission to its ranks, as it did.

Critique

In what follows, I deconstruct the *Mona Jabareen* decision and argue that the normative outlook of the holding is flawed. To begin with, it is not clear why the Court characterized the St. Joseph School as a private rather than a public school. To operate as a school, St. Joseph, like any other school in Israel, needs the accreditation of the Israeli Ministry of Education (see Kleinberger 1969, 310). For the school to maintain its accreditation status, it must submit to the supervisory powers of the Ministry and these, effected by constant communiqués and visits by Ministry supervisors, seek to ensure that the school curriculum, as well as the teaching staff, meet the standards set by the Ministry itself (see Al-Haj 1995, 98).

It is true that St. Joseph is classified as "recognized but unofficial" in terms of the general school structure in Israel. This status grants it some autonomy in its internal dealings and makes it possible to promote a particular curriculum, which can also be religious (*Mona Jabareen* 1993, 202). Despite its "unofficial" status, the school is still subject to the constant supervision by and accreditation requirements of the Ministry of Education. More importantly, its categorization makes the school eligible for public funding (see Mar'i 1978, 63–64). As "recognized but unofficial," the school receives 80 percent of its operational budget from the Ministry (Mar'i 1985, 64; see also Al-Haj 1995, 98). These formal elements, together with the fact that the school, like any other school, fulfills a public function of educating future active citizens, makes St. Joseph more public than private in nature.[6] Therefore, according to the very standards set by Justice Barak, the school should have been much more accommodating toward Mona Jabareen's claim of freedom of conscience because, arguably, schools that accept public funding cannot, even if religious, practice discrimination as if they were private churches (see Spinner-Halev 2012, 49, 58).

Second, referring to pluralism as a guiding normative code commonly means respecting differences and accepting the legitimacy of diversity (Galston 2002, 23). According to this general philosophy of pluralism, "we need mosaics, not melting

6. The private/public school divide is not always clear, just as the divide between the public and the private spheres is not. One can also make a plausible claim that schools receiving public funds can still be regarded as private schools. However, St. Joseph did not just receive public funds, it also came under the supervisory powers of public officials and had to fulfill a number of obligations in terms of hiring and curriculum not much different from those applicable to regular public schools. Additionally, questioning Justice Barak's holding in this respect is based on the criteria employed in Israeli administrative law that holds religious bodies that receive public funding and statutory recognition accountable to certain public norms. See *Bar-Ilan University v. National Labor Court* (2011); *Hevrat Kadisha v. Kastenbaum* (1992). See also Raday (2005, 85).

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pots" (Green 1998, 170). So if St. Joseph wanted to be faithful to its proclaimed pluralistic approach, then it should have admitted the headscarfed Mona Jabareen instead of setting conditions for her admission (see Levinson 1997, 335, 351). Seemingly, the least plausible theory to justify the school's actions is pluralism.[7] In the concluding chapter of *Liberal Pluralism*, William Galston writes: "if liberal pluralism means anything, it means internalizing norms and habits that restrain us from compelling others to live life our way rather than theirs, even when we have good reason to believe that their way is mistaken" (2002, 124). So pluralism does not mean commonality and uniformity. Its practice requires the creation of spheres in which differences are practiced and tolerated (Stolzenberg and Myers 1992, 657).

It is true that pluralism does not prescribe legal relativism (Galston 2002, 30) in the sense that there can be no objective standard for reconciling the values of different traditions. Pluralism assumes that there are primary values independent of specific cultures, and that these are essential for the public order and for the well-being of society (see Griffiths 1986; Tilly 1998). Yet, when looking at the sorts of norms embodied in this common sphere in a pluralistic society, one finds only basic norms that seek to guarantee the conditions of public order (Galston 2002, 65–66). These pertain to the existence of a judicial process by which rights are determined and the basic moral conditions preserving property rights and physical integrity are upheld (66–78). Yet we have recourse to this common sphere when the legitimacy of being different is first recognized. In the inner realm of St. Joseph, difference was first revealed—and disallowed—by denying Mona Jabareen the right to identify herself as a religious Muslim.

Third, there is something disingenuous in resorting to pluralism given what was known about the educational environment of St. Joseph. The "uniformity" that the Court ended up backing was that of a Catholic school, where prayers and religious ceremonies are held regularly, and whose administrators are Catholic priests who dress in the habits of their orders, but where a Muslim female student cannot come to school with a headscarf.[8] Additionally, Justice Barak highlighted the fact that St. Joseph started off as an educational institution for training Catholic priests and still does so today (*Mona Jabareen* 1993, 202). Students studying to be priests come to school in distinctive garb. True, the Court stressed in its opinion that non-Catholic students are exempt from the duty to participate in such religious lessons and prayers (202), but such an exemption seems in direct opposition to the uniformity principle on which the Court rests its holding. Indeed, the religious activities in school, the special characteristics that mark the school as Catholic, are anything but uniform.

It is important to note in this respect the German experience with restricting the Muslim headscarf in some of its states (*Länder*). Those who were first targeted by this restriction were the teachers, for endangering the value of "neutrality" (Joppke 2007, 53). Interestingly, this restriction on Muslim female teachers was observed even though in some of these German schools Christian symbols were

7. This, of course, does not mean that neutrality cannot be defended under other theories. For example, it was already argued that principles of republicanism do support the interests of a neutral public sphere over the interests of individuals following their religious practices, including wearing the Muslim headscarf in public (see Joppke 2007, 332).

8. Catholic schools are generally run by Catholic priests and nuns who come to school in their religious attire (see Sa'ar 1998, 218).

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tolerated (53–54).[9] In spite of this unbalanced attitude against the Muslim headscarf in German schools, the restriction did not apply to Muslim female students. As a matter of fact, one German court even relieved a Muslim female student from the obligation of taking part in coeducational sports activities, based on the student's freedom of religion (55). So, if one part of the school's mandate is to signify the importance of commonality and neutrality, it is surely the teachers and administration who should take the lead rather than the students.

Fourth, one can take issue with the logic of Barak's holding that if St. Joseph were a public school, Mona Jabareen's religious liberty, as expressed in her wearing the headscarf, would have prevailed over the interest of the school in maintaining neutrality in the dress code of its students. From a legal standpoint this outlook is justified under the pretext that public institutions are subject to more rigorous scrutiny from the judiciary and thus are more restricted in their internal administration than are private institutions. At the same time, one could also make the argument that if private institutions have a legitimate interest in advancing the practices of neutrality among their students, then a public institution would have an even stronger interest in doing so. One can logically assume that a public school would attract an even more diverse body of students and thus should have a stronger need than a private school to diminish the divides among them in the name of neutrality. The French experience with the ban on the Muslim headscarf in public schools lends support to this point (Levinson 1997, 351). When the freedom of Muslim female students to attend public school with a headscarf was restricted, one dominant justification for the ban was the need for commonality as a virtue of neutrality in the public sphere (see Bakircioglu 2007).[10] Yet the logic as exhibited in the *Mona Jabareen* decision is just the opposite: neutrality can be an overriding interest of private, but not of public, schools.

MAKING SENSE OF *MONA JABAREEN*

In spite of the critique of the *Mona Jabareen* decision, I believe that the actual holding, as well as the emblematic Catholic practices at the school, can be defended. This becomes possible if we conceive of the case not only in terms of Mona Jabareen's individual right to assert her religious freedom against the school's right to assert its prerogative to effectuate the pedagogical policy of commonality, but as a case presenting a conflict between the right of the Catholic community, as a nonruling minority, to assert its freedom of religion against the right of nonmembers to assert their own religious group identity within the area of St. Joseph. Once

9. It is interesting to note that in a recent judgment of the Federal Constitutional Court of Germany, the Court decided that a general prohibition on teachers in state schools expressing religious beliefs by outer appearance, such as the wearing of the headscarf, stands against the freedom of faith as guaranteed in Germany's Basic Law. See http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2015/bvg15-014.html (accessed April 19, 2015).

10. Even if the ban on the headscarf in France was actually motivated by a sincere desire to integrate the Muslim minority in the country, insisting on a neutral public sphere remains a widely contested matter (see Laborde 2008; Wallach Scott 2010). Constraints of space preclude a discussion of this important issue here, so I will take the argument legitimizing the ban for the sake of neutrality at face value, assuming that if the ban is to apply, there is greater legitimacy to do so in public institutions rather than in private ones.

the Catholic community, as a nonruling minority, becomes entitled as a group to freedom of religion, it is then possible to justify the actions of the community to preserve and promote its own religious identity exclusively, whether in the form of regularly holding Mass at school, having religious lessons, or allowing Catholic priests and nuns to fulfill pedagogical and administrative functions at school attired in their traditional clothing.[11] Therefore, given its status as a nonruling minority, the Catholic community's freedom of religion becomes formidable vis-à-vis the right of Mona Jabareen and other non-Catholic religious students.

On the one hand, if denied the power to regulate admission to its own ranks, for example, by restricting nonmembers', whether Muslim or other, display of their own religious symbols and practices, St. Joseph would lose much of its identity. Given that religious education is, by and large, central to preserving the identity of the religious group, this can also affect the identity of Catholics in Israel in general. As the Court itself noted in *Mona Jabareen*, over one-half of its student body is non-Catholic (*Mona Jabareen* 1993, 203). On the other hand, if denied admission to St. Joseph, non-Catholic students would still have a reasonable and viable opportunity to acquire a high school education at another school without needing to compromise their religious beliefs or practices.[12] Of course, these students would be denied the advantages St. Joseph has to offer. Yet this denial, given the other available options, would not be equal in its impairment to that caused to St. Joseph were it forced to permit the practices and symbols of other religious communities in its domain.[13] So a

11. On the right of religious minorities to have their own religiously identified schools, see Spinner-Halev (2000, 115–18). Associative religious life has been recognized as part of the freedom of religion and, in the context of European human rights law, has worked to safeguard the religious community from state interference (see Kiviorg 2010).

12. In 1993, the same year that the *Mona Jabareen* decision was rendered, an all-girls public school of an explicit Islamic religious nature, named after the Prophet Mohammad's first wife, Khadijah, was established in Mona Jabareen's own city of residence, Umm al-Fahm. At the time, as is still the case, the elected municipality of Umm al-Fahm was controlled by the Islamic Movement, which established this school. By 2000, this school led the Palestinian Arab minority in terms of achievements in the Israeli matriculation examinations (see Rubin Peled 2009, 254). A study published in 2001 indicated that 75 percent of the students who attend this school cover their heads with a headscarf (see David 2001, 254). The availability of an alternative "to the claimant that allowed him to manifest his religion" brought the British court and the European Court of Human Rights to be more considerate of religious institutions' internal practices (see McCrudden 2011, 216).

13. This argument is premised on the fact that a number of Christian schools sought to restrict the Muslim headscarf on their premises, a policy revealing a particularly intense interest on their behalf in this respect. I was able to locate two petitions filed in recent years in which the Christian school restricted Muslim students from attending school with their headscarf. These proceedings ended with the petition being retracted by the students in whose name it was filed (the petitions are on file with the author). Additionally, a Christian school in East Jerusalem was ready to dismiss one of its Muslim teachers who came to school one day with the headscarf. This case was settled out of court. The details of the settlement remained confidential. See *Nimri v. Schmidt Girls School* (2011). My assumption is that such schools would not stand fast behind their ban on the headscarf while willing to admit Muslim students and teachers unless they had a sincere self-perceived interest that the headscarf undermines their characters as religiously identified schools. I am aware of the fact that a Christian school can also be tolerant of other religious symbols on its premises without such symbols necessarily undermining its character. In fact, I have found that two prominent Christian schools do not restrict their Muslim girl students from wearing the headscarf. I personally think that this latter policy is the more commendable one. But that said, those that happen to have the restrictive policy can still be regarded as having a viable interest in supporting their ban as evident from their bylaws and willingness to defend their stand publicly in courts.

calculation in the spirit of comparative impairment[14] shows that the Catholic community's communal interest would be more impaired were it to permit non-Catholic religious symbols and practices in St. Joseph than would the communal interests of other religious groups if St. Joseph restricted them.

Group rights theories provide additional support for why nonruling minorities should be entitled to regulate entry into their identity-defining institutions, thereby making the interest of St. Joseph even clearer. A commitment to pluralism entails the accommodation of nonruling minority groups in exceptional ways. Minority group members can be exempted from certain norms, their language and cultural symbols can be accorded official recognition, and they can also be granted autonomy to govern their members (Levy 1997).

Group rights theory, whether from the perspective of communitarianism or liberal multiculturalism, provides two major reasons why minority groups are entitled to special rights. The first builds on the fact that minority group members are embedded in their cultural group, which can be ethnic, religious, racial, or any other identity that gives rise to a "societal culture" (Kymlicka 1995, 75). If the minority is left without special protection, then it is likely that minority group members will give in to the pull of the hegemonic majority culture, thereby weakening minority culture.[15] Communitarianism will perceive this weakening as a loss to society and to democratic culture, given that groups, as such, have the right to exist. After all, communities "are prime agents for the fulfillment of human needs, interests and desires" (Barzilai 2003, 34–35). Liberal multiculturalism will go the extra step of arguing that in such a case, minority members would lose part of their own identity and even part of their autonomy—everything that defines their capacity to make meaningful choices (Kymlicka 1995, 83; see also Raz 1994).

A second major justification is concerned with making democracy an inclusive system of government (Young 1990, 91–95). Once again, given the power of majority hegemony, if minority groups had little say or effect in government and other institutions, it would marginalize minority groups even more, considering that the incentives to take part in the existing process would increasingly diminish. Therefore, some measure of accommodation must be accorded to minority groups, guaranteeing them meaningful representation in government bodies, providing them with subsidies to support institutions that maintain their identity, and even by offering affirmative action measures, not only as a tool to compensate for past injustices, but also for empowering minority members to become qualified and contributing individuals to the state as a whole.

Arguably, these justifications do not apply to the dominant majority group. The status of the majority, as such, is usually sufficient for securing its group identity and for promoting its interests. Members of the majority group are adequately represented in government bodies, in the market, in the mass media, and in other

14. Comparative impairment is a method designed to resolve true conflicts in a choice of law analysis that seeks to discern and take into consideration the governmental interests of the laws involved (see Hill Kay 1980).

15. For an eloquent appraisal of the worth that religious communities can have in terms of individuals who belong to such communities, see the decision of the South African Constitutional Court in *Christian Education South Africa v. Minister of Education* (2000).

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bodies, and this is usually sufficient for cultivating the group's identity and advancing the needs and aspirations of its members.

These observations have important normative implications that help us distinguish between the legitimacy of different group-based actions. For example, the majority group might discriminate in its actions in a number of ways. It might grant its own members certain rights and benefits that it denies to minority members. Conversely, it might decide to grant minority members certain rights and privileges that it denies to members of the majority group. In principle, both actions are discriminatory—they exclude individuals solely on the basis of their group identity. In the first case, it is the minority member who is excluded; in the second case, it is the majority member who is excluded.

But are both these discriminatory acts equally illegitimate? I do not think so, at least not from the group rights perspective. A majority that discriminates against its own members will be more in line with the rationale of group rights than one seeking to discriminate against members of a minority group (see Ely 1974, 727, 731–32). This is because the majority is assumed to be in control of the decision-making process, and it cannot be assumed that it is making this decision for reasons of racial prejudice (735). Therefore, as John Hart Ely suggested in the context of US constitutional law, if discriminatory actions are usually entitled to "strict scrutiny" by the courts, this will not be called for "when White people have decided to favor Black people at the expense of White people. Whites can do things to Whites they could not do to Blacks" (727).

Accordingly, a minority that seeks to exclude majority group members, or even members of other minority groups, from its schools has more legitimate reason to do so than a majority group that excludes minority group members from its institutions. In the first case, exclusion is needed in order to secure the existence and maintenance of group identity; this is not so in the second case. So, generally speaking, it is just and fitting that Native Americans should have their own reservations and the power of excluding white Americans, as well as blacks, Hispanics, and other minority members, but yet not be excluded from white cities and towns. Without the exclusionary power of the minority, it risks losing its identity. But the majority cannot be empowered to exclude minority members. Similarly, when African Americans are forced into segregated schools, the act must be condemned, for in such a case, separate cannot be equal; however, were the African American community to push for a separate educational system, say a university that is identified with the African American community, the exclusion of whites would be justified precisely because it would result in a separate framework for African Americans.

The discussion thus far affords us a normative presumption for and against the act of exclusion by an institution identified with a certain group depending on whether the excluding group is a minority or a majority. As a rule of thumb, exclusionary practices are more tolerable if it is the minority group doing the excluding than when the majority group excludes minority members from its ranks.

To apply this analysis in the context of *Mona Jabareen*, it becomes imperative now to refer to the status of the groups involved. Generally speaking, Israel's population is diverse. Nationally, there exists a Jewish majority that in 2013 numbered over 6.1 million, forming about 75 percent of the total population of 8.1 million

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(Central Bureau of Statistics 2014, Table 2.1). About 20.6 percent of the population is Palestinian Arab (1.7 million) (Table 2.1). This national minority is divided in terms of religion into three major groups: Muslims, numbering about 1,200,000 (16 percent of the total population), Druze, numbering about 120,000 (1.6 percent), and Christians, numbering about 150,000 (2 percent) (Table 2.2). Thus, the Christian community in Israel is not only part of a national minority, but is also itself a religious minority both within Israel at large and within its national minority group. In terms of its minority status, the Christian community is further weakened because it is itself subdivided into over twenty different religious communities (see McGahern 2011, 42),[16] and has experienced a high rate of emigration from Israel over the years (see Betts 1978, 73–74; Tsimhoni 2002, 125, 149).

A major activity on the part of some of these Christian communities is the establishment and operation of schools. These were often established as missionary schools before the creation of the State of Israel (see Mar'i 1978, 10–11) in an effort to establish a hold and promote Western colonial interests (see Ichilov and Mazawi 1996, 7, 9). When the state was established, the preservation of these Christian schools was perceived as part of Israel's obligations under the international covenants that provided it legitimacy and international status (see Bialer 2005, 105, 108). The Christian schools in Israel proved to be very successful (Shavit 1990, 116). Relative to other schools, they were well funded, with adequately equipped educational facilities (Al-Haj 1995, 100–01). On top of the public funding they received over the years from the government as "recognized unofficial" schools, they had the backing of their own Christian communities, most of which were connected to foreign countries (Ichilov and Mazawi 1996, xvii).

The Christian schools of today have no missionary intentions, nor are they regarded as representing colonial interests (Al-Haj 1995, 95–96). The teaching staff and the student body are diverse, with representatives from the different religious communities (see Kleinberger 1969, 310). In fact, in many of these schools, a sizable number of the student body is composed of nonmembers (see Maoz 2006, 698), as is the case in St. Joseph. In some of these schools, the Christian students of all denominations are themselves a minority (see Sa'ar 1998, 218). The average representation of Muslims in Christian high schools is about 40 percent (Al-Haj 1995, 101). In spite of this, these schools perceive themselves as serving their respective religious communities (Sa'ar 1998, 217–18). Priority in admission is given to community members (Al-Haj 1995, 101).

The school administration generally consists of priests and nuns; school curriculum and activities are identified, at least partially, with the specific church and the celebration of Mass and Christian prayers are common on school grounds (see Landau 1993, 71). All this provides abundant empirical data showing that the Christian schools in Israel have an instrumental role in preserving and nourishing their communities, which are relatively small and fragile. If these schools succumb to the demands of nonmembers seeking to stress their own religious symbols and practice their own religious rites while at school, much of what the schools are designed to preserve will be lost.

16. Ten of these communities are officially recognized (see Karayanni 2012, 305 n4).

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Characterizing a particular group as a minority or as a majority is not always an easy task. *Mona Jabareen* can be seen as presenting such a dilemma. It is incontestable that St. Joseph enjoys a record of financial stability and academic achievement that ranks it among Israel's best schools, Jewish and Arab alike. The Court acknowledged this in the opening paragraph of its decision. Additionally, the vast real estate holdings of the Christian communities remained in their ownership after the establishment of the State of Israel, as opposed to the property of the Muslim community, most of which was effectively confiscated by the Israeli authorities (Rubin Peled 2001, 4–5; Tsimhoni 2002, 126–27).[17] Muslim religious schools that had existed before Israel was established were shut down (Mar'i 1985, 64), whereas Christian denominational schools were allowed to remain and went on to flourish.[18]

If we were to evaluate the material standing of the Christian communities with the Muslim community in Israel as a point of reference, it is doubtful that the Christian schools should be regarded as minority institutions. However, my point of reference in this respect is the wider context of Israel as a whole. Within this context, the Christian communities are small and relatively fragile as far as population goes, and have limited political power to advance their communal interests. Moreover, within this larger context it should matter less whether the particular school of the community has done well in terms of its financial standing and academic achievements. If indeed communal identity is entitled to protection, then minority religious schools are entitled to protect their communal identity, irrespective of their financial and academic standing.[19]

It is interesting to note that the jurisprudence surrounding the right to freedom of association gives communities, especially religious ones (see Sandel 1998, xii), considerable autonomy in handling their own internal affairs, including the power to discriminate against nonmembers (see Levinson 1997, 337; Bagni 1979, 1521). As a matter of fact, the more the discriminatory act of the community is connected to its aims and agenda, the more leeway it is given to discriminate under the right to freedom of association (Greenawalt 1998, 115–16). These discriminatory powers become almost immune to legal challenge when it comes to the rules of admission and membership as set by a religious community (116). Thus a synagogue may restrict membership to Jews only, even when the individual seeking membership is a Christian who fully identifies with Judaism. Cases become more difficult when a religious community discriminates against nonmembers in functions not related to

17. Preserving the ownership of church property in Israel was largely due to Israel's foreign policy toward Western countries (see Betts 1978, 174).

18. Today, there are 72 Christian denominational schools in Israel (the full list is on file with the author).

19. Take, for example, the JFS case in Britain, which dealt with a top-ranked school that had an explicit Jewish identity and that denied admission to a candidate who, under orthodox *halakha*, was deemed to be non-Jewish. There was no disagreement that this school could have been more discriminatory in terms of nonminority members per se, and probably even more so if such pupils were substantially represented and wanted to display their own religious identity when attending school (see McCrudden 2011, 209). However, if the communal interests of the Jewish minority in England are deemed worthy of protection as a matter of principle, it does not follow that such protection should be deemed unnecessary because of the school's academic record.

their aim or agenda. For example, if the same synagogue is prepared to employ only Jewish janitors, would that be permissible? And what of nonexpressive and nonreligious associations, such as golf clubs or chambers of commerce, that restrict membership to men only (116–17)?

It seems quite clear, on the other hand, that a school affiliated with a certain religious community that seeks to preserve and nourish that community's particular identity should have considerable, if not absolute, autonomy in controlling the admission of nonmembers (Greenawalt 1998, 117–19; see also Bagni 1979, 1540–42), especially when these nonmembers seek to assert their own religious symbols and practices in the school's domain. Such a regulation by the school is an integral part of the school's aims and agenda. It is important to add that from the perspective of freedom of association, this resolution is normatively defensible irrespective of whether the concerned school is affiliated with a minority or a majority religious group (see Levinson 1997, 337). Such control over admission is the prerogative of both groups. Yet, in light of the foregoing discussion with respect to group rights generally, it can be reasonably claimed that if the concerned religious group is a nonruling minority, then its interest in regulating admission, especially when the admissions policy is designed to serve the aims and agenda of that group, is especially powerful. Once again, the stakes of a minority group in this respect can be greater than those of groups that have majority status. If the non-Catholic student population at St. Joseph were to assert its own various religious symbols and practices at the school, then much of what the school was established to do would be undermined.

This analysis leads us to a salient proposition when coming to assess the legitimacy of exclusionary practices by groups. Normatively, our assessment should consider whether the excluding group is a nonruling minority or is in fact the hegemonic majority. A minority group is much more justified in its exclusionary actions against nonmembers (even if these are members of other, nonruling minority groups) than when the ruling majority excludes members from its institutions. So if Mona Jabareen were to seek admission to one of the general Israeli universities, all of which are essentially identified with the Jewish majority, and was denied admission because of her insistence on attending classes wearing her headscarf or her refusal to participate in certain sports activities, the university would not be justified in its action. Its assertions of commonality and neutrality as guiding liberal notions would be less significant given the existing power structure between Jews and (Muslim) Arabs in Israel. Put more simply, it is essentially all about "who tells whom" that a given group wants to be different.

MONA JABAREEN IN THE ISRAELI CONTEXT

The group rights analysis of the *Mona Jabareen* decision makes it possible to decode additional propositions and arguments made in the Court proceedings and in its holding. First, I was unable to determine why St. Joseph refrained from raising the strongest argument of all against the headscarf in its domain. The argument goes to the freedom of religion of the school itself, or rather of the Catholic

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community that the school was established to serve. The Court seemed sympathetic to this argument as it highlighted the fact that the Catholic community that operates the school is one of the recognized religious communities in Israel. Therefore, St. Joseph could have bluntly said that the institution is a religious one and thus only their religious symbols and not those of others—Muslim or otherwise—should be allowed.

When it comes to religious symbols, one can also imagine that a case can be made on behalf of majority groups who, in the name of preserving their religious institutions, are permitted to restrict the religious symbols and religious practices of other religions in their own religious institutions. Instead, St. Joseph took pains to argue (unpersuasively, in my opinion) that what was at stake was not its own religious freedom but rather the interest in uniformity and commonality among its student body. This notwithstanding the fact that everything in the school was very much Christian and Catholic.

I suggest that raising such an argument would have stressed the religious divides among the Palestinian Arab religious communities, which the Greek Catholic Melkite community was not prepared to do (see Stopler 2009, 30). After all, nationally, Palestinian Arab Muslims and Christians share one identity, and attempts to divide this community along religious lines are discouraged by community leaders (see Jiryis 1976, 199–200), especially in light of the fact that the Israeli establishment has traditionally worked to reinforce the existing religious divisions in order to control Palestinian Arabs better (see Barzilai 2000, 436; Louër 2007, 14–15, 19, 88). Thus, from among the different possible reasons for supporting a minority community in preserving its identity, this community chose the interests of commonality and uniformity among its students.

This further suggests that there are notions that run deep when a Palestinian Arab religious community comes to exclude others from its institutions. Palestinian Arabs in Israel may accept the legitimacy of having different schools, each serving its own religious community, but once in the same school, the collective ethos of the non-Jewish minority prevents the different groups therein from being overtly different. So the argument raised by St. Joseph, eager on the one hand to retain its religious identity, but seeking to suppress the divides among its student body, is in line with the self-perception of Christians in Israel as being "carefully on the margins" (Sa'ar 1998, 215). As already noted, Christians in Israel experience a continuous struggle between Christian "ethnocentrism on the one hand and Palestinian national identification on the other" (215).

Second, characterizing St. Joseph as a private school, notwithstanding the fact that the Court was aware of the public funds regularly transferred to the school, also makes sense if we are to consider how Israeli institutions, including the courts, relate to the jurisdiction accorded to the Palestinian Arab religious communities, especially the Christian ones. Given the Jewish nature of the State of Israel and the inherent entanglement of Judaism as a religion in the identity of the state, Jewish religious institutions came to be perceived as part of Israel's public sphere and those of the Palestinian Arab minority as part of the state's private sphere (Karayanni 2007, 6). The private nature of the Palestinian Arab religious communities, in general, and of the Palestinian Arab Christian communities, in particular,

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is so ingrained that statutory regulation of these institutions has been very rare and Israeli courts have tended to abstain from intervening in their jurisdictional authority, even when individual rights of community members were severely undermined by the religious norm (26–35). As opposed to all other religious communities, judges in the courts of the recognized Christian communities are appointed at the sole discretion of each church, without the involvement of any government body.

Last, the analysis offered here explains another anomalous aspect of the *Mona Jabareen* decision. As indicated earlier, the case passed almost unnoticed in the press and, more surprisingly, also in the academic community. Arguably, the Supreme Court of the State of Israel's denial of the right of a female Muslim student to come to a publicly funded school with her headscarf should have made headlines in Israel to the degree that it did in France and other European countries. Moreover, unlike the Muslim community in France, which is originally an immigrant community, the Muslim community in Israel is an indigenous community—it did not purport to impose a foreign culture or tradition in a country to which its members immigrated. On the contrary, the Muslim community during the Ottoman period was the hegemonic group that had to adjust to a foreign culture and the establishment of a different sovereign entity in the land it had lived for centuries. But, as opposed to the controversy of the Muslim headscarf in Europe, where the restriction was imposed by powerful state institutions supposedly representing the will of the hegemonic majority, the restriction in *Mona Jabareen* was imposed by a religious minority that was seeking to control its own religious institutions. As such, it did not strike the same chord as it did in Europe. Thus, the volume of discussion on each of these cases was materially different.

NO'AR KEHALAKHA

The Case

The Jewish community in Israel, like that in the world at large, has long struggled with internal divisions. One is between religious and secular Jews. Another is between Jewish communities of eastern or North African descent, commonly known as Sephardic or Mizrahi,[20] and Jewish communities of European descent, known as Ashkenazi. This latter division is so pervasive that communities with varying degrees of religiosity can still be divided by ethnicity along Sephardic and Ashkenazi lines. This happens also in the ultra-Orthodox Jewish community. Different schools and yeshivas usually serve the Sephardic and Ashkenazi ultra-Orthodox communities. The two communities at times follow different teachings, abide by different codes, and form different political parties to tend to their needs.

Immanuel is a Jewish settlement in the occupied West Bank, established in 1983 (Shoshana and Ginsberg 2013, 241). In 2008, when the petition in question was brought before the Supreme Court, the settlement had a total population of

20. There are different political connotations associated with the terms Sephardic and Mizrahi Jews (see Lehmann and Siebzehner 2006, 20–21).

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2,700 ultra-Orthodox Jews (Bass 2008). The settlement had two all-boys elementary schools—one Ashkenazi and one Sephardic. In addition, it had one all-girls school: Beit Ya'acov. Tensions within the community began to mount around 2006 when a substantial community of ultra-Orthodox Jews who embraced religious life after being secular settled in Immanuel. This community was mainly of Sephardic descent (see Shmueli 2013, 268). The major cause of these tensions was the fact that this community of newcomers did not altogether internalize the strict norms of ultra-Orthodox life, using at times words and phrases that other members regarded offensive (Bass 2008, 5–6). The sentiment in the settlement was that the young girls of the old ultra-Orthodox community, Ashkenazi and Sephardic alike, would be adversely affected if they interacted with the girls of the newcomers (6).

Initiatives to create a new school for the more conservative families were unsuccessful. Then, in the summer of 2007, the Ashkenazi ultra-Orthodox community sought separation within the confines of the existing Beit Ya'acov School while the Sephardic ultra-Orthodox community sought to create a new school of its own (Bass 2008, 6). Ultimately, the objective of separation within the existing school bore fruit. The school was divided into two sections. Each section now had a different dress code, a different administration, a separate playground, and a separate teachers' lounge. A physical structure was erected to signify the separation. The end result of this process was the establishment of two schools in the area of what previously was one school (8). It is important to add that it was the new section that administered an admissions procedure—admitting only those girls who were deemed "suitable" (6). In terms of numbers, the old school now had 139 students, 107 (77 percent) Sephardic and 32 (23 percent) Ashkenazi, and the new school had 79 students: 58 Ashkenazi (73 percent) and 21 (27 percent) Sephardic (10–11). These numbers were assembled by the special investigator, attorney Mordechai Bass, a former senior official in the State Comptroller's Office, appointed by the Ministry of Education.

In Bass's opinion, the division created in the Beit Ya'acov School was administratively improper, yet it was not motivated by a discriminatory policy on the part of the new school against Sephardic students. A critical piece of evidence in this regard was the fact that Sephardic girls who (through their parents, of course) were willing to accept the terms and conditions of conduct of this new school were actually admitted. This, in his opinion, was a testament to the fact that the split in Beit Ya'acov was motivated by religious conservatism on the new school's part rather than by a discriminatory policy against Sephardic students (Bass 2008, 13).

Parents of a number of Sephardic pupils protested to the Ministry of Education, arguing that the actions carried out in the school were designed to discriminate against the Sephardic students and their parents. As a result of a number of meetings that took place between Ministry officials, including those of the department in charge of ultra-Orthodox schools, it was settled that the school could have two educational programs, one general and one Ashkenazi. Students would have the option of choosing between the two. However, those who opted for the Ashkenazi program would need to abide by a certain set of rules embodied in the bylaws.

According to these rules, parents must accept the authority of a certain rabbi, girls may not ride bicycles outside their homes, parents must make sure that their

girls come in contact only with other girls who abide by the spirit of Beit Ya'acov, the girls must not listen to radio, watch television, or possess a computer with Internet access, and the parents must abstain from taking the girls to hotels or any other recreational facility or be hosted in the homes of relatives or friends who are not observant Jews (*No'ar Kehalakha* 2009, para. 7). The one rule that was disapproved by the Ministry of Education was that the Sephardic girls had to pray according to Ashkenazi rite, and to recite the text in the Ashkenazi pronunciation used for praying (para. 7). This last rule, though disqualified, was further evidence of the fact that the Ashkenazi faction in the school was pushing for a much more conservative educational policy, and that the Sephardic section was struggling to adapt.

Justice Edmond Levy, who authored the lead opinion on behalf of a unanimous panel of three justices, concluded that the separation in this case was motivated by ethnic considerations rather than by religious ones. In its essence, the Ashkenazi section of the school as well as the Ministry department in charge of ultra-Orthodox schools sought to exclude the Sephardic students from the Ashkenazi section of the school solely on the basis of their ethnicity (*No'ar Kehalakha* 2009, para. 26).

Justice Levy was certainly aware of the fact that the education system in Israel is divided into different sectors, each having an educational agenda of its own. He was also a supporter of the idea that sectarian education is important and has legitimate objectives (*No'ar Kehalakha* 2009, para. 14). However, he held that when the school rules have the sole objective of restricting admission of a certain part of the population, they are considered to be discriminatory and therefore invalid (para. 26). In his opinion, the physical divide created in the school is equal to the testimony "of a thousand witnesses on the discriminatory intentions of those [the Ashkenazi section] who insisted on the separation" (para. 26). It was evident that what guided Justice Levy was the notion that separating between students on the basis of their ethnicity is unequal treatment, in line with the basic proposition of the landmark case of *Brown v. Board of Education* (1954) that separateness is inherently unequal (*No'ar Kehalakha* 2009, para. 24; see also Aronson and Shoshana 2013, 9).

This same notion was echoed in the concurring opinions of the two other justices, Edna Arbel and Hanan Melcer. Justice Arbel spoke about the bylaw that mandated prayer in an Ashkenazi accent, and took it as indicative of the true intention of the separation, which was insulting and degrading to the Sephardic students and their parents. Justice Melcer added that what had happened in the school was offensive also to the principle of human dignity as enshrined in the Basic Law: Human Dignity and Freedom (*No'ar Kehalakha* 2009, para. 2). Students were classified into two different campuses on the basis of their ethnicity—an act that is inherently degrading and offensive (para. 3). It is no surprise that the actions of the Sephardic ultra-Orthodox parent who spearheaded the legal battle in *No'ar Kehalakha* were considered by two scholars as comparable to those of Rosa Parks, the African American who defied segregated buses in Alabama in the 1950s (Dahan Kalev and Ferber Tzurel 2013, 84–85).

In light of all this, the Court declared that the right of the concerned Sephardic students to equality was denied. The school was ordered to eliminate all

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substantial and formal signs of separation. Should the school not comply, the Ministry of Education was instructed to take all necessary legal measures, including revocation of the school's license and withholding of its budget.

In the real world, nothing changed (Perry-Hazan 2013, 180). The parents from the Ashkenazi section of the school refused to send their daughters to the integrated school. So the discriminatory practice of separation continued during the following school year of 2009/2010 (see *No'ar Kehalakha* May 17, 2010, June 15, 2010, September 14, 2010). Eventually, thirty-five of these parents were held in contempt, fined, and detained (Shoshana and Ginsberg 2013, 239). But soon afterward, these proceedings became moot, given that an ad hoc compromise was reached for that school year (*No'ar Kehalakha* June 27, 2010). More importantly, when the new school year of 2010/2011 opened, the Ashkenazi section sought and received a license to open a new school that was in full control of its admissions policy but was not eligible for government funding.

The Israeli Supreme Court, in its final decision in the contempt proceedings, rendered on September 14, 2010, was well aware that this new school was essentially a scheme to circumvent its original holding (*No'ar Kehalakha* September 14, 2010). The Court was also aware of the fact that although this new school was not legally eligible for government funding, schools with the same status did receive substantial state funding, equal to 55 percent of the funding received by a regular public school (para. 16). Therefore, the Court stressed the fact that the Ministry of Education, as well as the local government authorities that intended to supplement this budget, should withhold such funding if the discriminatory practice continues.

Once again, the Courts referred to the legacy of *Brown v. Board of Education* (1954) and the process associated with desegregation in US schools in the wake of the landmark holding (*No'ar Kehalakha* September 14, 2010, para. 14; *No'ar Kehalakha* June 15, 2010, para. 7; *No'ar Kehalakha* May 17, 2010, para. 20). But to no avail. Researchers who visited Beit Ya'acov in 2011 testified that the school was still divided into separate sections: the first floor, with a separate entrance, was for Ashkenazi ultra-Orthodox girls and the third floor for Sephardic and Habad girls (Shoshana and Ginsberg 2013, 249). Sensing that something more than legal proceedings was needed in order to end discrimination at Beit Ya'acov, the Court ended its last pronouncement by hoping that the parties would ultimately embrace the virtue of unity, quoting biblical scripture that recalls how "the tribes of Israel gathered together"[21] and instructing: "Love thy neighbor as thyself" (*No'ar Kehalakha* September 14, 2010, para. 20).

Critique

The constant reference in *No'ar Kehalakha* to the landmark case of *Brown v. Board of Education* and its holding that separate education is inherently unequal gives the impression that the Israeli education system supports integration. One could think there was now a norm of constitutional significance in Israel that

21. In Moses's blessing of the tribes of Israel (Deuteronomy 33:5).

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deemed separate education discriminatory. It is true that the Israeli Supreme Court took its stand with respect to the Sephardic-Ashkenazi divide within the Israeli Jewish ultra-Orthodox community. As a matter of principle, it would seem, this sphere cannot be separated from other spheres. So if divisions on ethnic grounds within the Jewish ultra-Orthodox community are deemed improper, why not deem as improper divisions along national (Jewish-Arab) and religious (secular-religious, Christian-Druze) lines?

It is intriguing to note that the Court in *No'ar Kehalakha* was prepared to infer the discriminatory treatment by the Ashkenazi section of the school toward the Sephardic students on the basis of the empirical facts provided by Mr. Bass, who found that in the newly established Ashkenazi section, the student body was 73 percent Ashkenazi and 27 percent Sephardic. Mr. Bass's conclusion that these numbers could be explained by the stricter, more conservative religious norms of the Ashkenazi group did not satisfy the Court, which considered the disparity in the numbers as overwhelming evidence of discriminatory treatment on the part of the Ashkenazi section.

But when looking at the Israeli education system as a whole, the reality of separate educational institutions for different national, religious, and ethnic communities seems to be the rule rather than the exception. In fact, one Israeli legal scholar has already noted that the "basic premise" of the Israeli school system is "separate but equal" with the "separateness being primarily on religious grounds" (Goldstein 1992, 158). At the national level, two main educational frameworks exist, one for Jews and one for Palestinian Arabs (Okun and Friedlander 2005, 165). The Palestinian Arab section is itself divided along ethnic-religious lines, with a different school system for Arabs, for Bedouin, and for Druze and Circassians (Maoz 2006, 693–94). Within this general system there are also a number of Christian schools, such as St. Joseph, operated by the different local Christian communities (see generally Blass 2012).

Within the Jewish community, there are three major official divisions: public secular, public national religious, and ultra-Orthodox (see Benavot and Resh 2003, 176–77). Most importantly, the ultra-Orthodox education system has been for some three decades officially divided along ethnic lines—a special school system for the Sephardic community run by *Ma'ayan ha-Hinukh ha-Torani* (the Wellspring of Torah Education) established and run by the Sephardic political party *Shas* (acronym for Shomrei [guards of] Sepharad) and the original ultra-Orthodox school system run by the Independent Religious Education Network dominated by the mostly Ashkenazi ultra-Orthodox religious party *Agudat Yisrael* (Lehmann 2012, 1034). In the Shas schools, "teachers and students are practically all Sephardim" (Siebzehner and Lehmann 2008, 30). These divides, depicted as creating "educational enclaves" reflecting the sectarian enclaves that exist in Israel as a whole (30), make the Israeli educational system largely segregated (Al-Haj 1995, 122–24).

While this segregation is not mandated by law, but is, instead, the result of many ad-hoc arrangements over the years, the Court in *No'ar Kehalakha* relied on the empirical reality in terms of the number of Ashkenazi and Sephardic students in the two sections of the Beit Ya'acov School in order to infer the existence of discrimination. Therefore, if the holding in *No'ar Kehalakha* is to be taken at face value, the whole sectarian educational system in Israel is discriminatory and should

be abolished. However, neither in the case itself nor in the commentary that came in its aftermath was such a suggestion put forward or even considered. So in essence, the holding in *No'ar Kehalakha* reflects a double standard: it condemns separation between Ashkenazi ultra-Orthodox students and Sephardic ultra-Orthodox students in a school in Immanuel in an education system where separation exists at every level—national (Arab and Jews), religious (public, public religious, ultra-Orthodox, Christian, Druze/Circassians), ethnic (Shas schools and the Independent Religious Education Network), and gender (boys and girls). What the Israeli Supreme Court did in *No'ar Kehalakha* could be comparable to the US Supreme Court declaring that segregation between whites and African Americans is illegal but segregation between Irish, Italian, Hispanic American, Christian, Jewish, and Muslim, as well as separate schools for boys and girls, is not. While this may be a (rather improbable) interpretation of *Brown v. Board of Education*, it goes entirely against the spirit of that ruling.

The stand taken by the Court in *No'ar Kehalakha* becomes even more problematic if we look once again to the pronouncements of Justice Barak in *Mona Jabareen*. In clarifying the legal norms that govern the admissions policy of St. Joseph School, Barak explicitly submitted that St. Joseph would have acted within its powers were it to restrict admission to Catholic students only (*Mona Jabareen* 1993, 204). So essentially, St. Joseph could have been 100 percent Catholic and this separateness would have been legal, but if the Ashkenazi section of the Beit Ya'acov School in Immanuel is 73 percent Ashkenazi, then this separateness is illegal. Once again, how is this legal outlook compatible with the principle of equal treatment as set forth in *Brown v. Board of Education*?

Another aspect of the *No'ar Kehalakha* decision I want to take issue with is the Court's sterile individualist outlook. The individual rights to equality and human dignity of the excluded Sephardic ultra-Orthodox girls were the central values that guided the Court. This individualistic stance was so pervasive that no reference was made in the decision to the Sephardic community as a distinct community, nor to the long history of mistreatment and discrimination suffered by this community at the hands of the Israeli Ashkenazi establishment (Bitton 2011, 503; 2012, 284, 285–86). At this point, I would like to challenge the Court's individualistic outlook as projected in the *No'ar Kehalakha* decision and argue that even in this respect the Court's analysis is insufficient.

It is essential to recall that in the background of *No'ar Kehalakha* was the quest of the Sephardic ultra-Orthodox students, or rather their parents, to be admitted to the Ashkenazi section of the school. As we shall see later on, the Sephardic ultra-Orthodox community has always looked up to Ashkenazi ultra-Orthodox and the latter have traditionally looked down on Sephardic religious tradition (Friedman 1993, 196). Elite Ashkenazi ultra-Orthodox educational institutions that were willing to admit Sephardic students had a quota system, a *numerus clausus* that restricted Sephardic access to Ashkenazi schools. In fact, two researchers have claimed that one central motivation of the parent who spearheaded the legal and public battle in *No'ar Kehalakha* was his own experience of rejection when, as a young student, he sought admission to an Ashkenazi ultra-Orthodox school (Dahan Kalev and Ferber Tzurel 2013, 74).

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So the battle in *No'ar Kehalakha* was not over the Sephardic ultra-Orthodox community's demand for its own independent education system, which exists, nor about integration for the sake of integration. Rather, at its base, the parents' demand was about having their girls be admitted to Ashkenazi ultra-Orthodox educational institutions (Dahan Kalev and Ferber Tzurel 2013, 71). But why were the Ashkenazi ultra-Orthodox so sought after by Sephardic ultra-Orthodox community members? Mainly because of the perceived strict observances of Jewish Halakha, and the learned tradition of those who guided these institutions (Leon 2013, 176).

The conservative religious outlook of the Ashkenazi ultra-Orthodox tradition was clearly embodied in the bylaws of that section of the Beit Ya'acov School that the Sephardic girls were asked to consent to as a condition for their admission. As mentioned above, among other things, the girls were not allowed to ride a bicycle outside their homes (but boys can, of course); and the ability of the girls to interact with others who were different, or of discovering the world through the Internet, was genuinely curtailed.

These rules of conduct were known by the Court, as Justice Levy cited them in his decision (*No'ar Kehalakha* 2009, para. 7). Yet none of these instructions were perceived to be problematic. The main provision of the Ashkenazi section's bylaws at Beit Ya'acov that the Court took issue with was the fact that the Sephardic students were required to say their prayers using Ashkenazi pronunciation—a provision that was revoked months before the Court rendered its decision. But can the individualistic outlook, concerned with autonomy, human dignity, and equality, be supportive of a school system where students and their parents are committed to such a code of conduct? I do not think so, and yet the Court disregarded this aspect entirely.

The problem of illiberal internal norms practiced by groups seeking accommodation from the state is a central issue in the literature dealing with minority group rights. The problem becomes especially persistent when the minority group seeking accommodation is not merely asking for some form of external protection against the hegemonic majority group, for example, receiving official status for a minority language or having some form of representation in government bodies, but rather when the accommodation sought is designed to give it power to assert its own norms over its members—commonly known as accommodations with internal restrictions.

The grant of judicial autonomy in matters of personal status or having government funding and independence in minority schools are examples of such accommodations. These powers enable a minority group to apply its own norms and indoctrinate individual members in its own tradition, at the same time as such norms and traditions can be discriminatory toward women or incapacitate individuals as such. The bylaws of the Ashkenazi section of the Beit Ya'acov School just surveyed are a powerful example of an accommodation with an internal restriction that is patriarchal and debilitating in terms of the capacity of the girls attending this school to judge and handle the complexities of modern life and become active citizens.

Views vary as to what should be done in the case of accommodations with internal restrictions. One suggestion is that no accommodation is to be afforded by

the state that is of the internal restriction type. For how can it be possible for liberalism, which is taken to be the normative bedrock for accommodating minority groups in many Western democracies, to allow for the protection of groups that are ready to apply illiberal norms to its members? But this can be too harsh a measure. Groups, especially religious ones that do not have the capacity of applying their norms to group members, will have difficulty in sustaining and preserving themselves. Thus, other measures were suggested, such as guaranteeing the right of exit to group members who do not wish to abide by the internal restrictions of the group. This measure may be adequate theoretically but has proved difficult to effectuate in practice. Let us take, for example, the students of Beit Ya'acov, Ashkenazi and Sephardic alike, who might not be interested in leading an ultra-Orthodox life: they have no real choice in the matter.

The discussion on how to deal with internal restrictions of minority groups seeking accommodation is wide-ranging. The conflict between liberal individualist ideals and the freedom to practice one's religion in schools is central both in political and legal theory (see, e.g., Arneson and Shapiro 1996; Lipkin 1996; Macedo 2000; Dagovitz 2004; Fernández 2010). In fact, many staunch liberals believe that schooling, especially if funded by the state, should guarantee that students be provided with the proper skills and knowledge to think critically about various beliefs, including their own (McDonough 1998, 469, 476; Levinson 1999, 53). This notion of comprehensive liberalism strenuously holds that values of personal autonomy and liberty are superior to all others (see Gutmann 1999, 88).

Others, who take a more nuanced liberal outlook, known as political liberalism, do not seek to enforce liberal norms, but rather to provide for adequate norms and mechanisms that guarantee toleration (see Macedo 1995). But even then, followers of political liberalism are mindful of the fact that children are not an extension of their parents in the sense that the religious identity of their parents should not, in the name of religious liberty, be automatically extended to the children. Children need to become aware of alternative ways of life in order to be able to make choices of their own (486).

In light of all this, one sees how incapacitating the bylaws of the Ashkenazi section of the Beit Ya'acov School are. Yet the Court in *No'ar Kehalakha* had nothing to say about this, even though the rhetoric of its decision relied heavily on values of liberalism and individualism. The Court's holding in *No'ar Kehalakha* that essentially sought to safeguard the Sephardic students' right to become part of the Ashkenazi section in the name of equality and individualism is baffling at best. The paradigm underlying *Brown v. Board of Education* assumed that if African American students are admitted to the schools of white children, they will have a better chance of receiving equal treatment and attaining higher achievements. This would obviously not be the case if the Sephardic students were to gain admission to the Ashkenazi section of Beit Ya'acov; rather the opposite. In terms of their capacity to establish critical thinking and choose between different ways of life, these girls will be worse, rather than better, off. In my opinion, the paradigm of the exclusion of the Sephardic girls in *No'ar Kehalakha* is more akin to that in *Wisconsin v. Yoder* (1972).

In that case, the US Supreme Court supported the freedom of conscience claim of Amish parents who took their children out of school at the age of fourteen and

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before the mandatory education age of sixteen. The holding was criticized for undermining the capability of the Amish children to understand the complexities of modern life and to be able to make decisions of their own in the future (Arneson and Shapiro 1996; see also Kymlicka 2001, 300, 304). However, this was with respect to the Amish children themselves. Let us suppose, for the sake of discussion, that these Amish children were educated in the Amish community's educational institutions where patriarchy reigns and no connection to the outer world is permitted.

Now imagine that a non-Amish individual seeks admission for his three daughters to these Amish educational institutions, but is denied solely because of their ethnicity. In terms of religion, this nonmember is willing to commit himself as well as his daughters to Amish teachings and lifestyle. Will he have the right to call upon principles of individualism and equality and ask that his daughters be admitted? If the principles of individualism and autonomy can be stretched in order to safeguard the right of the Amish community to protect itself as a minority by having some power to educate its own children, these principles will need to be stretched even further in order to grant the Amish community the authority to educate nonmembers.

But this point was totally ignored by the Court as it did not take the *Wisconsin v. Yoder* case as its paradigm. What makes the Israeli Supreme Court's failure in this respect even more troubling is that, unlike the Amish community, which is relatively small, fragile, and politically powerless, the Ashkenazi ultra-Orthodox community in Israel is steadily growing and has substantial political power.[22] This suggests that basic notions tending to individualism and autonomy should be all the more forcefully applied to an Ashkenazi ultra-Orthodox educational institution. The least plausible option in this respect is to grant the Ashkenazi ultra-Orthodox institution the power not only over its own members but over nonmembers as well.

MAKING SENSE OF *NO'AR KEHALAKHA*

Turning once again to the principle of "who tells whom" makes it possible to justify the result reached by the Court in *No'ar Kehalakha*. The facts of the case make it clear that the Ashkenazi ultra-Orthodox section in the school was excluding the Sephardic ultra-Orthodox girls. The Court specifically stated that it was the Ashkenazi section of the school that initiated the separation (*No'ar Kehalakha* 2009, para. 4, per Levy J.). As shown above, restricting entry to religious institutions is not in and of itself unacceptable. Principles guiding freedom of religion justify a religious group in restricting membership even to the level of discriminating on grounds that we would normally reject.

However, the fact that the Sephardic ultra-Orthodox group had traditionally suffered discrimination and was looked down upon by the Ashkenazi ultra-Orthodox group (Siebzehner and Lehmann 2008, 23–24, 27)[23] is what makes the

22. The same point has been made in respect of Christian fundamentalists in the United States (see Macedo 1995, 489).

23. The inferior status of the Sephardic ultra-Orthodox community is influenced by the overall inferior status of the Sephardic community in Israel when compared to that of the Ashkenazi community (see Shavit 1990).

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act of separation at the Beit Ya'acov School discriminatory and degrading. In this respect, *No'ar Kehalakha* presents the mirror image of *Mona Jabareen*: if in *Mona Jabareen* a minority group was seeking to restrict membership in order to preserve its identity, in *No'ar Kehalakha* it was the hegemonic majority group seeking to restrict membership of the minority group.

The relations within the ultra-Orthodox community between Ashkenazi and Sephardic groups are rather complex. These relations touch upon tradition, interpretation, and application of Jewish Halakha, politics, and more. There is wide agreement, however, that in historical terms and in terms of the prevailing power structure, the Ashkenazi ultra-Orthodox have dominated (Ben-Shemesh 2013, 15; Dahan Kalev and Ferber Tzurel 2013, 63). Ashkenazi ultra-Orthodox educational institutions were considered to be the more prestigious (see Lehmann and Siebzehner 2006, 140). In spite of the condescending treatment they received, Sephardic students sought admission to Ashkenazi yeshivas and schools (Ben-Shemesh 2013, 17). Admission conferred recognition of the Sephardic students' abilities, and upon graduation these students have a better chance of holding a public office of religious relevance (Leon 2013, 181, 184).

When Jewish immigrants from Middle Eastern countries began to move to Israel, many of their religious members felt threatened by the secularization of their children (Leon 2013, 162). At the same time, the ultra-Orthodox Ashkenazi community was rebuilding itself after its decimation in the Holocaust (174). The ultra-Orthodox community whose origin was in Lithuania was the first to accept Sephardic students (174). Over the years, the Lithuanian ultra-Orthodox establishment assumed an informal, patronizing, custodial relationship with the Sephardic ultra-Orthodox. Lithuanian ultra-Orthodox yeshivas and seminaries looked down on the Sephardic religious heritage, and for many years the Sephardic religious community internalized this perception by looking up to the Lithuanian yeshivas and schools. Talented Sephardic male students who had ambitions of pursuing a career in a religious institution or in politics, or simply of marrying higher up on the social ladder, made efforts to be admitted to a Lithuanian yeshiva.

Because of the power structure that developed, Ashkenazi ultra-Orthodox yeshivas became particularly anxious about their reputation and thus administered a quota system (Lupo 2004, 182–88). The cap reported in studies was limited to 20 percent of students of Sephardic descent in an Ashkenazi yeshiva. For girls it was 30 percent (Dahan Kalev and Ferber Tzurel 2013, 81; Leon 2013, 181). The underlying assumption was, of course, that excessive admission of Sephardic students would damage the reputation of the Ashkenazi educational institution (Ben-Shemesh 2013 18–19; see also Lehmann 2005, 43).

This reality persisted even after the Sephardic ultra-Orthodox community, led by the Shas party, established its own publicly funded school system in 1984. Most telling of how the Sephardic ultra-Orthodox establishment came to internalize its assumed inferiority was the almost complete silence of the Shas party in the struggle against the exclusionary acts of the Ashkenazi section at Beit Ya'acov. It is this long-ingrained inferior status that makes the holding of the Court in *No'ar Kehalakha* particularly just from a group rights point of view and also makes the case comparable to *Brown v. Board of Education*. As in *Brown*, so too in *No'ar*

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Kehalakha, the group attempting to escape its inferior status was trying to fight the exclusionary policy of segregation by the group with the "superior" status. This, in turn, makes the act of exclusion repugnant and degrading.

A similar analysis was suggested by referring to the right of human dignity as part of the right of equality. As in John Hart Ely's argument, it is assumed that when a state administers a policy of affirmative action benefiting minority members, the discrimination that this necessitates against members of the majority group is certainly disadvantageous, but not degrading (see Dorfman 2013, 138). On the contrary, it carries with it some recognition that majority members belong to the more powerful and privileged group. But when those who are excluded by the state perceive the exclusion as being imposed because of their inferior status as a group, then the exclusion becomes degrading and, thus, wrong (138–39). In this analysis, too, it is necessary first to identify the privileged majority group and the underprivileged minority group (136). More importantly, as I have tried to argue here, the simplified test of "who tells whom" which group wants to be different is fully capable of guiding us through the normative evaluation, without the state initiating the separation, as was the case in *No'ar Kehalakha*.[24]

Another factor at play in *No'ar Kehalakha* is the normative power associated with the resolution of separation. Differentiating between groups is acceptable when considered in the context of nation-states (there is one state for the Germans and one state for the Greeks), regions within the same state (a French-speaking province and an English-speaking province), cities and towns (reservations restricted to Native Americans), or even schools that happen to be on different sides of the same street (a Catholic school on one side and a Jewish or Protestant one on the other). However, in smaller contexts, separation, even if implemented along these same lines, becomes intolerable. We might think it is plausible to separate between male and female students in schools when these schools are themselves separate, but when the separation occurs on the same bus, for example, demarcating areas for female and male passengers, then what is considered tolerable in the larger context becomes (for most of us) intolerable, particularly if it is the hegemonic group—the men—who insist on the segregation.

Along the same lines, one can argue that while separate educational institutions for Jews and Arabs in Israel can be justified in certain cases—different education systems exist to meet the different needs of these two groups—if these groups were to attend the same educational institution, say an Israeli university, it would become degrading if Jewish students were to sit on different class benches than Arab students. This separation would become even more degrading if it were

24. Dorfman (2013, 138–39) assumes that the school's administration was responsible for the separation between the two sections, and takes this to be the decisive cause for deeming the exclusion degrading. I think, however, that this argument is not sufficiently nuanced, for what made the act of separation degrading is that it was initiated by Ashkenazi parents, who belong to the more powerful and more privileged group. Arguably, the Sephardic parents could have initiated the separation, and the act may also have been backed by the school administration. But then this would and should not be perceived as equally wrong. What matters is the status of the group seeking separation and not what the administration or the state does. The administrative action alone, to accept the separation, thus provides necessary but insufficient grounds for a critique of the separation.

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demanded by the hegemonic group, in this case, the Jewish students. The high resolution of the separation plays an important role in making separation wrong, whereas in a low-resolution context separation is more tolerable. Of course, the high and low resolution of separation is not in itself sufficient to explain why separation is tolerable or intolerable. The reason goes to the heart of human dignity and the self-image of groups. Once people are differentiated based on their group membership within the confines of one school and, more particularly, within one classroom, it is more degrading than when the differentiation takes place by separating the two groups by creating two different schools.

Circles with Edges

My analysis thus far has demonstrated that if we approach the legal dilemmas presented in *Mona Jabareen* and *No'ar Kehalakha* through the prism of group rights, especially those of the minority group, then the conclusion reached in both decisions becomes more convincing than if we were to analyze the case through the prism of individual rights, especially when these rights are detached from the groups these individuals belong to and from the power structure that prevails among them. So it is the perception of the groups involved, their status and history that brings us to a more refined and precise analysis, in contrast to the individualistic analysis undertaken by the Court.

I emphasize this point because analyzing and determining rights with respect to groups rather than individuals has been severely criticized as being blunt and crude, and promoting cultural essentialism (see, e.g., Bielefeldt 2000). At times, individuals seek to justify their illegal actions, claiming that they were acting according to what their culture mandates or at least legitimizes. Such is the case with so-called honor killings, in which (usually male) members of the family murder other (usually female) members for ostensibly sullying the family's honor. This claim, when raised in court, has come to be known as the cultural defense (Dundes Renteln 2004, 5).

This position has been criticized for viewing the relevant group as having a fixed and static set of norms that excludes other interpretations. This is why the perspective of group rights has been condemned, and that of individual member rights has been extolled, for they can emerge as contested and dynamic (see Deckha 2009, 264). Another criticism of the crudeness of the group perspective is the problem of the minority within the minority, mentioned earlier (see Eisenberg and Spinner-Halev 2005, 3). It is certainly necessary to be mindful that the accommodation of a minority group might empower the group to apply norms that are discriminatory and degrading with respect to certain members. Many religious groups hold and apply norms that are patriarchal in nature and therefore disadvantage women in relation to men (Okin 1999). So if religious groups are granted judicial autonomy over the family law matters of their members, this might have adverse effects on women (see Deveaux 2006, 3). Consequently, a cautious attitude is called for when the group accommodation can be supportive of the group but degrading in terms of certain individuals therein.

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Last, affirmative action schemes are constantly being challenged as damaging and discriminatory (see Rubenfeld 1997, 428). They can be damaging in terms of the individual minority group members who are stigmatized as incapable and, but for the affirmative action policy, would not have been admitted to this or that university or received a particular job (see Kennedy 1986, 1330). Affirmative action schemes can also be discriminatory with respect to nonminority group members who, in spite of their outstanding qualifications, can be denied university admission or a particular job (see Spann 1995, 7). This suggests that determining rights and entitlements with respect to groups is too rudimentary for a modern-day legal system, but the analysis applied in this article demonstrates just the opposite. Relating to discrimination and exclusion only in terms of individualism can also be crude and blunt.

What refines and sharpens the issues involved, in our case the exclusionary power of a religious school, is the group rights perspective. This does not mean that the group rights perspective is better. The individual rights of minority group members require constant vigilance and maintenance. But looking beyond individuals to the groups they belong to can be equally instrumental in analyzing the proper relations of rights when individuals ask courts to remedy a seemingly discriminatory act. This perspective can also be helpful in settling future dilemmas. It is certainly true that limiting a Muslim student's right to wear a headscarf in a public Israeli university, even one with overt Jewish values, is more discriminatory than limiting a Jew from displaying outward signs of her religion in an institution run by and for a minority religious group. In one case, the university identified with the Jewish majority group is actually restricting the freedom of minority religion members, so the act of exclusion should be taken as illegitimate, at least as a default position.

In the other case, the educational institution belongs to the minority religious group, and so it does have a legitimate interest in restricting distinctive religious symbols of other groups, once again as a default position. This group jeopardizes much more if it loses its distinctiveness, while the distinctiveness of an institution controlled by the majority will be less jeopardized. More importantly, also from the perspective of the individual rights of freedom of conscience and human dignity, the axiom proposed by the Court in *No'ar Kehalakha* is that discrimination is said to exist when the basis for individual exclusion is the person's group identity.

The normative edge of the circles drawn by the Court was especially evident in *No'ar Kehalakha*. The Court quoted the Bible, enjoining the parties to be as "the tribes of Israel gathered together," to stress the virtue of Ashkenazi-Sephardic togetherness, and imply that an integrated school is preferable to dividing the school into two separate sections. This is possible only if one circle is drawn around both Ashkenazi and Sephardic schools, emphasizing their consonant religious and national identity. Drawing different circles around the groups marks the difference between them, and the Court deems this to be improper. The unitary position, connecting Ashkenazi and Sephardic Jews in Israel, resonates well with the dominant social policy, which was once the official policy of the state for the "ingathering of the exiles" (*kibbutz galuyot*) and creating a melting pot assists in this endeavor (see Bitton 2012, 281–82).

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What about Palestinian Arab unity and the religious divides that split the members of this community? Indeed, what about the unity of the citizens of Israel altogether, irrespective of their religious and national affinity? Is the Israeli Supreme Court prepared to take a position on these issues as on Ashkenazi and Sephardic unity? With reference to this latter question, the Supreme Court does not seem to recognize the existence of one circle that unites all Israeli citizens. This was reaffirmed recently when the Court reiterated its holding from over thirty years ago that under the rubric of "nationality" in public records, the term "Israeli" cannot exist, but only one of the officially recognized identities such as Jewish, Arab, Druze, and the like (*Ornan v. State of Israel* 2013). In terms of the divisions among the Palestinian Arab religious communities, the Jewish establishment worked to stress them in order to control the Palestinian Arab minority better. I believe that sooner or later the design of circles will evolve in Israel, and the normative edge of these circles will evolve by sharpening a new surface while dulling the existing one.

CONCLUSION

The Israeli legal environment has many cases exemplifying the tensions between different religious groups, between a particular religious group and its members, and between the Israeli constitutional order and the different religions, groups, and individuals. At times, this reality is harsh. Tensions between the different religious communities can run high, religious norms are not always attuned to the individual needs of those who want to be free from religious coercion, and the State of Israel as a Jewish nation-state must handle these tensions in a way that also comports with liberal ideals.

This reality has one virtue: it keeps alive the questions of privilege, exclusion, and status. As individuals, groups, and courts join in this discourse of rights, certain characteristics emerge to which we are often oblivious. In *Mona Jabareen*, the Israeli Supreme Court had to decide whether there were legal grounds for restricting the wearing of a Muslim headscarf in a Catholic school in Nazareth. It concluded that there were. In *No'ar Kehalakha*, the Court was asked to decide whether there were legal grounds for excluding Sephardic students from an Ashkenazi section of the school. It concluded that there were not. Although the political, social, and religious environments of these cases are very different, the two cases prove to be mirror images of each other.

Unfortunately, the Court sought to deal with these cases by defining the conflict they presented in individualistic, liberal terms, and produced conflicting holdings that made little legal sense. Yet, these cases also provided a way to show that in order to be able to determine how minority and majority group members and institutions interact, it is essential to determine not only the entitlement of individuals independent of their groups but also that of the group with respect to other groups.

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