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Localising Religion in a Jewish State

Yishai Blank†

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

Keywords: religious liberty, local government law, religious minorities, decentralisation, religion-based segregation

1. Introduction

Throughout the world, legal systems are required to accommodate religious diversity and manage heightened tensions that arise from radically conflicting religious beliefs and practices. In some countries, there is a conflict over whether some religious attire should be prohibited in public areas (the Muslim veil, for example); elsewhere, it is debated whether certain religious symbols should be banned from public areas (or at least from governmental areas, as in the case of the United States); while in other countries the fight is over architectural symbols of religion (the Swiss initiative to ban Muslim minarets is a case in point). These conflicts between religious and secular groups, as well as among different religious groups, often take place in smaller polities, in the form of a battle over the shape and content of local public spaces, controlled and regulated by local governments. In Israel such conflicts include, for example, the closure of stores and roads during religious holidays and days of rest,[1] the display of religiously offensive

† Senior Lecturer and Vice Dean, Tel Aviv University Law School. LLB, BA (Phil), Tel Aviv University, 1997; LLM, Harvard Law School, 1999; SJD, Harvard Law School 2002. Email: yblank@post.tau.ac.il.

[1] HCJ 5016/96 *Horev v Minister of Transportation* 1997 PD 51(4) 1 (*Horev*) (holding that the closure of a major road in Jerusalem during the Sabbath was 'unreasonable' since it gave too much weight to religious

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objects (such as pork meat or leavened dough on Passover) in streets and showcases,[2] holding religiously contentious parading in streets (in the case of gay parades, for example),[3] the allocation of municipal budgets and lands for religious activities,[4] the presentation of religious symbols in town halls and city parks,[5] and more. The immediacy of these issues, the fact that the traditional powers – business licensing, traffic and road control, spending, and more – of local authorities touch upon many of them, and the inability of central government to obtain a nationwide consensus over religious matters have caused the *localisation* of religious liberty in Israel.

The localisation of religion in Israel has two meanings: first, it refers to the legal mechanisms by which local governments are empowered to manage religious liberty; second, it means that many local governments in Israel are internally fairly homogeneous in the religious beliefs and practices of their population. With few important exceptions, the study of the legal relationship between religions and the state has tended to focus on the role that central state organs have played in this regard, ignoring the complexities of the interplay between different levels of government.[6] This article shifts this focus by exploring the role that local governments have been playing in structuring and regulating religious–secular tensions in Israel.

Lacking meaningful constitutional constraints against the establishment of religion,[7] Israel has a history of legislative imposition of religious norms,[8] and of governmental efforts to give religious considerations priority over others. Local governments, in particular, have been trying to

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considerations). In the American context, see *McGowan v Maryland* 366 US 420 (1961) (ruling that state Sunday closing laws did not violate the Due Process or Equal Protection Clauses of the Constitution).

[2] HCJ 953/01 *Solodkin v City of Beit Shemesh* 2004 PD 58(5) 595 (*Solodkin*) (ruling that a local authority can limit the selling of pork meat to certain areas in order to balance between 'religious feelings' and freedom of occupation).

[3] HCJ 5277/07 *Marzel v Police Chief of the District of Jerusalem* (unpublished, 2007) (holding that the municipality's refusal to allow a gay parade march was unreasonable).

[4] See AdminA 343/09 *Jerusalem Open House v City of Jerusalem* (unpublished, 2010) (*Jerusalem Open House*); HCJ 262/62 *Peretz v The Chairman, the Council Members and the Residents of Kfar Shemaryahu* 1962 PD 16 2101 (*Peretz*).

[5] See, for example, *County of Allegheny v ACLU* 492 US 573 (1989) (ruling that the display of a crèche on government property violated the Establishment Clause, but that a menorah on display was not unconstitutional).

[6] See, for example, Richard C Schragger, 'The Role of the Local in the Doctrine and Discourse of Religious Liberty' (2004) 117 Harvard Law Review 1810; Daphne Barak-Erez, *Outlawed Pigs: Law, Religion, and Culture in Israel* (University of Wisconsin Press 2007); Issachar Rosen-Zvi, 'Pigs in Space: Geographic Separatism in Multicultural Societies' in Michael Freeman, *Law and Sociology: Current Legal Issues 2005, Vol 8* (Oxford University Press 2006) 225.

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

[8] Prime examples for such religious pieces of legislation are the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 and the Law of Return, 1950. The first is of special importance as it sets up a religious system of marriage and divorce, prohibiting in Israel any marriage which is not religious, and assigning individuals to their 'official' religions, thus forcing them to marry.

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use their authorisation in order to advance religious interests and express religious norms. Although some of these attempts were curbed by the Israeli Supreme Court, in many cases localities were either explicitly or implicitly authorised to take religious considerations into account. Localities were able to use their powers in order to establish religion within their jurisdictions, and also as a result of the relative religious homogeneity within localities in Israel. This homogeneity enabled localities to reach an internal consensus where the national legislator failed. As compared with the religious diversity of the entire population of Israel and of the Knesset – being made up of ultra-orthodox Jews, modern-orthodox Jews, secular Jews, Muslims, Christians, Druze and more – localities are indeed homogeneous. This article also documents the various mechanisms by which this religious homogeneity is achieved and perpetuated.

The Israeli form of localisation of religion indeed presents us with a most vivid example of the famous Madisonian 'risk of faction'. Lacking sufficient constitutional constraints, localities might express – and enact into law – the most radical and violent views of religious factions, often targeting weak and vulnerable minorities. As Susan Okin and other scholars have noted, granting cultural communities, especially religious communities, control over their jurisdictions puts minorities-within-minorities at a greater risk of domination and abuse.[9] Thus, instead of Madison's 'positive pluralism' we might in fact face what he termed the 'violence of faction'.[10] Indeed, Madison was concerned with the risk that the federation would deteriorate into a multitude of radical religious factions combating each other with ever increasing zeal. In his view, a structure of weak federal institutions and overly strong states (and localities) could bring about the deprivation of individual rights within states and localities, and the radicalisation of the entire federation.[11] Madison's cure – 'extending the sphere' – would potentially deradicalise the local zeal and result in the moderation of extreme politics in light of the large number of people with opposing views throughout the federation who would balance each other and the restraining effect of federal elites.[12]

But the localisation of religion in Israel might also have been beneficial for the protection of religious (or secular) minorities. Localities that are active in shaping and developing the discourse and doctrine of religious liberty can be highly effective institutional safeguards – rather than mere judicially enforced barriers such as a disestablishment principle – against the monopolisation of one religion over the entire state.[13] The fact that localities have been able to exercise their powers in a way that benefited their preferred religion is imperative, given the monopoly that orthodox Judaism enjoys in central government. Other religions, as well as other Jewish denominations, are discriminated against and suffer from chronic weakness and underrepresentation in government; hence the only avenue left for them is in local government. Obtaining power at the

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[9] Susan Moller-Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999).
[10] James Madison, 'The Federalist No 10', essay published 22 November 1787.
[11] ibid. See also the discussion at Section 4.2.1 below.
[12] ibid. The idea to 'extend the sphere' means that the larger the political units are, the less susceptible they will be to the risk of faction. Larger political units would include more individuals, thus leading to a more moderate constituency.
[13] Schragger (n 6).

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local level allows such marginal and minority religions to use the coercive power of local government to advance the interests of their members. An additional advantage of the localisation of religion is that it facilitates and enables religious minorities to 'dissent by deciding'.[14] Permanent minorities at the national level, argues Heather Gerken, are sometimes able to form local majorities (or powerful local coalitions) and if these jurisdictions are given decision-making powers, they can express their views not only by 'talking' but by 'deciding'. Religious minorities, too, are thus able to form a local majority and express their radically different views by acting upon them at the local level. This ability makes for an extremely powerful dissent, exposing the hegemony of the majority religion and its oppression of other religions.

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

2. Religious Freedom in Israel

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

First, Israel is constitutionally defined as a 'Jewish and democratic state' in two of its Basic Laws (Human Dignity and Freedom of Occupation) as well as in other pieces of legislation.[15] Courts and scholars are divided over whether the term 'Jewish' should be read as referring to

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[14] Heather K Gerken, 'Dissenting by Deciding' (2005) 57 Stanford Law Review 1745, 1764–65.

[15] Basic Law: Human Dignity and Liberty, 1992, SH 1391, 150; Basic Law: Freedom of Occupation, 1994, SH 1454, 90.

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Judaism as a religion, to Jewish nationality or to Jewish morality.[16] The constitutional reference to the 'Jewishness' of the state is therefore at the heart of endless legal debates pertaining to the ability of the state to enforce Jewish prohibitions or to express Jewish religious values. And, while the majority of views is that this constitutional provision does not mandate the state to become a theocracy, but rather to 'integrate' or 'harmonise' the two poles – Judaism and democracy – this expression leaves ample room for competing interpretations, including religious-friendly ones.

Second, although there is no explicit mention of freedom of religion in either of Israel's Basic Laws, the Supreme Court has read it into the term 'dignity', which is protected by Basic Law: Human Dignity and Liberty.[17] The exact content and meaning of this constitutional freedom of religion is, however, unclear. Most agree that it has a negative and a positive aspect: the negative one being freedom *of* religion – a version of the free exercise clause, which prohibits the state from interfering with the right of individuals to worship and express their faith; the positive aspect being freedom *from* religion – a version, albeit a diluted one, of the disestablishment clause, prohibiting the state from coercing people to worship or act religiously.

Third, until the enactment of the two Basic Laws – which hold normative superiority over ordinary legislation – the Knesset was able to enact any law that it wished to since there were no constitutional rights on the basis of which the courts could review and strike down laws.[18] The Knesset thus continuously enacted laws that reflected a perception of the religion–state relationship that was radically different from two of the most prominent models of relationship between religion and state in the West: the American notion of 'disestablishment' (a 'wall' between church and state) and the French principle of state secularism (the concept of '*laïcité*'[19]). The most (in)famous example of the Israeli 'integration' between religion and state is the lack of civil laws of marriage and divorce.[20] As a continuation of the Ottoman 'Millet' system and the British Mandate of Palestine, Israel only recognises marriage and divorce that is performed by religious state officials – rabbis, priests or qadis – and according to the religious laws of the various 'recognised' religious communities.[21] While religious liberty is maintained in the narrow sense that individuals are not forced to marry or divorce against their faith, it is severely jeopardised since there is no non-religious option for marriage or divorce within Israel.[22] The

[16] See Aviezer Ravitzky and Yedidia Z Stern (eds), *The Jewishness of Israel* (Israel Democracy Institute 2007).
[17] See, for example, *Horev* (n 1) 34.
[18] Until the enactment of Basic Law: Human Dignity and Liberty in 1992 there was almost no limitation on the power of the Israeli parliament to legislate on religion. The only barrier between religious laws becoming state law was the political situation in which religious parties were a minority, unable to obtain a majority. Since 1992, however, the Israeli parliament is constrained by various constitutionally protected individual rights (including the right to a free exercise of religion, which the Court read into them), yet there is no general prohibition on establishing religion.
[19] The French principle of *laïcité* imposes a strict prohibition on any form of state establishment of religion. Obviously, the principle as well as its application have been criticised by many.
[20] See Gila Stopler, 'The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality', (2004) 10 William & Mary Journal of Women and the Law 459, 485–92.
[21] ibid. See also Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953. The recognised religious communities are Judaism, Islam and several Christian denominations.
[22] Some scholars have also pointed to the fact that this system established de facto anti-miscegenation since members of different religious denominations cannot marry each other in Israel.

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only way to opt out of a religious ceremony is either to settle for common law marriage or to marry outside Israel and ask the state to recognise this marriage (which the Supreme Court has ruled the state must do).[23]

There are numerous other examples of the enmeshing of religion and state in Israel. The state regularly appoints clergy and it funds state religious activities according to explicit legislation which orders the transfer of money to religious schools and religious services. Jewish, Christian and Muslim schools are almost fully funded by the state. The operation of the rabbinical and of the non-Jewish denomination religious courts is the responsibility of the state and is fully funded by the state. The Ministry of Religious Affairs is responsible for the operation of a huge system of religious courts and services. Indeed, Israel is anything but a secular state. There are only very few laws, however, which explicitly endorse religious prohibitions or commandments. There are no laws that force a certain dress code, impose modesty or prohibit sexual behaviour such as infidelity and homosexuality. What prevented the Knesset from enacting such laws, even before 1992, were not legal constraints but rather political ones: for decades the secularist political parties enjoyed a solid majority in the parliament, preventing the religious parties from enacting laws which would explicitly endorse religious prohibitions. Attempts to entirely prohibit the selling of pork meat, for instance, have failed as a result of the opposition of secularist forces.[24] This is one of the major causes of the localisation of religion: the inability to reach nationwide consensus as a result of religious diversity and strong secular opposition drove religiously inspired groups to opt for the local arena.

The fourth principle of religious freedom in Israel is that, while parliament has been rather free to establish religion (save for a lack of political will to do so), the Supreme Court has developed a jurisprudence which has severely curtailed – but has not entirely eliminated – the ability of the administrative branch, including local government, to do so. In a series of rulings dating back to the 1950s, the Court has held that, unless specifically authorised by the Knesset, state authorities cannot take into account 'religious considerations' as 'dominant factors' when using their powers.[25] The Court, however, did not prohibit any religiously motivated use of governmental power. If these religious considerations were not 'predominant' but only 'additional', ruled the Court in *Lazarovitz v Food Controller*, governments – including at the local level – could be influenced by them in their decision-making.[26] In fact, a governmental decision would have been 'deficient' had the administrative agency ignored the relevant religious considerations.[27] Only when religious considerations became dominant, overshadowing the relevant professional considerations, would the Court invalidate the action. This basic principle has prevented

[23] Because of the serious infringement that the religious-only marriage system imposed on the liberty of individuals, the Supreme Court ordered the state, in the 1960s, to recognise and register marriages that were performed outside Israel: see HCJ 143/62 *Funk Slezinger v Minister of Interior* 1962 PD 17 225.
[24] Barak-Erez (n 6), 43–57.
[25] HCJ 98/54 *Lazarovitz v Food Controller* 1956 PD 10 40 (ruling that the exercise of power by government authorities cannot be guided chiefly by religious motivations, but can be influenced by them). See also CrimA 217/58 *Isramax Ltd v State of Israel* 1962 PD 22 343.
[26] *Lazarovitz*, ibid.
[27] ibid 55; HCJ 531/77 *Baruch v Tel Aviv District Traffic Controller* 1978 PD 32(2) 160, 163 (*Baruch*).

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government officials from further enmeshing state and religion, unless specific 'enabling' legislation was enacted.[28]

The fifth principle is that a distinction is made between 'religious motivations' and 'religious sentiments' or 'feelings' (*rigshot dat*). Indeed, it was often the case that state agents took religious considerations into account not because they themselves shared the religious belief, but because they thought they were obligated to accommodate the religious communities. Thus, for instance, certain roads were blocked by traffic authorities during the Sabbath because religious communities rioted, demanding their closure. The need to balance the religious 'sentiments' of religious people with various other considerations became one of the dominant paths through which religious considerations were let into Israeli law. While government was prevented from being 'motivated' by religion, it was allowed – even mandated – to take into account the religious 'sentiments' of an affected community. It was therefore legal for a locality to use its ordinary traffic and road control powers in order to close down streets and roads during the Sabbath in order to prevent 'the direct infringement' on the lives of the religious community living nearby.[29]

The sixth principle was set out in *Axel v Netanyah* (*Axel*), in which the Court ruled that religion is a 'nationwide problem', resting solely in the hands of central government and outside the jurisdiction of cities. Any attempt made by localities to use their powers in order to reflect religious beliefs or considerations was considered ultra vires, and therefore null and void.[30] Thus, the city of Netanyah was prohibited from banning the selling of pork by using its business licensing powers since religion 'is a general, nationwide problem', the solution for which must rest on the shoulders of the national legislator.[31] As we shall now see, this did not prevent localities from becoming highly active in regulating religion. Indeed, localities have played an important role in the evolution of the doctrine of religious liberty, since cities were at the forefront of secular–religious tensions, and they often took into account various 'religious' considerations when closing down roads on the Sabbath, refusing to grant business licences, allocating resources, and more. In Section 3 I examine this local involvement in depth.

3. The Localisation of Religion

As I have already indicated, when I argue that religion was localised I do not suggest that the central state gave up on its role as regulator and legislator of religious matters; on the contrary,

[28] Indeed, since the 1950s the Knesset has enacted a few 'special enablement laws', granting specific powers to localities to limit, or even prohibit, the sale of pork meat in their jurisdiction, and to take into account 'religious considerations' when granting business licences to various establishments and determining their ability to operate during religious holidays: see Local Authorities Act (Special Enablement), 1956, s 249(21); Municipalities Act, 1964 (religious holidays and days of rest); and Prohibition of Opening of Amusement Places (Special Enablement), 1997 (regarding Tish'a Be'av, the day of fasting and atonement to mark the destruction of the Jewish Temple).

[29] *Baruch* (n 27); HCJ 174/62 *The League for the Prevention of Religious Coercion v The Council of Jerusalem* 1962 PD 16 2665 (*Prevention of Religious Coercion*).

[30] HCJ 122/54 *Axel v The Mayor, Councillors and Residents of Netanyah* 1954 PD 8 1524 (*Axel*).

[31] ibid 1528 (translation of the Hebrew in Barak-Erez (n 6) 48–49).

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what marks the process of the localisation of religion in Israel was that local governments became heavily involved in mediating religious tensions and in regulating religion in the public sphere alongside – and not instead of – the constant involvement of the state in these affairs. Furthermore, the authorisation for localities to regulate religious matters and to express religious norms in their public spheres was often a result of concrete decisions of various central state organs, primarily the executive branch and the Knesset. Such acts were contested and fought over, and regularly challenged in courts, which had to determine the exact role of local government in expressing religious beliefs and norms.

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

Thus, it was the combination of legal powers given to localities, and of various government actions and court decisions, that influenced the residential patterns of religious communities in Israel and which eventually resulted in the localisation of religion. I begin by describing the powers vested in local governments which have given them such a crucial role in the doctrine of religious freedom in Israel.

3.1 The Legal Principles that Enable Localities to Express Religious Norms and Regulate Religious Liberty

Whether expansively or narrowly authorised, local governments are uniquely positioned vis-à-vis tensions that arise from daily, mundane interactions between individuals and groups over the character of the shared spaces in which they live, study, work and rest. Indeed, the powers of local government in many jurisdictions throughout the world often include the same cadre of authorities, enabling localities to promote 'the peace and security' of a local jurisdiction: zoning, land use, business licensing, road and traffic control, sanitation, water, housing, safety, spending

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and more. Israel is divided into roughly 255 localities (and hundreds of additional sub-localities that are organised as local committees (*va'ad mekomi*) within larger regional councils), ranging in population from over half a million residents to fewer than two thousand. Each of these localities possesses a large variety of legal powers and duties,[32] ranging from the duty to provide education, sewage and water, to controlling local planning and zoning, to managing local business licensing, to providing welfare services, to levying local taxes.[33]

As I have already indicated, these traditional powers are applied in many areas that touch upon religious freedom, and their application rests on the locality's attitude towards religious freedom. Whether to grant a special exception from a zoning law to a synagogue or a religious kindergarten, for example, depends on the local authority's position regarding the desirability of synagogues.[34] And when a coffee shop asks for a business licence, the town might prohibit it from playing 'western music' if it views such music as sacrilegious, or it might just as easily allow it if it holds a different view on the matter.[35] Cities did not just merely abuse their legal powers, however, when they were influenced by religious considerations. They were acting according to the legal guidelines laid down by the Supreme Court.

3.1.1 Cities Using Their Powers While Taking into Account Religious Considerations: Between a 'Nationwide Problem' and a 'Local Matter'

As a general rule, as already noted, the Supreme Court has ruled that the state must abstain from giving dominance to religious considerations unless explicitly authorised by the legislator to do so.[36] The same rule applied also to cities as administrative agents. The issue of cities taking into account religious considerations was raised most predominantly in the context of selling pork. Given the importance of the religious prohibition on eating pork in Judaism (and Islam), localities throughout Israel have tried to limit its sale within their jurisdiction. Lacking any specific authorisation to do so, they tried to regulate the sale by using their regular business licensing powers. In *Axel v Netanyah*, the Court voided the city's prohibition on the selling of pork within its jurisdiction, ruling that it had not been specifically authorised to prohibit such sale by the legislator.[37]

[32] This mode of authorisation was coined 'bundling of jurisdictions' by Richard Ford: see Richard T Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 Michigan Law Review 843, 844–45.

[33] See Compulsory Education Law, 1949 (education); Water Law, 1959 (sewage and water); Planning and Building Law, 1965 (planning and zoning); Business Licensing Law, 1968 (business licensing); Welfare Law, 1958 (welfare services); Municipalities Act, 1964 (levying taxes). Most of these powers are conferred in laws which date back to Mandatory Palestine (and in some cases even to the Ottoman period), and which have been amended quite significantly over the years. Local powers can be changed in regular legislation by a regular majority of the Knesset, and localities can be established and abolished, and local jurisdictions can be redrawn by a simple act of the Minister of the Interior.

[34] Such zoning exceptions were the issue in the case of a religious kindergarten in Ramat Aviv Gimel, a secular neighbourhood in the north of Tel Aviv, which became a 'target' for ultra-orthodox Jews. For an equivalent case in the US see *Bethlehem Christian Fellowship, Inc v Planning & Zoning Commission* 807 A 2d 1089 (Conn App Ct 2002).

[35] See HCJ 166/71 *Halon v The Mayor of Local Council Ussafiyah* 1971 PD 25(2) 591 (*Halon*).

[36] See nn 25–26 and accompanying text.

[37] *Axel* (n 30).

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But the Court went further. Instead of merely repeating the formal rule according to which religious affairs required explicit authorisation by the Knesset, President Olshen based his decision on the fact that religious matters, such as the prohibition on selling pork, were not a 'local' matter. In fact, Olshen ruled that religion is 'a general, nationwide problem that is not specific to a particular place, and its solution is within the exclusive purview of the national legislator'.[38] Although the Court has repeated this reasoning in other cases, it has not explained why selling pork is a 'nationwide problem' that requires the attention of the Knesset.[39] Perhaps the Court hinted at the fact that the entire nation is interested in the outcome of the judicial battle over outlets that sell pork, and that every Israeli citizen has a strong opinion with regard to the selling of pork. But are these considerations enough to centralise the issue and take it out of the hands of localities? Normally, other reasons are mentioned in order to legitimate central control over an issue: the existence of externalities and spillovers, the need to co-ordinate between several locations, and the need to protect minorities from abusive local majorities. While the first two reasons seem irrelevant to the consumption of pork (it involves no tangible externalities on other localities and there is no need to co-ordinate it nationally), it is possible that the Court wanted to protect secular minorities from local religious majorities.[40]

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

This competing principle was that, even though religion was a 'nationwide problem' that required explicit authorisation by the legislator, the authorised governmental agency was in fact at liberty – and sometimes even under a duty – to take into account religious considerations, whenever they were relevant for the efficient and professional use of power. In *The League for the Prevention of Religious Coercion v The City Council of Jerusalem*, the Court was faced with a challenge to the decisions of the city of Jerusalem and of the regional traffic controller to close several street sections in Jerusalem during the Sabbath.[41] The petitioners argued that the city and the traffic controller were prohibited from taking religious considerations into account when using their professional authority to close down streets. The Court rejected this claim, ruling that there is nothing wrong in considering the interests of the religious residents who live near the roads and balancing them against other considerations such as the volume of traffic and alternative roads, among other considerations.[42] Although there is no doubt that the city and the controller 'took into account interests which are religious by nature', they were allowed to

[38] ibid (translation of the Hebrew in Barak-Erez (n 6), 48–49).
[39] HCJ 72/55 *Freidi v Municipality of Tel Aviv* 1955 PD 10 734.
[40] This reading seems implausible in this concrete case, since the towns where such restrictions were enacted were in fact secular in their demographic composition, yet supportive of these restrictions as a result of the relative consensus, even among secular Jews, over the symbolic importance of the prohibition to sell and buy pork meat. However, the people who indeed wanted to consume pork were indeed a small minority, and deserved the Court's protection.
[41] *Prevention of Religious Coercion* (n 29).
[42] ibid 2668.

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do so, opined the Court, as long as those considerations pertain to a 'significant' part of the population.[43]

In *Baruch v Tel Aviv District Traffic Controller* (*Baruch*), which also had to deal with the closure of numerous roads and streets during the Sabbath, the Court affirmed a decision made by the professional traffic authorities, since there was nothing wrong in taking into account religious sentiments and the need to protect the religious interests of individuals.[44] In fact, citing *Lazarovitz*, the Court reasoned that it is possible that, had the authority failed to consider religious needs and interests, its decision would have been invalidated.[45] And, in *Horev*, although the Court struck down the decision of the traffic controller and the city of Jerusalem to close down a major road during the Sabbath, it did so because they failed to balance the competing interests properly, not because they were prohibited from taking any religious considerations into account. Indeed, the Court ruled that it is acceptable to consider the religious needs of the population, so long as this consideration should not overcome all other considerations.[46]

The tension between these two principles stands at the basis of the jurisprudence regarding the role of localities in the regulation of religious liberty in Israel. On the one hand, localities are prohibited from regulating religious practices since it is seen as a nationwide problem requiring the explicit mandate of the legislator; on the other hand, since many of these issues pertain to religious local populations for whose safety and interests the locality is responsible, local governments are necessarily empowered to take religious considerations into account. Thus, the Supreme Court oscillates between prohibiting localities from weighing religious considerations and allowing them to do so.

Such judicial oscillation is evident also in the area of sex-oriented businesses and other religiously objectionable establishments. The Druze village of Ussafiyah decided to issue a business licence to a coffee shop on condition that it would not play 'western music'. Despite clear evidence that the decision was based on religious prohibitions – no alcohol was allowed either at the coffee shop – the Court ruled in *Halon v Ussafiyah* that it was legal for the locality to do so, since 'we see no justification to deny the elected body's right to maintain the unique characteristics of its village … according to the spirit and the culture of the vast majority of its residents'.[47] Although the Court casts these religious prohibitions in cultural terms, it is rather obvious that the prohibitions are indeed religious in their origin and in their nature. The 'majority' to which the Court refers is not a 'cultural' group, but a religious one – the Druze. Put differently, I think it is hard to be convinced by the Court's attempt to legitimate the application of religious norms by merely calling such norms 'cultural'; it seems more plausible that the Court is willing to accept the adoption of such norms by governmental agencies when dealing with small religious communities.

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[43] ibid.
[44] *Baruch* (n 27) 164–65.
[45] ibid 163.
[46] *Horev* (n 1).
[47] *Halon* (n 35).

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And, indeed, in another case the Court was much less willing to accept the legitimacy of such religious/cultural considerations. In *SZM Ltd v The Mayor of Jerusalem*, the Court invalidated the decision of the Mayor of Jerusalem, operating as the local licensing board, to deny a sex shop a business licence.[48] Distinguishing the case from *Halon*, the Court reasoned that, while the village of Ussafiyah is rural and the majority of its residents share the same 'culture and traditions', Jerusalem is a 'mixed and diverse' city that has no 'unified life style'.[49] Hence, it seems that the Court is indeed willing to give more deference to local governments which represent religious minorities than it is to those which represent religious majorities. The Court, however, did not only distinguish the two cases; it also qualified and modified the general principle, limiting the city's ability to take into account religious and moral considerations. Such considerations were permissible only where there was a 'serious harm to the religious sentiments of a majority of the people' living near the controversial establishment.[50]

3.1.2 Special Enablement Laws

The tension between the competing principles articulated above has spurred different responses among localities, with some taking a more active role in establishing religion and accommodating religious sentiments and others either being inactive in this regard or even expressing their secularity and hostility towards religion. But another result of these evolving principles was that the Knesset enacted numerous special laws that explicitly enable localities to shape the public space within their jurisdiction in a religious fashion. Thus, over the course of the years, the Israeli parliament has enacted special permissions for localities to limit, or even prohibit, the sale of pork in their jurisdiction,[51] and to take into account 'religious considerations' when they grant business licences and determine the ability of establishments to operate on religious holidays and days of rest.[52]

The decision to authorise localities to regulate the selling of pork and the closure (complete or partial) of shops on the Sabbath was the result of intense political fighting between secularists, nationalists, moderates and religious politicians.[53] Until 1992, parliament was unlimited in its legislative capacity. Nonetheless, there were political constraints which prevented the adoption

[48] HCJ 230/73 *SZM Ltd v The Mayor of Jerusalem* 1974 PD 28(2) 113.
[49] ibid 117.
[50] ibid 119, 121. In a later case, the Court upheld a decision by a locality to restrict the location of a sex store for similar reasons: see HCJ 809/86 *Yanovitz v Chair of the Council of Ramat Ha-Sharon* 1987 PD 41(4) 309.
[51] Local Authorities (Special Enablement) Law, 1956.
[52] Municipalities Act, 1964, s 249(21) (religious holidays and days of rest); Prohibition of Opening of Amusement Places (Special Enablement), 1997 (Tish'a Be'av, a day of fasting and atonement marking the destruction of the Jewish Temple).
[53] The reason for this is a combination of political reality and the legal structure. The religious parties in the Knesset believe that they cannot obtain the required majority in order to enact such a nationwide prohibition. It is particularly true since such a law would most probably require the amendment of a Basic Law, a measure which mandates a special majority of the Knesset. In the case of the importation of non-kosher meat, such amendment to the Basic Law: Freedom of Occupation was obtained but it was a difficult process which only demonstrated the difficulty to enact such religious legislation nationwide.

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of laws establishing religion: religious parties were a minority in the Knesset and were unable to pass a nationwide prohibition on the sale of pork or on various activities on religious days of rest. Thus, these enabling laws were a compromise between religious and secularist members of the Knesset.[54] At the national level, this compromise seems to have worked: the Knesset has not attempted to enact a nationwide prohibition on the selling of pork or on operating businesses on the Sabbath in almost over two decades, since the 1990s.

The battle shifted from the Knesset to elsewhere. Following these special authorisations, many localities throughout Israel enacted bylaws which severely limited the selling of pork within their jurisdiction,[55] and which put serious restrictions on the operation of various businesses during the Sabbath. Other localities, however, actually allowed more and more businesses to open during the Sabbath and were filled with butcheries that sell pork. Indeed, one of the most obvious effects of these special enablement laws was a growing divergence among cities with regard to religious prohibitions. While some became more religious, others simply did not use, or used minimally, these laws and expressed their overt secularism. In other cities, however, wars of religion broke out, with residents trying to coerce the locality to adopt their view.[56] These battles were particularly noticeable where the demographic composition of the population was less homogeneous.

Especially in the case of pork, 'pig wars' have broken out throughout the country since the 1990s, making this issue salient and alive at the local level (and thus also at the central level). The reasons for this were legal, political and social. First, religious parties increasingly wanted to use their political power to exert more influence over the shaping of public areas in Israel (trying to pass laws that would prohibit the selling of pork throughout the state, rather than only in localities with a large religious majority). Indeed, the religious revival and the desire to reinscribe religion into the public sphere did not leapfrog over Israel.[57] This religious revival was strengthened by the high birth rate of the ultra-orthodox Jews, which caused this previously almost insignificant minority to become a visible and substantial minority: in less than two decades (from 1990 until 2008), the percentage of ultra-orthodox Jews rose from only 3 per cent to 9 per cent of the Jewish population of Israel.[58] While this fact enabled ultra-orthodox Jews to exert more political power and influence at the national and local levels, it also created a backlash which was mobilised by 'secularist' political parties that fed on the intensification of the conflict.[59]

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[54] Barak-Erez (n 6) 43–57.

[55] ibid 59–79; Rosen-Zvi (n 6) 226–27.

[56] A prime example was the battle that took place in Petah Tiqwa (in 1983–84) and in Jerusalem (in 1986–87) concerning the opening of cinemas during the Sabbath: see CrimC (Jerusalem) 3471/87 *The State of Israel v Kaplan* PM 5748(2) 26 (1988). See also Eliezer Schweid, 'The Sabbath in Israel' in Uri Dromi (ed), *Brethren Dwelling Together: Orthodoxy and Non-Orthodoxy in Israel – Positions, Propositions, and Accords* (Israel Democracy Institute 2005) 220–25.

[57] See Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press 2011).

[58] See Uzi Rebhun and others, *Demographic Trends in Israel* (Metzilah Center 2009) 27.

[59] The rise of Shinui, the political party which set out to combat the increased influence of religious parties, is commonly understood to be a manifestation of such a backlash: see Mautner (n 57), especially ch 5.

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

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

Fourth, a shift in the jurisprudence of the Israeli Supreme Court in favour of decentralisation and the delegation of powers to local governments has been taking place since the 1990s. This shift has made the courts more susceptible to ideas according to which local governments could serve as locations for political action, democratic legitimacy and norm setting no less – sometimes even more – than central government.[60]

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

The balance between the bureaucratic and the democratic conceptions has been slowly shifting over the past 25 years, not only at the ideological level but also in terms of legal reforms, governmental policies and judicial decisions. This shift has a contradictory character. On the one hand, local governments were given more planning powers, more fiscal discretion, and their general authorities were expansively construed in some important court rulings; on the other hand, and especially since 2004 following the financial crisis that many localities experienced, fiscal supervision over local governments tightened and it became easier for the Minister of Interior to interfere with the internal affairs of 'failed' localities (including putting them into receivership, etc.). Despite this contradictory nature of the change, it is safe to say that the democratic–localist conception has been strengthened since the 1990s, and that the bureaucratic–centralist one, while still being very dominant, is no longer the hegemonic perception of Israeli local government theory. See, for example, HCJ 2838/95 *Greenberg v Local Council of Katzrin* 1997 PD 53(1) 1.

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As a result of these new legal battles and the changing circumstances in Israel, the Supreme Court has refined, perhaps entirely reformed, its jurisprudence regarding the local exercise of special enablement laws. In the case of *Solodkin v City of Beit Shemesh*,[61] secular residents and a Member of Knesset from a party identified with immigrants from Russia petitioned the Court, challenging the legality of bylaws which limited, or entirely prohibited, the selling of pork in three localities. The Supreme Court ruled that there are two competing interests which must be balanced by the local government in regulating the sale of pork: it needs to take into account, on the one hand, the freedom of occupation of pork sellers and the right of pork eaters to consume whatever they wish to eat and, on the other hand, the need to protect the religious beliefs and conscience of those who oppose the consumption of pork.

What is unique about this balance, the Court added crucially, is that the legislator vested it in the hands of the local authority, which means that a special balancing needs to be carried out: one which would take into account the unique demographic composition and geographic dispersion of the local populace throughout the local jurisdiction. The maps drawn by the municipality of where pork may or may not be sold should reflect this demographic balance. The Court ruled that if there exists only a 'tiny minority' of 'pork eaters', the locality can prohibit it altogether, since they can either purchase pork in a nearby village, or they can choose to leave the locality and live in a another place where they could form a majority. The same goes for the internal division of the locality: if homogeneous neighbourhoods can be found within the local jurisdiction, the local government can prohibit (or permit) the sale of pork within these neighbourhoods.[62]

The *Solodkin* decision thus further localised religion. It pronounced a very clear principle according to which the balance between freedom from religion, freedom of occupation and religious sentiments is a 'local matter', which is to be based on local facts, such as demography and geography. Yet, it also localised religion in the sense that it fragmented each locality into smaller 'locales', requiring a more nuanced regulation, based on the character of each neighbourhood within it. What is particularly striking about the test that the Court adopted is that it is based on social science positive data regarding the demography and geography of the place rather than its history, context and character, or on real normative evaluation of the competing interests, values and rights. In this regard, although it might be said to leave only little discretion in the hands of the local governments, there is still room left to manoeuvre since the locality gets to decide the issue, even if theoretically it could be checked by courts retrospectively.

Hence, the *Solodkin* decision incentivised religious and secular local groups to obtain a clear majority in the whole locality, or at least in the neighbourhood where they lived. It has put a premium on homogeneous, 'pure' spaces and posited, perhaps unwittingly, an ideal of 'geographic separatism', as Rosen-Zvi claims.[63] Following *Solodkin*, it was argued before the courts that municipalities that wish to open synagogues and other religious public facilities should do so

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[61] *Solodkin* (n 2).
[62] ibid. For a detailed discussion of the decision, see Rosen-Zvi (n 6) 226–28.
[63] Rosen-Zvi, ibid 228–31.

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only in religious neighbourhoods.[64] Although the Supreme Court rejected this claim, the message sent by the Court in *Solodkin* was that if people want to have a residential environment that would fit their religious (or secularist) preferences, they should advance homogeneity in their locality or at least in their neighbourhood.

3.1.3 Taxation and Spending

Another extremely important area in which local governments constantly reflect and express their religious beliefs and sentiments is through taxation and spending, both of which lie well within the traditional powers of local governments in Israel and throughout the world. In their application of these powers, too, cities use religious considerations and try to benefit their favoured religions, provoking a fierce debate in courts, in the executive branch and in the parliament. In *Yekutieli v Minister of Interior*, local tax exemptions and deductions for residents of Jerusalem were challenged.[65] The basis for these exemptions were regulations promulgated by the Minister of Interior – a member of the ultra-orthodox Shas party – in which he enabled localities to exempt two groups of persons from local property taxes. The first group included those who dedicate their entire time to the study of the Jewish religious texts; the second group included families with four or more children. The Jerusalem local council/ municipality decided to use its power to grant these exemptions. Both exemptions benefited ultra-orthodox Jews, as families with that number of children almost exclusively belong to the ultra-orthodox community. While the legal challenge was raised against the Minister of Interior as well as against the Jerusalem local council/municipality, it was clear that the main problem was not with the way in which the city applied the regulations – they were very straightforward and clearly empowered the city to give such exemptions – but against the regulations themselves.

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

Indeed, the issue of local tax exemptions and deductions has long been centralised and taken out of the hands of localities – whether the exemption is religiously motivated or not. The reasons

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[64] See HCJ 10907/04 *Solodoch v Municipality of Rehoboth* (unpublished, 2010).
[65] HCJ 6741/99 *Yekutieli v Minister of Interior* 2001 PD 55(3) 673.

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for this are numerous, and undoubtedly involve the fear that some localities will abuse these powers and simply go bankrupt, believing that the government will bail them out. But the fear that local majorities will use their powers to exempt themselves and milk minorities is also significant. Yet, despite the formal prohibition on localities to grant tax exemptions and deductions, they try to use their taxation powers to benefit various religious communities. For example, they can expansively interpret the tax break given to synagogues, churches and mosques (by the Knesset), or they can interpret it narrowly.[66] Since the current exemption is given only to 'synagogues' (and other places of religious worship), some localities impose local taxes on buildings that only partly serve as synagogues. Other localities, on the other hand, read the exemption very generously, thus giving tax breaks to wedding parlours and other establishments that dedicate a small room for a synagogue and claim the exemption on this basis.[67] Cities can also act informally by, for example, measuring and assessing religious property with greater lenience, refraining from collecting the taxes, and so on.

Compared, however, with the relative centralisation of local taxation and the ensuing difficulty of cities to infuse taxation with religious motivations and preferences, cities are more easily able to use their spending power, and to allocate their property, in a manner that expresses their religious sentiments. As a legal matter, it is not only legitimate but also desirable that localities spend their money on projects which they deem appropriate. Indeed, except for municipal services which they are required to provide by law, local governments are expected to form a budget which is based on the unique local preferences and needs of their residents. And if those residents happen to be religious and wish to spend money on religious enterprises, it is legal for the local government to do so. However, once a locality decides to spend money on a religious enterprise, it must not discriminate between the different religions. This legal principle enables localities to express their religiosity by giving money to synagogues, churches and other religious enterprises. And, despite the requirement to allocate money and other municipal resources 'equally and transparently', this is a source of much contention and legal battling.

As early as the 1960s, the Supreme Court ruled that, while a locality was allowed to let religious activities take place within its property, it could not discriminate between different Jewish denominations, and had to give them equal access. In *Peretz v Kfar Shemaryahu* the Court invalidated the decision of a small and affluent Jewish suburb to refuse a group of reform Jews (a modern, non-orthodox Jewish denomination) to hold prayers in the synagogue owned by the suburb.[68] A city was under the duty to treat all its residents with equality, regardless of their religious denomination. Freedom of religion meant, the Court ruled, that each religious group was entitled

[66] Over the past year there has been an attempt to amend the tax exemption given to synagogues, churches and mosques so that it will also include places 'whose main use is for prayers'. In this way, localities will have to give this break even to buildings that only partly serve as synagogues: see the Knesset Finance Committee, 'Protocol of Session of the Knesset Finance Committee Concerning the Proposed Amendment to the Municipality Taxes and the Government Taxes Ordinance (Exemptions) (Synagogues), 2009 of Member of Knesset Nissim Zeev (P/662)', 2 March 2010, available at http://oknesset.org/committee/meeting/52/ (in Hebrew).
[67] ibid.
[68] *Peretz* (n 4).

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to the same treatment by the locality; it meant that no one religion could be preferred over another.[69] The fact that the religious sentiments of orthodox Jews might be hurt by a Reform prayer – since they find it offensive and sacrilegious – is insufficient to disallow reform Jews from holding prayer, as they have religious sentiments, too, that are obviously hurt when refused from using the suburb's property.[70]

Thus, alongside their support for religious activities which they favour, localities have made an attempt to *refrain* from budgeting for activities which were offensive to their religion, even though they could not openly admit that because of their duty to allocate their budget and land equally. In the case of *Jerusalem Open House v City of Jerusalem* (*Jerusalem Open House*), such discriminatory local practices came under the scrutiny of the Supreme Court. The Jerusalem Open House, a local LGBT (lesbian, gay, bisexual and transgender) organisation, has been leading a long and protracted legal campaign, challenging the refusal of the city of Jerusalem to fund its activities.[71] Over the past two decades Jerusalem has undergone a tremendous demographic transformation of 'ultra-orthodoxisation': the percentage of ultra-orthodox Jews in the city has increased dramatically as a result of migration and the natural growth of this community and of an exodus of secular and moderately religious Jews.[72] Ultra-orthodox parties form a rather solid coalition at city hall and, from 2003 until 2008, the mayor of Jerusalem was an ultra-orthodox Jew (Mayor Lopolyanski). Although Jerusalem denied that it was motivated by religious sentiments, the Open House's requests for municipal support were consistently refused. The city argued that all the budgetary allocations that the Open House applied for were either irrelevant considering the activities of the organisation, or that the organisation simply did not meet the standard that the locality was aiming for. A District Court Judge accepted the city's claims, ruling that the city had 'equal and transparent' guidelines which did not discriminate against gays and lesbians; they simply did not fit the specific activities that the Open House wished the city to fund.[73]

The Supreme Court overruled the District Court's ruling and ordered the city to revise its policy and allocate equal funds to the Open House. In a groundbreaking decision, Justice Amit adopted the American 'strict scrutiny' test, finding that gays and lesbians are a 'discrete and insular minority' deserving special protection. Historically oppressed, discriminated against, politically underrepresented and geographically dispersed, gays and lesbians are worthy of unique protection.[74] The reason for Justice Amit needing to adopt the special review test was that it

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[69] ibid 2106.

[70] ibid 2107.

[71] The list of petitions to the District Court and to the Supreme Court is lengthy. The most important decision by the Supreme Court was delivered in 2010: see *Jerusalem Open House* (n 4).

[72] Shlomo Hasson and Amiram Gonen, *The Cultural Tension within Jerusalem's Jewish Population* (Floersheimer Institute for Policy Studies 1997); Shlomo Hasson, *The Cultural Struggle over Jerusalem: Accommodations, Scenarios and Lessons* (Floersheimer Institute for Policy Studies 1996).

[73] AdminC (Jerusalem) 8187/08 *Jerusalem Open House v City of Jerusalem* (unpublished, 2008). This decision itself reversed a previous District Court decision in which Justice Yehudit Tzur requested that the municipality reconsider its policy: see AdminC (Jerusalem) 219/06 *Jerusalem Open House v City of Jerusalem* (unpublished, 2006).

[74] *Jerusalem Open House* (n 4) paras 53, 56–57.

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was very difficult to find any *intentional* discrimination against the Open House. Indeed, the broad fiscal powers of cities enable them to reflect religious sentiments by tailoring the criteria for spending in a manner that will exclude activities which are abhorrent to its religious creed. Thus, Jerusalem could refuse the funding requests of the petitioner by carefully crafting the 'objective criteria'.

Although the Supreme Court ruled that the Open House was discriminated against and that it should receive funds from the municipality, the case actually illustrates the ease with which local governments can overcome the prohibition to refuse funding based on religious animus. Despite the fact that overt discriminatory criteria-crafting would be deemed unlawful, in many such cases discriminatory intent or impact would be very hard to prove and localities will thus be able to reveal their religious sentiments.

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

3.2 Formal Segregation and the Forced Creation of Pure Religious Communities

It is impossible to appreciate the impact of the localisation of religion in Israel without giving due attention to the relative religious homogeneity of localities in Israel. This homogeneity has enabled localities to reach a consensus where the national legislator has failed. Compared with the religious diversity of the entire population of Israel and of the Knesset, localities are extremely homogeneous. Only very few localities have representative portions of ultra-orthodox Jews, modern-orthodox Jews, secular Jews, Muslims, Christians, Druze, etc. This homogeneity is a result of historical contingencies as well as of a uniquely Israeli legal structure, which forces and induces religious residential segregation. As many scholars have shown, this was a result of the historical background and market forces, but also of clear governmental policies.[75]

While some of the separating lines have been blurred over the years,[76] segregation between secular Jews and religious Jews has not weakened. If anything, it has strengthened. Several

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[75] Yishai Blank, 'Brown in Jerusalem: A Comparative Look on Race and Ethnicity in Public Schools' (2006) 38 Urban Lawyer 367, 384–89; see also Rosen-Zvi (n 60).

[76] I refer mostly to the segregation between Mizrahi Jews (Jews of oriental descent) and Ashkenazi Jews (Jews of European and American descent), which was extremely prevalent until the late 1980s. While a significant spatial segregation of impoverished Mizrahi Jews in development towns and poor neighbourhoods in large cities still exists, the radical isolation of Mizrahis has been mitigated as a result of government policies and the gradual upward mobility of second and third generation Mizrahis. Another segregation which still exists, but which has begun to change recently, is that between Palestinian Arabs and Jews. Though the vast majority of Arabs still live in localities which are purely Arab, and although most Jews live in all-Jewish localities, a new phenomenon

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new purely ultra-orthodox Jewish towns have appeared since the 1990s, and numerous ultra-orthodox neighbourhoods have appeared in mixed towns.[77] In addition, religious-Zionist Jews, who used to live in fairly integrated environments, have developed new residential patterns, which are more segregated than before. In part a result of the expanding settlement project in the occupied territories, and in part a result of internal pressures to create religious environs, a growing number of religious-Zionist Jews form and live in majority-religious localities or in majority-religious neighbourhoods.

I now turn to describe these. Much has been written about the residential separation between Jews and Arabs,[78] but very little attention has been given to the fact that the state also induced segregation *among* Jews, based on their faith and denominational affiliation.

3.2.1 History and Market Forces that Support Segregation

Historically, in the nineteenth century, ultra-orthodox Jews lived in separate neighbourhoods, which were later recognised by the British mandate authorities as independent localities. Christian Arabs and Muslim Arabs also often lived in separate villages and towns. The market values of houses in Arab villages and neighbourhoods (Christian as well as Muslim) and in ultra-orthodox Jewish areas were significantly lower than those of houses in central Jewish secular communities. There were also vast discrepancies among the different social groups in terms of funds available for purchasing an apartment: the income levels of Arabs and ultra-orthodox Jews were significantly lower than those of secular Jews.[79] The social capital of the former groups was similarly low. Accordingly, Arab or ultra-orthodox homeowners who sought to sell their houses and purchase homes in a Jewish town would be forced either to compromise on the size of the new house (if they succeeded in finding a smaller one, and live in crowded quarters), or else live in a poor neighbourhood in which the schools and other municipal services are inferior.[80]

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

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has started to unsettle this clear divide. If, until the late 1990s, there existed only very few 'mixed towns' – in which Jews and Arabs lived together (albeit in different neighbourhoods) – during the past decade a few more mixed towns began to appear as a result of new residential patterns. Arabs started to move into previously all-Jewish towns, thus changing the demographic nature of these towns, and weakening the radical segregation that previously existed.

[77] Such new localities include El'ad, Beitar Illit, and Modi'in Illit. See Norma Gurovich and Eilat Cohen-Kastro, 'Ultra-Orthodox Jews: Geographic Distribution and Demographic, Social and Economic Characteristics of the Ultra-Orthodox Jewish Population in Israel, 1996–2001', July 2004, available at http://www.cbs.gov.il/www/publications/int_ulor.pdf (in Hebrew).

[78] The separation between Jews (secular and religious alike) and Arabs (Muslim and Christians alike) was obtained mostly through the allocation of land exclusively to Jews: see Blank (n 75) 386–89.

[79] Blank (n 75) 384–89.

[80] ibid.

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3.2.2 FORMAL EXCLUSIONARY/SEGREGATIONIST MECHANISMS

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

The exclusion of ultra-orthodox Jews from secular – and even modern-orthodox – settlements was a by-product of the unique legal structure of rural settlements with state-sanctioned screening boards. Concerned with the concentration of the majority of the population in the centre of Israel, and worried about the scarce 'Jewish presence' in its northern and southern parts, the state began to establish dozens of new settlements in the rural periphery of the country.[81] Since the state owns 92 per cent of the land in Israel, it could easily implement this policy by allocating land in these remote areas to groups of individuals who organised themselves as collective associations. These associations would regularly appoint 'acceptance committees' (screening boards) that interviewed candidates and decided who could become a member of the association and purchase land in the settlement. The contracts that the residents signed with the collective association and the Jewish Agency (the official owner of some of this state land) regularly included restrictive covenants, requiring the consent of the screening board for any future land transaction. But most crucial was the condition that most associations included in their minutes and founding documents, which was that the candidate had served in the Israeli military.

While this condition was mostly aimed at excluding Arabs from these settlements, it incidentally excluded ultra-orthodox Jews who, by and large, very seldom serve in the army. The military service requirement was voided by the Court as being unconstitutional in the famous *Kaadan* case for violating the principle of equality.[82] However, such screening boards are still alive and well. They use various mechanisms, including psychological evaluations and other tests designed to examine the candidate's 'fitness' for the settlement in order to exclude various individuals. Indeed, it was only in 2011 that the Knesset passed a law which formalised the right of small settlements (that is, with fewer than 400 families) to screen their residents based on their 'fitness for community life' and 'fitness for the social fabric' of the settlement.[83] Various studies show that such screening processes serve to exclude individuals belonging to minority

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[81] See Oren Yiftachel and Alexandre (Sandy) Kedar, 'Landed Power: The Making of the Israeli Land Regime' (2000) 16 Theory and Criticism 67, available at http://www.vanleer.org.il/Data/UploadedFiles/Publications/TUV/16/4.pdf.

[82] 6698/95 *Kaadan v Israel Land Authority* 2000 PD 54(1) 258 (*Kaadan*). See also Alexandre (Sandy) Kedar, 'A First Step in a Difficult and Sensitive Road – Preliminary Observations on *Qaadan v Katzir*' (2000) 16 Israel Studies Bulletin 3.

[83] Amendment to the Collective Associations Ordinance Act (No 8), 2011, ss 1 and 2. The Association for Civil Rights in Israel filed a petition in the name of numerous individuals challenging the constitutionality of this amendment: see HCJ 2311/11 *Sabach v The Knesset* (filed 23 March 2011), the petition is available at http://www.acri.org.il/he/wp-content/uploads/2011/03/hit2311.pdf (in Hebrew).

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communities.[84] In some cases, even religious communities living in such settlements – religious-Zionist communities who do serve in the military – have used their screening boards to exclude ultra-orthodox Jews.[85]

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

When this government policy was challenged by secular Jews, the Supreme Court ruled, in *Am Hofshi v Ministry of Building and Housing*, that as long as secular Jews could purchase an apartment with the same government benefits, it was legal for the state to adopt and implement a 'separate but equal policy' on condition that it was aimed at enabling the religious community 'to sustain its [unique] ways of life'.[86] The Court stressed[87] that recognising the right of the religious community to sustain its lifestyle

> represents a well accepted contemporary notion among jurists, philosophers, social scientists and educators according to which the individual is entitled – among his many other rights – to fulfil his belonging to a community and its unique culture, as part of his right for personal autonomy.

This ruling proved to be of crucial importance, as it opened the gate for the establishment of more and more settlements solely for ultra-orthodox Jews.[88] In other cities, new ultra-orthodox

[84] Neta Ziv and Chen Tirosh, 'The Legal Battle Against the Screening of Candidates to Communal Settlements: A Trap in a Pierced and Muddy Web' in Amnon Lehavi (ed), *Gated Communities* (Law, Culture and Society Series, Faculty of Law, Tel Aviv University and Nevo Press 2010) 311.

[85] This happened when an ultra-orthodox family tried to be admitted to the religious-Zionist settlement of Bar Yochai. The screening board disqualified the family on the grounds that it did not 'fit' its way of life: see Neta Ziv, 'An Appeal on the Rejection Decision in the Settlement of Bar Yochai', letter to Israel's Land Authority sent by the family's lawyer, 11 April 2011 (on file with the author).

[86] HCJ 4906/98 *Am Hofshi v Ministry of Building and Housing* 2000 PD 54(2) 503, 508 (*Am Hofshi*). One of the sources of inspiration for the *Am Hofshi* decision was another case in which state-coerced segregation was challenged. In HCJ 528/88 *Avitan v Israel Land Authority* 1989 PD 43(4) 297, the Court affirmed the decision of Israel's Land Authority to establish towns only for Bedouins. The Court ruled that it was a legitimate state interest to settle the nomadic Bedouins and that excluding Jews as well as other non-Bedouins was imperative for this policy's success. The Court also mentioned the unique history and culture of the Bedouins as a way of legitimating the state segregation. In *Am Hofshi* the Court ignored the uniqueness of the Bedouin community, extending the licence to segregate between communities to any minority group with 'unique ways of life'.

[87] *Am Hofshi*, ibid 508–09. It is important to note that the Court in fact voided the Ministry's decision as it found that the policy was separate and unequal. The Court ordered the ministry to establish an equally beneficial project for secular Jews.

[88] Such new towns include El'ad, Beitar Illit, Modi'in Illit, Kiryat Sefer and Immanuel. Two additional ultra-orthodox cities – Kasif and Harish – are currently planned by the government.

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neighbourhoods are being constructed. Although this segregation is often presented as self-segregation – there is indeed no doubt that many ultra-orthodox Jews seek such radical segregation – the fact that it is mandated by the government makes it hard to assess whether it is voluntary or not. It seems plausible that at least some ultra-orthodox Jews would have chosen to have secular neighbours; and it is possible that some secular Jews would have liked to live near ultra-orthodox Jews. Indeed, according to a recent survey, only 61 per cent of ultra-orthodox Jews prefer to live in purely ultra-orthodox settlements; the rest – a significant minority counting for 39 per cent of the community – would rather live in integrated localities. Among the general population there is even greater willingness to live in integrated areas, with less than the majority (48 per cent) preferring not to live near ultra-orthodox neighbours.[89]

4. Evaluating the Localisation of Religion

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

4.1 The Advantages of Localising Religion in Israel

4.1.1 Localisation as Protection Against One Religion's Hegemony

The greatest promise of the dispersal of authority to local governments to express and reflect religious sentiments and beliefs is that it would counter and destabilise the monopoly that one dominant religion might have if all political power is held by central authorities. Richard Schragger noted that 'political decentralization ensures that the national councils do not have a monopoly on the power to regulate religion' in America.[90] The role of localities in the discourse and doctrine of religious liberty was of crucial importance as it provided incentive for the creation of religious groups, 'a necessary precondition for the robust competition among sects that prevents any one sect from gaining political dominance in the whole'.[91] Indeed, what Madison feared most – the violence of the religious faction – is, claims Schragger, the antidote against the dangers of *one* religious group becoming all too dominant. Decentralisation is an institutional

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[89] The survey was conducted by the Geocartography Institute. See Avi Dagani, '61% of the Ultra Orthodox Prefer to Live in Separate Settlements', 15 February 2011, available at http://www.relevanti.com/גלובס/עמוד-הבית/פרופ-אבי-דגני/m7329_61-מהחרדים-מעדיפים-לגור-בישובים-נפרדים (in Hebrew).
[90] Schragger (n 6) 1815–16.
[91] ibid.

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safeguard – rather than a mere judicially enforced barrier – against the monopolisation of one religion over the entire national territory.

The fact that local governments in Israel have been routinely involved in regulating matters pertaining to religious liberty – much like localities in the United States – has been crucial as a check both on the government's ability to establish one religion, and on religious power to spread through the entire federation. Even if the localisation of religion which I have described in this article has not truly dismantled the hegemony of Jewish orthodoxy, it has still managed to create 'pockets' of resistance to this hegemony. Theorised in this way, we can begin to see that localities are, in fact, the only places where non-hegemonic religions are able to flourish and become powerful in Israel, and thus possibly challenge the hegemony that orthodox Judaism currently enjoys. Taking some of the power in religious matters away from central government and vesting it in a multitude of local governments, each applying it somewhat differently, allocating budgets and jobs to non-orthodox strands of Judaism, might have actually weakened, at least to a certain degree, the monopolistic power of ultra-orthodox Judaism. In this view, the greatest threat to religious liberty comes, of course, from central government and the Knesset establishing religion, since it will always be one dominant religion: orthodox Judaism. Decentralisation is the antidote since it incentivises people to form religious sects that would fight against such dominance.

4.1.2 Localisation as Enabling Religious Dissent by Deciding

Given the monopoly that orthodox (even ultra-orthodox) Judaism enjoys in the government and in parliament, there is very little hope that reform Judaism, other Jewish denominations and other religions will ever be able to express their beliefs and norms publicly or assume power positions. Other religions, as well as other Jewish denominations, are discriminated against and suffer from chronic weakness and underrepresentation in central government. However, in cities where religious minorities constitute a locally significant constituency – or even a local majority – that can exert meaningful political clout, they are further empowered and might be thought of as exercising, to a certain extent, self-rule. This point lies at the heart of a compelling argument made by Heather Gerken.[92] Permanent minorities – those that could never become a majority of the votes at the federal level – who radically differ from the majority, she claims, are often thought to be able to do nothing more than voice their dissent or compromise their radical views. They can 'speak truth *to* power' but they can never be powerful.

The American structure of government, argues Gerken, enables such minorities to 'dissent by deciding', thus act radically and 'speak truth *with* power'.[93] Permanent minorities can do so since they are enabled to form local majorities, to which the law grants decision-making powers. The strength of dissenting by deciding does not lie solely with the immediate benefits and consequences of a particular action, such as prohibiting the sale of pork meat within one local jurisdiction or allowing women to be elected for a religious council in another. Such powerful local

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[92] Gerken (n 14).
[93] ibid 1750.

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'disobedience' enables religious minorities to give their dissenting viewpoint salience on the national plane. The nationwide ripple effects caused by different religious governmental actions – closing of roads on the Sabbath, but also refusing to enforce religious laws in the case of a secularist locality – are felt at the national level as other communities with similar views follow suit.

4.1.3 Localisation as Deprivatisation

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

The broad powers vested in the hands of localities in Israel indeed enable them to create such 'holy communities'. Control over what shops and establishments operate within their jurisdiction, over the opening of businesses during religious holidays and days of rest, over the closure of roads during the Sabbath, and over the presentation of Hammetz (leavened dough that is prohibited from being eaten and presented during Passover) in public during Passover all afford religious communities the ability to escape the privacy of their homes and engage in public religious lives. This is particularly true for 'nomic' communities, to use Robert Cover's term, whose mutual cultural world is not limited to a single and compartmentalised field of action, but rather stretches into a wide range of human activities and guides the group members in the most profound ways.[94] For such communities, only self-regulated and segregated areas can serve as an approximation to their radically alternative utopia. The intense segregation which I have described also contributes to the deprivatisation of religion, as it provides a safeguard against 'surprises' in the public sphere. For instance, having only ultra-orthodox around means that modest dress codes are retained also in the streets.

4.1.4 Localisation as Pluralism

Since localities can use their powers to express their endorsement as well as rejection of religious values and beliefs, the range of religious and secular attitudes is broad, reflecting the real plurality that exists among Israelis. According to David Barron, towns and cities should be understood as 'important political institutions that are directly responsible for shaping the contours of ordinary

[94] Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4; see also Abner S Greene, 'Kiryas Joel and Two Mistakes about Equality' (1996) 96 Columbia Law Review 1.

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civic life in a free society.[95] Enabling cities to deal with religious matters is part of such a pluralistic and democratic vision of society. Instead of viewing localities as mere instruments for the protection of individuals against governmental (or private) encroachment upon their negative liberties, we can see them as fostering 'public freedom', based on a positive rather than a negative conception of liberty.[96]

Harnessing the powers of local governments to advance positively the goals, ideas and desires of religious communities, and not merely to protect individual believers from discrimination, goes beyond negative liberty and affords those religious communities the capability to advance their shared world view and enrich the society with profound diversity. In Israel, especially, such pluralism can indeed be fostered through localising religion, since religion often overlaps with other identity traits such as nationality and ethnicity. Since the majority of Muslims and Christians are Arab, with other denominations that signify ethnicities, the use by localities of their religious authorities can become an instrument for racial and ethnic pluralism. Put differently, these minorities make use of their religious powers to express not merely 'religion' but also their cultures. It is therefore no coincidence that in the case of *Halon*, the Supreme Court refers to the prohibition on western music, which the Druze village imposed on a coffee shop, not as a religious prohibition but as an expression of '*the spirit and the culture* of the vast majority of its residents'.[97] Their empowerment to express religion and the overlap between culture and religion thus enables such minority communities to be able to self-construct and self-regulate, at least to a degree, their shared spaces.

But there is a danger in the reconfiguration of religion into a culture, as it moves it from the realm of actions to the realm of identity: religion is beginning to be understood as an ethnicity or race, rather than as a set of codes, beliefs, norms and practices. Religious norms, practices and motivations are reinscribed as expressions of 'culture', and religious freedom is reconceived as cultural autonomy. Religion thus becomes immutable and impossible to change or transform, as this conceptual manoeuvre reifies individual choices and congeals fluid practices. Ironically, secularism is also reconceived as a culture. As the percentage of secular Jews is dropping, and as their political power is in decline, there are more and more voices that try to conceptualise liberal secularism as a culture, perhaps one which is on the verge of being extinct in Israel. In the last round of battles between secular and ultra-orthodox Jews, such claims were made in an attempt to grant secular Jews the desired status of a minority which is entitled to 'separate' allocation of land or of an environment free from religious symbols altogether.[98] Although

[95] David J Barron, 'The Promise of Cooley's City: Traces of Local Constitutionalism' (1999) 147 University of Pennsylvania Law Review 487, 490.

[96] Gerald Frug defines public freedom as 'the ability to participate actively in the basic societal decisions that affect one's life': Gerald E Frug, 'The City as a Legal Concept' (1980) 93 Harvard Law Review 1057, 1068 (attributing the concept of 'public freedom' to philosopher Hannah Arendt).

[97] *Halon* (n 35) 594 (my emphasis).

[98] In the city of Beit Shemesh, which is experiencing waves of ultra-orthodox migration into the city, secular residents demanded that Israel's land authority allocate lands to a secular neighbourhood, as it regularly does for ultra-orthodox neighbourhoods. The District Court of Jerusalem refused to intervene with the Authority's refusal, reasoning that the logic of the *Am Hofshi* decision did not apply to secular Jews who were a majority group

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until now such challenges have been rejected by the courts, it is too early to tell what future lies for such attempts.

4.1.5 Localisation as Pacification

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

4.2 The Shortcomings of Localising Religion in Israel

4.2.1 Localisation as Radicalisation and Fragmentation

Religion, Madison warned, was a particularly 'virulent form of faction'.[99] As such, it had the potential to do much more than merely curb centralised political power or dismantle religious monopolies; it was one of the greatest risks to the American federation, which needed to be met with crystal clear central norms (constitutional protections of individual rights) and powerful central institutions. Religion was able to move people in the wildest directions, and it could bring about the most destructive ideas.[100] Thus, the healthy interreligious competition that we imagined earlier on can deteriorate into a multitude of radical religious factions combating with each other with ever increasing zeal. Madison's cure of 'extending the sphere' – enlarging the political units in a way that each becomes more moderate with more people whose ideologies and preferences 'balance out' each other's – is supposed to deradicalise the local zeal and result

with no unique lifestyle worthy of protection: see AdminC (Jerusalem) 1888/09 *Edri v Minister of Building and Housing* (unpublished, 2009). The Supreme Court affirmed the decision on procedural grounds: AdminA 68/10 *Edri v Minister of Building and Housing* (unpublished, 2011).

[99] Schragger (n 6) 1815.

[100] Madison argues: 'The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State': Madison (n 10).

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in the moderation of extreme politics in light of the large number of people with opposing views throughout the federation that will balance each other and the restraining effect of federal elites.[101]

Sadly, there is evidence that the Israeli combination of empowering localities to regulate religion and allowing – if not forcing – religious-based residential segregation is spiralling Israel into increased religious and political radicalisation. Religious radicalisation of the ultra-orthodox Jewish communities has recently been documented. There are reports that segregation between men and women is beginning to seep from the public and religious spheres into the privacy of the homes.[102] As recently as 2011, the Supreme Court was confronted with another case resulting from the growing religious extremity of the ultra-orthodox community. In *Ragen v Ministry of Transportation*, a group of orthodox Jewish feminists challenged the practice of public transport providers to force gender segregation on buses that passed through ultra-orthodox neighbourhoods and localities: men were let in through the front door and allowed to sit at the front of the bus, while women had to enter through the rear door and sit at the back.[103] The Court invalidated the practice, ruling that it violated the principle of equality and the antidiscrimination law inasmuch as it was forced upon the passengers. However, if passengers were willingly entering these 'Kosher buses' (as they became known) through different doors and voluntarily sitting in different parts of the bus, there was nothing wrong in bus companies accommodating this desire.[104]

A thorough discussion of this extremely controversial decision and its problematic assumptions regarding voluntary behaviour in such circumstances exceeds the limits of this article.[105] What is important to note, however, is that such a radical – and new – practice could not have developed unless a fairly strict spatial segregation existed between ultra-orthodox Jews and the rest of society. Indeed, it is only because these communities live in such insular localities and neighbourhoods that bus companies can cater for this desire. In a more integrated residential environment, secular and moderate orthodox Jews would have revolted or simply disobeyed the

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[101] ibid.

[102] According to the report, in various ultra-orthodox communities families have started to separate between men and women even in small family gatherings, squeezing women around separate tables in the kitchen. Until very recently, this custom had never been observed and has very little religious basis: see Tamar Rotem, 'Separate Tables', Haaretz, 1 July 2011, available at http://www.haaretz.com/weekend/week-s-end/separate-tables-1.370695.

[103] HCJ 746/07 *Ragen v Ministry of Transportation* (unpublished, 2011). See Yair Ettinger, 'High Court: Gender Segregation Legal on Israeli Buses – But Only with Passenger Consent', Haaretz, 6 January 2011, available at http://www.haaretz.com/news/national/high-court-gender-segregation-legal-on-israeli-buses-but-only-with-passenger-consent-1.335567. For a supportive position of the practice, see Alon Harel, 'Benign Segregation: A Case Study of the Practice of Gender Separation in Buses in the Ultra-Orthodox Community' (2004) 20 South African Journal on Human Rights 64.

[104] *Ragen*, ibid. The Court therefore required that the buses put up signs which made it clear that entering and getting off the bus through different doors was not mandatory and neither were the seating arrangements. These signs, ruled the Court, will make it clear that it was illegal to force anyone to respect these practices. Many commentators have criticised this ruling, calling it naïve at best.

[105] Many have criticised this decision, calling it a dangerous compromise and caving in to the most radical sections of the ultra-orthodox community.

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practice. Lacking meaningful internal opposition, the spatial insularity of the community enables the most radical elements within it to push forward their extreme policies.

As Madison predicted, unchecked by strong central powers, extremism can spread like fire. Once given the legitimacy of the law, the logic of segregation infiltrates deeper, into other domains of life and into other social groups. Residential segregation is now observed in Israel not only between ultra-orthodox Jews and secular Jews: modern-orthodox Jews are starting to demand segregated environments,[106] as are secular Jews.[107] Baffled by these developments, courts are oscillating between condemning such segregationist tendencies and accepting them as legitimate, desirable or simply unavoidable.[108] The logic of segregation is particularly noxious where social solidarity collapses, and where the traditional majority seems to lose its majority status. According to recent data, secular Jews are losing their clear majority status, and religious Jews are becoming an extremely large minority. Indeed, it is no longer clear that a majority, demographically speaking, truly exists. In such an environment, every group begins to demand its own homogeneous spaces, from which it could exclude all the rest. Once such a dynamic of accelerated fragmentation begins, it becomes very hard to retract from it. And as time goes by, and segregation becomes the rule, people are less and less able to imagine that secular and religious individuals ever lived together or that they could ever share a space again.

4.2.2 Localisation and the Oppression of Minorities

The radicalisation just described does not end, however, in theological extremism and growing disparity between the different parts of the country. One of the greatest dangers stemming from such radicalisation is that it puts minorities who reside within religious communities at risk of greater abuse and infringement of their rights. The danger that lurks for 'minorities within minorities' has been theorised already by Madison, who was worried that radical religious factions would infringe people's property rights by coming up with '[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project'.[109] But not only property owners are at risk under a structure of religious decentralisation. Women, gays and lesbians, and other minorities are also jeopardised by too powerful religious localities. As we have seen above, some of the most radical religious plans indeed involve the subordination of women and of gays and lesbians.[110] Giving religious communities control and autonomy over their jurisdictions exposes minorities-within-minorities to risks of domination and abuse by the powerful within their community.[111]

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[106] There are many projects throughout Israel that are currently marketed to national-religious families and individuals only. While some rely on market and social dynamics, in other cases the exclusion is overt and explicit. See, for example, the website of 'Be'emuna', which prides itself on marketing its apartments only to the national-religious sector, available at http://www.bemuna.co.il/show.asp?id=5861 (in Hebrew).
[107] See AdminC 1888/09 *Edri* (n 98); AdminA 68/10 *Edri* (n 98); and discussion above at Section 4.1.4.
[108] ibid.
[109] Madison (n 10).
[110] See the discussion above of the *Jerusalem Open House* case at Section 3.1.3 above.
[111] Moller-Okin (n 9).

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4.2.3 Localisation as Racial Steering and Discrimination

Spatial segregation of religious communities can be turned into a mechanism of 'racial steering' which could be used in order to discriminate against racial or ethnic minorities. In the case of Israel, this risk is particularly high since, as I have already noted, religious distinctions overlap national ones. Instead of diverse and empowered communities, we might end up with minorities who are discriminated against on the basis of their places of residence. Exclusion on the basis of religion can thus serve as a guise for exclusion on the basis of race, ethnicity or nationality. For example, instead of explicitly excluding Arabs – a practice prohibited by law since the ruling in *Kaadan*[112] – companies adopt a policy of selling apartments only to 'Zionist-religious' buyers, thus ensuring that no Arab will be allowed to buy into the project. Surprisingly, this practice was affirmed by the District Court of Tel Aviv, in a highly contentious decision.[113]

Furthermore, in some cases, religion has been used to justify ethnic discrimination, such as the discrimination of Mizrahi Jews (Jews of oriental descent) in the education system.[114] Religious leaders claimed that the Mizrahi or 'Sepharadi' girls were spiritually/religiously 'inferior', thus justifying the separation between Mizrahi and Ashkenazi (Jews of European descent) girls in a religious school in an ultra-orthodox locality. The Supreme Court invalidated this repugnant practice (sending some of the parents to jail for failing to send their daughters to the integrated school), yet it was a telling example of the ways in which religion can serve as a pretext for racial and ethnic discrimination.

5. Conclusion: Where to go from Here? Some Preliminary Suggestions

The various negative outcomes of mandatory and induced segregation that I have just mentioned should not be understood, however, as reasons to entirely oppose the localisation of religion. Localising religion has advantages that could be retained by attempting to counter the harmful effects of the radical segregation and the separatist ideology that is currently underwriting it. In this article I will not specify the legal rules that should replace the existing ones, but I would like to broadly sketch several principles which might overturn some of the detrimental effects which the specific form of localisation of religion in Israel has had.

The first is that the starting point should indeed remain that local governments should be authorised to express the religious norms of their residents in a significant manner. As I demonstrated,

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[112] n 82.

[113] The Tel Aviv District Court recently held that a private development company was allowed to refuse to sell apartments to anyone who was not 'Zionist-religious'. The court ruled that there was 'nothing wrong in a group of people organizing in order to live next to each other to be able to lead their life according to their ways of life': AdminC 2002/09 *Saba'a v Israel Land Administration* (unpublished, 2010). An appeal to the Supreme Court was rejected since the project was already being constructed and the Court ruled that it was a 'done deal'. However, the Court made remarks which could be understood as expressing dissatisfaction with the District Court's ruling as well as with the practice: AdminA 1789/10 *Saba'a v Israel Land Administration* (unpublished, 2011).

[114] HCJ 1067/08 *Noar Kahalacha v Ministry of Education* (unpublished, judgment delivered on 6 August 2009).

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there are advantages that cannot be underestimated: the localisation of religion provides a *structural protection*, unmatched by any other judicially enforced rule, against the dominance and hegemony of one religion.

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

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

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

Combined, these very broad principles are aimed at creating more heterogeneous localities and neighbourhoods, which might begin the undoing of the radical segregation between different religious communities in Israel. The vision of 'pure communities' which was advanced through the localisation of religion needs to be replaced with a more integration-oriented vision.

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