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# Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence

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# LAW AND RELIGION IN ISRAEL AND IRAN: HOW THE INTEGRATION OF SECULAR AND SPIRITUAL LAWS AFFECTS HUMAN RIGHTS AND THE POTENTIAL FOR VIOLENCE

*S.I. Strong\**

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## INTRODUCTION

To many in the United States and elsewhere, Israel is a bastion of democracy, a stalwart outpost of liberal political ideals stranded among a number of politically and religiously volatile Arab nations whose primary intent is, or at least has been, to destroy the Jewish state and, with it, the West's only secure foothold in the Middle East. Iran, on the other hand, is commonly demonized as the fundamentalist Islamic theocracy that took the United States hostage in 1979 and currently threatens not only the Middle Eastern peace process, but the security of the entire region as it attempts to export revolutionary Islam to other nations. The two countries are seen not only as sworn enemies in a Middle Eastern Cold War, but also as diametrically opposed, religiously, culturally, and politically.

The truth, however, is that the two nations are not as different as they and others would like to believe. Both choose to define themselves primarily by their majority religion, and both incorporate traditional religious principles in the law of the State to a high degree. By doing so, both have come under pressure from international human rights watch groups as well as their own citizens on the question of whether the State's integration of law and religion violates the rights of citizens and/or increases the potential for violence within and between nations. While both countries have experienced religiously based violence and are the target of claims that certain groups' rights are not being respected, few legal studies have attempted to analyze how and whether these two events are related to each other or to the amount of religious-legal integration within the society in question.

The absence of any inquiry into the relationship between violence and infringements of religious rights may be due to the international community's historical emphasis on civil and political rights over other sorts of rights.<sup>1</sup> Although religious rights can be said to exist within the right to liberty, a first-generation civil right, they have also been categorized as a type of natural right.<sup>2</sup> Whatever their classification, the

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1. See R.J. Vincent, *The Idea of Rights in International Ethics*, in *TRADITIONS OF INTERNATIONAL ETHICS* 250, 255, 262 (Terry Nardin & David R. Mapel eds., 1992).

2. See Christine Loh, *The Vienna Process and the Importance of Universal Standards in Asia*, in *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* 145, 152 (Michael C. Davis ed., 1995) (stating religious rights are first-generation civil rights); see also Vincent, *supra* note 1, at 254 (discussing natural rights); *infra* notes 398-472 and accompanying text (describing various types of religious rights). But cf. ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 139 (1993) (stating freedom of religion is not a traditional natural right); Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26, 41 (Robert C. Tucker ed., 2d ed. 1978) (expressing the view

international community has seldom focused on the problems raised by religious rights, perhaps due to the common conviction that religious conflict is a thing of the past or an assumption that matters of religion are of only domestic or regional concern.

If, however, the international community abdicates its role in overseeing the enforcement of religious rights, there is little to prevent potential abuse on the part of the State.<sup>3</sup> Because most States myopically see their own religio-legal regimes as being unobjectionable,<sup>4</sup> the likelihood that even the most tolerant nation will perpetrate or permit infringements of various religious rights is high. Outside monitoring is especially critical in situations where States may act maliciously toward minority religions.

The problem does not end with mere infringements, however; equally troubling is the possibility that violations of religious rights may lead to violence.<sup>5</sup> As the use of international peacekeeping forces rises, outbreaks of domestic violence become less a problem of national security and more a matter of global concern. Threats to international peace and security also occur if advocates of religiously inspired violence seek to expand their activities beyond a single nation's borders. Because acts of religious violence cannot be considered a purely domestic issue, the international community needs to investigate ways to minimize violence before it occurs and should focus particularly on the link between violence and the infringement of religious rights.

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that civil and political rights are only those that revolve around participation in the political community of the State); Yu Haocheng, *On Human Rights and Their Guarantee By Law*, in HUMAN RIGHTS AND CHINESE VALUES, *supra*, at 93, 104 (discussing Marx's views on civil and political rights).

3. See CLAPHAM, *supra* note 2, at 107 (arguing that certain international bodies may remind States of their duties toward individuals, but that the primary responsibility for recognizing and protecting human rights falls on States).

4. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207 (1992).

5. History suggests that the infringement of religious rights can and will lead to domestic violence and international war. For example, religiously based violence has not only been used by States against dissident minorities, as was the case with the Spanish Inquisition, but also against nations that profess a different faith, as was the case with the Crusades. In addition, religious repression has led to many violent internal uprisings by beleaguered minorities. See Murray Forsyth, *The Tradition of International Law*, in TRADITIONS OF INTERNATIONAL ETHICS, *supra* note 1, at 23, 24-25. Although these constitute the classic examples of violence inspired by religion, such acts are not relegated to the ancient past; in fact, some commentators believe religio-legal violence is on the rise as religious nationalism becomes commonplace in the developing world. See MARK JUERGENSMEYER, THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE 153 (1993); Steven Erlanger, *U.S. Assails China Over Suppression of Religious Life*, N.Y. TIMES, July 22, 1997, at A1 (noting U.S. government's concern that "conflicts based on religion . . . are of increasing importance").

One way to approach this problem is to study the ability of different religio-legal regimes to protect religious rights and minimize violence through a comparative constitutional analysis. By looking at several different systems, practitioners and politicians can decide what methods are most successful and what elements can be successfully incorporated into their national laws.<sup>6</sup>

A comparative study is most useful when the countries compared are similar in all respects except for the variable being compared. For the most part, differences in history, politics, law, and culture make it impossible to find a perfect match in the real world, but value can be found in an imperfect comparison between two countries so long as the extent of other variables is known.

When approached from this perspective, Israel and Iran provide fascinating examples for study. First, both have experienced or are experiencing certain levels of internal violence based on claims that citizens' religious rights have been infringed. Second, both have been involved in international conflict (either formal, i.e., declared war, or informal, i.e., terrorism) based, at least in part, on religious concerns. Third, both nations incorporate a variety of religious principles into both the substantive law and the institutional structure of the State based on the claim that it is necessary in order to fully respect and accommodate the religious obligations binding on the party in power. Yet despite these similarities, the international community still considers the two nations as radically different, holding up one nation, Israel, as a model for other Middle Eastern states while citing the other, Iran, as the example of what might occur if the situation in the Middle East were to deteriorate. It is an interesting dynamic, not only for Middle Eastern scholars, but for anyone concerned with how States' treatment of religious rights affects peace and security.<sup>7</sup>

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6. The inherent value of the comparative legal method is discussed in John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545, 554 (1995).

7. Although this topic has always been considered important to scholars specializing in Islamic law because of the common perception that Islamic states are prone to religious violence, it is also becoming more important in the United States because of the rise of religiously based domestic terrorism. See Faye Ginsburg, *Saving America's Souls: Operation Rescue's Crusade Against Abortion*, in FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES, AND MILITANCE 557, 558 (Martin E. Marty & R. Scott Appleby eds., 1993) (noting that Operation Rescue, which has committed terrorist acts against abortion clinics, consists of religious Christians practicing "biblical obedience"). In fact, some scholars believe that the rise of pluralism causes an increase in the infringement of minority religious rights and, therefore, violence. See, e.g., Steve Bruce, *Fundamentalism, Ethnicity, and Enclave*, in FUNDAMENTALISMS AND THE STATE, *supra*, at 50, 65 (discussing fundamentalism in Northern Ireland). Others argue that religious pluralism often leads to States'

Because law and religion are by themselves complex cultural and historical issues, any study of the interaction between the two will be at least as complicated. If one is to understand both a State's current religio-legal regime and what reform measures are most likely to succeed there,<sup>8</sup> it is necessary to understand at least a little of the nation's history and majority religion.<sup>9</sup> Therefore, Part I of this article provides a brief sketch of the principles of the two majority religions at issue in this discussion and an overview of the history of both Israel and Iran. It explains why each nation has chosen to structure itself as it has and why the imposition of U.S.-style secularism would be an inappropriate method of dealing with the religio-legal conflict in the two societies.

Part II compares the fundamental or constitutional laws of the two nations by analyzing the provisions, policies, and practices most influenced by religion.<sup>10</sup> The first area of discussion is the structure of each government system. This analysis not only sets the legal framework for later analysis, but demonstrates how both Israel and Iran have brought religion into the very fabric of their legal institutions.

The second area of analysis in Part II focuses on the principles of sovereignty and constitutional interpretation utilized by each State. Familiarity with these concepts is necessary in order to learn which religious principles, if any, are incorporated into each nation's general legal environment. These principles, which are implicitly understood by members of the society, are often unstated in judicial opinions or legislative enactments and can confuse outside analysts who fail to understand the framework in which laws are created and interpreted by the State.

The third area of study involves personal rights. This section discusses what is often called "family law" and includes issues concerning

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privatizing religion and religious issues, see Robert E. Rodes, Jr., *Pluralist Establishment: Reflections on the English Experience*, 12 CARDOZO L. REV. 867, 878 (1991), which is encouraging to those who believe that secularized states are less likely to experience religiously inspired violence, but daunting to those who believe that the process of secularization can increase violence in some regions.

8. Because of differences in history and culture, the wholesale importation of another country's legal system should never be attempted. However, selective incorporation of various principles or procedures can be very useful if care is taken to identify those concepts that are most likely to fit into existing belief and behavior patterns in the adopting state.

9. See JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* 4 (Victoria Elliott trans., 1995).

10. Because Israel does not have a written constitution, this article will focus on a number of its foundational documents, including its Basic Laws, which are "fundamental in some ill-defined sense," MARTIN EDELMAN, *COURTS, POLITICS, AND CULTURE IN ISRAEL* 30 (1994), despite their lack of true constitutional status or clear superiority to other domestic legislation. See *infra* notes 168-71 and accompanying text (discussing status of Basic Laws in Israeli law).

marriage, divorce, abortion, and the rights of women, children, and homosexuals. The use of the term "personal rights" is conscious and is meant to convey the idea that many of the legal questions that fall under the "family law" rubric often have little to do with familial relationships per se and more to do with individual life choices. However, as shall be seen, the group rights approach to law currently utilized in both Israel and Iran may tend to negate the emphasis on individual rights and choice that is prevalent in the West.

The fourth area of consideration in Part II concerns education, an area vital to both the State and parents. Because both parents and the State see education as highly important, conflicts over the structure and form of education can become quite heated and can be among the most difficult to resolve.

After identifying and analyzing the laws themselves in Part II, this article discusses in Part III the extent to which Israeli and Iranian laws comply with international human rights conventions concerning religious rights. Since both Israel and Iran follow a group rights approach to law, Part III also considers whether Israel and Iran's religio-legal regimes can be legitimated by reliance on group rights theory. After identifying whether and to what extent the two States have infringed upon their citizens' religious rights, Part III addresses the question of whether these infringements tend to increase or decrease the potential for violence within and between societies.

The article concludes by discussing where each nation is heading in terms of religion and law and by offering suggestions as to what each nation, and indeed any nation, should do to create an optimal religious rights framework.

## I. HISTORY AND RELIGION: DEFINING THE MODERN STATE

### A. *Israel*

#### 1. Principles of Judaism

The ancient religion known as Judaism originated early in the first millennium B.C.,<sup>11</sup> and, through constant evolution, has developed into a very personal religion in which each individual constantly challenges

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11. See NORMAN F. CANTOR, *THE SACRED CHAIN: THE HISTORY OF THE JEWS* 19 (1994).

his or her faith.<sup>12</sup> Contrary to popular conceptions, pluralism is both accepted and encouraged in Judaism, at least within certain broad confines, and there is no single set of orthodox principles that all Jews must follow.<sup>13</sup> Nevertheless, there are some general parameters that define what it is to be a Jew.

The Jewish God, who is the only source of moral law, has provided the Jews with a unique value system that distinguishes between virtues and vices.<sup>14</sup> Within this moral framework, Jews are free to choose their life path; unlike Christianity, which teaches that the desire to sin is inherent, Judaism holds that sinning is a matter of choice.<sup>15</sup> The choices made during a person's life, however, affect his or her personal salvation since Judaism teaches that actions are the means by which a person is redeemed.<sup>16</sup>

The law governing these actions is called the *Halacha*, meaning "path" or "way."<sup>17</sup> The *Halacha* covers commercial and civil matters as well as religious matters, and formed the basis of the Jewish system of self-government during the time of the diaspora (exile from Israel).<sup>18</sup> Even today, there are Jews who live by the precepts of the *Halacha* in Israel and elsewhere.<sup>19</sup>

12. See HUSTON SMITH, *THE WORLD'S RELIGIONS: OUR GREAT WISDOM TRADITIONS* 300, 312 (1991) (noting that Judaism is less orthodoxy than orthopraxis); see also Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?* 30 SAN DIEGO L. REV. 903, 907-10 (1993).

13. See DAVID S. ARIEL, *WHAT DO JEWS BELIEVE? THE SPIRITUAL FOUNDATIONS OF JUDAISM* 4 (1995); SMITH, *supra* note 12, at 312.

14. See ARIEL, *supra* note 13, at 18, 60, 62.

15. See *id.* at 85.

16. See *id.* at 159. Religious salvation cannot be achieved through just any act; the highly specific actions that lead to redemption are called *mitzvot*, and are based on God's commandments and on various practices designed to implement God's will. See *id.* This approach is different than that found in Christian theology, which teaches that salvation comes through faith. See *id.*; WALTER H. CAPPS, *THE RELIGIOUS RIGHT: PIETY, PATRIOTISM, AND POLITICS* 214 (1994).

17. See ARIEL, *supra* note 13, at 161 (describing types of activities governed by the *Halacha*); see also Saul Lubetski, Note, *Religion and State: Does the State of Israel Provide the Forum for the Revival of the Jewish Legal System?* 26 N.Y.U. J. INT'L L. & POL. 331, 336-37 (1994) (stating that the *Halacha* is a "philosophy encompassing all phases of Jewish life").

18. See ARIEL, *supra* note 13, at 162; Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221, 224, 228-32 (1985).

19. See Ehud Sprinzak, *Three Models of Religious Violence: The Case of Jewish Fundamentalism in Israel*, in *FUNDAMENTALISMS AND THE STATE*, *supra* note 7, at 462, 463-64. During the last two centuries, however, when assimilation into European society required religion to become a private matter, most Jews stopped incorporating all aspects of the *Halacha* into their lives and began departmentalizing their religion into the private sphere of life. See ARIEL, *supra* note 13, at 171.



One of the many responsibilities required of the Jewish people under the *Halacha* is the duty to seek justice and create a lawful society,<sup>20</sup> which has led traditional Judaism to reject any separation between religion and government.<sup>21</sup> However, because diaspora Jews have historically lived under secular, non-Jewish rule, they have been forced to accept a de facto separation of temporal and religious authority and have created religiously acceptable ways of recognizing the authority of the State in which they live.<sup>22</sup>

Another key aspect of Judaism is the belief that the people of Israel are a chosen people.<sup>23</sup> This covenant is not between God and individuals, as it is in the Christian faith; it is between God and the collective Jewish people.<sup>24</sup> This emphasis on the collectivity is also evident in the Jewish belief that no single Jew will be resurrected until the Messiah arrives on earth, at which time all Jews will be collectively redeemed.<sup>25</sup>

In Jewish theology, the Messiah will be both a spiritual and a political redeemer who will create a better world for Jews and restore the true worship of God.<sup>26</sup> The rabbinic literature contains an elaborate set of theories about the messianic era, the most important of which concerns the in-gathering of the diaspora in the reconstituted State of Israel.<sup>27</sup>

The practice of Judaism does not require a clergy or religious hierarchy for daily religious life.<sup>28</sup> However, there is a strong tradition of

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20. See SMITH, *supra* note 12, at 286.

21. See Lubetski, *supra* note 17, at 338. Islam also promotes a unified approach to faith and politics, while Christianity at least initially advocated its separation. See SMITH, *supra* note 12, at 249; PAUL JOHNSON, A HISTORY OF CHRISTIANITY 99, 126 (1976) (discussing integration of religion and state in Roman Empire); Mark 12:17 ("Jesus said unto them, 'Give unto the emperor the things that are the emperor's, and to God the things that are God's.'").

22. See Chaim Povarsky, *Jewish Law v. the Law of the State: Theories of Accommodation*, 12 CARDOZO L. REV. 941, 943-45 (1991); see also Elon, *supra* note 18, at 223 (citing the doctrine of *dina de-malkhuta dina*, under which "the [civil] law of the land (the government under whose reign Jews lived) is valid law"). However, although secular laws are to be followed whenever possible, they are considered invalid if they conflict with Jewish ritual law. See *id.* (citing R. SIMEON DURAN, RESPONSA (TASHBEZ) 1:158).

23. See SMITH, *supra* note 12, at 307. Although this belief could invoke feelings of superiority or exclusivity that would lead to discrimination against non-Jews, Judaism requires tolerance of other religions. See ARIEL, *supra* note 13, at 109-10. According to Jewish belief, a Jew and a gentile (non-Jew) have the same status in God's eyes if the gentile renounces idolatry and observes the "seven commandments of the sons of Noah." *Id.* at 128 (listing the seven universal commandments).

24. See ARIEL, *supra* note 13, at 113.

25. See *id.* at 228-29; ROY A. ROSENBERG, THE CONCISE GUIDE TO JUDAISM 236-38 (1990).

26. See SMITH, *supra* note 12, at 297.

27. See ARIEL, *supra* note 13, at 223.

28. See *id.* at 126.

learned scholars or rabbis who interpret and explain the law as laid down by God.<sup>29</sup> The basic written instrument of the Jewish religion is the Torah, which is considered the written expression of God's message to the Jewish people.<sup>30</sup> The Hebrew Bible also contains a number of prophetic books (*Nevi'im*) and additional books called the Writings (*Ketuvim*).<sup>31</sup> The oral law (Talmud) supplements God's written message to Israel.<sup>32</sup> Only the Torah is divine in origin.<sup>33</sup>

Like most major religions, Judaism encompasses a number of different denominations. The three major branches of Judaism are Orthodox, Conservative, and Reform.<sup>34</sup> Orthodox Jews base their beliefs on the strict rabbinic tradition, while the other major denominations allow more relaxed definitions of what it means to be a Jew.<sup>35</sup> Other Jewish belief systems include Zionism and several types of ultra-Orthodoxy.<sup>36</sup>

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29. See SMITH, *supra* note 12, at 210–22.

30. See ARIEL, *supra* note 13, at 134. The Torah consists of the five books of Moses: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. See *id.*

31. See *id.* at 134–35.

32. See Lubetski, *supra* note 17, at 334. The Talmud has two parts, the Mishnah, which is the oral code of law up until approximately 200 A.D., and the Gemara, which is a written record of the commentaries and questions surrounding the Mishnah. See *id.* at 334–35.

33. See ARIEL, *supra* note 13, at 135.

34. See *id.* at 44.

35. See *id.* at 44–46, 175. For example, Conservative Jews often try to find a middle ground between relativism (the belief that all truth is relative) and fundamentalism. See *id.* at 156, 173. Reform Judaism often focuses on social reform and calls on Jews to solve the injustices of modern society. See *id.* at 119.

36. One ultra-Orthodox group is the Hasidim. See *id.* at 175. The most mystical sect of Judaism, the *hasidim* believe that union with God is possible through prayer. See *id.* at 42, 175; see also CANTOR, *supra* note 11, at 218 (noting origins and impetus of *Hasidism*). Another ultra-Orthodox sect is the *Haredim*, who are considered Jewish fundamentalists and comprise a small but highly vocal minority in Israel. See Sprinzak, *supra* note 19, at 463; see also ARIEL, *supra* note 13, at 175. Both the *Hasidim* and the *Haredim* are isolationists who reject the secular world. See *id.* They also share an interpretation of Judaism that requires strict observation of all aspects of Jewish law and rejection of Zionism. See Sprinzak, *supra* note 19, at 464.

One critical aspect of the *haredi* belief system is the idea that the Jews are still in exile and that Zionism and the existence of the political state of Israel are “meaningless at best and terrible sins at worst.” *Id.* Although some *Haredim* have grown to accept the State of Israel, others actively oppose it as a profanation of God's will. See *id.* The *Haredim* focus on the traditional conception of the Jewish people as a collective and believe that the existence of even a minority of sinners will forestall heavenly redemption. See *id.* at 465. Furthermore, the *Haredim* require strict uniformity among members of the group and will undertake various acts, including violent ones, in order to enforce community norms. See *id.* (outlining some of the methods used to ensure religious and societal conformity within the *haredi* community).

Political Zionism, which is a secular movement related to Judaism, is responsible for the creation and existence of the State of Israel.<sup>37</sup> The Zionist movement arose in the late 1880s as a response to the Jews' perceived failure to assimilate in Europe.<sup>38</sup> Although there is a strong secular element present in Zionism, there are a number of Jewish religious traditions within Zionism as well.<sup>39</sup> For example, religious Zionists believe that redemption can be achieved by a return to the Jewish homeland (Zion) and the creation of an autonomous Jewish state.<sup>40</sup> Although traditional Jewish theology also states that a return to Zion is part of the process of redemption, many Jews, especially the Orthodox, believe that the faithful must wait patiently for God to decide when Jews are to return to Zion.<sup>41</sup> Zionism, in direct opposition to traditional Judaism, encourages Jews to take the initiative and regain their homeland.<sup>42</sup>

## 2. Growth of Judaism

The modern State of Israel is only the most recent manifestation of the secular Jewish nation that was born in the eastern littoral of the Mediterranean in the first millennium B.C.<sup>43</sup> Although the Jewish nation has been subject to a wide range of political vicissitudes over the intervening centuries, the Jewish religion has managed to survive despite the lack of a firm political base.<sup>44</sup>

In 586 B.C., after the invasion of Israel by the armies of Babylon, the Jews were expelled from their homeland into Babylonia.<sup>45</sup> Their numbers grew in exile so that by the time of the birth of Jesus there were nearly six million Jews living in the Roman Empire.<sup>46</sup> Two hundred

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37. Cultural Zionism, which arose at approximately the same time as political Zionism, did not find the existence of a Jewish state an absolute necessity but did advocate the rebirth of Jewish culture both within that state (if it should come into existence) and within the diaspora. See ARIEL, *supra* note 13, at 122.

38. See DANIEL J. ELAZAR & JANET AVIAD, RELIGION AND POLITICS IN ISRAEL: THE INTERPLAY OF JUDAISM AND ZIONISM 6 (1981); see also CANTOR, *supra* note 11, at 235, 288 (discussing importance of Zionism in history of Judaism).

39. See ELAZAR & AVIAD, *supra* note 38, at 6-7.

40. See *id.*; see also CANTOR, *supra* note 11, at 292-99 (discussing rise and ideology of Zionism).

41. See Sprinzak, *supra* note 19, at 464.

42. See ROSENBERG, *supra* note 25, at 199; ARIEL, *supra* note 13, at 244.

43. See generally Lubetski, *supra* note 17, at 338-45 (outlining history of the Jewish people).

44. See SMITH, *supra* note 12, at 310-11 (crediting rabbis for survival of the faith).

45. See CANTOR, *supra* note 11, at 62, 79.

46. Judaism was, however, for the most part tolerated by the State. See *id.* at 61, 65; see also JOHNSON, *supra* note 21, at 6-7, 9, 11, 70 (discussing status of Jews in the Roman Empire); ALAN WATSON, THE STATE, LAW AND RELIGION: PAGAN ROME 62 (1992) (discussing the legal problems associated with Judaism in the Roman state).

years later, Christianity had established itself as Judaism's bitter rival, and the conversion of the Roman emperor to Christianity in the early fourth century A.D. assured the continuation of Christianity in the Mediterranean world and the religio-political persecution of Jews by Christian states.<sup>47</sup> From that time on, the Jewish population began to decline in numbers as well as in social and economic status.<sup>48</sup>

Over the course of the next sixteen hundred years, the Jewish people existed in various communities throughout the world. Because persecution and discrimination were often legally enforceable,<sup>49</sup> Jews attempted to assimilate into the culture of the nations in which they lived in order to escape discriminatory treatment.<sup>50</sup> This assimilation often required Jews to reject traditional ways of life, including public indications of faith such as distinctive dress and deportment.<sup>51</sup> In many cases, efforts to assimilate failed, forcing Jews to flee in order to avoid violent anti-Semitism.<sup>52</sup> However, the need to live in a hostile secular world while simultaneously retaining their own belief system led to a rich legal heritage that has influenced not only the lives of individual Jews but also the structure of Israel itself.<sup>53</sup>

### 3. Birth and Growth of the Modern Nation

Although various Zionist groups began calling for the formation of a Jewish homeland early in the twentieth century, it was not until November 29, 1947, that their dream acquired political legitimacy through

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47. See CANTOR, *supra* note 11, at 80.

48. See *id.* at 80–81. Periodically throughout history, individual Jews and Jews as a group have been held in high esteem for their talents as soldiers, scientists, artists, and lawyers. See *id.* at 121, 174. However, recognition of Jewish merit often lasts only as long as society prospers or has need of Jews' special talents; once austerity sets in, Jews are often seen as the cause of the problems and persecuted accordingly. See *id.* at 174–75; see also J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2330 (1997) (discussing how tolerance wanes in times of economic hardship).

49. See CANTOR, *supra* note 11, at 109–10. Most of this persecution came at Christian hands; Jews under Muslim rule often flourished. See *id.* at 124 (noting two centuries under Muslim political dominance seen as a Jewish "golden era"). But cf. *id.* at 125 (noting modern Arab nationalism has created tension between Jews and Muslims).

50. See ARIEL, *supra* note 13, at 171.

51. See CANTOR, *supra* note 11, at 247–48, 355. But cf. Elon, *supra* note 18, at 231–32 (claiming that medieval conceptions of statehood did not require total assimilation and thus allowed for Jewish judicial autonomy and creation of vast body of Jewish law).

52. See CANTOR, *supra* note 11, at 189, 232.

53. See generally Povarsky, *supra* note 22 (noting conflict between Jewish and secular law and the subsequent rise of various legal doctrines to address the tension between the two systems of law).

a resolution of the United Nations.<sup>54</sup> The nation itself was established on May 14, 1948.<sup>55</sup> Although it seems natural to think that the concept of a sovereign state would receive universal support from a people who faced rampant persecution and discrimination around the world, a number of religious Jews vigorously resisted the creation of a secular state throughout the 1910s, 1920s, and 1930s.<sup>56</sup> As discussed above, this opposition was due to the Orthodox belief that actively working toward establishing a Jewish homeland would be to work against God's will and God's time.<sup>57</sup> Therefore, some Jews not only objected to the creation of Israel but affirmatively worked against the Zionists to forestall the creation of any secular state.<sup>58</sup> Other Jews, although uncomfortable with the thought of a modern Jewish state, were willing to immigrate to Israel, but only if the new nation was ruled by Jewish religious law.<sup>59</sup>

During this period of internal conflict and indecision, more and more Jewish settlers emigrated from Europe to Palestine, bringing with them more moderate religious views and helping to bridge the gap between the secular Zionists and the Orthodox Jews who resided in Palestine.<sup>60</sup> In addition, the genocide committed in Europe during World War II helped convince a number of rabbis of the need for a Jewish state.<sup>61</sup> The Orthodox leaders were still concerned about what rights and protections would be given to religious Jews in a secular state, however, and forced the Zionists to set forth certain protections that would never be changed. The letter containing these promises is called the Status Quo Agreement since it continued certain compromises that had existed during, and in some cases prior to, British rule.<sup>62</sup> In addition, the Provi-

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54. See G.A. Res. 181, U.N. Doc. A/519, at 131 (1947) (calling for the simultaneous creation of two sovereign nations, one Jewish and one Palestinian; notably, the latter never came into being); ELAZAR & AVIAD, *supra* note 38, at 7-8; see also YEHOASHA FREUDENHEIM, *GOVERNMENT IN ISRAEL* 1 (1967).

55. See EDELMAN, *supra* note 10, at 7.

56. See ELAZAR & AVIAD, *supra* note 38, at 8-9.

57. See *id.*

58. To the Orthodox, the Zionists were not only blaspheming the word of God by acting against God's instructions to wait patiently for the Messiah's appearance, but were delaying the redemption of all Jews. See Sprinzak, *supra* note 19, at 464.

59. See ELAZAR & AVIAD, *supra* note 38, at 8-11.

60. See *id.* at 10; see also Basheva E. Genut, Note, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT'L L.J. 2120, 2131 & n.89 (1996) (discussing demographics of various waves of Jewish immigrants to Palestine).

61. See SMITH, *supra* note 12, at 314.

62. See CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, *RELIGION AND POLITICS IN ISRAEL* 31-32 (1984) [hereinafter LIEBMAN & DON-YEHIYA, *RELIGION AND POLITICS*]; Lubetski, *supra* note 17, at 346. From 1914 to 1948, Palestine was governed by Great Britain pursuant to the mandatory scheme created by the League of Nations. See Genut, *supra* note

sional Council of State that was responsible for the transition from British to Israeli sovereignty announced that "the law in force on the day of the British withdrawal would continue in force in the State of Israel as long as it was not inconsistent with 'the establishment of the State and its authorities.'"<sup>63</sup>

Although the founders of the State of Israel intended to draft a constitution immediately, fundamental political difficulties arose concerning the proper balance between Israel's religious and democratic nature.<sup>64</sup> When it became apparent that the immediate adoption of a constitution would cause extreme divisiveness during a time when the threat to national security was high, the Constituent Assembly charged with the task of drafting and implementing a constitution decided to suspend its work, change its name to the Knesset, and establish itself as the legislative body of Israel.<sup>65</sup> A year later, the Knesset adopted the Harari

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60, at 2131 n.83 (citing CHARLES D. SMITH, *PALESTINE AND THE ARAB-ISRAELI CONFLICT* 42-135 (1988) (discussing British Mandate in Palestine from 1914-48)). Essentially, the Status Quo Agreement required that (i) Saturday be set aside as the national day of rest; (ii) dietary restrictions (*kashrut*) be observed in all government-controlled kitchens; (iii) religious courts retain exclusive jurisdiction over marriage and divorce; and (iv) the existing religious education systems be recognized by the new nation. See LIEBMAN & DON-YEHIYA, *RELIGION AND POLITICS*, *supra*, at 32. In the fifty years since Israel was created, the State has generally upheld the principles contained in the Status Quo Agreement, although some unofficial exceptions have been made. See Timothy J. McNulty, *Israelis Focus on Religious Laws: Observant Jews Ready to Flex Political Muscle*, CHI. TRIB., June 4, 1996, § 1, at 1 (noting that although the Status Quo Agreement is not binding law, its principles are reaffirmed by every new Knesset, since it would be akin to political suicide to attempt to override the agreement). For example, restrictions on doing business during the Saturday Sabbath at first required the State to halt all public transportation on that day and forbid restaurants or movie theaters from operating from sundown on Friday to sundown on Saturday. See *id.* Now, movie theaters in Tel Aviv are open on the Sabbath and buses run regularly in the more secularized cities along the Mediterranean coast, although Jerusalem still maintains a ban on public transportation on Saturday. See *id.*

63. Andrew Treitel, *Conflicting Traditions: Muslim Shari'a Courts and Marriage Age Regulations in Israel*, 26 COLUM. HUM. RTS. L. REV. 403, 418 (1995) (quoting Law and Administration Ordinance, 1948, sect. 11, 1 L.S.I. 7, 9 (1948)).

64. See FREUDENHEIM, *supra* note 54, at 31-37; Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 588 (1996); Amos Shapira, *Why Israel Has No Constitution*, 37 ST. LOUIS U. L.J. 283 *passim* (1993). The other major problem facing the drafters was the tension between the desire to create a constitution that protected human rights and the need to invoke certain emergency powers in light of the imminent threat posed by neighboring Arab states to Israel's national security. See Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 314 (1995). Nevertheless, there was a considerable amount of work put into a draft constitution in the late 1940s, see generally FREUDENHEIM, *supra* note 54, at 8-37 (discussing draft constitution and decision not to implement a single document), and not everyone has given up hope. See EDELMAN, *supra* note 10, at 25-26 (noting that in 1987, scholars at Tel Aviv University Law School created a draft constitution *sua sponte*).

65. See Hofnung, *supra* note 64, at 588 (citing Transition Law, 1949, 3 L.S.I. 3 (1949)).

Resolution, which stated that the Israeli Constitution would be drafted gradually in the form of a number of "Basic Laws" that would eventually comprise the various segments of the final constitution.<sup>66</sup> Unfortunately, the problems that prevented the adoption of a constitution at the time Israel was founded, namely the ideological debate between religious and secular forces and the threat to national security, have continued unabated to the present day.<sup>67</sup>

Politically and ideologically, Israel continues to shift back and forth between its secular-Zionist and its religious heritage. Given the disparity of viewpoints concerning the proper relationship between religion and state that has existed since Israel's birth, this is not surprising. Some in Israel see their country as a secular state, while others see it as something very close to a Jewish theocracy.<sup>68</sup> As in the United States, a major question in these conflicts between state and religion is which issues are public and which issues are private.<sup>69</sup> A second but equally compelling question is the extent to which religious institutions should be granted autonomy.<sup>70</sup> The religious parties in Israel have long expressed views on these issues, but have recently found their voices are increasingly heard in the Israeli political realm<sup>71</sup> because the major parties' need to court the religious parties' support in order to form coalition governments. As a result of this political necessity, the religious parties have been able to push through much legislation in their favor.<sup>72</sup> It remains to be seen

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66. See 5 D.K. (Knesset Records) (1950) 1743, cited in Genut, *supra* note 60, at 2142; Hofnung, *supra* note 64, at 588.

67. See Barak-Erez, *supra* note 64, at 314.

68. See Storer H. Rowley, *Religious and Secular Visions of Israel Clash: Cultural Battle Over Street Pits Jew vs. Jew*, CHI. TRIB., Aug. 12, 1996, § 1, at 4; Christopher Walker, *Cabinet Minister Vows to Challenge Rabbis' Marriage Blacklist in Court*, TIMES (London), Dec. 23, 1994, at 7 (quoting leading Israeli columnist as stating "Israel bills itself as the only democracy in the Middle East, but in matters of personal status it is a theocracy, pure and simple").

69. See Charles S. Liebman, *Jewish Fundamentalism and the Israeli Polity*, in FUNDAMENTALISMS AND THE STATE, *supra* note 7, at 68, 75.

70. See Genut, *supra* note 60, at 2154; see also John Quigley, *Apartheid Outside Africa: The Case of Israel*, 2 IND. INT'L & COMP. L. REV. 221, 231-39 (1991) (discussing extent to which the State has abdicated its power to religious institutions).

71. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 81; see also Liebman, *supra* note 69, at 68. Some commentators argue that the recent increases in the ability and willingness of the civil courts to exercise their power of limited judicial review have led to the limitation of the power of the religious parties, since the parties realize that legislation is not immune from court review. See Hofnung, *supra* note 64, at 602. Others disagree, seeing the religious parties as continuing to push for whatever political gains they can get. See Judy Dempsey, *Challenge to Nature of Israeli State*, FIN. TIMES, Apr. 5-6, 1997, at 4.

72. See Barak-Erez, *supra* note 64, at 321-22 (claiming major parties have caved in to religious parties' demands, including those that were considered illegitimate in light of con-

whether the secular elements in Israeli society, which have been forced to accept a large number of political disappointments at the hands of religious parties, will be able to recoup or whether the religious elements will continue to control the Knesset and the nation at large.

## B. Iran

### 1. Principles of Islam

Like Judaism, Islam is an ancient religion originating in the Middle East. The founder of the faith and model of proper Muslim behavior, Muhammad ibn 'Abdullah, was born in Mecca in or about 570 A.D., and he is considered by Muslims to be the last of the series of prophets sent from God to the children of Adam.<sup>73</sup>

Theologically, Islam is based on the "five pillars" of faith, a social and ideological program that was created during the early days of the religion and continues to the present day.<sup>74</sup> The Quran, which is considered by Muslims to be the sacred, literal, and inerrant word of God, contains additional injunctions concerning proper behavior for believers.<sup>75</sup> For example, sexual conduct is strictly regulated, although polygamy is accepted for men.<sup>76</sup> The role of women is also strictly regulated.<sup>77</sup> In addition, the faithful must adhere to certain dietary rules, similar to those in Judaism.<sup>78</sup>

Many of these religious precepts are found in the *Shari'a*, or sacred law of Islam.<sup>79</sup> The *Shari'a*, which governs all aspects of a believer's life, consists not only of the Quran, but also the *sunna*, or customary

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siderations of public fairness and the clear will of the public, in order to retain religious parties' political support); Bernard Susser, *Toward a Constitution for Israel*, 37 ST. LOUIS U. L.J. 939, 941 (1993).

73. See HENRY MUNSON, JR., ISLAM AND REVOLUTION IN THE MIDDLE EAST 8-9 (1988); MALISE RUTHVEN, ISLAM IN THE WORLD 59 (1984); SMITH, *supra* note 12, at 223. The other Islamic prophets were Noah, Abraham, Moses, and Jesus. See *id.*

74. See DILIP HIRO, HOLY WARS: THE RISE OF ISLAMIC FUNDAMENTALISM 9-10 (1989). The five pillars of faith are the profession of faith, prayer, obligatory charity, the fast of Ramadan, and the pilgrimage to Mecca. See *id.*

75. See RUTHVEN, *supra* note 73, at 84. Muslims consider the sacred scriptures of Judaism and Christianity to be incomplete versions of God's message to the early prophets. See MUNSON, *supra* note 73, at 8.

76. See RUTHVEN, *supra* note 73, at 84-87. Although polygamy has been justified as a means of maximizing human procreation in a difficult physical environment, it also objectifies women as merely reproductive objects. See *id.* at 87. However, modern scholars read the Quran as advocating monogamy as the ideal. See SMITH, *supra* note 12, at 252.

77. See RUTHVEN, *supra* note 73, at 84-87.

78. See *id.* at 84-85.

79. See HIRO, *supra* note 74, at 24.



practice of Muhammad and his companions.<sup>80</sup> Islamic fundamentalists often claim that the *Shari'a* can be used as the cornerstone constitutional document of a modern nation-state,<sup>81</sup> but only one-tenth of the Quran actually deals with legal obligations, and the majority of those verses deal with religious matters.<sup>82</sup> Of the remaining eighty or so verses that can be classified as "legal," most concern women, marriage, and the laws of inheritance.<sup>83</sup>

However, Islam is more than a mere set of religious rules. Its main focus is on the creation of a "good society,"<sup>84</sup> with the classical formulation of the faith condoning any means to achieve that end, including holy war (*jihad*) and assassination.<sup>85</sup> Many model the idea of the "good society" on the community founded by Muhammad in Medina in 622 A.D., after he fled Mecca in the face of religious persecution.<sup>86</sup>

80. See MUNSON, *supra* note 73, at 9; RUTHVEN, *supra* note 73, at 152, 385; see also Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1022-23 (1991) [hereinafter Mayer, *Islam and the State*] (noting *Shari'a* consists of Quran and the examples of Muhammad). The *sunna* consists of various *hadiths*, or reports, concerning the words and deeds of Muhammad. See MUNSON, *supra* note 73, at 8-9.

81. See ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 95 (1990). An-Na'im also discusses the *Shari'a* as a constitutional model and suggests alternate approaches to Islamic constitutionalism. See *id.* at 75-100; see also Said Amir Arjomand, *Shi'ite Jurisprudence and Constitution Making in Iran*, in FUNDAMENTALISMS AND THE STATE, *supra* note 7, at 88, 102-03 (discussing constitution making in Iran); Mayer, *Islam and the State*, *supra* note 80, at 1054-56 (discussing An-Na'im's influence on future Islamic political thinking).

82. See RUTHVEN, *supra* note 73, at 148.

83. See *id.*

84. *Id.* at 98. It is this continual call to improve the world that has led to cyclical patterns of fundamentalist reform in Islamic nations. See *id.* at 29-30, 98; see also MUNSON, *supra* note 73, at 14; Hamid Algar, *Social Justice in the Ideology and Legislation of the Islamic Revolution of Iran*, in SOCIAL LEGISLATION IN THE CONTEMPORARY MIDDLE EAST, 64 INST. OF INT'L STUD. RES. SERIES 17, 22 (Laurence O. Michalak & Jeswald W. Salacuse eds., 1986). Notably, the creation of a good society does not require the conversion of unbelievers, but does require their adherence to the Muslim code of behavior. All Muslims do not adhere to an activist interpretation of Islam that requires creation of a good or Muslim society; there is also a passivist interpretation of Islam, similar to that in Judaism, that requires the patient acceptance of adversity and imperfection in the world as part of God's will. See MUNSON, *supra* note 73, at 14.

85. See RUTHVEN, *supra* note 73, at 63-64. Although fundamentalist Muslims support a literal interpretation of the Quran, thus requiring them to aspire to the creation of a worldwide Islamic state, see MUNSON, *supra* note 73, at 15, 37 (noting weakness of fundamentalist polemic), there are many Muslims who do not support the classical method of expansion of the Muslim world by force. See AN-NA'IM, *supra* note 81, at 9.

86. See MUNSON, *supra* note 73, at 11. This is commonly called the golden age of Islam, when justice, equality, and virtue flourished. See *id.* But see RUTHVEN, *supra* note 73, at 96 (noting that the Medina period was also one of the most bloody and contentious eras in Islamic history).

Initially, clergy were not an integral part of Muslim life, since the nature of the Quran lent itself to use by laypersons.<sup>87</sup> Because Islam involves no priestly mediation between God and humans, each individual must earn his or her own salvation, primarily by working to create an ideal Islamic society.<sup>88</sup>

Despite the fact that clerics are not a required part of Muslim religious life, they became more necessary over time as the science of religious jurisprudence, or *fiqh* (understanding), arose.<sup>89</sup> Islamic *fiqh* expands upon the *Shari'a* by explaining and interpreting the rules and teachings of Muhammad, and is comprised of four elements: the Quran, the *sunna*, the consensus of the community, and analogous reasoning.<sup>90</sup> Eventually, the consensus of the community was transformed into the consensus of the *ulama* (religious scholars who had become the official interpreters of the Quran).<sup>91</sup> However, even though consensus of the *ulama* can be a powerful indicator of accepted theological beliefs, pluralism is accepted in Islam.<sup>92</sup>

There are two major denominations within Islam. Sunni Muslims far outnumber Shi'a Muslims in the Islamic world, although Iran is predominantly Shi'a.<sup>93</sup> The primary theological difference between the two groups is that Sunnis consider Muhammad's first four successors to be the "rightly guided caliphs" and follow all four as teachers and interpreters of Islamic law and behavior.<sup>94</sup> Shi'as, on the other hand, follow only 'Ali, the fourth *caliph*.<sup>95</sup> Most Muslims in Iran belong to the "Twelver" branch of Shi'a Islam, in which a line of twelve pure and

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87. See RUTHVEN, *supra* note 73, at 105; see also MUNSON, *supra* note 73, at 29 (noting lack of clergy in Islam).

88. See RUTHVEN, *supra* note 73, at 98; SMITH, *supra* note 12, at 238, 240-41.

89. See RUTHVEN, *supra* note 73, at 144. Classical scholars believe that the *fiqh* found in the *Shari'a* is immutable once it has been ratified through consensus. See Mark Cammack et al., *Legislating Social Change in an Islamic Society—Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45, 48-49 (1996). Modernists believe that some types of change in *fiqh* are possible; however, this approach has not been universally accepted within the Muslim community. See *id.* at 49.

90. See RUTHVEN, *supra* note 73, at 154.

91. The power and prestige of the *ulama* varies within the different branches of Islam. See MUNSON, *supra* note 73, at 29. However, within the *ulama* there is no single, universally recognized religious hierarchy. See SANDRA MACKEY, *THE IRANIANS: PERSIA, ISLAM AND THE SOUL OF A NATION* 115-17 (1996).

92. See RUTHVEN, *supra* note 73, at 157.

93. See MUNSON, *supra* note 73, at 16; see also MACKEY, *supra* note 91, at 85 (noting that Iran became ninety-five percent Shi'a in the eighteenth century). Other countries with Shi'a majorities are Iraq and Bahrain. See MUNSON, *supra* note 73, at 16.

94. See MUNSON, *supra* note 73, at 17; HIRO, *supra* note 74, at 18 (discussing doctrinal differences between Sunnis and Shi'as).

95. See MUNSON, *supra* note 73, at 17-19.

sinless spiritual leaders, or *imams*, figure largely.<sup>96</sup> The first *imam* was the fourth Sunni *caliph*, 'Ali.<sup>97</sup> Twelver theology dictates that the twelfth, or "hidden," *imam* has not yet arrived on earth, but will appear during the end times.<sup>98</sup>

Other differences between the two denominations include Sunnis' detailed observance of law and ritual, which has been compared to the legalism found in Orthodox Judaism, and the general absence of clerical mediation between God and humans.<sup>99</sup> Shi'as, on the other hand, strongly emphasize the role of the *ulama* in their religious practices.<sup>100</sup> Midway through the eighteenth century, a number of Iranian *ulama* supported the idea that all Shi'as should be led by a religious scholar, or *mujtahid* (jurist), whose interpretation of Islamic law would be binding on his followers.<sup>101</sup> During the twentieth century, the *mujtahids*, who are believed to be the deputies of the hidden *imam*, began to be called *ayatollahs* (signs of God) after they had risen to a certain level of esteem within the religious community.<sup>102</sup> Occasionally, a cleric's extraordinary faith, knowledge of religious law, and character would lead to his being given the most authoritative religious designation in Shi'a Islam, that of the *marja'-i taqlid*, or "source of imitation" for all others.<sup>103</sup> Notably, none of these titles are conferred by a religious body. Instead, the masses acknowledge a cleric's authority and begin to call him by the new title; if a sufficient (but undesigned) number of leading clerics accept the popular acclaim as merited, the new title becomes fact.<sup>104</sup>

In addition to its reliance on the *ulama*, Shi'a Islam is marked by a world view that is distinctly different than that held by Sunnis. The Shi'a perspective, which has greatly influenced modern Iranian politics,

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96. See *id.* at 16.

97. See *id.* at 17-19.

98. See *id.* at 16. The belief that the return of the twelfth *imam* is imminent has given rise to many radical religious movements. See *id.* at 26.

99. See RUTHVEN, *supra* note 73, at 188; see also MUNSON, *supra* note 73, at 35 (stating that the contrast between Sunni and Shi'a Islam is analogous to the contrast between Protestantism and Catholicism). Popular Sunni Islam, however, emphasizes a larger role for clerics than the orthodox view does. See *id.*

100. See RUTHVEN, *supra* note 73, at 202.

101. See MUNSON, *supra* note 73, at 31. *Mujtahids* were vested with more than just spiritual authority; they also exercised social, economic, and political power. See RUTHVEN, *supra* note 73, at 225; see also MACKEY, *supra* note 91, at 110 (stating that since the seventeenth century, the leading Shi'a scholar has been considered the leader of Iranian society). Many *mujtahids* exist simultaneously in Iranian society, and each one's opinion is as theologically valid as another's; however, a *mujtahid's* opinion is often valued according to where he stands in a complex and unspoken religious hierarchy. See *id.* at 116.

102. See MACKEY, *supra* note 91, at 116; MUNSON, *supra* note 73, at 31.

103. See MACKEY, *supra* note 91, at 116; MUNSON, *supra* note 73, at 32.

104. See MACKEY, *supra* note 91, at 116.

views the world primarily in terms of suffering and the presence of evil.<sup>105</sup> Martyrdom and defeat at the hands of the unjust also figure largely in popular Shi'a belief.<sup>106</sup>

## 2. Growth of Islam

Every religion is a product of its time and culture. For example, Judaism first appeared during a time of polytheism and pessimism about the nature of life, the world, and the hereafter, and responded by establishing a monotheistic faith that focused on the positive aspects of life.<sup>107</sup> In contrast, Islam was born in an atmosphere of political conquest<sup>108</sup> and close identification with the State.<sup>109</sup> Because Islam views the early days of the religion as its "golden era," it continues to aspire toward the recreation of the political, religious, and territorial unity that marked that period.<sup>110</sup> However, although religio-legal unity might be a goal of some Muslims, it is not a necessary part of Islam, as Islamic political and religious institutions have retained their own separate identities over the centuries so that observance of religious law in most Islamic countries is independent of secular law.<sup>111</sup>

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105. See RUTHVEN, *supra* note 73, at 188. Because Shi'as, as a minority sect, consider themselves to be in a position of danger in a corrupt world, Shi'a theology permits believers to engage in *taqiyyeh*, or "dissimulation of the truth." MACKEY, *supra* note 91, at 109. Essentially, this doctrine allows Shi'as to deny their faith in a variety of ways, something that is forbidden in Sunni Islam, which considers any denial of faith to be apostasy. See *id.*; see generally Alison E. Graves, *Women in Iran: Obstacles in Human Rights and Possible Solution*, 5 AM. U. J. GENDER AND L. 57 (1996). Shi'a acceptance of *taqiyyeh* has led many foreign governments to suspect that Iranian proclamations regarding a multitude of government practices, including the renunciation of international terrorism, are nothing more than concealment of the truth. See MACKEY, *supra* note 91, at 109.

106. See RUTHVEN, *supra* note 73, at 188; see also HIRO, *supra* note 74, at 19 (noting Shi'a belief that "the true believer should not shy away from challenging the established order, with arms if necessary, if it has become unjust and oppressive even if the chances of overthrowing it are slender"); MACKEY, *supra* note 91, at 55-56 (noting that Shi'as idealize "the devotion, religious zeal, self-sacrifice, and strict adherence to Islamic principles originally set by Ali").

107. See ARIEL, *supra* note 13, at 19-20.

108. See RUTHVEN, *supra* note 73, at 89-90, 289. The medieval wars of conquest for which Islam is famous were undertaken more for political and economic reasons than religious ones; in fact, conversion of the conquered peoples was generally discouraged. See *id.* at 144. Nevertheless, conversion did often occur, although more for economic and social reasons than for religious ones. See *id.* at 145.

109. This may also be due to the fact that Muhammad held both spiritual and political roles during the religion's formative years. See AN-NA'IM, *supra* note 81, at 3; SMITH, *supra* note 12, at 249.

110. See MUNSON, *supra* note 73, at 11, 37-38.

111. See RUTHVEN, *supra* note 73, at 157-60, 226; see also HIRO, *supra* note 74, at 9 (regarding relationships of religion and government in Judaism, Christianity, and Islam).

Based on these facts, it is not surprising that the history of Islam is a political, as well as religious. After Muhammad's death in 632 A.D., the Muslim community had to find a successor, or *caliph*, to carry on the policies begun by Muhammad.<sup>112</sup> Although the religious ties of Islam had created a tenuous peace between the formerly warring tribes of Arabia, that peace would last only as long as the Islamic empire continued to turn its attention outward, to the acquisition of territory and wealth, rather than inward.<sup>113</sup> However, turmoil arose within the Muslim world immediately after Muhammad's death on the choice of a leader for the Muslim community.<sup>114</sup> A small but vocal group believed that 'Ali, Muhammad's cousin and son-in-law, should lead the nation and the faith, but he was passed over.<sup>115</sup> Although 'Ali did eventually lead the Islamic community, by then the rift between the two sects had become irreparable, and the faith split into two distinct denominations.<sup>116</sup>

Despite the existence of various theological disputes, expansion of the Muslim sphere of influence continued under Muhammad's successors until the tenth century A.D.<sup>117</sup> At its height, Islam's political power reigned throughout Arabia, the Middle East, northern Africa, Asia, and part of Europe.<sup>118</sup>

Even the most successful empires eventually decline, however, and in the end economic and political problems, in conjunction with the rise of Christian European powers, finally brought down the empire in the nineteenth century.<sup>119</sup> One factor that helped hasten Islam's political demise was the preeminence of tradition in the Muslim mindset.<sup>120</sup> This curtailed industrialization and the adoption of new technology in Islamic nations, thus allowing Western industrial powers to insinuate themselves in the region and establish a certain level of economic dominance.<sup>121</sup> Along with technological know-how, the Europeans brought Western-style ideas about politics and, through their economic policies, forced the Muslim world to accept permanent nation-states and monar-

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112. See MUNSON, *supra* note 73, at 17.

113. See RUTHVEN, *supra* note 73, at 92.

114. See MUNSON, *supra* note 73, at 17.

115. See *id.* at 16-17.

116. See *id.* at 17.

117. See SMITH, *supra* note 12, at 230; Sarvenaz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 HARV. INT'L L.J. 145, 167 (1992).

118. See SMITH, *supra* note 12, at 230-31.

119. See RUTHVEN, *supra* note 73, at 289-92, 298. By 1920, there were only six independent Muslim states remaining. See *id.* at 292.

120. See *id.* at 290.

121. See *id.*

chies, thereby creating an enduring legacy of tension and conflict between Western and Islamic ideas.<sup>122</sup>

The twentieth century has witnessed a revitalization of Islamic religio-political thought, as States with Muslim majorities have begun to act on their long-standing animosity toward and suspicion of the West.<sup>123</sup> Modernization and secularization have been seen not only as a form of cultural domination at the hands of Western powers, but as a threat to the Islamic way of life.<sup>124</sup> Muslim activists utilize political revolution and religious reform as a means of establishing societies that embrace cherished traditional values.<sup>125</sup> The challenge, of course, is to integrate traditional values with the needs of twentieth century life. Many Islamic nations, including Iran, continue to struggle to find a workable approach.<sup>126</sup>

### 3. Birth and Growth of the Modern Nation

The area now known as Iran was once part of the ancient Persian empire and retains an enduring allegiance to certain traditions and beliefs that originated in that great pre-Islamic civilization. For example, modern-day alliances between religion and state in Iran mirror similar relationships between Zoroastrian priests and Persian kings.<sup>127</sup> Similarly, the ancient Persians, like twentieth-century Iranians, often preferred to pursue a socio-political ideal that preserved justice and a sense of balance and order rather than a model that established guarantees of individual freedom.<sup>128</sup> Finally, and perhaps most importantly, both cultures relied on religious leaders to instigate calls for radical social change whenever political powers failed to adequately ensure that justice was done.<sup>129</sup>

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122. See *id.* at 292; see also Mayer, *Islam and the State*, *supra* note 80, at 1026–27 (describing effect of modern nation-states on Islamic ideology).

123. See Ann Elizabeth Mayer, *The Fundamentalist Impact on Law, Politics, and Constitutions in Iran, Pakistan, and the Sudan*, in FUNDAMENTALISMS AND THE STATE, *supra* note 7, at 110, 111 [hereinafter Mayer, *Fundamentalist Impact*].

124. See MUNSON, *supra* note 73, at 118–19.

125. See RUTHVEN, *supra* note 73, at 286, 353–54.

126. See Mayer, *Fundamentalist Impact*, *supra* note 123, at 110–12, 142–44 (discussing fundamentalist movements in three States); see also Mayer, *Islam and the State*, *supra* note 80, at 1030–47 (discussing Pakistan and Algeria); Adrien Katherine Wing, *Custom, Religion and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149, 150–51 (1994) (discussing efforts to improve the legal status of Palestinian women).

127. See MACKEY, *supra* note 91, at 29.

128. See *id.* at 24.

129. See *id.* at 35.

In terms of Persian-Iranian history, the advent of Islam is only a recent occurrence, for it was not until 651 A.D. that Muslim forces conquered the Iranian plateau.<sup>130</sup> The Muslim Arabs brought with them not only a new religion but a new culture, and although Arabic influences have intermingled with Persian sensibilities over the last 1350 years, they have never completely conquered the Iranian mindset.<sup>131</sup> As a consequence, battles have continually broken out between the secular-Persian forces in Iranian culture and Islamic elements. The country has enjoyed the most stability when neither religion nor secularism has had absolute control over society, but rather when moderation and balance between the two elements has prevailed.<sup>132</sup>

Iran existed as an undifferentiated part of Timur Lang, a Sunni-dominated empire, until the end of the fourteenth century, when the death of the reigning shah put the empire into disarray.<sup>133</sup> Shah Ismail, chief of the Safavid tribe, moved into the breach and adopted Shi'a Islam as the state religion, creating for the first time a distinctive Islamic Iranian nation.<sup>134</sup> Shah Ismail brought in *ulama* from neighboring territories to educate the people regarding their new religion, and the *ulama* and the Safavids fell into a symbiotic relationship wherein the clerics legitimized the Safavids' expansionist policies while receiving prestige and wealth in return.<sup>135</sup> Under this arrangement, the shahs wielded both secular and religious authority while the *ulama* simultaneously enjoyed a certain amount of power over secular government, since they could destabilize the monarchy and bring about its end simply by withdrawing their support.<sup>136</sup>

In fact, the *ulama* have successfully initiated secular reforms throughout Iranian history by defying the government whenever it exceeded its authority.<sup>137</sup> This monitoring function was vital to the proper functioning of Iranian society, since the absence of any institutionalized checks on the shah's power meant the *ulama* were the only ones who

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130. *See id.* at 47.

131. *See id.* at 49.

132. *See* HIRO, *supra* note 74, at 142.

133. *Id.* at 142.

134. *See id.* at 142-43.

135. *See id.* at 143.

136. *See id.*

137. *See id.* at 148; MACKAY, *supra* note 91, at 118. Some believe that the Iranian tradition of absolute monarchic power, when combined with the high degree of social control exercised by the *ulama*, has created a State in which it is difficult for Western-style democracy to flourish. *See id.* at 93, 100, 102, 106.

could protect the people from abuse by the government.<sup>138</sup> That is precisely what happened in the mid-eighteenth century, when lack of clerical support helped bring down the Safavid monarchy and bring the Qajars into power in 1785.<sup>139</sup> Independent clerical action was also responsible for the Tobacco Protest of 1891–92, in which the *ulama* banded together with intellectuals and nationalists to oppose trade concessions given by the shah to Britain.<sup>140</sup> The Tobacco Protest showed the Iranians how to mount an opposition campaign, and, in 1906, the *ulama* were again joined by secular interests in undertaking a constitutional revolution and demanding that Iran be free of European domination.<sup>141</sup>

The Constitutional Revolution of 1906 was premised, at least in part, on the *ulama*'s belief that reducing the shah's powers would increase their ability to manipulate the population.<sup>142</sup> Although the clerics may have been right, their lack of political acumen led them to accept the intellectuals' suggestion that the new constitution be based on a secular model, despite the claim by some *ulama* that the new government should be comprised of *mujtahids*.<sup>143</sup> The 1906 Constitution, which remained in force until 1979, contained various provisions regarding religion, including Article 1, which declared Twelver Shi'ism to be the state religion.<sup>144</sup>

138. See MACKAY, *supra* note 91, at 138 (noting, however, that in many cases the *ulama* were part of the system of government and therefore part of the problem).

139. See MUNSON, *supra* note 73, at 30 (discussing the end of Safavid dynasty); RUTHVEN, *supra* note 73, at 222–23 (commenting on rise of clerical power after Safavid fall from power and leading to the beginning of the Qajar reign).

140. See HIRO, *supra* note 74, at 148; MUNSON, *supra* note 73, at 41.

141. See HIRO, *supra* note 74, at 148; see also RUTHVEN, *supra* note 73, at 334–35. In many senses, the 1906 revolution was as much of a fundamentalist movement as the 1979 revolution. See HIRO, *supra* note 74, at 148–49; see also Nikki R. Keddie & Farah Monian, *Militancy and Religion in Contemporary Iran*, in FUNDAMENTALISMS AND THE STATE, *supra* note 7, at 511, 513 (noting similar emphasis on fundamentalist Islamic mores in both revolutions).

142. See HIRO, *supra* note 74, at 148.

143. See *id.* at 148–49; MUNSON, *supra* note 73, at 43–44. One reason the clerics wanted to institute an Islamic political framework was to limit the power of the people, based on their belief that sovereignty was passed by God to the hidden *imam*, and from there to the *mujtahids*, bypassing the people altogether. See HIRO, *supra* note 74, at 149. However, this was the minority position, and the 1906 Constitution expressly noted that "[s]overeignty is a trust confided (as a Divine gift) by the People to the person of the King." *Id.* (translating Article 35 of the 1906 Constitution). Although the clerics lost the battle over the issue of sovereignty, they did manage to force through the Supplementary Laws of 1907, which included a provision instituting a council of five *mujtahids* who were to veto all un-Islamic legislation. See MACKAY, *supra* note 91, at 150–51. However, this provision was never implemented because the constitutionalists refused to grant this much power to the clerics. See *id.* at 150. The idea arose again in 1979 and was successfully implemented at that time. See *id.* at 292–93.

144. See HIRO, *supra* note 74, at 149.



The year 1925 saw another change in Iran's political landscape, when an ambitious and successful military leader named Reza Khan was made shah by the *ulama*.<sup>145</sup> Interestingly, Reza Khan originally wanted to create a republic with himself as head but was opposed by the *ulama*, who believed that form of government to be too European.<sup>146</sup> The new shah took the name Pahlavi to demonstrate his allegiance to Iran's pre-Islamic past and promptly began modernizing the nation.<sup>147</sup> This program of modernization, which was undertaken with extraordinary rapidity, led to the alienation of the population, particularly the Shi'a clerics.<sup>148</sup>

Shah Reza's reforms included the separation of secular and religious law;<sup>149</sup> the requirement that judges have law degrees;<sup>150</sup> the compulsory attendance of both males and females in free public schools;<sup>151</sup> and the banishment of the religious veil, or *chador*, for women.<sup>152</sup> It was not only the substance of Shah Reza's reforms that caused problems; it was also the speed with which he pursued secularization since he did not give the public time to become accustomed to new ideas and practices.<sup>153</sup> By 1941, Shah Reza was so out of touch with his people that he was unable to command their allegiance, and was summarily deposed by British and Russian powers and replaced by his son, Muhammad.<sup>154</sup>

The new shah, who was only twenty-two when he assumed the throne, vacillated through the early years of his reign, but by 1962 had gained sufficient personal resolve to institute the White Revolution,

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145. See MACKEY, *supra* note 91, at 166–72; MUNSON, *supra* note 73, at 46–47; RUTHVEN, *supra* note 73, at 335.

146. See MUNSON, *supra* note 73, at 46–47.

147. See *id.* at 47–48; RUTHVEN, *supra* note 73, at 335. "Pahlavi" was the name of a language used in Iran before it became an Islamic state. See MUNSON, *supra* note 73, at 47.

148. See MACKEY, *supra* note 91, at 176–82; MUNSON, *supra* note 73, at 48–49; RUTHVEN, *supra* note 73, at 335.

149. See MACKEY, *supra* note 91, at 178 (noting shah's institution of a new civil code that restricted the applicability of the *Shari'a* in criminal matters and property law and limited the jurisdiction of low-level clerics to matters concerning marriage, divorce, and inheritance).

150. See *id.* at 178–79 (noting the resulting expulsion of most clerics from judiciary).

151. See *id.* at 179 (noting replacement of all religious and private schools with state secular schools).

152. See *id.* at 181; RUTHVEN, *supra* note 73, at 335. This decision, which was enforced by the military when necessary, was among the most controversial, since it violated all norms of female decency. See MUNSON, *supra* note 73, at 48 (noting that the Western equivalent would be to mandate women's appearing topless in public). In addition, the new shah mandated Western-style hats for men that interfered with prayer. See MACKEY, *supra* note 91, at 181; RUTHVEN, *supra* note 73, at 335.

153. See MACKEY, *supra* note 91, at 184.

154. See RUTHVEN, *supra* note 73, at 336.

which included various agrarian and privatization reforms.<sup>155</sup> After 1962, Shah Muhammad continued his father's policy of secularization by, among other things, granting women various rights, including the right to vote, and increasing literacy training for both genders.<sup>156</sup> It was at this time that the cleric Sayyid Ruhallah Khomeini gained national prominence from his opposition to the shah's reforms and his claim that the *mujtahid* must become involved in the whole of society, including politics, in order to emulate the Prophet.<sup>157</sup> Khomeini's activism resulted in his deportation, first to Turkey and eventually to Iraq, where he continued his battle against the shah unfettered by censorship laws that would have hindered his effectiveness had he remained in Iran.<sup>158</sup>

In retrospect, it seems strange that support for Khomeini crossed all social, gender, and educational lines, especially since many of his followers later came to regret supporting the revolution. However, Khomeini's calls for reform were assisted greatly during the 1960s and 1970s by the shah's simultaneous alienation of virtually the entire nation through his ineptitude, indecision, and inconsistency.<sup>159</sup> Eventually the shah realized that, like his father, he had become unable to rule his country, and his departure in January 1979 paved the way for Khomeini's triumphant return on February 1, 1979.<sup>160</sup> Khomeini immediately began efforts to create an Islamic nation and held a referendum on March 29 and 30, 1979, to decide whether Iran should be an Islamic republic.<sup>161</sup> The referendum passed by an overwhelming majority, and the Constitution that created the Islamic Republic of Iran was completed in November and ratified by popular vote on December 2 and 3, 1979.<sup>162</sup>

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155. See MACKEY, *supra* note 91, at 185, 211–12; RUTHVEN, *supra* note 73, at 339. Opponents to the White Revolution were not afraid to use violence and sparked Iranian reformers' belief in the use of violence as a means of overthrowing the government. See Keddie & Monian, *supra* note 138, at 516–17.

156. See MACKEY, *supra* note 91, at 261. Among the rights granted to women in the 1960s were the limited right to initiate divorce proceedings; the right to deny their husbands the ability to marry a second wife; and the right to retain custody of their children. See *id.* (citing 1967 Family Protection Act). The shah also banned the Shi'a practice of temporary marriage and raised the age of marriage for girls from nine to fifteen. See *id.*

157. See *id.* at 222–24; RUTHVEN, *supra* note 73, at 339; see also CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN preamble, reprinted and translated in 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1992) [hereinafter IRAN CONST.].

158. See MUNSON, *supra* note 73, at 55–56; see also RUTHVEN, *supra* note 73, at 340 (describing Khomeini's religio-political theories during his years in exile).

159. See MUNSON, *supra* note 73, at 95–104, 125–30.

160. See HIRO, *supra* note 74, at 169.

161. See *id.*

162. Cf. *id.* at 169, 173 (suggesting religious coercion and fear played a large role in passage of referendum).

In the early post-revolutionary years, the government, led spiritually as well as politically by Khomeini, mounted a vigorous and violent campaign to quell any opposition to the Islamicization of Iranian society.<sup>163</sup> Khomeini's true political bent came as a surprise to a number of his supporters, many of whom had believed him to be a more moderate leader.<sup>164</sup>

Since Khomeini's death in 1989, the nation has struggled to define itself. His social policies have been carried on by the Islamic Republic's second supreme religious leader, the Ayatollah Ali Khameni, but a series of presidents and legislatures have shown a reluctance or inability to pursue Khomeini's program of socio-religious reform to its logical extreme.<sup>165</sup> Some commentators see this as a relaxation of the stringent Islamic social controls instituted by Khomeini, while others believe that the revolutionary hardliners still hold considerable power and influence over the nation.<sup>166</sup> In addition, the unraveling economy has made the population ready for reform, which might come about at the hands of the incoming president, a political and religious moderate.<sup>167</sup>

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163. See MACKEY, *supra* note 91, at 272, 296-302.

164. See *id.* at 286-87.

165. See Kristin J. Miller, Note, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response*, 10 EMORY INT'L L. REV. 779, 784 (1996). Although Khameni succeeded Khomeini as religious leader, he was not awarded the title of *marja'-i taqlid*, and cannot therefore unite religious and political authority to the same extent Khomeini did. See Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT'L L. & POL'Y 375, 408 (1996). Some read this as demonstrating a movement toward separating religious and political authority and returning to the more traditional approach where the two powers are distinct rather than combined. See *id.* However, over the years Khameni has become more powerful and outspoken in his attempts to dictate the form of Iranian society and has, at times, successfully overwhelmed the more moderate President Hashemi Rafsanjani. See Robin Wright, *Silencing Ideas: The Crisis Within Iran's Theocracy*, L.A. TIMES, Dec. 31, 1995, at M2 [hereinafter Wright, *Silencing Ideas*]. It remains to be seen what the relationship between Khameni and Mohammad Khatami, who was elected president in 1997, will be.

166. See Mayer, *Islam and the State*, *supra* note 80, at 1041; see, e.g., Robin Wright, *Islam Rising: Ideology—Muslims Open Up To Modern World*, L.A. TIMES, Apr. 6, 1993, available in 1993 WL 2331092 [hereinafter Wright, *Islam Rising*] (describing a 1993 separatist reform movement in Iran, and Islam as a whole, similar to the 16th century Christian Reformation); Wright, *Silencing Ideas*, *supra* note 165 (noting move in 1995 back towards repressive social policies after making headway towards liberalization in some areas).

167. See Robin Wright, *In Iran, the Revolution Unravels*, L.A. TIMES, Dec. 2, 1994, at A1 [hereinafter Wright, *Revolution Unravels*]; see also John Daniszewski, *A Mullah with Open Mind, Khatami Won By Dint of Character*, L.A. TIMES, May 25, 1997, at A10 (noting the new president is moderate and has written extensively on modernization of Islam and the reconciliation of Islam and democracy).

## II. THE CONSTITUTIONS COMPARED

### A. Constitutional Structure

This article's first area of critical analysis focuses on the structure of government found in both Israel and Iran. Just as the structure of U.S. government says much about traditional American beliefs, so too does the structure of other nations' governments say much about their values and priorities. This is particularly true of Israel and Iran, who have both created political systems that institutionalize religion and perpetuate the inclusion of religious values in the State.

#### 1. Israel

As discussed above, Israel is among the few nations in the world without a written constitution which, of course, makes a constitutional analysis difficult. However, Israel has passed a number of Basic Laws that have been given pseudo-constitutional status because they are considered the preliminary chapters of what will eventually become the final constitution.<sup>168</sup> Basic Laws are not superior to any other type of enactment, however; all can be changed by subsequent legislation.<sup>169</sup> Only if a Basic Law contains an "entrenchment" provision will later Knessets be limited in their ability to pass acts contrary to that Basic Law.<sup>170</sup>

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168. See *supra* note 66 and accompanying text. Eleven Basic Laws have been enacted: Basic Law: The Knesset, 1958, 12 L.S.I. 85 (1957-58); Basic Law: Israel Lands, 1960, 14 L.S.I. 48 (1960); Basic Law: The President of the State, 1964, 18 L.S.I. 111 (1963-64); Basic Law: The Government, 1968, 22 L.S.I. 257 (1967-68); Basic Law: The State Economy, 1975, 29 L.S.I. 273 (1974-75); Basic Law: The Army, 1976, 30 L.S.I. 150 (1975-76); Basic Law: Jerusalem, Capital of Israel, 1980, 34 L.S.I. 209 (1979-80); Basic Law: Judicature, 1984, 38 L.S.I. 101 (1983-84); Basic Law: The State Comptroller, 1988, S.H. 1237; Basic Law: Freedom of Occupation, 1992, S.H. 1387; and Basic Law: Human Dignity and Liberty (sometimes called Human Dignity and Freedom), 1992, S.H. 1391. See EDELMAN, *supra* note 10, at 11 & 134 n.13 (listing the Basic Laws and their original dates of enactment). English translations of the Basic Laws are also available in 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1988, 1994) [hereinafter CONSTITUTIONS (ISRAEL)].

169. See Genut, *supra* note 60, at 2142-43.

170. See H.C. 148/73; Kaniel v. Minister of Justice, 27(1) P.D. 794, cited in Barak-Erez, *supra* note 64, at 326; Genut, *supra* note 60, at 2142-43 (noting that Knesset needs special majority in order to amend a Basic Law with an entrenched provision); Hofnung, *supra* note 64, at 594. However, the Basic Law: Human Dignity and Liberty, although not entrenched, contains a balancing test that must be employed whenever the Knesset attempts to infringe upon a right protected by it through subsequent legislation. It provides: "There shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required." Basic Law: Human Dignity and Liberty, § 8, 1992, S.H. 1391, translated in CONSTITUTIONS (ISRAEL),

In addition to the Basic Laws, several other documents have been interpreted to have a certain level of fundamental significance.<sup>171</sup> Perhaps the most important of these documents is the Proclamation of Independence, for although it “does not consist of any constitutional law,” the Israeli Supreme Court held in *Kol Ha'am Co. v. Minister of the Interior* that it is legally binding to the extent that it “expresses the vision of the people and its faith,” which requires the courts to “pay attention to the matters set forth in it when [they] come to interpret and give meaning to the laws of the State.”<sup>172</sup> The Proclamation of Independence is therefore considered legally binding, despite its containing language to the contrary.<sup>173</sup> In fact, based on the precedent set in *Kol Ha'am*, Israeli courts have relied upon the Proclamation of Independence to protect a number of civil and human rights not recognized in legislation.<sup>174</sup>

According to the Basic Laws, Israel consists of a parliamentary democracy,<sup>175</sup> with legislative power vested in the Knesset, the ruling parliamentary body.<sup>176</sup> The unicameral nature of the Knesset gives the legislature a high degree of power, especially when combined with the

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*supra* note 168. This provision will limit, to some extent, the ability of future Knessets to enact legislation contrary to this Basic Law. See Barak-Erez, *supra* note 64, at 327–28; Hofnung, *supra* note 64, at 595.

171. These include the Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3 (1948) [hereinafter Proclamation of Independence]; Law and Administration Ordinance, 1948, 1 L.S.I. 7 (1948); Transition Law, 1949, 3 L.S.I. 3 (1949); Law of Return, 1950, 4 L.S.I. 114 (1949–50); Law and Administration Ordinance (Amendment) Law, 1951, 6 L.S.I. 7 (1951–52); Knesset Members (Immunity, Rights and Duties), 1951, 5 L.S.I. 149 (1950–51); Women's Equal Rights Law, 1951, 5 L.S.I. 171 (1950–51); and World Zionist Organisation—Jewish Agency (Status) Law, 1952, 7 L.S.I. 3 (1952–53). English translations of these laws are also available in CONSTITUTIONS (ISRAEL), *supra* note 168.

172. H.C. 73/53, 87/53, *Kol Ha'am Co. v. Minister of the Interior*, 7 P.D. 871, 884, translated in 1 Selected Judgments of the Supreme Court of Israel 90, 105 (1948–1953); see also Genut, *supra* note 60, at 2147 (terming *Kol Ha'am* as the most important case in Israeli constitutional law); Treitel, *supra* note 63, at 406–07 (discussing the case).

173. See Treitel, *supra* note 63, at 407. But cf. Lubetski, *supra* note 17, at 347 (arguing that the Proclamation of Independence is not binding and carries no constitutional weight).

174. See *infra* note 187.

175. See FREUDENHEIM, *supra* note 54, at 40–41; Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1, 15 (1993). Israel recently changed its system of government from a classic parliamentary system in which the prime minister is designated by a parliamentary vote of confidence to a system whereby the prime minister is elected directly by popular vote. See Basic Law: The Government, 1992, S.H. 214; Susser, *supra* note 72, at 939 (discussing the new system).

176. See Basic Law: The Knesset, 1958, 12 L.S.I. 85 (1957–58); see also FREUDENHEIM, *supra* note 54, at 40–41; Lubetski, *supra* note 17, at 346. Unlike the U.S. electoral system, Israel's proportional representation system ensures that no vote is wasted and allows smaller parties to win seats in the Knesset. See Genut, *supra* note 60, at 2144 n.208 (citing ERVIN BIRNBAUM, *THE POLITICS OF COMPROMISE: STATE AND RELIGION IN ISRAEL* 39 (1970)).

generally limited powers of judicial review given to the courts.<sup>177</sup> Although this approach appears decidedly pro-majoritarian, minority religious parties have wielded most of the power in the Knesset in recent years due to the major parties' inability to form a government without them.<sup>178</sup>

The second branch of government is the executive and is headed by the president. The executive branch is considerably weaker than the legislative branch.<sup>179</sup> Elected by the Knesset, the president has little to do with the actual business of government and is entrusted with mostly ceremonial duties.<sup>180</sup>

The third branch of government, the judiciary, is the most interesting for purposes of this article. This is because the judiciary, unlike the legislative and executive branches, is not completely secular. On the secular side there exist several levels of courts, including district courts, magistrates' courts, military courts, and the Supreme Court.<sup>181</sup> The Supreme Court sits as an appellate court over the secular trial courts and the appellate decisions of the district courts, and in this second capacity acts as a High Court of Justice from which there is no appeal.<sup>182</sup> Although the Supreme Court is usually the court of last resort, it has virtually no power to intervene in matters reserved to the religious courts or to hear appeals therefrom.<sup>183</sup> However, the Supreme Court, when acting as the High Court, has overturned a few judgments of the

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177. See Barak-Erez, *supra* note 64, at 318 (noting the supremacy of Knesset means that courts can protect civil rights only against infringements of an administrative nature, not from oppressive legislation); Hofnung, *supra* note 64, at 589, 596.

178. See Barak-Erez, *supra* note 64, at 321–22, 347–48; Dempsey, *supra* note 71; see also EDELMAN, *supra* note 10, at 9–10 (discussing exceptionally high prominence of political parties in Israeli politics); Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 615 (1994) (noting general lack of counter-majoritarian checks on Knesset).

179. See Basic Law: The President of the State, 1964, 18 L.S.I. 111 (1963–64); FREUDENHEIM, *supra* note 54, at 41.

180. See Basic Law: The President of the State, 1964, 18 L.S.I. 111 (1963–64); EDELMAN, *supra* note 10, at 9.

181. See Basic Law: Judicature, 1984, 38 L.S.I. 101 (1983–84), art. 1; see also Treitel, *supra* note 63, at 408–11 (discussing jurisdiction of the different courts).

182. See Hofnung, *supra* note 64, at 589; Treitel, *supra* note 63, at 409–10.

183. See Basic Law: Judicature, 1984, 38 L.S.I. 101 (1983–84), art. 15; LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 38. One exception is when a party to a religious court proceeding raises a jurisdictional question at the first available opportunity; the Court may then order the religious court to abstain from hearing the case. See Treitel, *supra* note 63, at 410.

religious courts based on its ability to undertake administrative review of judicial organs.<sup>184</sup>

The Supreme Court is also severely limited in its ability to review primary legislation passed by the Knesset.<sup>185</sup> However, a high percentage of the laws in Israel consists not of primary legislation but of secondary legislation passed by administrative bodies to implement primary enactments.<sup>186</sup> These secondary laws are subject to judicial review by the Supreme Court and have provided the basis for a number of important precedents.<sup>187</sup> This is not to say that the Knesset cannot or has not subse-

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184. See Hofnung, *supra* note 64, at 591. For example, in one case, the High Court negated a ruling of the Grand Rabbinical Court that applied Jewish law in a case regarding the respective rights of a man and a woman to property upon divorce. See *id.* (discussing H.C. 1000/92, Bavli v. Grand Rabbinical Court, 48(2) P.D. 221). Normally this would be within the exclusive jurisdiction of the religious courts, but because the rabbinical court did not take into account the State's law granting women and men equal property rights upon divorce, the High Court held that the rabbinical court had acted outside its jurisdiction, and used its powers of administrative review to return the case to the rabbinical court with instructions. See *id.*; see also *Israeli High Court Favors Women's Rights*, CHI. TRIB., Feb. 8, 1994, § 1, at 6 (discussing Court's holding that "rabbinical courts must incorporate civil law in rulings"). In this way, the Court interpreted its own previous case law concerning equal property rights as binding on all other courts in the country. See Hofnung, *supra* note 64, at 591.

A similar case arose in a Muslim religious court in Israel. See Hofnung, *supra* note 64, at 591 (discussing C.A. 3077/90, Plonit v. Ploni, 49(2) P.D. 578); see also *infra* note 190 and accompanying text (explaining the legal basis for Muslim religious courts in Israel). This case involved an unmarried mother who sued a man for child support, alleging he was the father of her child. The man argued that because he was not the woman's husband, he could not be the father of her child, since under Islamic law paternity attaches only in the context of a legal marriage. See Hofnung, *supra* note 64, at 591. The Muslim court agreed, and the district court refused to overturn the decision on the grounds that religious courts have exclusive jurisdiction over family law matters. See *id.* The High Court disagreed with the district court's interpretation of jurisdiction and distinguished between paternity under religious law and paternity under civil law. See *id.* Although the Israeli civil courts cannot declare a man to be the father of a child under religious law, they can investigate paternity in order to establish responsibility for child support payments, since the civil law regarding child support is purely secular and makes no distinctions on the basis of religion. See *id.* The High Court therefore ordered the defendant to undergo a tissue examination in order to determine whether he was in fact the child's father. See *id.*

Together, these two cases appear to indicate that although the religious courts retain significant discretion to rule according to their own religious laws, the State has not absented itself completely from family law matters. See *id.* Instead, these cases suggest that individuals have some recourse to the civil courts when certain rights are denied to them by their religious law. See *id.*

185. See Goldstein, *supra* note 178, at 610; Hofnung, *supra* note 64, at 588-89.

186. See Goldstein, *supra* note 178, at 610.

187. In addition, the courts had found an inherent power to review certain unenumerated civil rights even prior to the implementation of the 1992 amendments to the Basic Law: Judiciary, which slightly expanded the Court's review powers. See Barak-Erez, *supra* note 64, at 316-17; Genut, *supra* note 60, at 2146-47; Goldstein, *supra* note 178, at 605 (noting human rights in Israel "have been protected almost exclusively by judge-made law"); Netanyahu, *supra* note 175, at 13. Many of these cases were based on the judicial presumption that

quently enacted primary legislation specifically overruling Supreme Court decisions; however, many of the principles underlying those decisions still stand and have led the Supreme Court to be considered the guardian of the rule of law in Israel.<sup>188</sup>

Religious courts in Israel hold considerable power, including exclusive jurisdiction over issues concerning marriage and divorce and concurrent jurisdiction with the civil courts over other matters of personal status, including inheritance, legitimation, guardianship, and maintenance.<sup>189</sup> There are four recognized religions in Israel (Judaism, Christianity, Muslim, and Druze), and each has its own judiciary and system of law based on its religious traditions.<sup>190</sup> In Israel, everyone must have some sort of religious affiliation because without such an affiliation, a person cannot marry or divorce.<sup>191</sup> Rabbinical courts exercise exclusive jurisdiction over all Jews and apply *Halachic* law, regardless of whether the persons before them practice or believe in the tenets of Judaism.<sup>192</sup> Similar strictures bind persons of other religions to their respective religious courts.<sup>193</sup>

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because Israel was founded on democratic values, as illustrated by the Proclamation of Independence, the Court should recognize such unwritten rights as freedom of expression, freedom of demonstration, freedom of movement, freedom of association, freedom of property, and procedural due process. See Barak-Erez, *supra* note 64, at 316–17 (noting rights recognized by the Court essentially encompass those recognized by the international community as classic human rights); Genut, *supra* note 60, at 2146–47 (noting Court's reliance on H.C. 73/53, 87/53, *Kol Ha'am Co. Ltd. v. Minister of Interior*, 7 P.D. 871, in protecting unwritten rights). Freedom of religion and conscience are included among these unwritten rights. See H.C. 262/62, *Peretz v. Chairman, Local Council and Inhabitants of Kfar Shmaryahu*, 16 P.D. 2101, 2116, *translated in* 4 *Selected Judgments* 191, 207 (1961–62). These lines of cases are considered to be Israel's unwritten constitution. See Barak-Erez, *supra* note 64, at 317.

188. See Goldstein, *supra* note 178, at 613; Netanyahu, *supra* note 175, at 2.

189. See EDELMAN, *supra* note 10, at 52; Lubetski, *supra* note 17, at 346.

190. See Lubetski, *supra* note 17, at 346; Treitel, *supra* note 63, at 411–12. This system, which is called the *millet* system, was first implemented during the Ottoman Empire, when religious minorities, including the Jewish community, were given the right to decide issues of personal status in accordance with their religious traditions. See Genut, *supra* note 60, at 2135 (citing Izhak England, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 196 (1987)).

191. See Lubetski, *supra* note 17, at 346–47. As a result of this approach, there is no such thing as civil marriage in Israel. See *id.* at 368–70; cf. Jean-Jacques Rousseau, *On Social Contract or Principles of Political Right*, in ROUSSEAU'S POLITICAL WRITINGS 84, 173 n.8 (Alan Ritter & Julia Conaway Bondanella eds., 1988) (arguing that since marriage is a civil contract, religion should not hold an exclusive claim on the right to perform marriages).

192. See Lubetski, *supra* note 17, at 346, 348. Because jurisdiction was vested in the rabbinical and other religious courts by the Knesset, a secular body, religious law is imposed on Israelis not by virtue of their individual religious leaders, but by the State. See Genut, *supra* note 60, at 2151 (citing Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. 139(1) (1952–53)).

193. For example, Muslim courts have jurisdiction over matters of personal status for all Muslims, be they Israeli citizens or foreigners subject to Muslim religious courts in their



If a question arises as to whether a case falls within the exclusive jurisdiction of a religious court, the parties are referred to a special tribunal consisting of two Supreme Court justices and the president of the highest court of the relevant religious community.<sup>194</sup> If an action involves persons of different faiths, the president of the Supreme Court decides which court system has jurisdiction.<sup>195</sup> In cases where consent is needed in order to apply religious law but consent is not given, the religious courts apply legislation passed by the Knesset.<sup>196</sup> Judgments arising out of the religious courts are enforced by the civil courts, although the chief execution officer of the civil court may refuse to enforce a judgment if it appears as if the religious court exceeded its jurisdiction or acted contrary to natural justice.<sup>197</sup>

## 2. Iran

Unlike Israel, Iran does not claim to be a secular state. Instead, Iran proclaims itself as unabashedly Muslim in both a practical and legal sense,<sup>198</sup> and it has often been said that Iran is less a republic than a theocracy.<sup>199</sup>

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home countries. See Treitel, *supra* note 63, at 412; see generally EDELMAN, *supra* note 10, at 73–88 (discussing treatment of Israelis in Muslim courts). Muslim courts are split into several denominations. See Treitel, *supra* note 63, at 414–15. The Christian religious courts are spread among the recognized Christian communities and have exclusive jurisdiction over marriage, divorce, and alimony for Christians. See Treitel, *supra* note 63, at 412; see also EDELMAN, *supra* note 10, at 3 (describing Christian courts). Druze courts also have exclusive jurisdiction over marriage and divorce, and over inheritance and personal status issues by consent. See Treitel, *supra* note 63, at 413; see generally EDELMAN, *supra* note 10, at 89–99 (providing background on Druze courts). Qualifications for judges in the rabbinical and Muslim courts are set by statute; Christian courts are free to organize themselves and appoint judges without government interference. See Treitel, *supra* note 63, at 412.

194. See Treitel, *supra* note 63, at 413.

195. See EDELMAN, *supra* note 10, at 1.

196. See *id.* at 53; see also Treitel, *supra* note 63, at 415 (discussing application of law in context of Muslim courts) (citing Aharon Layish, WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE: A STUDY BASED ON DECISIONS OF THE SHARI'A COURTS IN ISRAEL 4 (1975)).

197. See Treitel, *supra* note 63, at 413 (citing HENRY E. BAKER, THE LEGAL SYSTEM OF ISRAEL 209–10 (1968)).

198. See IRAN CONST. arts. 1–2; see, e.g., *id.* art. 4 (“All civil, penal[,] financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations.”). As in the 1906 Constitution, Twelver Shi’ism is named the official sect of the country, although other schools of Islamic thought are given equal dignity under the law. See *id.* art. 12; HIRO, *supra* note 74, at 148–49.

199. See Mayer, *Islam and the State*, *supra* note 80, at 1039. The actual form of government is called the *vilayat-i-faqih* or “guardianship of the theologian jurisconsult.” Bahar, *supra* note 117, at 147; see also RUTHVEN, *supra* note 73, at 341 (discussing leadership of the *faqih*).

Despite the constitutional claim of creating a distinctively Islamic state, however, the structure of the Iranian government actually incorporates a number of Western political norms.<sup>200</sup> First, the preamble of the Constitution claims to allow "participation by all members of society at all stages of the political decision-making process."<sup>201</sup> Although in practice the Iranian people have very little political power because the clerics can overrule legislation based on the supremacy of religious law, this provision sounds suspiciously similar to the Western doctrine of universal suffrage, a concept alien to both traditional and contemporary Muslim ideals.<sup>202</sup>

The Constitution also provides for the formal separation of the various branches of government, another Western concept.<sup>203</sup> However, functional separation may not be accomplished due to Iran's unique separation of powers. For example, the first branch of government, that of the executive, is headed by the president, who is elected by an absolute majority of the popular vote.<sup>204</sup> Although the president is given extraordinary powers so that he (or, theoretically, she) may act "efficiently and swiftly in the fulfilment of [his or her] administrative commitments,"<sup>205</sup> the position is not as independent as it may seem since the Constitution requires that all candidates for the position be approved by the Council of Guardians.<sup>206</sup> Because the Council of Guardians will not approve those whose religious or political views vary too widely from its own, the president must, in actuality, be part of the inner circle

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200. See Bahar, *supra* note 117, at 155 ("[T]he Constitution relies on the Western concepts of constitutional government and popular elections to secure the expression of popular will and the government of representative bodies."). For example, the Constitution is written in a Western style and may have been based in part on the 1958 French Constitution. See Mayer, *Fundamentalist Impact*, *supra* note 123, at 118.

201. IRAN CONST. preamble.

202. See RUTHVEN, *supra* note 73, at 154-55 (discussing the doctrine *ijma* (consensus), under which the views of the clerics rather than those of the people receive primacy; "*ijma* [does] not imply democracy in any modern application of the term"). One commentator has noted that Iran has transformed the Western notion of popular sovereignty into a new Islamic doctrine, that of divine sovereignty. See Mayer, *Islam and the State*, *supra* note 80, at 1036-37.

203. See IRAN CONST. art. 57; David A.J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 15 (1993).

204. See IRAN CONST. art. 117.

205. *Id.* preamble.

206. See *id.* arts. 99, 118; Robin Allen, *Iran Votes Under Stern Gaze of Clerics*, FIN. TIMES, May 23, 1997, at 3 (noting 234 of 238 potential candidates, including all nine female candidates, failed to pass this requirement in the 1997 election); see also MACKEY, *supra* note 91, at 299-300 (stating president has little power in Islamic Republic).

of Iranian power politics.<sup>207</sup> The Constitution also implies a de facto, if not a de jure, requirement that the president be Shi'a Muslim by instituting a presidential oath of office in which the president-elect promises to "guard the official religion of the country," dedicate him or herself to the "propagation of religion and morality," and "follo[w] the Prophet of Islam and infallible Imams."<sup>208</sup>

The legislature, which is called the *Majlis* or Consultative Assembly, makes up the second branch of government.<sup>209</sup> Again, those who seek reform will find it difficult to do so from within the *Majlis*, since its members must take an oath of office similar to that of the president.<sup>210</sup> However, unlike the presidential oath, the legislative oath specifically recognizes the possibility that some members of the *Majlis* may not be Muslim.<sup>211</sup> Although this appears to be quite progressive in a nation that prides itself on its adherence to Islamic law in all things, there is little chance that persons of minority religions will ever gain significant influence in the Iranian legislature, both because they are such a small minority in the nation and because it is doubtful that they will ever gain more than the four seats that are reserved for Christians, Jews, and Zoroastrians.<sup>212</sup>

Unlike in Israel, however, the legislature is not the predominant branch of government in Iran. In fact, the *Majlis*' ability to act is severely limited. First, the *Majlis* is restricted by virtue of the State's foundation upon Islamic principles that are considered comprehensive.<sup>213</sup> Under that approach, the *Majlis*' primary function is to interpret Islamic principles that already exist and not to create new laws except on those

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207. See IRAN CONST. art. 115 (requiring presidential candidates not only to be pious but also possessed of a "convinced belief in the fundamental principles of the Islamic Republic of Iran and the official *madhhab* [adopted policy; usually applied to *fiqh* jurisprudence] of the country"). By requiring presidential candidates to support the "official *madhhab* of the country," *id.*, the Constitution ensures a continuation of the religio-political status quo.

208. *Id.* art. 121; see Mayer, *Islam and the State*, *supra* note 80, at 1018 (discussing to what extent Islamic leaders must be religious conformists); see also IRAN CONST. art. 115 (requiring president to follow official *madhhab* of country).

209. See IRAN CONST. art. 58.

210. See *id.* art. 67 (requiring members of the legislature to swear to protect the "sanctity of Islam" and to "defend the Constitution").

211. See *id.* ("Members belonging to the religious minorities will swear by their own sacred books while taking this oath.").

212. See MACKEY, *supra* note 91, at 343.

213. See Bahar, *supra* note 117, at 149; see generally IRAN CONST. preamble.

subjects upon which the *Shari'a* is silent.<sup>214</sup> Second, as shall be seen, the *Majlis* is subject to the oversight of the clerical elite.<sup>215</sup>

The third branch of conventional government, the judiciary, is charged with the task of enforcing Islamic principles and ideological conformity within the Islamic Republic.<sup>216</sup> The courts of justice are operated "in accordance with the criteria of Islam, and are vested with the authority to examine and settle lawsuits, protect the rights of the public, dispense and enact justice, and implement the Divine limits."<sup>217</sup> As Iran supports a literal interpretation of Islamic law, judges have, in the past, imposed certain Quranic sentences such as death by stoning for those guilty of adultery.<sup>218</sup> Notably, there is no requirement that judges be trained as lawyers; in fact, in the early days of the Republic, most judges were clerics who adamantly supported Khomeini's policies.<sup>219</sup> Since that time, however, there has been some moderation in the system, and some hardline judges have been quietly removed and replaced.

The most important aspect of Iranian government is its unique fourth branch of government. According to the Constitution, all governmental bodies are subject to the oversight of the Council of Guardians,<sup>220</sup> whose purpose is to "prevent any deviation by the various organs of State from their essential Islamic duties."<sup>221</sup> This system of

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214. This approach is consistent with the pre-modern approach to lawmaking, which requires believers to interpret existing law, not create new law. See Mayer, *Islam and the State*, *supra* note 80, at 1022.

215. See *infra* notes 220–33 and accompanying text.

216. See IRAN CONST. preamble.

217. *Id.* art. 61.

218. See Graves, *supra* note 105, at 57. Apostasy is also considered by some to be a capital crime. See Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, 10 EMORY INT'L L. REV. 139, 149 (1996) [hereinafter Arzt, *Religious Human Rights*]; Chase, *supra* note 165, at 396–99; Erlanger, *supra* note 5 (noting four Baha'is are currently imprisoned for apostasy and have been given the death sentence).

219. See IRAN CONST. (noting judges must have "meticulous knowledge of the Islamic laws").

220. See *id.* preamble (noting that "the exercise of meticulous and earnest supervision by just, pious, and committed scholars of Islam . . . is an absolute necessity"); *id.* art. 4 (stating that the Council of Guardians will ensure that all laws correspond with Islamic principles); *id.* art. 57 (mandating other branches of government operate under the supervision of the Council of Guardians and Supreme Jurisprudent). Six of the twelve members of the Council of Guardians are selected from among the leading *fuqaha*, or clerical elite; the other six are composed of Muslim jurists elected by the *Majlis*. See *id.* art. 91; Bahar, *supra* note 117, at 157; MACKAY, *supra* note 91, at 292–93; see also Mayer, *Islam and the State*, *supra* note 80, at 1040–41 (discussing changing role of the Council of Guardians vis-à-vis other branches of government); RUTHVEN, *supra* note 73, at 341 (discussing Khomeini's view of the *faqih*).

221. IRAN CONST. preamble. For example, if any piece of legislation is not in accordance with Islamic principles, the Council returns it to the *Majlis* for review. See *id.* arts. 58, 91, 94, 98; Bahar, *supra* note 117, at 157.

clerical oversight of secular government puts into effect the traditional religious notion that the *faqih* is the proper interpreter and implementor of the *Shari'a* and the rightful governor during the period of the hidden *imam*.<sup>222</sup> However, Iran departs from past practices by extending the claim of the *faqih* beyond mere spiritual authority into a mandate to rule, a move that breaks sharply with Shi'as' previous acceptance of political authority.<sup>223</sup> Because the Council of Guardians is given the power to veto any law it deems to contradict the laws of Islam,<sup>224</sup> the clerics of Iran are, in effect, running the country.

However, there is yet another layer of clerical review of state action in Iran. According to Articles 5 and 57 of the Constitution, the Council of Guardians is itself under the supervision of the single most respected *faqih*, who is titled the Supreme Jurisprudent.<sup>225</sup> The Constitution establishes the Supreme Jurisprudent as uniquely infallible and requires Iranians to submit to his political authority as part of their religious obligation.<sup>226</sup> Unsurprisingly, Khomeini held the position of Supreme Jurisprudent until his death in 1989.<sup>227</sup>

In 1988, what was once a merely supervisory role became an absolute guardianship by the clerical elite. At that time, Khomeini transformed the system of *vilayat-i-faqih* to the *vilayat-i-mutlaqa-yi-faqih*, claiming that the change was both due to and legitimated by necessity.<sup>228</sup> The transformation was simple but extreme. During the first nine years of the Republic, Iran was governed by two sources of law:

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222. See Bahar, *supra* note 117, at 151–52.

223. See RUTHVEN, *supra* note 73, at 341; see also MACKEY, *supra* note 91, at 264–66, 286 (discussing political philosophies that influenced this constitutional approach); Bahar, *supra* note 117, at 151–52.

224. See MACKEY, *supra* note 91, at 293.

225. See IRAN CONST. arts. 5, 57; MACKEY, *supra* note 91, at 293.

226. See IRAN CONST. preamble, art. 94; MACKEY, *supra* note 91, at 293.

227. See MACKEY, *supra* note 91, at 293, 334. Although the Supreme Jurisprudent was intended to be the primary source of emulation in the Islamic Republic, no one met the stringent political requirements after Khomeini's death, and the standards were changed so that the Supreme Jurisprudent now need only be "‘potentially’ qualified to become a source of emulation." *Id.* at 354. This radically altered the theological basis for the Supreme Jurisprudent and essentially stripped religious legitimacy from the person who was supposed to act as the supreme religious leader of the State. See *id.*

228. See Bahar, *supra* note 117, at 160. Islam recognizes "necessity" as a legitimate theological reason for deviation from the literal requirements of the *Shari'a*. However, the change was more likely due to Khomeini's impatience with the legislative delays caused by very aggressive clerical review by the Council of Guardians and his desire to bypass some of the problems inherent in the *vilayat-i-faqih* system. See Mayer, *Islam and the State*, *supra* note 80, at 1039–40. The effect was to emasculate his system of governance by the religious elite, since it gave the presumption of religious legitimacy to all government enactments approved by the Supreme Jurisprudent, thereby skipping the Council of Guardians completely. See *id.*

primary rules based on the *Shari'a* and secondary rules created by the *Majlis* for the implementation of the *Shari'a*.<sup>229</sup> After 1988, all governmental ordinances were declared to be primary rules, and the legislature could not only speak as to issues upon which the *Shari'a* was silent, but could also temporarily suspend rules contained in the *Shari'a* if necessary.<sup>230</sup> Even fundamental religious obligations such as the pilgrimage to Mecca could be suspended under this system.<sup>231</sup> Essentially, this new law reversed the priority of law in Iran: while originally the *vilayat-i-faqih* was created to challenge the law of the State on the grounds of the superiority of Islamic principles, the new approach essentially stated that all laws passed by the legislature and approved by the Supreme Jurisprudent were the supreme law of the land, even if they conflicted with the Quran.<sup>232</sup> A number of religious scholars opposed this measure, arguing that Khomeini's move was without religious precedent and provided the opportunity for rampant abuse in the hands of fallible human beings, but the provision passed and has continued in force from 1988 to the present.<sup>233</sup>

### B. Sovereignty and Constitutional Interpretation

The second area of comparative analysis concerns national sovereignty and general constitutional interpretation. It is important to identify the theoretical bases that support a nation's concept of sovereignty because such bases will invariably influence what is considered legislatively and judicially permissible. Similarly, before analyzing specific constitutional provisions, it is critical to know what general constitutional principles affect judicial interpretation, since without understanding the larger legal infrastructure, it is impossible to understand individual laws and judicial opinions.

#### 1. Israel

Although Israel has always been closely associated with Judaism, it is nominally a secular democratic state.<sup>234</sup> For example, there is no es-

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229. See Bahar, *supra* note 117, at 161.

230. See MACKAY, *supra* note 91, at 349; Bahar, *supra* note 117, at 161; Mayer, *Islam and the State*, *supra* note 80, at 1039-40. As long as the Supreme Jurisprudent supported the legislature, the Council of Guardians could not oppose the measure. See Mayer, *Fundamentalist Impact*, *supra* note 123, at 120.

231. See Mayer, *Fundamentalist Impact*, *supra* note 123, at 120.

232. See Mayer, *Islam and the State*, *supra* note 80, at 1039-40.

233. See Bahar, *supra* note 117, at 160-61.

234. See ELAZAR & AVIAD, *supra* note 38, at 1; Erik Cohen, *Citizenship, Nationality and Religion in Israel and Thailand*, in *THE ISRAELI STATE AND SOCIETY* 66, 69-70 (Baruch

established religion, nor does the State allow discrimination on the basis of religion or infringement on the freedom of religion.<sup>235</sup> Despite these guarantees, however, Israel has incorporated many aspects of Judaism into its legal and institutional make-up.<sup>236</sup>

For example, fundamental Israeli documents suggest that Israel has adopted a unique approach to sovereignty. In establishing the new state, the Proclamation of Independence recognized that the right to a sovereign Jewish nation was "the natural right of the *Jewish* people to be masters of their own fate, like all other nations, in their own sovereign State."<sup>237</sup> By placing sovereignty in the hands of the people rather than with God, Israel aligns itself with other secular nations; however, by limiting the right to sovereignty to only Jewish people, the Proclamation of Independence could be said to be creating a national identity that advances one trait at the cost of all others.<sup>238</sup> In fact, this pattern is repeated in other aspects of Israeli life, sometimes to the detriment of the nation.<sup>239</sup>

This interpretation is supported by other portions of the Proclamation of Independence, one of which states that the new nation will be "based on freedom, justice and peace as envisaged by the prophets of Israel," thereby emphasizing the fundamental Jewish nature of the nation.<sup>240</sup> In addition, the Proclamation of Independence explicitly describes Israel as a "Jewish State," which can be read to exclude all secular or non-Jewish perspectives from the public sphere.<sup>241</sup> A number

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Kimmerling ed., 1989); see also EDELMAN, *supra* note 10, at 50 (noting Israel has never "adopted an official overall policy statement about the position of Judaism in the State").

235. See Treitel, *supra* note 63, at 407–08, citing H.C. 262/62, Peretz v. Chairman, Local Council and Inhabitants of Kfar Shmaryahu, 16 P.D. 2101, 2116, *translated in* 4 Selected Judgments 191, 207 (1961–1962) (stating the Proclamation of Independence guarantees freedom of religion and worship to all citizens); see also Donna E. Arzt, *Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective*, 9 WIS. INT'L L.J. 1, 32 (1990) [hereinafter Arzt, *Religious Freedom*] (arguing that while there is no formal establishment of religion in Israel, there is a legal "association" between religion and the State).

236. See Cohen, *supra* note 234, at 70.

237. Proclamation of Independence, 1948, 1 L.S.I. 3, 4 (1948) (emphasis added).

238. See Quigley, *supra* note 70, at 226, 228–31.

239. See *id.* at 228–49.

240. See Proclamation of Independence, 1948, 1 L.S.I. 3, 4 (1948).

241. *Id.*; see Genut, *supra* note 60, at 2120 n.2, 2121 (noting Proclamation of Independence does not define "Jewish state;" also commenting that Israeli citizens have differing visions of what a Jewish state should be) (citing GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 7 (1993); Norman L. Cantor, *Religion and State in Israel and the United States*, 8 TEL AVIV U. STUD. L. 185, 203 (1988); Quigley, *supra* note 70, at 227; see also LIEBMAN & DON-YEHIYA, *RELIGION AND POLITICS*, *supra* note 62, at 17 (discussing that concept of a "Jewish state" requires Jews to have a preferential status in the State); Cohen, *supra* note 234, at 72 (elucidating discriminatory practices against non-Jews).

of commentators have, however, argued that the Proclamation of Independence's recognition of broad principles of freedom and justice has opened the door not to restrictive practices in favor of Jews and Jewish religious principles, but to expansive notions of human rights and dignity that benefit all persons and lead to a more liberty-minded society.<sup>242</sup> Because the case law of the Supreme Court indicates that individual human rights are to be protected unless there is legislation to the contrary, this latter interpretation has merit.<sup>243</sup> However, although Israel may be generally libertarian, the relationship between religion and state has been subject to certain legal constraints due, in part, to the provisions found in the Status Quo Agreement and the sharp split in popular opinion on the subject.<sup>244</sup>

In 1980, the State's reliance on Jewish law and principles was increased when the Knesset passed a bill entitled the "Foundations of Law."<sup>245</sup> This legislation provides that "[w]here a court is required to decide a legal question for which there is no answer in statutory law, judicial precedent, or by analogy, the question shall be determined in the light of the principles of freedom, justice, equity, and peace of the Jewish heritage."<sup>246</sup> This law was the first to establish an explicit connection between Jewish law and Israeli secular law and could potentially be used to impose uniquely Jewish obligations on the Israeli public.<sup>247</sup>

The passage of the Foundations of Law is particularly problematic in that the Proclamation of Independence includes explicit language regarding the universality and equal protection of Israeli law. For example, the Proclamation of Independence promises that the new state "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex," and that "it will guarantee freedom of religion, conscience, language, education and culture."<sup>248</sup> However, the claims of universality in the Proclamation of Independ-

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242. See, e.g., Barak-Erez, *supra* note 64, at 316-17; Genut, *supra* note 60, at 2146-47 (collecting commentaries). On the other hand, others have argued that Israeli law is heavily based on Jewish law and socialism, neither of which is oriented toward a libertarian-based law of human rights. See Goldstein, *supra* note 178, at 607 (claiming Jewish law is "primarily duty-oriented rather than rights-oriented" and that socialism is "primarily communal rather than individualistically oriented").

243. See Goldstein, *supra* note 178, at 610.

244. See Shapira, *supra* note 64, at 287.

245. See Foundations of Law, 1980, 34 L.S.I. 181, S.H. 978.

246. Elon, *supra* note 18, at 240 (offering an alternate translation for Foundations of Law, 1980, sect. 1, 34 L.S.I. 181, S.H. 978); see also Barak-Erez, *supra* note 64, at 341 & n.152; Quigley, *supra* note 70, at 227.

247. See Elon, *supra* note 18, at 240.

248. Proclamation of Independence, 1948, 1 L.S.I. 3, 4 (1948).



ence have never been completely implemented, either with respect to the rights of non-Jews or non-Orthodox Jews.<sup>249</sup>

Any infringement on the rights of minorities is a cause for concern, but discrimination on the basis of religion is particularly troubling in a State founded by persons fleeing from religious persecution. Israel has attempted to protect the rights of religious minorities by granting them the right to live in accordance with their own unique religious traditions in the areas that are presumably most important to them, including marriage, divorce, and other aspects of personal status.<sup>250</sup> Even in these highly personal areas, however, the Israeli courts and Knesset have shown a willingness to impose Jewish values on non-Jews. For example, polygamy is expressly permitted under Islamic law and was recognized as a legitimate expression of religious belief by Muslims in Palestine during British rule.<sup>251</sup> Nevertheless, in the early 1950s, the Knesset extended its prohibition on polygamy to cover not only Jewish men, but non-Jewish men as well.<sup>252</sup>

In a precedent-setting case, a Muslim man argued that the law infringed on the religious freedoms promised to him by the Proclamation of Independence; however, the Supreme Court ruled that "[f]reedom of religion is not to be interpreted as freedom to do what the religion permits but freedom to fulfill what the religion commands. The plurality of wives . . . is not a commandment of the Moslem religion but is permitted by it."<sup>253</sup> Because "[p]olygamy of the Moslem does not constitute an

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249. See Cohen, *supra* note 234, at 72; see also Erlanger, *supra* note 5 (noting harassment of and attacks on Jehovah's Witnesses in Israel). Since the birth of the nation, the Arab minority has experienced various types of overt and covert discrimination. See Cohen, *supra* note 234, at 72; Quigley, *supra* note 70 *passim*.

250. See EDELMAN, *supra* note 10, at 121; Treitel, *supra* note 63, at 411-13.

251. See Treitel, *supra* note 63, at 423.

252. See *id.*

253. H.C. 49/54, *Mulhem v. Qadi of Acco*, 8 P.D. 910, *quoted in* Treitel, *supra* note 63, at 423. *Mulhem* and the Knesset prohibition on multiple marriages of all persons apparently overturned an earlier case, G.A. 112/50 *Yosifof v. Attorney General*, 5 P.D. 481, *translated in* 1 Selected Judgments of the Supreme Court of Israel 174 (1948-1953), which held that Muslim men could enter into multiple marriages, but Jews could not. See Genut, *supra* note 60, at 2150 (discussing *Yosifof*). *Yosifof* may still be of some importance, however, in that it addresses the Israeli vision of equal protection.

In *Yosifof*, a Jewish man argued that he could not be convicted of bigamy because the law at that time allowed Muslim men to marry more than one wife. See *id.* He argued that Jews were discriminated against because they were treated differently than Muslims with respect to marital law. See *id.* The Court disagreed, stating that the issue of discrimination must be resolved in the context of the social realities of the State, including the different laws and customs that mark the different religious communities. See *id.* In order to determine whether differential treatment is discriminatory, the Court must focus on whether the law in question discriminates against a community, not an individual. See *id.* This approach, which focuses on discrimination against a group rather than an individual, is consistent with the

integral part of Moslem belief or of its religious commandments," there was "no incursion whatsoever upon the freedom of religion of the citizen."<sup>254</sup> The law was thus upheld despite the State's claim to support freedom of religion.

Freedom of religion and judicial reliance on Jewish principles are also at issue in the Basic Law: Human Dignity and Liberty, which is the most explicit Basic Law in terms of its adherence to the principles of Judaism. Passed in 1992 and amended in 1994, the Basic Law: Human Dignity and Liberty states that its purpose is to "protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state."<sup>255</sup> Although in some respects this law supports the protection of the same basic human rights that are found in many national and international instruments,<sup>256</sup> it is qualified by its intent to establish Jewish values in the State of Israel. Although it is too early to predict how the Supreme Court will interpret this provision, the law may solidify judicial and legislative pronouncements advancing the Jewish nature of the State to the detriment of other more universal values and further legitimize links between Jewish and Israeli law.

One alarming aspect of the Basic Law: Human Dignity and Liberty is the absence of any mention of freedom of religion. This omission was intentional and was brought about at the instigation of the religious parties, who were concerned that if such a right were recognized it would limit their control over matters involving personal status.<sup>257</sup> Because the

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argument that Israeli law is based on a theory of group rights rather than the individual rights theory used in the United States. See Treitel, *supra* note 63, at 407 (noting Israel idealizes a "separate but equal" legal system).

254. H.C. 49/54, Mulhem v. Qadi of Acco, 8 P.D. 910, *quoted in* Treitel, *supra* note 63, at 423.

255. Basic Law: Human Dignity and Liberty, 1992, sect. 1, S.H. 1391; *see also* Barak-Erez, *supra* note 64, at 323-24. For an interesting discussion as to what interpretive method should be used with respect to this provision and what results will ensue, *see id.* at 342-44.

256. *See, e.g.,* American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 99, OEA/Ser.K/XVI/1.1/Doc. 65 (English), Rev. 1, Corr. 1 (1970); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms (and accompanying Protocol), Nov. 4, 1950, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration]; *see also* Richards, *supra* note 203, at 34 (comparing rights found in French and U.S. constitutions).

257. *See* Barak-Erez, *supra* note 64, at 325. Interestingly, the Basic Law: Freedom of Occupation, which was also amended in 1994, *see* S.H. 1454, explicitly acknowledges the principle of religious equality, again at the behest of the religious parties. *See* Hofnung, *supra* note 64, at 597 & n.47. In fact, it is possible that the language regarding religious equality in the Basic Law: Freedom of Occupation might be used against the very people who argued for its inclusion and allow courts to strike preferences granted to Orthodox institutions. *See id.*

Basic Law: Human Dignity and Liberty was enacted only recently, it is difficult to determine what effect this omission will have on the interaction between state and religion in Israel. However, the bluntness with which this Basic Law embraces Jewish values suggests that Israel will continue to support increasing levels of religio-political interaction.

In fact, it will likely become increasingly difficult for Israel to move back to a more moderate stance.<sup>258</sup> This has been made even more true since the passage of a 1985 law that limits the ability of those who disagree with the current form of Israeli law and society to gain access to the Knesset.<sup>259</sup> A similar law prohibits members of the Knesset from considering any bill that "negates the existence of the State of Israel as the state of the Jewish people."<sup>260</sup>

There may be several reasons why laws supporting Jewish values in Israeli society are appearing more frequently. It may be that some politicians and jurists believe that the incorporation of community values (be they religious or other) into the law of the State is one way to calm social tensions and avoid violent conflicts.<sup>261</sup> This seems unlikely, however, especially since many legal commentators believe that incorporation of religious values into the law of the State actually increases the potential for conflict and violence.<sup>262</sup> It is thus more probable that the rise in religio-legal interaction is due to the increased power of religious parties in the Knesset during the 1980s and 1990s.<sup>263</sup> These recent advances by the religious parties have resulted in the reinforcement of existing religious legislation and suggest the potential for massive change in the Israeli political system.<sup>264</sup>

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258. See, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 99 (1965) ("[I]n matters of morals negative legislation is especially difficult, because relaxation is thought to imply approval.").

259. In 1985, a law was passed prohibiting any candidate who "reject[ed] the existence of the State of Israel as the state of the Jewish people" from participating in elections for the Knesset. Basic Law: The Knesset (amend. No. 9), 1984, S.H. 1155, *quoted in* Quigley, *supra* note 70, at 227. This provision effectively bars any person who wishes to minimize the religious nature of the State and maximize secular elements from participating in government. It also tends to act disproportionately against Israeli Arabs who may oppose the Jewish nature of the State. See Quigley, *supra* note 70, at 227.

260. 1986 Yalkut Hapirsumim 772 (amendment to Knesset Rules, sect. 134), *translated in* Quigley, *supra* note 70, at 227.

261. See Sprinzak, *supra* note 19, at 486.

262. See Bruce, *supra* note 7, at 65; David C. Rapoport, *Comparing Militant Fundamentalist Movements and Groups*, in *FUNDAMENTALISMS AND THE STATE*, *supra* note 7, at 429, 440.

263. See Liebman, *supra* note 69, at 68.

264. See *id.* at 75, 77, 84.

However, the basic problem with these laws is that they give credence to only one aspect of Israeli citizenship (Jewishness) and limit the ability of dissidents to change the legal landscape through legitimate political means. In doing so, they may unwittingly strengthen the resolve of those minority groups who believe that political and cultural change in Israel can only be effectuated through violence.<sup>265</sup>

## 2. Iran

Iran's 1979 Constitution states that "[t]he form of government of Iran is that of an Islamic Republic,"<sup>266</sup> and that it is based on the belief in:

1. the One God . . . ;
2. Divine revelation and its fundamental role in setting forth the laws;
3. the return to God in the Hereafter . . . ;
4. the justice of God in creation and legislation; [and]
5. continuous leadership and perpetual guidance.<sup>267</sup>

In such an environment, it is not surprising that the primary interpretive method used by the Iranian courts is to ensure consistency of the law with Islamic principles.<sup>268</sup> Since 1988, however, the judiciary has had less need to exercise this prerogative, since under the *vilayat-i-mutlaqa-yi-faqih* system all acts of the legislature that are approved by the Supreme Jurisprudent are presumptively legitimate under Islamic law.<sup>269</sup>

Legal sovereignty in Iran belongs exclusively to God, although humans are considered masters of their own destiny and therefore are entitled to exercise their God-given rights in accordance with other con-

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265. See S.I. Strong, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society?*, 29 CASE W. RES. J. INT'L L. 1, 64-65 (1997) [hereinafter Strong, *Christian Constitutions*]. Some believe that the increased recognition of Jewish values in the Israeli legal system may eventually change the nature of the Israeli-Arab struggle from a political conflict to a purely religious war. See Liebman, *supra* note 69, at 75, 77, 84; see also Cohen, *supra* note 234, at 73 (noting Israeli Arabs find it "difficult, if not impossible, to identify with the Jewish symbols of statehood").

266. IRAN CONST. art. 1.

267. *Id.* art. 2.

268. See *id.* preamble, art. 61.

269. See *supra* notes 225-33 and accompanying text.

stitutional and religious principles.<sup>270</sup> The purpose of the Constitution is "to realize the ideological objectives of the [fundamentalist Islamic] movement and to create conditions conducive to the development of man in accordance with the noble and universal values of Islam."<sup>271</sup> The formation of an Islamic nation is to be achieved through a variety of measures, including "the creation of a favourable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption."<sup>272</sup>

Interestingly, the Iranian Constitution does not limit itself to controlling acts within its territorial boundaries; instead it contemplates the expansion of Islam throughout the world and the "defence of the rights of all Muslims," no matter where they may be located.<sup>273</sup> This approach to law and sovereignty is vaguely reminiscent of Marxist and communist philosophy in that it supports the proselytization of state ideology beyond the State's borders.<sup>274</sup> It also harkens back to the early days of Islam, when religious ties were of ultimate importance and the globe was broken into *dar al Islam* (the Islamic world) and *dar al harb* (the non-Islamic world).<sup>275</sup> However, this all-encompassing world view has created problems for Iran because it disregards accepted norms regarding both the political sovereignty of nations and traditional Islamic theology.<sup>276</sup>

Iran's domestic policy is, in some ways, just as militant as its foreign policy. "The official religion of Iran is Islam and the Twelver Ja'fari school," although other schools of Islamic thought are also recognized with respect to matters of religious education, personal status, and related litigation.<sup>277</sup> According to the Constitution, all non-Muslims

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270. See IRAN CONST. art. 56. Because most followers of the *Shari'a* believe that all sovereignty comes from God, a democratic political model granting unlimited sovereignty to the people would have been in complete opposition to religious teachings. See Wright, *Islam Rising*, *supra* note 166 (noting modern Islamic political theory attempts to reconcile Islam and democracy).

271. IRAN CONST. preamble.

272. *Id.* art. 3(1). This is consistent with the creation of a "good society" in the Islamic tradition. See *supra* note 84 and accompanying text.

273. IRAN CONST. art. 152; see also *id.* preamble, arts. 3(16), 11 (referencing the community of all Muslims). These provisions have been used by some Iranians to justify the exportation of the Islamic revolution to other nations. See MACKAY, *supra* note 91, at 310, 344-46 (commenting on varying positions among political groups regarding exportation of revolution).

274. See Chris Brown, *Marxism and International Ethics*, in TRADITIONS OF INTERNATIONAL ETHICS, *supra* note 1, at 225, 236, 240-42.

275. See Bahar, *supra* note 117, at 164-65.

276. See generally Chase, *supra* note 165 (discussing how the religious *fatwa* issued by Khomeini against author Salman Rushdie violated both religious and secular law).

277. IRAN CONST. art. 12.

are to be treated with "justice and equity," but only as long as those persons do not conspire or act against Islam and the State.<sup>278</sup> The Constitution states that no one is to be persecuted for his or her religious beliefs and in fact recognizes and protects three minority faiths: Zoroastrianism, Judaism, and Christianity.<sup>279</sup> However, members of another religious minority, the Baha'i, are not given any explicit constitutional protection and are, in fact, widely persecuted despite the explicit provisions of Article 23.<sup>280</sup> When it will even admit to such actions, Iran justifies its behavior by claiming that it is not acting against Baha'is based on their religious beliefs, but instead on their political beliefs, which threaten the Islamic state.<sup>281</sup> However, this distinction is circular since crimes against the faith can easily be defined as political crimes in a theocracy.<sup>282</sup> It also seems anomalous to permit Iran to practice genocide merely because it chooses to classify Baha'i as political criminals rather than heretics.

However, it is not just religious minorities who are at risk under Iran's religio-legal system; Shi'a Muslims are also put in considerable danger due to the lack of religious protection in the Constitution. For example, Article 23 of the Constitution states that no one is to be "molested or taken to task simply for holding a certain [religious] belief."<sup>283</sup> However, Muslims may be afraid to renounce Islam and choose another religion because Iranian courts are empowered to penalize Muslims found guilty of apostasy.<sup>284</sup> Under this analysis, Article 23 has

278. *Id.* art. 14; *see also id.* art. 19 (providing for equal protection under the law based on ethnicity, race, language, "and the like"). Despite this language, some commentators have noted that non-Muslims in Iran are "afforded an officially unequal status under law." Arzt, *Religious Human Rights*, *supra* note 218, at 154.

279. *See* IRAN CONST. arts. 13, 23.

280. *See* Arzt, *Religious Human Rights*, *supra* note 218, at 157-60; Louis Rene Beres, *Israel, Iran, and Nuclear War: A Jurisprudential Assessment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 65, 70-72 (1996). Evangelical Christians are also persecuted regularly in Iran due to their proselytizing efforts. *See* MACKEY, *supra* note 91, at 373; Wright, *Islam Rising*, *supra* note 166 (describing most States that codify the *Shari'a* as forbidding persons of other religions to proselytize).

281. *See* MACKEY, *supra* note 91, at 129-30; Arzt, *Religious Human Rights*, *supra* note 218, at 60; Terry Atlas, *Iran's Leaders Push Baha'i Persecution*, CHI. TRIB., Mar. 4, 1993, § 1, at 3; *see also* IRAN CONST. art. 14 (extending protection to persons of other religions only insofar as they do not conspire or act "against Islam and the Islamic Republic of Iran"). The evidence appears to contradict the state position, however, as Baha'is are considered by many people in Iran to be heretical Muslims rather than persons of a distinct religious minority. *See* MACKEY, *supra* note 91, at 129-30; Atlas, *supra*.

282. *See* Arzt, *Religious Human Rights*, *supra* note 218, at 160; *see also* MACKEY, *supra* note 91, at 130 (discussing Baha'i "heresy" against the Shi'a clergy).

283. IRAN CONST. art. 23.

284. *See* Chase, *supra* note 165, at 396-99, 403; *see also* AN-NA'IM, *supra* note 81, at 86-87 (indicating problems with adjudicating apostasy).

little meaning in Iran, either for members of the religious majority or religious minorities. Instead, it seems as if the only religious protection available in Iran is reserved for those who already adhere to the official definition of Islam.

Finally, in its attempt to create an enduring Islamic state, Iran has unfortunately laid the groundwork for future religio-political violence by forestalling peaceful methods of change. Under Article 9, the Constitution states that "no authority has the right to abrogate legitimate freedoms, not even by enacting laws and regulations for that purpose, under the pretext of preserving the independence and territorial integrity of the country."<sup>285</sup> Although this provision probably exists as a result of the perceived infringements on Iranian freedoms that were associated with certain economic concessions granted to foreign companies and governments by the shah in the pre-revolutionary period, it can also be used by those who claim that their freedom to live under Islamic rule would be violated by any secularizing law. Under these types of restrictions, opponents to the Islamic regime are left with no legitimate recourse for political change and may find violence their only means of effecting legal and social reform.<sup>286</sup>

### C. Personal Rights

#### 1. Israel

The area that is most reflective of religious values in a society or legal system is that of personal rights and related issues (often called "family law"), and Israel is no exception. In fact, Israel has made special provision for the inclusion of religious values in this area of law by granting nearly exclusive jurisdiction over these matters to the religious courts pursuant to the Status Quo Agreement.<sup>287</sup> Although Israel has four different sets of religious courts, one for each of the officially recognized religions, this article will focus only on the rabbinical courts, as they are the guardians of the Jewish nature of the State and are, in some commentators' minds, the "center of conflict between religious and secular values."<sup>288</sup>

Under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, rabbinical courts have exclusive jurisdiction over marriage and

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285. IRAN CONST. art. 9.

286. See Rapoport, *supra* note 262, at 432, 446-47.

287. See EDELMAN, *supra* note 10, at 48; FREUDENHEIM, *supra* note 54, at 43, 58.

288. Adam M. Dodek, Book Note, 36 HARV. INT'L L.J. 571, 573 (1995) (reviewing EDELMAN, *supra* note 10).

divorce proceedings of Jewish citizens and residents.<sup>289</sup> In these cases, the rabbinical courts apply *halachic* law regardless of whether the person practices or believes in Judaism; if he or she is legally a Jew, then the *Halacha* applies.<sup>290</sup> The parties' consent is not necessary and is, in

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289. See Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, sect. 1, 7 L.S.I. 139 (1952-53); Treitel, *supra* note 63, at 411.

290. See Lubetski, *supra* note 17, at 347. The question of "Who is a Jew?" is one of the most troubling and long-standing jurisprudential questions in Israel. The legal principles were first codified in 1950 in the Law of Return, which states that every diaspora Jew has the right to immigrate to Israel and become an Israeli citizen merely by virtue of his or her religion. See Law of Return, 1950, sects. 1-2, 4 L.S.I. 114 (1949-50). The *oleh* (Jew immigrating to Israel) may be Jewish by birth or by conversion. See Law of Return (Amendment No. 2), 1970, sect. 4B, 24 L.S.I. 28 (1969-70).

For all practical purposes, conversion within Israel must be performed by Orthodox rites, and the Knesset is considering a bill which would enshrine this practice in law. See Dempsey, *supra* note 71; see also *Israel Delays Bill Regulating Jewish Conversion*, WASH. POST, June 23, 1997, at A20 (noting the Knesset has shelved the bill pending discussions between Orthodox and non-Orthodox leaders). The law would overturn a 1995 Supreme Court decision that held that Reform and Conservative conversions within Israel are legitimate. See *Israeli Bill Would Invalidate Non-Orthodox Conversions to Judaism*, CHI. TRIB., Apr. 2, 1997, § 1, at 21 [hereinafter *Israeli Bill*] (stating that the Supreme Court ruling has never been implemented). Conversion outside Israel may be performed by a rabbi of any denomination, see Stephen Franklin, *Conversion Rule in Israel is Widened*, CHI. TRIB., July 25, 1989, at M5 (citing 1989 Supreme Court case), although religious parties within Israel would like to see that law changed as well, see *Israeli Bill*, *supra*. However, despite the fact that the State considers those who are converted outside Israel by Conservative or Reform rabbis to be Jewish, such persons cannot be married in Israel or buried in Jewish cemeteries in Israel, since those functions are controlled by the religious courts, which utilize more stringent (i.e., *halachic*) criteria for Jewishness than does the State. See Marjorie Miller, *50 U.S. Rabbis Urge Israel Not to Make Non-Orthodox Jews 'Second Class'*, L.A. TIMES, Jan. 27, 1997, at A8.

The most famous case construing the Law of Return is known as the Brother Daniel case. See H.C. 72/62, Rufeisen v. Minister of the Interior, 16(4) P.D. 2428, cited in Lubetski, *supra* note 17, at 365; see also ELAZAR & AVIAD, *supra* note 38, at 21-22. In that case, a man who was born to Jewish parents in Poland subsequently converted to Catholicism during the Holocaust and became a monk. See *id.* at 21. Under strict construction of *halachic* law, Brother Daniel was a Jew, since his mother was a Jew, but the Supreme Court distinguished between *halachic* law and the secular law of the State, and denied his application for automatic citizenship as an *oleh*. See *id.* at 22. The Court considered his conversion to Christianity as a repudiation of his Jewish heritage and required him to go through normal naturalization procedures (which he subsequently did) if he wished to become an Israeli citizen. See *id.* Other cases concerning the Law of Return have also tested the boundaries of secular and religious authority. In most of those cases, the Israeli courts have focused not on subjective expressions of Jewishness, but on objective, often *halachic*, criteria. See *id.* at 22-23.

In order to resolve some of these hard questions of law, the Knesset amended the Law of Return so that a Jew, for purposes of citizenship, is a person born of a Jewish mother or who converted to Judaism and is not an adherent of another religion. See Law of Return (Amendment No. 2), 1970, sect. 4B, 24 L.S.I. 28 (1969-70); Lubetski, *supra* note 17, at 366; see also Hofnung, *supra* note 64, at 593-94 (citing H.C. 230/86; Miller v. Minister of the Interior, 40(4) P.D. 436, wherein the Supreme Court ordered the Minister of the Interior to consider a woman who converted to Reform Judaism in the U.S. as a Jew). Spouses, chil-



fact, irrelevant in these types of proceedings. In cases concerning guardianship or administration of property, however, the parties must consent to the jurisdiction of the court.<sup>291</sup>

There are a number of problems associated with a legal system that varies its treatment of a person based not on personal consent or the existence of any relevant distinguishing characteristics but instead on that person's religious heritage.<sup>292</sup> The most common manifestation of these types of problems in Israel concerns marriage, which, according to the rabbinical courts, must be performed in accordance with Orthodox rites, whether or not the couple is Orthodox.<sup>293</sup> Because the Orthodox have traditionally controlled the rabbinical courts, they have been able to impose their version of Judaism on Israel almost uniformly, despite the fact that Orthodox Judaism is not the majority Jewish denomination in Israel.<sup>294</sup> Although Israeli Jews can avoid Orthodox rites by being mar-

dren, and grandchildren of Jews are given the same rights as a Jew. See Law of Return (Amendment No. 2), 1970, sect. 4A(a), 24 L.S.I. 28 (1969-70).

Although most commentators focus on whether the Law of Return improperly favors some Jews at the expense of others, the most discriminatory aspect of the Law of Return may be its refusal to grant automatic citizenship to any non-Jews, including those Palestinian Arabs who were longtime residents in the area during the period of the British Mandate and were forcibly expelled from the State in 1948. See Quigley, *supra* note 70, at 229-31. Again, this is cause for some concern because it reinforces the Jewish nature of the State at the cost of other, more unifying traits.

291. See Treitel, *supra* note 63, at 411-12 (citing BAKER, *supra* note 197, at 207-08).

292. The challenge raised by Israel's religious court system actually mirrors the classic jurisprudential dilemma that arises when a society chooses to bind itself voluntarily to a highly restrictive legal-moral code and then discovers that various members of the second generation wish to violate that code privately and discretely. See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 57-62 (1990); see also Leslie Green, *Internal Minorities and Their Rights*, in *THE RIGHTS OF MINORITY CULTURES* 256, 261-70 (Will Kymlicka ed., 1995). In Israel, many jurists similarly find that the impetus for change comes not from persons who have immigrated to Israel and who ostensibly can be said to have chosen to live under the *millet* system, but by their children and grandchildren who did not make any such choice. See Liebman, *supra* note 69, at 74. But see LIEBMAN & DON-YEHIYA, *RELIGION AND POLITICS*, *supra* note 62, at 122 (noting rise of neo-Orthodoxy among the young in Israel). This problem is made more troubling by the recognition that legal differentiations that are based on a person's parents' and grandparents' religious heritage sounds very much like a status crime, wherein a legal burden is imposed not by virtue of an individual's voluntary action but on account of his or her having involuntarily contracted some disfavored characteristic. The fact that this system of religiously based distinctions was created by the founding generation and memorialized in the Status Quo Agreement does not immunize it from criticism since any attempt by one generation to limit future generations' ability to change the law constitutes an improper limitation on the democratic process and is as jurisprudentially unsound as the creation of status crimes.

293. See LIEBMAN & DON-YEHIYA, *RELIGION AND POLITICS*, *supra* note 62, at 25; Storer H. Rowley, *In Israel, Synagogue Versus State*, CHI. TRIB., Dec. 3, 1995, § 2, at 1 [hereinafter Rowley, *Synagogue Versus State*].

294. See ELAZAR & AVIAD, *supra* note 38, at 23-24; Dempsey, *supra* note 71; Dodek, *supra* note 288, at 573. However, in 1994 the Supreme Court held that Reform and Conser-

ried outside Israel, this is extremely burdensome considering that the right to found a family (which includes the ability to marry freely) is a fundamental freedom.<sup>295</sup> Notably, this law is not a mere inconvenience; it can constitute an absolute bar to marriage in Israel because Orthodox law forbids marriage between certain people.<sup>296</sup>

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vative rabbis must be allowed to sit on the municipal religious councils that are responsible for supervising religious services. See *Non-Orthodox Rabbis Granted Status in Israel*, CHI. TRIB., Jan. 27, 1994, § 1, at 10. In that landmark ruling, which for the first time granted Reform and Conservative rabbis official status in Israel, the Court stated that "[b]anning candidates because of their world view constitutes discrimination and contradicts the principle of equality." *Id.*

295. See C.A. 450/70, Rogozinsky v. State of Israel, 26(2) P.D. 129 (refusing to recognize the validity of civil marriage ceremonies performed within Israel because the Knesset clearly intended that Jewish marriages in Israel are to be performed under Jewish law); H.C. 143/62, Funk Schlesinger v. Minister of the Interior, 17(1) P.D. 225 (holding marriages of Israeli citizens performed outside Israel do not have to conform to Orthodox procedures), cited in Genut, *supra* note 60, at 2155 & n.321; see also LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 25 (describing tensions between permissible marriages under Western law and *Halacha*); Lubetski, *supra* note 17, at 369–70 (describing ways to circumvent *halachic* rules). Private ceremonies in Israel that accord with Orthodox practices but that do not utilize the agency of the official rabbinate will be recognized as valid; the couple may then be married publicly by Reform or Conservative rites. See H.C. 51/69, Rodnitsky v. Grand Rabbinical Court of Appeals, 24(1) P.D. 704, cited in Genut, *supra* note 60, at 2155 (likening requirements of Orthodox marriage ceremony to requirements of civil ceremonies in other nations); see also Miller, *supra* note 290 (discussing 1996 Supreme Court case concerning whether the Orthodox rabbinate could prohibit non-Orthodox rabbis from performing marriages, burials, and conversions).

296. For example, a male *kohen* (a descendant of Aaron, the first high priest) cannot marry a divorced woman. See Lubetski, *supra* note 17, at 368 n.154. *But cf.* H.C. 51/69, Rodnitsky v. Grand Rabbinical Court of Appeals, 24(1) P.D. 704 (ordering State to recognize marriage between a *kohen* and widow; holding that law vesting exclusive jurisdiction over marriage to rabbinical courts did not intend to apply full scope of Jewish law), cited in Genut, *supra* note 60, at 2155–56 & n.322. Rodnitsky may provide a potential avenue for change in that the Court held that enforcement of purely religious-based prohibitions on marriage constituted coercion of conscience, which was contrary to the fundamental principles upon which the State was founded. See *id.* at 2155–56.

The other restriction on marriage concerns *mamzerim* (children born outside a legitimate Jewish marriage), who can marry only other *mamzerim*. See EDELMAN, *supra* note 10, at 65. Unfortunately, because issues of whether a person is a *mamzer* are decided by Orthodox considerations, a couple who may be legally married in the eyes of the State through a non-Orthodox ceremony conducted outside Israel may not be considered married under *halachic* law; therefore, any children from that union would be *mamzerim* and forbidden to marry anyone but another *mamzer* under current religio-legal principles. It is worth considering whether the Supreme Court would consider restrictions on marriage between a *mamzer* and a non-*mamzer* to be a religiously based restriction in violation of an individual's freedom of conscience, and therefore violative of the principles discussed in Rodnitsky. Such a ruling may become necessary in the near future, as the Religious Affairs Ministry has apparently been keeping a secret blacklist of approximately ten thousand Israeli citizens who are prohibited from marrying other Jews, based on *halachic* principles. See Walker, *supra* note 68 (noting that some of the persons on the list do not even know that they appear on it).

Proponents of the current system point to the problem of the *mamzerim* as proof that any relaxation of the present law will create additional tensions between Orthodox and non-

The obvious intent of these laws is to impose *halachic* principles on all Jews within the State of Israel, whether they personally believe in Orthodox Judaism or not. The problem is that religious Jews do not need secular laws to make sure that they conform with religious precepts; they will do so by choice. The only reason to require that all marriages be performed in accordance with Orthodox rituals is to coerce non-Orthodox Jews into behaving in accordance with the *Halacha*.<sup>297</sup> The religious parties defend their position on the ground that they have a religious responsibility to nonreligious Jews,<sup>298</sup> but that does not change the fact that some people who want to marry are forbidden to do so unless they either (i) conform to religious rites in which they do not believe or (ii) go outside the country to be married, something that may not be economically feasible for them.<sup>299</sup>

Divorce in Israel is nearly as problematic as marriage since it is also subject to the exclusive jurisdiction of the rabbinical courts. Unsurprisingly, the courts require all Jewish divorces to conform to the requirements set forth in Jewish law, regardless of whether the couple is religious or not. Because there are no affirmative religious rituals that are imposed on the parties, the issue is not quite the same as it is with respect to marriage. Instead, the problem is primarily one of gender in-

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Orthodox Jews, as the Orthodox would not know who they were permitted to marry under *halachic* law. However, the problem already exists, since an estimated 150,000 Israeli Jews are forbidden from marrying within their own nation. See Rowley, *Synagogue Versus State*, *supra* note 293.

297. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 25–26. This type of approach is theologically justifiable since, in Judaism, actions are more important than belief. See ARIEL, *supra* note 13, at 159.

298. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 26; see also Miller, *supra* note 290. This motive is consistent with the understanding that Jews' covenant with God is of a collective, rather than individual, nature. See ARIEL, *supra* note 13, at 113–14; see also Arzt, *Religious Freedom*, *supra* note 235, at 12 (noting “[t]he most important characteristic of ultra-Orthodoxy is its belief that all Jews must follow Jewish law in all spheres of life, both private and communal” and that “the *Halakah* is not opposed to coercion in order to achieve the desired behaviour, even in the case of a person who denies the principles of faith” (quoting Izhak Englard, *The Relation Between Religion and State in Israel*, in JEWISH LAW IN ANCIENT AND MODERN ISRAEL 171 (H. Cohn ed., 1971)). A secondary motive is to uphold the Jewish nature of the State. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 26.

299. Essentially, this law relegates principled atheists and non-Orthodox Jews to the status of second-class citizens. See Lubetski, *supra* note 17, at 368–70 (discussing problems arising from absence of civil marriage option in Israel); Donna J. Sullivan, *Advancing The Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT’L L. 487, 518 (1988). This provision is especially hard on principled non-Orthodox Jews, who are least likely to want to submit to religious rituals in which they do not believe, but who are most likely to feel bound by their religious obligation to marry. See ARIEL, *supra* note 13, at 68 (discussing Jewish belief in the necessity of marriage).

equity, since *Halachic* law requires that the man deliver a decree of divorce, or a *get*, of his own free will.<sup>300</sup> Without a *get*, a woman cannot legally remarry.<sup>301</sup> If she does enter into another relationship and bears any children, those children will be considered *mamzerim* and forbidden to marry anyone but another *mamzer*.<sup>302</sup> Not only is this unfair to the children, it is also unduly hard on women who wish to divorce but who cannot convince their husbands to provide them with a *get*. Although the State has attempted to assist these women by incarcerating recalcitrant husbands, it cannot force a man to grant his wife a *get*, and some men prefer to remain in prison for years rather than grant their wives a divorce.<sup>303</sup> Women are therefore required to remain in unhappy marriages or grant their husbands' demands, including economic concessions, in order to obtain a divorce.<sup>304</sup>

Although there is no discussion among the commentators on this point, it might be possible for women to avoid the law requiring a *get* by going abroad to obtain a civil divorce; however, it is not clear whether the State would recognize a foreign divorce the same way it does a foreign marriage. In addition, under Orthodox principles, any children from a foreign marriage following a foreign divorce would be considered *mamzerim*, regardless of the fact that their parents were legally married in the eyes of the State, since the second marriage is religiously invalid without a *get* from the first husband. As in the case of marriage, the rationales behind this obviously coercive law are the religious obli-

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300. See *Deuteronomy* 24:1; see also Genut, *supra* note 60, at 2157 (discussing the *get* requirement).

301. See ISAAC KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE 450-51 (1979). In addition, Israel's rabbinical courts have occasionally been known to permit Jewish men to take a second wife under a little-known loophole in Jewish law. See *Divorce Court, Israeli Style*, CHI. TRIB., Dec. 19, 1985, § 1A, at 44 (noting ninety-one men received rabbinical approval to take a second wife between 1980 and 1985 under the doctrine of *heter nissuim* (permission to marry), which "allows a [Jewish] man to take a second wife if his present one is insane, legally incompetent or categorically opposed to divorce"). Women do not have similar rights. See *id.*

302. See *Deuteronomy* 23:3; Genut, *supra* note 60, at 2156-57 (citing Shimon Shetreet, *Freedom of Religion and Freedom from Religion: A Dialogue*, 4 ISR. Y.B. ON HUM. RTS. 194, 211 (1974)).

303. See, e.g., *Israeli Who Refused to Give Wife Divorce Dies in Prison*, CHI. TRIB., Dec. 6, 1994, § 1, at 20 (noting death of man who spent thirty-two years in prison rather than grant his wife a divorce). The procedure of incarceration begins with a rabbinical court entering a judgment of compulsory divorce and the appropriate district court utilizing its power of enforcement to imprison a man until he complies with the order and grants the divorce. See *id.* However, this procedure is not as useful as it sounds, not only because some men prefer to remain imprisoned rather than grant a *get*, but because rabbinical courts very rarely issue orders of compulsory divorce. See *id.*

304. See Genut, *supra* note 60, at 2157 (citing DAPHNA SHARFMAN, *LIVING WITHOUT A CONSTITUTION* 79 (1993)).

gation felt by the Orthodox toward the non-Orthodox and the protection of the Jewish nature of the State.<sup>305</sup>

Although marriage and divorce in Israel are clearly controlled by religious law, another area that is often highly influenced by religion is the law concerning women's rights. Somewhat surprisingly given the restrictions and inequalities inherent in the laws on marriage and divorce, Israel is quite progressive with respect to gender equity in other areas of society. The Women's Equal Rights Law, which was passed in 1951, grants women the same legal standing as men and permits women to own property in their own right.<sup>306</sup> The law is binding on all courts, including those of the religious communities, and appears to constitute a major step forward in women's rights by reversing certain religious traditions that marginalize women's roles in society.<sup>307</sup> However, the law has two major exceptions that limit its ability to effect full gender equity in Israel.

First, all matters concerning divorce and marriage are still to be decided by the laws of the religious communities.<sup>308</sup> Second, the law will not take effect if the parties are over eighteen years of age and consent to be tried by the law of their religious community.<sup>309</sup> Although this provision appears to take into account the need to respect and accommodate individual religious beliefs, and indeed may be quite appropriate in that it requires affirmative consent from the parties before applying religious laws that are admittedly inequitable, it ignores the possibility that social and religious forces may pressure a woman into "choosing" to have her case adjudicated under religious law against her better judgment.<sup>310</sup>

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305. See LIEBMAN & DON-YEHIYA, *RELIGION & POLITICS*, *supra* note 62, at 26; see also Miller, *supra* note 290 (indicating that Orthodox rabbinate believes itself to be "caretaker of Jewish tradition").

306. Women's Equal Rights Law, 1951, sects. 1-2, 5 L.S.I. 171 (1950-51).

307. See *id.* sect. 7, 5 L.S.I. 171, 172; see also Treitel, *supra* note 63, at 422 n.127. For example, modern Orthodox Judaism claims to honor women's roles as mothers and daughters, but continues a religious tradition that places them in secondary positions in society. See CANTOR, *supra* note 11, at 47-48 (noting that an Orthodox male's morning prayer thanks God for not making him gentile or female, and that architecture of modern Orthodox synagogues perpetuates segregation of sexes).

308. See Women's Equal Rights Law, 1951, sect. 5, 5 L.S.I. 171, 172 (1950-51); Treitel, *supra* note 63, at 422 n.127. However, at least one recent case has held that the religious courts must consider civil laws giving equal property rights to women and men in cases of divorce. See H.C. 1000/92, Bavli v. Grand Rabbinical Court, 48(2) P.D. 221, *cited in* Hofnung, *supra* note 64, at 591.

309. See Women's Equal Rights Law, 1951, sect. 7, 5 L.S.I. 171, 172 (1950-51); Treitel, *supra* note 63, at 422 n.127.

310. Cf. JOHN STUART MILL, *ON LIBERTY* 63 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859) (discussing how social coercion can be more powerful than legal coercion).

However, absent a patently paternalistic interference in women's thought processes, the most the State can do in this situation is give women the option of proceeding under civil or religious law, ensure full disclosure as to the differences in treatment under the two systems, and remove as many instruments of coercion as possible.

In addition to the two explicit exceptions to the application of the Women's Equal Rights Law, the law provides that religious laws of inheritance that discriminate on the basis of gender will be upheld when the decedent died testate.<sup>311</sup> However, in cases of intestacy, the Women's Equal Rights Law will safeguard the female family members against discriminatory treatment.<sup>312</sup>

The Knesset is not the only branch of government that protects women's rights in Israel; case law indicates that the Supreme Court does not tolerate certain types of gender discrimination either. For example, the Court has ordered women to be included in municipal religious councils, thus appearing to disregard certain religious traditions concerning the proper role of women.<sup>313</sup> By giving women more of a voice at the grassroots level, the Court may have opened the door to various liberalizing effects in the interpretation of religious laws. In addition, the Court has relied on the principles found in the Basic Law: Human Dignity and Liberty to force the military to permit women to enroll in training courses for combat pilots, overturning earlier administrative regulations that permitted gender differentiation.<sup>314</sup>

Gender equality is also apparent in Israeli child custody laws. Unlike some countries, Israel does not favor one parent in matters concerning child rearing and custody; both are equal guardians.<sup>315</sup> Nevertheless, the State may intercede if it is in the best interest of the child.<sup>316</sup> There is little evidence that children are given any rights of their

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311. See Women's Equal Rights Law, 1951, sect. 4, 5 L.S.I. 171 (1950-51); FREUDENHEIM, *supra* note 54, at 61.

312. See FREUDENHEIM, *supra* note 54, at 61.

313. See H.C. 153/88, Shakdiel v. Minister of Religious Affairs, 42(2) P.D. 221, *cited in* Hofnung, *supra* note 64, at 594.

314. See Hofnung, *supra* note 64, at 596 (citing H.C. 4541/94, Miller v. Minister of Defense, 49(4) P.D. 94); Joel Greenberg, *Pilot Program: Israeli Woman Hopes to Fly in the Face of Military Tradition*, CHI. TRIB., Jan. 14, 1996, § 13, at 10 (noting that the "changing role of women in the Israeli military seems certain to influence attitudes toward women in Israeli society at large, in which the army plays a central role;" also noting that the combat ban reflected "traditional attitudes toward women in Jewish society").

315. See Women's Equal Rights Law, 1951, sect. 3(a), 5 L.S.I. 171 (1950-51). This reflects the Jewish belief that childrearing is an obligation shared by both parents and God. See ARIEL, *supra* note 13, at 71.

316. See Women's Equal Rights Law, 1951, sect. 3(b), 5 L.S.I. 171 (1950-51).

own, as is becoming the trend in countries such as the United States and the United Kingdom.<sup>317</sup>

Although Israeli child custody laws seem ideal in terms of gender equity, the State does discriminate on the basis of religion in its family policies. For example, the State pays child support to parents in order to encourage high birth rates but gives de facto preference to Jewish parents over Arab parents.<sup>318</sup> This type of provision perpetuates the belief that non-Jews are *persona non grata* in the eyes of the State and can increase tension and strife between persons of different religions.

As would be expected in a nation that promotes women's equality, abortion law in Israel is relatively liberal, permitting abortion in some but not all cases.<sup>319</sup> This is in accordance with Jewish religious principles that hold that life does not begin at conception.<sup>320</sup> Abortion does not seem to have the same socially divisive effect in Israel as it does in the United States, perhaps due to differences in underlying religious beliefs about when life begins or because religio-political parties have other concerns that are more important to them. However, the religious parties do consider the prohibition of abortion for socio-economic reasons to be one of their future goals.<sup>321</sup>

There is no right to die in Israel, and assisted suicide remains illegal, but doctors are given some discretion in how they are allowed to treat terminally ill patients.<sup>322</sup> For example, one district court recently ruled that a terminally ill man could refuse medical treatment in order to die with dignity.<sup>323</sup>

Israeli law concerning homosexual rights is also relatively progressive.<sup>324</sup> Unlike some nations that criminalize homosexual relationships,

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317. Cf. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371 *passim* (1994).

318. See Quigley, *supra* note 70, at 248. For example, payments may be increased if one parent is or was a soldier or if a child is a student at a Jewish seminary. See *id.* at 248-49. Both measures tend to exclude non-Jews from qualifying for additional payments. See *id.*

319. See Dan Fisher, *Israel Demographic War: It All Depends on Babies*, L.A. TIMES, Mar. 21, 1988, pt. 1, at 6 (stating that approximately twenty thousand legal and forty thousand illegal abortions in Israel in 1988).

320. See ROSENBERG, *supra* note 25, at 172. But see ARIEL, *supra* note 13, at 71 (noting some scholars do hold that life begins at conception).

321. See Julian O'Zanne, *Israel Braces for Retreat from Secularization*, FIN. TIMES, June 13, 1996, at 4.

322. See *Judge to Rule on Israeli's Pleas to 'Die With Dignity'*, THE INDEPENDENT (London), Jan. 1, 1996, at 9.

323. See *id.* This is in accordance with the Jewish belief that a person cannot hasten his or her death, but can refuse to prolong it by artificial means. See KLEIN, *supra* note 301, at 272-73.

324. See Michael Parks, *Israeli Armed Forces Ban Discrimination Against Gay Rights*, L.A. TIMES, June 12, 1993, at A5 (quoting one homosexual rights activist as stating that,

Israel grants certain equal protection-type rights to such unions. For example, in 1994 the High Court ruled that the domestic partner of a homosexual airline employee was entitled to the same type of free airline tickets that were given to married employees' spouses as part of the employees' collective working agreement.<sup>325</sup> In a move that was perhaps even more compelling, in 1993 the Israeli military reversed a 1986 standing order limiting homosexuals' ability to serve in the military, recognizing that "homosexuals are as worthy of military service as others," and announced it would induct homosexuals if they were "fit for service according to the same criteria according to which all other candidates are inducted."<sup>326</sup>

## 2. Iran

Islam has always valued and encouraged strict community norms regarding the regulation of family life, and Iran gives full effect to that tradition in its laws.<sup>327</sup> For example, the preamble of the Constitution designates the family as "the fundamental unit of society" and states that "[i]t is the duty of the Islamic government to provide the necessary facilities" for the support of the family.<sup>328</sup> The government is also required to establish "competent courts to protect and preserve the family."<sup>329</sup> In fact, "all laws, regulations, and pertinent programmes must tend to facilitate the formation of a family, and to safeguard its sanctity and the stability of family relations on the basis of the law and ethics of Islam."<sup>330</sup> In exchange for these privileges and guarantees, a reciprocal obligation is placed on the family to uphold religious beliefs and ideals.<sup>331</sup>

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"[t]his makes Israel one of the most advanced nations in the world with regard to homosexual rights"). *But cf. Israel's High Court Hands Gays Major Legal Triumph*, CHI. TRIB., Dec. 1, 1994, available in 1994 WL 6549421 [hereinafter *Major Legal Triumph*] (stating homosexual rights activists consider Israel to be a "relatively conservative society" with respect to homosexuality).

325. See H.C. 721/94, *El Al v. Danilovich*, 48(5) P.D. 749, cited in Hofnung, *supra* note 64, at 594; see also *Major Legal Triumph*, *supra* note 324.

326. Parks, *supra* note 324; see *Israel Formalizes Policy of Drafting Gays*, CHI. TRIB., June 12, 1993, § 1, at 17. Under this new approach, homosexuals are allowed to serve in all parts of the military, including elite combat units and other positions requiring top security clearance. See Parks, *supra* note 324. This move was particularly momentous in that the Israeli military constitutes one of the nation's most important social institutions. See *id.*

327. Proponents of Islamic law tend to guard family law more closely than other areas of law due to the strong textual basis in the Quran for many rules concerning the family and the belief that families are responsible for teaching children their religious duty. See Cammack et al., *supra* note 89, at 50-51.

328. IRAN CONST. preamble.

329. *Id.* art. 21(3).

330. *Id.* art. 10.

331. See generally *id.* preamble.



Many religious traditions give special honor to the family, so Islam is not unique in this regard. However, reverence for the family, when placed in a constitutional setting and combined with an extremely conservative established religion, can tend to limit certain segments of the population into strictly defined roles.<sup>332</sup> Such is the case of women in Iran.<sup>333</sup>

Prior to the 1979 revolution, Iranian women enjoyed a number of Western-style rights under the Pahlavis' attempts to liberalize Iran.<sup>334</sup> For example, women and men had equal rights to divorce, which was granted through civil, rather than religious, courts.<sup>335</sup> Abortion was legalized and men's right to practice polygamy, which is permitted under Islamic religious law, was severely curtailed.<sup>336</sup> Education became widely available to women, and many obtained professional degrees and

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332. See generally Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?* 15 MICH. J. INT'L L. 307, 331 (1994) [hereinafter Mayer, *Clash*]. Usually the application of restrictive laws tends to fall most heavily on marginalized or economically dependent subgroups. For example, laws against "un-Islamic" dress require men to forego wearing ties or unconventional clothing, while otherwise allowing Western fashion; Iranian women, on the other hand, are forced to wear a *chador*, whether or not they are Muslim. See *id.* at 393 n.394; see also HIRO, *supra* note 74, at 201; MACKAY, *supra* note 91, at 9–10 (noting female visitors to Iran must also comply with restrictions on dress). But cf. Geneive Abdo, *Seeking Respect, Liberation in Iran*, CHI. TRIB., Sept. 18, 1994, § 6, at 1 (commenting that restrictions on women's dress have eased so that extra-large raincoats and scarves may suffice). Some people believe the legal requirement to wear a *chador* is akin to torture, especially considering the health risks that accompany the donning of the hot, heavy garb in a region where temperatures can rise to 115° Fahrenheit. See Graves, *supra* note 105, at 70–71, 88 n.262; see also Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 357 n.364 (1997) (discussing *Fisher v. Immigration and Naturalization Serv.*, 37 F.3d 1371 (9th Cir. 1994), remanding to Immigration Board for consideration of Iranian woman's claim that the requirement that women wear a *chador* is a type of persecution). Full *hejab*, or Islamic dress, includes thick socks, pants to the ankles, a long, heavy coat, a large scarf wrapped around the head, and the *chador*, which is a cloth laid over the shoulders, forehead, and chin. See Graves, *supra* note 105, at 70 n.96. If the *chador* is not worn, or is not worn in accordance with legal requirements (something that is nearly impossible to do), a woman is given seventy-four lashes. See *id.* at 78. Each year, thousands of women are imprisoned or otherwise penalized for not wearing full *hejab*. See *id.* at 57–58, 70–71. On the other hand, a number of Iranian women claim that "Westerners put too much emphasis on Islamic dress, which many women find liberating." Kim Murphy, *Victims or Victors? Women in Iran Make Gains but Must Endure Restraints Some Find Intolerable*, L.A. TIMES, May 6, 1992, at E1.

333. Cf. Wing, *supra* note 126 *passim* (discussing women's role in other Islamic countries and methods of reform within the Islamic tradition).

334. The extent to which those rights were fully implemented is in some dispute. See Miller, *supra* note 165, at 823 n.239.

335. See Graves, *supra* note 105, at 74 (citing Tamilla F. Ghodsi, *Tying a Slipknot: Temporary Marriage in Iran*, 15 MICH. J. INT'L L. 645, 658 (1994)).

336. See *id.* (citing Ghodsi, *supra* note 335, at 658).

entered the legal system as judges and lawyers.<sup>337</sup> After Khomeini came into power, all of these rights and protections disappeared, except the right to vote.<sup>338</sup> Today, women in Iran are highly marginalized and oppressed by Western standards.<sup>339</sup>

Although it is commonly known that women experience de facto oppression under the law in Iran, the letter of the law is much more ambiguous, especially in light of the large number of conflicting constitutional provisions concerning the proper role of women in Iranian society. For example, the preamble notes that the constitutional "view of the family unit delivers woman from being regarded as an object or as an instrument in the service of promoting consumerism and exploitation."<sup>340</sup> At first glance this provision seems to indicate that women are

337. *See id.*

338. *See id.* at 58, 77–81 (citing AZAR TABARI & NAHID YEGANEH, *IN THE SHADOW OF ISLAM: THE WOMEN'S MOVEMENT IN IRAN* 26 (1982)); Miller, *supra* note 165, at 783. However, few women today exercise their right to vote independently; it is more likely that a woman votes for the candidate her husband or male guardian selects. *See* Graves, *supra* note 105, at 65.

339. This is not to say that there is not a significant number of women who support the Iranian system. Many Iranian women believe that the State's restrictions are part of their religious duty and that religiously based gender roles free both men and women to fulfill their obligations to Allah properly. *See* Graves, *supra* note 105, at 83 n.214 (noting reasons why women adopt fundamentalist Islamic beliefs).

Nevertheless, some do oppose current Iranian policy toward women, although there are few active feminists in Iran since the laws restricting women's lives and actions effectively prevent feminist discourse. *See id.* at 65. Those women in Iran who do consider themselves feminists often have different goals than feminists in the West; rather than having gender equality as one of their uppermost goals, Iranian feminists focus on the right to *mahr* (a bride price similar to dowry) and rights regarding divorce, as these two issues contribute most to women's disempowerment and low quality of life in Iranian society. *See id.* at 67–68.

340. IRAN CONST. preamble. In accordance with this interpretation of Islamic culture, Iranian women have reportedly been prohibited from entering 62 of 124 scientific professions and from sitting on the bench. *See* Mayer, *Clash*, *supra* note 332, at 333 n.97 (citing *Final Report on the Situation of Human Rights in the Islamic Republic of Iran*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Agenda Item 12, at 37, U.N. Doc. E/CN.4/1993/41 (1993)); *see also* Graves, *supra* note 105, at 77 (stating that after Khomeini came into power, all female judges were fired and told to find clerical positions) (citing TABARI & YEGANEH, *supra* note 338, at 15). As one of former President Rafsanjani's advisors stated, "we don't want women to work in factories . . . . We want them to have a job that matches their personality, like doctors, cultural work, or work in education." Mayer, *Clash*, *supra* note 332, at 333 & n.97 (quoting Annika Savill, *Sisters of the Veil*, THE INDEPENDENT (London), June 7, 1992, at 12).

Some people see certain liberalizing trends in Iran that give women hope that they will again be able to find employment in their chosen fields. For example, the State is now encouraging women to attend universities and is lifting restrictions that had previously prevented women from working in areas such as engineering. *See* Katayon Ghazi, *Iran Woos its Women with Reforms and Rights*, THE GUARDIAN, Jan. 3, 1995, at 8 [hereinafter Ghazi, *Iran Woos*]. Women may even become assistant judges under the current regime. *See id.*; Wright, *Islam Rising*, *supra* note 166. This may have less to do with an ideological shift than

to be free to do what they wish with their lives, but it can also be construed as excluding women from functioning in the workplace and as reinforcing their roles as wives and mothers.<sup>341</sup> Indeed, although the Constitution pays lip service to the notion that "[a]ll citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights," such rights are to be exercised "in conformity with Islamic criteria."<sup>342</sup> It is this express limitation, "in conformity with Islamic criteria," that invalidates much of the progressive language of the Constitution.<sup>343</sup>

There are other constitutional provisions that include Islamic qualifiers permitting arbitrary and/or discriminatory treatment of dissenting or minority groups. For example, "[e]veryone has the right to choose any occupation he wishes, if it is not contrary to Islam and the public interests, and does not infringe the rights of others."<sup>344</sup> Similarly, "[n]o one is entitled to exercise his rights in a way injurious to others or detrimental to public interests."<sup>345</sup> Since equality for women under the law can be, and often is, viewed by Iran's Islamic government as injurious to individual men, individual women, and public (Islamic) interests,

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with recent downturns in the Iranian economy that have required women to return to work to help support their families, however. See *Iran Women Challenging Their Status*, CHI. TRIB., Apr. 24, 1992, § 1A, at 22 [hereinafter *Iran Women*].

341. This attitude is similar to that taken by the United States Supreme Court early in the twentieth century, when the Court adopted a protectionist stance towards women in the workplace. See generally *Bunting v. Oregon*, 243 U.S. 426 (1916); *Muller v. Oregon*, 208 U.S. 412 (1908); *Lochner v. New York*, 198 U.S. 45 (1905). In some regards, this might be termed Iran's first line of defense against modernism and industrialization, issues which the West began to resolve much earlier in the century.

342. IRAN CONST. art. 20. Even with this constitutional protection ostensibly entitling them to equal pay and benefits under the law, women must endure constant discrimination in the workplace. See Katayon Ghazi, *A Voice For Change: High-Ranking Official in Iran Works to Break Gender Barriers*, CHI. TRIB., Nov. 22, 1992, available in 1992 WL 4541951 [hereinafter Ghazi, *Voice for Change*] (noting reality of life for women in Iran does not live up to state's guarantees for financial and professional independence for women); *Iran Women*, *supra* note 340 (discussing that female employees can expect to receive twenty-five percent less in annual bonuses than male colleagues).

343. See AN-NA'IM, *supra* note 81, at 87; Mayer, *Clash*, *supra* note 332, at 316.

344. IRAN CONST. art. 28 (emphasis added); see also *id.* art. 22 (noting the "occupation of the individual [is] inviolate, except in cases sanctioned by law"). Statistics on the actual number of women in the Iranian work force vary widely. For example, in April 1992, one journalist reported that women's only real suitable environment was the home and that women held only five percent of all professional jobs and only twelve percent of all jobs in the civil service. See *Iran Women*, *supra* note 340. On the other hand, another journalist reported a month later that women made up thirty-five percent of the workforce. See Murphy, *supra* note 332. These reports demonstrate the difficulty in obtaining reliable data out of country that has little reason to be truthful to Western media.

345. IRAN CONST. art. 40.

women can easily be prohibited from a variety of occupations and activities.<sup>346</sup>

"Islamic criteria"<sup>347</sup> are dictated, in large part, by the religio-legal edicts found in the Quran. Although the Quran was originally a progressive document that expanded the rights of women, it has been interpreted, over time, much more restrictively.<sup>348</sup> In addition, the Iranian emphasis on a traditional, literal interpretation of religious law prevents the introduction of any modern influences that might expand women's opportunities.<sup>349</sup>

Therefore, when the State promises to "ensure the rights of women in all respects" (albeit only to the extent that those rights conform with "Islamic criteria"),<sup>350</sup> it is not undertaking to provide those types of protections that are commonly recognized in the West. In fact, the distinctiveness of the Iranian approach is most obvious in the provision that requires the State to "create a favourable environment for the growth of woman's personality and the restoration of her rights."<sup>351</sup> By

346. Some would argue that it is a form of cultural imperialism to impose Western values regarding women's rights on a non-Western society. See Mayer, *Clash*, *supra* note 332, at 330. While respect for other nations' societal norms is certainly laudatory, cultural relativism should not be used to justify discrimination and oppression. See *id.* at 331; see also Wing, *supra* note 126, at 155, 164-98 (arguing that reforming existing legal structures to address the situation of Palestinian women must account for cultural norms in Palestinian society). To do so would preclude any reform anywhere, since change always alters the cultural status quo. In addition, every right that is now commonly accepted in the West was once contrary to prevailing societal norms, showing how people's attitudes can change over time. See Miller, *supra* note 165, at 823.

347. IRAN CONST. art. 20.

348. See RUTHVEN, *supra* note 73, at 164-67; Graves, *supra* note 105, at 73-77; Wing, *supra* note 126, at 157-63 (discussing interpretations of the Quran by different schools of Islamic thought).

349. For example, although it is not mentioned in the Constitution, women must still obtain the consent of their husbands or other male guardians in order to undertake any form of employment. See Graves, *supra* note 105, at 89 (quoting Fact Sheet, *Status of Women in Iran*, COMMITTEE FOR HUMANITARIAN ASSISTANCE TO IRANIAN REFUGEES QUARTERLY REPORT (International Campaign in Defense of Iranian Women's Rights 1996); Howland, *supra* note 332, at 310; Murphy, *supra* note 332. Women have not only been limited in their ability to seek employment; Quranic injunctions regarding public decency and the role of women has also led the State to prohibit Iranian women from participating in international athletic events in order to avoid appearing in public with bare arms and legs. See MUNSON, *supra* note 73, at 109; Abdo, *supra* note 332 (noting that because they must wear *hejab*, Iranian women can compete only in chess, equestrian sports, skiing, shooting, and games for the handicapped). However, despite these difficulties, a recent *Majlis* had seventeen women members—approximately the same proportion as the U.K. House of Commons at about the same time. See Edward Mortimer, *The Satanic Dialogue*, FIN. TIMES, May 21, 1997, at 28; see also Murphy, *supra* note 332 (citing number of women candidates in Iran's 1992 election and noting that the previous *Majlis* had sat more women than were in the U.S. Senate).

350. IRAN CONST. art. 21.

351. *Id.*

all accounts, Iran believes that it has complied with this directive, even though most outside observers would argue that women's rights have been curtailed rather than restored in post-revolutionary Iran. Similarly, by guaranteeing to protect "mothers, particularly during pregnancy and childrearing" and glorifying women who fought in the revolution while simultaneously emphasizing their roles as child-bearers and child-rearers,<sup>352</sup> the Constitution demonstrates the Iranian perspective that women's roles are different than men's, and what Westerners may see as inequality and subservience is merely the natural, divinely ordained ordering of society.<sup>353</sup>

Some people may find it odd that the drafters felt compelled to include protective language in the Constitution if they never intended to protect women's rights, at least in the sense commonly accepted by the international community, but the existence of these provisions may provide a useful insight into the Iranian mindset. Because women cannot rely on these provisions to change their status within the State (at least not yet), it can be assumed that Iran used this language either (i) to practice *taqiyeh*, or (ii) to show that it was as progressive and human rights-minded as any other civilized nation.<sup>354</sup> This second theory suggests that Iran may be more vulnerable to international opinion than commonly suspected, and may give human rights workers cause to hope that their efforts to cure rights violations in Iran will have some effect.

In addition to the above mentioned general provisions, women's rights are also affected by the availability of divorce, and, as is to be suspected, the law of divorce in Iran is heavily male-oriented.<sup>355</sup> According to the Quran, men can divorce their wives at will by simply stating "I divorce you" three times.<sup>356</sup> Although men now must obtain judicial decrees of divorce rather than simply relying on verbal declara-

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352. *Id.*; see *id.* preamble.

353. IRAN CONST. art. 21. See *id.* preamble; HIRO, *supra* note 74, at 202; see also Graves, *supra* note 105, at 77, 79–80 (discussing Khomeini's vision of Iranian women as "Muslim housewives" and his belief that their ultimate goal and purpose should be to bear sons who would carry out the goals of the revolution).

354. See MACKEY, *supra* note 91, at 388 (stating that Iranians want to be recognized and respected as an ancient, cultured civilization).

355. Although the shah's secular family courts were disbanded soon after the revolution and replaced with *shari'a* courts headed by Islamic theologians rather than trained jurists, see Graves, *supra* note 105, at 78, the *Majlis* passed a law in 1992 requiring divorces to be governed by civil, rather than purely religious, law and insisting that divorces be formalized through civil courts. See Wright, *Islam Rising*, *supra* note 166 (noting that statute was adapted from European law, not the *shari'a*).

356. See RUTHVEN, *supra* note 73, at 169–70.

tions, divorce is still relatively easy for a man to obtain.<sup>357</sup> Women, on the other hand, find it much more difficult to extricate themselves from a troubled marriage and can obtain a divorce only with their husband's consent or, in limited circumstances, through a court order.<sup>358</sup> Following a divorce, a woman must wait three to twelve months before remarrying, but a man may remarry immediately.<sup>359</sup>

It is just not the difficulties and inequities inherent in obtaining a divorce that create hardships for women; it is also the economic vulnerability that follows a divorce.<sup>360</sup> If a bride is entitled to *mahr*, a type of bride price or dowry, she can recoup that sum upon divorce.<sup>361</sup> However, not every woman is entitled to *mahr*, and those who are not have no bargaining chips in the marriage and can be easily evicted from their homes by their husbands, with no rights to any marital assets or to custody of their children above a certain age.<sup>362</sup> Although divorced women have apparently gained the right to recover the value of their labor during their marriage, it is not clear whether a nation that values its women for their roles as homemakers and mothers will reward those roles with large monetary sums in cases of divorce.<sup>363</sup> Without an ade-

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357. See generally Wright, *Islam Rising*, *supra* note 166 (discussing new divorce laws in Iran).

358. See AN-NA'IM, *supra* note 81, at 90; Graves, *supra* note 105, at 69; see also Ghazi, *Voice for Change*, *supra* note 342 (describing conditions in which courts will grant a woman's request for divorce); *Iranian Law Gives Women Property Rights in Divorce*, CHI. TRIB., Nov. 20, 1994, § 1, at 35 [hereinafter *Iranian Law*] (noting divorce is husband's right under Iranian law). However, the State has apparently begun to encourage the use of prenuptial contracts that allow women to initiate divorce proceedings. See Ghazi, *Iran Woos*, *supra* note 340. These prenuptial contracts are also intended to guarantee women some financial security in case of divorce, although very few successfully do so. See Ghazi, *Voice for Change*, *supra* note 342.

359. See RUTHVEN, *supra* note 73, at 169–70. This double standard has been justified by the need to establish paternity. See *id.*

360. See *id.* at 170.

361. See Graves, *supra* note 105, at 67–68 (citing Ziba Mir-Hosseini, *Women, Marriage and the Law in Post-Revolutionary Iran*, in *WOMEN IN THE MIDDLE EAST: PERCEPTIONS, REALITIES AND STRUGGLES FOR LIBERATION*, 59, 68–80 (Haleh Afshar ed., 1993)). Sometimes the threat of a wife claiming her *mahr* is enough to make a husband think twice before pursuing a divorce, since the *mahr* is often more than a man can easily raise. See *id.* (citing Mir-Hosseini, *supra*). Alternatively, if a woman wants out of an unhappy marriage, she can release her husband from his obligation to pay her *mahr* as the “price” of divorce. See *id.* at 68 (citing Mir-Hosseini, *supra*).

362. See *id.* at 69 (citing Mir-Hosseini, *supra* note 361, at 67). Fathers in Iran have the right to absolute custody of their sons above the age of two and daughters above the age of seven. See *id.* (citing Mir-Hosseini, *supra* note 361, at 67). Women may only retain custody if the husband has no living male relatives old enough to assume custody. See *id.* at 69 n.87 (citing Mir-Hosseini, *supra* note 361, at 67).

363. See MACKEY, *supra* note 91, at 368; Wright, *Islam Rising*, *supra* note 166 (reporting that the judiciary has upheld the law compensating women for labor during mar-

quate education and barred from a number of occupations, many divorced women must resort to becoming temporary wives under the Islamic doctrine of *mut'a*.<sup>364</sup>

As is to be expected in a nation where women have little control over their own lives, abortion in Iran is illegal, although some sources say that illegal abortions are easily obtained.<sup>365</sup> Contraception, on the other hand, is legal, though not always widely available, and is encouraged by a government that must deal with the strain from the high birth rates of the 1980s.<sup>366</sup>

Children's rights in Iran are also heavily influenced by Islamic law and tradition. As in Israel, children themselves appear to have no legally recognized rights. Instead, the Quran and the State devolve the ultimate responsibility for childrearing on the father by giving him absolute custody of children over a certain age.<sup>367</sup> The State will only award "guardianship of children to *worthy* mothers, in order to protect the interests of the children."<sup>368</sup> In practice, mothers are never given custody of their children.<sup>369</sup>

Finally, homosexuals in Iran are not given any protections by the State and, in fact, can be executed under Islamic law.<sup>370</sup> Some homosexuals have sought asylum in other countries in order to avoid persecution at the hands of Iranian authorities.<sup>371</sup>

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riage); see also *Iranian Law*, *supra* note 358 (noting that although monetary awards will be decided on a case-by-case basis, women could be given up to half the property gained during marriage).

364. See Graves, *supra* note 105, at 69 & n.86 (citing Mir-Hosseini, *supra* note 361, at 67), 81–82; *Iran Women*, *supra* note 340.

365. See Murphy, *supra* note 332. State officials also claim that an abortion can be obtained if the life of the mother is at risk. See Robert Fisk, *Iran Surprises the West with Liberal Line on Birth Control*, THE INDEPENDENT (London), Sept. 14, 1994, at 11.

366. See Murphy, *supra* note 332; see also Ed Blanche, *Despite Radicals' Grumblings, Iran Intensifies Birth-Control Program*, L.A. TIMES, Jan. 7, 1990, at A5 (stating Khameni declared that "birth control is not un-Islamic"). But see Howland, *supra* note 332, at 313 n.187 (indicating that at least in some Islamic countries, husbands may enjoy a wife's use of contraception).

367. See RUTHVEN, *supra* note 73, at 165–72; *supra* note 362.

368. IRAN CONST. art. 21(5) (emphasis added).

369. See Ghazi, *Voice for Change*, *supra* note 342; *Iran Women*, *supra* note 340.

370. See Bettina Boxall, *3 Foreign Gays Seek U.S. Asylum*, L.A. TIMES, Apr. 30, 1990, at B3.

371. See *id.*

## D. Education

### 1. Israel

Many devout persons feel that one of the most important contributors to the success and survival of their religion is the ability to educate their children in the way they feel is best.<sup>372</sup> In Israel, that sentiment is reflected in the Status Quo Agreement, which guarantees the continuation of the religious educational system as it existed during the time of the British mandate.<sup>373</sup> In accordance with that agreement, the new state set up a dual educational system in 1948 that included both secular and religious schools.<sup>374</sup>

Currently, all schools in Israel receive state funding, regardless of religious affiliation.<sup>375</sup> There is little opposition to this practice; instead, most of the controversy concerning education in Israel centers on the level of state involvement in religious schools, i.e., whether and to what extent the State should have some supervisory power over religious schools.<sup>376</sup>

As in other areas of Israeli life, discrimination in the schools is much more likely to be leveled against non-religious or non-Orthodox Jews than against other religious groups, again due to the disproportionate power of the Orthodox in government and their determination to shape the culture of the Jewish community in Israel.<sup>377</sup> Even the secular schools are not completely secular, since religion is taught as part of the regular curriculum.<sup>378</sup> Although this approach may sound novel to U.S. citizens who are more familiar with battles being over whether religion is permitted in state-run schools at all, the Israeli approach is consistent

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372. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 21; see also McNulty, *supra* note 62 (discussing different educational priorities of religious and secular Israelis).

373. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 32.

374. See *id.* at 32–36.

375. See *id.* at 21–22 (defining lack of discrimination between Jewish, Muslim, and Christian schools as “institutionalized pluralism”).

376. See *id.* at 22; Genut, *supra* note 60, at 2154 (highlighting the controversy as delineated in LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 22, and Norman L. Cantor, *Religion and State in Israel and the United States*, 8 TEL AVIV U. STUD. L. 185, 207, 217 (1988)).

377. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 19. However, in a blow to the powerful Orthodox minority, Jewish schools have been ordered by the Education Minister to teach Conservative and Reform Judaism in addition to Orthodox Judaism. See *Israeli Schools Deal Orthodox a Setback*, CHI. TRIB., Aug. 2, 1994, § 1, at 14.

378. See LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62, at 21. But see McNulty, *supra* note 62 (describing religious parties' goal is to have secular schools teach Jewish philosophy).



with that of some other countries.<sup>379</sup> However, segregation of students by religious affiliation often alienates the groups even further and increases the probability of animosity and violence between them.<sup>380</sup>

Although "separate but equal" may prevail in Israel's primary and secondary schools, things are very different at the university level. Despite the fact that all universities in Israel are private, they are forbidden by law from discriminating in the admissions process on the basis of "race, sex, religion, national origin or social status."<sup>381</sup> Nevertheless, Arabs are regularly excluded from certain faculties based on concerns about national security.<sup>382</sup> Although this may appear to be a race-based distinction, it is also a religious distinction since virtually all Arabs are non-Jews. In addition, financial aid for Arab university students is severely limited, since non-Jews are ineligible for scholarships granted by the Office of Absorption of the Jewish Agency (a pseudo-governmental agency) and for most private scholarships, which usually require prior service in the Israel Defense Force.<sup>383</sup> Although loans and grants are available to veterans or residents of "development towns" or "renewal neighborhoods," these definitions exclude virtually all non-Jews from qualifying for student funding.<sup>384</sup> This type of approach perpetuates the marginalization of non-Jews in Israel, since, without a higher education, it becomes increasingly difficult for persons of minority religions to move into positions of power that would allow them to peacefully change discriminatory practices.

## 2. Iran

As in Israel, religion in Iran is part and parcel of the state-controlled schools.<sup>385</sup> However, unlike the Israeli system, the Iranian education

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379. See, e.g., Strong, *Christian Constitutions*, *supra* note 265, at 42–43 (discussing sectarian educational system in Ireland).

380. See *id.* at 53–54; James F. Clarity, *At Lunch, Belfast Women Talk of a Hunger for Peace*, N.Y. TIMES, Mar. 11, 1996, at A10 (highlighting that nonsectarian schools might create a more cohesive society in Northern Ireland). This dynamic was also evidenced in the U.S. and South African school systems prior to racial desegregation. See Strong, *Christian Constitutions*, *supra* note 265, at 54; Suzanne Daley, *South African School Battle Now a War of Nerves*, N.Y. TIMES, Feb. 23, 1996, at A10 (noting how integrated education has been hailed in South Africa as the key to achieving racial equality).

381. Quigley, *supra* note 70, at 247 (quoting Council for Higher Education (Recognition of Institutions) Rules (1964), Rule 9).

382. See *id.*

383. See *id.*

384. See *id.*

385. See MACKAY, *supra* note 91, at 336. Private schools are banned in Iran, but parents have launched alternative "non-profit" schools that now provide ten percent of primary education in the State. See Wright, *Revolution Unravels*, *supra* note 167.

system considers devotion to the state religion to be perhaps the highest job qualification possible and requires teachers to demonstrate their piety in order to obtain employment.<sup>386</sup> Despite this bias toward Islamic education, however, officially recognized religious minorities are free to educate their children in accordance with their religious beliefs.<sup>387</sup>

The Constitution grants all children the right to an education through high school, but the fact that schools are segregated by gender leads to serious questions about whether the schools are, in fact, separate but equal.<sup>388</sup> This concern is increased by virtue of the fact that married women have no right to an education above primary school, a legal quirk that can severely hinder a girl's ability to become educated, since the average age of marriage for females in Iran is twelve to thirteen.<sup>389</sup> Even if a woman can obtain her father's or husband's permission to obtain an education, she is often reviled by a society that equates higher learning in a woman with the secular West and considers such learning both unneeded and unwanted in an Islamic regime.<sup>390</sup> However, the recent easing of restrictions on the types of education available to women has increased women's freedom slightly.<sup>391</sup>

Although many Iranian universities were closed immediately after the revolution, they have reopened and are experiencing rising attendance, although they are not quite what they used to be.<sup>392</sup> For example, the curriculum of the schools at both the lower and university levels has been revised to give predominance to religion and the revolution,<sup>393</sup> and it has taken a number of years for women's attendance to reach

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386. See MACKEY, *supra* note 91, at 336.

387. See IRAN CONST. arts. 12-13.

388. See *id.* art. 30. Some commentators have noted that the enrollment of girls is nearly as high as that of boys, at least in primary school. See Scheherazade Daneshkhu, *Birth-Rate Successes Moderate Iran's Stance*, FIN. TIMES, Sept. 1, 1994, at 4.

389. See Graves, *supra* note 105, at 65 n.49 (citing Jacqueline Rudolph Toubia, *Effects of the Islamic Revolution on Women and the Family in Iran*, in WOMEN AND THE FAMILY IN IRAN 131, 142 (1985)); Howland, *supra* note 332, at 307 n.158. Still, commentators have recognized that literacy rates for both males and females have increased, even in the post-revolutionary era. See MACKEY, *supra* note 91, at 368; Daneshkhu, *supra* note 388 (quoting literacy rate as seventy-four percent).

390. See Graves, *supra* note 105, at 65 & n.50 (citing Steven E. Coleman, *Survey of Recent Developments in Third Circuit Law: Immigration Law*, in 24 SETON HALL L. REV. 1722, 1726 (1994)).

391. See Ghazi, *Iran Woos*, *supra* note 340.

392. See FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, IRAN: A COUNTRY STUDY 131-32 (Helen Chapin Metz ed., 1989); Wright, *Revolution Unravels*, *supra* note 167.

393. See MACKEY, *supra* note 91, at 336.

pre-revolutionary levels.<sup>394</sup> In addition, academic freedoms have decreased greatly, with government informants on the lookout to root out and punish un-Islamic thoughts among students and faculty.<sup>395</sup> Professors must demonstrate the proper ideological outlook, namely dedication to Islam, in order to retain their positions,<sup>396</sup> and applicants to the universities must pass a character test to be sure that they support government ideology.<sup>397</sup>

### III. THE EFFECTS OF INSERTING RELIGIOUS PRINCIPLES INTO CONSTITUTIONAL LAW

#### A. *The Effect of Religio-Legal Unity on Human Rights*

As discussed above, both Israel and Iran expressly incorporate religion and religious principles into their constitutional and fundamental laws. Although this approach may seem problematic to those who are used to strict separation of church and state, religio-legal unity was once the political norm throughout the civilized world and has been supported by many esteemed philosophers throughout the centuries.<sup>398</sup> The close identification of law and religion was especially common in the Middle East prior to the colonization of the region by European powers and the concomitant imposition of post-Enlightenment values and political theory on previously Islamic states.<sup>399</sup>

The apparent simplicity of a unified religio-legal system is deceptively attractive, particularly in a world that is increasingly complex and in a region where religion has traditionally been linked with the State. Typically, those who support the unification of religion and state believe it is the only logical solution to the political and religious problems created by a secular system in which both the State and God demand

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394. In 1978, Tehran University was forty-three percent women. See Graves, *supra* note 105, at 75. In 1995, women reportedly constituted forty percent of university students. See Ghazi, *Iran Woos*, *supra* note 340; see also Murphy, *supra* note 332 (claiming women outnumber men in Iranian universities).

395. See Miller, *supra* note 165, at 819–20.

396. See MACKAY, *supra* note 91, at 336–37. This “outlook” is demonstrated through several years’ cooperation with the government prior to being granted tenure. See Miller, *supra* note 165, at 820.

397. See Miller, *supra* note 165, at 820.

398. See, e.g., THOMAS AQUINAS, *The Summa of Theology*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 61 (Paul E. Sigmund trans. & ed., 1988); THOMAS HOBBES, LEVIATHAN 230, 268, 332–34, 366, 371–72, 399 (C.B. Macpherson ed., 1985); ST. AUGUSTINE, THE POLITICAL WRITINGS 192–93, 196–99, 202–04 (Henry Paolucci ed., 1962).

399. See RUTHVEN, *supra* note 73, at 292; Mayer, *Islam and the State*, *supra* note 80, at 1025–26.

perfect and total allegiance.<sup>400</sup> For example, these people claim that because religions such as Judaism and Islam do not differentiate between matters of spiritual and temporal concern, there will be times when it is impossible to be fully obedient to a State that does not incorporate religious values into its laws.<sup>401</sup> Therefore, they conclude that classical liberalism is wrong to separate religion from the affairs of the State.<sup>402</sup>

Nevertheless, despite the problems inherent in a secular political model, separation of religion and state has become the norm for many Western nations and has its supporters in other regions of the world.<sup>403</sup> Separatism's popularity is largely due to an increased recognition of various human rights, including the right to religious liberty. Although some commentators see no logical inconsistency between the establishment of religion and freedom of religion,<sup>404</sup> others believe complete separation is the only method by which religious freedom can be fully enjoyed.<sup>405</sup> Despite differences in the way various nations approach religious rights, however, virtually every culture views those rights as important in some way.<sup>406</sup>

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400. See, e.g., Rousseau, *supra* note 191, at 169. Cf. John F. Wilson, *Church and State in America*, in JAMES MADISON ON RELIGIOUS LIBERTY, 97, 102-03 (Robert S. Alley ed., 1985) (defining three models of church-state relations). Many people fail to recognize, however, that combining spiritual and temporal authority in a single entity does not eliminate all disputes about what religio-moral code should be imposed on society; even theocratic or theonomous States must resolve the differences of opinion raised by divergent theological approaches to law and religion.

401. See Schwarzschild, *supra* note 12, at 909 (arguing that the Enlightenment could only occur in a Christian state). This argument ignores the fact that both Judaism and Islam have created theologically acceptable systems for living under secular rule.

402. See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* *passim* (1993); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* *passim* (1986); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 839-40 (1995).

403. See, e.g., MACKEY, *supra* note 91, at 376 (discussing work of Abdul Karim Soroush); Arzt, *Religious Freedom*, *supra* note 235, at 61 (noting "Halakah is not incompatible with liberalism").

404. See G.W. Hogan, *Law and Religion: Church-State Relations in Ireland From Independence to the Present Day*, 35 AM. J. COMP. L. 47, 73-74 (1987); see also Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 308 (1990) (discussing tolerance in liberal and pre-liberal societies). This approach often relies on toleration of the non-established faiths, which both Israel and Iran claim they do.

405. See, e.g., Sullivan, *supra* note 4, at 197-98.

406. For a discussion of the dispute as to whether human rights, including religious rights, are universal or merely culturally relevant, see Michael C. Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 2, at 3, 7-8; Eliza Lee, *Human Rights and Non-Western Values*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 2, at 72, 74-76; Loh, *supra* note 2, at 155 (noting that if cultural rela-

One way of gauging the importance of religious rights is to look at the increased attention given to such rights by the international community. While a State's religio-political regime was once considered a subject of solely domestic concern,<sup>407</sup> today there are numerous international conventions that address the subject of religious liberties, and various States, including the United States, are beginning to look at religious persecution as an area of growing international concern.<sup>408</sup>

Within the context of the current discussion, international conventions on religious and other rights are important in two ways. First, States are expressly bound to uphold the provisions of any convention or declaration that they have ratified. Second, whether or not they are binding on any one particular country, international human rights instruments identify principles that the international community believes worthy of protection. Since one purpose of this article is to discover whether and to what extent violations of religious rights lead to violence within and between societies, it will be helpful to discuss certain international instruments that Israel and Iran have not signed or ratified, not to argue that either of the two nations is bound by the principles contained in those documents, but to see the extent to which their domestic practices deviate from accepted norms and what effect that has on violence in each society.

Most current formulations of international human rights are based on an individual system of rights.<sup>409</sup> However, because both Israel and Iran have adopted a group rights theory of government, it will also be important to analyze whether group rights theory is consistent with or contrary to the existing religious rights regimes. If the two approaches conflict, there may be problems with domestic enforcement of convention obligations.

### 1. International Human Rights Law

The concept of international human rights as a protectible interest was not recognized until the twentieth century, when the United Nations (UN) became the primary catalyst for official recognition of these

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tivism is to be taken to its logical extreme, then even the most "despicable acts" must be condoned); Mayer, *Clash*, *supra* note 332, at 309-20.

407. See Eric Kolodner, Comment, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407, 407-09 (1994).

408. See *id.* at 409-14; see also Erlanger, *supra* note 5 (examining report commissioned by congress to study the incidence of religious persecution in various nations).

409. See Vincent, *supra* note 1, at 253-61 (commenting on claims to rights made by individuals and by entities other than individuals).

rights.<sup>410</sup> Although religious freedom had been supported by political theorists since the eighteenth century, it was very difficult for individuals living under an oppressive regime to enforce their rights, and dissidents had few options other than emigration. Today, internationally binding instruments provide for individual relief as well as international sanctions upon countries that violate those provisions.<sup>411</sup> Smaller blocs of nations have also created regional human rights conventions.<sup>412</sup>

#### a. Rights under the International Bill of Rights

One of the first instruments promulgated by the UN after its creation was the Universal Declaration of Human Rights (Universal Declaration).<sup>413</sup> The Universal Declaration is a comprehensive document that enumerates a variety of rights and protections, including an explicit protection of the freedom of religious belief.<sup>414</sup> Many of these rights are protected under similar language in two other fundamental UN documents, the International Covenant on Economic, Social and Cultural

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410. Because both Israel and Iran are members of the United Nations, they must comply with the human rights provisions of the UN Charter. See Loh, *supra* note 2, at 149; see also Proclamation of Independence, 1948, 1 L.S.I. 3, 4 (1948) (declaring Israel will comply with principles in UN Charter).

411. See Kolodner, *supra* note 407, at 410–14.

412. See, e.g., Bangkok Declaration (1993), reprinted in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 2, at 205; The Cairo Declaration on Human Rights in Islam, U.N. Doc. A/CONF.157/PC/35 (1992), reprinted in TWENTY-FOUR HUMAN RIGHTS DOCUMENTS 180 (Center for the Study of Human Rights, Columbia University ed., 1992); Banjul Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 59 (1982); The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (and accompanying protocols), Nov. 4, 1950, reprinted in MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS, apps. A–B. The Cairo Declaration, which has met with little support outside of Iran and Saudi Arabia, is not considered binding law, but is indicative of the Iranian approach toward human rights. See Arzt, *Religious Human Rights*, *supra* note 218, at 143.

413. See Universal Declaration, *supra* note 256. Some have argued that Iran must comply with the principles set forth in the Universal Declaration by virtue of the fact that portions of the Universal Declaration have become customary law. See Loh, *supra* note 2, at 149; Miller, *supra* note 165, at 780 n.6, 791–92; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT]; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38. Others argue that Iran is bound by the Universal Declaration by virtue of its voting in favor of the Universal Declaration in the General Assembly in 1948. See Miller, *supra* note 165, at 791. As a party, Israel is bound by the provisions of the Universal Declaration.

414. Interestingly, the preamble itself notes that the violation of these rights can lead, “as a last resort, to rebellion against tyranny,” thus recognizing the causal link between human rights violations and violence within or between societies. Universal Declaration, *supra* note 256, preamble.

Rights (ICESCR)<sup>415</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>416</sup> Together these three instruments constitute the International Bill of Rights;<sup>417</sup> because both Israel and Iran have ratified the ICCPR, the ICESCR, and the Universal Declaration, they are bound by the principles contained within those instruments.

The first mention of religion in the Universal Declaration appears in Article 2, which states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion."<sup>418</sup> This basic concept, which is also protected by the two covenants<sup>419</sup> and is known as the principle of nondiscrimination, has been described in equal protection terms. Interestingly, these provisions do not explicitly state whether the signatory nation only needs to avoid discrimination by public institutions or whether the State must also eliminate private discrimination.<sup>420</sup> However, neither Israel nor Iran has effectively complied with the principle on nondiscrimination on either the public or private level, despite the fact that their fundamental or constitutional laws contain language prohibiting discrimination based on religion.

An example of Israel and Iran's failure to comply with the nondiscrimination principle is that in both countries access to higher education is dependent on a student's religion. In Israel, the discriminatory action is disguised as a national security issue in order to bar entry to certain faculties; it may also be disguised as financial support of Jewish settlers

415. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6136 (1966) [hereinafter ICESCR].

416. See ICCPR, *supra* note 256.

417. See 31 I.L.M. 997 (1992) (noting Israel's ratification of the ICESCR and ICCPR on October 3, 1991); Graves, *supra* note 105, at 87-88 (noting Iran's ratification of ICESCR and ICCPR) (citing Abdullahi Ahmed An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491, 503-04 (1994)). These are nearly the only international human rights instruments acceded to by Iran. See *id.*

418. Universal Declaration, *supra* note 256, art. 2; see also *id.* art. 7 (entitling all people "to equal protection of the law"). This echoes one of the express purposes of the United Nations, as stated in the Charter: to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . religion." UN CHARTER art. 55; see also *id.* art. 1 (declaring the United Nations' purpose is to promote "fundamental freedoms for all without distinction as to . . . religion"); Howland, *supra* note 332, at 327-28 (describing States' human rights obligations under the Charter).

419. See ICCPR, *supra* note 256, arts. 2(1), 4(1), 18; ICESCR, *supra* note 415, art. 2(2). Notably, Islamic alternatives to existing human rights conventions generally do not provide for either religious freedom or equal protection under the law for women and religious minorities. See Mayer, *Clash*, *supra* note 332, at 329-35 (discussing, inter alia, the Cairo Declaration).

420. The applicability of international law to private action has recently become a topic of scholarly discussion. See CLAPHAM, *supra* note 2, at 89-133.

or veterans. In Iran, discrimination in education is somewhat more subtle, as the State obstructs entrance to higher education only if the applicant has an improper ideological outlook; however, since "deviant" religious beliefs such as Baha'ism or atheism would, in all likelihood, be considered ideologically improper, Iran also violates the principle of religious nondiscrimination.

The most specific provision regarding religion in the Universal Declaration provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>421</sup>

Both Israel and Iran claim to comply with this aspect of the Universal Declaration in that they protect freedom of conscience and religion, but both have certain problems in the implementation of that right. Israel is certainly the more compliant of the two nations, in that people are not persecuted for their religious beliefs and are, for the most part, free to practice their religion openly. This is even true of Reform or Conservative Jews, who are generally not forbidden to perform their religious rites.<sup>422</sup> However, the State does impose certain purely religious obligations on non-believers, as in the case of Jewish marriage and divorce. This problem of affirmatively requiring non-believers to undertake religious acts is not explicitly addressed in any of the three instruments,

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421. Universal Declaration, *supra* note 256, art. 18; see ICCPR, *supra* note 256, art. 18 (providing the same rights); Sullivan, *supra* note 299, at 493-94 (discussing types of coercion prohibited under Article 18(2) of the ICCPR).

422. Although the requirement that Conservative and Reform Jews comply with Orthodox rituals regarding marriage and divorce might be considered a violation of Article 18 of the Universal Declaration, it might pass muster if one considers Orthodox marriage requirements to be akin to civil marriage requirements. This second interpretation is bolstered by the fact that the State does not prohibit Conservative and Reform Jews from undergoing marriage rituals that accord with their own religious rites.

One exception to the general rule of free exercise of religion in Israel concerns women who want to sing or pray publicly at the Western Wall. Orthodox Jews oppose this practice strenuously and sometimes attack women who engage in this sort of religiously objectionable behavior. The State is currently trying to find ways to protect Reform Jews' free exercise of religion while respecting Orthodox Jews' claim that they are religiously offended by having to witness such practices. This raises serious questions of whose rights should prevail: those of the person whose sensibilities are offended by witnessing the sinfulness of others or those of the person whose religious rights would be curtailed by limiting the practice. This problem also exemplifies the classic dilemma of identifying what actions are public versus what actions are private. See S.I. Strong, *Romer v. Evans and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. (forthcoming 1997) [hereinafter Strong, *Morality Legislation*].



but arguably falls within the ambit of Article 18 of the Universal Declaration, since one can seldom freely practice one religion while being forced to comply with another faith's religious obligations.<sup>423</sup> Another potential problem is raised by the Israeli Supreme Court's protecting religious minorities' right to do that which is religiously required but restricting that which is religiously permitted,<sup>424</sup> which could be considered a violation of a person's right to exercise fully all aspects of his or her religion.

As discussed above, Iranians do not have the right to practice religion freely, notwithstanding explicit constitutional protections to that effect.<sup>425</sup> For example, Baha'is are openly persecuted for holding certain religious beliefs, and Muslims can be executed or otherwise penalized for renouncing their faith. Obviously, both of these practices violate the Universal Declaration.

It is unclear whether the protection of belief in the Universal Declaration includes non-belief as well, as it does in U.S. law.<sup>426</sup> In Israel, one is permitted to choose one's religion or even to repudiate all religions, although this right is somewhat limited in practice since all persons, including professed atheists, must have at least a nominal religious affiliation in order to fully exercise certain fundamental freedoms such as the right to marry and found a family.<sup>427</sup> In Iran, the issue of whether the State will protect non-belief is rather interesting, since it seems as if religious minorities can reject all religions while those within the religious majority cannot. For example, under Articles 14, 23, and 137 of the Iranian Constitution, religious minorities are apparently free to renounce

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423. However, Israel has never claimed that requiring non-Orthodox Jews to comply with the *Halacha* is intended to coerce religious belief, which may save the law requiring all marriages to comply with Orthodox religious rituals from violating the Universal Declaration. See H.C. 72/62, *Rufeisen v. Minister of the Interior*, 16(4) P.D. 2428 ("Our State is based upon freedom of conscience and therefore no Jew may be compelled to declare himself an adherent of the doctrines of the Jewish faith when he is a non-believer."), quoted in *Arzt, Religious Freedom*, *supra* note 235, at 56; cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943) ("It is also to be noted that the compulsory flag salute and pledge requires affirmation of belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.").

424. See *supra* notes 253-54 and accompanying text (discussing prohibitions on polygamy).

425. See *supra* notes 277-84 and accompanying text.

426. See *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); Howland, *supra* note 332, at 342 (suggesting the right to non-belief is of equal status with the right to religious belief).

427. See Barak-Erez, *supra* note 64, at 320; *supra* note 299.

their faith and take up another religion or none at all; Muslims, on the other hand, cannot rely on these provisions, since in rejecting Islam they would be guilty of apostasy.

Together, Articles 2 and 18 of the Universal Declaration demonstrate those concepts that have most concerned religious rights activists over the years: (i) the principle of nondiscrimination on the basis of religion; (ii) the protection of religious belief (i.e., thought or conscience); and (iii) the protection of specific external practices directly related to religion (i.e., teaching, practice, or worship).<sup>428</sup> Although neither Israel nor Iran fully complies with these three principles at present, that is not to say that they cannot do so within the context of a religiously established State.<sup>429</sup> The goal of religio-legal reformers, therefore, need not necessarily be to advocate the complete elimination of religion and religious principles in the laws of Israel and Iran, since that appears to be both jurisprudentially unnecessary and practically impossible given the history and culture of the two nations. Instead, the aim should be to find ways to work within the existing system to (i) adequately protect the rights of all citizens, be they members of the majority religion, a minority religion,<sup>430</sup> or secularist; and (ii) limit religiously inspired violence within and between societies.

However, perhaps the biggest problem in Israel and Iran is not their lack of compliance with the three basic tenets of religious rights; it is the danger that by incorporating religious values into the law of the State, the two nations may violate certain fundamental non-religious rights in addition to religious rights. International instruments have attempted to protect these other types of rights through specific guarantees such as the Universal Declaration's and ICCPR's provisions concerning the rights of the family, including the right "to marry and to found a family."<sup>431</sup> In language reminiscent of the Iranian Constitution, both documents state in essence that "[t]he family is the natural and

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428. There has traditionally been a difference between freedom of belief, which is given absolute protection, and the freedom to exercise or practice a religion, which can be restricted to give effect to other societal concerns. See Sullivan, *supra* note 299, at 492-93.

429. Great Britain, for example, is generally considered to comply with these three fundamental principles, despite its being an established state. See generally Howland, *supra* note 332, at 330 n.259 (citing a 1960 study indicating form of church-state relations has no causal relation to violations of religious rights); Sullivan, *supra* note 299, at 490.

430. See JUERGENSMEYER, *supra* note 5, at 179 (noting minority religious groups are concerned about two potential problems: that the majority religious group will engage in preferential treatment of persons of the majority faith, and that the majority religious group will force minorities to submit to religiously based laws).

431. Universal Declaration, *supra* note 256, art. 16(1); see ICCPR, *supra* note 256, art. 23.

fundamental group unit of society and is entitled to protection by society and the State.”<sup>432</sup> While these provisions may seem innocuous on their face, in practice they can be more harmful than helpful. For example, Iran has used similar language to define “family” in accordance with majority religious principles,<sup>433</sup> which has effectively barred the formation of anything other than patriarchal family units and has given credence to the notion that women’s proper place is in the home, not the workplace.

While Israel’s approach to founding a family is not as explicit as that of Iran because of the absence of a written constitution, Israel also violates the fundamental right to marry and found a family by allowing religious principles to dictate proper procedure in the State. Because religious communities are given exclusive jurisdiction over marriage and divorce in Israel, one cannot marry without complying with some type of religious law; this violates the right of non-believers and unrecognized religious minorities to marry without submitting to religious rites in which they do not believe. Israelis’ right to found a family is also limited, at least within the Jewish community, by virtue of the fact that any children from a marriage not conducted in accordance with Orthodox rites (be it performed in Israel or abroad) are considered *mamzerim* and are prejudiced in who they will later be allowed to marry.

Protection of the family is a laudatory goal of any society; however, a narrow definition may transform a provision that is meant to be protective into one that is, in effect, punitive. Without the incorporation of a more expansive definition of “family,” it is perhaps better to delete all references to the family in a constitutional or international human rights document. It is particularly dangerous to tie protection of the family to a religious ideal, since those ideals are, by definition, immutable and unable to be adapted to suit the needs of the present era. If references to the family must be made, better language is found in the ICESCR, which grants “[t]he widest possible protection and assistance . . . to the family.”<sup>434</sup> This language would protect families formed not only in accordance with majority religious principles, but those that met similar but less stringent standards.<sup>435</sup>

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432. Universal Declaration, *supra* note 256, art. 16(3); see IRAN CONST. preamble, art. 21(3); ICCPR, *supra* note 256, art. 23.

433. See IRAN CONST. art. 10 (noting State is to safeguard family “on the basis of the law and the ethics of Islam”).

434. ICESCR, *supra* note 415, art. 10(1).

435. For example, a “family” could consist of a legally recognized homosexual union, an interfaith couple, or a single parent. Israel is more progressive in this respect than is Iran, in that Israel has begun to grant some protection to homosexual unions and recognizes that

The Universal Declaration also states that “[m]otherhood and childhood are entitled to special care and assistance.”<sup>436</sup> Although a seemingly innocent provision, this can be interpreted in a paternalistic manner and limit choices available to women. This has been the case in Iran, which has a similar provision in its Constitution.<sup>437</sup> In many ways, it seems odd to establish a distinct right to protect mothers and children and, to a Westerner, somewhat limiting in that it pigeonholes women into reproductive roles. This has certainly been the case in Iran. The need for basic protection, however, may exist in those parts of the world where women are held in such universal disregard that recognition of their importance as mothers is actually a step forward. Nevertheless, a better formulation is one that encourages similar protections while recognizing that “working mothers should be accorded paid leave or leave with adequate social security benefits.”<sup>438</sup> This type of provision ensures protection of women as mothers, but also recognizes the need of most women to work outside the home while simultaneously caring for their families.<sup>439</sup>

Certainly women in Israel have need for this latter type of protection since they are full (or nearly full) participants in both the Israeli workplace and military. Although equality between the genders has not been completely established, due more to cultural barriers than legal ones, Israel is by most accounts extremely progressive in the area of women’s rights. Iran, on the other hand, is not, despite the fact that hard economic conditions are forcing more women into the workplace to

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women and men should have equal rights to custody of their children after divorce or the death of one spouse.

The argument against state recognition of these sorts of non-traditional families is that it defames and disrupts “normal” heterosexual marriages, thus destroying the moral fabric of society. See Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2497–2501 (1997); Adam Clymer, *Bitter Debate, Then A Vote For Rejecting Same-Sex Marriages*, N.Y. TIMES, May 31, 1996, at A18. However, there is no proof to support the truth of such claims. See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641–42 (1943) (holding that the state cannot compel school children to recite the Pledge of Allegiance on First Amendment grounds) (“[W]e apply the limitations of the Constitution with no fear that the freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”); FEINBERG, *supra* note 292, at 136.

436. Universal Declaration, *supra* note 256, art. 25(2).

437. See IRAN CONST. art. 21(2) (stating one goal of the nation is “the protection of mothers, particularly during pregnancy and childrearing, and the protection of children without guardians”).

438. ICESCR, *supra* note 415, art. 10(2).

439. The only way to improve such a provision would be to grant similar protections to fathers for paternity leave.

help support their families. Providing these women with paid leave and/or State benefits would actually support the Iranian goal of preserving and protecting the family while simultaneously avoiding undue hardship on working women and their families.

All three instruments reflect the importance of education. For example, the Universal Declaration and the ICESCR both recognize a personal right to education as well as a parental right to "ensure the religious and moral education of their children in conformity with their own convictions."<sup>440</sup> Unfortunately, this second clause creates problems for both Israel and Iran, despite the fact that both States explicitly recognize parents' right to give their children a religious education.<sup>441</sup> The difficulties arise as a result of both States' not officially recognizing and, indeed, severely burdening certain minority religions.

For example, in Israel, Reform and Conservative Jews may find it difficult to convince their children that their faith is religiously valid when the State, as embodied by the rabbinical courts and municipal religious councils, only legitimizes Orthodox Judaism. Although dissident parents are always concerned that state-supported belief patterns may prove more forceful than their own teaching,<sup>442</sup> the situation is heightened in Israel, since non-Orthodox Jews must face the reality that their children will not be fully protected by the law when they grow up, especially with respect to marriage and divorce. In addition, non-Jewish parents are also burdened by the knowledge that their children may not be able to obtain a university education in Israel because of restrictions on entry to certain faculties.

The situation in Iran is both more obvious and more dangerous. Baha'i parents must be concerned about the effects of raising their children in their faith, since they know that their children will be persecuted and perhaps killed for their religious beliefs. While other non-Shi'a parents do not face the same level of concern, they must worry about whether their religious beliefs constitute some sort of ideological impropriety such that their children will be denied entry to a university.

The existence of these burdens, and in some cases threats, in Israeli and Iranian law and society raises the question of whether parents should be given the absolute right to raise their children in a minority

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440. ICCPR, *supra* note 256, art. 18(4); ICESCR, *supra* note 393, art. 13(3); *see* Universal Declaration, *supra* note 256, art. 26(3).

441. In Iran, this protection is included in the Constitution, while in Israel it is contained within the Status Quo Agreement.

442. For example, some parents in the United States argue that the allegedly strict secularism of the State infringes on their religious beliefs and their ability to raise their children as they wish.

religion that can pose significant obstacles to the child's well-being or whether children should, at some point, be permitted to choose their own religion. The latter approach appears to make sense if one focuses on the child's right to life, education, and religious belief. However, it can also have the effect of encouraging States to increase the social and economic burdens placed on minority religions as a way of convincing children to reject their parents' teachings and join the majority religion. This should obviously not be allowed, since parents within minority religious groups are precisely the ones who are most in need of state protection. There is therefore an unresolved tension between a parental right to instill children with the parent's religious values and a child's right to choose his or her own religion.

The ICESCR attempts to address this problem in its provisions concerning education by placing an affirmative burden on the State to provide an "education [that] shall enable all persons to participate effectively in a free society, [and] promote understanding, tolerance and friendship among all . . . religious groups."<sup>443</sup> The state-provided education must also "strengthen the respect for human rights and fundamental freedoms."<sup>444</sup> At the same time, the ICESCR permits parents to "ensure the religious and moral education of their children in conformity with their own convictions."<sup>445</sup> This approach recognizes the legitimate concerns of parents who practice a minority religion by not only giving them the right to educate their children in accordance with their own religious beliefs, but also by limiting the State's ability to indoctrinate children in a public education system. Although there are some parents whose religions oppose "understanding, tolerance and friendship among all . . . religious groups,"<sup>446</sup> as a matter of public policy it is unwise to permit schools to espouse anything other than understanding and tolerance, especially in a religiously or racially pluralistic state. Although some parents' religious rights could be somewhat curtailed under this provision, at least to the extent that their religion advocated intolerance of other religious groups, this approach is jurisprudentially acceptable in the way it limits the State's ability either to promote interreligious prejudice and discrimination through the school curricula or to discriminate on the basis of religion by making higher education available only to one religious group.

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443. ICESCR, *supra* note 415, art. 13(1); *see also* ICCPR, *supra* note 256, art. 20(2) ("Any advocacy of . . . religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

444. ICESCR, *supra* note 415, art. 13(1).

445. *Id.* art. 13(3).

446. *Id.* art. 13(1).

In looking at the two nations under review, it appears that Israel's system of publicly supported sectarian schools allows parents virtually free rein in educating their children in accordance with their religious beliefs but creates a society in which religious differences are emphasized rather than minimized. Many believe that "understanding, tolerance and friendship"<sup>447</sup> are better taught in an integrated educational framework, and separating children into different groups, be they based on race, religion, gender, or some other characteristic, only increases the possibility of conflict between those groups.<sup>448</sup> Similarly, Israel's university system violates the ICESCR by limiting non-Jews' ability to enroll and study all subjects freely.

Although Iran also fails to provide equal access to higher education and thereby violates the ICESCR, a more troubling aspect of the Iranian educational system may be its emphasis on religion and the revolution in the primary school curriculum. This sort of indoctrination is suspect because it can very easily minimize understanding and tolerance of other religious groups. In addition, to the extent that women's opportunities for education are limited, Iran also fails to "enable all persons to participate effectively in a free society."<sup>449</sup>

According to the above analysis, both Israel and Iran are having difficulties living up to their obligations under international law due, in large part, to the manner in which they have chosen to incorporate religious principles into the law of the State. Nevertheless, both nations may attempt to argue that they have complied with the provisions found in the Universal Declaration, the ICESCR, and the ICCPR because none of the above-mentioned rights is absolute; in fact, all of these rights are expressly made conditional. For example, the Universal Declaration states: "In the exercise of his rights and freedoms, everyone shall be subject . . . [to] the just requirements of morality."<sup>450</sup> Even the manifestation of religion is subject under the ICCPR "to such limitations as . . . are necessary to protect public safety, order, health, or morals or the

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447. *Id.*

448. See EDELMAN, *supra* note 10, at 59, 75; Clarity, *supra* note 380 (noting nonsectarian schools might create a more cohesive society in Northern Ireland). For example, in the United States, the segregation of races proved to perpetuate racial inequality and racial tension. Although integration in U.S. public schools has been difficult at times, it has undoubtedly succeeded in creating a more equitable society. In South Africa, integrated education has also been hailed as the key to achieving racial equality. See Daley, *supra* note 380.

449. ICESCR, *supra* note 415, art. 13(1).

450. Universal Declaration, *supra* note 256, art. 29(2).

fundamental rights and freedoms of others.”<sup>451</sup> Although conditional rights can be jurisprudentially troublesome because such rights are often illusory and permit the State to justify otherwise illegitimate acts merely to support the status quo,<sup>452</sup> the language does exist in each of these documents.

If Israel and Iran attempt to argue that they need not change their religio-legal regimes in order to comply with their international obligations, they are most likely to do so under the public morality exception. Essentially, the argument is that because both States are founded on religious principles and traditions and both equate state or public morality with the morality of their majority religions, they may legitimately refuse to implement measures that limit the free and full expression of majority religio-legal principles. If minority rights are detrimentally affected by this approach, such infringements are necessary to uphold public (i.e., religious) morality and are therefore appropriate.

Despite the apparent rationality of this argument, it cannot withstand closer scrutiny. For example, if highly restrictive religio-legal regimes such as Israel and Iran are allowed to insulate themselves from compliance with their international obligations merely by claiming that public morality is, in their eyes, the same as religious morality, then international instruments protecting minority religions have no teeth whatsoever. The practice of minority religions cannot be limited by the morality of others, for to do so destroys the basic premise of religious rights, which is that minority religions are most in need of protection when they are most unlike majority practices.<sup>453</sup> This is especially true in regions where religion has political overtones, since in such cases there

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451. ICCPR, *supra* note 256, art. 18(3); *see also id.* art. 19 (granting freedom of expression but limiting it under a “public health or morals” clause).

452. *See Mayer, Clash*, *supra* note 332, at 319. However, these limitations cannot be exercised as freely as it may initially seem, at least under the ICCPR, since the Siracusa Principles, which elucidate the ways in which the implementation of the ICCPR may be limited, only allow limitations based on morals to be imposed if “the limitation in question is essential to the maintenance of respect for fundamental values of the community.” The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex para. 27 [hereinafter *Siracusa Principles*]; *see Chase, supra* note 165, at 416 & n.172 (stating Siracusa Principles permit derogations only if they are “(1) in accordance with the law; (2) in the interest of a legitimate objective of general interest; (3) strictly necessary in a democratic society; (4) imposed without a less intrusive means available; and (5) not imposed arbitrarily”). Nevertheless, these guidelines are problematic due to their subjectivity, especially since the Siracusa Principles recognize that “public morality varies over time and from one culture to another.” *Siracusa Principles, supra*, para. 27.

453. *See Strong, Christian Constitutions, supra* note 265, at 54–55.



is even more incentive for the State to suppress non-majority religions.<sup>454</sup> Although there are situations where limitations on free exercise of religion are warranted,<sup>455</sup> such limitations should be carefully scrutinized before they are implemented.

One aspect of the ICCPR that may benefit religious minorities is its limitation on the manifestation of religion if and when such practices infringe on the human rights or fundamental freedoms of others.<sup>456</sup> This provision is extremely important, as it provides a jurisprudentially legitimate basis for restricting the majority's ability to impose religious or religiously influenced laws on minority populations.<sup>457</sup> For example, a law that required one type of prayer in school would violate the rights of atheist children or those who pray differently. Laws barring marriages between certain persons on religious grounds would violate a person's right to found a family. Laws "protecting" women from working in certain fields would violate economic freedoms requiring equal rights between the genders.<sup>458</sup> If one reads these instruments as requiring an analysis of how the State's implementation of majority religious principles affects the fundamental freedoms of other persons, then both Israel and Iran must reconsider how they approach law and religion, since both currently curtail minorities' fundamental freedoms in order to give effect to the religious tenets of the party in power.

b. Rights under the Declaration on the Elimination of All  
Forms of Intolerance and of Discrimination  
Based on Religion or Belief

The most recent UN resolution regarding religious rights is the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Discrimination).<sup>459</sup> Intended to complement, rather than usurp, earlier

454. See Mayer, *Clash*, *supra* note 332, at 334.

455. For example, some religious practices do, in fact, pose a threat to public safety, as would be the case with involuntary human sacrifice.

456. ICCPR, *supra* note 256, art. 18(3). The prohibition on infringement of others' fundamental freedoms includes protection of the right to marry and found a family, to work, to control one's body, etc. It is also possible to use this provision to regulate religio-political hate groups that encourage violence between religious groups, since such practices violate, *inter alia*, others' right to life. See Howland, *supra* note 332, at 332 (describing human rights and fundamental rights and freedoms in context of UN Charter).

457. See Sullivan, *supra* note 4, at 197 & n.9.

458. See ICCPR, *supra* note 256, arts. 16, 26; ICESCR, *supra* note 415, arts. 3, 6, 7.

459. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36155, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981) [hereinafter Declaration on Discrimination]; see Sullivan, *supra* note 299, at 488 & n.4 (noting Declaration "lacks . . . the nature of an international agree-

conventions concerning religious liberties,<sup>460</sup> the Declaration on Discrimination reinforces common elements such as the freedom of religion.<sup>461</sup>

However, the protections stated in the Declaration on Discrimination are more specific than they are elsewhere.<sup>462</sup> For example, discrimination based on religion is specifically prohibited and defined in Article 2, and, like the ICCPR, focuses on the nullification of other persons' human rights and fundamental freedoms.<sup>463</sup> By focusing on effect rather than intent, the Declaration on Discrimination addresses those types of discrimination that are deeply ingrained in cultural or socio-economic institutions.<sup>464</sup> Unfortunately, these rights are subject to a limitation based on public safety and morals, as they are in the International Bill of Rights.<sup>465</sup> Nevertheless, all States are admonished to "take effective measures to prevent and eliminate discrimination on the grounds of religion or belief" and are instructed to "enact or rescind legislation where necessary."<sup>466</sup> This affirmative duty to act is unique among the religious rights documents but has not resulted in widespread change.

The Declaration states that parents have the right to raise their children in accordance with their religious beliefs, although the practices of that religion or belief "must not be injurious" to the child's "physical or mental health."<sup>467</sup> However, nowhere in the Declaration on

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ment" but is "regarded throughout the world as articulating the fundamental rights of freedom of religion and belief" and implies "obligations of conduct") (quoting U.N. Doc. E/CN.4/1988/44/Add. 2, at 1; U.N. Doc. E/CN.4/Sub.2/1987/26, at 48-49).

460. See Declaration on Discrimination, *supra* note 459, art. 8.

461. See *id.* art. 1.

462. See *id.* art. 6.

463. See *id.* art. 2(2) ("[I]ntolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.").

464. See Sullivan, *supra* note 299, at 502.

465. See Declaration of Discrimination, *supra* note 459, art. 1(3). There is no provision allowing derogation on the grounds of national security, precisely because such language would allow restrictions of religious freedoms based on a classification of religious activity as political activity. See Sullivan, *supra* note 299, at 499-500. However, the same effect may be brought about under the public safety exception. See *id.*

466. Declaration on Discrimination, *supra* note 459, art. 4; see also *id.* art. 7 ("The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice."). Although neither "religion" nor "belief" is defined, the *travaux préparatoires* indicate that non-theistic and atheistic beliefs are covered by the Declaration on Discrimination. See Sullivan, *supra* note 299, at 491.

467. Declaration on Discrimination, *supra* note 459, art. 5. Interestingly, Baha'i parents could be said to endanger their children's health and economic prospects by raising them as Baha'i in Iran. This argument would appear, at first glance, to support a claim that Baha'i

Discrimination are children of any age given the right to choose their own religion or reject that of their parents.<sup>468</sup>

Some of the most interesting language in the Declaration on Discrimination is found in the preamble, which explicitly links violations of religious rights and societal violence. For example, the preamble notes that "disregard and infringement of . . . the right to freedom of . . . religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind."<sup>469</sup> Conversely, "freedom of religion or belief should . . . contribute to the attainment of the goals of world peace."<sup>470</sup> The Declaration also notes that "manifestations of intolerance and . . . discrimination in matters of religion or belief [are] still in evidence in some areas of the world," and considers it:

essential to promote understanding, tolerance and respect in matters relating to freedom of religion or belief and to ensure that the use of religion or belief for ends inconsistent with the Charter, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible.<sup>471</sup>

While both Israel and Iran claim to have complied with the more technical aspects of the Declaration on Discrimination and other UN documents in that both would argue that they provide equal protection and treatment of all religions (albeit in the context of religiously established states), neither nation has completely eliminated those provisions which have "as [their] purpose or as [their] effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."<sup>472</sup> In fact, as has been discussed above, there is ample evidence that both nations have violated the principles of the Declaration on Discrimination, but because the

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parents should not be permitted full exercise of their right to raise their children in the Baha'i faith. However, because it is the State's impermissible actions, i.e., religious persecution, that constitute the danger to Baha'is, rather than some inherently dangerous religious practice, the endangerment argument is unavailing.

468. See generally *id.*; Sullivan, *supra* note 299, at 513–14. Austria is apparently one of the few nations that has expressly addressed the right of children to choose their own religion. See *id.* at 514 n.119. For an interesting discussion of the rights of children in the context of religion, see Dwyer, *supra* note 317 *passim*.

469. Declaration on Discrimination, *supra* note 459, preamble; see also Universal Declaration, *supra* note 256, preamble (stating violations of religious rights can lead, "as a last resort, to rebellion against tyranny"). One commentator has noted that religious violence occurs most often in those regions that have had the most difficult time accepting or defining a secular nation-state. See JUERGENSEMEYER, *supra* note 5, at 34.

470. Declaration on Discrimination, *supra* note 459, pmbl.

471. *Id.*

472. *Id.* art. 2.

Declaration on Discrimination is not binding law, neither Israel nor Iran can be penalized for non-compliance. However, if there is a causal link between violations of religious rights and violence, as suggested by the Declaration's preamble, one would expect that the two nations would be experiencing a certain level of religiously inspired violence—something that has, in fact, occurred, as shall be discussed below.

### c. Rights under other International Instruments

In addition to the International Bill of Rights and the more specific Declaration on Discrimination, there are other international documents that suggest certain problems with Israel's and Iran's system of laws. The most interesting of these is the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).<sup>473</sup>

Although defining apartheid can be difficult, some commentators classify it as a "set of practices of domination and subjection, intensely hierarchized and sustained by the whole apparatus of the state, which affects the distribution of all values."<sup>474</sup> The Apartheid Convention itself defines apartheid as consisting of any one of an enumerated list of "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."<sup>475</sup> Those acts include the murder of members of a racial group or the infliction of serious bodily or mental harm upon them; arbitrary arrest or imprisonment; imposition of conditions intended to cause the complete or partial physical destruction of a certain racial group or the inability of such group to participate in the political, social, economic, or cultural life of the State; measures that physically segregate a racial group; expropriation of the land of a racial group; subjecting a racial group to forced labor; and the persecution of persons who oppose apartheid.<sup>476</sup> Case law of the International Court of Justice indicates that apartheid cannot be

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473. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, 13 I.L.M. 50 (1974) [hereinafter Apartheid Convention]. Although the Apartheid Convention has won wide approval, neither Israel nor Iran is a party. *See id.*; Quigley, *supra* note 70, at 223 n.13.

474. MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 523 (1980).

475. Apartheid Convention, *supra* note 473, art. 2.

476. *See id.*; Quigley, *supra* note 70, at 223–24.

justified on the basis of religious beliefs, no matter how sincerely held.<sup>477</sup>

Although the Apartheid Convention focuses on racial discrimination, it could be equally applicable to religious discrimination, especially if race and religion are linked as they are in both Israel and Iran.<sup>478</sup> For example, Jews are often considered to be a separate racial group,<sup>479</sup> which has led some commentators to argue that Israel institutionalizes apartheid by defining itself as the State of a single racial group, thereby excluding all others by necessity.<sup>480</sup> Because Israel has a Jewish-Arab racial dichotomy that parallels, for the most part, the Jewish-gentile dichotomy, laws favoring Jews or discriminating against non-Jews may be in violation of the Apartheid Convention and other international instruments prohibiting racial discrimination.<sup>481</sup> For example, Arabs, and, to a lesser extent, non-Orthodox Jews in Israel are unable to participate fully in the political and/or cultural life of the State, which is controlled almost exclusively by the Orthodox. This appears to be a prohibited act under the Apartheid Convention and therefore raises the question of whether Israel is practicing religious apartheid.

The case in Iran is less clear, but still appears problematic. Because the modern nation of Iran lies within the boundaries of the ancient land of Persia, most Iranians are of Persian rather than Arabic ancestry.<sup>482</sup> This distinction is paralleled in the religious realm by the fact that virtually all Iranians are Shi'a Muslims, while the vast majority of Arabs are

477. See Howland, *supra* note 332, at 347-49 (discussing Afrikaners' religious arguments in favor of apartheid in South Africa and Namibia).

478. See *id.* at 345 n.317; Sullivan, *supra* note 299, at 508 (describing instances when race and religion overlap). Race and religion are treated virtually identically in such authoritative texts as the UN Charter and the Restatement on Foreign Relations. See U.N. CHARTER arts. 1, 13, 55; RESTATEMENT, *supra* note 413, § 702 cmt. j; Howland, *supra* note 332, at 335 n.275.

479. See Genut, *supra* note 60, 2126 n.42 (quoting Arthur Koestler, *A Valedictory Message to the Jewish People*, reprinted in PAUL MENDES-FLOHR & JEHUDA REINHARZ, *THE JEW IN THE MODERN WORLD* 243-45 (1980)). Others believe Jews are not so much a separate race but a separate religious or cultural group. See CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, *CIVIL RELIGION IN ISRAEL: TRADITIONAL JUDAISM AND POLITICAL CULTURE IN THE JEWISH STATE* 15 (1983) [hereinafter LIEBMAN & DON-YEHIYA, *CIVIL RELIGION*]. For purposes of this discussion, it is sufficient to note that many Arabs consider Israeli Jews to be a racially distinct group, and that Israeli Jews consider themselves racially different than Arabs. See Quigley, *supra* note 70, at 224-26.

480. See Quigley, *supra* note 70, at 228.

481. Compare *id. passim* (arguing that Israeli law constitutes a system of apartheid) with Treitel, *supra* note 63, at 407 (stating "[t]here has been no attempt to . . . alienate [Israeli Arabs] from their nationality, or to deny them the right to develop their culture, religious practice or language"). But see *id.* at 416 (noting Israeli Arabs' "countrymen are not their people; their people are not their countrymen").

482. See MACKEY, *supra* note 91, at 2.

Sunni Muslims.<sup>483</sup> Therefore, laws that exclude non-Shi'as from Iranian political or cultural life could be said to constitute religio-racial discrimination that might rise to the level of religious apartheid.<sup>484</sup> Certainly the genocide practiced on the Baha'i constitutes a prohibited act under the Apartheid Convention, since it amounts to the systematic oppression of a group based on a single trait.

## 2. Group Rights Theory

For the most part, the rights discussed above are based on an individual rights framework that is consistent with the post-World War II trend granting rights to individuals rather than groups.<sup>485</sup> Recently, however, the UN has shifted its position and begun to recognize certain rights regarding minority cultures,<sup>486</sup> which may be more consistent with the group rights system used in both Israel and Iran.<sup>487</sup>

Interestingly, minority groups do not appear to be the only ones claiming collective rights at present; certain political majorities, including religious nationalists, also support political models that emphasize collective or group rights.<sup>488</sup> Such is the case with both Israel and Iran, neither of whom aspire to Western-style individualism and instead rely on various group rights arguments to support their particular type of religio-legal unity. For example, one way that these two nations utilize group rights to justify the combination of law and religion is by

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483. See *id.* at 2, 41, 53.

484. Although some provisions in the Iranian Constitution appear to favor Muslims in general, thereby helping Iran avoid charges of religio-racial discrimination, these may be implemented in an impermissible manner. For example, the requirement that the president be possessed of a "convinced belief in the fundamental principles of the Islamic Republic of Iran," IRAN CONST. art. 115, effectively precludes Sunni Muslims from holding that office, despite the fact other provisions merely require that the president "follo[w] the Prophet of Islam;" IRAN CONST. art. 121.

485. See U.N. CHARTER art. 1, para. 3 (emphasizing rights "for all"); Will Kymlicka, *Introduction*, in THE RIGHTS OF MINORITY CULTURES, *supra* note 292, at 1, 18. Prior to World War II, rights theory focused on the protections owed by the State to minority groups or cultures within the State. See Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311, 1319 (1991); Kolodner, *supra* note 407, at 409–10. *But cf.* Kymlicka, *supra*, at 4; see also Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in THE RIGHTS OF MINORITY CULTURES, *supra* note 292, at 31, 31–56.

486. See generally FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES*, U.N. Sales No. E.91.XIV.2 (1991); see also ICCPR, *supra* note 256, art. 27.

487. See Barak-Erez, *supra* note 64, at 348; Chase, *supra* note 165, at 389; Treitel, *supra* note 63, at 407; see also Vincent, *supra* note 1, at 264–65 (describing Southern or Islamic concept of rights, which emphasizes the collectivity over the individual).

488. See JUERGENSMEYER, *supra* note 5, at 197; Lee, *supra* note 406, at 80–84.

arguing that concepts of religious liberty demand that people be allowed to impose certain restrictions on society at large if their religion requires them to do so. Because both Judaism and Islam ostensibly require believers to be responsible not only for their own behavior but also for the behavior of others,<sup>489</sup> Israel and Iran can claim that their unified approach to law and religion is necessary to give full effect to the religious precepts of the party in power.

Notably, the right being claimed is the right to live in a community that accords with religious principles. This is considered a group right because it involves more than individual belief or action; it also takes into account the relationships between people within the society and the effect that one person's sinful actions has on others and on society as a whole. Although this argument can be made in the context of an established or disestablished State, it is obviously stronger in a society that has based itself on theocratic or theonomous principles and is highly compelling to those who recognize that religiously devout persons generally do not separate their religious obligations into the public and private sphere.<sup>490</sup>

In addition to relying on the difficulties inherent in making a distinction between matters of public and matters of private concern, advocates of a group rights based claim to unification of religion and state also rely on the argument that no court, and indeed no entity, can accurately differentiate between those religious claims that are true and those that are not.<sup>491</sup> Therefore, the State should not protect some relig-

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489. In Judaism, believers are responsible for the behavior of other Jews, based on the principle that the Jewish covenant with God is of a collective, rather than individual, nature. Also, because redemption of individual Jews is delayed until the entire Jewish population is redeemed, Jews as a group have an increased interest in other Jews' actions. The practice is slightly different in Islamic societies, in that the obligation to create a good society has been interpreted to require religious Muslims to compel both Muslims and non-Muslims to live in accordance with Islamic criteria.

490. See Schwarzschild, *supra* note 12, at 909 (contending that the Enlightenment could only have arisen in Christian states).

491. It is for this reason, among others, that some theorists have argued that matters of religion must be removed from the political sphere. See generally JOHN RAWLS, *A THEORY OF JUSTICE* 212 (1971); Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1012-20 (1986) (discussing theories of Rawls, Henkin, and Ackerman as proponents of a separatist approach); David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 879 (1993); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987). Not everyone views this approach as universally necessary, however, or even as attainable in a practical sense. See Greenawalt, *supra*, at 1060-64; Hollenbach, *supra*, at 880. Notably, the fact that a religion is followed by a majority of a nation's population does not mean that it is correct; divine truth exists completely separate of whether it is followed by one or one million.

ious practices while denying protection to others. In order for the State to truly respect religion, it must give effect to those principles that adherents of the faith deem to be important, including the creation of a religiously ordered society, or so the argument goes. The fact that the Israeli Supreme Court claims to have been able to distinguish between those religious practices that are fundamental to the faith and those that are merely permissible<sup>492</sup> is not persuasive to persons who have adopted the above argument, both because it will not always be possible for the courts to make such distinctions and because it is not seemly for the State to involve itself in deciding religious dogma. Therefore, these reformers conclude, groups must be allowed to impose their religious perspective on society.

Although this argument sounds persuasive, it only looks at the problem from the majority viewpoint<sup>493</sup> and fails to see the universality of the claims it makes. For example, if these theorists are, in fact, correct that (i) a group's religious rights, including the right to create a religiously ordered society, must be respected *in toto*, (ii) religiously devout people should not be forced into making public-private distinctions that are contrary to their world view, and (iii) no entity, including the State, is able to differentiate between those religious claims that are true and those that are false, then all religions, not just one, must be respected and protected fully, equally, and simultaneously by the State. There is no room in this scenario for selective enforcement of only one set of religious principles; it must be all or nothing.

Setting aside the possibility that some religious precepts may be in direct opposition to one another,<sup>494</sup> the only way to fully respect all persons' religious rights would be for the State to identify every religiously

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492. See H.C. 49/54, *Mulhem v. Qadi of Acco*, 8 P.D. 910, cited in Treitel, *supra* note 63, at 423. Similarly, Israeli courts have also attempted to distinguish between different types of violations of the Jewish Sabbath, which forbids work of all kinds. On the one hand, the courts allow the state-run television to operate on Saturday, since religious Jews who object to such practices cannot turn their televisions on to witness such sinfulness anyway. See Arzt, *Religious Freedom*, *supra* note 235, at 30 (citing H.C. 287/69, *Meron v. Minister of Labor*, 24(1) P.D. 337). On the other hand, the State forbids non-Orthodox persons from driving on streets adjacent to synagogues during times of prayer, since this intrudes upon Orthodox Jews' ability to keep the Sabbath. See *id.* (citing H.C. 174/62, *League for the Prevention of Religious Coercion v. Jerusalem Council*, 16(4) P.D. 2665). Some commentators claim that in this line of cases the Supreme Court is "distinguishing between secular *interference* with religious needs, which can be regulated, and mere secular *offense* to the religious, which cannot." *Id.*

493. See Sullivan, *supra* note 4, at 207 (discussing myopia of majority groups).

494. This would occur when religion A required its followers to undertake a certain practice, while religion B required its followers to eliminate all instances of that practice in society.



mandated practice of every citizen within its borders and adopt a socio-legal code that enforced the most stringent provisions possible among these different choices. This would satisfy the person with the most restrictive religious tradition within the society and would presumably not offend persons of other faiths, since their religious precepts would be respected as lesser included restrictions within the greater restriction.<sup>495</sup>

Obviously, there are very few people who are willing to adopt this sort of approach. Most would claim that being forced to live under someone else's religio-moral code is a violation of their right, religious or otherwise, to order their lives however they wish. In addition, such a regime blatantly ignores the explicit limitations on religious practices discussed above, i.e., that religious rights cannot be exercised in contravention of others' fundamental freedoms.<sup>496</sup> However, most people (particularly those who are members of the majority religious group) would argue that the above system gives too much weight to the opinion of highly restrictive minority groups when, in a democratic state, any religio-legal code should be structured in accordance with majority rather than minority rule.<sup>497</sup>

Once this argument is made, however, the issue is no longer based on purely religious concerns (i.e., all religious rights must be respected); now the debate has imposed a balancing requirement and entered the realm of political and legal theory. Under this approach, the majority is given the right to decide what is socially appropriate for the nation and to enact laws that will further those social ends.<sup>498</sup> Obviously, in this system some minorities will not be able to exercise fully their "right" to impose their religious ideals on society. However, as long as the laws

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495. Of course, this approach would violate secularists' right to live free from the religious obligations of others, but that would not be a problem to most religious activists, according to one researcher who found that religious nationalists were willing to grant concessions to persons of minority religious faiths but were not willing to grant the same concessions to secularists, since they were considered "antireligion." JUERGENSMEYER, *supra* note 5, at 186.

496. See Declaration on Discrimination, *supra* note 459, art. 1(3); ICCPR, *supra* note 256, art. 18(3); see also Sullivan, *supra* note 4, at 198 (discussing limits of religious rights).

497. Interestingly, this is precisely the argument that non-Orthodox Jews are making with respect to the disproportionate power wielded in Israel by the Orthodox. Because Iran is based on religious rather than political principles, there is less room to argue that democratic ideals should prevail; however, the acceptance of pluralism within Islam and the simultaneous recognition of the importance of community consensus in matters of religion might demonstrate an acceptance of majoritarian arguments in modern Iranian culture. In addition, the Islamic Republic was established by referendum, the most democratic measure available in a modern nation-state, thereby indicating that majoritarian demands played some role in the creation of the Islamic state.

498. H.L.A. Hart called this concept "moral populism." H.L.A. HART, LAW, LIBERTY, AND MORALITY 79 (1963).

created by the majority do not violate certain pre-established minority rights (i.e., the right (i) to be free of any overt discrimination on the basis of religion; (ii) to hold any religious belief; and (iii) to practice religion within certain boundaries created by the majority to protect public health, safety, and morals), then proponents argue that the laws are valid.

However, as has been discussed above, neither Israel nor Iran is able to meet even these basic requirements under their existing religio-legal regimes. Overt discrimination exists despite both nations' claims that there can be separate but equal religio-legal systems within the State; people are not permitted to hold any religious belief, at least not without severe burdens being placed upon them; and certain minority religions cannot practice their faith freely, since the party in power claims that infringement is necessary to protect the morals of the State or the religious character of the nation.

Nevertheless, Israel and Iran both claim that the majoritarian approach to law and religion is necessary not only to give full effect to the majority's right to practice its religion, but because the moral and religious sensibilities of their citizens are harmed by knowing that others are acting in an immoral manner. Because the two nations are founded on majority religious principles, they claim they have a special need and obligation to protect these persons' right to be free from religious offense.<sup>499</sup> However, the States' argument makes no logical sense if it is based on a general respect for religion *qua* religion, since they make no attempt to ascertain whether the religion of the party in power is true or better than other religions. If either State were to do so, it might justify giving one religion full effect over all other faiths; as it stands, however, the two States rely solely on a "might makes right" argument that cannot prevail as a matter of religion or jurisprudence.<sup>500</sup> In addition, by only giving effect to the religious sensibilities and distress of followers of one religion, Israel and Iran have created bifurcated societies in which religious minorities are second-class citizens, unable to gain respect for their beliefs and unable to dispute the religious or political legitimacy of majority practices.

Those who support the majority's "right" to impose its religious values on the nation attempt to bolster their position by pointing to mi-

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499. In secular states, distress at the knowledge that others are acting immorally is not actionable, since permitting such distress to provide the basis for the nation's laws would negate the idea that individual liberty is a value to be protected. *See, e.g.,* FEINBERG, *supra* note 292, at xix-xx; HART, *supra* note 498, at 4-5, 46-47.

500. *See* Strong, *Morality Legislation*, *supra* note 422 (arguing that morality cannot be decided by mere political strength).

nority groups that have been granted legal recognition for their religious cultures as evidence that a religious culture is legally protectible. If minority groups are permitted to build and protect communities that enforce their religious beliefs, majority religions should be allowed to do the same, or so the argument goes.<sup>501</sup>

However, this argument must also fail. Minority groups are given special protection not because they are recognizable groups, but because they are *minority* groups whose cultures and histories are distinct from that of the majority. To grant the majority the right to create a religious community would negate the minority's corresponding right to be free of majority influence. In addition, minority rights theory states that in order to have a legitimate subculture, dissenting members must be able to escape the minority culture should they disagree with the prevailing practices and beliefs.<sup>502</sup> Because majorities cannot establish a realistic opportunity for dissenters to exit the culture, majorities cannot rely on minority group rights theory to create a homogenous religious society. Even if the majority tried to provide dissenters with some method of escape from the majority culture, such efforts would further divide the nation by segregating it into discrete religious territories.<sup>503</sup> As proven by the United States, South Africa, and Northern Ireland, segregated societies are inherently unstable and invariably result in violence between groups.<sup>504</sup>

Under this analysis, there appears to be no jurisprudentially viable approach based on group rights theory that will allow the State to impose a single religious perspective on society. To some people, the only alternative is secularism, which, as stated above, is not an option for

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501. This argument points out a critical problem in minority rights theory. By accepting the idea that a minority's religious culture should be sustained, society gives credence to religious majorities' view that they can legitimately structure their society in accordance with their religious beliefs. Similarly, allowing religious activists to incorporate some religious principles into the law of the State may demonstrate that the State is not truly grounded on religious principles, thus leading to a "more radical transformation of the political order or a more than token intrusion of religion into public life." JUERGENSMEYER, *supra* note 5, at 198.

502. See Sullivan, *supra* note 4, at 214 n.84; see also Green, *supra* note 292, at 264.

503. Some commentators believe that this has already happened in Israel, due to the State's reinforcement of separate ethnic and religious identities rather than a single national identity. See EDELMAN, *supra* note 10, at 122-23.

504. See also Michael Walzer, *Pluralism: A Political Perspective*, in THE RIGHTS OF MINORITY CULTURES, *supra* note 292, at 139, 148-53 (discussing problems with identifying ethnic or other privileged groups).

either Israel or Iran at this point. However, there may be another way to protect minority rights without creating a purely secular state.<sup>505</sup>

As has been discussed above, it is jurisprudentially impermissible to enforce only one group's religious principles, and it is impractical to enforce fully all groups' religious rights simultaneously. However, it might be possible to protect most persons' religious practices by enforcing only those religious edicts that are common to all or most religions within the society. Notably, this approach does not attempt to discern which religious practices are mandatory or which are true; the only thing that matters is whether they are common to all (or virtually all) groups in society. This approach recognizes the importance of all religions equally, but realizes the impossibility of giving full effect to any or all of them in a pluralist society. Instead, it recognizes and accepts the possibility of slight infringement on all persons' rights rather than large infringements on the rights of some. Of course, this approach would also have to make sure that the implementation of such laws did not infringe on the fundamental freedoms or human rights of any persons, as discussed above.

This approach can even take into account certain doctrinal elements within the majority religion. For example, in Judaism, gentiles achieve parity with Jews in God's eyes if they adhere to the seven laws of Noah; these laws are common to all faiths that are offshoots of Judaism, including Christianity, Islam, and probably the Druze religion, all of which are recognized religions in Israel.<sup>506</sup> Therefore, Israel might implement a system that only incorporated religion to the extent that it was based on the seven laws of Noah.

A similar solution is possible in Islamic nations such as Iran. According to some Islamic commentators, there are two levels of *Shari'a*: a generalized level of social mores that are incumbent on all persons, regardless of their religious affiliation, and a more particularized level that is only incumbent on Muslims.<sup>507</sup> Like the seven laws of Noah, these

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505. Some commentators argue that classical liberalism's support of strict secularism is an impossible ideal and therefore advocate the return to a society in which the State protects a single orthodox morality while tolerating dissenting or minority viewpoints. See Smith, *supra* note 404, at 308. In this case, however, neither Israel nor Iran can rely on the principle of toleration of minority groups as a way to avoid changing their religio-legal regime, since minority faiths have not historically been tolerated by either State. Although it sounds like a useful legal value, tolerance, without any legal protections to back it up, is virtually useless, since it extends only as far as the party in power wishes.

506. See ARIEL, *supra* note 13, at 127-28. Very little is known about the Druze, as the precepts of their faith are kept secret from virtually everyone, but as an offshoot of Islam it is likely that they accept the teachings of Noah as valid. See EDELMAN, *supra* note 10, at 89.

507. See JUERGENSMEYER, *supra* note 5, at 182.

more generalized laws are typical of what would be found in any civilized nation.<sup>508</sup> Under this sort of accommodationist approach, the State could enforce only those principles that were common to most religions within the State. Other, more stringent religious duties could be undertaken as a matter of personal choice. If adopted, this approach might resolve many of the problems associated with the imposition of religious law on minority groups.

Some people might argue that, while imposing the lower level of obligation on minorities within the State might be appropriate, adherents to the state religion should be held to the higher standard of religious behavior. However, this approach would still result in unequal protection of the laws based on religious affiliation. In addition, it would, in all likelihood, require the State to impose duties on persons who were nominally of the majority religion but who were non-practicing or who were members of a minority denomination within the faith. In creating a system that imposes only a single general level of religiously based laws, the State is not prohibiting devout members of society from following their own religious norms, at least to the extent that those norms affect the behavior of the believer him or herself. The only difference is that the religiously devout would not be permitted to impose religiously coercive laws on those who would not otherwise live in accordance with religious edicts.

A second alternative would be to create a system of law wherein everyone was held to the same the generalized standard of behavior unless and until someone indicated a desire to be held to a more stringent religious rule. This would be similar to the procedure under the Israeli Women's Equal Rights Law, which allows women to choose whether to proceed under civil or religious law with respect to certain matters.<sup>509</sup> However, such a system would have to institute the same protections required under the Women's Equal Rights Law, namely giving people the option of proceeding under civil or religious law, ensuring full disclosure as to the differences in treatment under the two systems, and removing as many instruments of coercion, be they legal or social, as possible.

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508. *See id.* These rules may be similar to those precepts that H.L.A. Hart identified as the "moral minimum" that was necessary to create a viable society. H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 9 (1967); *see also* FEINBERG, *supra* note 292, at 136 (noting people cannot live together without agreement, but arguing that agreement on all things is not necessary).

509. *See* Women's Equal Rights Law, 1951, 5 L.S.I. 171 (1950-51).

*B. The Integration of Law and Religion and  
Its Effect on Societal Violence*

As the above discussion shows, religious rights are among the most difficult types of rights to consider, even in theory; however, they are even more troublesome in practice, especially when one considers the possible correlation between violations of religious rights and inter- and intra-societal violence. Although wars over what is the one true religion are, for the most part, a thing of the past, people are still willing to fight to protect their ability to live in accordance with the precepts of their faith. The question for modern states is how to minimize the potential for conflict while maximizing respect for individuals' religious rights.

Traditionally, religious violence took the form of repressed minorities rebelling against state oppression,<sup>510</sup> but today just as many religious activists rebel against religio-political separatism as against religious repression.<sup>511</sup> In these cases, violence occurs when religious activists believe that it is their religious right and, indeed, their obligation to impose their world view on society.<sup>512</sup> Although some conflicts can be resolved through the political process, others cannot, especially when activists view the State as promoting anti-religious ideals.<sup>513</sup>

Religious rebels or reformers can have a variety of goals, ranging from the complete overthrow of their own government, as was the case in Iran in 1979,<sup>514</sup> to the imposition of retribution on dissidents in an effort both to penalize them and to teach them to mend their ways, as is the case with certain religious vigilante groups in both Israel and Iran.<sup>515</sup>

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510. This was the concern of many Enlightenment philosophers. See Schwarzschild, *supra* note 12, at 904-05.

511. See Underkuffler-Freund, *supra* note 402, at 839; see generally JUERGENSMEYER, *supra* note 5.

512. See Rapoport, *supra* note 262, at 432. Activists often claim to be restoring social harmony, but that is seldom the result. See *id.* at 440.

513. See Ginsburg, *supra* note 7, at 558-63; see also JUERGENSMEYER, *supra* note 5, at 174 (noting irrelevance of usual means of political discourse in a religious state).

514. This has been called the "paradigmatic religious revolution." JUERGENSMEYER, *supra* note 5, at 50. But cf. *id.* at 171 (noting that not all religious revolutionaries wish to follow the Iranian model of government). The seeds of a similar revolutionary passion burn in some Israelis who follow the views of Rabbi Meir Kahane, who advocated the creation of a "truly" Jewish nation through the use of violence. See *id.* at 62-69.

515. For example, some ultra-Orthodox Jews will throw stones at cars passing through their neighborhoods on the Sabbath or attack women who are praying in public. See Arzt, *Religious Freedom*, *supra* note 235, at 10; Sprinzak, *supra* note 19, at 465 (indicating *haredi* violence against individuals whom the *Haredim* consider non-observant). In Iran, much of the violence is (or at least was) state-sponsored and includes executions as well as intermittent and violent enforcement of codes of morality, especially against women and certain religious minorities. See Graves, *supra* note 105, at 78 (collecting accounts of violence); Keddie & Monian, *supra* note 141, at 523.

Alternatively, the activists may be calling attention or attempting to influence state policy on certain discrete issues, as is the case of anti-abortion terrorists in the U.S., or inciting religious revolution or reform outside the activists' national borders, as is the case with Iranian support of certain terrorist groups in Lebanon.<sup>516</sup> The violence can be offensive or defensive, private or state-sponsored, and can involve violence against members of other religions or against persons of the same faith.<sup>517</sup>

The common perception is that including religious values in the law of the State leads to a legitimization, express or implied, of religiously based violence.<sup>518</sup> It is certainly true that when politics adopt a religious tone people become willing to die or kill over issues which in other societies would be accepted as mere political differences.<sup>519</sup> In addition, by inserting religion into the debate, compromise becomes impossible, as any change of policy is equated with a change of religious doctrine, and difficult political questions are swept away as something that must be accepted on faith.

There are, however, a large number of nations that are not faced with the problem of inserting religion into the public arena; it is already there, and has been for decades or, in some cases, centuries. Such is the case in both Israel and Iran, which have existed as either established or semi-established states. In this type of situation, violence can occur if the State moves too quickly to limit the amount of religion in the public sphere, since religious activists see themselves as losing their "right" to live in a religiously ordered society and react accordingly. The activists' demands are often not based on any recognized interpretation of international law or group rights theory, since neither recognizes a "right" to live in a religiously ordered society and/or impose one group's religious standards on others. Nevertheless, in order to establish the legitimacy of their actions and gain the support of others, religious rebels or reformers must find some source of moral and/or legal authority.

Oddly enough, moral authority is relatively easy to establish. Experts in the area of peace and security have argued that violence is perhaps one of the most compelling forces that a nonlegal entity can possess and that religion can give moral legitimacy to violence.<sup>520</sup> There-

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516. See Ginsburg, *supra* note 7, at 560; Keddie & Monian, *supra* note 141, at 527.

517. See Rapoport, *supra* note 262 *passim*.

518. See JUERGENSMEYER, *supra* note 5, at 198.

519. See *id.* at 156; Rapoport, *supra* note 262, at 446 (stating that "[w]hen a religious justification is offered for a cause which might otherwise be justified in political or economic terms, the struggle is intensified and complicated enormously").

520. See JUERGENSMEYER, *supra* note 5, at 163, 167.

fore, attaching religious values to what may primarily be a political movement can actually increase the likelihood that violence will be used.

Religious activists often find it more difficult to find acceptable legal bases upon which to base their movements, both because the most obvious source of legitimization (international or domestic law) is not available and because the use of violence tends to suggest that the action being taken is *per se* indefensible as a matter of law. However, religious rights activists usually claim that their actions are based on one of three rationales, two based on purely legal principles and one based on extra-legal principles that allegedly supersede temporal law.

The first type of rationale used by religious activists to justify the use of violence claims that the activists are only pursuing those rights that are already established under international law or some type of political theory. If, for example, the Baha'i in Iran rebelled against the State, they might claim that they were being denied several rights, including the right to life (a non-religious right) and the right to nondiscrimination on the basis of religion (one of the three fundamental religious rights). The Baha'i would argue that all means of peaceful discourse had failed and that violence was being used either in self-defense or to convince the State to reconsider its policies toward them.

The second type of rationale used by violent activists claims that the activists are pursuing rights that are not currently recognized in law or theory but are a logical extension thereof and that violence is necessary to force the State to recognize these new types of rights. For example, this category of violence would include acts undertaken by religious reformers who wanted to convince the State to permit religious human sacrifice in cases where the victim was willing. As the law currently stands, human sacrifice is prohibited, even if religiously motivated; however, this claim is a logical extension of the existing right to nondiscrimination and free exercise of religion.

The third type of rationale used by religious reformers who act violently is extra-legal in that it does not attempt to justify violence on any legal or political basis; instead, it relies on the supremacy of religious obligations over temporal law to justify violent and illegal actions. For example, millenarianists who believed that God required them to blow up the White House on December 31, 1999, as a catalyst to the apocalypse would be acting on a purely religious basis; both the acts and anticipated results are motivated by religious sentiments alone.

If these three categories encompass the universe of religiously inspired violence, the question that politicians and practitioners must ask is how and whether each type of violence can be minimized or elimi-



nated by any sort of state action. The first category of violence is easily addressed, at least in theory, since States need only recognize the legitimacy of the activists' claims and create *de jure* and *de facto* protections for the rights at issue in order to eliminate the need for religious activists to resort to violence. The problem, of course, arises when, for whatever reason, the State either refuses to recognize the legitimacy of the rights claimed or argues that it is already protecting those rights adequately and in accordance with the State's religious, legal, and cultural history.

Iran already has experienced this type of violence several times in the last century, with the most obvious example occurring in 1979. At that time, the religious segment of Iranian society believed that the shah had infringed on Muslims' free exercise of religion by imposing various secularizing policies that failed to accommodate the needs of the religiously devout. Although the rebels did not enunciate their claims in formal rights-speak, the religious backlash against the shah's policies was a major impetus for the Islamic Revolution. Although the activists eventually created a religio-legal regime that included certain "rights" not recognized under international law, the revolution was initially a response to legitimate religious concerns. Had the shahs recognized the need to accommodate the rights of both the religious and the secular segments of society, the revolution might have been avoided.

Israel is currently facing certain types of violence that fall into this first category, primarily at the hands of Palestinian Arabs. Notably, the Palestinians are, for the most part, not attempting to claim that Judaism is wrong and Islam is right as a matter of religious truth; rather, they are opposed to living in a Jewish state that (i) refuses to recognize their religious beliefs and principles as equally valid as Jewish religious beliefs and (ii) marginalizes them politically, culturally, and socially. In Israel, the situation is the opposite of that found in Iran in the 1970s in that religious minorities are protesting excessive religiosity in the law and national culture, not excessive secularism.

Interestingly, another oppressed minority, non-Orthodox Jews, have not resorted to violence despite being subjected to discriminatory state practices that are similar in many ways to those applicable to the Palestinians. After looking at the examples of Israel and Iran, it appears that religious activists only resort to violence if violations of religious rights (including the nullification of the fundamental freedoms of a minority group due to the creation of a majority religious culture) are extreme, absolute, and long-lasting. In this definition, "extreme" means the violations must be more than *de minimis*; "absolute" means there must be no opportunity for peaceful political discourse and change nor any op-

portunity to escape the offensive laws; and "long-lasting" means the violations must endure for several political cycles (i.e., several monarchs' reigns or several seatings of the legislature).

It is the second element, that of absolutism, that differentiates non-Orthodox Jews from Palestinian Arabs in Israel. For example, Jews have hope that they can eventually effectuate political change, while Arabs generally do not. In addition, non-Orthodox Jews are able to escape the most oppressive laws (those concerning marriage and divorce) by leaving the country temporarily, while Arabs have no such relief. Even the level of extremism is different, for non-Orthodox Jews generally benefit from and support the concept of a Jewish state, although they may disagree with the current level of interaction between law and religion.<sup>521</sup> Israeli Arabs, on the other hand, receive no benefits from increasing the Jewish aspects of Israeli law and culture and have no reason to wish the continuation of the current religio-legal regime. Therefore, if Israel wishes to decrease the level of violence practiced by Palestinian Arabs, it must address those violations of rights that are extreme, absolute, and long-lasting. The longer it delays, the less likely it is that the Palestinians will ever be able to identify with the State and support its continued existence.

The second type of religious violence occurs when individuals or groups claim certain rights or privileges that are not currently recognized but are arguable extensions of existing rights. At first, this appears to be logically inconsistent in that violence is the antithesis of legal or political legitimacy, but the key to understanding this second category of violent behavior is recognizing that these religious activists are using violence as a form of religio-political communication<sup>522</sup> and that they do not justify their actions on purely religious grounds. They may in some ways see their goals as religiously required, but those goals are to be attained on the temporal, earthly level, and violence is merely a means

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521. Non-Orthodox Jews do not wish the destruction of the State or the total reformation of the society (as do the Palestinian Arabs); nor do they believe that violence is the only means of communication left open to them (as do a number of Arabs and ultra-Orthodox Jews); therefore, violence is unnecessary and, indeed, counterproductive to achieving their goals. See Ginsburg, *supra* note 7, at 574 (quoting historian Thomas Rose as saying "violence is a political resource when the bargaining process provides no other alternatives, or at least when some groups perceive no other alternatives").

522. See Rapoport, *supra* note 262, at 446 (noting that "[i]n a secular world, violence is normally understood as a means to an end whereby participants strive to increase efficiency wherever possible by discarding less productive structures and methods;" arguing the same dynamic appears in fundamentalist movements). The first category of acts also uses violence as a form of communication, but there the message is often much easier to interpret, since it involves previously recognized rights.

of convincing individuals and/or secular political institutions to respect or implement their proposed reforms.

This second category covers most forms of religious terrorism and ad hoc outbursts of violent confrontation. For example, in Israel, some ultra-Orthodox Jews will spontaneously attack passers-by who are violating certain *halachic* norms, such as women who pray publicly and people who work on the Sabbath. Although these acts originate from a sense of religious indignation and outrage that the victims are ignoring their religious obligations, the violence is essentially an attempt to communicate with the offending parties and persuade, coerce, frighten, or force them into changing their behavior. The attackers may also hope that by demonstrating the level of their discontent with current laws and policies and their willingness to use whatever means necessary to oppose current state practices, the State will acquiesce to their demand to enforce certain religious norms on a wider scale in order to keep the peace. Such acts may also be undertaken in an attempt to convince the State to uphold the religio-legal status quo. This second type of communication, which is directed at state bodies even though it is practiced on individuals, can be classified as religious terrorism.<sup>523</sup>

Much of the violence aimed at the State of Israel by those who desire the destruction of Israel, be they international terrorist groups or neighboring states, can also be categorized within this second type of religious violence since it is both communicative and seeks to extend existing legal rights. In this case, the neighboring states and terrorist non-state entities each have certain rights, none of which includes interference in the internal affairs of another sovereign body.<sup>524</sup> However, Israel's opponents are using violence to assert their "right" to determine the course of Israel's policies. Their justification for doing so may rely on a belief that (i) they have the right and duty to protect the rights of Israeli Muslims, which may be an extension of a State's right to act to protect its nationals who are resident in another country and being abused by that other sovereign; or (ii) they have the right and duty to protect themselves and their constituencies from the religious offense given by the Jewish state to those who are not Jewish. In many ways, this latter argument is similar to that raised by Orthodox Jews who are offended by the behavior of non-Orthodox Jews, but is more dangerous

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523. Religious terrorism can also be practiced directly on the State and may sometimes attempt to minimize the risk of harm to innocent individuals, as in the Irish Republican Army's technique of tipping police off to the existence of bombs in public places so that the explosions damage only property.

524. See Vincent, *supra* note 1, at 257-61 (discussing rights of states and non-state entities under international law).

in that it carries the possibility that opposition to Israel is based solely on claims about the religious truth of Islam versus Judaism.<sup>525</sup>

At this point, however, the violence aimed at the State of Israel<sup>526</sup> has as its goal the diminution or destruction of the Jewish state in either a territorial or cultural sense rather than the extermination of Jews per se. Although the violence and the desired results are on a larger scale than those previously discussed, they still reflect an underlying belief that such acts will bring about a change in a temporal political entity. This belief may be disguised by the claim that such acts are being taken out of respect for and in obedience to a religious authority that is higher than of the State, but the determinative factor is that the violence is intended to bring about a change in others on an individual or state level.

Similar examples exist in Iran. For example, attacks on women not wearing *hejab* and on Baha'is may initially seem to be acts of religious retribution, but they are really intended to coerce behavior and extend the religious rights of attackers from the negative right to themselves be free of religious coercion to the positive right to impose their religious values on others.<sup>527</sup> The fact that in Iran the violence is either perpetrated or condoned by the State is irrelevant to this analysis. Instead, the focus should be on the fact that violence in Iran, as in Israel, is used as an extreme form of communication: conform with the religious norms of the religious activists (in this case, the State) or face the consequences. In both cases, the violent actors are trying to extend their rights from recognized legal protections of their own beliefs and practices to the as yet unrecognized "right" to impose one person's or one party's religious values on others.

Because this second category of religious violence involves people who are unwilling to respect existing boundaries of the law, it may appear to be beyond the control of non-participants, but, strangely enough, can be minimized through proper legal measures. However, the approach varies between Israel and Iran, since in one case the State wishes to minimize violence while in the other the State practices it.

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525. If that should happen, the violence would fall under category three, discussed *infra*.

526. See Beres, *supra* note 280, at 65–72 (noting current Iranian position is that Israel is a "cancerous growth in the Middle East" and must cease to exist, simply because it is a Jewish state). A number of commentators believe that a state of war already exists between Iran and Israel, based on Iran's unilateral intent to destroy Israel and irrespective of the absence of formal hostilities or declarations. See *id.* at 72 & n.25; see also MACKAY, *supra* note 91, at 385 (commenting that Iran is unwilling to "end its role as the leader of the opposition to the Middle East peace process").

527. See Strong, *Christian Constitutions*, *supra* note 265, at 63 (discussing whether religious rights are positive or negative).

In all instances of communicative violence, the first step is to identify what the demands of the various speakers are. The problem in Israel is that the messages diverge between each of the groups who utilize violence. In the case of violence practiced by Jews against Jews, it is the religiously devout protesting increased secularization in their communities and nation. In the case of non-Jews against the State, it is a religiously marginalized minority (or a neighboring state or non-state entity that feels compelled to protect that minority) protesting the existing levels of religio-legal interaction and opposing any increases thereof. Therefore, it would seem that any attempt to conciliate one group would inflame the other. While this is a risk, Israel faces violence every day as a result of the current system and change must be considered.

The second step in analyzing and addressing communicative violence is to take into account the underlying validity of the various claims to see which, if any, can be fulfilled. Although the conviction of the actors might initially seem important, in that more devoted activists might be more willing to use extreme measures to win their point, such considerations cannot figure into the analysis since to do so would encourage more groups to adopt violence as a means of effectuating political change. Instead, the claims for change must be proven legitimate on their own merits, for implementing laws that impose a different set of inequities will not lead to lasting peace but will only create a new group of disgruntled citizens.

In considering the competing claims of violent actors in Israel, one must first recognize that, as discussed in connection with the first type of violence, non-Jews in Israel have a legitimate complaint that their religious and other rights are being infringed upon by the State. To some extent, the violence aimed at Israel by outside entities is a response to the inequitable treatment of Muslim Arabs within the State. Although the outrage felt by these neighboring nations and non-state organizations is largely unactionable at law, it is based on state acts that are legally impermissible. Therefore, it is unnecessary at this juncture to address the novel aspects of the claims made by surrounding states and terrorist groups against Israel, since by eliminating the first level problems (i.e., the violation of resident non-Jews' legitimate rights), Israel may eliminate some or all of its second-level problems as well. In addressing the territorial claims of the Palestinian Arabs through the Middle Eastern peace process, Israel has begun to implement this plan, but by ignoring the cultural issues that affect the everyday lives of non-Jews within the State, Israel may find the peace incomplete and temporary.

Although territorial concessions to the Palestinians inflame certain portions of the Israeli population (particularly the Orthodox),<sup>528</sup> much of the violence undertaken at the hands of the Orthodox has less to do with disputes over land and more to do with disputes over culture. These acts are basically a response to the State's allowing others to act in ways that offend the Orthodox and their conception of what a Jewish state should be. This complaint obviously falls outside the three basic religious rights and even outside the "fundamental freedoms" analysis, since the Orthodox are not claiming that their right to life, found a family, work, or any other recognized freedom is being infringed upon; it is their religious sensibilities that are at issue. While this is obviously distressing and should be accommodated to the extent possible, it cannot form the primary basis of law in a nation that claims to protect all citizens' rights, religious and otherwise. In fact, this problem occurs not only with respect to restrictions put on non-Jews but also on obstacles to non-Orthodox Jews' practicing their faith freely and openly. Despite the fact that non-Orthodox Jews are not violent at present, they still suffer from the current formulation of the State as a Jewish Orthodox institution. Although restrictions on non-Jews' rights should obviously be reevaluated, Israel should also reconsider the limitations placed on the rights of non-Orthodox Jews. By relaxing the restrictions on non-Orthodox Jews (something which is sure to receive significant media attention), the State will send a message to non-Jews that religious pluralism is accepted and protected within the nation and that alternate conceptions of Israeli culture are as valid as those based on Jewish (Orthodox) criteria.

Persuading the violent factions within the Jewish community that territorial and cultural concessions should be made to non-Jewish and non-Orthodox Israelis will be difficult, however, especially considering the general acceptance of violence by religious activists as a means of political discourse in Israel. The likelihood of legislative change is also diminished by the fact that the religious parties currently hold a great deal of power in the Knesset and may be loath to implement changes they feel are contrary to their religious obligations. However, they may be persuaded to do so if they become convinced that it will decrease violence within society. In general, reforms in Israel should focus on accommodating the rights of all religious groups by giving non-Jews and non-Orthodox Jews more of a voice in Israeli politics and culture

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528. The Orthodox tend to oppose returning land to the Palestinians based on a religious conception of what Israel should be, while non-religious Jews often view territorial concessions as unwise as a matter of national security. Although the latter is a political matter outside the scope of this article, the former is obviously relevant to the current discussion.

and more equal rights, while at the same time limiting the ability of the Orthodox to control all aspects of Israeli culture. This is not to say that Orthodox Jews must give up all of their rights and privileges to appease Arab and secular interests; rather, both sides must compromise. However, it should be noted that the reason why it may appear that the Orthodox are receiving the brunt of the reforms is because the Orthodox have enjoyed a disproportionate ability to shape the values of the country. If the religio-legal culture more closely matched the actual demographic makeup of the nation, there would be fewer adjustments to be made and the Orthodox would perceive the burden to be less.<sup>529</sup> Because the balance of power has been skewed, the sting of reform will be equally unbalanced.

Although the situation in Israel provides certain helpful insights, religio-legal violence in Iran is of a different nature and therefore requires a different approach. Practiced by the State against non-conformists of all religions, Iranian violence constitutes an attempt to persuade, coerce, and/or force the population to adhere to the State's definition of Islam, if not in mind, at least in practice. Although the State has reportedly decreased its use of violence, this might merely reflect the success of earlier violent acts in eliminating the opposition. Alternatively, the State may recognize that the downturn in the Iranian economy has caused widespread discontent that has made violent social reform inappropriate and dangerous to the stability of the current regime.<sup>530</sup> Nevertheless, a number of those in power still believe violence is a legitimate tool of state, which makes it unlikely that the impetus for change will come from the state itself, since it sees little wrong with its actions.<sup>531</sup>

Although it is difficult, there are ways to encourage a nation to change its internal approach to law, with domestic human rights groups often standing the best chance of success.<sup>532</sup> The international commu-

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529. See Genut, *supra* note 60, at 2151-52; see also LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS, *supra* note 62 (reporting that forty percent of Israeli Jews identify themselves as secular, forty percent as traditional, and twenty percent as religious); EDELMAN, *supra* note 10, at 40 (noting eighteen percent of Israeli population is Arab).

530. Another more theoretical possibility is that violence is usually a tool of the most oppressed faction in society; in Iran, that group is women, who, as a group, generally do not rely on violence to achieve their ends. Additionally, violence is easier to legitimize if it is being used in the name of religion rather than against religion. Because the Iranian state is considered more religious than the dissidents, reformers cannot use religious justifications for violence, at least at the present time. However, should corruption in government continue to spread, religion may be used as a means of deposing the current regime.

531. See MACKEY, *supra* note 91, at 308.

532. See Graves, *supra* note 105, at 85-86 (discussing theoretical solution of Professor An-Na'im, set forth in Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or De-*

nity might also contribute to Iran's religio-legal reformation through measures designed to indicate its disapproval of the State's use of religio-political intimidation. In addition, other States and international non-governmental organizations can stress that a system that violates all three basic tenets of religious rights will eventually be exposed to violence at the hands of oppressed dissenters who view the violations of rights as extreme, absolute, and long-standing. By emphasizing the need for moderation as a way of ensuring the State's own survival, the international community may make the message of reform more palatable and less threatening to the Iranian government and increase the chance that it will eventually be acted upon. In the past, international commentary has been universally negative, which has only made Iran more defensive and less likely to adopt new methods of dealing with dissidents. By demonstrating how less oppressive measures help stabilize the current regime, the international community gains some respect in the eyes of the Iranian government. This approach may result in both parties getting what they want: respect and non-interference for the Iranian government and a more rights-oriented society for the international human rights community.

Although Iran has typically resisted interference in its domestic affairs by outsiders, these techniques may be more effective than they at first appear, since Iran is evidently embarrassed<sup>533</sup> enough by its own actions that it has attempted to hide them from or justify them to the outside world.<sup>534</sup> Therefore, because Iran may be vulnerable to international opinion, measures should be taken to open constructive dialogue with the State about its use of violence in furthering the goals of the Islamic Republic and to discourage violent acts in the future.<sup>535</sup>

The third and final type of violence is utilized by persons who believe that the principles of their faith require them to use violence to bring about certain religious ends, such as the mass destruction of non-

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*grading Treatment or Punishment, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 19 (1992)); Loh, supra note 2, at 162; Miller, supra note 165, at 818-19.*

533. See also MACKEY, *supra* note 91, at 388 (noting Iranians' desire to be respected by and recognized in the international community).

534. First, Iran has attempted to deny any incidents of religious repression, such as attacks against Baha'i, although this may simply be an example of *taqiyeh*. See Atlas, *supra* note 281. Second, Iran claims that it is respecting religious and other rights through its Constitution, which contains various provisions protective of minority rights. Third, it claims that it is implementing religious rights in accordance with its own unique Islamic (i.e., non-Western) culture.

535. Because Americans tend to perceive Iran as highly militant (a move that in itself may help to fuel the flames of anti-American passion in Iran), this course of action may be more likely to be undertaken by nations other than the U.S. See Peter Waldman, *Iranian Revolution Takes Another Turn, But Where Is It Going?*, WALL ST. J., May 11, 1995, at A1.



believers or a cataclysmic event heralding the return of the Messiah.<sup>536</sup> The difference between people in this category and those in the other two categories is that people in this group are not attempting to communicate, nor are they attempting to bring about any change in the temporal political realm; they are utilizing violence as a means of bringing about a purely religious end. As discussed above, it is possible for the State to minimize the first and second types of violence, since the desired outcome lies within the State's power. However, there is nothing the State may affirmatively do to eliminate or minimize this third type of violence, since it has nothing to do with the State as a political body. This sort of pure religious violence, which is inherent in all religions,<sup>537</sup> can only be controlled through the State's criminal justice system, as any other act of violence would be regardless of its motivation.

### CONCLUSION

As Israel and Iran move into the twenty-first century, they each face the challenges associated with reconciling, on the one hand, the needs and demands of a devout population with a history of religio-legal unification with, on the other hand, the need to respect and protect the religious rights of minority populations. If these two nations fail to do so, they face the possibility of increased domestic violence, as various groups struggle to create a nation that reflects their own values. In fact, the longer Israel and Iran fail to address their problems and deny the legitimate human rights claims of their citizens, the more extreme the fallout will be when change is finally implemented.

At this point, the two countries are taking somewhat divergent paths, with Iran moving toward increased secularization and Israel moving toward increased integration of religious principles in law. Despite the existence of strong secular elements in both societies, neither nation is a candidate for complete separation of religion and state, due to their political, legal, cultural, and religious histories and to their both having created certain political institutions that perpetuate the inclusion of religion and religious principles in the law of the State.

Because this article has proceeded under the assumption that creation of a secular state is not a possibility for either Israel or Iran at the present time, there has been no discussion about the merits of separation

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536. See Rapoport, *supra* note 262, at 447-50 (discussing violence based on "founding myth[s]" and millenarian or messianic beliefs).

537. See *id.* at 446.

versus unification of law and religion. Instead, this article has assumed that, for these two nations, religion must be reflected in the law of the State; the only question has been to what extent. A system that incorporates all persons' religious obligations fully, equally, and simultaneously cannot stand, as most people would protest being forced to live under another group's highly restrictive religious law and would oppose having society controlled by a single, highly devout minority. Similarly, a system that gives full or nearly full effect to the obligations arising under one religion while curtailing the rights of persons of other religions cannot last long, since such an approach leads to divisiveness, alienation, and violence. Instead, if religion must be included in the law of the State, it is best to create a system in which all religions are given as much respect as possible through a "lowest common denominator" approach to enforcement of religious obligations that only incorporates those religious elements that are common to all religions within the State. This approach can be strengthened by utilizing theologically permissible techniques that allow the imposition of a lower standard of behavior on nonbelievers and/or by establishing a consent provision that would allow for judicial enforcement of more stringent aspects of religious law only in cases where the parties consented to the application of such principles.

As Israel and Iran begin to reform their legal systems, they should first consider the three basic tenets of religious rights law (nondiscrimination, freedom of religious belief, and freedom of the exercise of religion), while also being aware of the extent to which the incorporation of one group's religious principles in law may nullify the fundamental freedoms of non-believers. It is this last provision that has created the most problems for States that include majority religious principles in the law of the State and has inspired the most conflict between different segments of society.<sup>538</sup> Although opponents to existing religio-legal regimes may not enunciate their objections in precise legal terms, they may use violence as a means of communicating their discontent with the status quo.

One type of communicative violence arises out of violations of established religious rights. This type of conflict is often the easiest to cure, since, by respecting internationally recognized religious rights, the

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538. Historically, incorporation of religious principles in law has only been successful in States that are highly homogeneous and that are geographically and/or culturally isolated from the rest of the world. The problem is that most nations are becoming more pluralistic due to the increased movement of persons across state boundaries and the easy accessibility of foreign ideas through improved communications technology.

State eliminates all claims and acts of violence based on infringement of those rights. As a matter of political expediency, if not legal principle, States should respect and protect these rights in order to foster peace and stability within their borders. Notably, the problem of universality versus relativity of human rights does not arise in this situation, as it is not external actors who are attempting to impose non-native values on the nation in question; it is the citizens of the State who are demanding recognition of certain rights.

The second type of communicative violence is more difficult to address, in that it claims as rights certain principles that have not yet been recognized under international law or political theory. States faced with this type of violence must first identify the demands advanced by the activists and then balance those demands against the existing rights regime. Since the field of human rights is constantly evolving, States cannot assume that actors who fall into this second category of religious violence will never advance a legitimate claim; conversely, however, States should not assume that everyone who falls into this class has claims that should be upheld.

The third type of religiously inspired violence is not communicative in that it does not attempt to influence individual action or state policy. Since it focuses solely on religious goals, it is beyond any sort of productive dialogue with the State and should be addressed through the criminal law, as any other violent act would be.

As the two countries think about whether and to what extent they wish to reform their existing religio-legal regimes, they should consider several concepts. For example, most commentators agree that Israel's most glaring structural problem is its use of separate religious courts for every religious community. Should Israel continue its use of the religious court system, it will likely find itself increasingly at odds with its Arab population, due to the religious courts' tendency to perpetuate and highlight religious differences within society. One way to minimize the conflicts and inequities created by the *millet* system might be to consolidate the various religious courts into a single system staffed with jurists from the existing courts. The new court would initially utilize the different lines of precedent that have grown out of the independent religious courts, but would, over time, begin to develop a single approach to religio-legal concerns in Israel. This type of institution would emphasize the common elements among the various groups in Israel rather than their differences and could successfully reconcile the diverse groups within the nation. The success of this approach would depend on the court's ability to avoid using an overwhelmingly Jewish perspective and interpretive style, since that would be counterproductive to any uni-

fying efforts. Because the Supreme Court has already been recognized as the protector of the rule of law in Israel and commands a high degree of trust and respect from the population, it seems logical to vest the judiciary with the task of harmonizing the different religio-legal approaches into a universal system of Israeli jurisprudence.

In addition to renovating the structure of the judiciary, Israel needs to take a hard look at the substance of its laws. For example, the Knesset's direction to the judiciary to use Jewish principles and values as a default mechanism to fill in any gaps in legal precedent is not without risk, since it sends a message to religious minorities that their values and cultures are of secondary importance. By minimizing minority groups' contributions to the nation, the Knesset fails to inspire dedication and loyalty to the State and increases the possibility that dissenters will perceive violence as the only way to effectuate change in society. Activists are also more likely to turn to violence now that the Knesset has prohibited certain persons and certain viewpoints from entering into the public sphere. Although this is obviously an attempt to protect the Jewish nature of the State, it may decrease the possibility that Israel will be able to unify the diverse components of its culture and find a national vision that includes, rather than excludes, minority populations.

This need for respect of other religious perspectives is also apparent in the area of personal law. Although much of what Israel has accomplished is good, there is a problem, at least for the Jewish community, with respect to restrictions on marriage and divorce. Interestingly, if the government were to ease up on those restrictions, it might help improve Jewish-Arab relations and minimize violence in society, since Arabs would begin to believe that the Jewish Orthodoxy was beginning to loosen its monopoly on Israeli culture and that there was hope that they, too, might one day find their voices heard by the State.

There are similar concerns with respect to education, in that current restrictions on entry to universities only affirm non-Jews' belief that they are second-class citizens in their own country. If such restrictions are lifted, these minorities might see themselves as equal participants in the future of Israel and be less likely to utilize violence as a means of political opposition.

Although Iran's institutional problems are more severe than Israel's, the society has offered less resistance to the current regime.<sup>539</sup> Because

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539. One explanation for this phenomenon might be the creation of a one-party state and the banning of the leading secular liberal party. See Elaine Sciolino, *Fear, Inflation and Graft Feed Disillusion Among Iranians*, N.Y. TIMES, May 30, 1995, at A1 (reporting that due

there are so few explicit challenges to the Iranian system, there is some question as to the source of the next wave of religio-social reform. Traditionally, clerics have acted as the watchdogs of the State, but because they now hold much of the power in Iran, it is unlikely that change will be initiated from that sector.<sup>540</sup> Instead, reform and moderate secularization may occur as a result of the economic problems that currently face that nation, since the government may find it impossible to impose repressive social strictures on an already discontented public.

Obviously the most difficult problem for Iran to overcome, should it decide to cure the numerous rights violations practiced by the State, is the institutionalization of the *vilayat-i-mutlaqa-yi-faqih*. As long as the Supreme Jurisprudent has the sole authority to decide which laws are permissible in the Islamic Republic, there is danger that people's rights will be abused. Although a more moderate Supreme Jurisprudent could permit or require certain distinctions to be made between religious and secular law, that decision could easily be changed by the next Supreme Jurisprudent since there is apparently no requirement that one Jurisprudent follow the precedents of his predecessors. Therefore, until fundamental changes are made to the Iranian structure of government, there will be danger of state infringements on religious rights.

With respect to the substantive law, Iran's approach to sovereignty and judicial interpretation makes it difficult for any sort of liberalization to occur. However, there are signs that the *Majlis* and the courts are softening their views on how much religion to incorporate into the laws of the State. For example, women are now given the right to monetary compensation after divorce and are permitted to sit as assistant judges. Since the post-revolutionary restrictions on un-Islamic behavior fell disproportionately hard on women, it is encouraging to see some improvements in this area and is in a way predictable, since women's rights have often constituted the first and most extreme battleground in the war between secular and religious forces in Iran. Although there has not been any liberalizing movements in other aspects of personal law, including laws regarding disfavored religious minorities, it is possible that this initial foray toward more equitable treatment of women is a

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to government repression, there is "no serious challenge to the theocracy that has ruled for more than 16 years").

540. See Chase, *supra* note 165, at 406-07 (discussing possibility of an opposition movement in Iran and the current position of the *ulama* in Iranian society). However, it is possible that those lower level clerics who are not currently in positions of power may eventually begin an opposition movement if and when the corruption in the ranks of the clerical elite becomes impossible to bear. See generally Sciolino, *supra* note 539 (reporting government corruption in Iran).

sign that the Islamic Republic will become more moderate in coming years.

As is true of Israel, Iran has had some difficulties in implementing an equitable system of education, with the most significant problems arising when minority or dissenting members of society wish to obtain a university education. Women, however, have made great strides in this area in recent years and may be able to utilize their learning to better their position in Iran.

As has been demonstrated throughout this article, any debate over the proper role of religion in law is extremely complex. However, the only way to progress in this area is to recognize what the purpose and effect of religiously influenced laws are and to decide whether those laws are permissible as a matter of law and theory. Even this approach is further complicated by the problem of ascertaining whether and to what extent each proposed change will affect the level of violence within and between societies, but the fact that a task is difficult does not mean it is not worth undertaking; in fact, quite the opposite is true.

After weighing the different approaches and their effect on society, this article suggests that it is preferable as a matter of law and safer as a matter of national and international security to create legal systems in which all persons' rights are respected to the fullest extent possible, limited only when the exercise of one person's or one group's religious rights begins to infringe on another person's legitimate rights. By doing so, the State creates an atmosphere in which all persons feel free to exercise their religious rights and increases the loyalty felt by all groups toward the State, thus decreasing the likelihood of violence within and between nations. If the goal is to create more peaceful and rights-oriented societies, one group cannot have total control over the definition of culture and the amount of religio-legal integration in the State; to do so will inspire permanent divisions in society and perpetuate violent power struggles between groups, as repressed minorities attempt to find a way to gain the respect they need and deserve.

