

# ISRAEL IN THE HUMAN RIGHTS ERA: FINDING A MORAL JUSTIFICATION FOR THE JEWISH STATE

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*Nationalism is an inflamed condition of national consciousness which can be, and has on occasion been, tolerant and peaceful.*<sup>1</sup>

*You will be a kingdom of priests and a holy nation to Me.*<sup>2</sup>

The political stalemate between Israel and the Palestinians and the incessant violence and terror of *Intifada II* has overshadowed (for good reason) the recent fundamental political shift of the Israeli electorate and Israel's political right.<sup>3</sup> Whereas the two state solution was once the brain child of the peace camp, Likud (Israel's mainstream right wing party) has adopted the two state solution; accepted, in principal, the existence of a Palestinian state in the occupied territories (to which the Oslo accords did not formally recognize); and indicated that it will do something the Israeli political left never did—withdraw from territory gained in 1967 and disband Israeli settlements.<sup>4</sup>

The agreement between the Israeli right and left that the occupied territories will, at some point in the future, contain a Palestinian state<sup>5</sup> suggests that Israel's occupation of the Gaza

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1. Isaiah Berlin, *The Bent Twig: A Note on Nationalism*, 51 FOREIGN AFF. 11, 17 (1972).

2. *Exodus* 19:6.

3. See Editorial, *Exit Strategy*, NEW REPUBLIC, May 3, 2004, at 7.

4. See Thomas L. Friedman, *Kicking Over the Chessboard*, N.Y. TIMES, Apr. 18, 2004, § 4, at 13.

5. While the left and right do not agree on the borders of a future Palestinian state, both sides agree that a Palestinian state will exist on some significant part of the Gaza Strip and the West Bank. See Thomas L. Friedman, *Wanted: Fanatical Moderates*, N.Y. TIMES, Nov. 16, 2003, at A13; David Brooks, *Finally, Good News in Mideast*, N.Y. TIMES, May 22, 2004, at A17.

strip and the West Bank is nearing its end. Ariel Sharon's concession that the occupation undermines Israel's security and that "holding 3.5 million Palestinians is a bad thing for Israel, the Palestinians, and the economy"<sup>6</sup> and his commitment to Israeli withdrawal from the Gaza Strip and parts of the West Bank (referred to as the disengagement plan)<sup>7</sup> bolsters the claim that Israel's future borders will look something like those of the 1948 armistice lines (the Green Line). Thus, it seems appropriate to imagine an Israel without the occupation.

At the core of claims challenging Israel's legitimacy rests Israel's occupation of Gaza and the West Bank. The occupation has led the international community, Arab states, Palestinians, and Israelis to question Israel's moral integrity.<sup>8</sup> While it may be optimistic or outright naïve to think that an Israel without the occupation will translate to an Israel at peace with its neighbors or with Palestinians, some may conclude that an Israel free of the shadow of the occupation will recapture the moral high-ground and world sympathy it enjoyed prior to the 1967 war.<sup>9</sup> Thus, the prospect of an Israel without the occupation suggests that Israel could enjoy a new era of legitimacy in the international community and, possibly, in the Middle East.

Yet, there is reason to suspect that, even without the occupation, Israel will not enter a golden era of international acceptance, or for that matter, an era without challenges to its legitimacy. While the occupation has presented the easiest, most popular, and salient means of critiquing Israel, other more fundamental challenges to Israel's moral legitimacy will continue to be levied against the Jewish state.

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6. *Sharon Speaks Out Against Israeli "Occupation"*, DAILY TELEGRAPH (Sydney), May 28, 2003, at 35.

7. See Gil Hoffman, *PM: Settlers Won't Decide Nation's Fate*, JERUSALEM POST, Oct. 22, 2004, at 1.

8. See ARTHUR HERTZBERG, *THE FATE OF ZIONISM: A SECULAR FUTURE FOR ISRAEL AND PALESTINIANS*, ch. 3 (2003) (offering a brief historical sketch of the Palestinian claims against Israel).

9. See MICHAEL OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* 313-23 (2002); see also AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* 250-53 (2000) (explaining that Israel's territorial aims had been settled and considered legitimate prior to the 1967 war).

This Note anticipates a critique of Israel's legitimacy in the post-occupation era. Central to this appraisal is a moral challenge to Israel as a Jewish state. While a debate over the morality of the modern Jewish state predates the state of Israel<sup>10</sup> and has been a part of Israel's *national* dialogue for the better part of the state's history,<sup>11</sup> this Note argues that the international community—the community of states, international organizations, and intellectuals outside Israel—will focus its critique on the Jewish character of Israel, challenging the morality of its state-sponsored Jewishness. At its core, challenges to Israel's legitimacy in the post-occupation era will be based on another conflict: the perceived conflict between Israel as Jewish state and principles of liberal democracy and international human rights. Based on its arsenal of human rights treaties and covenants, it is likely that the international community will deem that the very character of Israel, despite its democracy, violates human rights.

Part One provides a conceptual framework for discussing and evaluating Israel as a democracy.<sup>12</sup> Using terminology from democracy studies, this section sets out a theoretical framework for discussing and evaluating different types of democracies. In particular, this section analyzes the character, challenges, and limitations of Israel as an ethnic or communal democracy.

Part Two investigates the possible sources of Israel's illegitimacy. This section looks at how Israel's Jewish character

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10. See generally ARTHUR HERTZBERG, *THE ZIONIST IDEA: A HISTORICAL ANALYSIS AND READER* (1997) (providing a historical background of the Zionist movement).

11. See generally YORAM HAZONY, *THE JEWISH STATE: THE STRUGGLE FOR ISRAEL'S SOUL* (2000).

12. Some scholars challenge Israel's classification as a democracy. See As'ad Ghanem et al., *Questioning "Ethnic Democracy": A Response to Sammy Smooha*, 3 *ISR. STUDIES* 253 (1998); As'ad Ghanem, *State and Minority in Israel: The Case of the Ethnic State and the Predicament of its Minority*, 21 *ETHNIC & RACIAL STUDIES* 428 (1998). But see Alan Dowty, *Is Israel Democratic? Substance and Semantics in the "Ethnic Democracy" Debate*, 4 *ISR. STUDIES* 44 (1999); Ruth Gavison, *Jewish and Democratic? A Rejoinder to the "Ethnic Democracy" Debate*, 4 *ISR. STUDIES* 44 (1999). These scholars argue that Israel has, at best, procedural elements of a democracy but in substance is not democratic. This Note works under the assumption that Israel qualifies as a democracy and considers the illiberal elements of Israel's democracy as qualities that make it a thinner or less thick democracy.

conflicts with the human rights of Israel's largest minority group, its Palestinian citizens.

Part Three considers responses to the moral conundrum caused by Israel's Jewish character. This section considers possible justifications for Israel but demonstrates that these rationales fail to offer a comprehensive response to the human rights challenge to Israeli democracy.

Part Four critiques the international human rights legal regime, focusing on its limitations, and sets out a framework for legitimizing Israel's Jewish character in moral terms. The final Part of the Note concludes that Israel must seek moral justification to properly defend itself against claims that Israel as Jewish state is illegitimate.

## I. CONCEPTUAL FRAMEWORK: ISRAEL AS A COMMUNAL DEMOCRACY

Israel's supporters often point out that it is the only true democracy in the Middle East. At the heart of Israel's democracy is its advanced civic and political culture. Israel holds regular elections, grants all its citizens the right to vote, has an independent judiciary, and has a free press. Moreover, during the past twenty years, Israel has made significant strides in the realm of civil and political rights. Most significant here is what some have called Israel's constitutional revolution, which has opened the way for the judiciary to strike down laws that conflict with two of Israel's most liberal laws: Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.<sup>13</sup>

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13. See Basic Law: Freedom of Occupation, 1994, S.H. 1454; Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, *amended by* 1994, S.H. 1454, available at <http://www.mfa.gov.il/MFA/Government/Law/Basic+Laws/Basic+Laws+of+the+State+of+Israel.htm>; see also Aharon Barak, *The Role of the Supreme Court in a Democracy*, 3 ISR. STUDIES 6 (1998) [hereinafter Barak, *The Role of the Supreme Court in a Democracy*]; Aharon Barak, *Jewish or Democratic? Israel's Top Judge Reflects on Values*, FORWARD, Aug. 23, 2002, at 1. In 1992, Israel's Parliament enacted two Basic Laws that resulted in what Aharon Barak, President of Israel's Supreme Court, termed a "constitutional revolution." See Hillel Neuer, *Aharon Barak's Revolution*, 3 AZURE 13, 14 (1998); see also GARY JEFFREY JACOBSON, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES ch. 4 (1993). There are those, however, who consider the Basic Laws as a setback for a liberal constitution. See Yossi Yonah, *Fifty Years Later: The Scope and Limits of Liberal Democracy in Israel*, 6 CONSTELLATIONS 411, 426 n. 13 (citing S. ALONI, I CAN DO NO OTHER, SHULAMIT ALONI CONVERSES WITH IDITH ZARTAL (Or Yehuda 1997)).

It is important to take into account the context of these protections. During the last fifteen years, amidst long stretches of fighting Palestinian violence and terror in the occupied territories, Israel pursued basic laws that increased the rights of all its citizens including its Palestinian citizens.<sup>14</sup>

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14. The text of the Basic Law of Human Dignity and Liberty is as follows:

Section 1 Basic Principles: Basic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom, and these will be respected in the spirit of the principles of the Declaration of Independence of the State of Israel.

Section 1(a) Purpose: The purpose of this Basic Law 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.

Section 2 Preservation of Life, Body and Dignity: There shall be no violation of the life, body or dignity of any person as such.

Section 3 Protection of Property: There shall be no violation of the property of a person.

Section 4 Protection of Life, Body, and Dignity: All persons are entitled to protection of their life, body, and dignity.

Section 5 Personal Liberty: There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner.

Section 6 Leaving and Entering Israel: (a) All persons are free to leave Israel. (b) Every Israel national has the right of entry into Israel from abroad.

Section 7 Privacy: (a) All persons have the right to privacy and to intimacy. (b) There shall be no entry into the private premises of a person who has not consented thereto. (c) No search shall be conducted on the private premises or body of a person, nor in the body or belongings of a person. (d) There shall be no violation of the secrecy of the spoken utterances, writings or records of a person.

Section 8 Violation of Rights: 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 or by such a law enacted with explicit authorization therein.

Section 9 Reservation Regarding Security Forces: There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defence Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a Law and to an extent no greater than required by the nature and character of the service.

There are, however, elements of Israel's democracy that make it illiberal.<sup>15</sup> The stated purpose of the Basic Law: Human Dignity and Liberty is to establish the values of the "State of Israel as a Jewish and Democratic State."<sup>16</sup> Thus, Israel's commitment to liberalism is in tandem with its commitment to and sponsorship of its Jewish identity. This has led scholars to classify Israel as an "ethnic democracy,"<sup>17</sup> a "republican democracy,"<sup>18</sup> or a "communal democracy."<sup>19</sup> While Israel's religious character sets it apart from other democratic

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Section 10 Validity of Laws: This Basic Law shall not affect the validity of any law (din) in force prior to the commencement of the Basic Law.

Section 11 Application: All governmental authorities are bound to respect the rights under this Basic Law.

Section 12 Stability: This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under Section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than required.

1992, S.H. 1931, *amended by* 1994, S.H. 1454; *see also* Barak, *The Role of the Supreme Court in a Democracy*, *supra* note 13 (addressing the Israeli Judiciary's commitment to upholding basic rights); Ruth Gavison, *The Jew's Right to Statehood: A Defense*, 15 *AZURE* 70, 95 (2003).

15. Fareed Zakaria, *The Rise of Illiberal Democracy*, *FOREIGN AFF.*, Nov.-Dec. 1997, at 22.

16. *See* 1992, S.H. 1931, *amended by* 1994, S.H. 1454 ("The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.").

17. *See* Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, 2 *ISR. STUDIES* 198 (1997); *see also*, Ilan Peleg, *Ethnicity and Human Rights in Contemporary Democracies: Israel and Other Cases*, in *NEGOTIATING CULTURE AND HUMAN RIGHTS* 303, 303-04 (Lynda S. Bell, et al. eds., 2001) [hereinafter Peleg, *Ethnicity and Human Rights*]; Ilan Peleg, *Ethnic Constitutional Orders and Human Rights: Historical and Comparative Analysis*, in *HUMAN RIGHTS AND DIVERSITY: AREA STUDIES REVISITED* 279, 288 (David P. Forsythe and Patricia C. McMahon eds., 2003) [hereinafter Peleg, *Ethnic Constitutional Orders and Human Rights*].

18. *See* Yonah, *supra* note 13.

19. *See* Peleg, *Ethnicity and Human Rights*, *supra* note 17, at 304. Others argue that because of Israel's unique, religious character it does not fit any classification, and can only be classified as a Jewish State. *See* Gavison, *supra* note 12.

nation-states,<sup>20</sup> for the purposes of comparative analysis and theoretical discussion, I will refer to Israel as a communal democracy.

What is a communal democracy? The best way to define communal democracy is by contrasting it with two other types of democracy: liberal democracy and consensus, or consociational, democracy. Liberal democracy is the popular conception of democracy: It is “a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of the basic liberties of speech, assembly, religion and property.”<sup>21</sup> These rights are “individually granted, are considered ‘philosophically’ inalienable, are usually protected in a written constitution and a bill of rights” and are enforced by an independent judiciary.<sup>22</sup> The United States and the United Kingdom are the classic examples of liberal democracies. Important here is that liberal democracies employ the principle of state neutrality, which make the state neutral towards its citizens’ conceptions of the common good.<sup>23</sup> Thus, the societies best suited for liberal democracy are ones where the political dialogue is multicultural and does not promote a particular ethnicity.<sup>24</sup> The society has no cultural preference and attempts to relegate issues of ethnicity, race, and religion to the private realm.

In bi-ethnic or multiethnic societies, however, where social and political division is largely divided along ethnic lines, “claims for *group rights* are likely to overwhelm the basic principle of liberal democracy that rights are granted to individuals alone.”<sup>25</sup> In order to combat ethnic division and safeguard a democratic form of government, states like Belgium and Canada have adopted a form of government referred to as conso-

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20. Peleg, *Ethnic Constitutional Orders and Human Rights*, *supra* note 17, at 288.

21. See Peleg, *Ethnicity and Human Rights*, *supra* note 17, at 309 (quoting Zakaria, *supra* note 15).

22. *Id.*; see also Yonah, *supra* note 13, at 413.

23. See Yonah, *supra* note 13, at 413. Part IV will question the true extent of state neutrality in liberal democracies.

24. See Peleg, *Ethnic Constitutional Orders and Human Rights*, *supra* note 17, at 281-82. Additionally, societies that are ethnically homogenous are a natural fit for liberal democracy because no rivalry exists between the majority and minority ethnicities.

25. Peleg, *Ethnicity and Human Rights*, *supra* note 17, at 309 (emphasis added).

ciational democracy or consensus democracy.<sup>26</sup> Because majority rule in a plural society results in majority hegemony and minority suppression rather than democracy, the consensus model advocates that the State grant all its citizens an equal right to be full members of the community, that membership in the community be voluntary, and that the common good of the republic must be dynamic.<sup>27</sup> This last condition requires that the “community should neither be imprisoned by their ancestors’ ideals . . . nor by their own earlier ideals and goals.”<sup>28</sup> Some accommodationist measures that implement the conditions of a consensus democracy are “‘special representation of certain minorities in the second chamber or upper house,’ territorial and non-territorial federalism, a written constitution which guarantees minority veto over amendments and other means—constitutional, administrative, and electoral—that constrain the majority and force it to share power.”<sup>29</sup>

In addition to consensus democracy and liberal democracy, there is a third category: communal democracy. This type of democracy includes the basic features of a liberal democracy—free and fair elections and periodic transfer of power in accordance with voters wishes—but does not promote “interethnic accommodation despite a deep societal divide.”<sup>30</sup> A communal democracy may also share democratic features beyond the electoral sphere, such as an independent judiciary, a free press, and the rule of law. The majority community, however, actively uses its superior power to promote its exclusive interests which may be against the interests of the minority. Thus, while the government is democratically elected, “it systematically deprives at least some of its citizens of basic rights and freedoms in the name of communal consid-

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26. See *id.* at 309-11; see Yonah, *supra* note 13, at 419-24 (describing the multicultural democracy model).

27. See Yonah, *supra* note 13, at 416.

28. *Id.*

29. Peleg, *Ethnicity and Human Rights*, *supra* note 17, at 310 (quoting AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUAL GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984)). Switzerland and Belgium fit under the territorial and non-territorial federalism model. On written constitutions, consider, for example, the recent constitutional framework set up in Iraq. See generally NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003) (discussing the possible constitutional framework for Iraq after the American intervention).

30. *Id.* at 311.

erations.”<sup>31</sup> Finally, constitutional and administrative restraints within a communal democracy, such as a bill of rights, political culture, and a constitutional court, are ineffective in restraining the majority.<sup>32</sup> Israel is an example of communal democracy because, from its inception, the state was established as both Jewish and democratic. Other examples of communal democracies include Sri Lanka, Eastern European states, the Baltic states, most former Soviet states, Nigeria and Turkey.<sup>33</sup> Although the extent of each state’s commitment to democratic principles—especially the protection of minority rights—may vary widely, conceptually they are alike: Each has democratic features and state identity is defined by the culture, nationality, or religion of the majority population.

Human rights advocates (described more fully in Part II, *infra*), as well as proponents of liberal democracy, believe the inherent moral weakness of communal states rests in what they consider the unsatisfactory protection of the minority’s individual and communal interests. Thus, states that define themselves as representing one particular segment of the population—one identifiable community (be it ethnic, religious, cultural, etc.)—tend to be non-democratic. These states are often referred to as hegemonic democracies<sup>34</sup> because the majority community has control of the state machinery and uses it for the benefit of the majority. These states do not provide a neutral arena in which to balance the conflicting group interests of a society. In Israel, for example, the emerging constitution does not enjoin the state from exhibiting partiality towards the different cultural, ethnic, and religious conceptions of its majority.<sup>35</sup>

Moreover, because the hegemonic majority is unchallenged or, in Israel’s case, is at the core of the state’s identity, observers may perceive the hegemony as neutral, making “the use and abuse of state power for exclusive ethnic goals normal and non-controversial.” These features of communal democracy expose its illiberalism. The ethnic, national, or religious

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31. *Id.* (citing Zakaria, *supra* note 15).

32. *Id.*

33. *Id.* at 312.

34. *Id.* at 312-14; see Ghanem et al., *supra* note 12; see also Smooha, *supra* note 17; Peleg, *Ethnic Constitutional Orders and Human Rights*, *supra* note 17, at 283.

35. Peleg, *Ethnicity and Human Rights*, *supra* note 17, at 318.

force of the majority combine with the powerful bureaucracy, military, and regulatory agencies of the modern state to produce an “unprecedented potent instrument in negating minority rights.”<sup>36</sup>

This has led human rights scholars to resolve the tension between Israel’s communal identity and its commitment to democracy by promoting one of two solutions: Transform Israel into a liberal democracy or transform Israel into a consensus democracy.<sup>37</sup> The former resolves the tension by adopting state neutrality and making Israel a non-ethnic, civil state, while the latter advocates transforming Israel into a consensus democracy that accommodates the communal aspirations of the minority, resulting in a bi-national state.<sup>38</sup>

Underlying these solutions is the assumption that communal democracies violate basic human rights of minorities, often leading states toward ethnic cleansing, mass expulsions, and even full fledged genocide.<sup>39</sup> It is this violation of human rights that ultimately makes the communal state intolerable, making the transformation to a more human rights friendly democracy the only ethical policy. In this light, promoting the majority’s conception of the communal is certainly considered undemocratic and, worse, deemed immoral. Therefore, measures that transform the state, according to this argument, are considered the only way a communal democracy can exit an otherwise immoral state.

## II. SOURCES OF ISRAEL’S ILLEGITIMACY: RELATIONS BETWEEN ISRAEL AND ITS PALESTINIAN MINORITY

Advocates for the transformation of Israel from a communal state to a liberal or consensus democracy emerge primarily from three distinct groups: Jewish civil-libertarians within Israel, Palestinian Israeli citizens, and Palestinians in the Occupied Territories. While each has a separate agenda, they all

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36. *Id.*

37. *Id.* at 309-10; see also Smooha, *supra* note 17, at 199; Yonah, *supra* note 13, at 421.

38. See Peleg, *Ethnicity and Human Rights*, *supra* note 17; see also Yonah, *supra* note 13, at 421.

39. See Peleg, *Ethnic Constitutional Orders and Human Rights*, *supra* note 17, at 284-85.

speak in the popular terminology of universal rights.<sup>40</sup> I will focus exclusively on the case of the Palestinian minority in Israel.<sup>41</sup> As Israel's largest non-Jewish minority, Palestinians will likely be at the center of any challenge to the post-occupation Jewish state, and their case most effectively highlights the limitations of Israel's democracy.

Palestinian citizens comprise close to twenty percent of Israel, and in recent years they have opened an organized struggle for civil equality.<sup>42</sup> While Israel has made significant strides in loosening governmental control over its Palestinian citizens,<sup>43</sup> human rights and democracy studies argue that Israel's Jewish character leads it to violate Palestinian rights on an ideological, structural, and operative, or policy, level.<sup>44</sup>

On an ideological level, scholars such as Ghanem argue that Israel's basic symbols show a "cognitive disregard for the existence of its Arab Citizens."<sup>45</sup> Consequently, Israel's flag, official state holidays, and its legally enshrined definition of Israel as a Jewish state are considered discriminatory.<sup>46</sup> While Israel grants Palestinians citizenship and gives them the right to vote, scholars such as Ghanem dismiss these rights as cosmetic and argue that Israel's symbols and national values discriminate *ipso facto* against the communal identity of its Arab citizens.<sup>47</sup> Thus, Israel's ban on political parties that do not recognize Israel as a Jewish state is considered a discriminatory measure that stifles Palestinian political expression.<sup>48</sup>

On a structural level, Palestinians are excluded from Israeli institutions. Some examples of this mistreatment are exclusion from political decision making centers, exemption

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40. *Id.* at 284.

41. From this point forward, "Palestinians" will refer to the Arab minority in Israel who have Israeli citizenship and not to the Arabs in the Occupied Territories.

42. CENT. BUREAU OF STATISTICS, THE ARAB POPULATION IN ISRAEL 2 (ISR. 2002); see Peleg, *Ethnicity and Human Rights*, *supra* note 17, at 321.

43. Peleg, *Ethnicity and Human Rights*, *supra* note 17.

44. See Ghanem, *supra* note 12, at 432-34; Nadim Rouhana & As'ad Ghanem, *The Democratization of a Traditional Minority in an Ethnic Democracy: The Palestinians in Israel*, in DEMOCRACY, PEACE AND THE ISRAELI-PALESTINIAN CONFLICT 163, 165 (Edy Kaufman et al. eds., 1993).

45. Ghanem, *supra* note 12; see also, Yonah *supra* note 13, at 416.

46. Ghanem, *supra* note 12, at 432.

47. *Id.*

48. *Id.*; see Yonah, *supra* note 13, at 418.

from military service, and non-employment in senior positions. Scholars argue that Palestinians are politically impotent in Israel and point out that there has never been an Arab Minister in the government. While there have been deputy ministers, they are usually relegated to handling matters related to the minority and not the general population.<sup>49</sup> Moreover, critics of Israel point to studies that illustrate systematic exclusion of Palestinian Knesset members from positions on the Finance, Foreign Affairs, and Defense committees.<sup>50</sup> Ghanem has shown that it is rare to see Palestinians hold senior positions in government ministries or state owned firms.<sup>51</sup> These scholars argue that Palestinians are also excluded from the centers of public, social, economic and military power.<sup>52</sup>

Finally, on an operative level, Ghanem points out that Palestinians are discriminated against in legislation, in budgets, in the allocation of land, and in national and regional zoning plans.<sup>53</sup> One example of this type of legislation is Israel's Law of Return.<sup>54</sup> While some have pointed out that the Law of Return does not discriminate against Palestinian citizens in Israel, rather it excludes Palestinian non-citizens from immigrating to Israel,<sup>55</sup> it nonetheless underscores how Israel's laws provide preferential treatment for Jews, perpetuate Israel's Jewishness, and alienate the Palestinians from having an impact on society's notion of the communal good.

Human rights lawyers and political scientists argue that the root cause of Palestinian mistreatment is Israel's constitutional and institutional identity as a Jewish state. In other words, the fusion of Israel's state machinery and its Jewish character inevitably discriminates against Palestinians and leads to human rights violations. It follows that if Israel were

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49. Ghanem, *supra* note 12, at 433.

50. *Id.* (citing UZI BENZIMAN & ATTALAH MANSOUR, *SUB-TENANTS, THE ARABS OF ISRAEL: THEIR STATUS AND POLICIES TOWARD THEM* (1992)). Recently, there have been signs that Palestinians are reaching the highest levels in Israel's bureaucracy. Yuval Yoaz, *Pines-Paz to Appoint First Israeli Arab Director-General*, HA'ARETZ, Mar. 14, 2005, available at <http://www.haaretzdaily.com/hasen/spages/551970.html>.

51. *Id.*

52. *Id.* at 432-36.

53. *Id.* at 434-36.

54. Law of Return, 1950, S.H. 159, amended by 1954, S.H. 174.

55. See Gavison, *supra* note 14, at 95.

to adopt more accommodationist measures (constitutionally, institutionally, and socially), thereby transforming Israel from a Jewish state into a state of all its citizens, Israel's violation of Palestinian individual and communal rights would cease. Until Israel transforms its national character, they suggest, a Jewish state inherently violates human rights, is not a true democracy, and is immoral at its very foundation.<sup>56</sup>

### III. JUSTIFICATIONS FOR ISRAEL AS JEWISH DEMOCRACY

While some of Israel's defenders may consider the human rights/democracy critique reviewed above as unworthy of a response and consider this assessment of the Jewish state as another form of anti-Semitism, this Note argues that a response is merited because of the substance of the challenge. Many Israelis in some way struggle with the liberal and Jewish tension within Israel's democracy, and a justification that fends off a critique of Israel as a Jewish state is therefore appealing.<sup>57</sup>

So, how can Israel defend itself against claims that the Jewish state, through its laws, institutions, and agencies, violates both the individual rights and communal goals of its Palestinian minority? Even if one disagrees with the assertion that Israel violates the individual rights of its Palestinian minority, how does Israel legitimize Palestinian alienation resulting from communal forms of identity, such as the Jewish star on Israel's flag, Hebrew as the national language, the Law of Return, or the incorporation of Jewish holidays as State holidays?

#### A. *Justification One: Israel is Not Alone*

One justification, which has recently received more attention, is the claim that Israel's various forms of national expression are no different than those of an ever-growing number of nation-states across the world.<sup>58</sup> According to this view, con-

56. Ghanem, *supra* note 12, at 443.

57. See Gavison, *supra* note 14, at 98; see also Ruth Gavison, YISRA'EL KI-MEDINAH YEHUDIT VE-DEMOCRATIT: METAHIM VE-SIKUYIM [CAN ISRAEL BE BOTH JEWISH AND DEMOCRATIC: TENSIONS AND PROSPECTS] (1999); Barak, *The Role of the Supreme Court in a Democracy*, *supra* note 13.

58. See ALEKSANDER YA'AKOBSON & AMNON RUBENSHTEIN, YISRA'EL U-MISHPAHAT HA-'AMIM: MEDINAT LE'OM VE-ZEKHUVOYOT HA-ADAM [ISRAEL AND THE FAMILY OF NATIONS] (2003); Amnon Rubinstein, *Zionism's Compatriots*, 16 AZURE 111, 111 (2004).

temporary Israel has fulfilled Herzl's vision of a Jewish state: Israel is really like all other nation-states.<sup>59</sup> This position legitimizes Israel by showing that the nation-state enterprise, once thought to be a relic of the nineteenth century, is actually a vibrant, emerging community of states.

Yaakovson and Rubenstein, in particular, have documented the resurgence of nationalism in Western Europe and the emergence of nation-states in the former Soviet states.<sup>60</sup> In Western Europe, for example, the Basques have rekindled their national spirit and promote their identity through a distinct language, culture, and region. In Belgium, divisions between the French- and Flemish-speaking populations threaten to unsettle their society.<sup>61</sup> Similarly, Catalans, Corsicans, and Scots also view themselves as separate nations, in turn igniting "old animosities."<sup>62</sup> These developments lead Rubenstein to conclude that "eliminating the borders between old national entities has not only failed to suppress nationalism, but has actually given it new life."<sup>63</sup>

There is no better example of how suppressing nationalism actually creates fertile ground for nationalist fervor than in the former Soviet states. Because many of these nation-states are members of the Council of Europe, Europe, once thought to have been rid of nationalism, has had to engage the problems posed by nationalism once again. In particular, protecting national minority identities is one problem that has received increased attention as these states transition from communism to democracy.<sup>64</sup> Two relatively new laws, the Framework Convention for the Protection of National Minorities<sup>65</sup> and the European Charter for Regional Minority Languages,<sup>66</sup>

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59. See Rubenstein, *supra* note 58, at 111.

60. See YA'AKOBSON & RUBENSSTEIN, *supra* note 58.

61. Rubenstein, *supra* note 58, at 113.

62. *Id.*

63. *Id.*

64. Andras Sajó, *Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe*, 1993 U. CHI. L. SCH. ROUNDTABLE 53, 64 (1993).

65. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351. The Convention, under the auspices of the Council of Europe, protects the rights and freedoms of persons belonging to national minorities.

66. European Charter for Regional or Minority Languages, Nov. 5, 1992, E.T.S. 148, available at <http://conventions.coe.int/Treaty/EN/Treaties/>

underscore Europe's attempt to harness nationalism by recognizing and protecting the national rights of minorities.

Another phenomenon is Europe's "increased willingness to re-evaluate the idea of diaspora."<sup>67</sup> An issue that is close to Israel's heart seems not to be unique to Israel's brand of nationalism. Other nations, such as Ireland, Greece, Armenia, and the Baltic states, also find their nationhood influenced by diaspora communities. Nine nations in Europe have passed laws which officially recognize the kinship between the nation and its ethnic or national brethren living abroad.<sup>68</sup> In a victory for national minorities, the European Council's Venice Commission upheld diaspora laws so long as they do not contravene the territorial sovereignty of the states affected.<sup>69</sup>

While Europe's recent encounter with nationalism certainly answers critics who claim that Israel is a relic of nineteenth century nationalism,<sup>70</sup> European policies in response to nationalism may do more harm than good towards protecting Israel's Jewish character from criticism. Rubenstein advocates that Israel adopt Europe's standards for nationalism as set out in the Framework Convention for the Protection of National Minorities and that it must do more in the direction of granting Palestinian group rights.<sup>71</sup> On a conceptual level, such a position suggests Israel should move towards a consensus democracy. Applying the European approach to Israel stresses the need to protect Palestinian group rights, grant Palestinians a significant share in the polity's resources, employ accommodationist measures such as language rights, and provide guaranteed political representation.

In other words, the European response to nationalism focuses primarily on protecting both the individual and group

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Html/148.htm. The Charter falls under the jurisdiction of the Council of Europe. The Charter seeks to safeguard historical regional and minority languages in Europe. It covers languages traditionally used by the nationals of the State Parties (thus excluding languages used by recent immigrants from other states). See European Charter for Regional or Minority Language, at [http://en.wikipedia.org/wiki/European\\_Charter\\_for\\_Regional\\_or\\_Minority\\_Languages](http://en.wikipedia.org/wiki/European_Charter_for_Regional_or_Minority_Languages) (last visited Feb. 15, 2005).

67. Rubinstein, *supra* note 58, at 114.

68. *Id.* at 115.

69. *Id.* at 117.

70. See Tony Judt, *Israel: The Alternative*, NEW YORK REV. BOOKS, OCT. 23, 2003, at 8.

71. See Rubinstein, *supra* note 58, at 120.

rights of minorities. But, along with protection of minorities, does Europe's approach provide reciprocal legitimacy for the state's majority? Rather than being a source of legitimacy for nation-states, Europe appears to see nationalism as a problem that needs to be managed. It seems plausible that Europe's recognition of diaspora minority nationalities, such as in the conclusions of the Vienna Commission, is more of an attempt to protect minorities in nation-states than to legitimate nationalism *per se*. Moreover, some have determined that nationalism is only tolerated in Europe because it was a force powerful enough "to combat the anomie left in the wake of Communism."<sup>72</sup> In this light, Europe stomachs nationalism because it is an effective means of state-building. Europe's aspiration for these nation-states, however, is not a renaissance of nationalism but an "integration and increased dependence on Europe."<sup>73</sup>

Indeed, it is valuable to point to the growing number of states that are unabashedly nationalist-states and to create cognitive linkages between nation-states and Israel. Most important, this shows that any critique of a nation-state's democratic misdeeds should not be reserved exclusively for Israel. Nevertheless, similarities between Israel's communal/national nature and other states fall short of what is needed to defend Israel. Justifying Israel as a Jewish state requires more ammunition than simply a sign that says, "they do it too!" As Israel's experience with the occupation shows, if Israel violates human rights—even if there are states with far worse records—Israel will be subject to international scrutiny.<sup>74</sup> Therefore, a more robust justification for the Jewish state is needed.

### B. *Justification Two: Everyone Else Is Worse*

Another possible justification for Israel as a Jewish state adopts an honest assessment of Israeli democracy and recognizes its limitations, but believes that it is better than the alternative and is certainly better than other communal democracies. This approach, which is descriptive and comparative in nature, concludes that, while Israel's democracy is not without its faults, it is fair enough.

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72. Sajo, *supra* note 64, at 73.

73. *Id.* at 63.

74. See Anne Bayefsky, *The U.N. and the Jews*, 117 COMMENTARY 42 (2004).

Similar to all communal democracies, the Jewish community in Palestine during the British Mandate “embodied a collective sense of mission for an ethnically defined community.”<sup>75</sup> The Israeli Declaration of Independence states: “the Land of Israel was the birthplace of the Jewish people. Here the spiritual, religious, and national identity was formed. Here they achieved independence and created a culture of national and universal significance.”<sup>76</sup> While Israel embraced individual rights and the procedural rules of democracy, the Declaration underscores that, from its inception, Israel adopted communal thinking that considered the Zionist collective mission of paramount importance. In contrast to liberal democracies in which rights take priority over the common good, Israel stood for the opposite proposition.<sup>77</sup> From the time of its fledgling years, the Jewish state depended on individuals and groups to contribute to the collective good—the Zionist project.

One of the best examples of how Israel emphasizes the common good over rights in the legislative sphere is the Law of Return.<sup>78</sup> Enacted in 1950, the statute provides for the right of entry for any Jew wishing to settle in Israel: Citizenship is granted to any Jewish person settling in Israel under the Law of Return. Explaining why the law did not conflict with the equal citizenship status of Jews and non-Jews, Ben Gurion said that the Law of Return was not given to Jews by the State; rather the right predated the state and “Jews had possessed [the right] by virtue of being Jews.”<sup>79</sup> The Law of Return highlights how Israel committed itself to communal values over liberal principles by passing legislation which fulfills what it considers a prehistoric Jewish right.

So why does the exclusivity of the Law of Return, or any other manifestation of communal republicanism, not amount to discrimination against its Palestinian minority? Peled argues that Palestinian citizenship, while not as robust as Jewish

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75. Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM POL. SCI. REV. 432, 434 (1992).

76. Declaration of the Establishment of the State of Israel, 1 L.S.I. 3 (1948).

77. Peled, *supra* note 75, at 434.

78. Law of Return, 1950, S.H. 159, *amended by* 1954, S.H. 174; *see* Hertzberg *supra* note 8, at 94.

79. Peled, *supra* note 75, at 435.

citizenship, is liberal enough to “[endow] them with sufficient rights and privileges to both enable and induce them to conduct their struggle within the constitutional framework of the state, rather than against it.”<sup>80</sup> It is precisely because Israel has made strides in protecting individual and group rights of Palestinians that Israel has been able to maintain a stable democratic regime amidst the violence of interstate wars and the *intifada*. Nevertheless, there is a threshold beyond which Palestinian citizenship will not be able to cross. This limit, Peled explains, is “at the transition point between struggling to have their liberal rights respected in the conduct of official policy and attempting to change the prevailing notion of the common good.”<sup>81</sup>

Thus, the Law of Return should not be subject to Palestinian veto because matters of communal good are out of the hands of the minority. According to Peled, Israel’s two tiered democracy—republican citizenship for Israelis and liberal citizenship for Palestinians—is a practicable arrangement that allows Israel to maintain its Jewish character and maintain a democratic system of government.<sup>82</sup>

A corollary point to Peled’s argument is that the trade-off Israel makes in balancing its Jewish character with the integrity of its democracy is not unlike problems faced by liberal democracies.<sup>83</sup> According to this view, Israel’s struggle is characterized as a tension between particularism and universalism—a tension the United States also faces. What is peculiar to Israel, however, is that its “tension between particularism and universalism has been completely out in the open for such a long time, in part precisely because the identity of Israel’s people is still open in a way that French or U.S. identity is not.”<sup>84</sup> This

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80. *Id.* at 440. Peled’s study focuses on the plight of political parties that have challenged the ethno-republican principle and Israeli Supreme Court cases that address their legality. *Id.*

81. *Id.*

82. *Id.*

83. See JACOBSON, *supra* note 13; see also Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327 (2000) (reviewing PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY* (1997)).

84. Tushnet, *supra* note 83, at 1337.

suggests that even liberal democracies sponsor a certain brand of particularism.<sup>85</sup>

Yet, U.S. constitutionalism, like that in most states, is dynamic, and strains of particularism are usually weeded out in favor of a national interpretation that embraces universalist values. In the case of Israel, however, there is no way to sidestep the particularity of its national proposition. The very essence of a Jewish state is that it cannot redefine its nationality without compromising its Jewishness.<sup>86</sup>

In this regard, Israel is unlike liberal democracies; Israel employs an accommodationist tilt towards liberalism only to the extent that such a compromise does not conflict with Israel's communal goals. Whereas a liberal democracy has a discreet national identity, Israel formally concretizes its distinctiveness to maintain its overt communal identity while preserving the individual rights of its minority. For example, although Palestinians are confined to liberal citizenship—and not the robust communal citizenship held by their Jewish counterparts—at the same time, they are made secure by these rights and possess the political agency to mobilize for increased rights.

While overt use of ethnicity to distinguish between different levels of rights is offensive to anyone committed to liberal values, Peled argues that such a critique is blind to real world democracies. According to Peled, the real difference between the two-tiered model and liberal democracy is a choice between “de facto discrimination under the guise of liberal constitutional principles and something resembling two-tiered democracy.”<sup>87</sup> In other words, the rest of the world is no better, and Israel's system may not be the worst possible outcome.

The most compelling part of this justification is that it frames the choice between liberal democracy and Israel's communal democracy as between systems that possess competing

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85. See FELDMAN, *supra* note 29, at 60-61. See also Tushnet, *supra* note 83, at 1340. In the case of the United States, Tushnet quotes Abraham Lincoln at Gettysburg saying, “that the Declaration of Independence showed that the United States is a nation ‘dedicated to [a] proposition.’” *Id.*

86. See Yonah, *supra* note 13, at 418. While national interpretations of what a Jewish state should look like (secular, political, religious, etc.) are dynamic, only fringe political groups equivocate over whether the state should be Jewish.

87. Peled, *supra* note 75, at 440.

goods. With liberal or consensus democracy, comprehensive equality for minorities (both individual and group rights) is protected, but, in Israel's case, it would come at the cost of subordinating Israel's *raison d'être* for statehood—the Jewish State. Not addressed in this justification is a normative assessment of the merits of Israel's two-tiered democracy over a classic liberal democracy. While liberal democracy's moral foundations rest squarely on human rights, the two-tiered communal democracy ignores the rights sphere. Whether liberal democracies really do a better job on a practical level of protecting minority rights is a provocative question, and certainly contested.<sup>88</sup> Therefore, this approach does not seriously explain why Israel's system is as good or better.

C. *Justification Three: Is Human Rights the Law? A Review of Orthodox International Law*

Another means of responding to the claim that the Jewish state is immoral because it subordinates its democracy is by reviewing how international law balances human rights and the rights of states. How entrenched are minority rights in international law, and what is the scope of protection provided? This justification relies upon the view that comprehensive minority rights, particularly group rights, are in no way a precondition for legitimacy under international law. While human rights advocates may aspire to create a legal regime that jettisons the Westphalian system of states, which is founded upon the principle of state sovereignty and self-determination, human rights have yet to supplant the fundamental right of states to define the national character of its subjects.<sup>89</sup>

The scope of human rights enforcement mechanisms against a state is limited. While matters of human rights are no longer relegated to the domestic jurisdiction or internal affairs of the state, the moral right to intervene when human rights are violated is narrow.<sup>90</sup> Certainly, there is no moral right to intervene in Israel's affairs on the basis of human rights because minority rights in Israel, though imperfect, are protected by quasi-constitutional laws, an independent judi-

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88. Peleg, *Ethnicity and Human Rights*, *supra* note 17.

89. See, MALCOLM S. SHAW, *INTERNATIONAL LAW* 149 (4th ed. 1997).

90. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

ary, and open elections. That being said, as brutal as the rights critique against Israel can sometimes be (the U.N. General Assembly's resolution, later rescinded, that Zionism is racism comes to mind),<sup>91</sup> almost no one advocates intervention in Israel on humanitarian grounds.<sup>92</sup>

International law also recognizes the right of peoples to self-determination. The U.N., on the basis of this principle, established Israel as a Jewish state in the 1947 Partition Plan.<sup>93</sup> Self-determination, enshrined in the U.N. Charter,<sup>94</sup> recognizes the concept of nationality and provides the right of all peoples to "determine their political status and freely pursue their economic, *social, and cultural development*."<sup>95</sup> The principle of self-determination, therefore, is vital to any justification of Israel as a Jewish State because the essence of self-determination is framed in moral terms and in the language of rights. Once self-determination is taken into account, the challenge posed by human rights presents a question of rights versus rights (self-determination rights v. minority rights), not rights versus idiosyncratic values.

Though human rights enjoys widespread awareness, there is confusion as to its precise nature and role in international law.<sup>96</sup> Certain human rights have become so accepted that they are non-derogable. The International Covenant of Civil and Political Rights (ICCPR), for example, confers special non-derogable status on rights such as "the right to life, recognition as a person before the law, the freedoms of thought, conscience and religion, [and] the prohibition on torture, slavery, and retroactivity of criminal legislation . . . ."<sup>97</sup> These

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91. G.A. Res. 3379, U.N. GAOR, 30th Sess., Supp. No. 34, at 83-84, U.N. Doc. A/10034 (1975) ("Zionism is a form of racism . . . ."); G.A. Res. 46/86, U.N. GAOR, 46th Sess., U.N. Doc. A/Res/46/86 (1991) (revoking Resolution 3379).

92. See Thomas Franck, *Are Human Rights Universal?*, 80 FOREIGN AFF. 191 (2001). Even the right of democracy, which could arguably be a legal basis for humanitarian intervention, does not refer to existing democracies that protect basic rights and are relatively stable.

93. Hertzberg, *supra* note 8, at 78; Gavison, *supra* note 14, at 82.

94. U.N. CHARTER arts. 1(2), 55.

95. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

96. SHAW, *supra* note 89, at 196.

97. *Id.* at 204. Many of these rights are also protected in international and regional human rights treaties. See *id.* ch. 7.

might be termed “hard rights” since their violation is almost never permitted. The Genocide Convention is an example of a non-derogable right that extends protection to group rights, rather than just individual rights. However, whether other group minority rights take priority over a state’s right to self-determination is a matter on which international law does not provide an authoritative answer.<sup>98</sup>

The international law justification can be reduced to one claim: Israel’s status as a Jewish state is not prohibited under international law. And even this claim relies on an orthodox interpretation of international law. For example, scholars are split as to how entrenched self-determination is in international law.<sup>99</sup> Some reject the view that self-determination is a moral validation for nation-states in favor of the position that self-determination is simply a convenient way of explaining why we should honor existing borders.<sup>100</sup>

A more critical problem with the international law justification is that it is a body of law founded on the principle of legitimizing and perpetuating the state entity.<sup>101</sup> In other words, international law can not be used to discern normative principles because its entire system is built upon the premise of preserving the sovereignty of states. Put this way, the international law justification cannot present an alternative to the normative values of the rights regime.

#### IV. PARADIGM SHIFT: FROM JUSTIFICATION TO COMPETING RIGHTS

The principle problem with all three justifications outlined in the previous section is that they each fail to engage the human rights critique on a normative plane. Whether Israel as a Jewish state may possess actual legitimacy because it is no different than other states (justification one), because both Jews and Palestinians within Israel are resigned to work within Israel’s democratic system (justification two), or because international law does not prohibit Israel’s communal

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98. *Id.* at 209.

99. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1269 (Henry J. Steiner & Philip Alson eds., 2000).

100. *Id.*

101. SHAW, *supra* note 89, at 152.

democracy (justification three), none of these approaches articulates a compelling justification for the moral legitimacy of a Jewish state.

Legitimizing Israel in normative terms requires a paradigm shift from justifications that are defensive in posture to justifications that take the offensive. A normative case for the Jewish state should be an argument that does not yield the moral high ground to the human rights critique but stakes a claim that is fortified in an equally coherent moral philosophy. While delving into different schools of philosophy is beyond the scope of this Note, it is possible to set the landscape supporting such an argument.

#### A. *Not Just Israel Revisited*

The relevance of justifying Israel as a Jewish state on a normative basis might be valuable for reasons that are entirely removed from Israel. In addition to the resurgence of nationalism in Europe, there has been a growing focus on spreading or building democracy in Islamic states in North Africa, the Middle East, and Asia.<sup>102</sup> The central issue facing Islamic democracy is not unlike the dilemma between democracy and the Jewish state: How can two seemingly foreign ideas coexist? Islamic democracy, according to one scholar, may require seeing democracy in its most basic terms so that it is defined as “choosing leaders and making political decisions on competition for the people’s votes.”<sup>103</sup> In other words, Islamic democracy is possible, and can very well flourish, if democracy is reduced to its rudimentary formulation, thereby making it universally applicable.<sup>104</sup>

What this shows, for the purposes of this Note, is that, as democracy continues to spread to parts of the world where religion and culture are dominant forces in civic and political life, the world will need to embrace the pliability of democracy. The more robust democracy that human rights scholars advocate, however, may result in increasing the gulf between democracy and other religions and cultures. Because some might prefer to see a state that is undemocratic with liberal values rather than a democracy that is illiberal (either on

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102. See generally FELDMAN, *supra* note 29.

103. *Id.* at 33.

104. See *id.* at 75-78.

moral or realpolitik grounds),<sup>105</sup> those who argue for Islamic democracy would benefit from a normative case for why a religious democratic state is right and just. Ironically, the case for Israel as a Jewish state might prove valuable for the democratic futures of the states that are its harshest critics.

### B. *Human Rights and Morality: Piercing the Secular Veil*

The way to begin a normative justification for the Jewish state is by exposing the particularism of the human rights critique. Human rights, the repository of liberal values that guarantee the individual and group rights of peoples, have been the subject of scrutiny in the former Communist states and in the Third World. One of the most compelling arguments, proven to be useful for Israel's case, is the indeterminacy critique.<sup>106</sup> It argues that the rights discourse claim is founded on universal values and "that it transcends all particular understandings of appropriate social organization. A successful rights claimant trumps majoritarian sentiment regarding the good life."<sup>107</sup> The problem is that "the most important rights concepts are formulated at an exceedingly high level of abstraction . . . [and] they are capable of being given a wide range of meanings, including inconsistent meanings."<sup>108</sup> Take the right to privacy as an example: For many people, this right protects the ability to make personal choices about reproduction and abortion. This same right, however, can be used nefariously, such as to justify why courts should not intervene to prevent or punish domestic violence.<sup>109</sup>

A more fundamental problem with human rights is the way they are applied in democratic thinking. As we have seen, human rights discourse dictates, particularly in divided societies, that democracies protect freedoms of association and argue for accommodating excluded minorities by insisting on equality and identical treatment. Yet, at the same time, the

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105. See Zakaria, *supra* note 15; see also FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 18, 55-56, 91-92, 100-01, 117-18 (2003).

106. Karl Klare, *Legal Theory and Democratic Reconstruction*, 25 U. BRIT. COLUM. L. REV. 69, 97 (1991), *reprinted in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, *supra* note 99, at 339.

107. *Id.*

108. *Id.*

109. *Id.* at 339-40.

human rights regime accepts and embodies the belief that all peoples are entitled to cultural autonomy and self-determination. Underlying these, at times contradictory, rights, is a claim that they are all universal. Human rights discourse, however, “does not provide *neutral decision procedures* with which to make such choices.”<sup>110</sup> Thus, a gaping hole in the human rights regime is the lack of neutral criteria for deciding between conflicting claims of rights. In Israel’s case, for example, how should the right to self-determination of the Jewish people accommodate the individual and group rights of its Palestinian minority? The indeterminacy critique, therefore, suggests that resolving conflicts of competing rights resides outside the discourse of human rights.

With this critique in mind, let us return to the two alternatives to the Jewish State raised earlier: liberal democracy and consensus democracy. Both programs, if applied, would transform Israeli democracy. Israel as a liberal democracy would relegate religion and culture to the private sphere, thereby making it a state of all its citizens. Leaving aside the obvious practical political problems of implementing such a solution, the supposed value of such a proposition is that the State would be neutral towards religion, race, and culture. However, when the state privatizes notions of the common good, does the state really remain neutral? Recent events in France suggest otherwise. In an effort to integrate its increasingly large Muslim minority, France passed a law that prohibits the wearing of headscarves in public schools.<sup>111</sup> Did France choose to suppress the religious expression of its minorities in the interest of integration or to promote different values, such as French nationalism or secularism? This highlights that, to slightly change the popular idiom, one man’s neutrality is another man’s secularism.

This same problem occurs in consensus democracy. If Israel were to adopt the full array of accommodationist measures promoted by human rights scholars, then it would morph into a bi-national state. One of the weaknesses of a bi-national state is that its features and procedures are hazy.<sup>112</sup>

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110. *Id.* at 340 (emphasis added).

111. Helene Fouquet, *World Briefing Europe: France: Bandannas Not Ruled Out*, N.Y. TIMES, Apr. 17, 2004, at A5.

112. See Gavison, *supra* note 12, at 55-57.

For example, does a bi-national solution require recognition of only some Palestinian group rights or does it require Jews to relinquish their national and cultural self-determination? A truly bi-national state would require both Palestinians and Jews to “give up symbols and controls connected with sovereignty.”<sup>113</sup> What is clear, though, as the discussion above demonstrates, is that a bi-national state will promote a set of values that are not neutral to issues of religion.

C. *Back to Israel: A Moral Claim for Israel as a Jewish State*

In light of the critique that the human rights regime is unable to offer a neutral procedure for resolving the conflict between rights, it is possible to legitimize the morality of the Jewish state. While I have shown that the human rights critique offers a set of universal rights with which the Jewish state must wrestle, the human rights regime cannot claim that its morality dictates a particular form of democracy. A communal democracy or liberal democracy may do well in protecting the rights of minorities, but they do so by compromising other rights, such as self-determination.

Only common sense is necessary to conclude that it is wrong to fully entertain one right without some consideration for the opposing, conflicting right. To engage in relativism and conclude that even a minimum level of basic individual rights conflicts with the right of self-determination distorts the indeterminacy critique. A nationalism that engages in ethnic cleansing on the basis that the mere presence of its minority undermines its right of self-determination is untenable and disingenuous. In Israel's case, thankfully, the Jewish state has offered increasing protection for rights of its Palestinian minority.<sup>114</sup>

In Israel, the conflict between the majority's view of the common good (a Jewish state) and the minority's view of the common good (something other than a Jewish state) is resolved by offering every citizen the right to vote, providing regular elections and an independent judiciary, and including quasi-constitutional rights that protect the individual rights of minorities. This system seems to be fair and just because it

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113. *Id.* at 57.

114. See Part I, *supra*.

takes seriously the legitimate rights of Palestinians, while at the same time allowing Israel to exercise its right to self-determination. A Palestinian state would add to the legitimacy of the Jewish state because it would provide its Palestinian minority an alternative state that expresses its notion of the collective good.<sup>115</sup> Moreover, Israel's expression of the Jewish right to self-determination is not completely predetermined. The contours of the Jewish state and its relative commitment to traditional, religious, or secular values are determined through a democratic process.<sup>116</sup>

Yet, what makes Israel's system moral and just, also makes it vulnerable. Israel's democracy rests on the assumption of a Jewish majority. Demographics are the only insurance that Israel can legitimately remain a Jewish state.<sup>117</sup> On a practical level, if Israel does not maintain a Jewish majority, then the Jewish state faces a choice between suppression of its Palestinian citizens (something akin to apartheid) or relinquishing its Jewish character. Israel's present constitutional framework combined with a Jewish majority translates to a system that is moral and just.

## V. CONCLUSION

Throughout its short history, rarely a week has gone by without Israel capturing world attention. While the majority of present day international scrutiny of the Jewish state centers on the Palestinian-Israeli conflict in the Occupied Territories, criticism of Israel will likely continue in a post-occupation era. Instead of focusing on the problems posed by settlements and Palestinian statehood, critics of Israel will likely focus on the conflict between Israel's democracy and its Jewish character. A recent example of this critique argues that Israel is an "anachronism" because the "very idea of a 'Jewish state'—a state in which Jews and the Jewish religion have exclusive privileges from which non-Jewish citizens are forever excluded—is rooted in another time and place."<sup>118</sup>

In this Note, I have argued that at the heart of this critique is an assumption that the Jewish state is immoral be-

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115. See Gavison, *supra* note 14, at 88.

116. *Id.* at 79.

117. *Id.* at 86.

118. Judt, *supra* note 70, at 8.

cause, when the state uses its machinery to express its Jewishness, it violates the individual and group rights of its Palestinian minority. Israel's critics, therefore, argue that Israel should transform its otherwise unjust democracy to either a liberal democracy or consensus democracy. While there is some debate as to which of these two democratic models is most appropriate for Israel's society, the common denominator shared by both models is that Israel should not remain a Jewish state.

There are a number of justifications that respond to the rights-based challenge to Israel's democracy. Each of the justifications reviewed in this Note, while valuable, ultimately fall short of addressing the claim that Israel's democracy is immoral because it violates the collective rights of its minority. These justifications—that Israel is like all other nation-states, that other states are guilty of similar violations, or that Israel's system does not violate international law—do not explain why Israel as a Jewish state (with all the symbols, laws, and Jewish values it promotes) is legitimate in light of its Palestinian minority.

Given the rights regime critique, this Note argues that, to comprehensively justify the Jewish state, a paradigm shift is necessary. The Jewish state must be justified on moral grounds and not just on practical justifications. One such approach is to value minority rights on equal terms with Israel's right to self-determination, instead of considering minority rights sacrosanct. Building on Third World and Eastern European critiques of human rights, which show that human rights prove unable to provide a moral procedural framework for competing or conflicting rights, this Note claims that considerations of minority rights do not trump a moral basis for the Jewish state. Thus, Israel's system of balancing its self-determination with the rights of its minorities is no less moral than the way a liberal democracy or a consensus democracy might manage the conflict between rights and self-determination.

Although Zionism in the twentieth century was able to establish the Jewish state after the Holocaust on the basis that the Jews needed a state that would guarantee their safety, the memory of the holocaust is, unfortunately, no longer enough to justify the Jewish state. Israel's legitimacy rests on a twenty-first century response to its critics that argues that the Jewish right to self-determination is moral and just.