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# In the Best Interests of the Group: Religious Matching Under Israeli Adoption Law

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## INTRODUCTION

A strict pre-condition exists under Israeli law for an adoption to take place: complete matching between the religious identity of the adopters and that of the adopted child. Section 5 of the Adoption of Children Law, 1981 (“ACL, 1981”)<sup>1</sup> is explicit on the matter: “The adopter must be no other than he who belongs to the same religion of the adoptee.” This is a long-standing norm, initially codified in Israel’s first statutory pronouncement regulating adoption, the Adoption of Children Law, 1960 (“ACL, 1960”).<sup>2</sup> A number of characteristics make the religious matching requirement compelling.

First, the 1960 statutory regulation of adoption is regarded as the first effort to make a norm applicable in the family law context for all Israelis, irrespective of their religious affiliation.<sup>3</sup> ACL, 1960 effectively replaced the Ottoman *millet* tradition, a tradition that identified the subject’s per-

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1. Adoption of Children Law, 5741-1981, 35 LSI 360 (1980-81).

2. Adoption of Children Law, 5720-1960, 14 LSI 93 (1960).

3. MENASHE SHAVA, HA-DIN HA-ISHI BE-YISRAEL [PERSONAL LAW IN ISRAEL] 190 (4th enlarged ed., 2001) (in Hebrew); Menashe Shava, *Legal Aspects of Change of Religious Community*, 3 ISR. Y.B. HUM. RTS. 279, 280 n.8 (1973) [hereinafter Shava, *Legal Aspects*].

sonal law—which for local citizens was their religious law—as the governing law in family law matters.<sup>4</sup> However, as the religious matching requirement unequivocally demonstrates, the result of this quest for a territorial norm fell short of sanctioning adoption across religious lines, at least when the adoption takes place in Israel itself.<sup>5</sup> Why is this the case? Why is there such a strict requirement under Israeli law that under no circumstances may Jews adopt or be adopted by non-Jews, Muslims by non-Muslims, or Druze by non-Druze, and no member of one of the ten recognized Christian communities may adopt or be adopted by a member of another Christian community, let alone a non-Christian one? What are the sources of the difficulties in creating a complete territorial regulatory scheme in personal status matters in Israel, irrespective of difference in religious affiliation?

Second, the strict and uncompromising religious matching requirement under Israeli adoption law also seems to be at odds with the basic notion of the best interests of the child,<sup>6</sup> supposedly the overall guiding principle of modern adoption law.<sup>7</sup> For example, no matter how suitable the prospective adopters are in terms of affording an adopted child a loving and materially providing home, the religious identity attributed to the child needs to match that of the prospective adopters.<sup>8</sup> Otherwise, adoption is to be denied.

Third, the religious matching requirement is seemingly in conflict with the prospective adopters' constitutionally recognized freedom of re-

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4. Pinhas Shifman, *International Adoptions*, in ISRAELI REPORTS TO THE XIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 35 (Celia Wasserstein Fassberg ed., 1990) [hereinafter Shifman, *International Adoptions*].

5. In terms of adoptions taking place outside of Israel, there need not be a religious matching between the adopters and the adoptee. ACL, 1981, section 28.20(c).

6. Barbara J. Dickey, Comment, *Religious Matching and Parental Preference: Easton v. Angus*, 1986 UTAH L. REV. 559, 560-561, 573 (1986).

7. CAROLINE BRIDGE & HEATHER SWIDELLS, ADOPTION – THE MODERN LAW 11 (2003); Jared C. Leuck, *The Best Interests of the Child in Adoption: An Article Review*, 11 J. CONTEMP. LEGAL ISSUES 607, 607 (2000). The best interests of the child is also the guiding principle in Israeli law generally in issues pertaining to children. See Yehiel S. Kaplan, *The Interpretation of the Concept “The Best Interest of the Child” in Israel*, in CHILDREN’S RIGHTS AND TRADITIONAL VALUES 47, 49-50 (Gillian Douglas & Leslie Sebba eds., 1998).

8. See Leonhard J. Kowalski, *Religion and Adoption—Constitutionality of Religious Matching Practices*, 17 WAYNE L. REV. 1509, 1516 (1971); Ellen S. George & Stephen M. Snyder, Comment, *A Reconsideration of the Religious Element in Adoption*, 56 CORNELL L. REV. 780, 803, 825 (1971); Darren L. Michael, *The Religious Factor in Adoption*, 3 OSGOODE HALL L.J. 14, 15 (1964).

ligion.<sup>9</sup> The adopters, like the child, can be denied the opportunity of adoption solely because of their religious identity.<sup>10</sup> Once again, what matters is their attributed ethnic, religious identity, and not their ability to provide emotional and material support for an adopted child.

Looking at the relatively rich literature on adoption law in Israel in an effort to learn about the rationale of the existing religious matching requirement provides no assistance.<sup>11</sup> Other than some passing remarks about the religious matching requirement,<sup>12</sup> no proper scholarly discussion has taken place in Israel as to the rationale of the requirement. The objective of this article is to fill this gap and offer a general thesis explaining why a territorial enactment designed to serve the best interests

9. Israel has long recognized the freedom of religion of its citizens. See Haim H. Cohn, *Religious Freedom and Religious Coercion in the State of Israel*, in ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL'S 50TH ANNIVERSARY 79 (Alfred E. Kellerman et al. eds., 1998); Ruth Lapidot & Michael Corinaldi, *Freedom of Religion in Israel*, in ISRAELI REPORTS TO THE XIV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 273, 277-78 (Alfredo Mordechai Rabello ed., 1994); Ariel Rosen-Zvi, *Freedom of Religion: The Israeli Experience*, 46 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 213 (1986); Shimon Shetreet, *Freedom of Religion and Freedom from Religion: A Dialogue*, 4 ISRAEL Y.B. HUM. RTS. 194 (1974).

10. See George & Snyder, *supra* note 8, at 803; Dickey, *supra* note 6, at 568, 571, 574; Patricia Madely Chaikof, *Adoption in Ontario: An Agnostic's Position*, 3 OSGOODE HALL L.J. 23, 24 (1964).

11. HUGO SHOR, IMUTS BA-ARETS U-VE-HU'L [ADOPTION IN ISRAEL AND ABROAD] (1995) (in Hebrew); AMNON BEN-DROR, IMUTS VE-PUNDEKA'UT [ADOPTION AND SURROGACY] (1994) (in Hebrew); NILI MAIMON, DINNEY IMUTS YELADIM [THE LAW OF ADOPTION] (1994) (in Hebrew); Rivka Minkovich, *Imuts Yeladim be-Yisrael: Le-Or Hok ha-Imuts, 5741-1981* [Adoption of Children in Israel: In Light of the Adoption Law, 5741-1981] (1988) (unpublished M.A. Thesis, Tel-Aviv University) (in Hebrew); PINHAS SHIFMAN, IMUTZ YELADIM BE-YISRAEL [ADOPTION OF CHILDREN IN ISRAEL] (1977) (in Hebrew) [hereinafter SHIFMAN, ADOPTION]; HAIM PIZAM & SHOSHANA BROIDE, DINNEY IMUTS YELADIM: HALAKHA U-MA'ASEH [ADOPTION OF CHILDREN LAW: THEORY AND PRACTICE] (1977) (in Hebrew); S. Z. CHESHIN, YALDEY IMUTSIM [ADOPTED CHILDREN] (1956) (in Hebrew); ITZHAK KISTER, SKIRA AL IMUTS YELADIM BE-YISRAEL: LE-HALAKHA U-LE-MA'ASEH [SURVEY OF ADOPTION OF CHILDREN IN ISRAEL IN LAW AND IN PRACTICE] (1953) (in Hebrew); Eliezer D. Jaffe, *Adoption in Israel*, 12 JEWISH J. SOCIOLOGY 135, 136 (1970); Izhak Englard, *Imuts Yeladim be-Yisrael—Hagshamat ha-Hok le-Ma'aseh* [Adoption of Children in Israel—The Law's Implementation in Practice], 1 MISHPATIM 308 (1968) (in Hebrew).

12. See SHOR, *supra* note 11, at 25; MAIMON, *supra* note 11, at 113-19; BEN-DROR, *supra* note 11, at 221; PIZAM & BROIDE, *supra* note 11, at 20-22, Englard, *supra* note 11, at 318, 337. A somewhat extensive observation, though Jewish centered, can be found in 2 AVNER H. SHAKI, MIHU YEHUDI BE-DINEY MEDINAT YISRAEL [WHO IS A JEW IN THE LAWS OF THE STATE OF ISRAEL] 458-71 (1977) (in Hebrew).

of the child and intending to break the religious monopoly over matters of personal status falls short of permitting adoption across religious lines.

My thesis here is that the religious matching requirement under Israeli adoption law is derived from considerations outside the realm of adoption law. The requirement is a mirror image of what I shall call grand norms governing inter-religious relations in Israel, that is, such norms that explicitly or implicitly work to define the general normative framework of state-group and inter-group relations in the country.

This study is divided into three parts. Chapter I provides a background analysis of group relations in Israel as a whole as well as the law regulating adoption prior to the enactment of ACL, 1960. Chapter II addresses the legal framework and legislative history of ACL, 1960 and presents a detailed description of the legislation process that led to the enactment of the religious matching requirement. As I will show, the Knesset's deliberations on the bill introducing ACL, 1960 had a pivotal effect on the introduction of the religious matching requirement as a strict precondition for adoption in Israel and offers a rare glimpse of how general norms pertaining to groups, rather than to the ostensible subject (in this case the child's best interests), work to establish a strict and uncompromising norm of religious matching.

The first part of Chapter III furnishes a theoretical evaluation of what has come to be called the mirror theory of law.<sup>13</sup> In the fields of both comparative law and anthropology of law there have been extensive discussions on the interplay of law and culture.<sup>14</sup> In a number of areas, especially in the domain of regulating domestic relations, a close relationship has been observed between dominant cultures and specific regulation.<sup>15</sup> In this context, law can be perceived as culture in action, "inseparable from the interests, goals and understandings that deeply shape or compromise social life."<sup>16</sup> In the second part of this chapter, I will outline what I believe are the two basic grand norms in Israeli culture: the absoluteness of the *millet* system as a social code, and the he-

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13. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).

14. See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 175 (1983); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

15. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10 (1987) [hereinafter GLENDON, ABORTION AND DIVORCE].

16. Austin Sarat & Thomas Kearns, *The Cultural Lives of Law*, in LAW IN THE DOMAIN OF CULTURE 1, 6 (Austin Sarat & Thomas Kearns eds., 1999).

gemony of Jewish collective interests—with this latter grand norm effectively having the upper hand. The discussion in this chapter also relates to other grand norms that usually influence group-based matching in adoption. The first is the interest in protecting minorities, and the second is the best interests of the child. However, as this chapter also asserts, the effect of such norms with respect to the Israeli requirement for religious matching in adoption was of secondary importance, if it carried any weight at all.

As much as this study is about “understanding the understanding” of the religious matching requirement under Israeli adoption law, it is also about the norms governing what may be called an inter-religious intimacy in Israel in the family law context.<sup>17</sup> This aspect of relations among the different religious communities in Israel has not been analyzed or theorized.<sup>18</sup> Much of the discussion pertaining to Israel’s various religious communities has been concerned with the political realm, especially in light of Israel’s definition as a Jewish state.<sup>19</sup> A number of studies have been conducted on jurisdictional and choice-of-law norms when conflicts arise between the laws or judicial capacity of the courts of the different religious communities, whether among themselves or vis-à-vis secular state norms and institutions.<sup>20</sup> However, these studies focus primarily on the set of rules governing such conflicts and not on their social and constitutional meanings and underpinnings. This investigation of the religious matching requirement under Israeli law delves into the history of inter-religious intimacy in Israel and, in the process, uncovers a portrait of Israeli society itself.

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17. The term “intimacy” in an inter-group context originally appeared in RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001).

18. One article stands out as an exception: Daphna Hacker, *Inter-Religious Marriages in Israel: Gendered Implications for Conversion, Children, and Citizenship*, 14 *ISR. STUD.* 178 (2009). However, this article does not deal with inter-religious marriages in Israel generally but is actually centered on cases when one of the spouses is Jewish and the other spouse is of a foreign origin.

19. Michael M. Karayanni, *The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 5 *NW. U. J. INT’L HUM. RTS.* 41, 63-64 (2006) [hereinafter Karayanni, *The Separate Nature*].

20. See FREDERIC M. GOADBY, *INTERNATIONAL AND INTER-RELIGIOUS PRIVATE LAW IN PALESTINE* (1926); EDOARDO VITTA, *THE CONFLICT OF LAWS IN MATTERS OF PERSONAL STATUS IN PALESTINE* (1947); MOSHE SILBERG, *HA-MA’AMAD HA-ISHI BE-YISRAEL [PERSONAL STATUS IN ISRAEL]* (1957) (in Hebrew); SHAVA, *supra* note 3.

## I. BACKGROUND

A. *The National and Religious Reality of Israeli Society*

Israel is a highly divided society. Nationally, there exists a Jewish majority that at the end of 2008 numbered 5,569,200, forming about 75.6% of a total population of 7,374,000.<sup>21</sup> About 20% of the population is Palestinian-Arab (1,487,600).<sup>22</sup> The remaining portion (317,100) are unidentified as Jews or Arabs but are mostly immigrants who acquired Israeli citizenship under a special provision in the Law of Return, 1950<sup>23</sup> (being the relative of a Jew) or have acquired permanent residence in Israel under special circumstances.<sup>24</sup> Another group is that of foreign workers, estimated at 222,000, who do not appear in the official census.<sup>25</sup> In terms of religion, Israeli society is far more diverse. The Jewish majority is divided into secular, traditional, and religious groups, with the latter including a well-established ultra-Orthodox camp.<sup>26</sup> Within the Jewish traditional and religious communities other divisions exist, such as between Ashkinazim and Sefaradim, and between Orthodox, Conser-

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21. CBS Statistical Abstract of Israel 2009, [http://www.cbs.gov.il/shnaton60/shnaton60\\_all.pdf](http://www.cbs.gov.il/shnaton60/shnaton60_all.pdf), Table 2.1 [hereinafter CBS Statistical Abstract].

22. *Id.*

23. The relevant provision is that of a 1970 amendment: Law of Return (Amendment No. 2) 5730-1970, 14 LSI 28 (1969/70), art. 4A(a):

The rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.

The amendment adds in art. 4B: "For the purposes of this Law, 'Jew' means a person who is born of a Jewish mother or has become converted to Judaism and who is not a member of another religion." See generally Menashe Shava, *Comments on the Law of Return (Amendment No.2), 5730-1970 (Who is a Jew?)*, 3 TEL-AVIV STUD. L. 295 (1977).

24. CBS Statistical Abstract, *supra* note 21, at 79.

25. *Id.*

26. See SHLOMIT LEVY ET AL., A PORTRAIT OF ISRAELI JEWRY, BELIEFS, OBSERVATIONS, AND VALUES AMONG ISRAELI JEWS 5-6 (2002).



vative, and Reform Judaism.<sup>27</sup> However, as far as Israeli law is concerned, none of these Jewish communities forms a separate religious community. In respect of the Palestinian-Arab community there are three main divisions: Muslims, numbering about 1,200,000 (16% of the total population); Druze, numbering about 120,000 (1.6%); and Christians, numbering about 150,000 (2%).<sup>28</sup> The Palestinian-Arab Christian community is divided into ten recognized religious communities: (1) The Eastern (Orthodox) Community; (2) The Latin (Catholic) Community; (3) The Gregorian Armenian Community; (4) The Armenian (Catholic) Community; (5) The Syrian (Catholic) Community; (6) The Chaldean (Uniate) Community; (7) The Greek (Catholic) Melkite Community; (8) The Maronite Community; (9) The Syrian (Orthodox) Community; and (10) The Evangelical Episcopal Church in Israel.<sup>29</sup> In addition to these there is the Bahai Community – a recognized religious community since 1971.<sup>30</sup>

In Israel, one's religious affiliation may have major ramifications on one's legal status. For example, while a Jew has an almost absolute right to acquire Israeli citizenship upon his immigration to Israel, no such right exists for members of other religious national groups.<sup>31</sup> This happens to be the case even in family unification cases between Palestinian-Arab citizens of Israel and Palestinian-Arabs from the West Bank and Gaza Strip.<sup>32</sup> Another important ramification of religious affiliation that is more relevant for the present discussion is in the sphere of family law.<sup>33</sup> Until the present day, the law governing marriage and divorce of local

27. See Ephraim Tabory, *The Israel Reform and Conservative Movements and the Market for Liberal Judaism*, in *JEWS IN ISRAEL: CONTEMPORARY SOCIAL AND CULTURAL PATTERNS* 285 (Uzi Rebhun & Chaim I. Waxman eds., 2004); Basheva E. Genut, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 *FORDHAM INT'L L.J.* 2210, 2151 (1996); Izhak England, *Law and Religion in Israel*, 35 *AM. J. COMP. L.* 185, 191 (1987).

28. CBS Statistical Abstract, *supra* note 21, at Table 2.2.

29. See R. Gottschalk, *Personal Status and Religious Law in Israel*, 4 *INT'L L. Q.* 454, 455 (1951). The Evangelical Episcopal Church was recognized in 1970. See Order of Recognition of a Religious Community (Evangelical Episcopal Church in Israel), 1970, K.T. 2557, at 1564.

30. Order of Religious Community (The Bahai Faith), 1971, K.T. 2673, at 628.

31. Law of Return, 1950, art. 1 ("Every Jew has the right to come to this country as an Oleh.").

32. See Special Report, Ban on Family Unification, <http://www.adalah.org/eng/famunif.php> (last visited Feb. 15, 2010).

33. See Pinhas Shifman, *Religious Affiliation in Israeli Interreligious Law*, 15 *ISR. L. REV.* 1, 1 (1980) [hereinafter Shifman, *Religious Affiliation*].

Israeli citizens is the law of the relevant religious community.<sup>34</sup> Additionally, in such cases the religious institutions and religious courts of the community to which the parties belong have exclusive jurisdiction to handle issues of marriage and divorce.<sup>35</sup> Local citizens who belong to one of the recognized religious communities cannot opt for a civil marriage in Israel but must resort to the local religious institution.<sup>36</sup>

The entanglement between religious affiliation and legal status is often the cause of frictions and controversy, and has been a contentious issue since the establishment of the State of Israel in 1948.<sup>37</sup> The question of “Who is a Jew,” and particularly whether this definition should draw on strict orthodox religious standards or more secular and liberal standards, has been at the core of an ongoing argument, leading at times to major political crises.<sup>38</sup> The secular-religious rift was also central to issues pertaining to the jurisdiction of religious law and religious courts in family law matters.<sup>39</sup> The religious camp called for maintaining the existing law while the secular camp fought for the introduction of a secular territorial regime, at least as an alternative to the existing religious one.<sup>40</sup>

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34. See Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 *UCLA J. INT'L L. & FOR. AFF.* 339, 343 (2000).

35. Asher Maoz, *Religious Human Rights in the State of Israel*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVE* 349, 355 (Johan D. van der Vyver & John Witte, Jr. eds., 1996); HENRY E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 159-60 (1968); Amnon Rubinstein, *Law and Religion in Israel*, 2 *ISR. L. REV.* 380, 384-88 (1967).

36. See Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 *ISR. L. REV.* 101, 122 (2000). In an effort to avoid the jurisdiction of religious institutions in matters marriage, some Israelis seek to solemnize their marriage abroad. *Id.* at 123. See also Menashe Shava, *Civil Marriages Celebrated Abroad: Validity in Israel*, 9 *TEL-AVIV STUD. L.* 65 (1989).

37. See Izhak England, *supra* note 27, at 190-96, 202; Frances Raday, *Israel—The Incorporation of Religious Patriarchy in a Modern State*, 4 *INT'L REV. COMP. PUB. POL'Y* 209 (1992).

38. See e.g., OSCAR KRAINES, *THE IMPOSSIBLE DILEMMA: WHO IS A JEW IN THE STATE OF ISRAEL?* (1976); Nicole Brackman, *Who is a Jew? The American Jewish Community in Conflict with Israel*, 41 *J. CHURCH & STATE* 795 (1999); Gidon Sapir, *How Should a Court Deal with a Primary Question that the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, 39 *VAND. J. TRANSNAT'L L.* 1233, 1239-50 (2006).

39. See Erica R. Clinton, *Chains of Marriage: Israeli Women's Fight for Freedom*, 3 *J. GENDER, RACE & JUST.* 283, 285 (1999); Rubinstein, *supra* note 35, at 399.

40. See Pnina Lahav, *The Status of Women in Israel—Myth and Reality*, 22 *AM. J. COMP. L.* 107, 107 (1974); Ze'ev W. Falk, *Minority Religions in a Democratic Republic*, 12 *J.L. & RELIGION* 447, 451 (1995-1996); Luci Endel Bassli, Comment, *The Future of*

One other important aspect related to the issue of religious affiliation is the absence of any real challenge to the existing infrastructure of religious jurisdiction within the Palestinian-Arab community.<sup>41</sup> The major opposition to the exclusive jurisdictional authority granted to religious institutions has been an intra-Jewish matter.<sup>42</sup> This goes back to the fact that the Palestinian-Arab minority in Israel remained largely conservative on matters of family law and has not produced any meaningful secular political force that actively challenged the existing religious jurisdiction.<sup>43</sup> Moreover, secular political parties operating within the Palestinian-Arab community have usually abstained from challenging the jurisdiction of religious institutions, focusing instead on the national status of the Palestinian-Arab minority in Israel as a whole.<sup>44</sup>

### B. Israel's Pre-Modern Adoption Law

Although the concept of adoption appears already in ancient legal traditions,<sup>45</sup> it is a relatively new institution in a number of common law jurisdictions.<sup>46</sup> It was only when special adoption statutes were enacted in the nineteenth and twentieth centuries in the United States and the United Kingdom that adoption became formally recognized.<sup>47</sup> This does

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*Combining Synagogue and State in Israel: What Have we Learned in the First 50 Years*, 22 HOUS. J. INT'L L. 477 (2000).

41. See Karayanni, *The Separate Nature*, *supra* note 19.

42. Michael M. Karayanni, *Living in a Group of One's Own: Normative Implications Related to the Private Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 6 UCLA J. ISLAMIC & NEAR E.L. 1, 6-7 (2007) [hereinafter Karayanni, *Living in a Group of One's Own*].

43. See Karayanni, *The Separate Nature*, *supra* note 19, at 63. See also DAPHNE TSIMHONI, CHRISTIAN COMMUNITIES IN JERUSALEM AND THE WEST BANK SINCE 1948, A HISTORICAL, SOCIAL AND POLITICAL STUDY 182 (1993).

44. See Danny Rubinstein, *Ha-Shesa ha-Dati-Khiloni Bekerev ArvieiYisrael [The Religious-Secular Rift among Israeli Arabs]*, in SHNATON DAT U-MEDINAH 5753-5754 [ST. & RELIGION Y.B. 1993-1994] 89 (1994) (in Hebrew).

45. See John F. Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 333 (1922) (noting that adoption was recognized as far back as 2285 B.C.E. in the Code of Hammurabi, as well as in the Assyrian, Greek and Egyptian legal systems). See also Joseph W. McKnight, *The Shifting Focus of Adoption*, in CRITICAL STUDIES IN ANCIENT LAW, COMPARATIVE LAW AND LEGAL HISTORY 297, 323-28, 329 (John W. Cairns & Olivia F. Robinson eds., 2001).

46. Leo A. Haurd, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956).

47. *Id.* The main reason behind these enactments was the increasing concern for the welfare of neglected and dependent children. By taking such objectives, these enactments

not mean that adoption did not take place until the enactment of such statutes. Private adoptions did exist, usually in consensual agreements between the biological parents (in most cases a woman who had given birth out of wedlock) and the adopters. In some societies adoption was regulated by local customs, as in the case of the Native American community.<sup>48</sup> But in the absence of formal statutory recognition, such agreements were ineffective in conferring such rights and obligations as are normally associated with a parent-child relationship. For example, if one of the adopting parents happened to die intestate, the adopted child had no inheritance rights.<sup>49</sup> In addition, agreements between biological parents and adopters were considered to be revocable. Thus, regardless of any pre-existing contract, the biological mother was recognized to have an almost absolute right to her child,<sup>50</sup> while the “adopter” could relinquish custody to the parent(s) or to a third party.<sup>51</sup> Legal enactments were thus essential in asserting full family ties between adoptee and adopter(s) and the full dissolution of ties with the biological parents.

The development of adoption as a legal institution in Israel has evolved in a similar way, from dubious adoption arrangements to full formal recognition. Before the enactment of ACL, 1960, there was no generally applicable territorial law regulating adoption. Unlike the legal vacuum that preceded the enactment of special adoption statutes in other common law jurisdictions, Israel did have a form of legal basis for adop-

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symbolized the departure from the pre-modern objective of adoption as a function securing the succession of the adopter. See Haurd, *supra* note 46, at 749. This also explains why common law jurisdictions recognized adoption relatively late. Common law allowed early on in its development free testamentary disposition of unentailed lands, which was difficult to achieve in continental Europe, whose legal systems adhered to strict feudal restrictions. Thus, until adoption practices began to stress the modern objective of caring for the child instead of focusing on the interests of the adopters, no real legal need was found for giving legal recognition to adoption. See McKnight, *supra* note 45, at 324.

48. Brosnan, *supra* note 45, at 334-35.

49. See e.g., R. Brent Drake, Note, *Status or Contract? A Comparative Analysis of Inheritance Rights under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675, 678-79, 681 (2005).

50. See *Barnardo v. McHugh*, [1891] A.C. 388 (H.L.) (Appeal taken from England). The prevailing notion at the time assimilated between the natural affection possessed by the biological parent toward her or his child and the well-being of the child. See *R. v. Nash*, 10 Q.B.D. 454, 456 (1883)(C.A.) (“[t]he affection of the mother for the child must be taken into account considering what is for the benefit of the child.”) (per Lindley, L.J.).

51. See *Humphrys v. Polak*, [1901] 2 K.B. 385 (1901) (A.C.).

tion prior to 1960.<sup>52</sup> This scheme was the long-standing Ottoman *millet* system by which local citizens were governed by their religious community courts and norms in certain family law matters.<sup>53</sup> Much was lacking, however, in the religious norms of the different religious communities to establish an adoption relationship, thereby making the Israeli case not much different from that existing some decades earlier in common law jurisdictions.

When Israel declared independence in 1948, it absorbed much of the law of Mandatory Palestine (1917-1948), including the Palestine Order in Council, 1922 (POC), a document that functioned as a constitution for the country.<sup>54</sup> This document recognized and preserved the preceding Ottoman *millet* system of according prescriptive and adjudicative jurisdiction in matters of personal status to recognized religious communities almost in its entirety.<sup>55</sup> Article 51 of the POC explicitly stated that the issue of “adoption of minors” is one of personal status.<sup>56</sup>

The legal significance of this is twofold. First, by virtue of being a personal status matter, adoption became subject to the parties’ personal law, which in the case of local citizens was determined to be their religious law.<sup>57</sup> Therefore, on issues of adoption, the courts had to resort to the relevant religious law of the parties. The second significant result has to do with the adjudicative jurisdictional authority of religious courts to

52. SHIFMAN, ADOPTION, *supra* note 11, at 53-54.

53. Karayanni, *Separate Nature*, *supra* note 19 at 41-42.

54. See, e.g., Anis Al-Qasem, *The Draft Basic Law for the Palestinian National Authority During the Transitional Period*, in THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES 101, 102 (Eugene Cotran & Chibli Mallat eds., 1996); Daniel Jacobson, *The Legal System of Israel*, 40 A.B.A.J. 1067, 1067 (1954).

55. As a matter of fact, under Article 9 of the Palestine Mandate granted to Great Britain by the League of Nations it was specifically stated that “Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed.” British Mandate for Palestine, Article 9, <http://www.mtholyoke.edu/acad/intrel/britman.htm>.

56. POC, Article 51.

57. The relevant provision of the POC in this respect is Article 47, which provides that civil courts shall exercise their jurisdiction in personal status matters as defined in Article 51 of the POC “in conformity with any law, ordinances or regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable.” This last phrase, “the personal law applicable,” was, in respect of local citizens, taken to mean their religious law. See Menashe Shava, *Connecting Factors in Matters of Personal Status in Israel*, 5 TEL-AVIV U. STUD. L. 103, 103 (1982); 1 PINHAS SHIFMAN, DINNEY HA-MISHPAKHA BE-YISRAEL [FAMILY LAW IN ISRAEL] 19 (2d ed. 1995) (in Hebrew) [hereinafter SHIFMAN, FAMILY LAW]; SILBERG, *supra* note 20, at 3; VITTA, *supra* note 20, at 135-36.

deal with adoption proceedings. Given that the “adoption of minors” is a matter of personal status but is not accorded to the exclusive jurisdiction of the religious courts, the parties can turn to their religious court to adjudicate adoption only if all parties consent to such jurisdiction. This jurisdictional capacity came to be known as “concurrent jurisdiction.”<sup>58</sup> In the absence of such consent, the civil courts had the default jurisdictional capacity to issue the adoption order. But even then, the governing law of the adoption proceeding was the religious law of the relevant community.<sup>59</sup>

The historical account of religious jurisdiction in matters of adoption before 1960 would not be complete without mention of the Muslim community. Unlike the Jewish and the recognized Christian communities, the jurisdiction of the Muslim *Shari'a* courts was only partially regulated by the POC. Article 52 of the POC provided the Muslim *Shari'a* courts with exclusive jurisdiction over all personal status matters as defined in the Ottoman Law of Procedure for *Shari'a* Courts promulgated in 1917. The list provided here was wider than the list of personal status matters coming under the exclusive jurisdiction of the Christian and Rabbinical courts, which was primarily restricted to matters of marriage and divorce.<sup>60</sup> So while the Christian and Rabbinical courts enjoyed only concurrent jurisdiction that necessitated the consent of all parties concerned in matters such as child custody and maintenance allowances, the Muslim *Shari'a* courts enjoyed exclusive jurisdiction over all personal status matters of Muslims.<sup>61</sup> The privileged jurisdictional power of the *Shari'a* courts stemmed from their original function as the official state courts of the Ottoman Empire. The preservation of the jurisdictional authority of the *millet* system, first by the British Mandate and later by the State of Israel, has thus led to the preservation of the privileged jurisdictional power of the *Shari'a* courts, aside from some

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58. See Elazar Lev Globus, *A'Imutz Baneem BeEretz Israel [On the Adoption of Sons in the Land of Israel]*, in BAYOUT HAMIDINAH BEISRAEL [STATE PROBLEMS IN ISRAEL] 1, 1 (1949) (in Hebrew).

59. *Id.*

60. See ROBERT H. EISENMAN, ISLAMIC LAW IN PALESTINE AND ISRAEL 85 (1978); MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 77 (1994).

61. See Ido Shahar, Practicing Islamic Law in a Legal Pluralistic Environment: The Changing Face of a Muslim Court in Present-Day Jerusalem 62 (2006) (unpublished Ph.D. dissertation, Ben-Gurion University of the Negev).

modifications made by each.<sup>62</sup> However, the *Shari'a* courts, it turns out, could not issue an adoption order. The Ottoman Law of Procedure for *Shari'a* Courts, despite its extended list of personal status matters, did not include adoption,<sup>63</sup> probably because *Shari'a* does not recognize adoption.<sup>64</sup>

Given the fact that the POC accepted the Ottoman arrangement of *millet* courts for personal status matters and granted concurrent jurisdiction to the Christian and Rabbinical courts in the matter of adoption of minors, it is clear that there was a legal basis regulating adoption prior to the enactment of ACL, 1960. According to empirical data collected from the 1950s, courts often dealt with adoption proceedings. Two documents offered by two then-sitting judges, Justice Shneur Z. Cheshin of the Israel Supreme Court and Judge Izhak Kister of the District Court of Tel-Aviv–Jaffa (who later became a Supreme Court Justice), showed that

62. Amnon Rubinstein, *State and Religion in Israel*, 4 J. CONTEMP. HIST. 107, 117 (1967). Today, however, the jurisdiction of *Shari'a* courts is almost the same as that of Christian and Rabbinical courts. On the process of limiting the jurisdiction of *Shari'a* courts in Israel, see Moussa Abou Ramadan, *Judicial Activism of the Shari'ah Appeals Court in Israel (1994-2001): Rise and Crises*, 27 FORDHAM INT'L L.J. 254, 263-70 (2003) [hereinafter Abou Ramadan, *Judicial Activism*]; Moussa Abou Ramadan, *Divorce Reform in the Shari'a Court of Appeals in Israel*, 13 ISLAMIC L. & SOC'Y 242, 245-46 (2006).

63. Article 7 of Ottoman Law of Procedure for *Shari'a* Courts included the following matters in its list of personal status matters over which the *Shari'a* courts originally enjoyed exclusive jurisdiction: matters relating to the administrations of *waqf* property; debts of *awqaf* and orphans that had been legally established; matters related to guardianship, testaments and bequests, substantiation of legal incompetence and legal maturity; designation of guardians, matters relating to absentees; matters relating to marriage and divorce, dower, maintenance, ascription of children, and succession. See Shahar, *supra* note 61, at 62 n.76. See also EISENMAN, *supra* note 60, at 46; S. D. GOITEIN & A. BEN SHEMESH, HA-MISHPAT HA-MUSLIMI BE-MEDINAT YISRAEL [MUSLIM LAW IN THE STATE OF ISRAEL] 275-76 (1957) (in Hebrew).

64. See Alexander D. Gonzalez, *The Hague Intercountry Adoption Act and its Interaction with Islamic Law: Can an Imperfect Enforcement Mechanism Create Cause for Concern?*, 10 GONZ. J. INT'L L. 437, 438-39, 444 (2007); Ella Landau-Tasseran, *Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies*, 66 BULL. SCH. ORIENTAL & AFRICAN STUD. 169, 169-72 (2003). See also June S. Katz & Ronald S. Katz, *The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems*, 23 AM. J. COMP. L. 653, 662 (1975) ("According to Islamic law, the blood relationship is the keystone of the law regulating inheritance and the guardianship and supervision of a child; adoption may not alter these laws."). However, *Shari'a* did recognize in long term fostering arrangements (*kafala*). See William Duncan, *Children's Rights, Cultural Diversity and Private International Law*, in CHILDREN'S RIGHTS AND TRADITIONAL VALUES 31, 32 (Gillian Douglas & Leslie Sebba eds., 1998).

adoption petitions were often submitted to the district courts, as the following table reveals:<sup>65</sup>

| Year (total) | District Court of Tel-Aviv–Jaffa | District Court of Haifa | District Court of Jerusalem |
|--------------|----------------------------------|-------------------------|-----------------------------|
| 1950 (54)    | 39                               | 17                      | 8                           |
| 1951 (127)   | 66                               | 49                      | 12                          |
| 1952 (141)   | 91                               | 39                      | 11                          |
| 1953 (191)   | 122                              | 51                      | 18                          |
| Total        | 318                              | 156                     | 49                          |

The steady increase in the number of adoption petitions submitted each year is corroborated by a remark of the Minister of Justice, Pinhas Rosen, when introducing the bill of the Adoption of Children Law to the Knesset in 1958. Rosen submitted that the total number of petitions for adoption filed in 1957 reached 239.<sup>66</sup>

These findings correlate with the numbers collected by Eliezer D. Jaffe of the School of Social Work at the Hebrew University:<sup>67</sup>

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65. From CHESHIN, *supra* note 11, at 84. It seems that the adoption petitions filed before the district courts at this period were all from Jewish petitioners. See KISTER, *supra* note 11, at 5 (indicating that in all the adoption petitions handled by him while serving as district judge in the Tel-Aviv–Jaffa District Court, none were for adopting a non-Jewish child).

66. DIVREI HAKNESSET (1959) 928 [hereinafter DK].

67. Eliezer D. Jaffe, *Imutz Yeladim BeIsrael* [Adoption of Children in Israel], REVA'OUN LEMAHKAR HIVRATI [SOCIAL RESEARCH QUARTERLY], issue 12-19, 211, 214 (1971) (in Hebrew) [hereinafter Jaffe, *Imutz Yeladim BeIsrael*].



| Year | Number of Adoptions |
|------|---------------------|
| 1950 | 44                  |
| 1951 | 120                 |
| 1952 | 123                 |
| 1953 | 192                 |
| 1954 | 167                 |
| 1955 | 154                 |
| 1956 | 216                 |
| 1957 | 215                 |
| 1958 | 228                 |
| 1959 | 217                 |
| 1960 | 162                 |

Rabbinical courts also dealt with adoption proceedings. For example, between 1949 and 1951 some 79 petitions were filed in the Rabbinical courts.<sup>68</sup> However, the number of adoption petitions filed in Rabbinical courts declined rapidly, with only five petitions filed in the four-year period between 1954 and 1957.<sup>69</sup>

In an effort to simplify adoption proceedings, two sets of procedural rules were issued, one for the Rabbinical courts, issued by the Chief Rabbinate in 1943, and the other for the civil courts, issued by the Ministry of Justice in 1955.<sup>70</sup>

It appears that adoption also took place privately, that is, by mutual agreement between the biological parents and the adopters without intervention by the courts. In his findings on adoption, Judge Kister estimates that this mode of adoption was more widespread than court-managed adoptions.<sup>71</sup> At the time it was not illegal to adopt children privately, and such arrangements were preferred for their evident simplicity. Couples would petition the courts for formal adoption orders usually when the child was in the foster care of a public institution.<sup>72</sup>

68. KISTER, *supra* note 11, at 4-5.

69. DK (1959) 929.

70. For remarks of the Minister of Justice at the time, see *id.*

71. KISTER, *supra* note 11, at 5. See also remarks by Pinhas Rosen, DK (1959) 928; and remarks by the then Minister of Welfare, Yossef Bourg, DK (1960) 504.

72. KISTER, *supra* note 11, at 5.

Adoption was also recognized indirectly. Laws conferring certain legal entitlements on the basis of kinship specifically mention adoption as establishing such kinship.<sup>73</sup>

### C. Efforts to Fill the Legal Void

In spite of the various legal recognitions of adoption, the institution was no more than a legal mirage.<sup>74</sup> The Rabbinical, Christian, and civil courts were practically powerless to issue adoption orders. The Rabbinical and Christian courts, for example, needed the consent of all concerned parties in the adoption proceeding in order to deal with the issue, because their jurisdiction was of a concurrent nature in adoption. However, such consent was practically impossible to attain, since the children who were up for adoption, being minors, were legally incompetent to grant consent.<sup>75</sup>

With the religious courts virtually powerless to deal with adoption proceedings, Jews and Christians had to file for adoption before the civil courts. But here again jurisdiction was mostly spurious. The Christian community was historically small and did not seek adoption orders from civil courts in any substantial number.<sup>76</sup> The position of the Jewish community was far more complex. On the one hand, traditional Jewish law—at the time the governing law in adoption among Jewish citizens of Israel—did not recognize adoption in its modern sense.<sup>77</sup> On the other

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73. The list included such laws as Invalids (Pension and Rehabilitation) Law, 5709-1949, 3 LSI 119 (1949); Fallen Soldier's Families (Pensions and Rehabilitation) Law, 5710-1950 4 LSI 115 (1949-50); National Insurance Law, 5714-1953, 8 LSI 4 (1953-54); Protected Tenants' Protection Law, 5715-1955, 9 LSI 172 (1954-55). For a complete list, see Haim Cohn, *Introduction*, in CHESHIN, *supra* note 11.

74. For a discussion of the legal shortcomings of adoption orders that were handed by courts in Israel at the time, see E. Livne, *Imutz Yiladim Bilsrael [Child Adoption in Israel]*, 6 MEGAMOT 139 (1955) (in Hebrew).

75. VITTA, *supra* note 20, at 190 ("In cases of adoption . . . the concurrent jurisdiction of the religious courts has been in practice nullified by the civil courts . . . the adoption of minors has been considered outside the jurisdiction of such courts [i.e., the religious courts] owing to the impossibility of minors to consent to it."). The precedent was set in the District Court of Haifa in 1943. See Globus, *supra* note 58, at 1-2.

76. See KISTER, *supra* note 11, at 5 (noting that not one case of adoption was brought before him as a judge since the establishment of the State of Israel).

77. See MAIMON, *supra* note 11, at 2, 113; Minkovich, *supra* note 11, at 5, 10; Tova Lichtenstein, *Halmutz MeNikidat Mabat Yuhoudit [Adoption from a Jewish Viewpoint]*, 10 Hivra URivahah [Society and Welfare] 29 (1989) (in Hebrew); 1 THE JEWISH ENCYCLOPEDIA, *Adoption*, 206-07 (1901); 1 THE UNIVERSAL JEWISH ENCYCLOPEDIA, *Adoption*, 100 (1939).

hand, as indicated earlier, both the civil courts and the Rabbinical courts, supposedly working under the auspices of Jewish law, which did not recognize adoption, regularly issued adoption orders with respect to local Jewish adopters and adoptees.<sup>78</sup> The Israeli Supreme Court, when analyzing this curious anomaly, held that these “adoption orders” were actually long-term custody orders.

The first case of this sort brought before the Israeli Supreme Court was that of Tovriel Klien.<sup>79</sup> Tovriel was born in Romania in 1948, and he shortly afterwards lost his father. In 1951 he immigrated with his mother to Israel, but in 1953 lost her as well. Tovriel’s travails seemed to come to an end when he was placed in the foster care of the Hirschikovitz family, who came to “love [Tovriel] as if he was their own.” The Hirschikovitzs had lost their own son to the Nazis nearly a decade before they became Tovriel’s guardians. The Hirschikovitzs sought to adopt Tovriel and filed for adoption before a civil court, the District Court of Haifa. Tovriel’s relatives objected to the child’s adoption by strangers. Ignitz Greenberg, Tovriel’s mother’s uncle, who resided in the United States at the time, challenged the Hirschikovitzs and stated that he and his wife were willing to adopt the boy and have him come to live with them in America. The District Court of Haifa denied the Hirschikovitzs’ adoption petition, noting that for an adoption order to be issued, the adoptee must be classified as a deserted child. According to the District Court, the boy was not deserted, given his relatives’ willingness to care for him.

The Hirschikovitzs appealed to the Supreme Court. The Court first clarified that since adoption is considered to be a personal status matter under Article 51 of the POC, and the parties to the adoption proceedings (Tovriel and the Hirschikovitzs) are Jewish Israeli citizens, the governing law is that of Jewish law. However, since Jewish law does not recognize adoption, there is no legal proceeding that can transfer the parental relationship from the biological parents to the adopters.<sup>80</sup> At this point it appeared that the Supreme Court had no option but to deny the Hirschikovitzs’ adoption application. However, the Court did not take this position. It reclassified the proceeding initiated by the Hirschikovitzs as that of claiming custody instead of petitioning for adoption. As a re-

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78. See BAKER, *supra* note 35, at 161 (explaining that the civil courts issued such adoption orders owing to an “urgent need” and in “anticipation of the passage of appropriate legislation which would, *inter alia*, validate those orders”).

79. See CA 50/55 Hirschikovitz v. Greenberger [1955] IsrSC 9 791.

80. *Id.* at 795.

sult, it remanded the case to the District Court to consider who should have custody over the boy. The Court also made its views known to lawmakers, calling for them to enact an adoption law for Israel.

The opinion also quoted from an unpublished decision delivered in 1949 by Moshe Landau, at the time a District Court Judge in Haifa and later a Justice and President of the Israel Supreme Court, who cautioned that the complications resulting from the legal void in adoption would be increasingly felt in the future given the anticipated numbers of orphans among the immigrants coming to Israel from the Diaspora.<sup>81</sup> Then, in the case itself, the Deputy President of the Supreme Court at the time, Justice Shneur Z. Cheshin, said that the need to enact an adoption statute is a “debt” the State of Israel owes to “the orphans of the Holocaust, to the parents who lost their children in the War of Independence, to homeless children, and to families denied the blessing of having children.”<sup>82</sup>

On remand, the District Court continued to regard the proceeding as one of adoption and once again ruled against the Hirschikovitzs. But on appeal, the Supreme Court vacated the decision and granted them custody. The Court’s major observation on appeal was that in deciding the matter of custody, the best interests of the child was the primary consideration, and these interests stand against the possibility of Tovriel being raised in a foreign country.<sup>83</sup> An expressive connection was made in this regard by Justice David Goitten. After observing that the sole question in this case was the best interests of the child, he went on to say: “I think that it is not in a Jewish child’s best interests to have him taken out of the jurisdiction of the country’s courts—a place where he receives a Hebrew education [*hinukh ‘ivri*] and to send him to the Diaspora [*golah*] and to a foreign culture.”<sup>84</sup> He noted that exceptions to this rule may be possible, but not in the case at hand.

The legal void in adoption law became more evident in the case of *Dina Cohen v. Kalman Cohen*.<sup>85</sup> If in the previously discussed adoption case the Supreme Court was finally able to reach a result that was compatible with what it deemed to be the best interests of the child, this result was unattainable by the Supreme Court in *Cohen*. The basic question

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81. CC (Hi) 257/48 In re Adoption of the Minor R.R. (March 18, 1949, not reported), reproduced in CHESHIN, *supra* note 11, at 190, 190-91.

82. *Hirschikovitz*, IsrSC 9 at 804.

83. CA 201/57 *Hirschikovitz v. District Attorney of Haifa* [1959] IsrSC 13 492.

84. *Id.* at 502.

85. CA 179/53 *Cohen v. Cohen* [1955] IsrSC 9 1166.

the Court dealt with in *Cohen* was whether an “adopted” Jewish child, who at the time the case came before the Court was already married, had inheritance rights in a certain immovable property that according to the then-applicable Succession Ordinance could not be disposed of by a will or any other similar legal instrument.<sup>86</sup> The Court’s answer denied the adoptee any inheritance rights in such property. The Court concluded that it could not decide otherwise, since the governing law among Jews in Israel as to whether an adoption proceeding is capable of creating a parent-child relationship is that of Jewish law and, as mentioned, Jewish law does not recognize adoption. The Court took this position even though the adoption proceedings took place before a Rabbinical court in Egypt when the parties were still residing there. As a result of the Court’s decision to deny the “adoptee” any inheritance rights in the property, her shares went to the adopter’s other relatives who, as the Court itself pointed out, were hardhearted and uncaring and had not even bothered to attend any of the deceased’s funeral ceremonies.<sup>87</sup>

#### D. First Attempts at Developing a Coherent Adoption Law

The Government was aware of the calls made for the enactment of an adoption law. Throughout the 1950s the Ministry of Justice composed a number of drafts for an adoption law.<sup>88</sup> The first was in 1952,<sup>89</sup> and the second was in the form of a separate chapter in a general proposed enactment titled the Individual and the Family Law, 1955. It was only the third time around, in 1958, that the draft bill of the Adoption of Children Law began the legislative process that was eventually to turn into ACL, 1960.<sup>90</sup>

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86. See U. Yadin, *Legislation, Reflection on a New Law of Succession*, 1 ISR. L. REV. 132, 137 (1966).

87. *Id.* at 1176. Though in a later decision some doubts were cast as to whether the *Cohen* decision correctly ignored the parent-child relationship as envisioned in a previous court judgment (that of the Egyptian Rabbinical court), even when considering the question under Jewish law. See CA 419/59 Koren v. Koren [1960] IsrSC 14 997.

88. See remarks made by Haim Cohn in Cohn, *supra* note 73, at 6-7.

89. The text of this draft bill appears in CHESHIN, *supra* note 11, at 243-46.

90. See MAIMON, *supra* note 11, at 13.

The earlier initiatives had failed primarily due to objections raised by Jewish religious parties in the Knesset.<sup>91</sup> They had two objections. First, it was argued that Jewish law could not accommodate the underlying idea of a modern adoption law that would sever all rights and obligations between the biological parents and the child after the adoption process is concluded.<sup>92</sup> Even though a number of religious sources do mention adoption, the distinctions between the biological child's rights of inheritance and those of the adopted child, and more importantly, the rules governing marriage restrictions, which could be concealed by adoption, cannot be altered by virtue of a judicial action and would clash with the proposed bills.<sup>93</sup>

Second, the religious parties objected to the proposed bills because they did not provide the Rabbinical courts with any jurisdictional competence to deal with adoption proceedings.<sup>94</sup> Only civil courts were given jurisdictional authority to deal with adoption. The official reason for this step was that since adoption was not recognized in its modern form by either Jewish or *Shari'a* law, there was no need to grant the religious courts jurisdictional capacity to deal with adoption proceedings.<sup>95</sup> Indeed the underlying motive in enacting ACL, 1960 was precisely to overcome the lacunae in religious law and produce a statute of a secular and territorial nature "devoid of any connection with religious law."<sup>96</sup> The Jewish religious parties saw adoption as an independent legal institution that in practice was not different from a proceeding to grant long-term custody. Therefore, the Jewish religious parties wanted the option to have recourse to the Rabbinical courts and have them administer the adoption proceedings according to their own beliefs, at least when the parties

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91. DK (1959) 2321 (Minister of Justice Pinhas Rosen remarking that "it is not a secret that the religious parties were the ones that caused the delay in introducing the bill [i.e., the adoption of children bill] to the Knesset"). See also *id.* at 935 (remarks by MK Ruth HaKattan).

92. *Id.* at 937 (remarks by MK Zerah Warhaftig); *id.* at 2177 (remarks by MK Kalman Kahana).

93. *Id.* at 938 (remarks by MK Zerah Warhaftig); *id.* at 941 (remarks by MK Zalman Ben Yaacov).

94. *Id.* at 938 (remarks by MK Zerah Warhaftig); *id.* at 941 (remarks by MK Zalman Ben Yaacov); *id.* at 947 (remarks by MK Yaacov Katz); *id.* at 2176 (remarks by MK Kalman Kahana); *id.* at 2177, 2178 (remarks by MK Shlomo Lorentz).

95. *Id.* at 927-30 (remarks by Minister of Justice Pinhas Rosen); *id.* at 2320 (remarks by MK Haim Zadok).

96. Pinhas Shifman, *International Adoptions*, *supra* note 4, at 35.

agreed to opt for such an arrangement.<sup>97</sup> These objections left their mark on the final version that became ACL, 1960, where a general provision was made that adoption concluded under the law will not affect the law dealing with marriage and divorce<sup>98</sup> and that a religious court is to have jurisdiction over adoption procedures if the concerned parties consent to such jurisdiction.<sup>99</sup> With respect to the adopted child, the law states that if the child is under the age of thirteen, the welfare authorities together with the Attorney General can provide the necessary consent on his or her behalf.<sup>100</sup>

To sum up the discussion so far, though the body of adoption law in Israel in the first twelve years of the state's existence is not extensive, it does offer some important historical facts associated with adoption in Israel. First, adoption in Israel was associated with the Ottoman *millet* system, given the fact that the issue of adoption was considered to be a personal status matter under Article 51 of the POC. Although the available norms that were applied under this system did not allow much leeway in concluding adoption proceedings, the fact that adoption was considered a personal status matter made it possible to connect between the value, or established norm, of dividing society among different religious communities (as evidenced by the *millet* system) and adoption as a whole. Second, the call for an adoption law in Israel was made not solely in the name of children's best interests being served, but in the name of the orphaned children of the Holocaust and bereaved parents of the Israeli 1948 War of Independence. This reasoning becomes an essential point in articulating the religious matching requirement. Third, adoption in this period also became part of a larger battle, in which Jewish religious parties sought to maintain influence. This trend ultimately held up the adoption project throughout most of the 1950s. Adoption in Israel, even before the enactment of ACL, 1960, was from the start entangled in the *millet* scheme of jurisdiction allocation, in Israel's national aspiration to care for its orphaned children, and in the religion, or rather the synagogue, and state conflict. No wonder, then, that when the Knesset came finally to deal with religious matching, the debate quickly revealed all the underlying values embodied in these affairs.

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97. DK (1959) 2178-79 (remarks by MK Shlomo Lorentz).

98. ACL 1960, art. 13(2).

99. ACL 1960, art. 24.

100. ACL 1960, art. 24(2).

## II. THE ENACTMENT OF THE 1960 ADOPTION OF CHILDREN LAW AND THE ORIGIN OF THE RELIGIOUS MATCHING REQUIREMENT

This chapter seeks to provide a detailed account of the legislative process leading to the enactment of ACL, 1960, with special emphasis on the Knesset's deliberations on the propriety of religious matching between adopters and adoptee. These deliberations are of special importance in light of the fact that none of the bills introduced in the 1950s, including the initial bill that led to the enactment of this law, included a religious matching requirement of any sort.<sup>101</sup> Yet the law in its enacted form contains an explicit provision (Section 5) mandating strict religious matching between the adopters and the adoptee in order for the adoption to take place in Israel. It is thus evident that the incorporation of the religious matching requirement was a direct result of the Knesset's deliberations concerning the bill. Indeed, as will be shown in the ensuing discussion, a number of Knesset members, primarily from among the Jewish religious parties, passionately called for religious matching in adoption, and such calls were the direct cause for the inclusion of the religious matching requirement in ACL, 1960.

### A. *The Knesset Floor Debate and Rhetoric: Round I*

The government introduced to the Knesset the Adoption of Children Bill in 1958. The legislative procedure of government-proposed legislation requires the minister heading the relevant ministry to introduce the bill to the Knesset. Pinhas Rosen, then Minister of Justice, introduced the bill and described the urgent need for an adoption law. As proof, he quoted extensively from Moshe Landau's and Shneur Z. Cheshin's remarks (previously quoted) on this desideratum. At this stage, however, Rosen said nothing about the need for religious matching; as indicated, the proposed bill contained no provision for any form of matching between adopters and adoptees. The issue of religious matching came up only after MK Emma Talmi from Mapam, the United Workers Party (*Mifleget ha-Poalim ha-Meuhedet*), a socialist party with a strong Marxist ideology, spoke in favor of the proposed bill. In particular, she praised Section 3 of the bill that, according to her understanding, made it possible for a cohabiting couple not considered legally married according to the laws of the religious community to which they belong to adopt a

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101. See MAIMON, *supra* note 11, at 113.



child.<sup>102</sup> She then provided an example of a Gentile woman who could now adopt the children of her Jewish spouse from his previous, Jewish marriage, even though Jewish law did not recognize her own marriage to him.<sup>103</sup>

This remark provoked a strongly worded response from MK Zerah Warhaftig, from the Zionist-religious party, *Ha-Po'el ha-Mizrahi*. He began by saying that the law should allow a couple to adopt a child only from among its own religious community.<sup>104</sup> Suddenly, his tone changed and, in a heightened and emphatic intonation, he dramatically told of the loss and abandonment of Jewish children and compared inter-religious adoption to kidnapping. This rhetorical tone and content would become characteristic of subsequent speakers' tone and content. From the podium he proclaimed: "We are against the kidnapping of children [of others], just as much that we are against the kidnapping of our children."<sup>105</sup> To prove his point he praised a recent Israeli court decision that prevented a Jew from adopting a Bedouin girl.<sup>106</sup> Warhaftig then spoke of the tragic experience of the Holocaust, and how in some cases, when Jewish parents who had hidden their children with non-Jewish couples or in monasteries for the duration of the war came to reclaim them, the caretakers refused to return them to their parents, saying they had adopted them.<sup>107</sup> In the course of presenting his arguments in favor of the religious matching requirement, Warhaftig mentioned the fact that such a requirement is promulgated in many states in the United States: "I can bring you a number of examples from many states in the United States, and will mention only Denver, [*sic*] Illinois, Maryland, New Jersey, New York, Ohio and Pennsylvania – in all such places there is the same criterion, that one can only adopt a child of the same religion."<sup>108</sup>

The next speaker to raise the issue of religious matching was MK Zalman Ben-Ya'acov from the ultra-orthodox *Agudath Yisrael–Poalei Agudath Yisrael* party. He began by stressing the legitimacy of the biological parents' request that their child be raised in accordance with their

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102. The exact Hebrew wording of article 3 of the bill provided that adoption could take place when the adopters are "*ish ve-ishto*" which MK Talmi understood to mean as a "man and woman."

103. DK (1959) 934.

104. *Id.* at 938.

105. *Id.* at 939.

106. *Id.*

107. *Id.*

108. *Id.* at 938.

own religious beliefs.<sup>109</sup> He spoke dramatically about how people had given their lives rather than convert or have their children's religion converted. The proof Ben-Ya'acov offered was "our" bloody history of persecution, self-sacrifice, and immolation.<sup>110</sup>

MK Benjamin Arditi from *Herut*, the right-wing revisionist party and forerunner of today's *Likud*, also spoke passionately in favor of the religious matching requirement. He began by underscoring the importance of the adoption law for Israel, and he expounded that the proposed law should be taken to fulfill not only the interest of childless families to raise children as if they were their own, but should also be taken as furnishing a solution to a social problem that is very important and special in "our country."<sup>111</sup> He explained:

No people in the world suffered from the brutalities of World War II as our people did. As a result of the mass murder committed by the Nazis, many children were orphaned. Thousands of such children were brought to Israel thanks to the efforts made by the national institutions. The Knesset in legislating the adoption law must take this fact into consideration.<sup>112</sup>

Immediately afterwards, MK Arditi considered another factor of the proposed adoption law, a factor that pertains to the special "demographic and religious conditions of our country."<sup>113</sup> In the course of his remarks on the proposed bill, MK Arditi elaborated on the need to adjust the proposed law to "Israeli reality." He stated:

In our country, in which there are citizens of different beliefs and religions, it is incumbent on the legislature to take this reality under consideration, for it is inconceivable that the legislature will allow for a person belonging to a certain religion to adopt a child that is of another religion.<sup>114</sup>

Another MK, Ya'acov Katz, again from *Agudath Yisrael-Poali Agudath Yisrael*, first bemoaned the fact that in Israel there were too many children up for adoption, claiming one reason as being "deviations in family life," another being the Holocaust.<sup>115</sup> Hitherto, he said, adoption proceedings had come before the Rabbinical courts, which administer Jewish law. Secular Jews [*hilonim*] argue that one should consider real-

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109. *Id.* at 941.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 944.

114. *Id.*

115. *Id.* at 947.

ity, “but what is reality? The reality is that we should consider the interests of our people, and the holiness of our people.”<sup>116</sup> MK Katz then responded specifically to Emma Talmi’s remark, which he felt “counsels us to open the doors of adoption to everyone.”<sup>117</sup> This, he continued, means that it will be possible for a Jewish child to “be adopted even by a Gentile mother (*em nokhriyah*) who has not converted to Judaism, and with no guarantee that she will raise the child as a Jew.”<sup>118</sup> MK Katz then said that in enacting this law the Knesset might want to be a beacon unto other nations, but these nations were “Gentiles [who had] oppressed and stolen the children of Israel, who were orphaned because of the cruelty of these Gentiles who gave no assistance when the parents, the mothers and the fathers, were exterminated.”<sup>119</sup> These nations later became the guardians of these orphaned children and adopted them, and they were now reluctant to return them to the “People of Israel” (*Am Yisrael*), who were the sole “patrons” of these children.<sup>120</sup> MK Katz then stressed the uniqueness of the Jewish people’s struggle and asked how the “nation” [*ha’am*, i.e., the Jewish nation] should react to assimilation [*hitbolelut*] and to the destruction of the Israeli family if not with a clear definition of Jewish heritage [*moreshet avot*] and the law of the Torah.<sup>121</sup>

#### B. *The Knesset Floor Debate and Rhetoric: Round II*

The deliberations in the Knesset were renewed in June 1959, as was the passion with which Knesset members argued against inter-religious adoption. MK Shlomo Lorentz, also of the *Agudath Yisrael–Poalei Agudath Yisrael* party, questioned whether the proposed bill could be considered Jewish in character, given that the law apparently allowed inter-religious adoption.<sup>122</sup> He said: “if the parents in the most arbitrary way desert their son, the child is still to be regarded the child of the Jewish people, he belongs to our people, and if his parents have deserted him, the Jewish people have not, and will not give him up.”<sup>123</sup> Religious matching

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116. *Id.*

117. *Id.* at 948.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 947-48.

122. *Id.* at 2178.

123. *Id.*

was thus of “first national priority.”<sup>124</sup> According to the proposed law, said MK Lorentz, the Supreme Court could issue an order enabling inter-religious adoption, but this would amount to kidnapping. Lorentz continued: “I do not want to kidnap children from another nationality or another religion, and I do not want them to adopt children of the Jewish people (*‘am Yisrael*) to another religion.”<sup>125</sup> MK Lorenz also mentioned laws restricting inter-religious adoption in the United States.<sup>126</sup> Therefore, to prevent any reasonable doubt, it was best to add a clear provision to this effect.<sup>127</sup>

Another speaker, MK Aharon Ya’acov Greenberg of the National Religious Party, *Ha-Mizrahi-Ha-Po’el Ha-Mizrahi*, denigrated the proposed law by saying it suited not the Jewish people but the law of the Gentiles. In the recent past, he said: “we have witnessed many people, parents . . . relatives and [others], willing to sacrifice their lives in order to free children from Gentile hands, from monasteries, and we encouraged them.”<sup>128</sup>

This steady opposition to inter-religious adoption made it clear that the law would not pass without reference to a religious matching requirement. When Minister of Justice Pinhas Rosen returned to the Knesset to respond, he promised that religious matching would certainly guide the courts when granting adoption orders. He explained that the reason such a condition was not explicitly included in the draft bill was because the Ministry did not seek to state the obvious.<sup>129</sup>

After these remarks, 26 MKs favored and 11 disagreed with the bill.<sup>130</sup> According to standard procedure, the bill was to be transferred to a Knesset committee with the appropriate portfolio to have it prepared for two additional rounds of votes (“readings” as they are called in local terminology), after which the bill would become law. Though discussions were held in the Public Services Committee, the bill did not make it back to the general assembly of the Knesset.<sup>131</sup> General elections were held on November 3, 1959 for the Fourth Knesset, which brought the

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 2319.

129. *Id.* at 2323.

130. *Id.* at 2325.

131. See remarks of Minister of Justice Pinhas Rosen, DK (1960) 470.

Adoption of Children Law proceedings to a temporary halt. When discussions on the adoption bill resumed, instead of picking up where the Third Knesset had left off, the newly formed government decided to submit the bill once again to the initial vote, beginning anew the legislative process.

The pressure exerted by the representatives of the religious parties had paid off. The bill in its new form provided religious courts with adjudicative authority to deal with adoption proceedings,<sup>132</sup> though as before, such jurisdiction was still concurrent in nature and dependent on the consent of all concerned parties. Provisions were made for receiving consent from minors. Significantly, in terms of grand norms, the fact that the religious court might not recognize adoption as an institution that substitutes the paternal relations of the biological parents with those of the adopters, and would thus be at fundamental odds with the government's intentions, did not prevent the government from resigning, or the religious parties from accepting it as a workable compromise.

Most relevant to our discussion was the explicit provision made in Section 5 of the proposed bill, which requires complete religious matching between the adopter and the adoptee. In the extensive debate that again took place regarding the Adoption of Children bill,<sup>133</sup> only MK Emma Talmi criticized the inflexibility of this provision.<sup>134</sup> However, even her argument was not that the best interests of the child might dictate that she or he be adopted by a person of another religion, but that difficulties might arise when the religion of the child is unknown or when the biological parents belong to different religions.<sup>135</sup> The Knesset members from the religious parties seemed satisfied with the text of the newly submitted bill, though they would also have added a provision that the adopted child be brought up religiously if it were to be the wish of his or her biological parents.<sup>136</sup>

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132. EISENMAN, *supra* note 60, at 210.

133. DK (1960) 470-73, 504-12, 535-40, 561-64.

134. *Id.* at 526.

135. *Id.*

136. See remarks by MK Tova Sanhedri, *id.* at 505; MK Shlomo Lorentz, *id.* at 523; MK Frida Zoaretz, *id.* at 527.

C. *Evaluating the Knesset Deliberations: More Questions than Answers*

The inclusion of the religious matching requirement in ACL, 1960 was clearly a result of the Knesset deliberations. Three main considerations proved dominant in articulating the religious matching requirement:

- a) Religious matching was taken to suit what MK Arditì called the “demographic and religious conditions” of the State of Israel;<sup>137</sup>
- b) The adoption of Jewish children by non-Jewish adopters was associated with the trauma of the Holocaust and other instances of Jewish persecution, in which Jews were forced to give up their children to Gentile adopters or hide them for safe-keeping, sometimes discovering that the children had been converted to Christianity;
- c) In a number of foreign legal systems, particularly in the United States, local adoption practice mandated that there be religious matching between the adopters and the adoptee, which provided a precedent in Western law.<sup>138</sup>

These factors may seem to be elaborate and sufficient, but they fall short of providing a solid explanation, let alone a theoretical framework, as to why the religious matching came to take the shape it ultimately took. At best, the arguments put forth by members of the Knesset come to no more than a list of subjective, anecdotal, and tendentious observations made from the vantage point of each speaker’s political agenda. Let us first take up the reference made by MK Arditì to the “demographic and religious conditions” of Israel: what exactly were those conditions? Was he referring to relations between Jews and Arabs as national groups, as seems to be presumed by MK Warhaftig when he spoke favorably about the Israeli court’s decision to prevent a Jew from adopting a Bedouin girl? Or was he concerned with the balance between religious and secular rule, or indeed all of the above?

The second factor found in the Knesset’s deliberations echoes what seems to be a genuine and sincere collective Jewish sentiment. In light of the relative proximity of the enactment of ACL, 1960 to the Holocaust and the concentrated efforts of Jewish families and Jewish organizations to reclaim children left with non-Jewish families in order to spare them

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137. DK (1959) 944.

138. *Id.* at 938.

from the Nazi death machine,<sup>139</sup> one can certainly understand the very strong feelings aroused by the prospects of a Jewish child being adopted in Israel by non-Jewish adopters. But this sentiment, while bowing to Jewish sensibilities, fails to give a full account of the strict religious matching as it was finally enacted. None of the Knesset members, including the non-Jewish members, thought to ask how a strict and uncompromising religious matching requirement would affect adoptions among and between other religious communities in Israel. For example, would an adoption of a Greek Orthodox child by a Greek Catholic couple cause tension between these two communities? What would be the level of sensitivity to trans-religious adoption within the Palestinian-Arab community, say between Muslims and Christians, or Muslims and Druze? Would it reach such a level that would necessitate the preclusion of such an adoption taking place under all circumstances?

The strong Jewish collective sentiments exhibited in the Knesset debates on the one hand, and the absence of any attempt to understand how the religious matching requirement will affect the Palestinian-Arab religious communities in Israel on the other, open two additional lines of inquiry. First, in relation to the practice of religious matching in the United States, as raised by MK Warhaftig, one should note that the common standard in the various states on religious matching was more elastic than the strict standard ultimately enacted in ACL, 1960. State laws in the United States mandated that religious matching take place only “when practicable.”<sup>140</sup> But what is more interesting about the American experience was the severe criticism this religious matching policy received over the years,<sup>141</sup> especially from U.S. Jewish community representa-

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139. See *infra* Chapter III, Section C.1.

140. CAROLYN HAMILTON, *FAMILY LAW AND RELIGION* 216 (1995) (United States and the United Kingdom); Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 *FORDHAM L. REV.* 383, 424 (1989); Lawrence List, *A Child and a Wall: A Study of “Religious Protection” Laws*, 13 *BUFF. L. REV.* 9, 22 (1963); Rabbi W. Gunther Plaut, *The Child’s Rights in the Adoptive Process*, 3 *OSGOODE HALL L.J.* 31 (1964). See also George & Snyder, *supra* note 8, at 783.

141. See, e.g., Leonhard J. Kowalski, *Religion and Adoption—Constitutionality of Religious Matching Practices*, 17 *WAYNE L. REV.* 1509, 1509, 1515 (1971); Dickey, *supra* note 6, at 562; Monrad G. Paulsen, *Constitutional Problems of Utilizing a Religious Factor in Adoption and Placement of Children*, in *THE WALL BETWEEN CHURCH AND STATE* 117, 137 (Dallin H. Oaks ed., 1963); Leo Pfeffer, *Religion in the Upbringing of Children*, 35 *B.U.L. REV.* 333, 377 (1955); Michael, *supra* note 8, at 15; Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the “Best Interests” Standard*, 25 *FAMILY L. Q.* 171, 173, 181 (1991); Paul Ramsey, *The Legal Im-*

tives.<sup>142</sup> How is it that Jewish collective interests at about the same period of time could be so polarized on the issue of religious matching in adoption?

Second, where were all the Palestinian-Arab Knesset members during the Knesset debates on religious matching, which extended from the Third Knesset (in which there were eight Arab MKs)<sup>143</sup> into the Fourth (in which there were seven Arab MKs)?<sup>144</sup> It is also important to add that the Palestinian-Arab Knesset members in these two terms represented the three major religious communities of Muslims, Christians, and Druze.<sup>145</sup> The Knesset records reveal that not one Palestinian-Arab Knesset member participated in the debate about the religious matching requirement. The absence of Palestinian-Arab input during the Knesset's debates is especially peculiar given that the call for a matching requirement in adoption is generally raised by minority groups rather than by the majority.<sup>146</sup>

Another set of questions that arise from the Knesset's debates had to do with the objectives of the Israeli adoption law in general, rather than on the content of the deliberations themselves. One of the major objec-

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*putation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U. L. REV. 649, 672 (1959).

142. See Pfeffer, *supra* note 141; Plaut, *supra* note 140, at 31; Ellen Herman, *The Difference Difference Makes: Justine Wise Polier and Religious Matching in Twentieth-Century Child Adoption*, 10 RELIGION & AM. CULT. 57, 69 (2000); Schwartz, *supra* note 141, at 173-74.

143. Knesset Members in the Third Knesset, Knesset Website, available at [http://www.knesset.gov.il/mk/eng/mkindexByKnesset\\_eng.asp?knesset=3](http://www.knesset.gov.il/mk/eng/mkindexByKnesset_eng.asp?knesset=3) (last visited Feb. 15, 2010).

144. Knesset Members in the Fourth Knesset, Knesset Website, available at [http://www.knesset.gov.il/mk/eng/mkindexByKnesset\\_eng.asp?knesset=4](http://www.knesset.gov.il/mk/eng/mkindexByKnesset_eng.asp?knesset=4) (last visited Feb. 15, 2010).

145. See Daphne Tsimhoni, *The Christians in Israel: Aspects of Integration and the Search for Identity of a Minority within a Minority*, in MIDDLE EASTERN MINORITIES AND DIASPORAS 124, 128 (Moshe Ma'oz & Gabriel Sheffer eds., 2002).

146. See, e.g., Ivor Gaber & Jane Aldridge, *Introduction*, in IN THE BEST INTERESTS OF THE CHILD: CULTURE, IDENTITY AND TRANSRACIAL ADOPTION 1, 1 (Ivor Gaber & Jane Aldridge eds., 1994). Given that, in the context of interracial adoption in the United States, an overwhelming number of cases were those of White adopters adopting Black children, the practice was conceived by some organizations within the Black community as a form of "cultural genocide." See RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE, AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE* 14-15 (1992). A similar position was echoed in the United Kingdom. See DEREK KIRTON, "RACE," ETHNICITY AND ADOPTION 7 (2000); AMAL TREACHER & ILAN KATZ, *THE DYNAMIC OF ADOPTION: SOCIAL AND PERSONAL PERSPECTIVES* 120 (2000).



tives of enacting an adoption law in Israel was to have one set of secular norms apply to Israelis based on their territorial affiliation with the state rather than their personal affiliation with one of the recognized religious communities.<sup>147</sup> The original quest was thus to enact a territorial law on adoption to replace the *millet* concept of having each local citizen referred to his or her religious norms, which as we have seen proved to be totally ineffective. Though this objective was largely achieved with the enactment of ACL, 1960, the inclusion of a religious matching requirement undermines this quest and raises a general question about the limits of inter-religious intimacies in Israel: can the territorial regulation of family law break from the *millet* conception altogether or will it forever be impeded and controlled by it?

In Israel, as in modern adoption law generally, the best interests of the child standard is taken to be the over-all guiding principle of adoption.<sup>148</sup> However, no Knesset member sought to combine the issues and ask how, or why, a religious matching requirement would be in the best interests of the child. Insisting on full identity matching between adopters and the adoptee usually undermines the child's best interests rather than otherwise, for this means that children remain longer in foster and institutional care until full identity matching is found.<sup>149</sup> This very real dilemma could affect the lives of children – should the child be forced to wait and bear the negative psychological repercussions of foster and institutional care until a matching adopter is found or placed immediately regardless of the adopters' identity group.

In the course of this research, it became clear that identity matching in adoption is really not about the best interests of the child or about the realization of some over-all notion of territorial justice for all, but it is essentially about group interests, as they came to dominate at a certain period of time. Rather than understanding the identity matching requirement in terms of the best interests of the child, it is appropriate to realize the requirement in the context of the existing inter-group relations. In order to lay out this thesis I first inquired into what has come to be termed mirror theories of law. Under such theories, legal norms, especially in the sphere of family law reflect dominant basic norms in society at large. If we look at the matching requirement through the lens of the mirror the-

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147. 2 PINHAS SHIFMAN, DINNEY HA-MISHPAKHA BE-YISRAEL [FAMILY LAW IN ISRAEL] 53-54 (1989) (in Hebrew).

148. *Id.* at 54.

149. *See infra* Chapter III, part E.

ory, we will be able to find most of the answers to the series of questions just raised.

### III. MATCHING IN ADOPTION AS A MIRROR IMAGE OF GRAND NORMS OF INTER-GROUP RELATIONS

#### A. *Law as a Mirror of the Social and Political Order*

The idea that legal norms are an organ of the social and political order that embodies it is relatively well-established. The French social commentator and political thinker Montesquieu (1689-1755) in the *Spirit of the Laws*, first expressed the connection between the law, the social composition, and even the physical climate that surrounds it.<sup>150</sup> In fact the title of Book Four of Montesquieu's monumental monograph is "of Laws in Relation to the Nature of the Climate."<sup>151</sup> This idea suggests that law is not an autonomous phenomenon, but rather a reflection of the economic, historic, and cultural forces that help shape society.<sup>152</sup> As the prominent historian of American law Lawrence Friedman has put it: "law is a mirror held up against life. It is order: it is justice; it is also fear, insecurity, and emptiness; it is whatever results from scheming, plotting, and striving of people and groups, with and against each other."<sup>153</sup> As a result, scholars have come to call such notions of reciprocal representation "mirror theories of law."<sup>154</sup> Indeed, Friedman's notion of the law being a creature of society "is almost banal."<sup>155</sup>

On the other hand, it has been argued that law can be an autonomous realm detached from the social structure that produced it. As evidence, scholars cite the migration and transplantation of legal norms among and between legal systems that belong to different, and sometimes unique, political and social orders.<sup>156</sup> If legal norms were so embedded in the so-

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150. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748) (Thomas Nugent trans., 1949).

151. *Id.* at 221.

152. Ewald, *supra* note 13, at 492.

153. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 695 (1973).

154. Ewald, *supra* note 13, at 492.

155. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 588 (2002).

156. *See, e.g.*, Alan Watson, *Comparative Law and Legal Change*, 37 *CAMBRIDGE L.J.* 313 (1978).

cieties that produced them, their argument goes, it would be most difficult for norms to be transplanted from one body into another.<sup>157</sup>

These diverging views are partly due to the fact that there is some variance in the degree and kind of norms being related to certain social and political conditions—some are more connected, some are less so.<sup>158</sup> As a result, when norms seem to be less connected, as in the case of commercial law, their migration is much easier than when they are more connected to the national culture that produced them—e.g., the norms of constitutional, administrative, procedural, and labor law.<sup>159</sup> Moreover, different societies come to share social and political notions in specific quarters of life, such as commercial activities, which makes the transplantation of norms in such a field much easier, and more urgent, than in other fields, where social and political notions diverge. The general discussion about legal transplants and the notion of law being a mirror of society will probably continue.

There is, however, one field in which many agree that there is a close connection between social and political norms and the dictated legal order: family law.<sup>160</sup> As Otto Kahn-Freund rhetorically asked: “What can be closer to the moral and religious convictions, the habits and the mores and also the social structure of a community than the making and unmaking of marriages, and their effect on the legal position of the spouses, including their property?”<sup>161</sup> Therefore, when discussing family law, law is perceived as a storyteller: it “tells stories about the culture . . . stories about who we are, where we came from, and where we are going.”<sup>162</sup> “Much of family law,” as one scholar has observed, “is no more—and no less—than the symbolic expressions of certain cultural ideals.”<sup>163</sup>

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157. See Ewald, *supra* note 13, at 489-91.

158. See O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 1, 13 (1974) (stating that in today's world, as opposed to the era of Montesquieu, “[t]he question is in many cases . . . how closely [the law] is linked with the foreign power structure, whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and decision-making process and which are in fact part and parcel of its constitutional and administrative law”).

159. *Id.* at 10, 13, 20, 21-26.

160. MARY ANN GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 18 (1977).

161. Kahn-Freund, *supra* note 158, at 13.

162. GLENDON, *ABORTION AND DIVORCE*, *supra* note 15, at 8.

163. *Id.* at 10.

The close relationship between culture, politics, and the family is particularly present in the sphere of adoption. In discussing racial matching in adoption in the United States, Richard Banks observed how policies in this respect implicate “our most deeply held beliefs and values about family, community, and identity.”<sup>164</sup> For another scholar, Twila Perry, the subject of racial matching in America is about “drawing the lines in society,”<sup>165</sup> pertaining “to the politics and psychology of race and racism in America . . . .”<sup>166</sup> Consequently scholars have held the view that in dealing with the current practices of adoption one is able to learn more about “deeply held but often tacit assumptions about what in human life is natural and what is social.”<sup>167</sup>

Interestingly, in the distant past the relationship between the family and the realm of politics was the other way around. The laws of the family were the prototype for political organization.<sup>168</sup> In the late Middle Ages in Europe, the patriarchal form and structure of the family provided the paradigm for the form and structure of sovereign power. The family at that time, rather than the individual, was perceived to be the primary constituent of society.<sup>169</sup> Kings were compared with fathers, and since wives and children were under the absolute control of the father, so too the subjects of the monarch should be.<sup>170</sup> In other words, monarchical

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164. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 878 (1998). See also Timothy P. Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925, 925 (1993) (“The debate over trans-racial adoption and race matching policies is a battle between fundamental values: racial autonomy versus racial integration; group consciousness and identity versus nuclear family interests and integrity.”).

165. Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 36 (1993-94).

166. CLIVE DEAN, THE ARGUMENTS FOR AND AGAINST TRANSRACIAL PLACEMENT 1 (1994).

167. Sally Haslanger & Charlotte Witt, *Introduction: Kith, Kin, and Family*, in ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 1, 1 (Sally Haslanger & Charlotte Witt eds., 2005).

168. I would like to thank Joseph David for opening my eyes to this early contention of the family as a prototype for political hierarchies.

169. Mark Hulliung, *Patriarchalism and Its Early Enemies*, 2 POLITICAL THEORY 410, 411 (1974).

170. *Id.* at 412.

power was grounded in patriarchal power, and it symbolized divine order.<sup>171</sup>

Towards the end of the seventeenth century, Western political thought broke away from the static quality inherent in this order, though not necessarily from patriarchy as a social practice. The guiding principle now became that of liberalism and the placing the individual and his/her well-being at the center of political thought.<sup>172</sup> Political power was justified as a result of acts of consent made by free-born individuals—"contract and individual choice supplanted birth and divine designation as crucial factors in social and political analysis."<sup>173</sup>

Combining these observations with the concept noted earlier of family law as a reflection of the ideals and morals of society at large suggests that the relationship between the political and the family has been reversed in terms of who now influences what. In today's reality it is the political paradigm that is guiding the norms of family law.

It is within the confines of this general theory of law as a mirror image of the dominant forces in society at large that I come to perceive the religious matching requirement in Israeli adoption law. In order to understand why the religious matching requirement was incepted and why it was eventually shaped the way it was, one needs to identify the forces that define Israeli society as a whole in inter-group relations. Such forces are to be referred to as the grand norms. The assertion is that there exist two such grand norms in the Israeli context. The first is the maintenance of the *millet* system, while the second is the hegemonic status of Jewish collective interests.

#### B. *The Millet System as a Grand Norm of Inter-Religious Relations*

In legal terms, the *millet* system is a jurisdictional allocation scheme. It identifies the institutions and the norms that govern matters of personal status.<sup>174</sup> This system, originally of Ottoman design, managed to survive,

171. Melissa A. Butler, *Early Liberal Roots of Feminism: John Locke and the Attack on Patriarchy*, 72 AM. POLITICAL SCI. REV. 135, 136 (1978).

172. See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1047 n.239 (1992).

173. Butler, *supra* note 171, at 136.

174. The term *millet* has a number of meanings. Besides the sense of a legal institution with jurisdictional powers over community members, it has also been used in order to refer the collectivity of individuals that share the same religious identity, and as an adjective to "denote . . . the body of doctrine and practice common to one of these confessions: *millet* worship, *millet* ritual, and *millet* law." See Roderich H. Davison, *The Millet*

albeit with major modifications in the matters that mandate recourse to religious community institutions and in the norms that each religious community was able to implement. Despite these changes, the basic mandate of the religious institutions over matters of marriage and divorce was maintained throughout the years. Indeed, in present day Israel, there is no secular civil regime that affords local citizens an alternative regime of governance in matters of marriage and divorce, no matter how secular the couple happens to be in their personal convictions. Because of the dominance of the religious establishment over family issues under the *millet* system, another basic restriction has survived: for any of the religious institutions to deal with a couple's marriage or divorce, both parties must belong to the same religious community; otherwise, the religious institution will not be jurisdictionally competent.<sup>175</sup> Religious matching in marriage and divorce is hence a centuries-old practice under the *millet* regime. This long-established structure and the borders it drew eventually influenced adoption, which is a legal process that, like marriage and divorce, works to dissolve and create family ties among local citizens.

As previously mentioned, the *millet* system was originally set up by the Ottomans, who ruled what came to be Mandatory Palestine and Israel for 400 hundred years (1517–1917). The system granted official recognition to religious communities.<sup>176</sup> Thereafter, a recognized religious community was authorized to establish its own courts and apply its religious norms to its local religious members but not to foreigners.<sup>177</sup>

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as *Agents of Change in the Nineteenth Century Ottoman Empire*, in 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY 319, 320 (Benjamin Braude & Bernard Lewis eds., 1982).

175. See Shava, *Legal Aspects*, *supra* note 3, at 279-80.

176. The precise jurisdictional authority of the *millets* under Ottoman rule was not well defined. See IRA M. LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* 324 (1988). It is only in the nineteenth century that a clear and accurate picture is drawn as to the exact jurisdictional authority accorded to each *millet*. See Benjamin Braude, *Foundation Myths of the Millet System*, in 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE, *supra* note 174, at 69, 73; A. Üner Turgay, *Trade and Merchants in the Nineteenth Century Trabzon: Elements of Ethnic Conflicts*, in 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE, *supra* note 174, at 173.

177. As to foreign subjects, they were generally protected by what was called capitulation agreements that essentially exempted them from the jurisdiction of all local courts. Such agreements, kinds of treaties between the Ottoman Empire and foreign European powers, including Russia, put the subject of these powers under the jurisdiction of consular representatives of the foreign country in the Ottoman Empire. See Benjamin Braude & Bernard Lewis, *Introduction*, in 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE, *supra* note 174, at 1, 28-29.

The Muslim community and its *Shari'a* courts enjoyed a privileged status. Since Islam was taken by the Ottomans to be the official religion of their Empire,<sup>178</sup> *Shari'a* courts were thus entrusted not only with the duty of applying Islamic law to members of the Muslim community in matters of personal status, but also with the residual judicial capacity to deal with all disputes not coming under the jurisdiction of any of the other courts. Therefore, criminal and commercial proceedings with respect to local subjects (not with respect to foreigners, who were protected by capitulation agreements)<sup>179</sup> also found their way to the *Shari'a* courts. Though the reforms that took place in the Ottoman Empire in the nineteenth century (*Tanzimat*)<sup>180</sup> brought limitations to *Shari'a* courts' jurisdiction in commercial and criminal matters,<sup>181</sup> the jurisdiction of the *millet* religious courts as well as that of the *Shari'a* courts in matters of personal status remained intact and were even confirmed.<sup>182</sup>

178. See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 89 (1964). See also BERNARD LEWIS, THE EMERGENCE OF MODERN TURKEY 40 (1961) (observing that "in fact the Ottomans went further than any prior Muslim regime in establishing the sole authority of the Seriat [Shari'a] and its exponents"). This institution of Islamic law was attributed to Sultan Suleiman I (1520–1566), also known as the *Kanuni*—the Legislative, or the Magnificent. See Ebulula Mardin, *Development of the Shari'a under the Ottoman Empire*, in LAW IN THE MIDDLE EAST 279, 282-83 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

179. See GOADBY, *supra* note 20, at 58-65.

180. The word *Tanzimat* comes from the Arabic root *nizam* meaning order, regulation.

181. Established under these reforms, the new civil courts, or *Nizamia* courts, applied general territorial laws, or codes of law applicable to all Ottoman subjects. French law majorly influenced these newly enacted codes. Thus for instance, the Commercial Code enacted in 1850, the Criminal Code enacted in 1857, the Maritime Code enacted in 1863, and the Civil and Criminal Procedure Codes enacted in 1879 were all authored on the basis of parallel French legislation. EISENMAN, *supra* note 60, at 12-14. A major exception was the Ottoman civil code, called the *Mejelle* and enacted in 1879, which also built heavily on Muslim legal doctrines. The *Mejelle* was a breakthrough in legal tradition as far as Islamic law was concerned since it was held that Islamic law was not suitable for codification. See S.S. Onar, *The Majalla*, in LAW IN THE MIDDLE EAST, *supra* note 178, at 292; SCHACHT, *supra* note 178, at 92.

182. See RODERIC H. DAVISON, REFORM IN THE OTTOMAN EMPIRE, 1856-76, 132 (1963). This was evident in two major prescripts issued by the Sultan, one in 1839 called the *Hatti Sherif of Gulhan* (which also marked the beginning of the *Tanzimat* period) and the second issued in 1856 called the *Hatti Sherif Houmayon*, in which the Sultan specifically reaffirmed the commitment to religious freedom and the *millets*. Additionally, the newly adopted constitution of 1876, which essentially concluded the reform period in the Ottoman Empire, also affirmed the principle that matters of personal status are to be handled by the religious courts. See Edoardo Vitta, *The Conflict of Personal Laws*, 2 ISR. L. REV. 170, 173 (1966).

The rationale behind the *millet* system is unclear. In some respects the special status enjoyed by the Christian and Jewish communities under the *millet* system could be attributed to Islam itself.<sup>183</sup> As a separate category between the religion of the true believers (Muslims) and the pagans, Islam designated a special status for the People of the Book (*Ahl al-Kitab*), also known as the Protected People (*Ahl al-Dhimma*).<sup>184</sup> Under Islam, followers of the monotheistic religions that preceded Islam, namely Christians and Jews, are to be protected by the Muslim state upon acceptance of Muslim rule and payment of certain taxes (a poll tax, *jizya*, and a land tax, *kharaj*).<sup>185</sup> As a result of this status, both the Christian and Jewish communities were allowed to practice their religion and to enjoy a measure of communal autonomy.<sup>186</sup> This meant that both communities could retain their religious organizations, administer their religious norms on matters of personal status to their community members, and manage their places of worship and religious trusts.<sup>187</sup> However, the *millet* system could also be seen as a continuation of a traditional custom<sup>188</sup> that pre-dates Islam: the custom of granting a measure of autonomy to ethnic and religious minorities.<sup>189</sup>

In addition, the Ottoman *millet* system served as an imperial mechanism of administrative control.<sup>190</sup> The *millets* assisted in collecting taxes and administering the rule of law in the vast and heterogeneous areas ruled by the Ottoman Empire.<sup>191</sup>

183. LAPIDUS, *supra* note 176, at 323.

184. C.E. Bosworth, *The Concept of Dhimma in Early Islam, in* CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE, *supra* note 174, at 37.

185. See H.A.R. GIBB & HAROLD BOWEN, ISLAMIC SOCIETY AND THE WEST: A STUDY OF THE IMPACT OF WESTERN CIVILIZATION ON MUSLIM CULTURE IN THE NEAR EAST 207 (1957). The basic Qur'anic verse in this respect states: "Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the Religion of Truth, from among the People of the Book, until they pay the *Jizyah* with willing submission and feel themselves subdued." QUR'AN 9:29 ('Abdullah Yusuf 'Ali trans., 1989).

186. BERNARD LEWIS, THE JEWS OF ISLAM 20 (1984).

187. A. H. HOURANI, MINORITIES IN THE ARAB WORLD 17-18 (1947).

188. See HARRY LUKE, THE MAKING OF MODERN TURKEY: FROM BYZANTIUM TO ANGORA 97-98 (1936) (indicating that "[t]he autonomy of the *millets* was based . . . on ancient custom"); STANFORD J. SHAW, I HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY: EMPIRE OF THE GAZIS: THE RISE AND DECLINE OF THE OTTOMAN EMPIRE 1280-1808, at 151 (1977).

189. See Vitta, *supra* note 20, at 172-73.

190. See DAVISON, *supra* note 182, at 13-14.

191. SHAW, *supra* note 188, at 58-59.



The basic feature of the *millet* system, that of attributing jurisdictional powers to recognized religious communities, was preserved by the British Mandate over Palestine (1917-1948)<sup>192</sup> and by Israel as well.<sup>193</sup> These eras saw major reforms that worked to (1) restrict the privileged status of the *Shari'a* courts<sup>194</sup> and (2) enact general territorial norms governing all local subjects irrespective of their religious affiliation.<sup>195</sup> However, in the domain of marriage and divorce, the different religious communities continued to sustain their exclusive jurisdictional authority, and the normative corollary dictating religious matching among spouses in such matters survived all of the many dramatic political and legal upheavals that came with the change of government.

More importantly, the *millet* system embodied a social code,<sup>196</sup> whereby members of the different religious communities were not supposed to mix.<sup>197</sup> The *millet* system fused together family and religious community.<sup>198</sup> Not surprisingly, one's religious identity under the *millet* conception became one's ethnic identity as well.<sup>199</sup> This fusion of relig-

192. GOADBY, *supra* note 20, at 114 ("The substitution of a British for an Ottoman authority in Palestine did not in general affect the jurisdiction of the religious courts of personal status."). See also NAOMI SHEPHERD, *PLOUGHING SAND: BRITISH RULE IN PALESTINE 1917-1948*, at 245 (1999). It should be noted that the Mandate was officially conferred on the British in 1922.

193. Yoram Shachar, *History and Sources in Israeli Law*, in *INTRODUCTION TO THE LAW OF ISRAEL* 1, 3 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); IZHAK ENGLAND, *RELIGIOUS LAW IN THE ISRAELI LEGAL SYSTEM* 13 (1975).

194. EISENMAN, *supra* note 60, at 17-18; AHARON LAYISH, *WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATES: A STUDY BASED ON DECISIONS OF THE SHARI'A COURTS IN ISRAEL* (1975).

195. See Abou Ramadan, *Judicial Activism*, *supra* note 62, at 264.

196. See TSIMHONI, *supra* note 43, at xiv (indicating that "the religious community in the Middle East retained its significance as a political and social unit, in addition to its religious function"); ROBERT BRENTON BETTS, *CHRISTIANS IN THE ARAB EAST* 115 (rev. ed., 1978) (commenting that the *millet* system "precluded concern for, or even interest in, any people but those of one's own religious community").

197. See GABRIEL BAER, *POPULATION AND SOCIETY IN THE ARAB EAST* 68 (Hanna Szoke trans., 1964) (indicating that "religious endogamy is still the rule in most rural areas, and to some extent in the cities too").

198. Kemal H. Karpat, *Millets and Nationality: The Roost of the Incongruity of Nation and State in the Post Ottoman Era*, in 1 *CHRISTIAN AND JEWS IN THE OTTOMAN EMPIRE* 141, 143 (Benjamin Braude and Bernard Lewis eds., 1982).

199. See Stephen Goldstein, *Multiculturalism, Parental Choice and Traditional Values: A Comment on Religious Education in Israel*, in *CHILDREN'S RIGHTS AND TRADITIONAL VALUES* 118, 120 (Gillian Douglas & Leslie Sebba eds., 1998). According to the *Encyclopædia Britannica*, *millet* in Turkish means both "religious community" and "people", thus conflating religion and ethnicity in the very term itself. See "millet," *Ency-*

ion and ethnicity overshadowed the efforts made in the nineteenth century to construct a unifying concept of Ottoman citizenship.<sup>200</sup> The *millet* system was the reflection of the basic socio-cultural framework through which individuals interacted amongst themselves and in relation to the state.<sup>201</sup> Local subjects assumed their status and position in society through membership in the *millets*.<sup>202</sup> As Albert Hourani has noted: each of the groups existing under Ottoman rule “was a ‘world’, sufficient to their members and exacting their ultimate loyalty. The worlds touched but did not mingle with each other; each looked at the rest with suspicion and even hatred. Almost all were stagnant, unchanging and limited.”<sup>203</sup> The religious communities, as stated by another scholar, “were psychologically separated from each other, if not segregated by law.”<sup>204</sup>

The governments that followed preserved much of the social-cultural understanding embedded in the *millet* system. Neither the British authorities during the Mandate nor the Israeli legal system after the establishment of the state sought to create or impose any other civil identity in lieu of the religious (ethnic) one of local subjects. The motivation for preserving the *millet* system came from the realization that it had become part of the defining socio-cultural framework of individual identity. As Justice Moshe Silberg of the Israeli Supreme Court put it:

And why are matters of personal status governed according to the religious law of the parties? Because their regulation is not the same for every person; because in these matters, a thread of presence and tradition is woven in them and they differ and change with the divergence of self-perceptions in respect of religious belief, morals, culture, tradition, etc.  
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Others have divested the *millet* system from any individual component, perceiving it as a structure that is solely concerned with maintaining the religious group.<sup>206</sup> The individual, according to this perception, is

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*clopædia Britannica*, <http://www.britannica.com/EBchecked/topic/382871/millet> (last visited Feb. 15, 2010).

200. DAVISON, *supra* note 182, at 333.

201. Karpel, *supra* note 198, at 142.

202. SHAW, *supra* note 188, at 151.

203. HOURANI, *supra* note 187, at 22.

204. BRUCE MASTERS, *CHRISTIANS AND JEWS IN THE OTTOMAN ARAB WORLD: THE ROOTS OF SECTARIANISM* 17 (2001). Note, however, that as far as the Ottomans were concerned, the Christians, though divided into different *millets*, were considered as one religious community—at least among the Arab subjects of the empire. *Id.* at 64.

205. CA 26/51 Kotik v. Wolfson [1951] IsrSC 5 1341, 1345.

206. See MICHAEL WALZER, *ON TOLERATION* 18 (1997).

invisible; the jurisdiction afforded to the different *millets* in respect of their members is designed to sustain the religious group as such.<sup>207</sup> But since the system made it possible for the major religious communities to co-exist and function side by side, it was also perceived as a model of tolerance and pluralism, albeit illiberal in nature. Will Kymlicka thus calls the *millet* system a “federation of theocracies.”<sup>208</sup>

In the Knesset debates MK Arditi said that the religious matching requirement was necessary, given the “demographic and religious conditions of our country” where “citizens of different beliefs and religions” live. Arditi was essentially referring to this existing basic legal norm of separateness embodied in the *millet* system. Indeed, one major commentary on Israeli adoption law explains the origins of the religious matching requirement under Israeli adoption law in the following way:

The Israeli legislature when dealing with the subject of adoption faced a given reality: the British Mandate authorities included adoption in the list of personal status issues and made it bound by the exclusive jurisdiction of the courts of the different religious communities.

One may assume that the legislature was influenced by the sensitive structure of relationship between the different religions in the country and from the need to preserve the balance among them. Additionally, the legislature also considered the need to preserve the status quo within the Jewish community itself.<sup>209</sup>

The first part of this quotation is obviously inaccurate, given the fact that none of the religious courts had exclusive jurisdiction over adoptions.<sup>210</sup> However, the assumption that the Knesset was sensitive to the *millet* tradition when articulating the religious matching requirement seems correct. Two other Israeli scholars have similarly considered the strict religious matching requirement under Israeli law as evidence of respect for the autonomy and beliefs of each of the religious communities. Ruth Lapidot and Michael Corinaldi have observed:

Respect for religious pluralism is at the base of various laws which reject automatic equality in order to preserve the collective rights of a religious community. Thus, the Law of Adoption [sic], 5741-1981 prescribes that the adopting persons be of the same religion as the adoptee. In the matter

207. Will Kymlicka, *Two Models of Pluralism and Tolerance*, in *TOLERATION: AN ELUSIVE VIRTUE* 81, 82, 83 (David Heyd ed., 1996).

208. *Id.* at 82.

209. See SHOR, *supra* note 11, at 25.

210. *Supra* Chapter I, part B.

of weekly rest, it is provided that non-Jews may choose Sunday or Friday instead of Saturday, which is the Jewish Shabbat.<sup>211</sup>

The long-standing *millet* system offers an explanation for the modern religious matching requirement because the system represents a social code that guides the normative behavior of society at large in matters pertaining to the personal status of individuals. In this broad sense the *millet* system represents the notion that when it comes to personal status issues, each religious community should interact only among itself, whether in marriage or in adoption. As Hourani says, these “worlds” of religious communities only “touch” but do not “mingle.”<sup>212</sup>

However, the *millet* system does not offer a complete explanation for the religious matching requirement as it was enacted. From the Knesset deliberations one can clearly discern how Jewish collective sentiments were also at play in the formation of the requirement. I also believe that this latter factor was more controlling given the hegemonic status of Jewish collective interests in Israel generally. This will be discussed in greater detail in the next chapter. Two other remarks are in order to explain why the *millet* system cannot be held solely accountable for the strict religious matching requirement as it was eventually enacted in ACL, 1960. First, the rules pertaining to the jurisdiction of the different religious communities under the *millet* system did not include any positive norm mandating religious matching for the marriage to take place. It is true that the system as it operated made trans-religious marriages for local citizens impossible to conclude because of the exclusive jurisdiction of the religious courts in matters of marriage—a jurisdiction that was contingent upon both parties belonging to the same religious community.<sup>213</sup> But again, Israel never had an anti-miscegenation law that banned or criminalized inter-religious marriages, as was the case in some states in America, where trans-racial marriages were considered a crime until 1967.<sup>214</sup> In fact, throughout history the existing legal system worked to devise avenues of legal recourse for couples of a mixed marriage who fell under the jurisdiction of more than one religious institution. At first, it was the *Shari'a* courts as the official state courts that assumed the role of providing relief in such cases.<sup>215</sup> Later, when the *Shari'a* courts lost this status during the British Mandate, the Chief Jus-

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211. Lapidoth & Corinaldi, *supra* note 9, at 277-78.

212. HOURANI, *supra* note 187, at 22.

213. See Shava, *Legal Aspects*, *supra* note 3, at 279-80.

214. *Loving v. Virginia*, 388 U.S. 1 (1967).

215. VITTA, *supra* note 20, at 227.

tice of the Supreme Court was accorded special jurisdictional prerogatives in such cases.<sup>216</sup> In 1969 the Israeli Knesset enacted a special law, Matters of Dissolution of Marriage, (Jurisdiction in Special Cases) Law, 5729-1969,<sup>217</sup> which was specifically designed to offer a couple who are local citizens but belong to different religious communities a legal course of action in divorce cases.<sup>218</sup>

Secondly, although the *millet* system did represent a social code in favor of religious matching in adoption, in practice this social code did not apply equally to all religious communities. Close family ties existed between the different Palestinian-Arab Christian religious communities throughout history due to frequent inter-marriage between them.<sup>219</sup> Moreover, Palestinian-Arab Christians and Muslims have a common national identity and a common cultural identity.<sup>220</sup> Commenting on this aspect of intra-Palestinian relations, Daphne Tsimhoni provided:

Having lived under Muslim rule for hundreds of years and been socially and economically intermingled with the Muslim majority, [the Christians] have become culturally influenced by the majority and developed a sense of dependence on and identification with the Muslim Arab environment.<sup>221</sup>

This does not mean that religious affiliation is totally irrelevant to the sphere of family relations within the Palestinian-Arab community. As noted before, according to the *millet* grand norm, one's religious identity does define one's options in marriage relations. But because of the cultural and social reality among Palestinian-Arab Christians and Muslims, it can thus be assumed that a less stringent religious matching requirement in adoption is called for. It is because of this underlying reality that

216. *Id.*

217. 23 LSI 274 (1968/69) (Isr.).

218. Menashe Shava, *Connecting Factors in Matters of Personal Status in Israel*, 5 TEL-AVIV U. STUD. L. 103, 114 n.51 (1982).

219. See FOUAD FARRAH, AL HUJRAH AL-HAYA, AL MASSEHOON AL-ARAB FI AL-DIYAR AL-MUQADASSAH [THE LIVING STONES, THE ARAB CHRISTIANS IN THE HOLY LAND] 239 (2003) (in Arabic). Given that the religious matching requirement was perceived as preventing adoption among Christians belonging to different communities, an official report submitted in 1979 suggested that in such an instance the requirement can be relaxed. See STATE OF ISRAEL, MINISTRY OF JUSTICE, DIN VE-HESHBON HA-VA'ADA LE-INYAN HOK HA-IMUTZ [REPORT OF THE COMMITTEE INSPECTING THE ADOPTION OF CHILDREN LAW] 38-39, 41 (1979) (in Hebrew). Though the recommendations of this committee were instrumental in devising the different provisions of ACL, 1981, the exception proposed to the religious matching requirement did not make it through.

220. See BETTS, *supra* note 196, at 162.

221. Tsimhoni, *supra* note 145, at 125; see also BETTS, *supra* note 196, at 162.

the need for a strict religious matching requirement among Palestinian-Arab Christians and Muslims was questioned.<sup>222</sup> Had the collective interests of the Palestinian-Arab community minority been equally considered, it is not at all clear that the strict religious matching requirement would have been accepted. All this implies that other considerations of a more detrimental nature were at play here. As is evident from the Knesset deliberations, Jewish collective sentiments, given Israel's basic national character as a Jewish state, gained influential and hegemonic status and dictated the actual content and limits of the religious matching requirement.

### C. *The Hegemonic Status of Jewish Collective Interests*

In liberal democracies, the concept of equal citizenship is the *raison d'être* of the state.<sup>223</sup> As a result, the state's primary objective is to serve all of its citizens, irrespective of their ethnic or religious identity.<sup>224</sup> But in a nation-state, the state is established in order to serve the interests of its national majority, rather than those of all of its citizens.<sup>225</sup> The state is not conceived as, nor does it pretend to be, neutral towards the identity of its citizens. On the contrary, it actively works to promote the security, demography, language, culture, and interests of its national majority.<sup>226</sup> "As a result, the non-core groups cannot be fully equal and cannot fully identify themselves with the state."<sup>227</sup> Instead they are sometimes granted certain group accommodations designed to maintain and preserve them as a distinct and separate entity.<sup>228</sup>

Constitutionally, Israel is defined as a "Jewish and democratic" state.<sup>229</sup> This definition suggests that these two values are equal in terms

222. Englard, *supra* note 11, at 337; Jaffe, *Imutz Yeladim Belsrael*, *supra* note 67, at 212.

223. Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 *NATIONS & NATIONALISM* 475, 476 (2002).

224. *Id.*

225. *Id.* at 478.

226. *Id.* at 497.

227. *Id.*

228. *Id.* at 483.

229. RUTH GAVISON, *YISRAEL KE-MEDINA YEHUDIT VE-DEMOKRATIT: METAKHIM VE-SIKUYIM [ISRAEL AS A JEWISH AND DEMOCRATIC STATE: TENSIONS AND PROSPECTS]* (1999) (in Hebrew); RAV-TARBUTIYUT BE-MEDINA DEMOKRATIT VE-YEHUDIT: SEFER HA-ZIKARON LE-ARIEL ROSEN-ZVI ZA'L [MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: THE ARIEL ROSEN-ZVI MEMORIAL BOOK] (Menachem Mautner et al. eds., 1998)

of the state constitutional commitment. However, this is not the case, at least in terms of the state's self-perceived obligation of serving the collective interests of its various national and religious groups. As Sammy Smooha has noted, in Israel:

[t]he state sees its destiny and duty to preserve the Jewish people and regards itself as the main tool to carry out this ultimate end.

Zionism is de facto state ideology. Its central purpose is to make Israel Jewish in demography, language, culture, institutions, identity and symbols and to protect Jewish lives and interests all over the world.<sup>230</sup>

In terms of the Palestinian-Arab minority, whether it is understood to be one national group or a cluster of minority religious groups, some measures have been taken by the state in order to preserve it as distinct and separate. Accommodations have been made in respect of language, especially in the education system, and religion, including support for "separate religious institutions that ensure preservation of religion and endogamy."<sup>231</sup> Yet such recognition is conditioned by an expectation that it not hinder the supremacy of Jewish collective interest.<sup>232</sup>

(in Hebrew); see Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995); Ran Hirschl, *Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998). Cf. David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISRAEL L. REV. 238 (1992) [hereinafter Kretzmer, *New Basic Laws*]; David Kretzmer, *Constitutional Law*, in INTRODUCTION TO THE LAW OF ISRAEL 39 [hereinafter Kretzmer, *Constitutional Law*].

230. *Id.* at 485; see also Mark A. Tessler, *The Middle East: The Jews in Tunisia and Morocco and the Arabs in Israel*, in PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES 245, 247 (Robert G. Wirsing ed., 1981) (noting the official commitment of the State of Israel to its Jewish identity and how it "is officially committed to perpetuating and enriching the Jewish heritage and to meeting the needs of Jews throughout the world").

231. Smooha, *supra* note 223, at 488; see also Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT'L L. & POL. 885, 900, 942-48, 954-60 (2004); DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 163-68 (1990) (discussing the religious organization of the Palestinian-Arab religious communities under the heading of "group rights"); Itzhak Zamir, *Shivayon Zekhuyot Klapeh Aravim be-Yisrael [Equality of Rights for Arabs in Israel]*, 9 MISHPAT U-MIMSHAL 11, 26, 30 (2005) (in Hebrew); AMNON RUBINSTEIN & BARAK MEDINA, *I HA-MISHPAT HA-HUKATI SHEL MEDINAT YISRAEL [THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL]* 429-35 (6th ed. 2005) (in Hebrew).

232. Michael Karayanni, *Ricochetim Yuhudim u-Dimocratim [Jewish and Democratic Ricochets]*, 9 MISHPAT U-MIMSHAL 461, 470 (2006) (in Hebrew).

The hegemonic status of Jewish collective interests is reflected in a number of legal paradigms and norms, both national and religious. A prominent enactment in this respect is the Law of Return, 1950,<sup>233</sup> in which every Jew in the world is granted the right to immigrate to Israel and, through the working of the Nationality Law, 1952,<sup>234</sup> to become an Israeli citizen. Indeed, the Law of Return is regarded by many as representing the central ethos of Israel as a Jewish state.<sup>235</sup> As noted by one scholar, this law “implies, in a nutshell, why this state had to be established and what it stands for.”<sup>236</sup> In light of Israel’s Jewish identity it was natural that the flag, national emblem, anthem, and official holidays of the State would be identified, as a matter of course, with the Jewish tradition.<sup>237</sup> Jewish Zionist organizations, such as the World Zionist Organization and the Jewish Agency, received official status<sup>238</sup> and, under the auspices of the law, they are “to continue acting within the State of Israel for developing and settling the land, absorption of immigrants from the Diaspora and coordination in Israel of Jewish institutions and organizations active in the field.”<sup>239</sup>

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233. 4 LSI 114 (1949-50) (Isr.).

234. 6 LSI 50 (1951-52) (Isr.).

235. See Rubinstein, *supra* note 35, at 413 (characterizing the Law of Return as the *raison d'être* of Israel as a Jewish State); see also HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 395 (2d ed. 1996) (noting that the *raison d'être* of Israeli statehood was to provide “a homeland for all who wished to forsake the Diaspora and come home”).

236. Uri Yadin, *Sources and Tendencies of Israeli Law*, 99 U. PA. L. REV. 561, 567-68 (1951).

237. For a survey of state-enacted laws that deal with state symbols, see KRETZMER, *supra* note 231, at 17-22; see also GAD BARZILAI, COMMUNITIES AND THE LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES 109, 110 (2003) (“[s]tate law officially recognizes no Arab-Palestinian festival”).

238. The World Zionist Organization—Jewish Agency (Status) Law, 5713-1952, 7 LSI 3 (1952-53) (Isr.).

239. It is also worth mentioning that the specific role and function of WZO and the Jewish Agency were defined in covenants signed between them and the Government of Israel. Such covenants enabled WZO and the Jewish Agency to perform semi-governmental activities which, in light of their statutory mandates, were restricted to the Jewish community, whether in Israel or in the diaspora. Foremost among these functions is the responsibility for agricultural settlement. As a result, “while many new agricultural settlements have been created for the Jews, none have been established for Arabs.” Kretzmer, *Constitutional Law*, *supra* note 229, at 50.



The Jewish domination of the public sphere goes further, beyond such symbols.<sup>240</sup> As noted by scholars, the concept of citizenship has been influenced by the Jewish nature of Israel.<sup>241</sup> In Israel there are two types of citizenship. The first is republican in nature and has strong collective goals of a shared moral purpose, a perception of the common good and core civic values—relevant to the Jewish majority.<sup>242</sup> The second type is individual in nature—relevant to the Palestinian-Arab minority—and builds on liberal ideals of personal (not collective) rights. Another example of domination concerns the official state language. Although under the letter of the law both Arabic and Hebrew are considered official languages, it is Hebrew that dominates the public sphere.<sup>243</sup> On some occasions, courts have compelled public bodies to add Arabic inscriptions to signs and documents.<sup>244</sup> However, this is to be done, as the Israeli Supreme Court made clear, only as long as it does not undermine the hierarchical relationship between the two languages under which Hebrew is regarded as the “senior sister.”<sup>245</sup> Based on this and many other instances, the Palestinian-Arab community in Israel has been called “the most remote, excluded community from the state’s metanar-

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240. Henry Rosenfeld, *The Class Situation of the Arab National Minority in Israel*, 20 COMP. STUD. SOC’Y & HIST. 374, 400 (1978) (stating that the State of Israel “fosters a Jewish state-nation ethos and economy and therein sees the Arab strictly as a minority, or a series of minority groupings, and regards development as relating specifically to Jews”); Mark A. Tessler, *The Identity of Religious Minorities in Non-Secular States: Jews in Tunisia and Morocco and Arabs in Israel*, 20 COMP. STUD. SOC’Y & HIST. 359, 360 (1978) (noting how Israel is firmly committed to a Jewish identity in different spheres that go beyond national symbols).

241. See Gershon Shafir & Yoav Peled, *Citizenship and Stratification in an Ethnic Democracy*, 21 ETHNIC & RACIAL STUD. 408 (1998); Ayelet Shachar, *Whose Republic? Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 260-62 (1999).

242. See Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432 (1992); see also Raphael Cohen-Almagor, *Cultural Pluralism and the Israeli Nation-Building Ideology*, 27 INT’L J. MIDDLE EAST STUD. 461, 462 (1995).

243. See Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Changes*, 36 ISR. L. REV. 5 (2002).

244. See Ayelet Harel-Shalev, *Arabic as a Minority Language in Israel: A Comparative Perspective*, 14 ADALAH’S NEWSLETTER 1, 5-6 (2005); BARZILAI, *supra* note 237, at 111-13.

245. See H CJ 4112/99 Adalah, *The Legal Center for Arab Minority Rights in Israel v. Municipality of Tel-Aviv Jaffa* [2002] IsrSC 56(5) 393, 418 (per Chief Justice Aharon Barak).

ratives,”<sup>246</sup> with the status of second-<sup>247</sup> or even third-class<sup>248</sup> citizenship. In many respects, this hierarchical structure has determined the boundaries of the public sphere in Israel,<sup>249</sup> thereby making it possible to also characterize the Palestinian-Arab community in Israel as “the invisible man”<sup>250</sup> or the “odd man out.”<sup>251</sup>

The Jewish nature of the State of Israel has similarly come to dominate the sphere of religion and religion and state relations. This is principally reflected in the significant level of recognition and public funding awarded to Jewish religious institutions. Soon after the establishment of the State, the Knesset enacted an independent statute that defines the jurisdiction of Rabbinical courts and the procedure for the appointment of judges (*dayanim*) to such courts.<sup>252</sup> Special legislation organizes the operation of other Jewish religious institutions such as the Chief Rabbinate<sup>253</sup> and Jewish religious councils.<sup>254</sup> The Knesset has also enacted laws

246. BARZILAI, *supra* note 237, at 7; see also As’ad Ghanem, *State and Minority in Israel: The Case of Ethnic State and the Predicament of Its Minority*, 21 ETHNIC & RACIAL STUD. 428, 432-34 (1998) (stating that as a result of Israel’s structural identification with its Jewish ethnic ideals, the Palestinian-Arab minority was collectively excluded from the official public domain of the state).

247. Ahmad H. Sa’di, *Israel as Ethnic Democracy: What are the Implications for the Palestinian Minority*, 22 ARAB STUD. Q. 25, 25 (2000).

248. GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 110 (2002).

249. Baruch Kimmerling, *Sociology, Ideology, and Nation-Building: The Palestinians and Their Meaning in Israeli Sociology*, 57 AM. SOC. REV. 446, 450 (1992) (Arabs in Israel “remained . . . outside of the collectivity’s boundaries as nonmembers of ‘Israel.’”); WALZER, *supra* note 206, at 41 (noting how the Palestinian Arab minority in Israel, though citizens of the state, nevertheless “do not find their history or culture mirrored in its public life”).

250. Sammy Smooha & Don Peretz, *The Arabs in Israel*, 26 J. CONFLICT RESOL. 451 (1982) (adding that this characterization is also true with respect to the surrounding Arab countries that have also absented the Palestinian-Arab minority in Israel from the overall Israeli-Arab conflict).

251. Joel S. Migdal & Baruch Kimmerling, *The Odd Man Out: Arabs in Israel*, in THROUGH THE LENS OF ISRAEL: EXPLORATIONS IN STATE AND SOCIETY 173 (Joel S. Migdal ed., 2001).

252. Rabbinical Courts (Validation of Appointments) Law, 5712-1952, 6 LSI 62 (1951-52) (Isr.); Dayanim Law, 5715-1955, 9 LSI 74 (1954-55) (Isr.).

253. Chief Rabbinate of Israel Law, 5740-1980, 34 LSI 97 (1979-80) (Isr.).

254. Jewish Religious Services (Consolidated Version) Law, 5731-1971, 25 LSI 125 (1970-71) (Isr.). These religious councils work to minister to the religious needs of the Jewish community in such matters as maintenance of synagogues, cemeteries, ritual baths, supervision of *kashrut*, and appointment of marriage registrars. See EDELMAN, *supra* note 60, at 52.

regulating kosher food<sup>255</sup> and kosher certification and fraud prevention in the selling of Jewish religious items<sup>256</sup> such as Torah scrolls, *teffilin* (phylacteries),<sup>257</sup> and *mezuzot* (singular *mezuzah*).<sup>258</sup> Jewish religious holidays and days of remembrance received statutory recognition.<sup>259</sup> In addition, the Knesset took steps to guarantee the preservation of the heritage of certain Jewish communities in legislation.<sup>260</sup> Recently, special legislation was issued regulating the place of residence of rabbis.<sup>261</sup> On top of all of this, the Ministry of Education, from the establishment of the State of Israel until today, has operated a Jewish religious public school system that runs parallel to the “general” system and is fully funded by the state.<sup>262</sup>

Several scholars have depicted the preferable treatment accorded to Jewish religious institutions in other contexts as well. Gad Barzilai, for example, refers to the arrangements made under the Protection of Holy Places Law, 5727-1967.<sup>263</sup> Formally, the law protects all religious sites in Israel without distinction. Yet the Ministry for Religious Affairs, in an effort to make the provisions of the law operational, has issued regulations that identify only Jewish religious places as protected religious sites (referring to Protection of Holy Sites Regulations, 1981).<sup>264</sup> Amnon Rubinstein writes that in foreign diplomatic relations, the Chief Rabbis

255. Kashrut (Prohibition of Deceit) Law, 5743-1983, 37 LSI 147 (1982-83) (Isr.); *Kasher Food for Soldiers Ordinance*, 5709-1948, 2 LSI 37 (1948-49) (Isr.).

256. Phylacteries and *Mezuzot* (Prevention of Cheating) Law, 5735-1974, 29 LSI 21 (1974-75) (Isr.).

257. These are small boxes containing parchments with four passages from the Bible. A leather strap connects one box to the head. Another strap attaches the second box to the left arm during morning prayer, following a Biblical decree (Deuteronomy 6:8), and symbolizes emotional and intellectual belief in Judaism.

258. A *mezuzah* is a small case, made of various materials, about 3 inches (8 centimeters) long containing parchment inscribed with 15 verses from the Bible. The *mezuzah* is placed at the upper section of the right doorpost of the home and of each room. It serves as a reminder of God's presence everywhere.

259. Prohibition of Opening Places of Entertainment on Tisha'a be-Av (Special Authorization) Law, 5758-1997, S.H. 8.

260. Counsel for the Perpetuation of the Heritage of Sephardic and Oriental Jewry Law, 5763-2002, S.H. 92.

261. Residence of Rabbis in their Place of Service Law, 5763-2002, S.H. 101.

262. See Goldstein, *supra* note 199, at 121-22; Shimon Shetreet, *State and Religion: Funding of Religious Institutions—The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421 (1999).

263. 21 LSA 76 (1966-67) (Isr.).

264. BARZILAI, *supra* note 237, at 109.

of Israel receive protocol priority over the heads of other religious communities in Israel.<sup>265</sup> Martin Edelman shows that in 1981 the salary of a Rabbinical court judge (*dayyan*) was raised to the equivalent of “a magistrate in the civil court system,” but the salary of a Muslim *qadi* “remained that of a Justice of the Peace.”<sup>266</sup>

The status and, as a result, the amount of recognition given to Palestinian-Arab religious institutions is entirely different.<sup>267</sup> Officially, such religious communities are recognized and accommodated as minority groups in the interest of preserving their religious identity and religious divides. Their status is not derived from Israel’s established religion, which is Judaism, but from Israel’s general policy towards the Palestinian-Arab minority. Thus, while the state nominally respects the existing religious communities, thereby exhibiting commitment to democratic norms pertaining to tolerance, pluralism, and freedom of religion, its political and national interests dictate that budgets allocated to the Palestinian-Arab religious communities are disproportionately slim.<sup>268</sup> Regarding the Muslim community, aside from three enactments in the Ottoman and British Mandate periods,<sup>269</sup> the Israeli Knesset added two statutes dealing with the internal organization of that community. One has to do with the appointment of Muslim judges (*qadis*) to the *Shari’a* courts,<sup>270</sup> while the other deals with the handling of Muslim religious endowments (*awqaf*, or *waqf* in singular).<sup>271</sup> This latter regulation now limits rather than facilitates the Muslim community’s use of and control over such property.<sup>272</sup> The principal legal device used by Israeli government au-

265. Rubinstein, *supra* note 62, at 117.

266. EDELMAN, *supra* note 60, at 78. The practice has since stopped. A table of the current salaries of judges of all courts, including those of the Rabbinical and *Shari’a* courts, is available at [http://www.hilan.co.il/moked\\_yeda\\_lesachar/laws/mskchk66t.htm](http://www.hilan.co.il/moked_yeda_lesachar/laws/mskchk66t.htm) (last visited Feb. 15, 2010).

267. Karayanni, *The Separate Nature*, *supra* note 19, at 42.

268. Karayanni, *Living in a Group of One’s Own*, *supra* note 42, at 12.

269. Ottoman Law of Family Rights, 1917; Ottoman Law of Procedure for *Shari’a* Courts, 1917; Palestine Order in Council, 1922, art. 52, *reprinted in* 3 THE LAWS OF PALESTINE 2569 (Robert Harry Drayton ed., 1934). *See generally* VITTA, *supra* note 20, at 145-50; GOADBY, *supra* note 20, at 115-19.

270. Qadis Law, 5721-1961, 15 LSI 123 (1960-61) (Isr.); *Shari’a* Courts (Validation of Appointments) Law, 5714-1953, 8 LSI 42 (1953-54) (Isr.).

271. Absentees’ Property Law, 5710-1950, 4 LSI 68 (1949-50) (Isr.), *amended by* Absentees’ (Amendment No. 3) (Release and Use of Endowment Property) Law, 5725-1965, 19 LSI 55 (1964-65) (Isr.).

272. ALISA RUBIN-PELED, *DEBATING ISLAM IN THE JEWISH STATE: THE DEVELOPMENT OF POLICY TOWARD ISLAMIC INSTITUTIONS IN ISRAEL* (2001); *see also* LAYISH, *supra* note

thorities in this respect was the Absentees' Property Law of 1950.<sup>273</sup> This law made it possible to characterize Muslim religious endowments as absentee property by claiming that the Muslim religious officials who had handled the affairs of such property had become citizens or residents of Arab countries considered to be enemy states.<sup>274</sup> Consequently, a great deal of *waqf* property came under the control and, subsequently, the ownership of a government official known as the Custodian of Absentees' Property.<sup>275</sup> Israeli legislation dealing with Christian communities is almost non-existent, and successive Israeli governments have been most sensitive about intervening in the internal affairs of the Christian communities so as not to endanger Israel's foreign relations with the Christian West.<sup>276</sup> The Druze community was fortunate to have an independent law enacted in respect of its courts and the appointment of judges, as well as a set of regulations dealing with its internal organization.<sup>277</sup> Even here, however, it has been said that this preferable treatment was motivated by a desire to reward the Druze community for its loyalty to the State of Israel (Druze men regularly serve in the Israeli army, while the overwhelming majority of the Palestinian-Arab community do not)<sup>278</sup> and by an overall divide-and-rule policy to fragment the Palestinian-Arab minority in Israel so that it can be better controlled.<sup>279</sup>

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194; Aharon Layish, *Ha-Irgun ha-Adati shel ha-Muslimim* [Communal Organization of the Muslims], in HA-ARAVIM BE-YISRAEL: RETSIFUT VE-TMURA [THE ARABS IN ISRAEL: CONTINUITY AND CHANGE] 104, 112-17 (Aharon Layish ed., 1981) (in Hebrew).

273. 4 LSI 68 (1949-50) (Isr.). Actually this law was not the first enactment to deal with absentee property, it was preceded by the Emergency Regulations (Absentees' Property), 5709-1948, P.G. Supp. II, 59 (Isr.).

274. For a detailed discussion on the manner in which Muslim religious endowments became absentee property, see EISENMAN, *supra* note 60, at 224-34. For an account of the use of this mechanism in respect of the property of the Palestinians in Israel in general, see DON PERETZ, ISRAEL AND THE PALESTINIAN ARABS 141-91 (1958).

275. KRETZMER, *supra* note 231, at 176-78; Saban, *supra* note 231, at 956-58.

276. See Tsimhoni, *supra* note 145, at 126.

277. Regulations on Religious Communities (Organization) (The Druze Community), 5756-1995; see also Aharon Layish & Salman H. Fallah, *Ha-Irgun ha-Adati shel ha-Druzim* [Communal Organization of the Druze], in HA-ARAVIM BE-YISRAEL: RETSIFUT VE-TMURA, *supra* note 272, at 123.

278. Laila Parsons, *The Palestinian Druze in the 1947-1949 Arab Israeli War*, in NATIONALISM, MINORITIES AND DIASPORAS: IDENTITIES AND RIGHTS IN THE MIDDLE EAST 144 (Kirsten E. Shulze et al. eds., 1996).

279. KAIS M. FIRRO, THE DRUZE IN THE JEWISH STATE: A BRIEF HISTORY 102-04 (1999).

Indeed, Israel's initial periodic report documenting implementation of the International Covenant on Civil and Political Rights openly admits that "[i]n comparison with funding of Jewish religious institutions, the non-Jewish communities are severely under-supported by the Government."<sup>280</sup> A petition filed before the Israeli Supreme Court challenging the 1998 budget for the Ministry of Religious Affairs exposed this disparity in state funding. Although the non-Jewish communities in Israel form about 19.1% of the total population, they were granted only 1.86% of the Ministry's budget.<sup>281</sup>

The hegemony of Jewish collective interests in the public sphere tends to influence the structure of other normative settings, especially if these other spheres happen to be of significance to the hegemonic group. In the previous section, I exposed the close relationship between the family and the political order—with the latter becoming more and more a prototype for the former. In the next section, I seek to further expose this relationship in the context of adoption. The hegemonic status of Jewish collective interests in the national definition of the State of Israel and in religion and state relations have come to dictate the norms of religious matching and other issues that were also perceived as particularly important in terms of these collective interests.

### *1. The Hegemonic Interests of the Jewish Majority: From the General to the Particular*

An interesting literary dialogue took place between a Palestinian and an Israeli writer. The first pronouncement came from the Palestinian writer Ghassan Kanafani (1936–1972) in the title story of his book, *Returning to Haifa*,<sup>282</sup> and the second came from an Israeli writer, Sami

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280. THE STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR): COMBINED INITIAL AND FIRST PERIODIC REPORT OF THE STATE OF ISRAEL 228 (1998); *see also* Saban, *supra* note 231, at 943 (“[t]hroughout Israel’s history, there has been major, ongoing discrimination in budgeting for religious services for the Muslim and Christian communities in comparison to that for the Orthodox Jewish community”).

281. HCJ 240/98 Adalah—The Legal Center for the Rights of the Arab Minority in Israel v. Minister of Religious Affairs [1998] Isr SC 52(5) 167. Some limited form of remedy was later provided by the Court. *See* HCJ 1113/99 Adalah—The Legal Center for the Rights of the Arab Minority in Israel v. Minister of Religious Affairs [2000] IsrSC 54(2) 164.

282. GHASSAN KANAFANI, PALESTINE’S CHILDREN: RETURNING TO HAIFA AND OTHER STORIES 149-88 (Barbara Harlow & Keren E. Riley trans., 2000).

Michael, in his novel *Pigeons at Trafalgar Square*.<sup>283</sup> The central plot in both texts is similar: a Palestinian child left behind by his parents in the turmoil of events in 1948 is adopted and raised by Jewish Holocaust survivors. The climax of both stories is when these children, after growing up as Israelis, come in contact with their biological families. Though each of the writers sought to echo different aspirations from this encounter, both writers use the mixed adoption setting as a proxy for national narratives and as a means for magnifying the personal impact of the events of the Israeli-Palestinian conflict.<sup>284</sup> The family and the type of relationship it establishes among its members was employed to reflect the conflicting national narratives. And children, especially if adopted by members of the rival group, become, like land and other lost property, agents through which national claims, aspirations, resentments, and traumas are raised. The status of children as controlled individuals figure in as powerful national agents able to effectively mediate between the fate of the individual and the fate of the group.<sup>285</sup> It is no coincidence, therefore, that independence from foreign imperial power can at once be transformed into a national sentiment calling for restricting the adoption of local children by foreigners.<sup>286</sup>

A group's control over its destiny thus mandates its control over its children. It is through this lens that one needs to read and understand not only the Kanafani–Michael literary dialogue, but also the deliberations that took place in the Knesset on the propriety of having a religious matching requirement. When ACL, 1960 was enacted, Israel was a new-born state. In collective Jewish (or rather Zionist) thought, the state was established in an effort to emancipate the Jewish people and provide them with a national homeland. Thus, the fate of Jewish children and the way the state should deal with them readily became associated with Israel's nation-building process and, consequently, became an object of the hegemonic forces controlling this process. In other words, what best

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283. SAMI MICHAEL, YONIM BE-TRAFALGAR [PIGEONS AT TRAFALGAR SQUARE] (2005) (in Hebrew).

284. YOCHAI OPPENHEIMER, ME'EVER LA-GADER: YITSUG HA-ARAVIM BA-SIPORET HA-IVRIT VE-HA-YISRA'ELIT (1906-2005) [BEYOND THE BARRIER: THE REPRESENTATION OF THE ARAB IN HEBREW AND ISRAELI FICTION, (1906-2005)] 428-32 (2008) (in Hebrew).

285. This very same sentiment figured centrally in limiting the adoption of local children in some countries by foreign adopters. It was felt that such a practice, when significant in number, touches on the national pride of the country.

286. Drucilla Cornell, *Adoption and its Progeny: Rethinking Family Law, Gender, and Sexual Differences*, in ADOPTION MATTERS, PHILOSOPHICAL AND FEMINIST ESSAYS 19, 20 (Sally Haslanger & Charlotte Witt eds., 2005).

suited the national aspirations of the state of Israel was best suited for its children. Actual Jewish persecution before, during, and after the Holocaust, which took the form of forceful religious conversion of Jewish children by non-Jewish adopters or custodians, further cemented the connection between the fate of children and group interests. Two famous instances stand out in this regard.

A few years before the enactment of ACL, 1960, a legal battle ensued over the custody of two Jewish brothers (the Finaly brothers) that caught the attention of the international community.<sup>287</sup> On February 14, 1944, Gestapo agents arrested two Jewish refugees from Austria, Fritz and Annie Finaly, in the village of Tornche, France. Fritz and Annie never came back. Their two children—Robert, age three, and Gerald, age two—were taken into the custody of a Catholic woman, Antionette Brun, who in 1945 initiated proceedings to formally adopt them. Meanwhile, Brun had baptized the Finaly brothers into the Catholic Church. After World War II ended, an aunt of the boys from New Zealand traced them and asked Brun to turn the children over to another aunt who was living in Israel at the time, but Brun refused. The boys' relatives filed an action in a French court asking that Robert and Gerald be handed over to their custody. A legal battle reaching France's highest court ensued and the Finaly family prevailed, winning legal custody over the two brothers. But Brun managed, with the help of several Catholic priests, to smuggle the Finaly brothers out of France and into Spain. Only after high-ranking officials in the Catholic Church intervened were the boys returned to France and placed in their relatives' care.

The Finaly brothers' saga is one of numerous cases of Jewish children who were converted to Christianity and adopted by Christian families after the children's parents perished in the Holocaust. In some of these cases, the children were found and reclaimed by their biological relatives. However, in many other cases these children only uncovered their past by accident. Some European government agencies have, at times, worked to conceal the children's origin.<sup>288</sup> One scholar, who has studied the fate of such children in Holland, dubbed their situation a

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287. For a reflection on the affair, see Schwartz, *supra* note 141, at 187-88; see also JOYCE BLOCK LAZARUS, *IN THE SHADOW OF VICHY: THE FINALY AFFAIR* (2008); ROBERT G. WEISBORD, *THE CHIEF RABBI, THE POPE, AND THE HOLOCAUST: AN ERA IN VATICAN-JEWISH RELATIONS 180-81* (1992).

288. See Michael R. Marrus, *The Vatican and the Custody of Jewish Child Survivors after the Holocaust*, 21 *HOLOCAUST AND GENOCIDE STUD.* 378, 381-85 (2007).



“Small Holocaust,” noting that for these children the “war began” only after World War II ended.<sup>289</sup>

Another episode that still reverberates until today is that of Edgardo Mortara.<sup>290</sup> One evening in June 1858, the police of the Papal States arrived at the home of the Mortaras, a Jewish family from Bologna, with orders to seize one of their eight children, six-year-old Edgardo, and transport him to Rome to be raised by the Catholic Church. The Papal police, it transpired, was acting on the direct orders of the Vatican authorities, personally authorized by Pope Pius IX. The Vatican issued the orders after learning that the Mortaras’ Catholic maid had secretly baptized Edgardo when he was ill. Convinced that Edgardo was about to die, the maid thought that having him baptized would save him in the afterlife. Edgardo eventually recovered, but his baptism made him a Christian under Catholic doctrine. Acting on the above-mentioned orders, authorities removed Edgardo from his parents’ custody, for if the child had now become a Catholic he could no longer be raised in a Jewish household. Appeals on behalf of Edgardo’s parents to have their child returned were dismissed, and he was raised at a house for Catholic converts in Rome. Church authorities told the Mortaras that they could have Edgardo back only if they converted to Catholicism. After the case attracted international attention, protests were lodged in vein by Jewish organizations and prominent political and intellectual figures in Britain, the United States, Germany, and France. In 1870, when Edgardo turned 18 and was free to return to his family, he declined, declaring his intention to remain a Catholic. He was later ordained as a priest and deployed as a missionary to preach to the Jews.

By means of such stories and recent memories, the adoption and conversion of Jewish children became associated with Jewish persecution, enabling many Knesset Members to portray the prospect of interreligious adoption as kidnapping. Jewish collective sentiments building on Jewish collective memory could not tolerate the prospects of Jewish children being adopted by non-Jewish adopters, all the more under the auspices of Israeli adoption law. While the Kanafani-Michael dialogue used a fictitious setting of a Palestinian child’s adoption by Jewish parents as means to explore the intimacies of the Israeli-Palestinian conflict and the kind of personal dynamics it is able to construct, the prospects of

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289. Avirama Golan, *Their “Small Holocaust,”* HAARETZ.COM, Mar. 10, 2008, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=265290&contrassID=2&subContrassID=15&sbSubContrassID=0&listSrc=Y> (last visited Feb. 2, 2010).

290. See DAVID I. KERTZER, *THE KIDNAPPING OF EDGARDO MORTARA* (1997).

a Jewish child being adopted by non-Jewish adopters aroused actual collective emotions that were intertwined with the collective sentiments of the Jewish majority. Since the state of Israel was perceived by the lawmakers as it was actually conceived, a state in which the Jewish collectivity is emancipated and is to fulfill the right for self-determination of the Jewish people, it was natural to the Israeli lawmakers to perceive the state as owning a special obligation to the fate of Jewish children.

The issue of religious matching in adoption, reflecting a deep aspiration for freedom from persecution, was linked to the emancipating and self-determination function of the state of Israel.<sup>291</sup> As such, adoption, like other institutions important for Israel's self-definition as a Jewish state, came under the control of the existing hegemonic national and religious forces. This sentiment was so powerful, so self-evident, that none of the MKs calling for a religious matching requirement thought to inquire into how the suggested religious matching condition would affect non-Jewish communities. There was no attempt to hear the views of or consider the implications for Israel's other religious communities regarding inter-religious adoption. Would the adoption of a Greek Orthodox child by a Catholic or even a Muslim couple be regarded as repugnant in the collective sentiments of the Palestinian-Arab minority? What would be the effect of the religious matching requirement on children whose religion is undetermined? None of these considerations are found in the Knesset's deliberations. Once Jewish collective sentiments became the basis for the discussion, and these sentiments deemed inter-religious adoption dangerous, such a norm was deemed governing in respect of all Israelis.

The dominance of Jewish collective interests was assisted yet further by the fact that the Palestinian-Arab Knesset members did not challenge any of the proposed norms that eventually formed ACL, 1960, including the religious matching requirement. Two main reasons stand behind this passive attitude. First, the adoption project was from its inception classified as a religion and state issue. ACL, 1960 was in many respects a

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291. This Israeli context of religious matching is what differentiates it from the anti-religious matching stand taken by some representatives of the Jewish community in the United States and Canada. *See supra* note 142. Outside Israel, the major concern was to maximize the options of adoption for Jewish couples, given the relatively small number of Jewish children up for adoption within the Jewish community. *See Schwartz, supra* note 141, at 182. In Israel, on the other hand, the fate of Jewish children was tangled up with the state's national aspiration, regardless of how the religious matching requirement would limit the options of Jewish couples to adopt.

compromise between the secular and religious camps in the Knesset.<sup>292</sup> The Palestinian-Arab minority was absent from the religious-secular debate in Israel.<sup>293</sup> As opposed to the religious issues concerning the Jewish community, the Palestinian-Arab minority saw its religious matters as “private” matters outside the realm of religion and state relations in Israel.<sup>294</sup> Taking part in the adoption project would have jeopardized the private nature of the religious affairs of the Palestinian-Arab community. Second, the *Shari’a* does not recognize adoption, and this must have contributed to the Palestinian-Arab Knesset members’ abstention from the debate<sup>295</sup>—or the vast majority of their constituency was and still is Muslim.<sup>296</sup>

## 2. *The Hegemonic Status of Jewish Collective Interests, Adoption, and Policies of Assimilation and Confessionalism*

The hegemonic status of Jewish collective interests have worked not only to give special preference to Jewish collective sentiments based on past traumatic experiences but also to Jewish collective interests as they stood when ACL, 1960 was enacted. The religious matching requirement also worked to maintain the divides between the different religious communities in reference to protecting Jewish collectivity. Judaism as such is not a proselytizing religion, and can even be anti-assimilationist when it comes to members of other national and religious groups.<sup>297</sup> With Jewish collective interests attaining a hegemonic status in Israel, both on the national and religious level, this anti-assimilation norm has come to underlie inter-religious relations in Israel. It has also been argued that this policy was the product of another national and religious interest on part of the Jewish majority, namely the interest of preserving Jewish identity and guarding it from devaluation. If Israel will become an all-inclusive state, the argument goes, building on Israeliness rather than on Jewishness, it will be weakened as a Jewish nation state and this will threaten its Jewish hegemonic structure. In turn, keeping the non-Jewish community from assimilating and confining it to existing national and

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292. See *supra* Chapter I, section D.

293. Karayanni, *Living in a Group of One’s Own*, *supra* note 42, at 1-3.

294. Karayanni, *The Separate Nature*, *supra* note 19, at 51.

295. See *supra* note 64.

296. See *supra* Chapter I, section A.

297. Kretzmer, *Constitutional Law*, *supra* note 229, at 48.

religious divides helps maintain Israel as a Jewish nation state. As Ruth Gavison observes:

Even the decision to grant the Arabs linguistic autonomy and not to assimilate them into the Jewish culture was made by Jews, and primarily for Jewish interests. While Arab citizens did get the right to vote from the start, the regime was majoritarian in the clearest way.<sup>298</sup>

Similarly, Sammy Smooha has observed that the law preserving separate religious communities, especially in the domain of marriage and divorce (i.e., the *millet* system), is intended to prevent Israel from becoming a new multi-religious or multi-ethnic civic nation.<sup>299</sup> Religious endogamy is thus instrumental in maintaining Israel as a Jewish nation state.<sup>300</sup> Arabs, on the other hand, are intended to keep their separate religious and national identity.<sup>301</sup> It is not surprising to learn, therefore, that maintaining the jurisdiction of religious courts in the newly established state of Israel in 1948 was done “for the sake of guarding the unity of Jewish people and preventing mixed marriages,” as opposed to the British government’s motives during the British mandate to “not interfere in the internal affairs of the native religious communities.”<sup>302</sup> One could thus equally argue that the religious matching requirement also serves this interest in maintaining the religious divides between the Jewish community and the non-Jewish communities.

A testament to the strong relation between Jewish collective interests and adoption policy can be found in an article published in 1970 by Eliezer D. Jaffe of the School of Social Work at the Hebrew University.<sup>303</sup> Professor Jaffe served for a number of years as the head of the Jerusalem Department of Family and Community Affairs, a municipal body that handled adoption services in areas under municipal jurisdiction.<sup>304</sup> In the article, after noting that Israeli adoption law requires that there be complete religious matching between the adopters and the adoptee, Jaffe further notes that the strict religious matching requirement “often restricts Christians from adopting Muslim children, and changes

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298. Ruth Gavison, *Jewish and Democratic? A Rejoinder to the “Ethnic Democracy” Debate*, 4 ISRAEL STUDIES 44, 45 (1999).

299. Smooha, *supra* note 223, at 485.

300. *Id.*

301. *Id.* at 488.

302. Rubinstein, *supra* note 62, at 112 n.2.

303. Jaffe, *Adoption in Israel*, *supra* note 11, at 136.

304. See Eliezer D. Jaffe, *Economic and Market Determinants in Israeli Adoption Practices*, 62 J. JEWISH COMMUNAL SERVICE 352 (1986).

in the clause have been recently suggested.”<sup>305</sup> On this issue, Professor Jaffe cites the work of Izhak Englard, at the time a senior member of the Faculty of Law of the Hebrew University, which points to the special difficulties that arise from the religious matching requirement when a Christian adopter wishes to adopt a Muslim child.<sup>306</sup> However, Englard outlines as potentially problematic the case of Arab children who are unadoptable by Arabs from a different religious community. The more racially sensitive adoption of a Jewish child by Arab adopters, or of an Arab child by Jewish adopters, is not raised at all when considering the propriety of the religious matching requirement and its implications. But even more illuminating is Jaffe’s observation made in the context of intra-Jewish ethnic relations and matching policy. In this context, says Jaffe, the norm is

less bound by colour and ethnic prejudices in the matching of children and parents from different ethnic backgrounds. Some critics of present adoption practices raise the moral issue involved when one segment of the population provides children for another segment. Others praise these practices as the highest form of implementing Israeli social values of the “blending of exiles” and the satisfaction of common human needs.<sup>307</sup>

Within the Jewish community, the absence of a matching requirement is directly linked to the “blending of exiles,” an ostensible social and cultural goal of the Jewish state.<sup>308</sup> Nowhere in the article is there reference as to how the religious matching requirement works as an impediment to the blending of Jews and Arabs. Since there is no such stated policy, it is assumed that religious matching in this respect is the natural condition.

The religious matching requirement was self-serving in terms of Jewish collective interests for yet another reason. The requirement worked to maintain the religious divides among the different Palestinian-Arab religious communities and thus served the traditional policy of con-

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305. Jaffe, *Adoption in Israel*, *supra* note 11, at 136.

306. Englard, *supra* note 11, at 318, 337. Englard even raises the possibility that the religious matching requirement may prevent a Christian child from one sect being adopted by Christian adopters from another. *Id.*

307. Jaffe, *Adoption in Israel*, *supra* note 11, at 136.

308. See H. S. Halevi, *Divorce in Israel*, 10 POPULATION STUD. 184, 186 (1956) (noting that “marriages between spouses of different origins are welcome in Israel and are considered efficient instruments in the process of melting the Jewish tribes into one solid Israeli nation”).

trol that the state of Israel exerted towards this minority as a whole.<sup>309</sup> Promoting religious confessionalism among the Palestinian-Arab community was a governmental apparatus of control.<sup>310</sup> Since the Palestinian-Arab minority was traditionally perceived as a security threat, government agencies sought to minimize this threat through the application of different measures. One prominent instrument was the establishment of a military government to run the affairs of the Palestinian-Arab minority, which lasted from 1948 until 1966. Another instrument was that of segmentation and fragmentation: the more divided the community, the weaker it becomes, thereby maximizing the effectiveness of government control policies.<sup>311</sup> The existing religious divisions were thus a form of a natural resource that can be exploited, as indeed they were by the religious matching requirement.<sup>312</sup>

In sum, the religious matching requirement was a norm that worked towards maintaining Jewish collective interests; it preserved Jewish collective unity from within by preventing the dilution of Jewish collective identity, and from without by weakening the threat of the Palestinian-Arab minority achieving national unity.

### *3. International Jurisdiction of Israeli Courts in Adoption Proceedings and the Hegemony of Jewish Collective Interests*

Further evidence for the adoption project's high degree of attentiveness to Jewish collective interests can be found in yet another sphere regulated by ACL, 1960: the international jurisdiction of Israeli courts to deal with adoption proceedings.

It is commonplace to most legal systems that if a local court is called upon to adjudicate a multi-state proceeding that it first determines

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309. IAN LUSTIC, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY 14, 133 (1980). Suhalia Haddad, R.D. McLaurin & Emile A. Nakhleh, *Minorities in Containment: The Arabs of Israel*, in THE POLITICAL ROLE OF MINORITY GROUPS IN THE MIDDLE EAST 76, 79, 80-81 (R.D. McLaurin ed., 1979). See also KAIS M. FIRRO, THE DRUZES IN THE JEWISH STATE: A BRIEF HISTORY 99-104 (1999).

310. David M. Neuhaus, *Between Quiescence and Arousal: The Political Functions of Religion, A Case Study of the Arab Minority in Israel: 1948-1990*, at 16 (1991) (unpublished Ph.D. dissertation, The Hebrew University of Jerusalem).

311. See Sammy Smooha, *Control of Minorities in Israel and Northern Ireland*, 22 COMP. STUD. IN SOC'Y & HIST. 256, 273 (1980); Karayanni, *The Separate Nature*, *supra* note 19, at 60-63.

312. See MAJID AL-HAJ, EDUCATION, EMPOWERMENT, AND CONTROL, THE CASE OF THE ARABS IN ISRAEL 73, 121 (1995); Karayanni, *Living in a Group of One's Own*, *supra* note 42, at 6.

whether it possesses a proper nexus, or contact, with the case at hand.<sup>313</sup> Without such a nexus the court must refrain from adjudicating the case. Different terms are used by different legal systems in referring to this judicial capacity.<sup>314</sup> In Israel, this adjudicative authority is generally referred to as that of “international jurisdiction.”<sup>315</sup> However, the term international jurisdiction should not mislead us to think that the contacts set by Israel (or any other state for this matter) in order to establish this judicial capacity in civil proceedings (as opposed to criminal ones) are somehow internationally defined. Each state is essentially free to design its own international jurisdiction rules in civil matters.<sup>316</sup>

The specific contact that is singled out as sufficient to grant the courts of a certain country international jurisdiction is at times designed to further certain normative interests. In other words, the contact is not just a guarantee that litigation in the specific country is particularly convenient, but that given the specific contact a normative interest of that state is triggered, making litigation in that forum essential for the sake of guaranteeing the realization of that normative interest.<sup>317</sup>

When the first bill for an adoption law was introduced to the Knesset in 1958, the nexus that was chosen in order for Israeli courts to qualify as internationally competent to deal with adoption proceedings was that the child up for adoption be domiciled in Israel.<sup>318</sup> The prevailing thought at the time was that the determinative factors used in deciding the jurisdiction of courts in adoption proceedings should center around the child and require that the child be a local domiciliary. Additionally, the Israeli forum is best situated to issue the most effective judgment with respect to the child. But as soon as the bill was introduced in the Knesset, MK Zerah Warhaftig raised the issue that such a jurisdictional capacity would also enable an Israeli court to issue an adoption order when the adopters are not Israeli citizens and seek to have the child raised in their home in a

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313. ARTHUS T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW, A COMPARATIVE STUDY 25-28 (2007).

314. See Hans Smit, *The Terms Jurisdiction and Competence in Comparative Law*, 10 AM. J. COMP. L. 164 (1961).

315. MICHAEL M. KARAYANNI, HAHPA'AT HALIKH BREIRAT HA-DIN AL SAMKHOUT HA-SHIPPUT HA BEINLE'UMIT [THE INFLUENCE OF THE CHOICE OF LAW PROCESS ON INTERNATIONAL JURISDICTION] 16-17 (2002).

316. Michael Akehurst, *Jurisdiction in International Law*, 46 BRITISH Y.B. INT'L L. 145, 170 (1972-1973).

317. See MICHAEL M. KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE 211-29 (2004).

318. See MAIMON, *supra* note 11, at 454.

foreign country.<sup>319</sup> This prospect would be at odds with Israel's national policy to attract Jewish immigrants to settle in Israel, rather than have local Jewish children emigrate from Israel through adoption.<sup>320</sup> Indeed, as we saw before in the case of Tovriel Klein, the Israeli Supreme Court was most candid about this national interest when affording the local Israeli foster parents custody of the child, preferring them over the American relatives who sought to have him emigrate to the United States and be adopted by them there. Warhaftig stated to the Knesset that adoption should not enable Jewish emigration from Israel (*yeridah*) or make it possible for foreigners to adopt local children.<sup>321</sup> He feared that adoption by foreigners will lead to rich foreign adopters coming to Israel to adopt local children, thereby commercializing adoption.<sup>322</sup>

Though Warhaftig's comments thus far are applicable to Israelis alike, the rest of his observations clearly demonstrate that his worries were in effect Jewish-centered. "There is nothing more dangerous," Warhaftig added, "and I think it is against the *halachah*—than making adoption possible for foreigners."<sup>323</sup> Warhaftig further stated that when he was the Deputy Minister of Religions he received a number of requests asking him for assistance in the adoption of local children by foreigners, but he admittedly "disrupted the process as much as he could." For,

we try to have Jews immigrate to [Israel] . . . it is a great privilege to live in *Ha'aretz* [literally "the Land," commonly understood as "Israel"], and under what authority can we give permission to deport the child . . . ? I think that settling in *Ha'aretz* is always in the best interests of the child. It is in the interest of every Jew, and the sanctity of *Ha'aretz* demands that I should not afford this outlet.<sup>324</sup>

What Warhaftig suggested, instead, was a provision in which the court is empowered to vacate an adoption order if the adopters choose to emigrate from Israel within five years of the issuance of the adoption order.<sup>325</sup>

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319. *Id.* at 455.

320. Shifman, *International Adoptions*, *supra* note 4, at 39-40 n.10.

321. DK (1960) 537-38.

322. *Id.* at 538.

323. *Id.*

324. *Id.*

325. *Id.*



These observations were noted by the Israeli government. The second bill for an adoption of children law introduced to the Knesset in 1960 deleted the provision of the 1958 bill dealing with international jurisdiction. Article 1 of the new bill now provided that an Israeli court is able to issue an adoption order when it is petitioned by an adopter who is domiciled in Israel.<sup>326</sup> Therefore, when the adopter is not domiciled in Israel but the child is, the proposed provision would disqualify the Israeli court from issuing an adoption order, thereby preventing the prospects of a local child being adopted and eventually taken to live abroad by foreign adopters. When ACL, 1960 was finally enacted it defined Israeli courts' international jurisdiction over adoption proceedings in Article 25: "An Israeli court is competent under this law when the adopter is domiciled in Israel."

The formation of this standard for the international jurisdiction of Israeli courts to deal with adoption proceedings is another episode that reinforces the very close connection in Israeli adoption law between national Jewish interests and the fate of children in the adoption process. Just as the Knesset worked to adjust the international jurisdiction of Israeli courts to issue an adoption order, or rather prevent the court from issuing an adoption order of a local Jewish child when the adopters are foreigners, it also worked to prevent any possibility of a Jewish child being adopted by non-Jewish adopters.

#### *4. A Caveat on Jewish Hegemony in the Sphere of Religious Matching*

Before moving on, I would like to make one final remark about the hegemony of Jewish collective interests over the religious matching requirement. Unlike the usual form of hegemonic structures, the hegemonic structure of Jewish collective interests in the sphere of religious matching is not stiff nor is it repressive. It is of a relaxed nature. I argue this because, in my assessment, the existing religious matching requirement can be transformed from its strict and uncompromising form to a more flexible form that is able to accommodate the interests of the Palestinian-Arab minority. For example, in addition to the general provision prescribing religious matching, the Knesset can add a rule stating that if all of the concerned parties to the adoption process are non-Jewish, then religious matching is to be observed only when "practicable." Such a

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326. Adoption of Children Bill, 1960, H.H. 414, 40.

provision will give adequate recognition to Jewish collective sentiments without undermining the interests of other non-Jewish groups. The Surrogate Mother Agreement Law, 1996 (SMAL),<sup>327</sup> can serve as a powerful precedent in this regard. Besides answering the demand for regulating surrogacy agreements in Israel, this enactment was also very much attuned to Jewish religious norms.<sup>328</sup> This law authorizes what is known as gestational surrogacy (or the host method), i.e., the surrogate mother becomes pregnant via embryo transfer conceived from an egg of someone else.<sup>329</sup> SMAL also provides that the surrogate and the future mother need to be of the same religion.<sup>330</sup> This requirement was meant to prevent any doubt about the Jewish identity of the child,<sup>331</sup> for under the *Halakha* a child is a Jew if born to a Jewish mother.<sup>332</sup> However, the Knesset realized that similar concerns are not relevant for the non-Jewish population of Israel. Therefore, SMAL provides, in the same provision mandating religious matching in surrogacy agreements, that the statutory committee in charge of overseeing and approving surrogacy agreements may deviate from the religious matching requirement “where all parties to the agreement are non-Jewish.”<sup>333</sup> I assume that if enough political will is galvanized on the part of the Palestinian-Arab community, a similar provision is possible in the adoption law as well. The SMAL experience and my estimate here are the reasons why I have characterized the Jewish hegemony in the sphere of religious matching as being relatively relaxed, something that fundamentally differentiates it from the hegemony evinced in the Law of Return, for example.

#### D. Matching in Adoption as Safeguarding Minority Interests

Another consideration that generally works to justify matching, religious or otherwise, is the concern for underprivileged minority groups, especially in terms of their socio-economic status.<sup>334</sup> Due to their inferior socio-economic position, such groups are disproportionately over-

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327. Surrogate Mother Agreement Law (Approval of the Agreement and Status of the Child) Law, 1996, S.H. 176.

328. See Carmel Shalev, *Halakha and Patriarchal Motherhood – An Anatomy of the New Israeli Surrogacy Law*, 32 ISR. L. REV. 51 (1998).

329. SMAL, § 2(4).

330. SMAL, § 2(5).

331. Shalev, *supra* note 328, at 66-67.

332. *Id.*

333. SMAL, § 2(5).

334. See Schwartz, *supra* note 141, at 188.

represented in the pool of children up for adoption and disproportionately under-represented in the pool of potential adopters.<sup>335</sup> Poor conditions resulting from group economic deprivation, lack of employment, and poor education, all of which are usually characteristic of underprivileged minority groups, result in a large number of children being separated from their parents for various reasons<sup>336</sup> and eventually entering into the pool of children up for adoption.<sup>337</sup> The case within the more socio-economically secure majority group is exactly the opposite. There are relatively few children from among the majority that are available for adoption, particularly in relation to the demand for adoption among majority group members. Unrestricted adoption between the minority and the majority groups will therefore produce a one-way stream of minority children being adopted by majority adopters.<sup>338</sup> If the number of such adoptions is high, this raises concern for the well-being of the minority group, and thus matching becomes a legitimate pre-condition for adoption in the interest of preserving the minority group. This concern was the driving force behind the Indian Child Welfare Act (ICWA) enacted in the United States in 1978,<sup>339</sup> which conferred on Native American tribal courts exclusive jurisdiction to decide on the placement of any Native American child domiciled on a reservation.<sup>340</sup> Keeping Native

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335. See Sandra Patton-Imani, *Redefining the Ethics of Adoption: Race, Gender, and Class*, 36 LAW & SOC'Y REV. 813, 832, 845-46 (2002) (book review); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2001).

336. One major reason is based on the fact that the children of these minority groups are under greater surveillance of the welfare authorities, who in turn may take legal action to have the children removed from the parents' care, and ultimately offer them for adoption. Margret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 505 (1984); DEAN, *supra* note 166, at 16-17.

337. GIBB & BOWEN, *supra* note 185, at 496-97.

338. Thus it was argued in the United States that unrestricted trans-racial adoption serves more the interests of the dominant White adopters. See Perry, *supra* note 165, at 55 (noting how the number of trans-racial adoptions in American began to increase after White babies became a scarce commodity and social services dominated by White professionals began to place Black children in White homes). See also Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACK LETTER J. 39, 39 (1993); MADELYN FREUNDLICH, *ADOPTION AND ETHICS: THE ROLE OF RACE, CULTURE, AND NATIONAL ORIGIN IN ADOPTION* 13-14 (2000).

339. 25 U.S.C. §§ 1901-1963 (2008).

340. Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 124 (2003). In some cases, tribal courts have jurisdiction over Native American children living off the reservation. See MORAN, *supra* note 17, at 135.

American children within the exclusive jurisdiction of tribal courts was explicitly aimed at serving the Native American community's right to self-determination, regardless of the individual interests of the children themselves.<sup>341</sup> The ICWA "recognizes that children can be political and cultural resources for tribes facing extinction,"<sup>342</sup> and that out-of-tribe placement of children, including widespread adoption of Native American children by White adopters, was threatening the continued existence of the Native American community.<sup>343</sup> An estimated 25%-35% of all Native American children were separated from their families and placed in adoptive homes, foster care, or institutions.<sup>344</sup> Indeed, the term "cultural genocide" in the context of adoption was first used in relation to the placement of Native American children with White families.<sup>345</sup>

Concern for the well-being of the ethnic/racial minority group can be a viable interest worth protecting through the matching requirement even when the one-way stream of inter-group adoption will not endanger collective integrity or the cultural heritage of the minority group. The fact that the adoption of Black children by White adopters did not pose a genuine threat to the Black community in the United States<sup>346</sup> was immaterial to those who perceived the phenomenon as symbolizing exploi-

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341. MORAN, *supra* note 17, at 135.

342. *Id.* at 150.

343. Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, U. DET. L. REV. 451, 454, 456 (1989).

344. Michael E. Connelly, Note, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1878: Are the States Respecting Indian Sovereignty?*, 23 NEW MEXICO L. REV. 479, 480-81 (1993); Kathryn A. Carver, *The 1985 Minnesota Indian Family Preservation Act: Claiming a Cultural Identity*, 4 LAW & INEQ. 327, 328 (1986).

345. Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 203 (1997-98).

346. See Perry, *supra* note 165, at 42; GIBB & BOWEN, *supra* note 185, at 502; see also David S. Rosettenstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the Melting Pot*, 68 ST. JOHN'S L. REV. 137, 143 (1994).

tation by the dominant White majority.<sup>347</sup> Racial matching was thus based more on empiricism and ethical appeal.<sup>348</sup>

In light of this, one could argue that the religious matching requirement as enacted in ACL, 1960 was equally designed to protect the group identity of the Palestinian-Arab minority religions in Israel. Overall, the Palestinian-Arab minority in Israel is economically disadvantaged compared to the Jewish majority.<sup>349</sup> Two other factors have the potential of increasing the one-way stream of adoption from the Palestinian-Arab minority to the Jewish majority, if there were not a religious matching requirement. The first is the conservative and relatively patriarchal nature of the Palestinian-Arab society in Israel,<sup>350</sup> where Palestinian-Arab women have traditionally had limited access to health services.<sup>351</sup> This social reality leaves very little room for tolerating the status of a mother bearing a child out of wedlock or bringing that child up on her own. Second, the Palestinian-Arab community in Israel is predominantly Muslim. Since Islam does not recognize adoption, there is a shortage of potential adopters from among the Muslim community compared with the number

347. Ivor Gaber & Jane Aldridge, *Introduction*, in *IN THE BEST INTERESTS OF THE CHILD, CULTURE, IDENTITY AND TRANSRACIAL ADOPTION* 1, 1 (Ivor Gaber & Jane Aldridge eds., 1994).

348. Jane Maslow Cohen, *Race-Based Adoption in a Post-Loving Frame*, 6 B.U. PUB. INT. L.J. 653, 656 (1997); see also Perry, *supra* note 165, at 75 (pointing to the special meaning and sensitivity that might arise from the adoption of a Jewish child by a Palestinian adopter and vice versa).

349. See NOAH LEWIN-EPSTEIN & MOSHE SEMYONOV, *THE ARAB MINORITY IN ISRAEL'S ECONOMY: PATTERNS OF ETHNIC INEQUALITY* 14 (1993) ("In 1990, the Arab population comprised 18 percent of the Israeli population, and they were subordinated to Jews in virtually every aspect of socioeconomic status such as education, occupational prestige, income, political power and standard of living."); RAJA KHALIDI, *THE ARAB ECONOMY IN ISRAEL: THE DYNAMICS OF A REGION'S DEVELOPMENT* 3 (1988) (commenting that "various legal and extra-legal factors mitigate against the equal distribution of resources and opportunities between the Arab and Jewish community in Israel").

350. See HONAI DA GHANIM, LIVNOT ET HAOMAH MEHADASH [REINVENTING THE NATION] 4 (2009) (depicting the Palestinian-Arab community in Israel as a neo-patriarchal society given that outside the realm of family relations this same community can submit to norms of modern social and political interactions); WOMEN AGAINST VIOLENCE, *ATTITUDES TOWARDS THE STATUS AND RIGHTS OF PALESTINIAN WOMEN IN ISRAEL* 19, 21-22, 61-62 (2005) (indicating how in addition to social patriarchy the status of Palestinian-Arab women in Israel is also affected by the fact that they are members of an oppressed national minority). See also SUHEIR ABU OKSA DAUD, *PALESTINIAN WOMEN AND POLITICS IN ISRAEL* 7 (2009); E. Tuma, *Hinukh Yiladim BaKfar HaAravi* [Child Rearing in an Arab Village] 6 MEGAMOT 130, 30 (1955) (in Hebrew).

351. See RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 273 (2004).

of Muslim children available for adoption. Most telling in this respect is the practice of handing Palestinian-Arab Muslim children to foreign Muslim adopters in Europe, given the shortage of demand for adoption in the Muslim community in Israel.<sup>352</sup> On the other hand, in the Jewish community, which is much more economically established and relatively tolerant of the social status of single mothers, there is far greater demand for adoption than the existing supply of adoptable Jewish children.<sup>353</sup> So if adoption in Israel were permitted across religious lines, the vast majority of cases of trans-religious adoption would probably have involved Jewish adopters adopting Palestinian-Arab Muslim children. This hypothesis is strongly corroborated by the fact that within the Jewish community, trans-ethnic adoptions are usually between the more privileged Ashkenazi adopters and the children of underprivileged Sephardi Jews.<sup>354</sup> Though statistical data on adoption generally was unavailable in Israel for many years, Professor Jaffe has asserted that “[t]he adoptions of non-relatives, ranging from 59%-68% of all adoptions in Israel, consists primarily of Middle Eastern illegitimate children adopted by childless European-American parents of middle class background.”<sup>355</sup>

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352. Different scholars conducting research on Israeli adoption law have mentioned this practice in passing. See SHIFMAN, *ADOPTION*, *supra* note 11, at 74; Minkovich, *supra* note 11, at 117. In the initial report of the State of Israel concerning the implementation of the Convention of the Rights of the Child submitted by both the Ministry of Justice and the Ministry of Foreign Affairs there was a public admission of the practice. This report provided:

Adoption of children in Israel by people in other countries is extremely rare. In 1996, five children were adopted outside of Israel, and in 1997, six children were adopted outside of Israel. These children were born to Muslim mothers. As Islamic law does not recognize adoption, and inter-religious adoption is prohibited within Israel, these children were placed with adoptive families outside of Israel . . . .

INITIAL REPORT OF THE STATE OF ISRAEL CONCERNING THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 168 (2001) [hereinafter ISRAEL CRC REPORT]. The Child Welfare Authority has also provided the author with statistics showing that eight children from its Jerusalem district were handed to foreign adopters in the period between 2002-2006. The file is on record with the author.

353. See Eliezer D. Jaffe, *Introduction*, in *INTERCOUNTRY ADOPTIONS, LAWS AND PERSPECTIVES OF SENDING COUNTRIES* 1, 8 (Eliezer D. Jaffe ed., 1994).

354. Judith T. Shual, *The Structure and Dilemmas of Israeli Pluralism*, in *THE ISRAELI STATE AND SOCIETY: BOUNDARIES AND FRONTIERS* 216, 222-23 (Baruch Kimmerling ed., 1989); Sammy Smooha, *Jewish Ethnicity in Israel: Symbolic or Real*, in *JEWS IN ISRAEL: CONTEMPORARY SOCIAL AND CULTURAL PATTERNS* 47, 50 (Uzi Rebhun & Chaim I. Waxman eds., 2004).

355. Jaffe, *Adoption in Israel*, *supra* note 11, at 143; see also Jaffe, *Imutz Yeladim BeIsrael*, *supra* note 67, at 219, 220; Gabriela Yardiny, *Imutz Yiladim Kshaii Hasama*

In the Israeli context, the protection of minority interests through the matching requirement could also serve to protect minority interests. The Palestinian-Arab minority does not seek assimilation into the Jewish majority in Israel,<sup>356</sup> and endogamy is also the norm in the three major Palestinian-Arab religious communities. As established earlier, the social code embedded in the *millet* system works also within the Palestinian-Arab minority and not just between Arabs and Jews.

In spite of the fact that the religious matching requirement under Israeli adoption law can be perceived as a measure designed for the protection of minority religions, and even the Palestinian-Arab minority as a whole, there is no evidence that this was the objective that the requirement sought to achieve. The only specific collective interests or sentiments that were implicated to justify the requirement were those of the Jewish majority.

MK Warhaftig remarked during the Knesset deliberations that the religious matching requirement could also serve as a safeguard for non-Jewish collective interests, when he applauded an Israeli court decision that prevented a Jewish couple from adopting a Bedouin child.<sup>357</sup> However, this observation was at best a passing remark in the Knesset deliberations and was materially irrelevant to the issue of religious matching. Bedouins are more of a cultural sect within the Palestinian-Arab community and by no means form a separate religious community.<sup>358</sup> Additionally, if the religious matching requirement was meant to serve the interests of the Palestinian-Arab minority religious communities as against the Jewish majority, it is not clear why the matching requirement is so strict between Palestinian-Arab Muslims and Christians, and it is certainly inconceivable why members of one Christian Palestinian-Arab community should be prevented from adopting a child born in another Christian Palestinian-Arab community. National sentiment among the Palestinian-Arab community might encourage trans-religious adoptions among the Palestinian-Arab religious communities and further this minority's national unity. For one must also bear in mind that because of

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[*The Adoption of Hard to Place Children*] 18 SA'AD 31, 34 (1974) (in Hebrew); Aviva Leon, *Imutz Yiladim Mitos U'Metzieout* [*Adoption of Children – Myth and Reality*] 16 SA'AD 74, 74 n.3 (1972).

356. See Mark A. Tessler, *The Middle East: The Jews in Tunisia and Morocco and Arabs in Israel*, in PROTECTION OF ETHNIC MINORITIES 245, 246-47 (Robert G. Wirsing ed., 1981).

357. See DK (1959).

358. See ISRAEL CRC REPORT, *supra* note 352, at 5.

the religious matching requirement the Palestinian-Arab community as a national group is losing its children to foreign adopters, albeit in relatively very small numbers.

One cannot end this discussion, however, without emphasizing the unique aspect of the Israeli religious matching requirement. The fact that the requirement was so strongly advocated for by the Jewish majority, when such a requirement is generally demanded by minorities, is an intriguing testament to how the Jewish community conceived of itself at the time the law was enacted. Though a constitutionally safeguarded majority, it conducted its affairs, at least in the sphere of adoption, as a besieged minority struggling to survive. What is also intriguing in the Israeli case is the fact that the group whose interests were actually guarded by the religious matching requirement, at least in the sphere of Jewish-Arab relations, was that of the Palestinian-Arab minority (albeit at the expense of internal Palestinian-Arab unity). Without the matching requirement, it is safe to assume that trans-religious adoption in Israel would have been a one-way stream of Palestinian-Arab children being handed to Jewish adopters.

#### *E. The Best Interests of the Child as a Basic Norm for Religious Matching*

The discussion thus far implies that only considerations pertaining to the hegemonic interests of the Jewish community and the social code embedded in the *millet* system, rather than the interests of the individual adopted child, were the primary considerations behind Israel's religious matching requirement. However, given the fact that the best interests of the child are considered to be a guiding principle in modern adoption law, it is worthwhile to examine whether religious matching can also be taken as serving this basic adoption-specific norm.

Matching in adoption has been linked to the best interests of the child, primarily in respect of the trans-racial placement of a Black child with White adopters in the United States.<sup>359</sup> This linkage begins with the

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359. The same discussion has taken place in other places, primarily in the UK and South Africa. See CAROLINE BRIDGE & HEATHER SWINDELLS, *ADOPTION, THE MODERN LAW* 67 (2003); KIRTON, *supra* note 146; Noel Zaal, *Avoiding the Best Interests of the Child: Race-Matching and the Child Care Act 74 of 1983*, 10 S. AFR. J. HUM. RTS. 372 (1994); D.J. Joubert, *Interracial Adoptions: Can We Learn from the Americans?* 110 S. AFR. L.J. 726 (1993); Tshepo L. Mosikatsana, *Examining Class and Racial Bias in Adoptions Process and the Viability of Transracial Adoptions as a Policy Reference: A Further Reply to Professors Joubert, Pakati and Zaal*, 13 S. AFR. J. HUM. RTS. 602 (1997).



general assertion that society in America is still largely racist,<sup>360</sup> and thus members of the Black community will face reoccurring episodes in which they will need to confront racist attitudes.<sup>361</sup> It will be best for Black children, so the argument goes, if they are brought up by Black parents who are assumed to have already confronted racism in society.<sup>362</sup> Only then will such children be able to receive the skills necessary for coping with racist attitudes, or at least be better able to do so than if they were brought up by White adopters.<sup>363</sup> It has also been asserted that if Black children are raised in White families they will be alienated from their own heritage and culture and bound to develop a poor self-image.<sup>364</sup> These assertions have been strongly challenged, both conceptually and empirically.<sup>365</sup> There is evidence that children of trans-racial adoptions, like children of mixed-race marriages, grow up to develop healthy personalities while also being aware of their racial identity.<sup>366</sup> The only characteristic found in such children was that as adults they are less sensitive to social interaction with members of other racial

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360. Perry, *supra* note 165, at 43; see also FREUNDLICH, *supra* note 338, at 11; Fenton, *supra* note 338.

361. Barbara Bennett Woodhouse, "Are you my Mother?": Conceptualizing Children's Identity Rights in Transracial Adoptions, 2 DUKE J. GENDER L. & POL'Y 107, 123 (1995); Perry, *supra* note 165, at 66; Cynthia G. Hawkins-León & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1256-58 (2002).

362. Hawkins-León & Bradley, *supra* note 361, at 1274 ("Although most white adoptive families provide loving homes for their African American children, only a few of these families are able to effectively educate and prepare their African American children for the realities of racism in this country.").

363. See Rita J. Simon & Howard Altstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 178-79; DEAN, *supra* note 166, at 14; MORAN, *supra* note 17, at 145; Peter Hayes, *The Ideological Attack on Transracial Adoption in the USA and Britain*, 9 INT'L J. L. & FAM. 1, 4-5 (1995).

364. See Barbara Tizard & Ann Phoenix, *Black Identity and Transracial Adoptions*, in IN THE BEST INTERESTS OF THE CHILD, CULTURE, IDENTITY AND TRANSRACIAL ADOPTION 89, 89 (Ivor Gaber & Jane Aldridge eds., 1994); Woodhouse, *supra* note 361, at 111, 114.

365. Simon & Altstein, *supra* note 363, at 178-79; DEAN, *supra* note 166, at 14; MORAN, *supra* note 17, at 145; Hayes, *supra* note 363, at 4-5; TREACHER & KATZ, *supra* note 146, at 121-22; BRIDGE & SWINDELLS, *supra* note 359, at 70; KIRTON, *supra* note 146, at 34, 66, 64-98 (noting that the results presented by proponents of trans-racial adoption are "oversimplified").

366. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1214-17 (1991).

groups,<sup>367</sup> especially those of the majority groups. To those who believe in an integrated society, this is not necessarily a negative finding.<sup>368</sup> How much of this is relevant to religious matching in adoption?

Unlike trans-racial adoption placement, trans-religious adoption is not necessarily externally evident to the surrounding environment.<sup>369</sup> Additionally, once the adopted child is taken into the adopting family, she/he is fully capable of assimilating into the adoptive family's religion, thereby replacing his or her original religious identity with that of the adopters.<sup>370</sup> It is also important to add that under Israeli law there is very little chance that the adopted child's original religious affiliation would be publically disclosed, given the restricted access to adoption records generally.<sup>371</sup> The disclosure of the identity of the adopted child's biological parents is a criminal act.<sup>372</sup> Still, two Israeli Supreme Court cases, *The American European Beit-El Mission v. Minister of Welfare*,<sup>373</sup> and *Consuelos v. Tourjeman*,<sup>374</sup> that dealt with the problems associated with the trans-religious upbringing of a child have evinced concern about how such a setting can in fact undermine the best interests of the child standard. The Court was particularly concerned that the trans-religious setting would effectively be a means for the religious conversion of the child at an age when the child is incapable of understanding the meaning of religious identity and was worried about the repercussions that trans-religious placement might have on the child's self-image after growing up and learning about it.<sup>375</sup>

In the first case, *The American European Beit-El Mission*, the petitioner was a Christian-Evangelical organization that sought government-

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367. *Id.* at 1225-26.

368. Jennifer Swize, Note, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interests of Adopted Children*, 88 VA. L. REV. 1079, 1104-05 (2002); Barholet, *supra* note 366, at 1216.

369. Schwartz, *supra* note 141, at 173.

370. This discussion presumes that the adopted child is of a very young age and has not developed any sort of a religious identity before she/he was adopted. For if so, religious matching can become an important factor to be assessed together with other considerations pertaining to the child's best interest. See Beschle, *supra* note 140, at 397-98. The discussion in this chapter is centered, however, on children of a very young age that did not have a chance to develop a religious identity.

371. ACL, 1981, art. 30.

372. ACL, 1981, art. 34.

373. HCJ 103/67, [1967] IsrSC 21(2) 325.

374. HCJ 243/88, [1991] IsrSC 45(2) 626.

375. See MAIMON, *supra* note 11, at 114.

tal licensing for a foster care institution it ran for children in Haifa, where it also ran a Christian education plan.<sup>376</sup> The license as ultimately issued by the Ministry of Welfare conditioned the operation of the petitioner organization on the admission of Evangelical-Christian children only, for as provided in the relevant regulations no child can be admitted into state-licensed foster care that provides religious education unless the child belongs to the same religion as the institution.<sup>377</sup> The petitioner sought to challenge the legality of this regulation as well as the conditional license it received as being an infringement of freedom of religion.<sup>378</sup> The Israeli Supreme Court dismissed the petition, finding the regulation, as well as the license, to be reasonable.<sup>379</sup> Justice Alfred Witkon first stated that there was nothing discriminatory in the regulations, given that they applied to all religions alike.<sup>380</sup> More importantly, as underscored by Witkon, the regulations were applicable only to children under the age of 14.<sup>381</sup> Witkon further concluded that the regulations and the licensing process they regulate seek to protect young children who are not competent to apprehend religious belief from being subjected to religious education of a different religion.<sup>382</sup> Such education works to convert the child's religion, and this cannot be regarded as being in the child's best interests.<sup>383</sup> Even if the child is not converted, Witkon added, the child might still experience identity and social conflict if educated in one religious environment when she/he is unable to fully comprehend the meaning of religion, and then lead their lives in another.<sup>384</sup> A second Justice, Haim Cohn, was equally vigilant about the prospects of institutional religious care becoming a religious conversion process for young children. In his words:

A person, who because of being a minor, or because of some other circumstance that makes him incapable to weigh the different religious beliefs one against the other, cannot, and thus cannot have the right to, con-

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376. *The American European Beit-El Mission*, IsrSC 21(2) at 327.

377. *Id.*

378. *Id.* at 329.

379. *Id.* at 336.

380. *Id.* at 329.

381. *Id.*

382. *Id.*

383. *Id.* at 330.

384. *Id.*

vert from one religion to another. And if such a person lacks such a capacity . . . then no other person can possess the right on his behalf.<sup>385</sup>

Justice Cohn also pointed out that concern for the child's best interests makes it incumbent upon the Court and the welfare authorities not to put children in a position of inner conflict as may happen if children of other religions are admitted to the petitioner institution.<sup>386</sup>

This case also exemplifies the proposition that each of the Christian communities is regarded as a separate religion.<sup>387</sup> If such is the case for the purpose of admitting children to institutional care, then each of the separate Christian communities could be regarded as a different religion for adoption purposes as well.<sup>388</sup> However, the Court in *The American European Beit-El Mission* case noted the State Attorney's admission that religious matching among the different Christian communities might be amenable to a more elastic standard,<sup>389</sup> thereby implying that Christians as a whole can be regarded as one religious community.

In the second case, *Consuelos*, a Brazilian baby girl, Bruna Consuelos, was kidnapped from her home when she was only a few months old and handed to a baby trafficking mob.<sup>390</sup> Shortly afterwards, the baby was transferred to an Israeli couple, the Tourjemans, who sought to adopt a child and, on the advice of their lawyer, traveled to Brazil and then to Paraguay where they received the baby. Acting upon the foreign adoption order, the Tourjemans converted Bruna to Judaism and registered her as a Jew and as their daughter in state records.<sup>391</sup> Bruna's biological parents were Catholic, thereby bringing the Court to conclude that Bruna's original faith was Catholic as well.<sup>392</sup> The Brazilian parents did all they could to find their child. Miraculously, with the aid of a British TV producer who was investigating Brazilian baby exports, they managed to track down the child in Israel some 18 months after the kidnapping. The Brazilian parents then filed a *habeas corpus* petition before the Israeli Supreme Court seeking to regain custody of their child. The Court granted the petition, removing the infant from the Israeli adopters' hands. In a lengthy decision delivered by the Deputy President of the Supreme

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385. *Id.* at 333.

386. *Id.* at 336.

387. SHIFMAN, ADOPTION, *supra* note 11, at 73.

388. *Id.*

389. *The American European Beit-El Mission*, IsrSC 21(2) at 327, 336.

390. *Consuelos*, IsrSC 45(2) at 631-33.

391. *Id.* at 633.

392. *Id.* at 650-51.

Court, Menachem Elon, it was established that the foreign adoption order and the birth certificate that were issued for little Bruna were forged. Yet this was not enough to dispose of the case in favor of the Brazilian parents, for the controlling consideration was still that of the best interests of the child. Based on expert testimony, Justice Elon concluded that returning the child to her biological parents would not adversely affect her best interests, and only then was he prepared to determine that the child should be transferred to their custody.<sup>393</sup>

However, Justice Elon's opinion implicated the best interests of the child also in the context of the religious identity of little Bruna, who as indicated was converted to Judaism as part of the adoption process. This brought Justice Elon to reflect on the propriety of religious conversion of children: how could a months-old child possibly comprehend the significance of such an act? Elon, a preeminent expert on Jewish law, turned to *Halachah*, which is quite clear on the matter of conversion, unquestionably demanding that the person undergoing conversion be fully aware of the significance of accepting the Jewish faith. Therefore, when a child is converted into Judaism, *Halachah* grants the child the right to renounce the conversion after reaching the age of thirteen and to return to his or her religion of origin.<sup>394</sup> In any case, under Israeli law (Law of Legal Capacity and Guardianship, 1962), the child's biological parents must consent before conversion takes place, or the court must provide approval. Given that the adoption order was forged, the Israeli couple was left with no legal status to consent to the religious conversion, making it ineffective.<sup>395</sup> Even if the child were to be kept by the Israeli couple, she would grow up in a Jewish home and yet it is presumed she would also keep her original religious identity as a Catholic.<sup>396</sup> Elon resorted once again to the expert testimony before the Court in concluding that such a trans-religious upbringing would undoubtedly cause a severe identity crisis when the child discovers that her biological parents were Catholics and that she herself was born a Catholic.<sup>397</sup> According to Elon, this end result in itself is also incompatible with the best interests of the child. Indicative in this respect, Elon went on to argue, is the religious matching requirement in Israeli adoption law.<sup>398</sup> Justice Elon concluded his re-

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393. *Id.* at 650.

394. *Id.* at 651.

395. *Id.* at 652.

396. *Id.* at 650.

397. *Id.*

398. *Id.* at 652.

marks by resorting to the same Jewish collective sentiments appealed to in the Knesset debates thirty years earlier:

The question of the minor's severance from her parents' religion may be a further serious consideration to respond affirmatively to the plaintiff's petition in this case, and this is connected to the tragic memories of the European Holocaust a generation ago. We remember the struggle of families and Jewish organizations to restore to their people and to their religion the Jewish children whose parents and entire family, before being sent to the extermination camps and the gas ovens, consigned to Christians to care for and bring up. It is appropriate that we too should act in this manner in similar cases, in the opposite direction, when the background is not extermination camps but gangs of criminals and grasping mercenaries . . . . The interests of the decision and the interests of the minor, born to a mother of the Catholic faith, are to keep her birth religion, and this may not be changed without the consent of the petitioner, her mother and parent.<sup>399</sup>

Based on *The American European Beit-El Mission and Consuelos*, it can be argued that trans-religious adoption goes against the best interests of the child standard in two different ways. First, since trans-religious placement effectively includes the religious conversion of the child at an age when the child is incapable of comprehending both the meaning of a religious identity and the significance of religious conversion, trans-religious placement is regarded as akin to forceful religious conversion.<sup>400</sup> Ascribing to a child the independent value of human dignity demands that his or her religious identity not become a commodity that can be fixed or transferred, even when the child is transferred from the custody of one couple to the other.<sup>401</sup> Secondly, in light of the fact that the trans-religious placement can cause an identity crisis for the adoptee after growing up and learning of his or her original religious identity, the child's mental well-being requires that he or she be placed with adopters with the same religious identity.

The religious matching requirement, therefore, can be perceived as serving the best interests of the child. Even though in the Knesset debates no explicit reference was made to the child's individual dignity or to the possibility of the child experiencing any kind of identity crisis, such considerations are paramount in these two Israeli Supreme Court decisions which have influenced the preservation of the religious matching requirement as a valid norm until the present day.

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399. *Id.* at 652-53.

400. *See* SHAKI, *supra* note 12, at 459.

401. Woodhouse, *supra* note 361, at 111.

Having said this, however, it is seriously doubtful that consideration of the child's best interests had any major influence on the Israeli religious matching requirement. As will be outlined in the next section, the Knesset, in 1981, specifically authorized courts in Israel to permit the religious conversion of children to that of their prospected adopters, in order to satisfy the religious matching requirement and bring the adoption proceeding to a conclusion.<sup>402</sup> If considerations pertaining to the child's dignity and mental well-being were in fact dominant in the religious matching requirement, it is hard to imagine a more upsetting or cynical action than the authorization of taking a newborn child and changing its religion to satisfy the apparently unsatisfactory demands of the law. As Woodhouse says, a best interest-oriented approach mandates that the "law ought to bend to fit the child's reality, rather than trying to bend the child to fit some legal ideological blueprints for seamless perfection."<sup>403</sup>

Moreover, the consideration of the possibility of a child experiencing an identity crisis when growing up in one religion but ultimately finding out that he or she originally belonged to another is in essence a circumstantial consideration dependent on the social meaning of having a particular religious identity. If religious identity were seen to matter as little as, for example, eye color, there would be no debate over or demand for religious matching in adoption. What makes religious identity a factor is the existing social context pertaining to the place of religion in society and the hegemonic forces that govern the meaning and implication of religious affiliation. It has long been recognized that the best interests of the child standard is essentially a vague and open-ended concept that draws much of its content from the existing value system.<sup>404</sup> This in turn brings us back to the two grand norms that were identified above. In essence, if the best interests of the child is a factor, it is so in light of the existing grand norms. Religious identity is important only because society regards it as important.

#### *F. Religious Matching Exceptions*

Two exceptions to the religious matching requirement in Israel have been enacted. The first was with the enactment of ACL, 1981, which

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402. See *infra* section F.

403. Woodhouse, *supra* note 361, at 128.

404. See Stephen Parker, *The Bests Interests of the Child—Principles and Problems*, in *THE BESTS INTERESTS OF THE CHILD, RECONCILING CULTURE AND HUMAN RIGHTS* 26, 26 (Philip Alston ed., 1994).

provided that a child available for adoption can undergo religious conversion in order to have his or her religion match that of the prospective adopters and then conclude the adoption proceedings.<sup>405</sup> The second exception came in 1997 as part of a legislative initiative designed to regulate international adoptions. The new chapter added to ACL, 1981 makes it unnecessary to have religious matching when Israeli adopters seek to adopt foreign children.<sup>406</sup> Do these exceptions pose a challenge to the thesis offered earlier about the religious matching requirement being a reflection of the Israeli grand norms on inter-religious relations? Not really.

The religious conversion procedure is conditioned upon the child being first placed with the prospective adopting parents for a period of six months prior to the petition of conversion. The Child Welfare Authority identifies such prospective adopters and arranges these placements.<sup>407</sup> In turn, this governmental body becomes a gatekeeper in the conversion process. By placing the child with the proposed adopters, the course of conversion is effectively determined. From the numbers released to the author by the Child Welfare Authority on the conversion of children between 2002 and 2006, there were 96 cases of religious conversion for the purpose of adoption. No case is recorded of a Jewish child being converted to any other religion under this provision. In all but seven cases the children were converted to Judaism. None of these cases involved Muslim children. Rather, most cases involved Christian children. The seven cases of conversion that were not to Judaism were of Muslim children converted to Christianity. These numbers support the grand norm thesis provided earlier—it is evident that the Child Welfare Authority places children only with parents whose religion does not undermine these grand norms. The high number of Christian children that are converted to Judaism can be explained by the fact that these children are probably from the community of foreign workers who have come to Is-

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405. Legal Capacity and Guardianship Law, 1962, sec. 13a. For a discussion of the restrictions on the change of religious community of a minor that applied before this amendment, see Menashe Shava, *Legal Aspects*, *supra* note 3, at 262-64.

406. ACL 1981, Section 28.20(c).

407. See MAIMON, *supra* note 11, at 116.



rael seeking work. This community stands at about 250,000 today<sup>408</sup> and suffers from poor economic and social conditions.<sup>409</sup>

As to the exception in international adoption cases: here one can argue that by definition this exception does not undermine any of the grand norms. Both the *millet* system grand norm and that of the hegemony of the Jewish collective are applicable only in domestic cases. This statement is strongly corroborated by the fact that the personal law of foreigners has traditionally been their national rather than their religious law.<sup>410</sup>

### CONCLUSION

In this study I sought to inquire into the religious matching requirement under Israeli adoption law. Working primarily with public records, I sought to understand the strictness of Israel's need for religious matching in adoption. It is evident that the strict religious matching requirement was designed primarily to serve dominant group interests rather than the best interests of the child. Although the religious matching requirement discussed in this article is found in a one-sentence provision in one specific Israeli law, it is representative of many attributes of Israeli society as a whole. In light of the close relationship between matching policies in adoption and inter-group dynamics in society at large, the matching requirement in adoption can be taken as an objective indicator of the level of inter-group cohesion. Thus, we can learn much about the present state of the social fabric existing in Israel from the present state of matching in adoption. Finally, I hope that more research will be conducted on matching requirements in adoption in other countries, which will assist with discovering whether such policies are as informative as Israel's adoption policies are.

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408. See Ministry of Foreign Affairs, [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2001/8/Foreign%20Workers](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/8/Foreign%20Workers). (Last visited Mar. 17, 2010).

409. See ISRAEL DRORI, FOREIGN WORKERS IN ISRAEL, GLOBAL PERSPECTIVES 9-10 (2009).

410. See GOADBY, *supra* note 20, at 57; VITTA, *supra* note 20, at 76.