A PLURALITY OF DISCONTENT: LEGAL PLURALISM, RELIGIOUS ADJUDICATION AND THE STATE

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INTRODUCTION

The norms that the official legal systems of North American and European states apply do not derive directly from any religion. While some of those norms, such as some of the norms governing marriage, do originate, historically, in religion and religious law, no norms are today enforced by those legal systems because the norms are part of a specific religious legal order. And yet, adjudication according to religious norms is commonplace. In North America and Europe, the legal systems applying norms associated with specific religions to adherents of those religions are principally nonstate community tribunals. Outside this Northwestern world, state legal systems, particularly those of Muslim-majority jurisdictions, often permit religious normative materials to be applied to adherents of the relevant religions as a matter of state law. Both situations are examples of legal pluralism.[1]

The popularity of the application of religious norms by state legal systems[2] throughout much of the contemporary world raises a challenge

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1. Though note that John Griffiths, long the champion of this label, has now disowned it, writing instead of "normative pluralism" or "pluralism in social control." John Griffiths, *The Idea of Sociology of Law and its Relation to Law and to Sociology*, 8 CURRENT LEG. ISSUES 49, 63-64 (2005). In a recent paper, Brian Tamanaha reflected that the idea of "legal pluralism" can be useful despite persistent doubts as to which normative phenomena count as "law." Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 396 (2008).

2. A partial such application is nearly universal in Muslim-majority jurisdictions. *See*

for the Western assumption that state-enforced legality and expressly religious norms should stay apart. Can a modern state provide its citizens, residents and others subject to its power with a *just* and *stable* legal order by referring them to norms associated with their several religions and enforced by state courts?

This essay attempts an answer to this question by examining a fascinating case study: that of Israel. While Israel has long applied the norms associated with its inhabitants' several religions to their disputes concerning marriage, divorce and ancillary issues as a matter of state law, some observant Israelis have long been operating and attending nonstate religious tribunals. The recent expansion of this practice, long restricted to an extremist fringe group, to more moderate elements—a process I attempt to document below—hints at a pessimistic answer to the question raised in the preceding paragraph. Israel's mixed, secular-cum-religious state legal system seems unable to provide its inhabitants with a *stable* legal order: despite the system's absorption of both religious norms and religious adjudication into the state legal system, devout Israelis keep pining for a more completely religious legal order, and are now establishing nonstate religious court systems with the explicit purpose of supplanting the secular state system. The Israeli state legal system's incorporation of religious norms into the law it applies—specifically, into the family law it applies—also prevents it from providing those subject to it with a *just* legal order; some parts of the Jewish, Muslim and other religious norms of family formation and dissolution applied by the Israeli state system offend, against fundamental human rights.[3]

The application of religious norms by state legal systems is thus deeply problematic in practice, since in keeping with colonial-era practices, most postcolonial states apply only a part of religious law, namely religious family law, that is inadequate from a human rights point of view.[4] To turn to the Israeli case, the state's application of

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ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (Abdullahi An-Naim ed., Zed Books 2002) [hereinafter: ISLAMIC FAMILY LAW]. It appears in other jurisdictions as well, as the case study on which this essay is based makes clear.

3. *Infra* notes 72-78 and accompanying text.

4. The choice of family law as the subject to which religious and other traditional norms were to be applied reflects the priorities of Western colonizers. Those called for the westernization of the law governing business and trade as one prerequisite of the efficient extraction of subject countries' resources by the colonizing nations' businesspersons. What were seen as the internal affairs of the colonized population were far less drastically disturbed. *See, e.g.*, for the situation in Malaysia, Andrew Harding, *The Keris, the Crescent and the Blind Goddess: the State, Islam and the Constitution in Malaysia*, 6 SINGAPORE J INT'L & COMPARATIVE L. 154, 159-69 (2002).

religious norms in family law seems to give rise to nearly universal discontent: the non-observant see it as tying Israeli society to the norms of bygone eras, while the pious decry it as partial and insufficient. In concluding this essay, I will consider whether choosing a different field of law as the point at which religious norms impact state law may not produce a better legal regime than that which currently obtains. Of course, even if such a transformation may, in theory, produce a more adequate regime from a human rights point of view, its feasibility is doubtful, considering the centrality of religious family law to conservatives' demands and ideologies in many Muslim-majority jurisdictions and in the only Jewish-majority one.

In Part I of this essay, I discuss the two principal ways in which religious adjudication interacts with state adjudication. In the *integrationist model*, the state itself provides religious adjudication services in some types of case. In the *community court model*, all state adjudication is secular, but nonstate religious courts serve as arbitrators; and state courts occasionally enforce agreements to have conflicts arbitrated before those courts.

Part II provides a detailed insight into the instability of the *integrationist model*, describing how nonstate religious courts have been multiplying in Israel despite its having adopted several systems of religious family law as a part of its state law. The social dynamics fueling this accelerating trend show how the allocation of some areas of law—typically family law—to religious adjudication tends to leave religious conservatives pining for a more complete adoption of religious norms as state law.

In Part III, I return to my initial question, and conclude that at present, jurisdictions that have adopted the *integrationist model* are failing to provide their inhabitants with either a just or a stable legal order. While religious norms—especially religious systems of private and commercial law—can conceivably be part of a just and stable legal order, integrationist jurisdictions' focus on enforcing religious family law keeps them mired in injustice, while not providing for stability. Since integrationist jurisdictions are unlikely to adopt a western-type, completely secularized state law, their struggle with the conundrum explored in this essay is likely to continue.

I. RELIGIOUS ADJUDICATION AND THE STATE

Adjudication according to religious norms is commonplace in the contemporary world. Religious adjudication interacts with the provision of adjudication services by the state in two principal ways. In the

integrationist model, the state itself provides religious adjudication services by either (i) appointing scholars of religious law as judges of the state legal system, as in Iran;[5] (ii) allotting formal jurisdiction in certain types of case to a religious legal system, existing alongside a civil legal system with jurisdiction over all other types of case, as in many Muslim-majority jurisdictions (such as Lebanon, Iraq, Pakistan, Malaysia and Indonesia) and in Israel;[6] or (iii) directing the (non-religious-scholar) judges of the state civil legal system to apply norms drawn from religious law to some types of case, by either enacting such norms as statute or directing the judges to refer to traditional sources of religious law, such as scripture or the writings of religious scholars. Such a scenario obtains in, e.g., Egypt and India.[7]

The other widespread contemporary model for the interaction of religious adjudication and state adjudication may be called the *community court model*. It obtains in Western jurisdictions committed to the secular character of state adjudication, such as the U.S., U.K., Canada and E.U. jurisdictions.[8] In such jurisdictions, religious adjudication is principally available in non-state community courts operated by various minority and ethnic communities and manned by

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5. The Constitution of the Islamic Republic of Iran provides that the Chief of the Supreme Court and the Prosecutor-General must both be *Shari'a* sages who have attained the rank of *Mujtahid* (art. 162), and that the qualifications for judicial appointment shall be determined "in accordance with religious criteria" (art. 163). *See* Mehran Tamadonfar, *Islam, Law, and Political Control in Contemporary Iran*, 40 J. SCIENTIFIC STUDY RELIGION 205, 217-18 (2001).

6. On the allocation of jurisdiction in Lebanon, *see* ISLAMIC FAMILY LAW, *supra* note 2, at 127; in Iraq, *id*. at 112; in Pakistan, *id*. at 231-32; and in Malaysia, *id*. at 269-70. Indonesia's Islamic Courts (Pengadilan Agama) have had jurisdiction over Muslims' matter of personal status since independence in 1945. *See* John R. Bowen, *Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960-1994*, 34 L. & SOC'Y REV. 97 (2000). Law No. 3 of 2006 extended their jurisdiction to most matters of commercial law. Alfitri, *Expanding a Formal Role for Islamic Law in the Indonesian Legal System: the Case of Mu'amalat*, 23 J.L. & RELIGION 249, 250-51 (2007-08). For the Israeli situation, *see infra* notes 40-42 and accompanying text.

7. As to Egypt, *see* Lama Abu-Odeh, *Modernizing Muslim Family Law: the Case of Egypt*, 37 VANDERBILT J. TRANSNAT'L L. 1043 (2004); for India, *see* Marc Galanter & Jayanth Krishnan, *Personal Law Systems and Religious Conflict: A Comparison of India and Israel*, *in* RELIGION & PERSONAL LAW IN SECULAR INDIA 270, 272-75 (Ind. Univ. Press 2001).

8. For the U.S. situation, *see* Ruth Halperin-Kaddari, The Interaction between Religious Systems of Adjudication and the Secular Legal System in the United States, J.S.D. thesis, Yale, 6-23 (1993); for the U.K., *see* Les Reid, *First UK Sharia Court Up and Running in Warwickshire,* COVENTRY TELEGRAPH, September 9, 2008, *available at* http://www.coventrytelegraph.net/news/north-warwickshire-news/2008/09/09/first-uk-sharia-court-up-and-running-in-warwickshire-92746-21708478/; for Canada, *see* Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women*, 1 MUSLIM WORLD J. HUMAN RIGHTS notes 5-7 and accompanying text (2004); and for the E.U., *see* Mathias Rohe, *Shari'a in Europe*, 44 DIE WELT DES ISLAMS—INT'L J. FOR STUDY OF MODERN ISLAM 323 (2004) (special issue).

their religious legal experts. The nomocentric nature of Judaism and Islam has made the observant elements of Muslim and Jewish minorities in American and European jurisdictions establish many such community courts. The authority of such courts may flow from one or more of several sources: (i) community custom, according to which community members should resolve their differences before community, rather than state fora, adjudicating according to traditional religious law; (ii) their judges' personal status or renown among community members; or (iii) the parties' appointment of the tribunal as arbitrator.

The willingness of American and European jurisdictions to tolerate the religious courts' application of norms, some of which contradict fundamental human rights such as gender equality, and even to enforce their arbitral decrees, waxes and wanes. While many Western jurisdictions, including the U.S. and the U.K., have long accepted Jewish religious courts (*batei-din*) as arbitrators and enforced their decisions where necessary through the state enforcement apparatus,[9] Muslim minorities' demands for a similar recognition of their *Shari'a* courts have met with uneven success. For example, while the U.K. has since September 2007 recognized and enforced *Shari'a* court decisions in private law and family law matters as arbitral awards,[10] and some U.S. courts seem willing enough to confirm *Shari'a* arbitral awards,[11] the government of Ontario has recently legislated to ban religious arbitration in family matters,[12] while the Québec civil code bans *any* arbitration in

9. For the *beth-din* of the London United Synagogue, and the enforcement of its decrees by the U.K. state enforcement system, *see e.g.*, The United Synagogue—The London Beth Din—Litigation, www.theus.org.uk/the_united_synagogue/the_london_beth_din/litigation (last visited July 5, 2010). Among the many U.S. decisions recognizing *beth-din* arbitration, *see, e.g.*, Friedman v. Friedman, 824 N.Y.S.2d 357 (N.Y. App. Div. 2006) (the Supreme Court of New York County, Appellate Division, compelled arbitration of financial issues relating to a divorce before the Beth Din of America); Herzog v. Oberlander, 19 Misc.3d 1113(A), 2008 WL 880184 (N.Y. App. Div. 2008) (the Supreme Court of Kings County, New York, compelled arbitration of a neighbors' quarrel before a *beth-din*).

10. Abul Taher, *Revealed: UK's First Official Shari'a Courts*, THE SUNDAY TIMES, Sept. 14, 2008, *available at* http://www.timesonline.co.uk/tol/comment/faith/article4749183.ece. *See also* comments by the then Lord Chief Justice of England and Wales, Lord Phillips, who commented in July 2008 that he saw no problem with the U.K. application of *Shari'a* by private tribunals, so long as steps taken after the breach of agreements to arbitrate before them do not violate state law. Patrick Wintour & Riazat Butt, *Sharia Law Could have UK Role, says Lord Chief Justice*, THE GUARDIAN, July 4, 2008, *available at* http://www.guardian.co.uk/uk/2008/ jul/04/law.islam.

11. Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. App. 2004) (where the Court of Appeals of Minnesota confirmed a *Shari'a* arbitration award); Jabri v. Qaddura, 108 S.W.3d 404 (Tex. App. 2003) (where the Court of Appeals of Texas, Second District, Fort Worth, held an agreement to have disputes arbitrated at the Texas Islamic Court valid and enforceable).

12. FAMILY STATUTE LAW AMENDMENT ACT, R.S.O. 2006, ch. 1, § 1(1)(b), providing that arbitration in family matters may only be carried out in Ontario according to Ontario law or the law of another Canadian Province. For the public debate which preceded this legislation, *see*

those matters.[13] The existence of religious community courts forces the secular establishments of Western jurisdictions to face the contradiction between those fundamental human rights infringed by some religious norms and the virtue of multi-cultural tolerance, itself translatable into human rights language under the guise of group rights.[14]

To take the Israeli case, ever since its 1948 establishment, Israel has been committed to the *integrationist model*, allocating—much like Iraq, Lebanon, Pakistan and other Muslim-majority jurisdictions—state jurisdiction over family law to religious community courts. Typically, the religious community courts of the several "recognized" religious communities have been granted exclusive jurisdiction over community members' marriage and divorce, and concurrent jurisdiction (with the state civil courts) over ancillary matters such as paternity, custody, guardianship and the economic incidents of personal status.[15]

Israel's commitment to the *integrationist model* has been, and is clear, so far as the law in books, state law, is concerned. It has never been quite as clear as regards the law in action, broadly defined as the normative practices of the populace. Since the Ottoman era, subgroups of the Jewish population have been operating religious community courts, on the pattern common in jurisdictions where the state legal system is committed to secular adjudication.[16] Most such subgroups have merely intended to prevent their own community members from using state courts. The last five years, however, have seen the establishment of many new nonstate Jewish religious courts offering adjudication of private and commercial law disputes according to religious Jewish law (*halacha*). Some of the founders of those courts speak openly of their desire to draw even the non-observant population

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Natasha Bakht, *Were Muslim Barbarians Really Knocking at the Gates of Ontario? The Religious Arbitration Controversy—Another Perspective*, 2006 OTTAWA L. REV. 67 (40th Anniversary Special Edition), commenting, at note 72 and accompanying text, that the Act shall not curb family arbitration according to *Shari'a*, but merely drive it underground, away from the gaze of state authorities. Alternatively, *Shari'a* arbitrators may choose such *Shari'a* views as conform to the law of a Canadian province. *See also* Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008).

13. CIVIL CODE OF QUÉBEC, S.Q. 1991, ch. 64, art. 2639.

14. Studies of this contradiction are legion. Three classics are CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Princeton Univ. Press 1994); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (Oxford Univ. Press 1995); and AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (Cambridge Univ. Press 2001).

15. Palestine Order in Council, 1922-1947, § 51-55, 64-65.

16. The territory which is now Israel was part of the Ottoman Empire between 1516-1821 and 1831-1917. It was administered by Great Britain under a League of Nations mandate between 1922-48.

away from the state legal system, depriving it of litigants. These developments underline the *integrationist model*'s tendency to arouse continuous discontent, in Israel and elsewhere. State allocation of certain types of cases, often family disputes, to the jurisdiction of religious community courts seems to leave both the devout and the non-observant parts of society unsatisfied. The devout feel, as does, for example, human rights expert Abdullahi An-Naim,[17] that endowing religious tribunals with jurisdiction originating in the state compromises their specifically religious authority,[18] or that the partial jurisdiction allocated to religious courts is merely a temporary compromise, desirable until the allocation of full jurisdiction to such courts (or the staffing of state civil courts with scholars of religious law) becomes politically feasible. The non-observant feel that the march of progress is being held back by ignoble political compromise.[19] The continuing existence of the integrationist model in jurisdictions such as Israel and Lebanon is principally a product of political stalemate: the efforts of different sectors to modify the status quo in contrary directions tend to cancel each other out, the status quo being preserved as a result of the balance of hostilities (so far, in Israel, political rather than armed).

In the next Part of this essay, I examine the Israeli case in detail, focusing on a socio-legal study of the recent expansion of nonstate adjudication of private law disputes according to Jewish religious law. The resulting provision of religious adjudication by both the state (in family law) and private tribunals (in private law) emphasizes the discontentment and instability characteristic of the integrationist model.

II. THE EXTENSION OF PRIVATE HALACHIC ADJUDICATION IN ISRAEL: A CASE STUDY

A. Private *Halachic* Adjudication in Israel to 1988

While Palestinian, and later Israeli, state law has, since the late Ottoman era, been committed to the integrationist model, the devout

17. ABDULLAHI AHMED AN-NAIM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A *passim* (2008).

18. This feeling reflects the more general problem faced by both colonizers attempting to enforce traditional local legal orders in colonial legal systems and post-colonial societies attempting to "modernize" such traditional orders, "that local norms and processes could not be removed from their original medium without losing their integrity." Tamanaha, *supra* note 1, at 384. The same could be said of non-(or proto-) colonial phenomena, such as the absorption of medieval England's many local customs by the common law.

19. *See, e.g.*, SHULAMIT ALONI, HANDCUFFED DEMOCRACY (2008) (Hebrew).

branch of modern Judaism known as Ultra-Orthodoxy, or *Haredi* Judaism, has reacted, much as God-fearing Jews have historically reacted to living in gentile-majority polities, by setting up its own nonstate *halachic* tribunals. *Haredim* ("the fearful"), as followers of this extreme form of Jewish religious observance are known, prefer their own *batei-din* to those of the state, even in family law, which the state has allocated, as regards Jewish parties, to the jurisdiction of state-run *batei-din*, often staffed with *Haredi* judges. Israeli *haredim*'s deep resentment of the Jewish state—they regard the very establishment of such a state prior to the arrival of the Messiah as a grave religious misstep—made them emulate the *community court model* common among *haredim* living abroad.[20]

Although my essay does not focus on *haredi* courts, it is important to briefly mention them, as the history of their nonstate *batei-din* forms the pre-history of the more recent expansion of nonstate *halachic* adjudication, on which I principal focus. The *haredi* community has never been committed to state adjudication. It characterizes the Jewish state's secular courts as an abomination, as equal to gentiles' courts (*erka'ot ha'goyim*), and Jews who file suit there as *de facto* enemies of the Mosaic testament.[21] *Haredim* appear in state courts as defendants only when impelled to attend by the state's power. They file suit in state courts only when *haredi* community fora and the strong internal discipline common in *haredi* communities do not avail, as in suits against a non-*haredi* defendant, who will disobey a summons by a

20. For the decisions of a leading *haredi beth-din*, *see* DECISIONS OF THE PRIVATE LAW COURT OF THE CHIEF RABBINATE, JERUSALEM (11 vols., Rabbi Avraham Dov Levin ed., 1993-2009).

21. There are many sources for the *halachic* prohibition on Jews' adjudicating before non-Jewish courts. *See, e.g.*, BABYLONIAN TALMUD, Gitin 88a; Maimonides, MISHNEH TORA, Sanhedrin, 26, 7; SHULKHAN ARUCH, Choshen Mishpat 26:1. For the opinion that Israel's current civil state courts are, for purposes of this prohibition, equal to non-Jewish courts, *see* Avrohom Karelitz, CHAZON ISH, Sanhedrin 15:4; Ovadia Yosef, YACHAVEH DA'AT 4:65 and also footnote on p. 313-14; Eliezer Waldenberg, TZITZ ELIEZER, vol. 12:82; Yehuda Segal, *On Secular Law in Israel*, 7-8 HATORA VE'HAMEDINA 74 (1954-55); Yaacov Ariel, *The Law of the State of Israel and the Prohibition on Adjudicating before Non-Jewish Courts*, 1 TECHUMIN 319, 326-28 (1979-80); Avraham Sherman, *The Prohibition on Applying to the Civil Courts to Have an Halachic Verdict Annulled*, 45 TORAH SHE-BE'AL-PE 147, 151-52 and *passim* (2006-07); Dov Lyor, *What are Temporary Regulations Compared to Eternal Values?*, *in* 19 KUMI ORI 12-13 (2006-07); for the contrary opinion, *see* Yaacov Bazak, *Israel's Courts—are they Truly as Non-Jewish Courts*, 2 TECHUMIN 523 (1980-01); 3 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES AND PRINCIPLES, 1605-07 (1988-89) (*see* his reply to Karelitz's approach at *id.*, note 38); Chaim Cohen, *Gentile Courts and Jewish Values*, 4 MISHPAT UMIMSHAL 299-309 (1997-98). For academic discussion of the doctrine and its history, *see* Elon, *id.*, vol. 1, 13-18, and *id.*, vol. 3, 1322-28; Eliav Shochetman, *The Halachic Status of the Courts of the State of Israel*, 13 TECHUMIN 337 (1992-93).

haredi beth-din. Even under such circumstances, a *haredi* plaintiff needs special permission from a *haredi beth-din* to file suit in a secular court; on being convinced that the defendant shall not obey the *beth-din*, that body grants the plaintiff a "refusal order" (*tzav seruv*) which permits him, as a matter of *halacha*, to sue his adversary in a state, secular court.[22] The *beth-din* sometimes tries to force defendants to appear by community sanctions such as ostracism, but as these sanctions depend for their effectiveness on the strong internal cohesion characteristic of devout communities, they are unlikely to prove efficacious regarding non-observant defendants.

This private *halachic* court phenomenon has been more recently extended to the non-*haredi* sector. To be sure, many observant Israeli Jews who approve of the Zionist enterprise of establishing and maintaining a Jewish state in our times rather than in the End Times—a sector known as the "Religious Zionist" camp—have since Israel's establishment largely supported its choice of the integrationist model, retaining *halachic* adjudication in family law alone.[23] In recent years, however, some of them have been having second thoughts. Starting in 1988, and increasingly since 2005, Religious Zionist Israelis have been founding new nonstate courts dedicated to the *halachic* adjudication of private and commercial cases. Their judges are drawn exclusively from the Religious Zionist sector. Their authority is based on the judges' personal status as rabbis and *halachic* judges (*dayanim*) and on the parties' appointment of the court as an arbitrator, which is a condition to each case being heard. Many of those courts explicitly intend to draw not only Religious Zionist litigants, but non-observant litigants as well.

Unlike the *haredi* courts (which rarely expect, or attempt, to draw a non-*haredi* clientele), the new courts thus represent a direct challenge to Israel's state legal system, endeavoring to empty it of litigants. Though this challenge is in its formative stages—at present (2010), the two dozen or so new courts only hear several hundred cases per year fully told—it is a significant, ambitious and much-publicized attempt to posit *halacha* and the *halachic* forum as a fully functional alternative to the

22. *See, e.g.*, a recent copyright dispute between two Orthodox publishers of editions of Maimonides' MISHNEH TORAH. Plaintiff first sued in a nonstate *halachic beth-din*. On the defendant's default, the *beth-din* decided that Plaintiff "may put their right into action anywhere they please." This amounted to a *tzav seruv*, which granted Plaintiff *halachic* permission to sue in the state courts, which he promptly did: CA 4436/07 Ketuvim Publ'g v. Or Vi'yshuah Yeshiva [2007], ¶ 12.

23. On Religious Zionism, *see* A HUNDRED YEARS OF RELIGIOUS ZIONISM (Avi Sagi & Dov Shwartz eds. 2003) (Hebrew).

state's private law and its civil courts.[24] It is this radical attack on the state legal system, directed at the state system's core area of professional expertise—private and commercial law—that is the focus of the present Part. I shall first describe the new courts, their founders, personnel, social context, goals and the services they offer, later moving on to discuss the deep dissatisfaction with Israel's integrationist status quo which prompted their appearance.

B. Growth from 1988: Founders, Institutions and Tendencies

The earliest of the new courts were founded by rabbis serving in the state religious bureaucracy as Municipal Rabbis (*rav ir*). The late 1980s saw some of these rabbis extend the activities of the local Religious Councils to include the provision of *halachic* adjudication services in private and commercial law matters. The *batei-din* convened to hear such matters were not (and are not) state bodies; Israel's state Rabbinical Courts only have formal jurisdiction over family law cases.[25] Nor were (or are) the new *batei-din* funded by the state. Still, some of their initial status was probably based on their having been established by rabbis serving in key state posts.

The first two new courts were founded in 1988: the Private Law Court adjacent to the Kiryat-Ono religious council, founded by Rabbi Dr. Ratzon Arusi, and the District Private Law Court of Kiryat-Arba, near Hebron.[26] The Kiryat-Ono court attracted varied disputes, from the neighborly quarrels of the area around the Religious Council building to million-Shekel cases stemming from construction projects and various

24. Many other Religious Zionist *halachic* courts for the adjudication of private and commercial law disputes established during the last few years have since ceased to operate, but the entire system's caseload is apparently slowly growing. Interview with Rabbi Eliezer Halle, former judge of the private law *halachic* court of Beth-Shemesh (then part of the "'Gazit" court network) (Sept. 7, 2008) [hereinafter Halle Interview]; Interview with Rabbi Sinai Levi, manager of "Law and *Halacha* in Israel" (one of the new courts) (Dec. 14, 2008) [hereinafter Levy Interview]; Interviews with Rabbi Ido Rechnitz, General Manager of the "Eretz Chemda—Gazit" court network, (Dec. 15 & 31, 2008) [hereinafter Rechnitz Interview]; Interview with Rabbi Ya'acov Verhaftig & Rabbi Tzvi Lifshitz, Chief Judge and Judge, respectively, of the private law *halachic* court adjacent to "Neve Nof" synagogue in Har Nof, Jerusalem (Dec. 31, 2008) [hereinafter Verhaftig Interview]; Interviews with Rabbi Dr. Ratzon Arusi, Chief Judge of the private law *halachic* court adjacent to the local Religious Council in Kiryat-Ono (Dec. 29, 2008 & Jan. 5, 2009) [hereinafter Arusi Interview]; conversation with Rabbi David Stav, Chief Judge of the private law *halachic* court, Shoham, Dec. 7, 2009 [hereinafter Stav Interview].

25. Rabbinical Courts Jurisdiction Act (Marriage and Divorce) 1953, S.H. 165, § 1.

26. Founded by the Municipal Rabbi, Dov Lyor, and by Rabbi Yoezer Ariel, with the help of the chairs of the Religious Councils of Kiryat-Arba and the Hebron Hills. *See* Dov Lyor, *A Private Law Court in Action*, 1 SHA'AREY TZEDEK, 225, 226-27 (2000); Yoezer Ariel, *Introduction*, *in* DECISIONS OF THE DISTRICT PRIVATE LAW COURT OF KIRYAT-ARBA—HEBRON HILLS vii (1995) (Hebrew).

commercial and financial transactions. Litigants at this court came from every part of Israeli Jewish society—*haredim*, Religious Zionists and the non-observant. Activity at the Kiryat Ono court has lately been dwindling, largely due to its failure to obtain Religious Council money for maintaining the court, and to the grave crisis which threatened all of Israel's Religious Councils when the Religions Ministry, through which they were budgeted, was temporarily dismantled on December 31, 2003, due to political pressure from then-coalition-member Shinui, a party hostile to the religious bureaucracy.[27]

The years 1992 and 1993 saw the establishment of two more Religious Zionist nonstate *halachic* courts specializing in private and commercial law: the Private Law Court of the Neve Nof community at the Har Nof neighborhood of Jerusalem (a large neighborhood on the Western fringe of Jerusalem, populated by both *haredim* and Religious Zionists),[28] and the Gush Etzion Private Law Court, located at Alon Shvut, south of Jerusalem.[29] An effort to obtain funding for the Neve Nof court from the Jerusalem Religious Council failed, much like the analogous effort at Kiryat-Ono. The Neve Nof court's judges thus work gratuitously.[30] All the judges of this court were and are disciples of Rabbi Zalman Nechemia Goldberg, a former judge of the (state) Rabbinical Court of Appeal, and a key guiding spirit of the new Religious Zionist private law courts. Goldberg, known by the acronym HaGaRZeN (= the Great Rabbi Zalman Nechemia, but also meaning "the axe," for his intellectual sharpness) has been appointed President of the Neve Nof court. That court primarily hears cases concerned with damage to property and neighbors' quarrels; it also hears some disputes originating in employment relationships. The sums involved run from trifles to tens of thousands of dollars. Most litigants are Religious Zionists, though some are *haredim* and some are non-observant.[31]

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27. Arusi Interview, *supra* note 24. For Arusi's goals and motives, *see* his *Preface*, 1 SHA'AREY TZEDEK 13 (2000). Following Shinui's downfall in the 2006 elections, the Religions Ministry was re-established as the Ministry of Religious Services.

28. Founded by the Municipal Rabbi, Ya'acov Verhaftig. Verhaftig Interview, *supra* note 24.

29. By Rabbi Gideon Perl, Municipal Rabbi and head of the Religious Council; *see* information on this court's work in his *The Power of a Local Committee vis-à-vis Individuals' Rights*, 1 SHA'AREY TZEDEK 251 (2001).

30. *Compare* the *haredi* Private Law Court adjacent to the Chief Rabbinate, Jerusalem, which is funded out of the Jerusalem Religious Council's budget. Verhaftig Interview, *supra* note 24. This court was founded in 1978 by Rabbi Batzal'el Zholti, then (state) Municipal Rabbi of Jerusalem and judge of the (state) Rabbinical Court of Appeal. Much like the earliest Religious Zionist nonstate private law courts, this *haredi* nonstate court appears to have been founded by an employee of the state religious bureaucracy. There are other *haredi* examples.

31. Verhaftig Interview, *supra* note 24.

Those four pioneer courts have since 2005 been followed by several others established in Israeli settlements in the occupied territories, including at Beit-El, Itamar, Efrat, Barkan, Kedumim and New Giveon. Many of those new courts have, like their predecessors, been established by each settlement's Municipal (state-appointed) Rabbi, building on the notoriety acquired on the strength of his official role.[32]

Alongside the Religious Zionist private law *halachic* courts headed by rabbis holding a state appointment at the town or other settlement where the court sits, one now finds "Eretz Chemda—Gazit," a six-court network born of the March 2009 merger of the "Gazit" court network, established in 2005, with "Law and *Halacha* in Israel," a court established in the same year by "Eretz Chemda," a Religious Zionist college for advanced *halachic* studies focusing on educating those already certified as rabbis by the Israeli Chief Rabbinate toward the higher qualification of religious judge or *dayan*.[33] While most of the Municipal Rabbis' private law courts function in Israeli settlements in the occupied territories, the courts operated by "Eretz Chemda—Gazit" mostly sit in Israel proper, though principally in Jerusalem and its periphery, in the South and the North, that is, in Israel's poorer areas, where much of the observant population is concentrated. Only two such courts are located in Israel's coastal strip, which is home to a wealthier, mostly non-observant population.[34]

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32. For a list of *halachic* courts, including currently active Religious Zionist courts, *haredi* courts, state Rabbinical Courts and some courts which are now defunct, *see* www.dintora.org/beitdin.asp (last visited July 7, 2010).

33. The Chief Rabbinate, as a state institution, is mostly respected by Religious Zionists though mostly manned by *haredim*. It administers examinations in *halacha* and grants certificates of aptitude to serve as either a rabbi (the lower qualification) or a *dayan* (the higher qualification), similar to the Germanic *venia legendi*. Those certificates are principally sought after by persons desirous of a state appointment as Municipal Rabbi or Rabbinical Court judge.

34. "Eretz Chemda—Gazit" currently operates courts in Jerusalem (the court called "Law and *Halacha* in Israel" before the merger), Ramat Gan (the network's key coastal plain court, headed by Rabbi Ya'acov Ariel, the local Municipal Rabbi), Beit-Shemesh (a city in the Jerusalem periphery), Ofra (a settlement in the occupied territories; the court is headed by Rabbi Avi Gisser, the Municipal Rabbi), Safed (in the North) and Sderot (in the South). The last two courts are headed by the respective heads of the local *Yeshivot Hesder*—religious junior colleges for *halachic* study, intended for military-service-age (18-21) youths, the graduates of which perform abbreviated periods of military service. These *yeshivot* are perhaps *the* quintessential Religious Zionist institution; the students and graduates of *haredi yeshivot* are exempt from (otherwise compulsory) military service, a fact which does much for registration. Another nonstate Religious Zionist private law *halachic* court sits at Shoham, a fairly affluent coastal plain township. Its founder, Rabbi David Stav, the Municipal Rabbi, acts sometimes as part of the "Eretz Chemda—Gazit" network, sometimes as an independent court. Stav Interview, *supra* note 24. The network's website (*infra* note 38) does not mention Stav's court as one of its branches.

The two groups of private law courts serve communities of different types, and interact differently with those communities. The municipal Rabbis' courts mostly serve settlements (or communities) where inhabitants are ideologically (if not always practically) already committed to *halachic* adjudication. Most "Eretz Chemda—Gazit" courts, on the other hand, sit in communities which include many non-observant persons. The network makes a clear effort to attract a non-observant clientele. There is some overlap between the two groups of courts: "Eretz Chemda—Gazit" includes two courts headed by the Municipal Rabbis of the municipalities where the courts sit. One of those two courts sits in a settlement in the territories.[35]

Since 2008, four bodies engaged in either the actual provision of *halachic* adjudication services in private and commercial law, or in the promotion of such adjudication—"Gazit," "Law and *Halacha* in Israel" (since merged), Rabbi Arusi's "Customs of Israel" association, and the *Mishpatei Eretz* ("laws of the land") Institute, another Religious Zionist college for advanced *halachic* studies—have been coordinating their activities as components of a "Private Law Court Forum."[36] Cooperation includes some specialization: the Forum decided that, rather than offering actual adjudication services, *Mishpatei Eretz* shall concentrate on research in *halachic* private and commercial law and on writing *halacha*-based contracts useable in modern contractual situations. "Gazit" and "Law and *Halacha* in Israel" chose to gradually merge, a choice brought about by their moderate caseload—each of the two bodies heard about fifty cases in the year starting September 2007—as well as by their finances; both bodies emphasize that their activities are funded by donations rather than from the public purse.[37]

The "Eretz Chemda—Gazit" courts hear mostly labor disputes, disputes arising from real estate sales transactions, and tort cases. They profit from experience accumulated at the private law courts founded before 2005: Rabbi Moshe Ehrenreich, co-chair of "Eretz Chemda" and one of the two chief judges of its private law court, is a former judge of

35. They sit at Ramat-Gan and Ofra. *See* the network's website, *infra* note 38. *Id.*

36. There are further underlying connections between the various private law courts and the *halachic* colleges which supply them with much of their manpower: Rabbi Avi Gisser, municipal Rabbi of Ofra, a settlement, is both Chief Judge of the local private law court—first a standalone municipal nonstate court, now one limb of the "Eretz Chemda—Gazit" network—and the founder and Chair of *Mishpatei Eretz*. Gisser also encouraged the establishment of a municipal private law court at Itamar, another settlement; the judges of this court are Gisser's students at *Mishpatei Eretz*. *See* Nathan Chai & Tzvi Pereg, *Mediation and Conciliation at the Court*, *in* MISHPATEI ERETZ: LAW, JUDGE AND PROCEEDINGS 525 (2002) (Hebrew).

37. This emphasis seems to be intended to distinguish them from *haredi* institutions, often characterized, especially in non-observant circles, as an undue burden on the public purse.

the Neve Nof court. Rabbi Goldberg, President of the latter court, has been made President of the "Eretz Chemda—Gazit" network as well. The value of most cases heard (pre-merger) in "Gazit's" courts, as well as in "Law and *Halacha* in Israel," was between NIS 30,000-100,000: that is, beyond the competence of the (state, secular) Small Claims Court, but still not such sums as justify, from a cost perspective, filing suit in the regular state court system.[38]

The new Private Law Courts offer their services to the entire Jewish population of Israel, from the *haredim* to the non-observant. They represent a striking reversal of the long-held Religious Zionist strategy of attempting to transform Israeli state law so that it reflects *halacha* to the greatest extent possible.[39] This strategy has only occasionally succeeded: the core status issues of family law have continued, so far as Jewish couples are concerned, to be under the exclusive jurisdiction of traditionally constituted, state-funded, Rabbinical Courts, applying religious law. Non-Jews are, similarly, and largely as a consequence of the preservation of Rabbinical Court jurisdiction regarding Jews, subject, as regards the same issues, to their own state-funded traditional religious courts. Religious law is also applied to those family law issues over which both religious and secular courts have concurrent jurisdiction, even when adjudicated by secular courts.[40] Even outside family law, much Israeli legislation quotes

38. Rechnitz & Levi Interviews, *supra* note 24. For the "Eretz Chemda—Gazit" network, *see* www.eretzhemdah.org/beitdin.asp?lang=he&PageId=36 (last visited July 8, 2010); for the pre-merger "Law and *Halacha* in Israel," *see* LAW AND HALACHA IN ISRAEL, A PRIVATE LAW COURT ADJACENT TO ERETZ CHEMDA, BACKGROUND BOOKLET AND COURT MATERIALS (2006), *available at* http://www.eretzhemdah.org/Data/UploadedFiles/SitePages/278-sFileRedir.pdf [hereinafter BACKGROUND BOOKLET]. For the Mishpatei Eretz Institute, *see* http://www.dintora.org/english/freetext.asp?ChildID=340 (last visited July 8, 2010), and Yaron Unger, *Opening Remarks*, *in* MISPATEI ERETZ, *supra* note 36. For the "Customs of Israel" association, *see* net-sah.org/he/node/167 (last visited July 8, 2010); and for the Private Law Courts Forum, *see* http://www.dintora.org/pdb/ (last visited July 8, 2010). *See further* Ido Rechnitz, *Judges at thy Every Gate*, YNET (Sept. 5, 2008), www.ynet.co.il/articles/0,7340,L-3592512,00.html; Ya'ir Sheleg, *Shall the Rabbinical Courts Ease the Pressure on the [State] Court System?*, HA'ARETZ, (Oct. 25, 2006), www.haaretz.co.il/hasite/spages/779208.html,. For a "Gazit" case worth hundreds of thousands of shekels, *see, e.g.*, file 68/042, adjudicated at the "Gazit" court at Ofra, *available at* www.gazit.org.il/psd_68042.doc. For the merger of "Gazit" and "Law and *Halacha* in Israel," *see* 60 *Halacha Psuka* 5 (June 2009), http://www.eretzhemdah.org/Data/UploadedFiles/Mails_Files/718-sFile.pdf.

39. For the early (non-observant) roots of the "Hebrew Law Movement," which sought to purify the law to which Palestine's Jews were subject from non-Jewish normative material, *see* Assaf Likhovski, *The Invention of 'Hebrew Law' in Mandatory Palestine*, 46 AM. J. COMP. L. 339 (1998). The premier representative of this movement's later, largely Religious Zionist phase is Menachem Elon; *see* his magisterial JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Jewish Publ'n Soc'y 1994) (elaborating his view that all of modern Israeli law, rather than family law alone, should as least include a strong *halachic* element).

40. According to the (Mandatory) Palestine Order in Council, 1922-47, § 47, which is still in

Talmudic terminology and adopts some *halachic* ideas.[41] Still, much of Israeli state law is blatantly secular and modern, often copied from foreign (principally European and American) sources.[42]

Religious Zionists are painfully aware of the (at least) partial failure of their traditional project, and some of them have now formed the alternative strategy of drawing both observant and non-observant litigants away from the state judicial system to a *halachic* alternative. As the state judicial system itself offers *halachic* adjudication services in family matters, and the judges of the state Rabbinical Courts, themselves *haredim* or Religious Zionists, are widely respected in the Religious Zionist community, the new Religious Zionist strategy focuses on offering an *halachic* alternative to the services offered by the state judicial system in matters of private and commercial law. The choice of those fields, rather than criminal law, is explained by many *halachic* commentators not objecting to the provision of criminal adjudication by secular state authorities, and by the likelihood that an attempt to set up an alternative judicial service in criminal matters would have led to an hostile state reaction.

To draw non-observant litigants to the new private law courts, their organizers present them as offering superior services in senses other than the fact that *halacha* is being applied, as this fact is hardly likely to draw non-observant litigants to the new courts. They claim that the new courts offer a quicker, more efficient and more affordable service than the state's courts.[43] These arguments are, at present, largely true. The pre-merger courts operated by "Gazit" and "Eretz Chemda" usually held a full hearing no later than a few weeks after suit was first filed, while in the state system, many months sometimes elapse before the first

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force. During the last decade, the secular courts have found a way around this provision: they now hold that parallel to the religious norms applied to the economic incidents of family life under the Order in Council, a second legal order, developed by the secular courts out of general principles, such as human rights, the duty to respect them, and the duty to act in good faith, also applies. On this striking development, *see* Ruth Halperin-Kaddari, *Israeli Civil Family Law—towards Completion: now to be based on Dignity, Justice, Equality and Intention*s, 17 LEG. RESEARCH 105 (2001).

41. *See, e.g.*, the "Depositees Law" (*Hok HaShomrim*) of 1967, I.L. 1967, p. 52, which makes use of *halachic* terminology in distinguishing between remunerated (*shomer sachar*) and non-remunerated (*shomer chinam*) depositees (§ 1).

42. *See* DANIEL FRIEDMANN, THE EFFECT OF FOREIGN LAW ON THE LAW OF ISRAEL (Isr. L. Rev. Ass'n 1975).

43. *See* those arguments being made, with an obvious view to drawing non-observant litigants to the new courts, at the "Eretz Chemda—Gazit" website, http://www.eretzhemdah.org/content.asp?PageId=36&lang=he (last visited July 8, 2010). *See further* in Sheleg, *supra* note 38; Rechnitz, *supra* note 38; and in the BACKGROUND BOOKLET, *supra* note 38, at 5.

preliminary hearing is held.[44]

The new courts' services do come much cheaper than those of any state court except the Small Claims Courts. They are also much cheaper than the services of any other arbitration service providers currently active in Israel.[45] The merged "Eretz Chemda—Gazit" network has adopted the pre-merger fee scale of "Law and *Halacha* in Israel": 0.75% of the higher of either the quantum claimed or the value of the case, with a minimum fee of five hundred shekels.[46] This fee scale compares favorably with the state system's fees of 2.5% of the sum claimed, with a 694 Shekel minimum.[47] For claims of up to ten thousand shekels, pre-merger plaintiffs could choose the network's "Small Claims Track" for a flat fee of two hundred shekels. "Collection cases," involving just the collection of a sum certain with no need for a hearing, could be filed for a flat fee of fifty shekels. Most of the other *halachic* private law courts charge between fifty and three hundred shekels per case; the "Gazit" court at Sderot, the inhabitants of which have long been exposed to bombardment from neighboring Gaza, charged, pre-merger, no fees at all. While the fees payable at the state Small Claims Court also run between 50-310 shekels (one percent of the sum claimed, with a fifty Shekel minimum), those courts only have jurisdiction over cases worth 31,200 shekels or less (hence the three-hundred-plus Shekel fee ceiling).[48] As regards such cases, the new *halachic* courts provide no cost advantage over the state's courts.

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44. While the new courts' slim caseloads may explain their being able to deal quickly with each case, one should also note that their judges are, at present, far from being judges full-time, with their major professional responsibilities lying elsewhere. Levi Interview, *supra* note 24; BACKGROUND BOOKLET, *supra* note 38, at 8, 16.

45. As to fees charged by other arbitration service providers, note that even Rabbi Verhaftig of the Neve Nof Court charges much more significant fees when acting as sole arbitrator than when acting as Chief Judge of the Private Law Court. Verhaftig Interview, *supra* note 24. Fees quoted should be evaluated bearing in mind that Israeli employees' average monthly wage was 7,827 shekels in May 2009: CENTRAL BUREAU OF STATISTICS, http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=200926165 (last visited July 8, 2010).

46. For the fee schedule at "Law and *Halacha* in Israel," now adopted by the merged network, *see* the BACKGROUND BOOKLET, *supra* note 38, at 8. For the merged network's up-to-date fee schedule, *see* http://www.eretzhemdah.org/content.asp?PageId=37&lang=he (last visited July 8, 2010). For other nonstate *halachic* courts' fees, *see* the information at www.dintora.org/beitdin.asp (last visited July 8, 2010). I derived further such information from my interviews with Rabbis Levi & Rechnitz, *supra* note 24.

47. For fees at the state courts of first instance, *see* the Schedule to the Courts Regulations (Fees), 5767-2000, Israeli Regulations 6879, 720; Schedule to the Courts Regulations (Fees), 5770-2009, Israeli Regulations 6846, 413 (amendment effective Jan. 1, 2010).

48. For the fees at the state Small Claims Courts, *see* Small Claims Adjudication (Procedure) Regulations, 5737-1976, Israeli Regulations, 3633, 510; Courts Order (Extension of Small Claims Courts' Jurisdiction), 5768-2008, Israeli Regulations, 6702, 1228; Miscellaneous Publications, 5770-2010, 6041, 1186 (Notice published according to Courts Order).

The new Israeli *halachic* courts also enjoy a cost advantage over *halachic* arbitration services available elsewhere*:* the *Beth Din* of America, for example, charges three hundred dollars an hour for arbitration before a traditional three-member *beth-din*.[49] The services offered by the new Israeli *halachic* courts are thus, for cases beyond the competence of the state Small Claims Courts, quite attractive in terms of cost.

The economic attractiveness of these *halachic* courts is enhanced because parties can usually represent themselves, thus ridding themselves of the costs of a lawyer. Though the "Eretz Chemda—Gazit" network permits the use of lawyers, such use is, as yet, rare. The traditionally interventionist role of the *halachic* judge makes the use of lawyers not only out of step with the *halachic* ethos, but also superfluous in any but the most complex cases, particularly those litigated between corporations. The only Religious Zionist *halachic* private and commercial law courts where cases have been litigated by lawyers, rather than the parties themselves, are Rabbi Arusi's court at Kiryat-Ono and Rabbi Stav's court at Shoham. Perhaps unsurprisingly, given his experience, Arusi acknowledges that where a company's top managers do not themselves understand the legal and financial structures used to order their firm's affairs, there is no point in objecting to the use of lawyers. Others note that large business entities are unlikely to litigate in a *halachic* forum unless that forum lets them use a lawyer.[50]

To further increase their appeal to litigants more concerned with their judges' professionalism than with their Talmudic credentials, "Gazit" and "Law and *Halacha* in Israel" have emphasized, pre-merger, that their judges are certified by the Chief Rabbinate as fit to serve as *halachic* judges (which *haredi* judges often are not), as well as being conversant not only in *halacha*, but in secular Israeli state law and the practical realities of Israeli life as well. "Eretz Chemda—Gazit" now promises that its judges are, to a man, veterans of the Israel Defence Forces (in contrast to the *haredi* judges of other *halachic* courts, who do not serve). They "undertake continuing education programs in civil [secular, A.H.] law, and shall specialize in mediation and gain professional skills in the behavioral sciences."[51] That network's courts

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49. For fees at the Beth Din of America, *see* www.bethdin.org/fees.asp (last visited July 8, 2010); on *halachic* courts outside Israel, *see* Avraham Michael Union, *Batei Din in the Diaspora* 2 SHA'AREY TZEDEK 280 (2001).

50. For Arusi's views on parties' representation, Arusi interview; for the situation at Shoham, *see* Stav Interview. For the final sentence, Rabbi Yoav Sternberg, *Use of Lawyers at the Private Law Courts*, 28 TECHUMIN 200, 202 (2008).

51. http://www.eretzhemdah.org/content.asp?PageID=36&lang=he (last visited July 8, 2010).

make use of external experts, including physicians and various scientists, while the Neve Nof court consults with a secular lawyer, real estate agents and contractors.[52]

Despite the new courts' efforts to draw a non-observant clientele, most actual litigants have, so far, been Religious Zionists. The occasional *haredi* appears before the courts, either when a Religious Zionist defendant, who has been sued by a *haredi*, chooses that the case be heard before one of the new courts (in *halacha*, the defendant picks the forum), or when a *haredi* defendant consciously prefers his case to be heard by a court outside his own community. Some non-observant persons have litigated in the new courts, too, as have some non-Jews. At least one court, that run by Rabbi David Stav at Shoham, apparently serves primarily non-observant litigants.[53] While case volume is still modest, and the hoped-for breakthrough among groups other than Religious Zionists is yet to be achieved, the General Manager of "Eretz Chemda—Gazit" believes that the dissemination among individuals and businesses of *halachic* contract forms, stipulating that any dispute between the parties shall be adjudicated before one of the new courts, will increase demand for their services. Thousands of business deals are, he says, now being formalized in such contracts, and lawsuits based on them have already reached the new courts.[54]

C. Factors of Instability: Causes of the New Courts' Emergence

The appearance of the new nonstate Religious Zionist *halachic* courts for private and commercial affairs seems surprising in a state which already maintains state-funded *halachic* courts, well-respected by the Religious Zionist community. The reasons given for the decision by conservative elements in Religious Zionism to move away from their traditional allegiance to the state courts (including allocation of private and commercial matters to *secular* state courts) have to do with ideology, as well as with material interests. They exemplify the instability of the integrationist model.

(a) *Identification of the State Legal System as a Standard-Bearer for Secularism*. One reason for conservative Religious Zionists' break

52. *Id.*; *see BACKGROUND BOOKLET*, *supra* note 38. For the Neve Nof court, *see* Verhaftig Interview. *See also* decisions explicitly referring to such use in disputes concerning construction work: (i) by the "Gazit" court of Western Binyamin, in file 017/67 (June 2008), pp. 6-8 (on file with the JOURNAL OF LAW AND RELIGION); (ii) by "Law and *Halacha* in Israel," in file 08/06, at 4 (on file with the JOURNAL OF LAW AND RELIGION).

53. Stav Interview, *supra* note 24.

54. Rechnitz Interview, *supra* note 24; Verhaftig Interview, *supra* note 24.

with the state courts is those courts' increasing identification, in Israeli public discourse, with secularism and with a moderate, peace-seeking approach to the Israeli/Palestinian conflict. A significant part of the Religious Zionist community lives in settlements in the occupied territories; indeed, those settlements are the loci of many of the new courts. Heavily publicized decisions by the state courts, primarily the Supreme Court of Israel, are seen by this community as diluting the Jewish character of the state. These include the decision bypassing the statutory requirement that all Jewish Israelis who marry do so in a religious ceremony, by recognizing the civil marriage of Jewish Israelis, conducted abroad, as valid.[55] Religious Zionists also believe that the Supreme Court is endangering the settlements by easing restrictions placed on the Palestinian population, as in the several decisions redrawing the course of Israel's security fence so as to curtail the damage to Palestinian property and rights.[56] These decisions have contributed to many Religious Zionists' identifying the secular state courts as an arm of their secular adversaries.[57] Acceptance of the traditional *haredi* characterization of the secular state courts as essentially non-Jewish courts where a pious Jew may not go absent a direct order from a *beth-din* has contributed to conservative Religious Zionists' (sometimes called "*Nationalist Haredim*") alienation from the secular state courts.[58] Religious Zionists, together with some *haredim*, have since the mid-1990s attempted to exert pressure on the secular state court system so that it enforces some public aspects of religious compliance more forcefully.[59] The failure of those efforts has now induced leaders of the conservative wing of Religious Zionism to call on their adherents to abandon the state judicial system entirely (except in

55. HCJ 2232/06 A. v. Tel-Aviv Dist. Rabbinical Court [2006]. For analysis of this case, *see* Adam S. Hofri-Winogradow, *The Muslim-Majority Character of Israeli Constitutional Law*, 2 MIDDLE E. L. & GOVERNANCE 43, 72-75 (Mar. 2010).

56. *See, e.g.*, HCJ 2056/04 Beit-Sourik Village Council v. Isr. [2004] IsrSC 58(5) 807.

57. A recent dissertation reveals that sixty percent of the "Religious Zionist bourgeoisie" believe the Supreme Court to be either "hostile" or "deeply hostile" to the Religious Zionist population. Chanan Moses, From Religious Zionism to Postmodern Religion: Directions and Developments in Religious Zionism since the Assassination of Yitzchak Rabin (2009) (unpublished Ph.D Dissertation, Bar-Ilan University) (on file with Bar-Ilan University Library and with the author).

58. For that acceptance, *see, e.g.*, Ido Rechnitz, *Judges and Officers Shalt Thou Make Thee in all thy Gates!*, www.dintora.org/files/Hachrayut.pdf (last visited July 8, 2010); Dov Lyor, *supra* note 26, at 226. For a general discussion of "Nationalist Haredim," *see* ASHER COHEN & BERNARD SUSSER, FROM ACCOMMODATION TO ESCALATION: THE SECULAR-RELIGIOUS DIVIDE AT THE OUTSET OF THE 21ST CENTURY 128-29 (Shoken 2003).

59. That pressure is reflected in newspaper reports. *See* MENACHEM MAUTNER, LAW AND CULTURE IN ISRAEL AT THE OUTSET OF THE 21ST CENTURY 536 note 154 (2008).

family matters, where the state Rabbinical Courts have jurisdiction), and instead litigate before alternative, *halachic* courts for private law and commercial affairs.

(b) *Delegitimation of the State Rabbinical Courts' Practice of Arbitrating Private Law and Commercial Cases*. The state Rabbinical Courts, which have formal jurisdiction over family issues alone, have also, ever since the British Mandate era, adjudicated, as arbitrators, in private law and commercial matters. While this practice was confirmed by Mandate-era regulations,[60] no such confirmation has been issued since Israel's independence, and the practice thus has continued without any positive statutory acknowledgement. While any person or body can claim authority as an arbitrator, that authority having been constituted by the parties, a state court with positive state jurisdiction in one subject area, which chooses to preside as arbitrator in another, using its state-provided premises and budget, does at least risk appearing to act as a state institution in the latter context as well.

Rabbinical Court judges have long considered their jurisdiction to hear private and commercial law cases to flow from the basic *halachic* competence of a *beth-din* to adjudicate any matter brought before it.[61] This view, relying on an assumption that the authority of Israel's state-constituted, state-funded Rabbinical Courts is principally grounded not in Israeli positive law but in *halacha*, was rejected by Israel's Supreme Court in 1995.[62] By 2006, the Supreme Court expressly ruled that the state Rabbinical Courts may not hear private law and commercial cases as arbitrators, even if the parties have appointed them.[63] The state Rabbinical Courts are disobeying this last Supreme Court decision, and have kept arbitrating private and commercial cases nonetheless. Their choice to defy the Supreme Court itself underlines the challenges of attempting to integrate a traditional religious community court, which sees its jurisdiction as flowing from God unfettered by temporal statutory restrictions, into a hierarchical state judicial system. Despite the Rabbinical Courts' continuing readiness to arbitrate private and commercial matters, the number of such arbitration proceedings held

60. Religious Groups Ordinance—Regulations establishing the Knesset Yisrael, 1927, 202 *Palestine Gazette*, published Jan. 1, 1928.

61. *See* this view expressed by Rabbi Yitzhak Herzog, the first Chief Ashkenazi Rabbi of the State of Israel. *Id.*; YITZHAK HERZOG, DECISIONS AND WRITINGS, vol. 9, § 11 (Shlomo Shapira ed., 1991).

62. HCJ 3629/95 Katz v. Jerusalem Dist. Rabbinical Court [1996] IsrSC 50(4) 490 (1996). *See* discussion in Issi Rosen-Tzvi, *Subject, Community and Legal Pluralism*, 23 IYUNEI MISHPAT 539 (2000); Ruth Halperin-Kaddari, *Further Remarks on Legal Pluralism in Israel*, *supra* at 559.

63. HCJ 8638/03 Amir v. Rabbinical Court of Appeals [2006].

before them has been falling.[64]

From the perspective of prospective litigants wishing to have a private or commercial law dispute arbitrated by a *halachic* forum, the state Rabbinical Courts having been declared unable to offer such a service has rendered the service they do offer less attractive: their open disregard of the Supreme Court's instructions increases the risk that the arbitrating court's decisions will be overturned, annulled or declared void *ab initio*. Further, from a *halachic* point of view, the Rabbinical Courts' practice of actively flouting the Supreme Court's instructions annuls an advantage they earlier had over nonstate *halachic* fora: up until the Supreme Court's 2006 decision, many observant Jewish Israelis saw the state Rabbinical Courts, even when adjudicating as an arbitration tribunal, as "permanent courts," which could, according to *halacha*, oblige the parties to have their differences adjudicated before them.[65] They were considered "permanent" because of their being part of the state apparatus. Once their sitting as arbitrators became an act of defiance against the other parts of the state apparatus, this institutional advantage disappeared. The decline of state Rabbinical Court arbitration in private and commercial law matters seems to have contributed both to the demand for nonstate *halachic* adjudication in such matters and, indirectly, to supply, as rabbis have identified the increasing demand for this type of nonstate *halachic* adjudication.

(c) *An Increased Supply of Religious Zionist Halachic Experts*. The appearance of the new nonstate *halachic* courts is at least partly a product of supply looking for adequate demand. Israel's large public and private investment in *halachic* education over the past two generations has multiplied the number of available experts in *halacha*. Among Religious Zionists, the flourishing of Zionist (i.e., non-*haredi*) yeshivas for both high-school-age and military-service-age students (*Hesder Yeshivas*), as well as advanced *halachic* colleges for those already certified as of rabbinical competence,[66] has created a large

64. For the state Rabbinical Courts' continuing to sit as arbitrators in private and commercial law matters after the Supreme Court in April 2006 declared this practice illegitimate in a widely publicized decision, *see* STATE COMPTROLLER, ANNUAL REPORT 58B FOR THE YEAR 2007 AND THE ACCOUNTS FOR FISCAL YEAR 2006, at 944-45 (2008). The numbers have declined: while 653 arbitration proceedings were initiated before state Rabbinical Courts in 2004 and 650 in 2005, only 257 such proceedings have been filed for the year starting April 2006. *Id.*

65. *See, e.g.*, Rabbi Simcha Miron, *The Halachic Status of the State Rabbinical Courts*, 22 TORAH SHE-BE'AL-PE 93 (1981).

66. The best-known Zionist *yeshivas* are *Merkaz HaRav* (founded 1924) and *Har HaMor* (founded 1997). The first Religious Zionist advanced *halachic* college was the Harry Fichel Institute for Talmudic Research (founded 1931). Later significant colleges are the Psagot Institute (founded 1980), Eretz Chemda (founded 1987) and Mishpatei Eretz (founded 2000).

public of *halachic* experts looking for suitable employment. Some graduates of those institutions are both *halachic* experts and skilled in the practical business of modern life. They are thus better able than the typical *haredi* rabbi, who spends his entire time studying *halachic* texts, living in splendid isolation from all worldly concerns, to supply adjudication services which may answer the needs of practical businessmen. Some graduates of "Eretz Chemda" even have a (secular) law degree.

This abundance of *halachic* expertise looking for suitable employment has been a major cause of the present effort to create, maintain and increase demand for *halachic* adjudication services among every sector of Israeli Jewry, in matters over which the state Rabbinical Courts—which only offer a limited number of paying positions—have no formal jurisdiction.

(d) *The Religious Radicalization of Part of Religious Zionist Society*. Religious Zionism, occupying an uneasy intermediate position between the two extremes of secular Zionism and anti-Zionist *haredism*, has gradually, over the last generation been torn in two parts: some Religious Zionists have chosen a fuller integration in secular society, wearing their religion rather lightly; others have chosen a fuller commitment to every detail of *halacha*, such as characterizes the *haredi* creed. The latter camp differ from *haredim* only in that they do not adopt the *haredi* dress code, and in their swearing continued allegiance, in principle, to the State of Israel. That allegiance, however, has gradually become clouded with reservations, as Religious Zionists watched Israel make territorial concessions in an effort to reach a compromise vis-à-vis the Palestinians, an effort which the conservative wing of Religious Zionism, much of which is based in the Occupied Territories, opposes almost to a man. They are also increasingly troubled as much of Israeli society adopts a permissive, liberal lifestyle.

Conservative Religious Zionists are expressing their increasing disapproval of the direction Israel's political leadership and secular society are taking by adopting a pseudo-*haredi* lifestyle. A key component of this lifestyle is an increased submission to rabbis; many conservative Religious Zionists now look up to the *halachic* experts in their midst as guiding authorities, to be consulted on any issue. The choice of bringing private and commercial law disputes to a panel of rabbis rather than to a secular state court fits this lifestyle well, especially since litigating in a non-*Halachic* forum is, unsurprisingly, a

grave sin in *halacha*.[67]

This development interacts with the increased supply of *halachic* experts: just as more of the latter are becoming available, more Israelis are choosing to guide their own judgment according to that of a rabbi they admire. Some of the new courts are clearly rabbinical efforts at fostering this trend.[68] Increased *haredi*-style willingness to follow rabbinical advice on every subject from raising one's children to correct cooking does not, however, imply a willingness to follow the advice of *haredi* rabbis. The *haredi* and Religious Zionist populations regard each other with contempt.[69] There is thus a rising Religious Zionist demand for rabbinical services delivered by Religious Zionist rabbis. These developments have clearly secured some (modest) level of demand for the new courts' services.[70]

(e) *The Impact of Israel's 2005 "Disengagement" from the Gaza Strip and Northern Samaria*. The aforementioned religious radicalization among Religious Zionists has deepened following Israel's Summer 2005 "disengagement" from the Gaza Strip and northern Samaria, parts of the occupied territories. This operation, which included the forced uprooting of twenty-six Israeli settlements and the removal of their inhabitants—most of whom were Religious Zionists—into Israel proper, caused widespread shock and anger among conservative Religious Zionists, some of whom believed that God would not permit the operation to be carried out. In the wake of the disengagement, many Religious Zionists' allegiance to the state of Israel seems to have been significantly eroded; they now see the state as having resolutely chosen a direction they see as fundamentally

67. *See* sources cited *supra* note 21.

68. Ariel Edri, the Neighborhood Rabbi (a state position), who established a "Court" at "Har Choma," a neighborhood in Southern Jerusalem, emphasizes in the "announcement" of the establishment of the court that the purpose of his initiative is popularizing the largely *haredi* habit of bringing any question—"matters of (sexual) purity, the Sabbath, Kosher food, ideological matters, children's education, spousal harmony, as well as economic matters such as friends' or neighbors' disputes, paying one's creditors, torts, interest issues etc."—to one's rabbi for advice among the Har Choma population, much of which is not *haredi*. He explains that the establishing of a "court" is simply his way of breaking the psychological barrier which stops many non-*haredim* from "disturbing" rabbis with their personal questions. To help non-*haredim* adopt *haredi*-style reliance on rabbinic advice, rabbis' simple availability must be formalized into a "court." *Id.* Edri's informal "court" is clearly a very different institution from the highly formal, procedurally professionalized court at "Eretz Chemda," thus exemplifying the inner pluralism of the new wave of nonstate *halachic* courts. For the *Haredi* tendency of acting, in any question, on Rabbinical advice, *see* DAVID LANDAU, PIETY AND POWER: THE WORLD OF JEWISH FUNDAMENTALISM 47 (Hill & Wang 1993).

69. Interviews with Halle & Levi, *supra* note 24.

70. On the radicalization of the conservative part of the Religious Zionist public, *see* COHEN & SUSSER, *supra* note 58, at 131-37.

misguided. This erosion made many conservative Religious Zionists wish to have as little to do with formal state institutions as they might. The great wave of new nonstate *halachic* courts established by Religious Zionists in 2005, including both the "Gazit" network, "Law and *Halacha* in Israel" and many Municipal Rabbis' courts, seems a direct product of this turning away from the state.[71] Once more, a greatly expanded demand seems to have met a suitably expanded supply, as the founders of the several courts saw their chance.

(f) *Hopes that Non-Observant Use of Halachic Adjudication will Encourage the Adoption of Halacha as State Law.* A final cause of the recent emergence of many new Religious Zionist nonstate *halachic* courts specializing in private and commercial law is that some Religious Zionists believe that the provision of excellent *halachic* adjudication services to non-observant litigants may advance the traditional project of Religious Zionism—the reform of Israeli state law so as to bring it into conformity with *halacha*. This belief appeals to moderate Religious Zionists, who think in terms of modifying the law applied by the present state courts rather than in terms of replacing those courts and their judges. As Rabbi Reuven Hiller of Hod-HaSharon, a wealthy suburb of Tel-Aviv, explained:

> Propaganda is the most difficult of all. One can, of course, shrug it off by saying that "*halacha* shall only become the law of the state of Israel when most Israelis adopt a God-fearing lifestyle," but with all due modesty, I believe we must, and can, act to promote [the adjustment of Israeli state law to *halacha* even before such extreme social change takes place, A.H.]. The public is terribly disenchanted with the existing [secular judicial] system, while being completely ignorant of the wonderful treasure of *halacha*, of the moral standards of *halachic* judges and of the efficiency of *halachic* courts. When the people get to know the [new courts], and start preferring them whenever [state] law permits this, the resulting grassroots pressure shall eventually bring about the conforming of state law to *halacha*.[72]

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71. Most persons I interviewed pointed out this clear causal connection. The linkage between the experience of the "disengagement" and a new resolution to avoid the state courts is explicit in materials published by a movement, established after the "disengagement," called "Komemiyut—Spirit and Heroism for a Jewish Israel": "The movement shall act so that the religious public is freed from its dependence on the media and courts, which operate in contradiction to the path of scripture, and shall promote the religious media and courts": *Goals of the Movement*, http://www.komemiut.org/home/default.asp?pg=42 (Hebrew) [Ed. Note: The quoted language was removed from the website shortly before publication.] *See further* the essays in a special issue of a periodical published by Komemiyut, 19 KUMI ORI (June 2007).

72. Extracted from a *yeshiva* lecture delivered in December 2008:

III. Can Religious Adjudication Be Part of a Just, Stable State Legal Order?

Having discussed the recent expansion of nonstate religious adjudication in Israel as a case study, let us now return to the general question posed at the start of this essay: can a modern state provide its inhabitants with a *just* and *stable* legal order by referring them, on some (or all) subjects, to legal orders associated with their several religions and enforced by state courts? Our study of the Israeli case prompts a prima facie answer that while this challenge may in principle be surmountable, it poses formidable difficulties. Israel's integration of religious adjudication of some matters of personal status into its positive law has stopped it from providing a *just* family law, as some parts of the religious norms applied to family affairs in Israel infringe basic human rights, principally the right to gender equality.[73] Three examples of such infringing norms shall suffice.

(1) Both Jewish and Islamic law conceive of divorce, in principle, as granted at the absolute discretion of the husband. While in *Shari'a*, a wife may under some circumstances "purchase" a divorce from her husband, a procedure known as *khul*, *halacha* lacks this option.[74] This absolute discretion means that husbands may unreasonably refuse to divorce their wives. While the *halachic beit-din* may impose significant sanctions, including imprisonment, on recalcitrant husbands, actual use of this sanctioning power is limited by *halachic* judges' fear of the *halachic* rule holding divorces granted under duress void.[75] Husbands may also make divorce conditional on wives' renunciation of some or all of their rights in family assets, as well as their custodial rights and husbands' duty to provide child support.[76] While giving in to such

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www.yeshiva.org.il/midrash/shiur.asp?id=6780. The parentheses are mine.

73. "Jewish and other traditional religio-legal systems of marriage and divorce . . . contain asymmetries that disadvantage women." Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: a Pluralist Analysis*, 34 ISRAEL L. REV. 170, 171 (2000). For the protection of gender equality in human rights law, *see, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women, *entered into force* Sept. 3, 1981, 1249 U.N.T.S. 13. For its protection in the family law context *see id.*, art. 16.

74. For the basic *halachic* rules, *see* BABYLONIAN TALMUD, Gitin, 88b; Maimonides, MISHNEH TORAH, Divorce, 2:20; for the rules of *Shari'a*, *see* SYED KHALID RASHID, MUSLIM LAW 98-133 (4th ed., V.P. Bharatiya ed., E. Book Co. 2004), and Nayer Honarvar, *Behind the Veil: Women's Rights in Islamic Societies*, 6 J.L. & RELIGION 355, 371-76 (1988).

75. For the *beit-din*'s sanctioning power, *see* MISHNA, Ketubot, 7, 10; BABYLONIAN TALMUD, Yevamot, 65b; SHULKHAN ARUCH, Even Ha-Ezer, 154a; Rabbinical Courts (Enforcement of Divorce Decisions) Act 1995, I.L. 1995, p. 139. For the rule holding any *get* not given freely and voluntarily to be void, *see* BABYLONIAN TALMUD, Gitin, 88b; Maimonides, MISHNEH TORAH, Divorce, 2:20.

76. Such situations are extremely common in Israel. *See, e.g.*, the factual situations discussed

extortion could be seen as a wife purchasing her divorce, *halacha* does not, unlike *Shari'a*, include such a purchase as an acknowledged form of divorce. Though reform of Ashkenazi (European) *halacha* during the middle ages has made wives' consent a requirement for divorce, husbands wishing to divorce their wives may circumvent their wives' unreasonable refusal by obtaining the consent of a hundred *halachic* scholars to taking a second wife. Wives refused a *get* do not have a similar *halachic* bypass available to them.[77]

(2) In *Shari'a*, daughters receive shares of their parents' inheritance only one-half as large as those their brothers receive. In *halacha*, daughters who have living brothers receive nothing at all, with the entire estate being divided between their brothers. Modern Israel's law of succession does not follow those dictates, however, choosing instead to distribute the inheritance equally between the deceased's children, regardless of both their gender and their religion. However Israel's Inheritance Act lets the putative heirs of a decedent choose, if they will, to have his estate probated by the appropriate religious court rather than by a (civil) probate registrar. In that case, the religious court shall apply the relevant religious legal tradition.[78]

(3) *Shari'a*, as formulated in the Ottoman Law of Family Rights, which Israel's state *Shari'a* Courts apply, permits a man to marry up to four wives so long as he treats them all equally. While leading medieval Sephardi *halachic* sages permitted polygamy so long as the husband had the requisite means to keep all his wives and the ability to satisfy them all sexually, Ashkenazi *halacha* has for the last millennium insisted on monogamy. Modern Israeli criminal law makes polygamy a crime, unless it is expressly permitted, in a specific case, by a religious court. While the state Rabbinical Courts permit Jewish men to take a second wife where their existing wives are either mad (thus lacking the mental capacity necessary to agree to divorce) or unable to conceive, they do not permit polyandry under any circumstances. Neither do the *Shari'a* courts.[79]

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in Fam. (Rishon-Letzion) 14711/01 Doe v. Roe [2001] (delivered Jan. 12, 2006); Fam. (Jerusalem) 1203/08 R.L. (a minor) v. D.L. [2009] (delivered Mar. 17, 2009); Fam. (Ashdod) 10875/08 Doe v. Roe [2007]; Fam. (Rishon-Letzion) 36510/06 Doe v. Roe (delivered Dec. 2, 2007); Fam. App. (Haifa) 416/06 Roe v. Doe [2007].

77. For another description of the inegalitarian features of *halachic* family law, *see* Stone, *supra* note 73, at 174-75.

78. For the rules of *Shari'a*, *see* Rashid, *supra* note 74, at 343; for the rules of *halacha*, *see* SHULCHAN ARUCH, Choshen Mishpat, § 276.1; for modern Israeli inheritance law, giving sons and daughters equal shares in the parental inheritance, *see* the Inheritance Act of 1965, I.L. 1965, p. 63, §§ 10(2), 13; for the option of having estates probated by religious courts, *see id.*, § 155.

79. For polygamy under *Shari'a*, *see* Honarvar, *supra* note 74, at 369-70; Aziza Yahia al-

Israel's allegiance to the *integrationist model*, and its consequent failure to provide its citizens with a human rights-compliant family law, were not and still are not inevitable consequences of its allegiance to the Zionist enterprise of establishing and maintaining an independent nation-state for the Jewish nation.[80] Most early Zionists were secular Jewish nationalists, who insisted that world Jewry was a nation rather than a group of religious sects. Some of them aspired to a Jewish state modeled after late nineteenth-century European liberal democracies; others were socialists.[81]

Preserving the Ottoman Empire's millet system, which gave several minority communities partial legal and cultural autonomy, including traditional religious court jurisdiction over personal status issues, as a part of the law of the future Jewish state, was not part of the Zionist plan. The preservation of that system in independent Israel, subjecting its Jews (a minority turned majority), Muslims (a majority turned minority) and members of eleven other sects to their sects' religious courts, was largely a result of the limited time allocated to law reform as the State of Israel was quickly organized in the midst of the bitter war of 1948. Preserving the legal status quo required less time and effort than any other option.[82] Its preservation since then is largely a consequence of the great power enjoyed in the Knesset (Israel's

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Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J.L. & RELIGION 37, 58-59 (2000-01); ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 96 (4th ed., Oxford Univ. Press 1964); Ottoman Law of Family Rights of 8 Muharram, 1336, § 74. For polygamy under *Halacha*, *see* Maimonides, MISHNEH TORAH, Marriage 14.4; Elimelech Westreich, *The Protection of Jewish Women's Married Status in Israel: a Meeting of Various Ethnic Jewish Subgroups' Legal Traditions*, 9 PLILIM 273-347 (1999). For contemporary Israeli law, *see* the Israeli Penal Code of 1977, I.L. 1977, p. 226, §§ 175-83; for the point of view of a leading contemporary Sephardi *halachic* jurist, *see* 8 Rabbi Ovadia Yosef, YABIA OMER, Even Ha'Ezer, § b (1993).

80. An anonymous reader of this article posed this question to me. For a general English-language introduction to Zionism, *see* DAVID ENGEL, ZIONISM (Pearson/Longman 2009); for one of the movement's foundational tracts, *see* THEODOR HERZL, DIE JÜDENSTAAT (1896), translated into English as THE JEWISH STATE (Dover 1988).

81. *See, e.g.*, the view of Theodor Herzl, the key leader of early Zionism, that the future Jewish state should "keep [its] priests within the confines of their temples in the same way as we shall keep our professional army within the confines of their barracks." HERZL, *supra* note 80, at 146. David Ben-Gurion, Israel's first Prime Minister and the key leader of Socialist Zionism, married his wife, Paula, by a civil ceremony. MICHAEL BAR-ZOHAR, BEN GURION: A POLITICAL BIOGRAPHY 112-13, 118 (Am Oved 1975).

82. On Israel's Ottoman heritage, *see* Aharon Layish, *The Heritage of Ottoman Rule in the Israeli Legal System: The Concept of* Umma *and* Millet, *in* THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARI'A 128 (Peri Bearman et al. eds., I.B. Tauris 2008). On the preservation of the Ottoman millet system by Israel's first government, *see* Ron Harris, *Historical Opportunities and Absent-Minded Omissions: on the Incorporation of Jewish Law in Nascent Israeli Law*, *in* BOTH SIDES OF THE BRIDGE: CHURCH AND STATE IN EARLY ISRAEL 21 (Mordechai Bar-On & Zvi Zameret eds., Yad Izhak Ben-Zvi Press 2002).

parliament) by *haredi* political parties (though *haredim* constitute, as of 2008, only nine percent of Jewish Israelis).[83] *Haredim* pride themselves on their anti-Zionism. It is clear that nothing about Zionism made the adoption of the *integrationist model*, or the consequent infringement of gender equality, inevitable.

Israel's adoption of the *integrationist model* has not so far helped it achieve a *stable* legal order, either. Comparativist Brian Tamanaha noted that official legal systems sometimes try to absorb competing legal systems in order (among other motives) to control their potentially subversive influence.[84] Theoretically, the state of Israel's grant of limited state jurisdiction to both *Shari'a* Courts, controlled by the Arab minority, and Rabbinical Courts, controlled by the observant Jewish minority, can be seen as an attempt along those lines by Israel's majority of non-observant Jews.[85] Some commentators have seen Israel's grant of state jurisdiction over Muslims' personal status affairs to *Shari'a* tribunals as the creation of a semi-autonomous Muslim cultural enclave, recognized by the state, so as to mollify Muslims' dissatisfaction with the Jewish state and provide them with a limited extent of self-government.[86] The accumulating record, however, shows that the efficacy of the partial absorption of those religious legal systems in Israel's state legal system as a means to control "their potentially subversive influence" and achieve stability is questionable. Those systems seem rather to be utilizing the formal jurisdiction given them and the consequent access to state resources to try their hand at some subversion of their own: as aforementioned, some Rabbinical Court judges are choosing to ignore the Supreme Court's direction of 2006 that they not offer arbitration services.[87] The *Shari'a* courts ignore secular Israeli law, both statute and case law, even when it is formally applicable to the cases they hear, in an attempt to purify their cultural

83. For the demographic data, *see* Uzi Rebhun & Gilad Malach, "Demographic Trends in Israel," http://www.metzilah.org.il/webfiles/fck/Demo%20eng%20final.pdf(1).pdf (2009), at 27 (table A3), 29 (table A4), 46 (table C3); for the disproportionate influence of *haredi* political parties in the Israeli Knesset, *see, e.g.*, the results of the latest general elections, held in February 2009: Central Elections Committee for the 18th Knesset, http://www.knesset.gov.il/elections18/heb/results/main_Results.aspx.

84. Tamanaha, *supra* note 1, at 404.

85. In both cases, Israel's first government simply chose to affirm the grants of jurisdiction made by the Ottoman Empire and largely sustained by the British Mandate regime. *See* Harris, *supra* note 82. Still, at least in the Jewish case, affirming the status quo was a decision taken with the requirements and interests of the observant population in mind. *Id.*

86. *See* Michael Karayanni, *The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 5 NW. UNIV. J. INT'L HUMAN RIGHTS 41 (2006).

87. *See supra* note 71, and accompanying text.

enclave of all outside intervention and apply a "pure Shari'a."[88] And though the state has integrated those traditional legal systems into its own system, compromising Israeli law's compliance with human rights standards in the process, nonstate religious courts, which act as alternatives to the state legal system and actively seek to draw litigants away from it, have existed since before Israel's independence and are multiplying. Demand for their services seems to be rising and spreading to groups which were hitherto loyal to the state courts. In a state like Israel, where the extent of the state legal system's adoption or rejection of the legal orders identified with inhabitants' two most common religions—Judaism and Islam, both nomocentric religions—is a perennial hot-button issue, a choice to litigate in a nonstate religious forum often implies a rejection of the state's current stand vis-à-vis those orders.[89]

The new Religious Zionist courts were founded as a religious alternative to the state system. Yet their decisions, too, are integrated or absorbed into that system, though in a much weaker sense than those of the state religious courts: in order to have the new courts' decisions enforced through state enforcement mechanisms, they must, under Israel's Arbitration Act, be confirmed by a state District Court.[90] The same Act provides a limited judicial review mechanism of arbitrators' decisions, reviewing them for technical flaws.[91] The state judicial system thus allocates some of its scarce judicial and enforcement resources to providing its declared adversaries with crucial support services (crucial, at least, for enforcing decisions rendered against litigants not pious enough to obey the new courts out of respect for their judges' rabbinical authority alone). Occasionally, observant judges in the state system themselves suggest to parties who the judges think might be amenable to a *halachic beth-din* that they remove their dispute to a private *halachic* court.[92] The extension of the private *halachic* court

88. Moussa Abou Ramadan, *The Shari'a in Israel: Islamization, Israelization and the Invented Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E. L. 81, 83-84 (2005).

89. In trying to draw non-observant litigants away from the state courts, the new nonstate courts attempt to disguise those implications of litigants' choice of forum, presenting it as a typical consumer's dilemma involving a balance of costs and benefits. *See supra* note 43 and accompanying text.

90. Arbitration Act 1968, I.L. 1968, p. 184, § 23(a).

91. *Id.* at § 24.

92. *See, e.g.*, Civil Suit 9056/07 Ketuvim Publ'g v. Or Vi'yshuah Yeshiva [2008] (decided by Judge Noam Solberg, an observant Orthodox Jew). The parties rejected Solberg's repeated suggestions that they transfer their disputes to a *halachic beth-din*, perhaps because Plaintiff has only filed suit in the state court after having done so at a *beth-din*. *See supra* note 22 and accompanying text.

phenomenon to the non-*haredi* observant public, which litigates in state courts far more often than the *haredim*, is likely to make such referrals more frequent.

The state system's cooperation with a rival created specifically to supplant it seems remarkable, even given the new nonstate courts' presently limited caseloads. Its principal causes appear to be (i) the state system's difficulties in meeting the surging demand for its services; (ii) the surging popularity of various forms of alternative dispute resolution (ADR), including business arbitration (local and international), mediation, and transnational adjudication (such as that offered at the courts of the UN, EU, WTO and many other international entities), which makes nonstate religious adjudication seem but one form among many of the nonstate provision of adjudication services, a welcome way of easing state courts' burden; and (iii) a feeling that the private *halachic* courts do not at present, given their puny caseloads, constitute a serious threat to the state system.

The Israeli situation thus exemplifies the problems of the *integrationist model*. The secular state legal system having carried its toleration of its rivals to the point of both partly absorbing them—personnel, institutional structures, and the legal orders they enforce—into the state legal system itself (without their accepting the hierarchical and ideological consequences of such absorption), and extending a modicum of institutional support to some of those left outside, it finds the rivals' hostility undiminished, brimming with fresh plans to destabilize the state legal system, whether by mass remonstrations[93] or by emptying it of litigants. Permitting the promotion of nonstate legal orders by powerful social actors convinced—and convincing others—that they should weather, then supplant, the legal order enforced by the state system, runs a risk that they may eventually succeed.

Further, the instability produced by Israel's adoption of the *integrationist model* is far from atypical. Other states which adopted that model, having also typically chosen family law as the subject area to which religious norms are to be applied, often by religious courts, have also experienced efforts by religious leaders, parties and groups to extend the reach of religious law and the jurisdiction of religious fora. In Malaysia, where the Federal Constitution carefully defines "Islam" and where state (rather than federal) *Shari'a* court jurisdiction runs only to matters of family law, succession, trusts, and the policing of Muslims'

93. As in February 1999, when 250,000 to 400,000 *haredim* demonstrated against the Supreme Court of Israel's persistent adoption of liberal, secular ideas they reject: Mautner, *supra* note 59, at 537.

religious practices, PAS, an Islamist party, has on attaining power in two of the thirteen Malay states enacted (though not yet enforced) the *hudud*, the core of *Shari'a* criminal law.[94] In Indonesia, the religious courts' jurisdiction, which has long covered Muslims' matters of family law, succession and trusts, has recently been extended to cover business contracts and most types of financial transactions, apparently in order to provide the country's growing Islamic finance sector with an appropriate forum.[95] Pakistan, which at its 1947 independence only applied *Shari'a* to Muslims' matters of personal status, has since been subject to a series of attempts at Islamization at both the federal and state levels, including the enactment of a *hudud* Ordinance and the establishment of a Federal Shariat [sic] Court, a Shariat Appellate Bench and a federal *Mohtasib*, a *Shar'i* ombudsman.[96]

The application of the *integrationist model* thus often gives rise both to injustice, in permitting the enforcement of norms which do not conform to human rights standards, and to instability, with traditionalists typically pressing for the introduction of more religious law into state law or establishing nonstate religious alternatives.

Does the *integrationist model* have compensating advantages? It seems it does not, at least for polities which include persons preferring not to abide by any system of religious law. For while the availability of several legal orders, among which each person may choose the order that best suits his or her beliefs, undeniably enhances, in principle, the freedoms of conscience and religion; and the autonomous determination of the moral and legal compass each person obeys, incorporating parts of several religious legal systems *into state law* is unnecessary for achieving those advantages. The nonstate provision of religious adjudication by private tribunals, the decrees of which are enforced, if necessary, by state enforcement mechanisms—the model followed by Israel's *halachic* courts specializing in civil and commercial law—achieves the same advantages without forcing religious adjudication on persons preferring not to be subject to it. Sixty-five percent of Jewish

94. CONSTITUTION OF THE MALAYSIAN FEDERATION, Art. 74; Schedule 9, List II, item 1 (on the PAS *hudud* legislation in the states of Kelantan and Terengganu). *See* Jan Stark, *Constructing an Islamic Model in Two Malaysian States: PAS Rule in Kelantan and Terengganu*, 19 SOJOURN: J. SOC. ISSUES SE. ASIA 51 (2004).

95. *See supra* note 6; Bowen, *supra* note 6; Alfitri, *supra* note 6.

96. *See* MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN (Martinus Nijhoff 2006); TAHIR WASTI, THE APPLICATION OF ISLAMIC CRIMINAL LAW IN PAKISTAN (Brill 2009); *Wafaqi Mohtasib* (Ombudsman) of Pakistan, http://www.mohtasib.gov.pk/ (last accessed Feb. 27, 2010).

Israelis now support the introduction of a parallel civil marriage track;[97] under such circumstances, the exclusive application of religious systems of family law as the only choice available to Israelis seems indefensible. The *integrationist model*, applying religious legal orders to some types of legal subject matter while offering no civil-secular alternative, may work less injustice in jurisdictions where the entire population prefers to be subject to religious legal orders. It may be that some of the Muslim-majority countries which adopted this model approach such an idealized picture of a devout polity.

I doubt the *integrationist model* has any other advantages for the general public of would-be litigants. It is certainly attractive for lawyers, who enjoy the profusion of work that shifting, unclear jurisdictional boundaries produce. True, instability has produced a great deal of (often inspired) public discussion about the appropriate legal manifestations of Israel's nature as a "Jewish state." This intense discussion fits Judaism's traditional nomocentric focus well. The central purpose of law, however, is the provision of a just and workable social order, not of interesting public discussion. The unstable nature of Israeli law may make one wonder to what extent it provides an "order" at all.

Westerners faced with the disadvantages of the *integrationist model* are tempted to conclude that Muslim- and Jewish-majority jurisdictions should adopt the separation of religious legal orders and state law which is common in Europe and North America. The westernized liberals of those jurisdictions often tend to agree, and indeed, such a separation is likely to improve Israeli family law's compliance with human rights standards. Yet the significant demographic and political power of religious traditionalists in most Muslim- and Jewish-majority jurisdictions, and their strong attachment to religious law, make such jurisdictions' adoption of exclusively secular state adjudication extremely unlikely.

One theoretical solution would be to identify the legal subject areas where religious norms least infringe human rights standards, and designate those areas as the points where state law may be impacted by religious legal orders. Private and commercial law appear, from this perspective, to be the best choice. Islamic commercial law, for example, may be said to be more compliant with equality—a key human rights standard—than Western commercial law, in that Islamic financing,

97. Research by Guy Ben-Porat and Yariv Feniger, reported in their "The Majority Supports Civil Marriage," (Apr. 30, 2009), http://www.haaretz.com/hasite/spages/1082014.html. Professor Ben-Porat informed me that their preliminary results are yet to be embodied in any scientific (rather than journalistic) manuscript.

where both lender and entrepreneur bear the risks of business, distributes those risks less unequally than western interest-based financing.[98]

It would seem, however, that this solution is unattainable in practice, since the religious conservatives of many Muslim-majority nations, as well as those of the only Jewish-majority nation, see the application of their religions' legal order of family life as crucial from a religious point of view, and are unlikely to consent to exchanging family law with another field of law as the point where state law is impacted by religious legal orders. In both Islam and Judaism, the law of marriage, divorce, bastardy and related subjects is seen as a series of sacred duties,[99] which religious conservatives see themselves as obliged to obey and, so far as in their power, make co-religionists also obey. It seems therefore, that Muslim-majority countries' and Israel's search for a means for providing a just and stable legal order while integrating religious norms and (often) religious adjudication into their state legal systems is bound to continue: simple, clear-cut remedies are unavailable. Whether the integrationist type of legal pluralism is liable to produce something other than a plurality of discontents remains to be seen.

98. There is a large literature on Islamic financing and banking. *See, e.g.*, CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW 111-87 (Cambridge Univ. Press 1993); MUHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE (Kluwer L. Int'l 2002); BILL MAURER, MUTUAL LIFE, LIMITED: ISLAMIC BANKING, ALTERNATIVE CURRENCIES, LATERAL REASON (Princeton Univ. Press 2005); TIMUR KURAN, ISLAM AND MAMMON: THE ECONOMIC PREDICAMENTS OF ISLAMISM (Princeton Univ. Press 2004).

99. *Ibadat* (in Islam) or a matter of *isura* (in Judaism); such sacred duties are often contrasted, in both religions, with private and commercial law—*mu'amalat* (in Islam) or *mamonot* (in Judaism)—the duty to obey which is of somewhat lesser strength.