Appropriate Representation of Minorities: Canada's Two Types Structure and the Arab-Palestinian Minority in Israel

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I. Introduction 563
II. Theoretical Framework for Appropriate Representation of Minorities 565
A. Two Types of Appropriate Representation 565
B. Group-Differentiated Rights 566
C. Patterns of Inter-Communal Relationship in Deeply-Diverse Democratic Countries 572
III. The Two Types of Appropriate Representation in Canada 574
A. Canadian Pluralism and the Patterns of Inter-Communal Relationship which Comprise It 574
B. The French-Speaking Minority—The Extensive Presence of the Dense Appropriate Representation 575
C. Employment Equity in Canada: Classic-Type Appropriate Representation—Women, Racial Minorities, Native Canadians and People with Disabilities 579
IV. Israel—Preliminary Comparative Conclusions in Regard to the Arab-Palestinian Minority. 586
V. Summary. 593

I. Introduction

"Appropriate representation" of minorities is a term used in Israeli legislation for anti-discrimination and affirmative action policies. The main locus of these policies in Israeli law is the civil service. As a

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manifestation of affirmative action, "appropriate representation" requires that the selection procedures among candidates for a position or function in a competitive situation are "group" conscious in a manner that delegates preference—of one degree or another—to members of certain minority groups.

One of the main aims of this article is to call attention to the fact that "appropriate representation" (as indeed affirmative action, more generally) comes in at least two different types. The "classic" appropriate representation benefits members of minority communities without directly involving the community to which the targeted individuals belong. Appropriate representation of this kind is best known in the field of employment. Another type of appropriate representation grows out of the minority rights movement. Unlike classic affirmative action programs, this type involves minority communities directly. The minority community determines (or is a partner in the determination of) who benefits and how. It is helpful to call this by another name—"dense appropriate representation."

The trigger for writing this article was a pivotal decision handed down by the Israeli Supreme Court which indirectly exposed the existence of these two kinds of appropriate representation.[1] The Israeli Supreme Court ordered that Arab-Palestinian citizens be given "appropriate representation" on the Council of the Israel Land Administration, which manages huge tracts on behalf of the state.[2] The decision was notable for stressing that representation had to go beyond mere tokenism, i.e., go beyond appointing a sole Arab representative to this large board; however, the decision remained silent in the key area of who from the Arab-Palestinian community can be deemed a "representative." While voicing a complaint made by the petitioner with the State's choice of a person whose sole qualification appeared to be his affiliation with the ruling (Jewish) Likud party, the Supreme Court did not deal with how representatives should be selected. Thus, notwithstanding its contribution to advancing the rights of Arab-Palestinian citizens, the Supreme Court's decision left unanswered critical questions regarding the nature and mechanics aimed at achieving an appropriate representation for the minority members.

When is it morally preferable to use group representation ("dense appropriate representation") as opposed to classic affirmative action to overcome state imposed inequalities? Additionally, when is it feasible socio-politically to claim and achieve it? Both questions are difficult, and comparative study will probably be helpful in the quest for answers.

1. HCJ 6924/98 Ass'n for Civil Rights in Israel v. Israel [2001] IsrSC 55(5) 15.
2. *Id.*

For this reason, I assess similarities and differences in the responses given by two deeply diverse democracies, Canada and Israel.

Part II opens with theoretical perspectives on types of appropriate representation for minorities and modes of inter-communal relationships which influence their adoption. Part III examines Canadian arrangements. Part IV compares the Canadian and Israeli contexts in a preliminary search of conclusions about structures for appropriate representation of the Arab-Palestinian minority in Israel.[3] Finally, Part V concludes by summarizing the two main conclusions.

II. Theoretical Framework for "Appropriate Representation" of Minority Groups

A. Two Types of Appropriate Representation

Affirmative action, when applied, may reallocate a wide array of benefits and opportunities. Typically it may be directed at the labor market (or its entrance processes), however, it may also impact the distribution of other economic goods, including public services, government budgets, land, and immigration patterns. Moreover, affirmative action may implicate symbolic and cultural badges of belonging, including official narratives, holidays and days of remembrance, national flag, national anthem, currency design, and official languages. It may reorder political power by affecting access to decision-making bodies, including the legislature, executive, judiciary and the senior public service. The reordering of political power is unique, inasmuch as it shapes allocation decisions in other sectors.

Affirmative action affects goods under the control of the state as well as certain goods circulating in the private marketplace, such as jobs in the private economy. Here we encounter a difference in types of appropriate representation. Classic appropriate representation often imposes obligations on both state and private employers, while dense appropriate representation imposes obligations only on the state.

Classic and dense appropriate representation both accord unmistakable priority to group membership. This distinguishes them from traditional, liberal notions of individual merit, and what public

3. This article uses the term "Arab-Palestinian citizens" to refer to the part of Israel's population which lives inside the pre-1967 borders (the Green Line), has Israeli citizenship with its attendant legal rights, and considers itself (and is considered by others) to be part of the Arab nation and of the Palestinian people. Below, two terms shall be used interchangeably—"Arab-Palestinian citizens" and "Arab citizens"—both referring to the Palestinian citizens of Israel, as distinct from the Palestinians in the West Bank and the Gaza Strip, who have been subject to its occupation since 1967 (in the summer of 2005 Israel has withdrawn from Gaza strip and uprooted its settlements there).

policy is permitted to do as it pursues equality. Both classic and dense appropriate representation make a distinction between formal and substantive equality. This foregrounds for them the relevance of group membership to distributive practices and resulting social outcomes. It also brings into relevance the different historical experiences of privileged and excluded groups. With these additional perspectives, classic and dense affirmative action consider that it is valid to consider the relevance of group membership in the allocation of some—though not all—benefits and opportunities.[4] Their main claim is that the pursuit of substantive equality is doomed to failure unless the different starting points of privileged majorities and historically marginalized minorities are taken into account by public policy. This is mainly because of the tendency of privilege and exclusion to perpetuate themselves in succeeding generations. Put differently, they task traditional liberalism with failure to see how the correlation of privilege and exclusion with group membership relegates groups damaged by past mistreatment to long-term, second-class status.

In this critique of traditional approaches to equality, the two types of appropriate representation are in agreement. Beyond this point, classic and dense approaches depart, principally because classic appropriate representation stops here. Classic appropriate representation is content with improving access to educational, economic, cultural and political opportunities. Beyond the role played in obstructing access, group membership ceases to be a concern of classic affirmative action. Once barriers to participation have been eliminated, classic affirmative action conceives that group membership becomes irrelevant to public policy. Hence classic appropriate representation is temporary, integrationist, and ultimately individualistic in principle. Its concern with group membership is as a means; not as an end. It is not interested in the depth or quality of the individual's connection to the group, only to her membership in it.

Dense appropriate representation does not stop here. It obsesses about the nature, meaning and socio-political consequences of attachment to groups. It travels on to carve out a unique and specific category of group-differentiated rights.

B. Group-Differentiated Rights

Group-differentiated rights are a kind of affirmative action procedures. Unlike equal rights of citizenship (i.e., individual rights,

4. The distribution of basic civil (or negative) rights, such as *habeas corpus* or freedom of movement, cannot, under almost any scheme, be validly influenced by group membership.

such as freedom of speech or equal protection), which are extended to every individual on the basis of the individual's humanity and/or citizenship rather than membership in any social subgroup, the group-differentiated are rights possessed by individuals precisely because of their membership in a special group or by groups because of their special group characteristic. These are then "quasi-privileges" accorded only to the minority community and its members.

Kymlicka, in his ground-breaking work, describes three categories of group-differentiated rights: (1) "accommodation rights," (2) "self-government rights," and (3) "special allocation and representation rights."[5] Dense appropriate representation falls within the last two categories.

"Accommodation rights" impose broad, positive obligations on the state. Traditional constitutional rights (i.e., civil and political rights) limit governmental power. Accommodation rights are distinctive because they *require* the state to preserve the language, culture and society of *designated minorities*. A major illustration of this is public funding of minority language education—a duty that goes much beyond protecting the freedom to establish private minority schools. Moreover, accommodation rights oblige the state to make other special adjustments on behalf of the minority community so that its members do not have to sacrifice their cultural identity to have reasonable chances of success in social and political life. Common examples include exemptions for minority members from norms that are prejudicial to their religious or cultural practices, such as Sabbath laws, mandatory dress codes, and/or occupational restrictions, such as hunting.[6]

Like accommodation rights, the second category of minority rights—"self-government rights"—seek to preserve the minority culture

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5. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS, 26-33 (1995) [hereinafter MULTICULTURAL CITIZENSHIP]; WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 17-27 (2001) [hereinafter POLITICS IN THE VERNACULAR]. *See also* Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT'L L. & POL.885, 904-19 (2004) [hereinafter *Framework of Minority Rights*].

6. *See* KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 5, at 31. *See also* R. v. Powley, [2003] 2 S.C.R. 207, ¶¶ 13, 47:

> The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. [. . .] Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever. . . . This lack of recognition . . . infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

and its capacity to develop. The two kinds of rights, however, operate on different levels. Self-government rights enable the minority community to shape aspects of life relevant to the group. They decentralize state power and endow specified minority communities with autonomy in areas critical to their survival, including education, culture, and religion.[7] For example, in the context of education, the right of self-government moves beyond a publicly-funded education system for the minority (an accommodation right) to whether the education system is directly administered by the minority community itself.

"Special representation and allocation rights"—the third category of minority rights—are different because they focus on the national government. They rebalance the political power of the minority community in the great institutions of the state.[8] This involves rights related to the following two questions: (1) to what extent does the minority group have access to the goods that are allocated by societal institutions; and, (2) to what extent is the minority community an active participant in the allocating institutions themselves, the most important of which are the parliament, the government, the judicial authority, and the civil service? The question of representation and allocation centers on appointments to positions within these important institutions, the allocation of budgets and public services, and the allocation of aspects of culture and status, such as the official languages and other state symbols.

The main categories of group-differentiated rights of interest when considering dense appropriate representation of minorities are the last two. Self-government rights, which construct minority-run institutions, and rights which are pertinent to the election or appointment of minority representatives to high-ranking political and administrative positions in nation-wide institutions. All three categories of group-differentiated rights are justified by their vital roles in protecting the minority community's cultural identity, and the crucial role that group identity plays in our self-realization. It endows life with meaning that profoundly influences our individual choices.[9]

As the modern minority rights literature has shown, minority cultures are fragile. They are especially vulnerable to "nation building" efforts, such as, efforts at reinforcing the national character whether through the education system, use of language, choice of symbols or

7. *See* KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 5, at 28.

8. *See id.* at 31-33.

9. For an extensive theoretical discussion of these points, *see* MULTICULTURAL CITIZENSHIP, *supra* note 5, at 107-53; *see also* POLITICS IN THE VERNACULAR, *supra* note 5, at 28-29, 74-75, 79-80; *see also* YAEL TAMIR, LIBERAL NATIONALISM 35-37 (1993); *see also* DAVID MILLER, ON NATIONALITY 120-54 (1995); *see also* CHAIM GANS, THE LIMITS OF NATIONALISM 58-65, 70-78 (2003).

otherwise. Additionally, cultural minorities are susceptible to intended and unintended homogenizing pressures imposed by the wider society, mainly through the language of the labor market and the language and central images of the popular culture. Certain minorities (to be identified soon) are entitled to demand that nation building pressures be counter-balanced by a grant of group-differentiated rights to protect an arguably permanent value—the preservation of minority culture. The demand is for a long-standing shield in the face of ongoing corrosive pressures. Hence, group-differentiated rights differ from the temporariness that characterizes the classic type of affirmative action.[10]

Why is it not enough to protect minority cultures using individual rights on the classic affirmative action model? Two answers come to mind.

First, there is likely to be a gap between the rhetoric and practice where minority communities lack representation in national institutions. The ability of minorities to realize the individual rights that are normatively granted to them—freedom of expression, prohibition of discrimination on the basis of group membership, and so on—at least partly depends on their participation in the legal determination of the relevant modalities for those rights and in the institutions responsible for implementing those modalities.

Second, one category of group-differentiated rights—the special representation and allocation rights—adds an important protective

10. The distinction delineated in the article partly resembles recommendations recently made by two European expert committees. The Venice Commission for Democracy through Law (which is the Council of Europe's advisory body on Constitutional matters, and was established in 1990), issued a report in May 2005 in which it offers to move beyond the *stricto-sensu* concept of affirmative action to the concept of "special measures." By "special measures," the commission aims to "predominantly continue 'measures providing preference to minority members in elected bodies.'" *See especially* Venice Commission for Democracy through Law, *Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries*, Study no. 307/2004, sec. 7, *available at* www.venice.coe.int (last visited Mar. 12, 2006).

A similar development appeared at the Lund recommendations—an expert committee convened by the high commissioner of national minorities (HCNM) in OSCE (Organization of Security & Cooperation in Europe). One of its recommendations aims at the need for "authentic representation." "Institutions of self-governance, whether non-territorial or territorial, must be based on democratic principles to ensure that they genuinely reflect the views of the affected population." *See Lund Recommendations on the Effective Representation of National Minorities in Public Life*, sec. 16, *cited in Explanatory Note*, 12 INT'L J. GROUP & MINORITY RIGHTS 297, 303 (2005). There remain certain differences between the distinction delineated in the article and the above-mentioned developments. I would not expand on them here. *Compare* Krzysztof Drzewicki, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life—Five years After and More Years Ahead*, 12 INT'L J. GROUP & MINORITY RIGHTS 123 (2005).

element when it calls for minority representatives to be chosen not merely on the basis of the combination of (personal) merit and group membership—as is the case with classic affirmative action—but also on the basis of their connection to the group. This is because a statistical or classic implementation of the obligation of minority representation makes it possible to hollow out this obligation by filling such positions with people co-opted by the majority group.

Nonetheless, group-differentiated rights have disadvantages as well as benefits. Some in deeply divided states fear that group-differentiated rights are "too strong medicine." They may provide the minority with excessive power; they may encourage secessionist demands.[11] They arguably fuel "politics of identity." They crystallize social distinctions. They limit individual rights by subjecting "minorities within the minority community" to a new form of coercion by factions within their own communities.[12] They lead to new problems of legitimacy and accountability within minority communities. These concerns are not trifling, but it is possible to overemphasize them.

Firstly, as implied above, not all minority groups are morally entitled to the entire array of these special and demanding rights. As the minority rights literature has validly argued, there is an important difference between homeland minorities and immigrant groups. Immigrants undergo a profound process of transition from a homeland to a new land. This transition is individual in nature, and involves elements of separation. Morally speaking, in most instances there is a kind of unwritten agreement between the immigrants and the new society: they come to it and are received as individuals who wish to integrate into it—and not as a separate national community that seeks to comprehensively preserve its original culture and the separate national existence it may have previously led within the new country, amid the new culture. The legitimacy of this distinction arguably justifies the need for comprehensive minority rights only for these native minorities.[13]

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11. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 51-60 (1996).

12. SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 9-24 (1999); *see also* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 17-18, 30-32, and ch. 6 (2001).

13. For the terminology of "homeland" versus "immigrant" groups, *see* Milton J. Esman, *Two Dimensions of Ethnic Politics: Defense of Homelands, Immigrant Rights*, 8 ETHNIC & RACIAL STUD. 438, 438-40 (1985); Oren Yiftachel, *The Ethnic Democracy Model and Its Applicability to the Case of Israel*, 15 ETHNIC & RACIAL STUD. 125-37 (1992). For the normative ramifications of this distinction, *see* KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 5, at 95-96. *See also* KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 5, at 53-55 and ch.8; GANS, *supra* note 9, at 62-63.

Another note of caution: The inherent nature of, and justification for, group-differentiated rights is highlighted in the context of "societal cultures"—national, ethnic,

Secondly, the risks to the individual within the minority community, which stem from group-differentiated rights, primarily materialize only when the minority community does not share the majority's liberal-democratic values.[14]

Thirdly, a point more pertinent to this discussion, one should be careful not to establish a rigid moral hierarchy of the two types of appropriate representation—the classic (which is temporary in nature and does not generate the specific problems of group-differentiated rights) and the dense type based on group-differentiated rights. The question of which type is ultimately preferable is not predetermined nor decided on principles, but contingent upon an examination of the primary features of the excluded group: the assumed price of imposing a certain type of appropriate representation in the concrete society (including the probability and magnitude of internal repression); the nature of the jobs (management or policymaking versus traditional) for which appointments are considered; and the nature of the decision-making institution to which the appointment referred.[15] This inquiry addresses both the moral justification in the preference we make as well as the socio-political ramifications that may follow this initial preference.[16]

Lastly, classic and dense appropriate representation are not incompatible. As we will see, both types are required to address the inequality experienced by the Arab-Palestinian minority in Israel, and both are used to accommodate the various sources of Canadian

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and religious communities; i.e., groups that are, or have the potential to be, comprehensively communal, and that carry a culture that encompasses most of the dimensions of human life. There is serious doubt as to the extent other marginalized groups—such as women, homosexuals, or people with disabilities—possess most group-differentiated rights, at least in their full magnitude.

14. *See* Yael Tamir, *Two Concepts of Multiculturalism*, 29 J. PHIL. EDUC. 161, 166-70 (1995) (describing the greater difficulties that arise in situations of "thick multiculturalism"—involving liberal as well as non-liberal cultures—as opposed to "thin multiculturalism"— involving only different liberal cultures).

15. Indeed, on the question of representation it is important to avoid conflating all State institutions into a single, homogeneous package. What is suitable as a criterion for representation in the regular political and administrative institutions is not necessarily suitable for institutions with more rarified and specialized societal function. In my view, *the courts* and their composition are a good example of the latter. To use Weaver's terminology, there are "arbitral mechanisms," whose power to fulfill their vocation is based (and should be based) on a different, nonrepresentational, and non-directly-accountable foundation. R. Kent Weaver, Political Institutions and Canada's Constitutional Crisis, *in* THE COLLAPSE OF CANADA? 7, 15 (R. Kent Weaver ed., 1992).

16. For a nuanced call for a contextualized assessment of recognition claims advanced by different cultural groups, *see* Gila Stopler, *Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims*, 1 L. & ETHICS HUM. RTS.(forthcoming 2006). Stopler exemplifies the strength of her suggestion by analyzing the status of two communities in the Israeli society—the ultra-orthodox Jewish citizens and the Arab-Palestinian citizens.

pluralism.

C. Patterns of Inter-Communal Relationship in Deeply-Divided Democratic States

There is still one last theoretical question of a different nature: when is the state expected (in practice) to prefer one type of appropriate representation over another? The answer depends on the purpose that the appropriate representation is supposed to serve in the particular society. This goal derives from the kind of relations the state sustains with the minority community.

Three paradigms of inter-community dynamics characterize deeply divided democratic countries. In countries where there are a number of minority groups, there is possibly more than one paradigm of relations in play. Two of the paradigms, as we will see, are clearly evident in Canada.

The civic or liberal-integrative paradigm occurs where the state aspires to create an overarching collective identity bridging the majority and minority communities. This identity in modern times is usually constructed on a platform of common citizenship. The state prioritizes this identity against all others to encourage "(civic) nation-building." Most Western immigration-states, whether "new" (e.g., United States and Australia) or "established" (e.g., European countries) belong to this paradigm. These countries differ in the degree of energy they invest and the pressure imposed in the enterprise of building a nation. For example, the French model, in its "republican," openly assimilatory format is somewhat distinctive from the American way, and the American way is specific in regard to the Canadian model vis-à-vis its immigrants. Adherents of the civic paradigm treat collective or group-differentiated rights with caution. They are concerned about reinforcing separatist community boundaries that the civic paradigm attempts to blur. At the same time, and for the same reason, the civic paradigm takes seriously the combating of discrimination on a group basis. For this reason, the civic paradigm is expected to adopt steps in favor of affirmative action; however, these steps are expected to be restricted to the classic type of appropriate representation—the individualistic, temporary, and workplace oriented.

*The consociational (or power-sharing) paradigm***,** by contrast, accepts separation between the majority and minority communities as a structural given of the society. It attempts to allay tension inherent in the social cleavage by encouraging collaboration and power sharing among the communities. A state framework bearing a collaborative character is the desired result. The minority becomes a partner in governance and at

the same time benefits from autonomy in significant areas of its cultural life.[17] The more familiar examples of this paradigm are Switzerland, Belgium, and Canada (in its relations with the French-speaking minority). An intensive manifestation of dense appropriate representation is expected in this paradigm. The appropriate representation will often be permanent and collective in character.

The ethnic paradigm strives to preserve the social separatism among the national communities, like the "consociational" paradigm. In distinction to the "consociational" paradigm, the state, in the ethnic paradigm, eschews the role of a fair mediator. The state is not neutral; it identifies with one of its communities.[18] This paradigm is exemplified by the pattern of relations between the Jewish majority and the Arab-Palestinian minority in Israel. Other examples include Northern Ireland, at least until the 1970s vis-à-vis the Catholic-Irish minority, and Sri Lanka, with regard to the Tamil minority. While the ethnic paradigm preserves group-differentiated rights for the minority, these rights are limited. They preserve social separation, but they should not hinder the ethnic hierarchy imbedded in the paradigm. Thus, for example, minorities are expected to have a separate public education system in the minority's language, but these are not usually managed by the minority. In the same vein, appropriate representation policy may be present, but usually of the classic type.

It is worth adding a qualification to the last point. Rights of self-management or self-rule are available to the minority not only in the case of the "consociational" paradigm but also in the other two paradigms. For example, the Catalans and the Basques have been granted autonomy in the Spanish civic nation-state. Similarly, cultural autonomy for the Arab-Palestinian minority may, in principle, exist in Israel even if it is to remain a "Jewish State."[19] Rights of self-management provide the minority community with dense appropriate representation in the appointment of its members to roles and positions in the same specific areas of life in which these rights are accorded—education, religion,

17. *See* AREND LIJPHART, DEMOCRACIES IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977). *See also* AREND LIJPHART DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984).

18. *See* Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389 (1990); Ian Lustick, *Stability in Deeply-Divided Societies: Consociationalism vs. Control*, 31 WORLD POL. 325, 330-32 (1979).

19. For a discussion of this possibility in Israel, *see, e.g*, CLAUDE KLEIN, ISRAEL AS A NATION-STATE AND THE PROBLEM OF THE ARAB MINORITY: IN SEARCH OF A STATUS 19-25 (1987); Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, 2 ISRAEL STUDIES 198, 229 (1997); Ilan Saban, *Up to the Limit of the Zionist Paradigm*, *in* SEVEN ROADS: THEORETICAL OPTIONS FOR THE STATUS OF THE ARABS IN ISRAEL 79-122 (Sarah Ozacky-Lazar et al. eds., 1999) (Hebrew).

local government, etc. However, in countries not controlled by the "consociational" paradigm, it is very rare to find dense appropriate representation of the minority in "statewide institutions," such as the government and senior executive positions in the public service.

The theoretical framework presented above distinguishes two distinct types of appropriate representation, classic and dense. Moreover, it helps to understand why dense appropriate representation is a derivation of group-differentiated rights (rights of self-rule and rights for special allocation and representation). It also aids in determining when dense appropriate representation will appear. It is expected to appear in "consociational" relations pattern as well as (albeit in a modest mode) in other relations patterns that grant autonomy to the minority but do not reach the parity of participation that consociation establishes.

Now, at this juncture, it is possible to apply the theoretical frame to one significant case-study—Canada—and, in this manner, set the stage for the discussion of another case-study: Israel.

III. Two Types of Appropriate Representation in Canada

A. Canadian Pluralism and Its Inter-Community Relations Formats

Canada is one of the world's most diverse societies. According to the most recent national census, of Canada's approximately 30 million people, about 6.7 million, or 22 percent, speak French as a first language, and almost 3 million, or 10 percent, have a first language that is neither French nor English.[20] One million Canadians (3.3 percent) self-identify as aboriginal. Aboriginal communities are exceptionally diverse[21] and an unusually high proportion of aboriginal people—about one-third—are under the age of 15. A further four million Canadians identify themselves as members of a visible minority, one million of them Chinese.

Canada is a federation. It consists of ten provinces and three sparsely-populated northern territories that enjoy a special status. Canada's considerable heterogeneity is a consequence of a long-standing history of diverse contacts among a variety of ethno-cultural groups: first, the contact between the indigenous peoples of Canada (the Indians and the Inuit) and the settlers that led to the emergence of a third group of aboriginal people—the Métis); second, contact between French and subsequent British settlers; third, continuous interrelations among these

20. Most of the census data cited can be easily found through Statistics Canada's website: http://www.statcan.gc.ca (last visited Mar. 12, 2006).

21. *See* Phil Fontaine, *First Nations Should Recognize Diversity, Not Exploit It*, WINNIPEG FREE PRESS, Nov. 10, 2005 at A15.

three groups and waves of immigrants.[22] These encounters produced divisions and frictions. Among these, the division between the English- and French-speaking publics is the most pivotal in Canadian life and politics, the management of which poses a constant existential challenge to Canadian governance.[23]

Canada manages its diversity by diverse patterns of inter-community relations. Communal relations between the English-speaking and French-speaking publics are managed by institutions designed along "consociational" lines. This is quite different from Canada's machinery for managing aboriginal issues, which blends the "civic" and the "consociational" paradigms (basically a civic format overlaid with a degree of autonomy and consultation). Immigration and absorption policies march to a civic paradigm. The accommodation emphasis is on non-discrimination and on "respect for difference."[24]

As should be expected, each mode of inter-communal relations leads to another mixture of the two types of appropriate representation.

B. The French-Speaking Minority—The Extensive Presence of the Dense Appropriate Representation

The French-speaking community in Canada is endowed with a long enduring, deeply self-conscious nationalism. It enjoys an enviable protected status, more robust than the Catalans and Basques in Spain, or the Swedish minority in Finland (Alend Islands). The French speakers in Canada have a territorial foundation in which they comprise a decisive majority and also in which they possess very comprehensive autonomous authority—the Province of Quebec. Quebec is "the strongest sub-national government" known to the Western world in terms of share of

22. LESLIE LACZKO, PLURALISM AND INEQUALITY IN QUEBEC 15 (1995).

23. A referendum held in Quebec in 1995 regarding its proposed secession ended up in a hair-thin victory for the anti-secessionists (50.6% in opposition to 49.4%). Clyde Farnsworth, *For Quebec, the Neverendum*, N.Y. TIMES (Nov. 5, 1995) at Section 4, Page 3.

24. The Canadian Supreme Court was quite eloquent in elaborating on this concept in *R. v. Zundel*, [1992] 2 S.C.R. 731, where Justices Cory and Iacobucci said in dissent (but not on the multiculturalism point) that "all ethnic groups are entitled to recognition and to equal protection." They continued:

> People must be able to take pride in their roots, their religion and their culture. It is only then that people of every race, colour, religion and nationality can feel secure in the knowledge that they are truly equal to all other Canadians. Thus secure in the recognition of their innate dignity, Canadians of every ethnic background can take pride in their original culture and a still greater pride in being Canadian. Section 27 strives to ensure that in this land there will be tolerance for all based on a realization of the need to respect the dignity of all.

Id.

statewide resources, autonomous powers and range of activities.[25] French speakers are also well-represented in national institutions, including the Parliament, the Government of Canada, and other central institutions and bureaucracy. The constitutional law, conventions, statutes and tradition in Canada protect important aspects of this position.[26] Throughout the broad range of institutions where federal power is exercised, the French linguistic community is a significant partner. Moreover, Canada's legal structure has engendered the rare case in which the legal and sociopolitical status of the minority is to a great extent a product of *self-legislation*, the use of Quebec constitutionally enshrined powers.

Canada's constitution itself formally manifests dense appropriate representation for the French linguistic community. The first main point is to be found in the Canadian federal structure, which endows Quebec with formal and extensive powers. While this is true of all provinces, Quebec has been the only province which made intensive and transformative use of its power during and in the wake of its Quiet Revolution of the 1960s. Quebec has the will, size, population, resources, and presence in central institutions; as well as significant number of votes within the national political parties to use this formal power to an extent most provinces cannot.

Quebec's powers are enshrined. They cannot be revoked by majority rule in the federal parliament. They are anchored in the Canadian constitution; altering the constitution requires complex amending procedures, which involves the provinces themselves in the modification process. Most constitutional amendments necessitate the concurrence of at least seven out of the ten Canadian provinces, while also requiring that these seven provinces include at least 50% of the entire Canadian population. Regarding certain exceptional amendments, agreement of all provinces is necessary. These provisions are supplemented by a statutory procedure, the *Constitutional Amendments Act*,[27] which provides regional vetoes, including a veto for Québec, over

25. Stephane Dion, *Explaining Quebec Nationalism*, *in* THE COLLAPSE OF CANADA? 78 (R. Kent Weaver ed., 1992). *See also* KENNETH MCROBERTS, QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS 434 (1993); LACZKO, *supra* note 22, at 4.

26. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter of Rights and Freedoms]; § 16 (declaration of equal status); §§ 18-19; Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985) § 133, Manitoba Act, 1870, § 23 (Parliament, legislatures, court and civil administration to be bilingual); Supreme Court Act, R.S., ch. S-26, § 6 (1985) (equitable participation on Supreme Court); Official Languages Act, R.S.C., ch. 31, § 39 (1985) (equitable participation in civil administration); Canadian Charter of Rights and Freedoms, § 23 (minority language educational facilities); § 20 (Federal and New Brunswick governmental services).

27. An Act Respecting Constitutional Amendments, 1996 S.C., ch. 1 (Can.).

constitutional amendments to central institutions and other matters. This Act provides increased security to Québec's political institutions through machinery that amounts to a veto, though the procedure is not constitutionally entrenched. All this leaves Quebec with the substantial ability to object to constitutional changes that are not to its benefit.[28]

The second main arena in which dense appropriate representation of the French linguistic community is evident occurs in the allocation of the symbolic resources of Canada. The French linguistic community constitutes just over a fifth of the entire population of Canada. Symbolically, it has, to a great extent, succeeded in becoming a full partner. The Canadian flag, anthem, images on Canadian stamps, and money bills were all modified so that the francophone community is able either to "encounter itself" or not to encounter symbols that are solely those of the majority group. Moreover, Canada has made a giant step in the direction of a genuine bilingualism on the federal level. The *Canadian Charter of Rights and Freedoms* gives clear constitutional status to French as one of Canada's two official languages, and the constitutional statement in § 16 is quite significant: "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada."[29]

An additional important point regarding federal Canada's bilingualism is the fact that it is the complementary course in which French speakers enjoy appropriate representation of the other type, the classic/employment type. This finds expression in the *Official Languages Act*, which requires the two language communities to participate equitably in the Federal public service.[30] French speakers actually hold an advantage in the competition for job positions and advancement in the federal public services. This is because the federal public service, being bilingual, requires a large number of bilingual workers and since French speakers are a minority in an English-speaking

28. Aside from all these, but less formally: The political praxis of Canada relies to a significant extent on consultation between the federal government and the provinces and therefore various key decisions are sometimes made in genuine consultation with Quebec. *See* S.J.R. Noel, *Making the Transition from Hegemonic Regime to Power-Sharing: Northern Ireland and Canada in Historical Perspective*, *in* NORTHERN IRELAND AND THE DIVIDED WORLD 209 (John McGarry ed., 2001); *see also* Ronald Watts, *Federalism and Diversity in Canada*, AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES 29 (Yash Ghai ed., 2000).

29. *See especially* Canadian Charter of Rights and Freedoms §§ 16-23. For an elaborate discussion, *see* JOSEPH E. MAGNET, OFFICIAL LANGUAGES OF CANADA (1995). For a partial comparison between the Arab language in Israel and the French language in Canada, *see* Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, 36 ISR. L. REV. 36(2): 5-39 (2002).

30. Official Languages Act, R.S.C., ch. 31, § 39 (1985).

continent, they have a greater chance of being proficiently bilingual. Indeed, the ratio of members of the francophone minority community in the federal public services is greater than their proportion of the population.[31]

Moreover, French speakers in Quebec made extensive use of their powers of self-government beginning in the 1960s (the "Quiet Revolution" in Quebec). In less than a generation's time, they transformed Quebec from a bilingual province, in which the working language in the prestigious professions was mostly English, into a province that was principally unilingual, French. They enacted provincial legislation that has penetrated the language of education in public schools and the language of work in all the mid-size and larger businesses. Additionally, the legislation has sought to control the commercial signs and billboard language in the streets of Quebec. By all these means and more, French speakers in Quebec can now manage most of the domains of their lives—including the labor market—in their own language.

In essence then, both types of appropriate representation are practiced among the French-speaking minority in Canada. However, the prominent and accentuated type of appropriate representation for French speakers is the dense type. The francophone minority's chosen representatives share in the allocation of Canadian public goods in two principal ways. First, significant public powers are invested in the Province of Quebec, where French speakers are an overwhelming majority. Second, the political elites of the French Linguistic community share power through consociational mechanisms throughout the range of significant federal institutions.

31. Thirty-two percent of federal public servants, and thirty-seven percent of those under thirty-five years of age, speak French as their first official language (note that the percentage of Canadians who speak French as their first language is twenty-two percent). By contrast, in 1971, only eighteen percent of public servants spoke French. Although francophones still complain that French does not enjoy full equality with English in the federal bureaucracy, the improvement over the past four decades has been striking. For the data, *see* Public Service Human Resources Management Agency of Canada, *Attitudes Towards the Use of Both Official Languages Within the Public Service of Canada - Volume I - Quantitative Report, available a*t http://www.hrma-agrh.gc.ca/ollo/or-ar/study-%E9tude/quanvol1/index02_e.asp (last visited Mar. 12, 2006).

C. Employment Equity in Canada: Classic Appropriate Representation—Women, Racial Minorities, Native Canadians and People with Disabilities[32]

1. Stages of Development of the "Employment Equity" Doctrine

In contrast to the power-sharing/consociational format of relations vis-à-vis the French speakers, Canada handles its other sources of diversity much more in the civic-integrative relations pattern. This is why—with the exception of the native Canadians—we do not meet the dense appropriate representation. We find instead elaborate arrangements of classic appropriate representation mechanisms. The dynamics these mechanisms were subject to made them effective and in some ways even inspiring. They certainly deserve attention, if not emulation.

The first half of the 1980s saw key developments that moved the federal government towards more forceful employment of equity laws and policies. First, the *Charter* was enacted, with its recognition—thanks in large part to energetic lobbying by women's and minority organizations—that equality rights guarantees do not preclude affirmative action laws or programs. Section 15 of the Charter states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[33]

Second, Justice Rosalie Abella was appointed as a Royal Commissioner and charged with exploring how progress towards more equitable employment patterns could be accelerated. Her report, *Equality in Employment*,[34] was published in 1984. It set out a distinct

32. This chapter is based on an article which appeared in Hebrew: Ilan Saban & Scott Streiner, *On Two Types of "Appropriate Representation": Theoretical Framework, the Canadian Case and Initial Comparison with Israel*, 11 LAB., SOC'Y & L. 247 (2005) (Hebrew).

33. Canadian Charter for Rights and Freedoms, § 15.

34. Rosalie S. Abella, REPORT OF THE COMMISSION ON EQUALITY IN EMPLOYMENT

approach to affirmative action—coining the term "employment equity" to underscore differences from controversial American policies—and called for the passage of mandatory legislation.

Third, an accumulation of various pressures resulted in the 1986 adoption of the federal *Employment Equity Act*.[35] This legislation required annual, public reports on the workforce representation of four designated groups—women, visible minorities, aboriginal people, and people with disabilities—and covered federally-regulated private sector employers with 100 or more employees.[36] In other words, it applied to neither the federal public service nor private sector companies (the overwhelming majority) who fell under the jurisdiction of provincial governments.

During the same period, the Supreme Court of Canada issued a groundbreaking decision in the case of *Action Travail des Femmes v. Canadian National Railways*.[37] This case was the result of an anti-discrimination complaint filed in 1979 under the *Canadian Human Rights Act* by a feminist advocacy organization in Quebec against the country's largest railroad. The complaint was creatively worded, identifying discrimination suffered by women generally in the company in addition to individual instances of discrimination. The employer contended that this was an over-extension of the law and fought it in the courts, with some success.[38] The Supreme Court, however, took a different view. It upheld a Canadian Human Rights Tribunal order that the company set aside one out of every four new openings in traditionally male occupations for women—an order based largely on statistical evidence showing that women as a group had been kept out of certain types of jobs.[39] The Supreme Court's decision made it clear that the judiciary would consider claims of discrimination at both the group and individual levels, and would treat quantitative data as valid proof of such discrimination.[40]

Based on the *Action Travail* judgment and statistics made available by the *Employment Equity Act, 1986*, advocacy organizations and the

(1984).

35. Employment Equity Act, 1986 S.C., ch. 31 (Can.).

36. Under the Canadian Constitution, the main private sector employers regulated by the federal government are those involved in banking, communications, and interprovincial or international transportation. This covers the country's largest companies, but only about ten percent of the private sector workforce. All other companies are regulated by provincial governments.

37. Action Travail des Femmes v. Canadian National Railway Co., [1987] 1 S.C.R. 1114.

38. For a summary of the early stages of the litigation, *see id.* at 1130-32.

39. *Id*. at 1141-42.

40. *Id.* at 1141.

Canadian Human Rights Commission began to pressure private sector companies and government departments to develop and implement comprehensive employment equity plans. These efforts met with mixed success. Discontent grew about the fact that the law did not cover government departments and failed to accompany its' reporting requirements with some sort of enforcement mechanism.[41]

As a result, a new *Employment Equity Act* was passed in 1995.[42] The revised legislation provided much more detail on the steps employers had to take to address the under-representation of the four designated groups in their workplaces, extended coverage to the federal public service, and vested the Canadian Human Rights Commission with the power to audit compliance.[43]

2. The Main Components of the Employment Equity Model in Canada

The reality is that in most workplaces, members of the four groups designated by the *Employment Equity Act, 1995* obtain and retain employment at rates below their representation in the relevant labor market, especially when it comes to non-traditional or higher-paying work.[44] The legislation assumes that this under-representation is due not so much to deliberate discrimination as to subtle prejudices and systemic barriers.[45] That is to say, people from the designated groups are often excluded because of unfair preconceptions about their ability to do the job, or because the way employees are selected, promoted, and treated in the workplace unintentionally puts certain individuals at a disadvantage—despite seeming neutral at first glance. Examples of unfair biases include the sense that women cannot "cut it" in high-stress environments such as police forces, or the feeling that people from a minority group would not integrate well into an established, close-knit work unit. Examples of unjustified selection or workplace practices include using a demanding physical test to screen applicants for a job that involves relatively little physical activity (thereby placing women

41. *See* A REPORT TO THE STANDING COMMITTEE ON HUMAN RESOURCES DEVELOPMENT AND THE STATUS OF PERSONS WITH DISABILITIES (2001), http://www.hrsdc.gc.ca/en/lp/lo/lswe/we/review/report/main.shtml (last visited Mar. 12, 2006) (discussing, in part, the historical and contemporary context of the *Employment Equity Act, 1995*) [hereinafter A REPORT TO THE STANDING COMMITTEE].

42. Employment Equity Act, 1995 S.C., ch. 44 (Can.).

43. *Compare id.* with Employment Equity Act, R.C.S., ch. 23 (1985).

44. *See, e.g.*, KIMBERLEY BACHMAN, THE IMPACT OF EMPLOYMENT EQUITY ON CORPORATE SUCCESS IN CANADA (2003), http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/lp/lo/lswe/we/special_projects/RacismFreeInitiative/ConferenceBoard.shtml&hs=wzp (last visited Mar. 12, 2006).

45. *See generally* 1995 S.C., ch. 44, § 5.

and people with disabilities at a disadvantage) or setting a rigid shift-work schedule that prevents employees from taking time off for minority religious holidays.

The assumption that under-representation stems less from conscious discrimination than from subtle biases and unintentional barriers means that correcting it requires careful examination of existing attitudes and employment practices, along with concerted action to adjust them. In other words, Canada's approach is to place more emphasis on systematically reviewing and updating workplace behaviors and systems, and less emphasis on reserving specific jobs for members of the designated groups.[46] In fact, the law specifically prohibits imposition of a "quota,"[47] which is defined as "a requirement to hire or promote a fixed and arbitrary number of persons during a given period,"[48] though inclusion of the word "arbitrary" does leave some room for setting aside specific jobs for applicants from under-represented groups where a defensible rationale can be provided.

The logic outlined in the preceding paragraphs leads to the following statutory requirements for each employer covered by the *Employment Equity Act, 1995*:

> (1) It must conduct a self-identification survey through which employees indicate whether they are members of any of the designated groups.
>
> (2) It must then compare the survey results with labor market availability data taken from the Census. These data establish availability by broad occupational categories for each designated group, looking at factors such as geographic location and level of education. Based on this analysis of its workforce, the employer determines where under-representation exists.
>
> (3) Focusing on these representation gaps, the employer undertakes an "Employment Systems Review" to identify factors that have contributed to that outcome. Reviews typically include an examination of formal policies, informal attitudes, and techniques used to evaluate candidates for hiring or promotion. The review concludes with a report on the barriers found and recommendations for removing them.
>
> (4) Based on this report, the employer must develop an action plan to remove barriers and improve the representation of designated group

46. *See id*. §§ 9, 33.
47. *Id.* § 33(1)(e).
48. *Id.* § 33(2).

> members where they are currently under-represented. The action plan includes changes to policies and practices, special initiatives designed to draw more designated group members into the workplace, and numerical goals for increasing the hiring and promotion rates (in the short term) and representation rates (in the longer-term) of people from under-represented groups.
>
> (5) In meeting its employment equity obligations, the employer must provide information to employees and consult with their representatives, including unions. It must also submit annual reports on its activities to the federal Minister of Labour.
>
> (6) At least once every three years, the employer must compare actual hiring and promotion rates with the goals set out in its plan, and adjust its plan if progress appears unsatisfactory.

The Canadian Human Rights Commission's audits assess whether an employer has met its obligations under the legislation and is making "reasonable progress" towards a fully representative workforce.[49] The law requires that the Commission attempt to resolve any instances of non-compliance through "persuasion" and "negotiation."[50] The first step is to try to agree on an employer "undertaking" to correct the problem.[51] If an undertaking cannot be negotiated, the Commissioner can issue a "direction."[52] If the employer is dissatisfied with the direction or the Commission believes that an employer is still refusing to meet its obligations, either may turn to the Employment Equity Review Tribunal (the Canadian Human Rights Tribunal sitting in a different capacity) for a binding decision.[53] The rulings of that Tribunal can be brought before the Federal Court of Canada only on the narrow grounds of an error in law.[54]

This legislation poses certain challenges for employers. Persuading employees to respond in reasonable numbers to the self-identification survey has sometimes been difficult, though the greater problem is the unwillingness of some designated group employees to self-identify

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49. *See id.* §§ 22-23. *See generally id.* § 3 (defining "Commission" as "the Canadian Human Rights Commission established under section 26 of the *Canadian Human Rights Act*").

50. *Id.* § 22(2).

51. *See id.* §§ 22(2), 25.

52. *See id.* § 25(2).

53. *See* Employment Equity Act, 1995 S.C., ch. 44, §§ 27-30 (Can.) (noting "[a]n order of a Tribunal is final and, except for judicial review under the Federal Courts Act, is not subject to appeal or review by any court.").

54. *See generally id.* § 30(3).

because they do not want to be seen as "tokens."[55] The result can be representation figures that are artificially low, leading to the conclusion that the employer's representation rates are worse than they actually are. Explaining the purposes of the survey and guaranteeing confidentiality are critical to minimizing this problem.

Similarly, removing employment barriers that make a real difference to representation rates can be more difficult in practice than it appears on paper. The factors that lead to poor representation of certain groups can be highly complex and, in some cases, beyond an employer's control, at least in the short term. For example, the low numbers of women employed on the Canadian Coast Guard ships is mainly a result of the combination of two variables of a different nature. On the one hand, it has much to do with the attitudes of crews and the way sailors are chosen—matters over which the employer has significant influence—but, on the other hand, it is also related to social norms regarding women's roles and many women's own reticence to spend weeks at sea.[56]

While employers are being disingenuous when they seek to avoid any responsibility for under-representation by pointing to societal influences and the personal preferences of designated group members, advocacy organizations can also over state their case if they completely ignore the impacts of such factors.

Interestingly, the views of various stakeholders have converged significantly since the *Employment Equity Act, 1995* came into force. Employers are less inclined to look for excuses when their representation figures are low and more inclined to recognize the business advantages of a representative workforce, given the growing diversity and rights-consciousness of Canadian society and the globalization of commerce. Advocacy organizations are less prone to being accusatory and more willing to give credit to employers who make a genuine effort to improve representation, even if change is slower than they would like.

3. Outcomes of Employment Equity Policy in Canada

The view (though far from absolute consensus) expressed above reflects what may well be the most striking success of the *Employment Equity Act, 1995*: fostering broad agreement about the importance of

55. A REPORT TO THE STANDING COMMITTEE, *supra* note 41 (noting "[s]elf-identification was a major theme in most consultations.").

56. *See generally* EMPLOYMENT SYSTEMS REVIEW—MANAGEMENT ACTION PLAN (2005), http://www.dfo-mpo.gc.ca/communic/cread/maps/05-06/65171_e.htm (last visited Mar. 12, 2006) (providing the 3-Year Employment Equity Management Action Plan for the Canadian Coast Guard).

actively opening workplaces to traditionally excluded groups. The more extreme positions of the past—both those in favor of restricting legislative interventions to individualistic anti-discrimination law and those in favor of firm and sweeping hiring quotas—have largely been marginalized. The federal statute has managed to engender significant cultural change by taking a highly contentious issue and "normalizing" a set of compromise responses.

Beyond this attitudinal change, however, lies the crucial question: Has the legislation advanced its core objective of improving the representation of the four designated groups in the workplaces it covers? While unequivocal answers are never possible in the messy domain of social change, it seems clear that the law has made a positive difference, particularly with respect to women's employment in management jobs, visible minority employment in private sector companies, and the representation of Aboriginal people in the federal public service.

Between 1997 and 2002-03, the share of senior management positions held by women increased from 14.8 to 20 percent in private sector companies covered by the legislation, and from 25 to 34 percent among government executives.[57] Visible minority employment grew from 9.7 to 12.2 percent in the private sector, and from 5.1 to 7.4 percent in the public sector.[58] Aboriginal representation rose from 2.7 to 3.9 percent in the public sector, but only from 1.3 to 1.7 percent in the private sector.[59] Finally, the representation of people with disabilities was static in the private sector, 2.3 percent in both years, and increased in the public sector from 3.9 to 5.6 percent, mainly because more people identified themselves as having a disability, due to the changing mores and the aging of the workforce.[60]

The Canadian case brings at least two pertinent conclusions to mind. Classic appropriate representation—Employment Equity, in Canadian terminology—is a successful building block of Canadian nation-building and political stability in relation to most facets of Canadian diversity. However, the accommodation of Quebec's nationalism has necessitated the adoption of the dense type of appropriate representation: minority self-rule in major spheres of life and partnership in Canada's government and symbolic order.

57. For summaries of this and related data *see* CANADIAN HUMAN RIGHTS COMMISSION ANNUAL REPORT 2003, MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES (2004), *available at* http://www.chrc-ccdp.ca/pdf/reports/2003ARen.pdf (last visited Mar. 12, 2006).

58. *Id.*

59. *Id.*

60. *Id.*

IV. Israel—Initial Comparative Conclusions in Regard to the Arab-Palestinian Minority

The lessons learned from the Canadian experience in reducing social inequality and dispelling concerns in regard to the state's political stability by implementing two sophisticated kinds of appropriate representation may be of value to every deeply-diverse democratic society. I wanted to take the analysis a step forward and to draw a particular comparison—with Israel.

While the differences between Canada and Israel are not slight, the differences are not prominent regarding some of the classic beneficiaries of classic appropriate representation: women, people with disabilities, and perhaps also ethnic minorities (such as the ethnic minorities in the Jewish majority community in Israel). In fact, the sophisticated structures of the Canadian classic appropriate representation can be exported to Israel in the same contexts without too much difficulty.

In contrast, on the level of the minority that is of particular interest for me here—the national minority in Israel, the Arab-Palestinian minority—the differences between Canada and Israel are significant. There are at least four main dissimilarities between this minority and its Canadian counterpart, the francophone minority.

The main difference, which provides an opening point for additional contrast, is a geopolitical one. No bloody conflict accompanies Canada for almost two centuries, while Jews and Arabs are raging in a conflict, often ferocious, of one hundred years old. The land of Israel/Palestine contains two peoples divided into three main communities.[61] The Arab-Palestinian minority is the third community.[62] It shares in the Palestinian nationality, but also holds Israeli citizenship. The Israeli Jews and the Palestinians in the occupied territories are currently engaged in one of the most violent and deadly episodes of warfare since 1948; yet, the Arab-Palestinian minority in Israel does not participate collectively in the armed conflict and has not done so since the establishment of Israel.[63]

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61. *See* Saban, *Framework of Minority Rights*, *supra* note 5, at 898-99.

62. Arab-Palestinian residents of Israel comprise close to 20 percent of the total population of the country, numbering over 1,400,000 (200,000 are Palestinian residents of East Jerusalem). They live predominantly in villages, towns, and mixed Jewish-Arab cities in the Galilee region in the north, the Triangle area in central Israel, and the Negev region in the south. They belong to three religious communities: Muslim (81%), Christian (10%), and Druze (9%) (most Druze share the Arab collective identity but not its Palestinian component). For additional statistical data, *see* ISRAEL CENTRAL BUREAU OF STATISTICS, THE ARAB POPULATION OF ISRAEL (2003), http://www.cbs.gov.il/statistical/arab_pop03e.pdf (last visited Mar. 12, 2006).

63. Saban, *Framework of Minority Rights*, *supra* note 5, at 890. For a comprehensive discussion of the Arab-Palestinian minority *see also* IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY (1980); Sammy

Nevertheless, the minority status is definitely impacted by fluctuations in Israeli-Palestinian conflict. More concretely, substantial sectors within the Jewish majority continuously fear a change of course: changing power relations may drive the Arab-Palestinian minority to actively participate in the armed conflict.

A second major difference between the Arab-Palestinian minority and the francophone minority resides with the latter's autonomy. A change from within was the major transformative leverage of the francophones' status in Canada. By contrast, Arab citizens of Israel do not have—and in the visible future, there are no signs that they will attain—significant self-rule powers. Thus, the Arab-Palestinian minority cannot sustain its culture the way francophones have been doing through creating an entire social and economic system conducted in their own language.

A third difference: in Israel (the "Jewish and democratic" state), the Arab-Palestinian minority cannot really expect a genuine commitment to extensive bilingualism in the public service sector. Therefore, the impressive bilingualism of Arab citizens is not expected to yield any special advantages.[64]

Finally, given the ethnic paradigm that is in play in Israel, and considering the difficult and ongoing violent conflict between the

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Smooha, *Control of Minorities in Israel and Northern Ireland*, 22 COMP. STUD. SOC'Y & HIST. 256, 260-61 (1980); DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL (1990); OREN YIFTACHEL, PLANNING A MIXED REGION IN ISRAEL: THE POLITICAL GEOGRAPHY OF ARAB-JEWISH RELATIONS IN THE GALILEE (1992); BARUCH KIMMERLING & JOEL S. MIGDAL, THE PALESTINIAN PEOPLE: A HISTORY (2003); ALAN DOWTY, THE JEWISH STATE: A CENTURY LATER (1998); Nadim Rouhana & As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT'L J. MIDDLE E. STUD. 321 (1998); AS'AD GHANEM, THE PALESTINIAN-ARAB MINORITY IN ISRAEL, 1948-2000, (2001); *see especially* GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP ch. 3 (2002).

64. The important criterion of many professions in the Israeli labor market is the degree of one's knowledge of Hebrew alone (and occasionally one's grasp of English which, for Arabs, is a second foreign language and sometimes even a third, considering the differences between spoken Arabic and literary Arabic). An Arab citizen who competes for a position in the Israeli job market—even in the Israeli public sector—is tested for these language qualifications almost completely on the basis of his grasp of the Hebrew language. It is true that Israeli law prima facie grants the Arab language the status of an official language; however, for various reasons, its official status holds little weight in practical terms. For a more elaborate discussion, *see* Saban & Amara, *supra* note 29.

Additionally, in Israel, unlike Canada, members of the various nationalist communities attempting to penetrate the job market are not on par in another respect, the military service. This service is mandatory to non-ultra-orthodox Jews, while Arab-Palestinian citizens are exempted—and it is perceived in the Israeli employment market as, *inter alias*, a labeling system, a sifting system, and a preliminary training system that often receives significant weight when being considered for a job or advancement at the workplace.

country of the minority and its people—there is nothing similar to the Canadian political culture which views the French-speaking minority as an integral part of "being Canadian." In Israel, in times of tension, as is so often the case, the prominent feature in the attitude towards the Arab minority is a combination of alienation and suspicion.[65] This feature substantially affects the behavior of Jewish-controlled employers in considering Arab-Palestinian applicants.[66]

However, despite the fact that the four distinguishing points are indubitably germane and have significant implications, they still do not tell the whole story.

One of the great challenges facing Israeli society is the necessity to abandon the dichotomy dominating significant portions of the Israeli society—both Jews and Arabs. According to this prevailing dichotomy, there are no more than two possible futures for Israeli society: either the extant status quo (a "Jewish and democratic state"[67] in its present format) or a comprehensive ideal democracy (which renounces Zionism, the vision of the "Jewish and democratic state," in favor of a bi-national state).[68] This is a false and dangerous dichotomy that locks the parties in a "zero-sum game." Between the axiomatic walls of the Jewish-democratic state, there is ample space for changes vis-à-vis the Arab-Palestinian minority, and this space has more productive potential than its competitors.[69] How can the Canadian example contribute optimism to a possible course of improvement in the Zionist paradigm? First, in contrast to its "Swiss image," Canada was never free of tensions. Canada and present-day Israel are not at opposite ends on the issue of a threat to their nationalistic lives. In Canada the implications of inter-community relations present a genuine and serious threat: the prospect of Quebec seceding from Canada.[70] From the perspective of many Canadians, the secession of Quebec is a grim possibility and entails more tensions liable to surface in relations between native Canadians who are residents of Quebec and Quebecers.

Israel should learn from Canada's response to the Quebec challenge.

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65. *See* Kimmerling & Migdal, *supra* note 63, pp. 169, 178-180.

66. *See generally* BENJAMIN W. WOLKINSON, ARAB EMPLOYMENT IN ISRAEL: THE QUEST FOR EQUAL EMPLOYMENT OPPORTUNITY (1999).

67. This term describes two premises of Israeli constitutionalism: (1) Israel is a Jewish state and (2) Israel is democratic.

68. *Cf.* As'ad Ghanem, *The Binational Idea in Palestine and Israel: Historical Roots and Contemporary Debate*, 1 HOLY LAND STUD. 61 (2002) and John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 PENN ST. INT'L L. REV. 363, 378-79 (2002).

69. *See* Saban, *Framework of Minority Rights*, *supra* note 5, at 994-98.

70. PATRICK J. MONAHAN, CONSTITUTIONAL LAW 361 (1997) (describing the outcome of Quebec's 1995 secession referendum).

Federal Canada has withheld action in two respects. It did not succumb to every demand of Quebec; on the other hand, it did not opt for a more oppressive policy or a fortress-like preservation of the state of affairs. It changed and opted for a meaningful partnership. Indeed, socio-politically, there can be no expectation that the "Jewish State" will offer its national minority the same partnership that Canada has imparted to the French-speaking minority. However, as argued, the important point is that no "all or nothing" dichotomy is genuine here: Israel can take serious steps to ameliorate the Arab minority status.

In the first place, Israel could engage in a determined fight against the discrimination of Arab citizens and resolutely enforce the classic type of appropriate representation. Additionally, it could implement dense appropriate representation with respect to high-ranking managerial positions in the public service sector. Finally, it could grant the minority cultural autonomy.[71] Each of these steps would not harm Israel's self-definition as a "Jewish and democratic state." On the contrary, it will bring Israel significantly closer to that same synthesis that it promises to be.

A second point Israeli society can learn from the Canadian example is *differentiation*—the capacity as well as necessity not to relate or respond uniformly to each cleavage or tension in society. In this context, we have seen the diversified manner in which Canada strives towards equality and fairness. Canada administered classic mechanisms of affirmative action with respect to women, racial minorities, and people with disabilities; concurrently, it implemented "mixed" mechanisms—classic appropriate representation and rights of self-government—with regard to native Canadians. Further, it applied these mixed mechanisms with an emphasis on dense appropriate representation in relation to the French-speaking minority.

The Israeli Supreme Court has come a long way in its acknowledgement of the importance of differentiation when contending with the various cleavages in Israel, but, with regard to at least one aspect, it has not done enough—the Supreme Court has refrained from dealing with dense appropriate representation of the Arab-Palestinian minority. Two cases demonstrate both the advancement and the remaining ground to be covered.

The decision of *Adalah vs. Municipality of Tel-Aviv-Jaffa*[72] impressively articulates the differences among cultural groups in Israeli society. The case touches upon the sensitive issue of group-

71. For an elaboration of the proposed steps, compare the sources at *supra* note 19.
72. HCJ 4112/99 Adalah v. Municipality of Tel-Aviv-Jaffa [2002] IsrSC 56(5) 393.

differentiated rights for the Arab minority.[73] It is usually assumed Israel commits to equality in common citizenship rights (civic, political, social, and economic rights), but not in the realm of group-differentiated rights. This state of affairs has not changed. However, the Court in *Adalah* has implied that the minority does enjoy certain group-differentiated rights (linguistic rights, in this case) and Chief Justice Barak even found a way of extending the linguistic rights beyond what is granted in Article 82 of the Palestine Order in Council, 1922, that regulates this subject. The Court decision addressed the issue of the language(s) of municipal signs in mixed towns. The ruling is rather complex; and this article will only underline one important development.

Chief Justice Barak took a step of distinct importance by drawing a distinction between the Arab minority and other cultural groups in Israeli society, as a basis for allocation of exclusive linguistic rights to the Arab minority. A central paragraph in the ruling states:

> Against this background the following question may arise: What distinguishes the Arabic language, and why is its status different from that of several other languages—in addition to Hebrew—that Israelis speak? Does our approach not imply that residents of different towns in which there are minority groups of speakers of various languages, will now be able to demand that the signs in their towns will be in their language as well? My response is negative, *since none of those languages are the same as Arabic*. The uniqueness of the Arabic language is twofold. First, Arabic is the language of the largest minority in Israel, *who has been living here from times immemorial.* This is a language that is linked to cultural, historical, and religious attributes of the Arab minority group in Israel. This is the language of citizens who, notwithstanding the Arab-Israeli conflict, wish to live in Israel as loyal citizens with equal rights, amid respect for their language and culture. The desire to ensure dignified coexistence between the descendants of our forefather Abraham, in mutual tolerance and equality, justifies recognizing the use of the Arabic language in urban signs—in those cities in which there is a substantial Arab minority (6%-19% of the population)—alongside its senior sister, Hebrew. . . .[74]

In short, the Court expanded Arab minority linguistic rights based on the crucial distinction between homeland minorities and immigrant groups. For the first time, the Arab-Palestinian minority's distinctness as a homeland minority was recognized (albeit, thus far, only by the Court's Chief Justice).

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73. *See especially id.* at 451-69 (J. Heshin, dissenting).
74. *Id.* at 418 (emphasis added).

The second Israeli Supreme Court decision worth mentioning here opened the article—*Association for Civil Rights in Israel v. Israel*.[75] As mentioned earlier, the decision addressed the composition of the Council of the Israel Land Administration and the issue of nominating Arab members to this Council.[76] The Court ruled that the government must guarantee appropriate representation to the Arab minority and directed the Israeli government, giving basic guidelines, to realize this obligation.[77] The decision adds two distinctions (in addition to the native minority-immigrant group distinction, implied in *Adalah*) which together serve to counter the simplistic analogy often present in the Israeli public discourse between the Arab minority and other marginalized groups.

First, the Court notes that the causes of discrimination of Arabs in the Israeli society are a great deal more complex and harder to eradicate than other manifestation of discrimination and thus should draw special attention.[78] Second, the weight of the communal needs of the Arab minority corresponds with a heavier claim for representation in various societal institutions. As the Court explained:

> The question of what is appropriate representation in a particular body depends, among other things, on the nature of the body, and on its practical importance from the standpoint of the group that is entitled to appropriate representation. Accordingly, it appears that the importance of the representation and the extent of the representation in the Israel Land Administration are greater for members of the Arab population than, for example, for people with disabilities.[79]

In short, in this series of rulings the Court cultivated a somewhat novel and certainly important discourse in regard to Arab-Jewish relations in Israeli society. It has indicated the attributes that single out the Arab-Palestinian minority and its circumstances in Israeli society. Because of its singularity, the Arab-Palestinian minority has fair claim for group-differentiated rights (linguistic and participatory) and deserves more vigilance on behalf of the judiciary and other societal institutions with regard to the protection of the Arab minority from discrimination.[80]

Notwithstanding these important contributions of the Israeli

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75. HCJ 6924/98 Ass'n for Civil Rights in Israel v. Israel [2001] IsrSC 55(5) 15.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* ¶ 31.
80. For a more detailed and nuanced assessment of the Supreme Court's performance vis-à-vis the Arab minority in recent years, *see* Ilan Saban, *After the Storm? Aftermath of October 2000—The Israeli Supreme Court and the Arab-Palestinian Minority*, ISR. AFF. (forthcoming).

Supreme Court, the Canadian example identifies two missing steps in this jurisprudence. The Court must recognize an additional distinction—the difference between classic appropriate representation and dense appropriate representation. Further, it must discuss the adoption of dense appropriate representation particularly in relation to the appointment of Arab representatives to managerial and decision-making positions.

For if—as the Court itself notes—the Council of the Israel Land Administration is indeed so important to the Arab-Palestinian minority (as it suffers both from land expropriation and harsh discrimination in the allocation of tracts of land), then there is no genuine significance in appointing Arabs to the Administration Council without Arab participation in the appointment process. If the Israeli government can appoint its own protégés to the Council without much difficulty, what is the benefit of the court precedent? To have meaningful minority representation, Israeli administrative and decision-making bodies must be obligated to at least seriously consult minorities with regard to the appointment of minority members to senior positions.

Canada provides a third insight apart from the two abovementioned lessons. The gist of this lesson is the importance of classic appropriate representation to correct part of the employment discrimination against members of the Arab minority community in Israel. The classic appropriate representation has two major benefits for Israel—one is universal and the other results from its suitability to the divided Israeli reality. The general benefit springs from the fact that the classic type more effectively covers the regular employment market. In contrast to the dense type, there are no particular problems in the implementation of the classic appropriate representation that are due to the need in clarifying "who is a representative?" Therefore, when there is no particular justification for applying the complicated and sensitive procedure involved in dense appropriate representation, then, classic appropriate representation is to be employed.

The additional benefit of the classic type of appropriate representation for the Arab minority is rooted in the fact that it circumvents those severe detractors that arise in Israel every time arguments are raised in favor of dense appropriate representation. The majority community fears the empowerment of the internal leadership bodies of the Arab minority. However, these concerns do not exist with regard to classic appropriate representation. In other words, because of its individualistic nature, classic affirmative action stirs up less "devils"—fears and excuses—among the majority community. The point made here is in the prism of law and social change; there are often places where the minority runs into barriers, and therefore, its members may make use of an existing "detour." Classic affirmative action is such

a type of detour. Its spokespersons directly confront Jewish-Israeli society with the high-flown rhetoric it preaches.[81]

Finally, the Canadian example is also an indication of the importance of procedural and institutional tools in the success of appropriate representation policy. Canada has made improvements on at least two levels: it formulated important ways both for detecting employment discrimination and also for correcting it. In the context of rectifying mechanisms, Canada has developed the powers of a special body that deals with discrimination in employment—the Human Rights Commission. Until the founding of the Commission on Equal Opportunities at Work in December 2005, this body (subordinate to the Commission for Equal Rights for People with Disabilities) was not part of the legal and social reality in Israel.[82] The Commission and the Israeli courts will gain much through careful study of the substantial experience and the elaborate mechanisms used by their Canadian counterparts.

V. Summary

Appropriate representation is a fundamental manifestation of an affirmative action policy and should be divided into two basic types: classic-employment appropriate representation and "dense" appropriate representation. In the latter, the minority community has a genuine influence on the selection of the benefactors and representatives of appropriate representation. However, these two courses for confronting discrimination, subjugation and cultural erosion do not rule out each other and under certain circumstances, it is possible and in fact advisable to use them together.

The comparative analysis conducted in regard to Canada and Israel leads to two principal conclusions.

First, the developments in Canadian law are impressive with regard to both types of "appropriate representation." Israel should adopt the legislative and institutional arrangements of classic appropriate representation that have transformed Canadian law into a more effective vehicle of employment equity than its counterpart in Israel.

Second, and more specifically, in reference to the Palestinian-Arab minority in Israel: there is a gap—which cannot be entirely bridged—between the comprehensiveness of dense appropriate representation implemented towards the French-speaking minority in Canada and the

81. The core of the message is: "You promised a (Jewish and) democratic state, so prove it—do something substantial in order to realize it, particularly when the usual excuses are not at hand."

82. *See* Equal Opportunities in Employment Law, 1988, 42 L.S.I. 31 (amended 2005).

possible appropriate representation of the national minority in the "Jewish and democratic state"; however, an "all or nothing" attitude should be avoided. The gap between the Arab-Palestinian minority in Israel and the French-speaking minority in Canada is partially bridgeable. In a "Jewish and democratic state," it is strongly recommended—and furthermore, feasible—to create significant dimensions of appropriate representation for the Arab-Palestinian minority, even if such action could not lead to the profound inter-communal partnership which characterizes bi-national states.[83]

If Israel takes this direction—and endow it with true substance, in the form of granting cultural autonomy to its national minority and appointing Arab citizens, approved by their own community, to senior civil service positions—it will find itself in an improved moral and political situation, including the aspects which concern its political stability. This is the one road that has not yet been treaded in Israel's relations vis-à-vis its national minority, and it is about time to change course.

83. This is the direction implied by the recommendations of the Or Commission Report. *See* OR COMMISSION, DOCH VA'ADAT HACHAKIRA HAMAMLACHTIT LEBERUR HA-HITNAGSHUIOT BEIN SHERUTEI HABITACHON LEVEIN EZRACHEIM ISRAELIM BE-OCTOBER 2000 [REPORT OF THE OFFICIAL COMMISSION OF INQUIRY INTO OCTOBER 2000 EVENTS] (2003) *available at* http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm (last visited Mar. 12, 2006) (*see especially* part VI, §§ 40-43). The Israeli government charged the Or Commission to investigate the Arab-Palestinian minority demonstrations of October 2000, which erupted after the second *Intifada* and resulted in thirteen deaths. *See* Saban, *Framework of Minority Rights*, *supra* note 5, at 895-97.