“A Jewish And Democratic State:” Reflections on the Fragility of Israeli Secularism

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I. INTRODUCTION

While Israel self-defines itself as “a Jewish and democratic State,”1 the Israeli laws that pertain to the most intimate of choices—the choice of a life partner—are ancient religious laws and not laws that were enacted in a democratic process.2 The only way to get married in Israel is in a religious ceremony according to one’s religion.3 The determination of a person’s religion, as will be discussed below, is also under the sole jurisdiction of

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2. Isaac S. Shiloh, Marriage and Divorce in Israel, 5 ISR. L. REV. 479, 479 (1970) (distinguishing Israel’s “ramified system of religious tribunals for the administration [of marriage]” from the secular marriage laws of European legal systems).

3. Id. (“[N]early all [must] achieve either marital bliss or, if necessary, the happiness resulting from the dissolution of a miserable marriage in the manner sanctioned by the authorities of their own religious denomination.”).
religious tribunals according to religious law.\(^4\)

This regime creates numerous problems from a secular point of view, three of which will be discussed in this Essay. First, religious affiliation is not a matter of self-definition, nor is it a matter of determination by secular state law. It is determined according to ancient religious laws and the secular state therefore has no way of altering or adapting them to our time. Second, Israelis have apparently a very narrow right to freedom from religion.\(^5\) Secular Israelis, whether Jews, Muslims, or Christians, who do not wish to marry in a religious ceremony or to have a religious divorce have no civil procedure or ceremony available in Israel.\(^6\) They must travel abroad and get married in a country that allows non-citizens to get married on its territory.\(^7\) Third, Israeli citizens who wish to get married in Israel are limited to choose only partners from their own religion, since most religions regard interfaith marriages as void.\(^8\)

After briefly introducing the roots of the religious monopoly over personal status issues in Israel, this Essay will discuss these three limitations on the “democratic” part in Israel’s self-definition and the impact they have on Israeli secularism.

II. THE ORIGINS OF THE RELIGIOUS MONOPOLY OVER PERSONAL STATUS ISSUES IN ISRAEL

The existing religious monopoly in Israel over personal status issues originated during the Ottoman Empire’s rule over Palestine.\(^9\) During the


\(^5\) See generally Zvi Triger, Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts, 27 ISR. STUD. REV. 1 (2012) [hereinafter Triger, Freedom from Religion in Israel].

\(^6\) Id. at 5.

\(^7\) Id.

\(^8\) See id. at 9 (“Judaism, Islam, and other religions impose restrictions on marriage between people of different faiths and, in many cases, even regard this kind of marriage as void.”). A narrow exception to this principle exists in the case of Islam, which recognizes the marriage of a Muslim man with a non-Muslim woman under certain circumstances (but not vice versa). See, e.g., Alex B. Leeman, Note, Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions, 84 IND. L.J. 743, 755–59 (2009).

empire’s four-century rule, the Ottomans gave the various religious communities throughout the empire almost full autonomy concerning family issues.10 Family matters were dealt with within the communities’ and tribes’ religious tribunals according to their own religious laws.11 When the British occupied Palestine in 1917, they left the autonomous family law systems in place.12 The British Mandate Government that ruled in Palestine between July 24, 1922 and May 15, 194813 continued the Ottoman policy with regard to family issues without any significant changes.14

When the State of Israel was founded, the Israeli legislature preserved this system.15 While some matters of personal status were removed from the religious tribunals’ jurisdiction and became subject to secular law only,16

10. See id.
11. See M. Chigier, The Rabbinical Courts in the State of Israel, 2 ISR. L. REV. 147, 147–48 (1967). This policy was considered at the time to be highly progressive. Louisa Culleton, Armenian Rights in the Ottoman Empire, 2004 UCL JURISPRUDENCE REV. 144, 155 (2004) (noting the liberal quality of the Ottoman millet system and explaining that “it was in fact a very progressive system for its time”). Today, some might view this policy as an expression of a multi-cultural sensitivity, yet the Ottomans most likely implemented it based on their own political reasons rather than sensitivity to the other. But cf. id. (“The objective of the millet system was . . . simply to protect the non-Muslim minorities from the Muslim-majority. . . . It was actually to protect individuals as members of a national community against possible illiberal religious laws of a religion that was not theirs.”). Interestingly, many colonial regimes tend to adopt such policies. See Carmel Shalev, Freedom of Marriage and Cohabitation (Cohabitation and Marriage Outside the Religious Law) in WOMEN’S STATUS IN ISRAELI LAW AND SOCIETY 459, 464 (Frances Raday, Carmel Shalev and Michal Liban-Kooby eds., 1995) (Hebrew).
14. See, e.g., Tsimhoni, supra note 12, at 166–69. From its occupation by Britain in 1917 until the establishment of the British Mandate by the League of Nations, Palestine was governed by a British military administration. See generally Yair Wallach, Creating a Country Through Currency and Stamps: State Symbols and Nation-Building in British-Ruled Palestine, 17 NATIONS & NATIONALISM 129 (2011). All in all, the British rule in Palestine lasted thirty-one years.
15. Law and Administration Ordinance, No.1 of 5708-1948, 1 LSI 7 (1948) (Isr.). “The Ordinance was enacted on 10th Iyar, 5708 (May 19, 1948), and published in the Official Gazette, No. 2 of the 12th Iyar, 5708 (May 21, 1948).” Triger, Freedom from Religion in Israel, supra note 5, at 15 n.3.
16. See Ariel Rosen-Zvi, Family and Inheritance Law, in INTRODUCTION TO THE LAW OF ISRAEL 75, 76-77 (Amos Sharipa & Keren C. DeWitt-Arar eds., 1995). Some examples of this include matters of communal property, successions, wills and legacies, and the administration of property belonging to absent people. Id.
matters of marriage and divorce remained subject to religious laws. As the late Israeli family law scholar Ariel Rosen-Zvi put it, “[i]n the area of family law, Israel’s legal system is characterized by a laminated structure of religious laws, territorial legislation unique to family law, judge-made law grafted onto religious laws and general, civil and criminal laws.”

Perhaps one the most peculiar implications of this hybrid system is the criminal law’s response to polygamy. While polygamy is prohibited by law, there is a religious exemption from criminal liability for bigamous men who marry an additional wife without divorcing the first one pursuant to a religious tribunal’s permission.

Another consequence of the religious monopoly over marriage and divorce is related to women’s status. All major religions are patriarchal, and, therefore, all religious family laws discriminate against women. While the Declaration of Independence promises gender equality, the Israeli legislature has made sure that the realms governed by religious law will remain exempt from this requirement, as explained below.

The constitutional regime in Israel is comprised of the Declaration of

17. Id. at 75.
18. Id.
23. To be sure, secularism in and of itself is not necessarily committed to gender equality. See generally Seval Yildirim, Expanding Secularism’s Scope: An Indian Case Study, 52 AM. J. COMP. L. 901 (2004).
Independence and a series of Basic Laws that have been enacted gradually over the years. The Basic Laws that have been enacted enjoy a superior constitutional status, and the Supreme Court has used them—in a series of controversial decisions—as a tool for judicial review. There are eleven Basic Laws. Two of them, namely Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, secure certain human rights and civil liberties; however, neither contains the word “equality,” and neither applies to previously enacted laws. They lack retroactive power in part because of the religious monopoly in the area of personal status. Religious laws of most religions are notoriously discriminatory, first and foremost against women.

Indeed, the Supreme Court has read equality into the value of human dignity protected by the first Basic Law, but the constitutional infrastructure that the Court has built through its judgments is significantly fragile, as it does not rest on explicit legislative language, but rather on interpretation. The next section explores the question of religious affiliation, which is crucial for determining to which religion an Israeli citizen “belongs,” and thus, which religious tribunal has jurisdiction over his or her personal status issues.

25. See id. at 353 (describing a specific Israeli Supreme Court case in an effort to illustrate the limited “constitutional power of judicial review . . . under the Basic Law system”).
III. RELIGIOUS AFFILIATION OF ISRAELIS

The question of religious affiliation, known also in Israeli politics as the “Who is a Jew?” debate, is central to the maintenance of segregation between religious and ethnic communities in the country. This segregation, facilitated by the religious marriage regime, was viewed in the early 1950s by the Knesset—the Israeli parliament—as necessary in the wake of the Holocaust and the murder of 6 million Jews by the Nazis and their allies. It was considered a means to revive the Jewish people by avoiding assimilation through marriage. It also stemmed from the view that being a Jew is not only a matter of religion, but also a matter of ethnic identity as well as of national identity.

Interestingly, however, the definition of a Jew had not been set on religious criteria during Israel’s first two decades. While it was highly debated, it was still open to a secular interpretation. In the mid-1950s, David Ben-Gurion, Israel’s founder and first Prime Minister, declared that being a Jew is a matter of personal choice and self-definition, and it does not require any type of official religious conversion. The Minister of the Interior, Israel Bar-Yehuda, instructed in 1958 that “a person who declares in good faith that he is a Jew, shall be registered as a Jew, and shall not be required to provide any further evidence [for his claim].”

The resulting governmental crisis led to a gradual narrowing of Ben-Gurion’s and Bar-Yehuda’s definition. Following two high-profile Supreme Court cases that basically followed the self-definition test, the

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33. Id. at 521–22.
35. Zvi Zameret, Judaism in Israel: Ben-Gurion’s Private Beliefs and Public Policy, 4 ISRAEL STUD. 64, 74 (1999).
37. See, e.g., Zameret, supra note 35, at 73–74.
religious parties in the coalition demanded in the late 1960s a legal reform in the definition of a Jew that would conform to the Jewish Orthodox interpretation of Jewish law, which meant that only a person born to a Jewish mother or who converted to Judaism can be recognized as a Jew. 39 Religious affiliation thus became a matter of an objective fact (either birth or proper conversion), and no longer of self-definition.

One of the problems with the religious definition of one’s religion is that it creates such absurdities as people with dual religions (those born to a Jewish mother and a Muslim father, since in Islam the religious affiliation rule is paternal), or people with no religion at all (for example, those born to a Muslim mother and a Jewish father). As I mentioned above, in order to know how and with whom one can get married in Israel, we have to first determine his or her religion. The lack of a civil definition creates a problem of circularity: which religious law should be applied for the purpose of determining a person’s religion when in doubt? Doesn’t the choice of law in this case already determine the result? The absence of civil marriage in Israeli law makes these questions even more burning because they have serious implications for a person’s right to choose a partner.

IV. THE LACK OF CIVIL MARRIAGE IN ISRAEL AND THE DE FACTO PROHIBITION ON INTERFAITH MARRIAGE IN ISRAEL

There is no civil marriage in Israel. 40 People who either wish to marry a person of a different religion or wish to exercise their freedom from religion and not marry in a religious ceremony cannot get married in Israel. 41 While Israel’s secular laws do not prohibit interfaith marriage directly, there is an indirect prohibition on such marriages. 42 However, following the Supreme

39. See Ofrit Liviatan, Judicial Activism and Religion-Based Tensions in India and Israel, 26 ARIZ. J. INT’L & COMP. L., 583, 605 (2009); see also Law of Return (Amendment No. 2), 5730–1970, 24 LSI 28, §4.B (1969–1970) (Isr.) (“For the purposes of this Law, ‘Jew’ means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.”).
40. See Zvi Triger, Freedom from Religion in Israel, supra note 5, at 5.
41. See supra notes 3–8 and accompanying text.
42. Triger, The Gendered Racial Formation, supra note 32, at 481.
Court’s ruling in the landmark 1963 *Funk-Schlesinger* case, Israeli authorities must register as married couples who marry abroad, regardless of the religion of the spouses.43 This opened up the door for interfaith couples to get married, as well as for Jewish couples who did not want to get married in a religious ceremony or could not do so.44 However, this is a costly option,45 and the additional economic and bureaucratic requirements that are imposed on such couples are, from a liberal point of view, clearly discriminatory.

Since virtually all countries that allow marriage tourism do not allow divorce tourism when both spouses are non-citizens or non-residents,46 Israeli couples who got married abroad and wish to get a divorce need a local solution. After decades of vague and sometimes conflicting court rulings, the Supreme Court finally ruled in 2006 that the rabbinical court system has jurisdiction over the divorce of Jewish couples who marry civilly abroad.47 The Court’s decision was based on Jewish law principles and was pre-approved by a rabbinical court panel.48 However, because of the ongoing power struggles between the secular courts and the rabbinical court,

43. HCJ 143/62 Funk-Schlesinger v. Minister of Interior, 17(1) PD 225 [1963] (Isr.).
44. See id. Under certain circumstances, Jewish law also prohibits marriages between Jews. For example, a man who belongs to the class of priests (Cohanim) cannot marry a divorced woman, and a married woman who has an affair with another man cannot marry him if she divorces her husband. See Marc Galanter & Jayanth Krishnan, *Personal Law Systems and Religious Conflict: A Comparison of India and Israel, in Religion and Personal Law in Secular India: A Call to Judgment* 282 (Gerald James Larson ed., 2001). These are ancient laws that are enforced in modern Israel as a result of the religious monopoly over marriage and divorce. See id. (“Jews wishing to marry in Israel must seek the approval of the rabbinical courts that apply [traditional] Jewish religious law, or *Halachah*. Some observers note that since 1947, the rabbinical courts have interpreted the *Halachah* more strictly than before the creation of the state.”). Secular modern Jews who do not observe the religious commandments do not see these ancient laws as relevant to their lives. See id. at 281 (“[S]ecularists and non-Orthodox Jews [in Israel] resent being subject to any Orthodox rabbinical control, particularly in matters of vital concern such as marriage and divorce.”). Nevertheless, they are prohibited from getting married in Israel; therefore, civil marriage abroad provides them with a good solution. Id. at 282.
45. See id. (noting the significant expense to some Israeli couples of having to travel outside of Israel to get married).
47. HCJ 2232/03 Jane Doe v. Tel Aviv Rabbinical Court 61(3) PD 496 [2006] (Isr.).
48. See Triger, *Freedom from Religion in Israel*, supra note 5, at 1, 2, 6.
the latter has been insisting on performing a full get (Jewish religious divorce) procedure even for civilly married couples.49

V. CONCLUSION: ISRAELI SECULARISM—AN UNFULFILLED PROMISE

Israeli secularism is stumbling. The enclaves of religious laws within Israeli law significantly limit Israelis’ freedom of conscience, freedom from religion, the right to marry, and gender equality.

This Essay discussed two issues that demonstrate the problematic and troubled relationship between state and religion in Israel: the question of religious affiliation50 and the lack of civil marriage due to the religious monopoly over marriage and divorce.51 Both issues are connected to the notion that Israel is a Jewish state, both ideologically and demographically, and that its Jewish definition and character are in the hands of the rabbinal institutions, which are all Orthodox and male.52 Moreover, the complete overlap between religion, ethnicity, and nationality leaves no space for civil and secular definitions of “Jewish”; it renders the “democratic” in the Basic Laws the only carrier of secularist values, and thus in constant competition with the “Jewish” element.53

The rabbinal institution does not welcome attempts to inject secular values into the definition of “Jewish.” The example discussed above of civil marriage between two Jews performed abroad demonstrates the monolithic approach to “Jewish” that the rabbinal court is trying to impose: Despite the couple’s effort to avoid the rabbinal court, they must dissolve the marriage, should they decide to divorce, by a full Jewish divorce ceremony in the rabbinal court.54 This is because the rabbinal court has chosen to

49. Id. at 7.
50. See supra Part III.
51. See supra Part IV.
54. See supra Part IV (describing the jurisdiction of rabbinal courts over divorce proceedings).
disregard a Supreme Court ruling, which relied on halakhic principles as interpreted by the secular court. The rabbinical court views itself as bound by religious laws only, and its interpretation of the validity of civil marriage between two Jews leads it to the conclusion that they too need a get. Secularism cannot exist without separation of state and church. The monopoly awarded to religion in countries where there is no such separation is bound to result in such legal enclaves in which the territorial law does not apply. And in the Israeli case it weakens the “democratic” component of the state’s definition as “a Jewish and democratic” state.

55. See supra Part IV.
56. See supra notes 47–49 and accompanying text.
58. See Basic Law: Human Dignity and Liberty, § 1a, supra note 53 (defining Israel as a “Jewish and democratic state”).