
RELIGION AND THE SECULAR STATE –
AN ISRAELI CASE STUDY

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INTRODUCTION: A JEWISH AND DEMOCRATIC STATE

The relationship between religion and the secular state is particularly interesting and ambivalent in the case of Israel, which defines itself in its basic laws as a "Jewish and democratic state".¹ This idiom begs clarification, as its meaning is often controversial. Indeed, the term "Jewish" in this context may be interpreted as inferring various meanings: the nature of Israel as a Jewish nation-state, Israel's aspiration to be a center for Jewish civilization and culture, etc.² However, it is important to clarify before continuing that this idiom does not imply the adoption of the Jewish religion as the baseline of Israeli law. Rather, Israeli law assumes a secular system subject to religious direction in some areas, mainly some aspects of family law. When religious law is applied it derives its power from express authorization found in legislation, as detailed below. In addition, symbolically, the Foundations of Law Act, 1980 states that pending legal questions which

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¹ Basic Law: Freedom of Occupation; Basic Law: Human Dignity and Liberty.

² On the meaning of the "Jewish and democratic state" formula, see: Sami Smooha, *The model of ethnic democracy: Israel as a Jewish and democratic state*, 8 *NATIONS AND NATIONALISM* 475 (2002); Ariel Rosen-Zvi, *A Jewish and Democratic State: Spiritual Parenthood, Alienation and Symbiosis - Can We Square the Circle*, 19 *TEL-AVIV U. L. REV.* 479 (1995) (Hebrew); Avigdor Levontin, *Jewish and Democratic - Personal Reflections*, 19 *TEL-AVIV U. L. REV.* 521 (1995) (Hebrew); Ruth Gavison, *A Jewish and Democratic State: Political Identity, Ideology and Law*, 19 *TEL-AVIV U. L. REV.* 631 (1995) (Hebrew); Asa Kasher, *A Jewish and Democratic State – Philosophical Outline*, 19 *TEL-AVIV U. L. REV.* 729 (1995) (Hebrew); Menachem Elon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Personal Freedom*, 17 *TEL-AVIV U. L. REV.* 659 (1993); Menachem Elon, *The Values of a Jewish and Democratic State: The Task of Reaching a Synthesis*, 3 *HUM. RTS. REV.* 36 (2002).

cannot be resolved through statutes, case law, or analogy, should be decided by following “the principles of freedom, justice, equity, and peace of Israel’s heritage”. These inspiring sources of Israeli law serve no practical significance in the vast majority of cases, which are regulated by statutes or settled by case law, and do not imply acceptance of religious law as such. However, there is a tangible symbolic significance of the acknowledgement of the status of Jewish heritage in the public sphere.³

Israel was established in 1948 as a democracy, and accordingly its laws are the accumulation of legislation flowing from the secularly organized elected legislature (the Israeli parliament, the Knesset). In addition, Israel made pragmatic decision in 1948 to adopt all the extant law in the land during the times of the British Mandate, which was mainly an assortment of secular colonial law (subject to the choice of the British, as well as of the Ottomans, whose vast empire included also the land that became Israel, to defer to religious law in some areas of family law). Against this background, the declaration of Israel as a "Jewish" state, in addition to being a democratic one, does not reflect an adoption of religious norms as such, but rather reflects the understanding that Israel is a nation state of the Jewish people, whose values and symbols flow from Jewish culture and civilization.

I. THE INITIAL STATUS QUO COMPROMISE

Despite the fact that Israel is basically a secular state in the sense secularly elected bodies legislate its laws and basic laws, the issue of regulating the status of religion in general, and the Jewish religion in particular, was and remains controversial. When Israel was established, some Jewish religious groups (associated with Orthodox Judaism) wanted the law of the state to adopt, in various manners, religious norms. These aspirations were politically significant since they were also injected to the public sphere by religious parties. More specifically, in the early stages of pre-independence politics, it was important to find a solution that would secure the unity of the Jewish public in the new state, taking into consideration its delicate political situation: a nation in search of international recognition and with a state of conflict with the neighboring Arab states. The result has been a compromise between secular law as the baseline and some arrangements that give legal status to religious norms and practices. These arrangements were not

³ The exact meaning of the law has been debated in the Israeli Supreme Court. The hegemonic view regarding the law was presented by the former Justice (and later on Chief Justice) Aharon Barak who thought that the law only refers to abstract values of morality and justice ingrained in Jewish heritage. The confronting view was presented by fore Justice (and later on Vice Chief Justice) Menachem Elon, who advocated for inspiration by concrete doctrines of Jewish law, in as much as they can be reconciled with democratic values. See e.g. Menachem Elon, *More on The Foundations of Law Act*, 13 JEWISH LAW ANNUAL 227 (1987); Aharon Barak, *Foundation of Law Act and the Heritage of Israel*, 13 JEWISH LAW ANNUAL 265 (1987).

ingrained in a constitutional document, but rather in laws and regulations, and in a manner that presented them as reflecting a practical compromise rather than a principled constitutional arrangement. For this reason, it has been traditionally described as a "status quo" model, crystallizing some compromises arrived at in the early days of the state. In fact, Israel has yet to adopt a formal constitution, contrary to the original vision mentioned in its Declaration of Independence, due to the aforementioned long-lasting controversies between secularists and religious people regarding the regulation of religions and state in the country. The result has been the enactment of a series of basic laws, designed to be eventually be consolidated to a full formal constitution. This consolidation has yet to happen, due to the same controversies which are no more reconcilable at present than they were in the past.⁴

In fact, the status quo compromise, which has shaped the relationship between law and religion in Israel, dates back to political understandings and negotiations between Jewish leaders made prior to the establishment of the state.⁵ More specifically, the negotiations regarding the legal status of religion started as soon as the international processes, which eventually culminated in the creation of the state, matured. The most representative document in this context is a letter that the Jewish Agency, the main Zionist institution at the time (and controlled by the secular Labor Party), sent in 1947 to the international organization Agudat Israel, the hegemonic party within the ultra-Orthodox Jewish public. This letter, also known as the "status quo document," included commitments to observe certain traditions in the future state, and focused on issues considered important from a religious perspective. It specified the recognition of the Jewish Sabbath (Saturday) as the official day of rest; the provision of kosher food in public institutions; the exclusivity of the religious law in the area of marriage and divorce;⁶ and the autonomy of the ultra-Orthodox educational system. Currently, it is accepted that this document should not be considered as the only source of the status quo, but it certainly

⁴ See also: Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

⁵ At the same time, it is worthwhile to mention that these compromises were not a particular source of tension with the Arab minority of Israel. First, the Arab group is on average relatively traditional, and therefore open for awarding some legal status to religion in the law of the state. Second, as explained below, the acknowledgement of some legal status to the various religions (especially in the area of family law) is often regarded as a partial recognition of group rights, from the perspective of the minorities. Therefore, the analysis will focus on the tensions within the Jewish majority group.

⁶ This norm reflected the status quo in the area of family law also with regard to other religions, following a compromise set in the past by the Ottoman Empire, which governed Palestine for about 400 years, until 1917. This arrangement was adopted later also by the British Mandate in Palestine, that replaced the rule of the Ottoman Empire as part of the results of World War I.

represents an ideal embodiment of its spirit.⁷

The first years of Israeli independence constituted a period in which legislative initiatives as well as administrative decisions formulated the basic structure of the status quo.

First, several laws fulfilled the main promises of the status quo understandings. The Hours of Work and Rest Law 1951⁸ recognized the Sabbath as the official day of rest in the country. The *Kasher* Food for Soldiers Ordinance 1948 secured that the army would serve Jewish soldiers kosher food. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953⁹ established the monopoly of Jewish Halakhic law regarding Jewish marriage and divorce in Israel. The State Education Law, 1953¹⁰ recognized the autonomy of religious schools which operated outside the regular framework of public education, in addition to the option of choosing a religious school within the public system, thus preserving the autonomy of ultra-Orthodox education. These laws were supplemented by other administrative arrangements and policy decisions that complemented them, such as the policy to serve only kosher food also in other government institutions and the policy of not operating public transportation on the Sabbath and Jewish holidays (subject to exceptions in areas where such transportation operated without limitations before the establishment of the state).

Second, the formative period of Israeli independence saw other compromises that became part of the status quo understanding. One example is the exemption from military service for Yeshiva students (religious men who study Torah and Jewish Halakhic texts in traditional religious institutions). This exemption was not mentioned in the Defense Service Law, 1949.¹¹ However, David Ben-Gurion, Israel's first Prime Minister, had already agreed in 1948 to postpone the service of several hundreds Yeshiva students. This compromise apparently reflected a readiness to preserve the world of Yeshiva studies following the destruction of the European Jewish communities during the Holocaust. At the time, Yeshiva study was viewed as an anchor to a vanishing world considered valuable to Jewish society for cultural and historical reasons.¹² Another example is the willingness to enact special laws prohibiting pig-raising and pork-trade (inspired by the historical

⁷See Menachem Friedman, *The Chronicle of the Status-Quo: Religion and State in Israel, in* TRANSITION FROM "YISHUV" TO STATE 1947-1949: CONTINUITY AND CHANGE 47 (Varda Pilowski ed., 1990) (Hebrew); CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 31-34 (1984).

⁸Hours of Work and Rest Law (1951) [hereinafter Hours of Work and Rest Law].

⁹Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (1953) [hereinafter Rabbinical Courts Law].

¹⁰State Education Law (1953) [hereinafter State Education Law].

¹¹Defense Service Law (1949) [hereinafter Defense Service Law].

¹²On the eve of independence, Chief Rabbi Yitzhak Herzog wrote to the first Chief of Staff, Gal. Ya'acov Dori: "The holy Yeshivas in Israel deserve special treatment because, after the destruction of the Diaspora, they are the remnant of the Torah institutions and their students are a small minority Requiring them to enlist, even if partially, could undermine them, and Heaven forbid that we should do that." ZERACH WARHAFTIG, A CONSTITUTION FOR ISRAEL: RELIGION AND STATE 232 (1988) (Hebrew).

taboo on pigs in Jewish tradition) which at the time were supported also by non-religious politicians who understood such laws as reasonable compromises, and, to some extent, also as reflections of Jewish culture in the broad sense.¹³

The manner in which the status quo has crystallized during these years may be described by the well-known quote stating that the life of law has been experience and not logic.¹⁴ The regulation of public transportation during the Sabbath, varying according to the local traditions, is an excellent example of the preference of experience over mere logic.

II. THE CONDITIONS OF THE STATUS QUO

The status quo survived and flourished during the first three decades of Israel as an independent state due to a special combination of political, cultural, and legal conditions.

Politically, the existence of the status quo was based on the hegemonic power of the Labor Party, which formed all the Israeli Governments until 1977. The status quo was the culmination of the political cooperation of the Labor Party and the religious parties which served as its political allies (mainly the National Religious Party). In the past, when the Labor Party could be assured of its hegemony, it advocated compromises with the religious public and hence political life in this area was generally characterized as “consensual.”¹⁵

Culturally, the status quo reflected a spirit of partial identification of the secular public in Israel with some traits of Jewish religious culture. Large segments of the secular public could identify, at the time, with ideas such as the norm of religious marriage. Granted, these compromises were always resisted by certain groups—such as politicians from the left and women activists (mainly concerning the matter of family law) but as a whole they enjoyed relative support or at least understanding. In the 1950s, when the status quo compromise was crystallized, the Israeli public was relatively close to Jewish religious tradition. Even the secularists, who opposed it, were familiar with tradition at least in the sense that many of them were exposed to it in their childhood. In addition, the atmosphere of the time could be characterized as leaning toward national unity and hence compromise.

¹³ See DAPHNE BARAK-EREZ, *OUTLAWED PIGS: LAW, RELIGION AND CULTURE IN ISRAEL* 33-42 (2007).

¹⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

¹⁵ The original status quo arrangement was based on mechanisms of compromise. See ELIEZER DON-YEHIYA, *RELIGION AND ACCOMMODATION IN ISRAEL* (Shunamith Carin ed., Deborah Lemmer trans., The Florsheimer Institute for Policy Studies 1999) (1996).

Accordingly, even some of those who criticized the application of religious law to the arena of marriage and divorce accepted doing so for the higher goal of acquiring unity and avoiding discord.

Legally, as far as the basic tenets of the status quo were legislated, it was impossible to challenge these laws in court, due to Israel's constitutional culture until the 1990s—a culture of legislative sovereignty, following the British constitutional tradition.¹⁶

III. THE CHANGING NATURE OF THE STATUS QUO

The case-study of the Israeli status quo is worth analyzing especially due to the changes that it has undergone via the disguise of stability. As the discussion that follows will show, in fact, the status quo has proved to be anything but a status quo.¹⁷

The potential instability of the status quo arrangement was in fact eminent in its flimsy nature from its inception. First, there was no one document which applied to all the agreements which had formed the status quo. Second, the understandings and agreements left ample room for future interpretations and contradictory views. For example, the decision to acknowledge that the day of rest in Israel is the Jewish Sabbath was implemented by a law which recognized it as the day of rest for employees,¹⁸ and not by a general law which provided for all the other implications of the Sabbath in the public realm (transportation, commercial activities, etc.).¹⁹

Consequently, it should come as no surprise that the application of the status quo regime has transformed significantly in many ways since the establishment of the State of Israel. First, the material consequences of some of the arrangements included in the status quo understandings have dramatically changed. For example, the number of Yeshiva students exempted from military service has risen with the passage of the years, from starting point of a few hundreds to most recently several thousands. The result is a de-facto exemption of the ultra-Orthodox group from service (in contrast to the spirit of the original arrangement). Likewise, the practical meaning of the ban on public transportation on Saturdays and Jewish holidays has changed. In the past, this ban had left its mark on the vacant streets. Today, however, with rising standards of living, the streets are full with massive (private and taxi) transportation on Saturdays (although public transportation is still not provided in most areas). Another example comes from the area of meat import to Israel. In the past, the import of meat to the country was

¹⁶ See generally Daphne Barak-Erez, *supra* note 4.

¹⁷ Concerning the instability of the status quo, see also Aviezer Ravitzky, *Religious and Secular Jews in Israel: A Kulturkampf?* 15-16 (The Israel Democracy Institute, Position Paper No. E1, 2000) (1997).

¹⁸ See *supra* note 8.

¹⁹ HCJ 5016/96 Horev v. Minister of Transport, [1997] P.D. 51(4) 1 (an example of bitter litigation regarding a decision to limit the driving of private vehicles on Saturdays and High Holidays through a religious neighborhood in Jerusalem).

conducted exclusively by the government, which solely imported kosher meat. When meat import was privatized (as part of larger developments diminishing government involvement in economic life), the immediate effect was the possibility that non-kosher meat would be imported (by private merchants).²⁰ In other words, changes in economic administrative policies impacted the availability of kosher and non-kosher meat. Eventually, the controversies resulting from these developments led to the enactment of a new law prohibiting the import of non-kosher meat.²¹ This law was understood by some as a necessary step for the protection of the status quo, but at the same time was viewed by others as an infringement of the status quo because it had broadened the prohibition on the import of non-kosher meat also to private initiatives.²²

In addition, although the main laws which formulated the status quo (such as the Rabbinical Courts Law) have not been seriously challenged in the political arena, it seems that both religious and secular politicians feel free to initiate legislation or administrative policy decisions that encroach on the status quo. After 1977, when the religious parties joined the Likud Party as political allies, several new legislative initiatives were promoted to introduce new religious-spirited laws, such as the Festival of *Matzot* (Prohibition of Leaven) Law of 1986,²³ which prohibits merchants from displaying Leaven in public during the Jewish holiday of Passover. Some other changes were introduced through government initiatives, such as the growing scope of government allocations to religious institutions and schools,²⁴ as well as to ultra-Orthodox families, who are disproportionately in need of state support because of their adherence to the ideal of Yeshiva and Torah studies by men (who do not work and consequently do not earn a living).²⁵

On the secular side, the pressures to open businesses and

²⁰ HCJ 3872/93 Meatrael Ltd. v. Prime Minister and Minister of Religions [1993] P.D. 47(5) 485.

²¹ Meat and Its Products Law, 1994.

²² See HCJ 4676/94 Meatrael Ltd. v. Knesset of Israel [1996] P.D. 50(5) 15.

²³ Festival of *Matzot* (Prohibition of Leaven) Law (1986) [hereinafter The Passover Law].

²⁴ For further discussion, see: Shimon Shetreet, *State and Religion: Funding of Religious Institutions - The Case of Israel in Comparative*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421 (1999)

²⁵ Accordingly, although the Secured Income Law (1982) stipulates that students are not eligible to welfare payments since they are expected to support themselves by working, the annual budgetary laws have traditionally included a special allocation for similar welfare payments to Yeshiva students (thus supporting the choice to study Torah even by those who cannot support themselves and their families). This separate regime was invalidated by the Supreme Court after many years in 2010, as discussed below. See: HCJ 4124/00 Yekutieli v. Minister of Religious Affairs (to be published, decision from 14 June 2010) (hereinafter: Yekutieli decision).

entertainment places during the Sabbath have grown to an unprecedented level – with the increasing influence of capitalist and materialist culture and the decreasing attachment to traditions. In this sense, the meaning of preserving the Sabbath as a day of rest has changed completely.²⁶

The sources of change in the status quo mechanism are complex. Different views were offered in this regard, coming from the religious side as well as from the secular side in Israeli public life.

Representatives of the religious group argue that the secular public does not respect old compromises. A prime example is the steady pressure, already mentioned, to open businesses on Sabbath days and other Jewish high holidays. Another example is the lack of enforcement of the Passover Law by the Ministry of Interior.²⁷

From the secular side, it has been argued that religious politics, and not only secular politics, have instigated change. Since 1977, when the Likud replaced the Labor Party in government and cooperated with the religious parties that constituted its main political partners, these parties aimed to promote religious interests and increasing religious impact on the public sphere. The demands for increasing the quotas of Yeshiva students who got exemptions from military service have increased. In a similar manner, the demands for government allocations to religious institutions and to support a religious (and especially ultra-Orthodox) way of life increased as well. In addition, the religious parties tried to promote religious-oriented legislative initiatives, in contrast to the spirit of the status quo understandings.

More generally, and putting aside the different views of the religious public and the secular public regarding the relative “guilt” of each side for the curtailment of the status quo, it is clear that the status quo has become more and more unworkable because the basic conditions that had facilitated it have changed.

From a political perspective, the shift to a dual-blocks system since 1977 (when the Labor Party had lost its hegemonic power), put the religious parties in a position to demand the expansion of religious-oriented legislation. Accordingly, they had incentives to desert the

²⁶ During the 1980s, many struggles focused on the opening of entertainment venues like cinemas. See, e.g., Crim. C. (Jer) 3471/87 Israel v. Kaplan, [1987] P.M. 1988(2) 265 (a court decision invalidating a by-law which prohibited the opening of a movie theater on Saturdays); Naomi Gutkind-Golan, *The Heikhal Cinema Issue: A Symptom of Religious—Non-Religious Relations in the 1980s*, in RELIGIOUS AND SECULAR: CONFLICT AND ACCOMMODATION BETWEEN JEWS IN ISRAEL 67 (Charles S. Liebman ed., 1990). As a result, the Knesset enacted the Municipalities Ordinance (Amendment No. 40) Law, 1990, which authorized the enactment of bylaws banning the opening of businesses and entertainment venues on Saturdays. This amendment opened the door for a ban, but made it clear that it is a matter for the decision of each and every locality. In practice, movie theaters are open on Saturdays almost everywhere (though sometimes subject to restrictions concerning their location). The new battles concern the opening of regular commercial activity on Saturdays, including regular shopping.

²⁷ Recently, a Court of Local Affairs ruled that displaying Leaven (during Passover) inside stores is not considered “in public,” and therefore does not constitute a violation of this law. CrimC (Jer) 4726/07 Israel v. Terminal 21 Ltd (unpublished op. Apr. 2, 2008). This judgment led to furious reactions from the Orthodox side.

status quo, at least partially.²⁸

From a cultural and social perspective, Israelis who grew up as second and third generation secular Jews feel less attachment to old traditions. Accordingly, for them, the compromises in religious matters constitute a bigger sacrifice. In addition, Israelis have become more aware of the growing gap between the standards of the status quo and the norms prevalent in the western world concerning family law (the availability of civil marriage), the official day of rest (the availability of transportation, entertainment and commercial activities)²⁹ and more. In other words, the perception of sacrifice associated with the preservation of some of the status quo arrangements has intensified. For example, as the possibility of civil marriage as an option has become norm in liberal democracies, the special situation of Israel in this area has correspondingly become more pervasive. This change has become even more significant with the immigration to Israel of about a million new citizens from the former USSR during the 1990s. These new citizens were educated with hardly any connection to Jewish culture and religious practices. A significant number among them are not even Jewish according to Halakhic standards (having Jewish ancestry but not being born to Jewish mothers). Therefore, they cannot marry in Israel according to the Rabbinical Courts Law, which applies only to people recognized as Jews by the Jewish religious authorities.

From a legal perspective, the possibilities to challenge status quo-based compromises have significantly broadened. First, the Court reviews administrative decisions regarding the quality of the discretion practiced by the relevant decision-makers—asking whether the decision is reasonable or proportionate.³⁰ Indeed, some aspects of the status quo

²⁸ For an argument claiming that undermining of the status quo mechanism is connected to the changes in the political situation, namely the move from the hegemony of the Labor Party to politics of two-opposing blocs, based on clear-cut resolutions, see Asher Cohen & Baruch Susser, *From Consensus to Majoritarian Politics: The Decline of Israeli Consociationalism*, in *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: THE ARIEL ROSEN-ZVI MEMORIAL BOOK 675* (Menachem Mautner, Avi Sagi & Ronen Shamir eds., 1998) (Hebrew); Asher Cohen, *Shas and the Religious-Secular Cleavage*, in *SHAS: THE CHALLENGE OF ISRAELINESS* (Yoav Peled ed., 2001) (Hebrew); ASHER COHEN & BARUCH SUSSER, *FROM ACCOMMODATION TO ESCALATION: SECULAR-RELIGIOUS CONFLICT IN ISRAEL* (2003) (Hebrew).

²⁹ It is interesting to note that new legislative initiatives aimed at regulating activities on Saturdays acknowledge, in different degrees, the need to enable certain services which do not conform with Halakhic standards. The proposals differ in their degree of openness to divergence from tradition—whereas some secularists support the overall legalization of regular commercial activities, modern religious people together with secularists who recognize the social value of a day of rest tend to support a differentiation between regular commercial activity (which they believe should be banned) and activities in the area of culture, entertainment, and leisure (which would be legal).

³⁰ See, e.g., H CJ 5016/96 Horev v. Minister of Transport 51(4) P.D. 1 [1997] (reviewing a decision to ban driving during the Sabbath in a religious area from the perspective of reasonableness and proportionality); H CJ 953/01 Solodkin v. Municipality of Bet Shemesh

were always subject to review by the courts, but in a more limited manner. In the 1950s, for example, the Israeli Supreme Court interfered in administrative decisions and regulations which professed to enforce pig-related prohibitions. However, at the time, the Court had based its intervention mainly on the *ultra vires* principle, stating that the arrangements invalidated had not been based on legislative authorizations.³¹ Second, the new case law of the Court insists that substantive regulatory schemes will be dictated by primary legislation (in a manner that reflects a non-delegation approach). The practical outcome of this view is that status quo arrangements may require new legislation, as the Court had stated specifically with regard to the exemption of Yeshiva students from military service.³² Third, changes in the doctrines of justiciability and standing³³ have opened the Court more than ever to public petitions which challenge status quo arrangements, such as the exemption from military service enjoyed by Yeshiva students. Fourth and last, but not least, is the constitutional aspect. The basic laws on human rights from 1992—Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty—opened the door to judicial review also with regard to primary legislation.³⁴ Indeed, Basic Law: Human Dignity and Liberty limits this possibility only to new legislation, introduced after 1992. However, Basic Law: Freedom of Occupation is applicable also to former laws.³⁵ As Israel moves toward completing its constitutional project,³⁶ availability of judicial review will become more significant in this context. It is expected that when the stage of drafting the full constitution arrives (based on the existing basic laws), old legislation

[2004] P.D. 58(5) 595 (reviewing by-laws on pork trade from the perspective of proportionality. See also BARAK-EREZ, *supra* note 13+3, at 81-122.

³¹ H CJ 122/54 Axel v. Mayor of Netanya, Members of its Municipal Council and the People of Netanya Region [1954] P.D. 8(2) 1524; H CJ 98/54 Lazarovitz v. The Food Controller [1956] P.D. 10 40; H CJ 72/55 Fridi v. Municipality of Tel-Aviv-Yafo [1956] P.D. 10 734. Following these precedents, the Knesset enacted Local Authorities (Special Enablement) Law, 1956, and Pig-Raising Prohibition Law, 1962.

³² H CJ 3267/97 Rubinstein v. The Minister of Defense [1998] P.D. 52(5) 481.

³³The landmark precedent in this regard is H CJ 910/86 Ressler v. Minister of Defense [1988] P.D. 42(2) 441.

³⁴ Basic Law: Freedom of Occupation (1992); Basic Law: Human Dignity and Liberty (1992). For more background information, see Barak-Erez, *supra* note 4. For the interpretation of the basic laws as recognizing the possibility of judicial review, see CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village [1995] P.D. 49(4) 221.

³⁵Subject to the possibility of an overriding legislation, following the Canadian constitutional model, as authorized by section 8 of Basic Law: Freedom of Occupation.

³⁶The basic laws are supposed to be consolidated to a full constitutional document. This status of the basic laws was established by a Knesset decision from 1950, known as the Harari Resolution, to enact the future Israeli constitution gradually, chapter by chapter, so that each chapter constitutes a basic law by itself. The idea was to embark on a process that would address controversies one by one, so that ~~every single~~each and every compromise could serve as the basis for a basic law. Together, these basic laws would eventually form the Israeli Constitution. The resolution states: “The First Knesset directs the Constitution, Law and Justice Committee to prepare a draft constitution for the state. The constitution will be composed of separate chapters, each one constituting a basic law by itself. Each chapter will be submitted to the Knesset if the Committee completes its work, and all the chapters together will make up the constitution of the state.” 5 Knesset Protocols 1743 (1950).

and regulations will not enjoy a blanket immunity from judicial review (although it may be the case that some particular arrangements will receive such immunity, as part of a possible political compromise). Accordingly, the process will necessitate opening old arrangements and understandings. A focal point of the controversy is expected to be the application of religious law to matters of marriage and divorce (as the only legal alternative). This arrangement carries discriminatory consequences for many of Israel's citizens, especially immigrants from Jewish origin who are not considered Jewish according to Halakhic standards³⁷ and therefore cannot marry according to the Rabbinical Courts Law, and women, whose rights under religious law are regulated differently than those of men.³⁸ Therefore, it is difficult to envision a completion of the constitutional project without directly addressing the old compromise in this area and reforming it.

The result of these changes is that controversies formerly solved through political agreements and understandings have been overtaken by divisive conflict that seeks only clear-cut, dry resolutions (including legal rulings), demanding winners and losers, rather than compromise.

IV. INSTITUTIONAL ASPECTS OF THE JEWISH STATE AND CLASHES BETWEEN RELIGIOUS AND SECULAR UNDERSTANDINGS OF RELIGIOUS AUTHORITY

An important aspect of the status of religion in Israeli law is the support of religious services for those interested in them. This support is the result of complex motivations. Partially, it reflects the public sentiment, prevalent even among secular Jews, that the support of Jewish religious services is part of the mission of Israel as a "Jewish" state. To a large extent, however, its scope is the result of a political surrender to demands coming from the religious public.

This institutional support of religion has a variety of expressions. First, Israel enacted a law on the status of the Chief Rabbinate, and supports religious services by acknowledging the position of Rabbis, who are public servants – the two chief Rabbis of the country as well as municipal Rabbis.³⁹ Second, municipalities offer and fund religious services such as prayer space and religious instruction, through special statutory bodies called religious councils.⁴⁰ Third, Israeli legislation

³⁷According to the Jewish Halakha, a person is considered Jewish only if he or she were born to a Jewish mother (or else converted according to the religious rules).

³⁸Many women in Israel do not oppose the application of religious family law, in accordance with their religious or traditional view. Yet, this is certainly a feminist concern in Israel, since the law as it stands now does not recognize a civil alternative for marriage and divorce for those who would prefer this option.

³⁹ Israel Chief Rabbinate Law, 1980.

⁴⁰ Jewish Religious Services Law [Consolidated Version], 1971.

heavily regulates the issue of kosher certificates in a manner that goes beyond regular prohibition on fraud in food merchandize. Indeed, only the Chief Rabbinate and official municipal Rabbis are allowed to issue kosher certificates. Fourth, as already mentioned, Israeli education legislation has always recognized the possibility of state-funded religious schools – either the public religious schools (which suit the needs of modern Orthodox Jews) and ultra-Orthodox schools which are both supervised and supported financially by the state.⁴¹ Fifth, beyond legislation, the state provides funds for cultural and educational activities. This funding is not allocated as a matter of statutory duty, but rather reflects policies of several government ministries.

These aspects of the establishment of religion are formulated as optional services supported by the state, and do not have any mandatory impact on those who are disinterested in religious services. Israelis are not expected to use the services offered by the religious entities which function according to the law. However, the application of these arrangements do raise questions regarding the proper balance between liberal principles which govern state law and religious values which influence decision-makers who operate these arrangements, in most cases Orthodox Jews.

Appointments of Rabbis to official rabbinical positions are based on Orthodox religious criteria. Therefore, these positions are not open to women, for example. Traditionally, also the positions of councilors in religious councils were not open to women, but the Israeli Supreme Court decided that due to the fact that the relevant laws do not bar appointments of women, they should be interpreted as inspired the equality principle.⁴² Since then women have served as members of religious councils. Furthermore, while Kosher certificates are issued based on religious doctrine, there are borderline cases. In one case the Jerusalem Rabbinate declined to give a kosher certificate to a business which hosted dancing performances by women, an activity considered unchaste by Orthodox standards. The Israeli Supreme Court intervened in this decision as well – explaining that the Rabbinate was not authorized to apply religious criteria which fall outside the scope of the kosher rules in the narrow sense.⁴³ With regard to education, the main issue has been the statutory condition stating that funding will be allocated only to schools which would follow the statutory rules regarding "core curriculum" studies (including basic skills in subject matters such as Math, English as a foreign language and civics). Since the Supreme Court was willing to intervene and enforce this condition,⁴⁴ the law was changed and currently the state supports also Ultra-

⁴¹ See the text accompanying *supra* note 10.

⁴² See HCJ 153/87 Shakdiel v. Minister for Religious Affairs, [1988] P.D. 42(2) 221. See also: Daphne Barak-Erez, *Can Equality Survive Exceptions?*, 107 MICH. L. REV. FIRST IMPRESSIONS 134 (2009).

⁴³ HCJ 465/89 Raskin v. Religious Council Jerusalem, [1990] P. D. 44(2) 673.

⁴⁴ See: HCJ 4805/07 Center for Jewish Pluralism v. Ministry of Education (to be published, 27 July 2007).

Orthodox schools which do not abide with the core requirement.⁴⁵ Last but not least, the allocation of state funding to religious activities is subject to the principles of administrative law, and therefore has to meet standards of transparency and equality. The Israeli Supreme Court has been called on often to enforce this norm.⁴⁶

The Orthodox dominance of religiously-oriented public positions necessarily entails the birth of decisions that reflect Orthodox views and as such create tension between the secular state and the religious public. Examples come from various contexts. Regarding the operation of religious councils, the preference of the Orthodox politicians has been to appoint only male Orthodox councilors. The Supreme Court intervened and ordered that these appointments will be open also to women⁴⁷ and to members of other streams of Judaism, such as the Conservative and Reform Movements.⁴⁸ Orthodox activities have been preferred by the Ministry of Religion in several occasions, and the Supreme Court intervened in these decisions as well.⁴⁹ Another example is the struggle around the ceremonial aspects of the administration of the Wailing (or Western) Wall, the holiest worship place for Jews. The site is administered by a state-appointed Rabbi, and accordingly the practices of the place follow the Orthodox practice, including separation between men and women. In addition, activities of women who struggled for leading a prayer led by women (even in the women section) were prohibited, in a manner which led to a long-lasting litigation and a compromise according to which women lead prayers in a remote area of the Wailing Wall.⁵⁰

⁴⁵ See State Education (Amendment no. 7) Law, 2007 and Unique Cultural Education Institutions Law, 2008. These laws complement a gradual process of growing government allocations to the Ultra-Orthodox education system. In general, the ultra-Orthodox education remained independent, but the extent of government participation in its financing created a new phenomenon of autonomous education subsidized by the government. The growth of the Shas party had led to the creation of yet another new Orthodox education network based on government support. For general information, see RIKI TESLER, *IN THE NAME OF GOD: SHAS AND THE RELIGIOUS REVOLUTION* 277, 277-83 (2003) (Hebrew). Originally, the State Education Law had conditioned government support of private schools in the inclusion of general “core” curriculum in their programs. In fact, even the original status quo document from 1947 stated, with regard to the independence of the religious Ultra-Orthodox education, that: “The state, of course, will determine the minimum of compulsory studies... history, science, etc., and will supervise the fulfillment of this minimum.” Later on, however, due to the growing influence of the Orthodox parties in the political arena, Orthodox schools had gradually succeeded to get state funding, even when they did not meet the core curriculum requirements.

⁴⁶ See HCJ 59/88 Tsaban v. The Minister of Finance [1989] P.D. 42(4) 705 [1989].

⁴⁷ See *supra* note 42.

⁴⁸ See e.g. HCJ 4733/94 Naot v. Municipality of Haifa, [1996] P.D. 49(5) 111 [1996].

⁴⁹ See e.g. HCJ 1438/98 Conservative Movement v. Minister for Religious Affairs, 53(5) PD 337 [1999].

⁵⁰ See HCJ 257/89 Hofman v. Superintendent of the Western Wall, 48(2) PD 265 [1994]; HCJ 3358/95 Hofman v. Superintendent of the Western Wall, 54(2) PD 368 [2000]; A.H.

V. THE ROLE OF JUDICIAL REVIEW

Against this background of an ever-changing status quo, the emerging question concerns the role of the courts—mainly the Israeli Supreme Court—in the curtailment of the political compromise. Religious politicians tend to argue that the activist stance that the Israeli Supreme Court has been taking when confronting religious-related issues makes the status quo impossible. This allegation is correct to some extent. As noted, when religious matters are debated in courts the decisions based on the political understanding do not always withstand review. However, this is only one part of a broader picture. This section of the Article is dedicated to a more nuanced understanding of the role of judicial review in the current regulation of the status quo.

It is worthwhile to start this discussion by noting that the growing involvement of the Supreme Court in status quo-related issues should be assessed in the context of the intensifying activities of the legislature and the government in shifting the balance of the status quo. In the legislative arena, one can easily point to new laws enacted in order to change the status quo. In addition to the Passover Law already mentioned, which has relatively limited effects on everyday life, it is possible to mention significant reforms, such as the new laws which secure public funding for religious schools even if they do not meet the basic curriculum standards as stated in the State Education Law.⁵¹ Various changes have been introduced also through government decisions and even through lower level administrators. As already noted, the numbers of Yeshiva students exempted from service has increased throughout the years, via the power of the Minister of Defense to exempt individuals from service. When the Supreme Court finally accepted a decision against this form of exemption,⁵² it was after decades of gradual changes which had been introduced in the form of administrative decision-making. In a similar manner, the Supreme Court has started to review the allocation of government money to religious institutions without criteria, where the scope of this phenomenon has broken new records. The court held that allocations of public funds should be based on both egalitarian and open criteria.⁵³ This norm was later on adopted by the Knesset which enacted section 3A of the Foundations of Budget Law.

At the same time, it is important to note that in both cases the exercise of judicial review did not reshape but rather moderately changed the basic compromises in these areas. The decision in the

4128/00 General Director of the Prime Minister Office v. Hofman, 57(3) PD 289 [2003]. See also Frances Raday, *Claiming Equality in Religious Identity – the Case of the Women of the Wall: a Supreme Court*, 24 HAMISHPAT 10 (2007) (Hebrew); PHYLLIS CHESLER AND RIVKA HAUT (EDS.), *WOMEN OF THE WALL: CLAIMING SACRED GROUND AT JUDAISM'S HOLY SITE* (2003).

⁵¹ See *supra* note 42.

⁵² See HCJ 3267/97 Rubinstein v. The Minister of Defense 52(5) P.D. 481 [1998].

⁵³ See *supra* note 46.

matter of Yeshiva students was based on a non-delegation principle which rejected the possibility to base such an important policy on administrative decision-making by the Minister of Defense, without guiding principles in the authorizing legislation.⁵⁴ The result has been the legislation of a law that recognizes the possibility of granting Yeshiva students special deferment of service (subject to conditions).⁵⁵ This law was the subject of new petitions which argued that the legislation on the matter is discriminatory (in favor of the ultra-Orthodox public). However, the Supreme Court was reluctant to intervene, and adopted a restrained policy of judicial review.⁵⁶ Likewise, the allocation of budget to religious institutions has to be based on administrative guidelines which detail criteria. In fact, however, government ministries, especially those headed by ministers who are close to the ultra-Orthodox public, tend to prioritize Orthodox activities in various ways, such as "tailored" criteria.⁵⁷

An even more important argument regarding the involvement of the Israeli Supreme Court in status quo-related issues states that the decisions of the Court, ostensibly curtailing some aspects of the status quo regime, have in fact also contributed to its preservation. More specifically, the argument here is that the original compromises, struck at the very beginning of the state, have become unworkable due to changes in the conditions of life (in various spheres including the economy, culture, and more). If the status quo was applied according to its original specifics, decision-makers in Israel would have realized earlier that it fails to adapt to the new social circumstances. However, since it was applied and curtailed in a soft manner, it has adjusted itself to reality and hence survived (while causing many paradoxes and strange results).

The prime example for this phenomenon is the area of family law. The exclusivity of religious law with regard to marriage and divorce has left many citizens and residents of Israel without legal options in the country—in circumstances of mixed marriages (usually not

⁵⁴ See HCJ 3267/97 Rubinstein v. Minister of Defense (1998)

⁵⁵ Deferment of Service to Yeshiva Students Law, 2002 (known also as the "Tal Law", after the name of the retired Supreme Court Justice Tal who headed the committee which recommended this legislative compromise) acknowledges the special privilege of Yeshiva students to avoid service as long as they study, but in addition gives them the option to stop their studies and serve only a one year "civil service" – in a way that was designed to pave the way to more Yeshiva students get integrated in productive life in civil society,

⁵⁶ More specifically, the Court rejected the first petition against this law based on the reasoning that the Tal Law was enacted for five year which are supposed to check the effectiveness of its regime in encouraging more Yeshiva students to opt for leaving the Yeshivas and start working. See: HCJ 6427/02 Movement for Quality Government in Israel v. Knesset (2006). A new petition in the same matter is currently pending before the court.

⁵⁷ See Daphne Barak-Erez, *Judicial Review of Politics: The Israeli Case*, 29 *J. L. & Soc.* 611 (2002).

accommodated for by religious law without an act of conversion); same-sex couples (taking into consideration the official view of many religions against homosexuality); and more situations. To answer this problem, the Israeli Supreme Court formulated some limited solutions for these people aforementioned. The Court has recognized equal rights and privileges to cohabitants (similar to those awarded to married couples).⁵⁸ The Court has also recognized the possibility of formally registering Israel couples who marry abroad,⁵⁹ a ruling it then used as a precedent also for the registration of same-sex couples who marry abroad.⁶⁰ In addition, the Supreme Court, residing as the High Court of Justice, has the power to review the decisions of religious courts, which have jurisdiction in family matters (and with regard to marriage and divorce sole jurisdiction). The power to review decisions of religious courts has been enacted since the period of the British Mandate in Palestine, but since then has been interpreted more broadly, and is currently exercised in a manner that subjects these courts to the core values of the basic laws (in as much as they do not conflict expressly with substantive religious norms in the area of marriage and divorce).⁶¹ As a result, the status quo in the area of family law seems to be more bearable. In this sense, one may argue that the same processes that shifted the status quo also secured its preservation.

Indeed, the Supreme Court is the main institution that counter-balances government decisions or laws promoted by the ultra-Orthodox parties, especially when they have discriminatory effects. In fact, due to the current conditions in Israeli political life that make it necessary for almost every government to obtain the political support of the religious parties, these parties succeed in promoting policies which do not necessarily enjoy support by the public at large, but are still backed by the majority in the Knesset (especially considering the need to cooperate with these parties in political areas beyond family law, namely foreign policy, such as the Israeli-Palestinian conflict). The willingness of the government and the majority in the Knesset to back

⁵⁸ See CA 563/65 Yeger v. Palevitz [1966] P.D. 20(3) 244; see also Daniel Friedmann, *The "Unmarried Wife" in Israeli Law*, 3 TEL-AVIV U. L. REV. 459 (1973) (Hebrew); Menashe Shava, *The Unmarried Wife*, 3 TEL-AVIV U. L. REV. 484 (1973) (Hebrew).

⁵⁹By virtue of the principle set by HCJ 143/62 Punk-Schlesinger v. Minister of Interior [1963] P.D. 17 225. The option of civil marriages abroad has often been described as a reasonable solution for those who cannot get married in Israel. However, in fact, it has many shortcomings. First, it does not afford due weight to the recognition of the right to family life as a basic constitutional right, derived from the right to human dignity (protected under Basic Law: Human Dignity and Liberty). See HCJ 7052/03 Adalah: The Legal Center for Arab Minority Rights in Israel v. Minister of Interior (unpublished op. May 14, 2006). Second, this is a more expensive alternative for marriage. Third, it carries the message of a lesser citizenship of those who cannot marry in Israel. Fourth, it raises difficult legal questions regarding the regulation of divorce of the couples married abroad.

⁶⁰ HCJ 3045/05 Ben Ari v. Director of the Population Registry in the Ministry of Interior (unpublished op. Nov. 21, 2006). For more background, see Dan Yakir & Yonathan Berman, *Same-Sex Marriages: Is It Really Necessary? Is It Really Desirable?*, 1 MA'ASEI MISHPAT 169 (2008) (Hebrew).

⁶¹ See e.g. HCJ 1000/92 Bavli v. High Rabbinical Court, [1994] P.D. 48(2) 221; HCJ 3914/92 Lev v. Regional Rabbinical Court of Tel-Aviv-Jaffa, [1994] P.D. 48(2) 491.

the special policy regarding the military service of Yeshiva students is probably the most notable example.⁶² Other examples include the practice of discriminatory funding to ultra-Orthodox institutions or families. The instances for judicial review of such decisions are numerous.⁶³ Another central area of controversy touches on the great degree of autonomy experienced by the ultra-Orthodox schools. As mentioned, this autonomy was part of the original status quo understanding. However, the exercise of this autonomy in public life has intensified in conjunction with the growing scope of the funding to these institutions, which at the same time resist any regulation by the state of their curriculum and practices. As previously mentioned, the Supreme Court decided against the ongoing funding of religious schools which fail to meet the requirement to include "core curriculum" studies. This ruling proved obsolete since the Knesset enacted a new law which exempted ultra-Orthodox schools from this requirement.⁶⁴ The Supreme Court has equally invalidated budgetary allocations included in the annual budget laws, which gave special income support to ultra-Orthodox families in which the fathers study in Yeshivas, and therefore do not maximize their ability to work. The court found these allocations to be discriminatory in comparison to other populations of non-working students, who are required to prioritize work over studies if they cannot support themselves and their families. Another example of a direct clash between the court and the ultra-Orthodox community is the court's decision against the discriminatory policy of an ultra-Orthodox school in the city of Immanuel. The school had introduced separate classes for girls from Ashkenazi (European) and Mizrahi (Oriental) Jews. The court found this policy to be discriminatory, based on the rationale of denying the legitimacy of separate but equal policies.⁶⁵ The Ultra-Orthodox community considered this decision to be an illegitimate intrusion in its educational autonomy, although the petition was originally brought by Ultra-Orthodox individuals who claimed to represent the girls who suffered from discrimination. Since the decision was not honored, the court issued contempt of court orders directed also against the parents of the girls registered to the school, and these developments led to mass demonstrations of the Ultra-Orthodox public against the court. In practice, this clash led to a compromise between the rival groups in the Ultra-Orthodox public on maintaining joint activities for all the girls attending the school during the few days left until the end of the school year – as all the leaders of the Ultra-

⁶² See *supra* notes 54 – 56 and the accompanying text.

⁶³ See e.g. the Yekutieli decision discussed in *supra* note 25.

⁶⁴ See *supra* note 45.

⁶⁵ HCJ 1067/08 "Noar Kahalacha" v. Ministry of Education (to be published, 6 August, 2009)..

Orthodox public were concerned about the direct clash with the judicial system, which potentially threatened the educational autonomy enjoyed by their group.

CONCLUSION

The case of Israel in the area of law and religion is uniquely and especially complex. The regulation of the matter is based on historical compromises that fail to secure satisfaction from all relevant parties, and at the same time are also subject to constant changes. Another source of complication is connected to the concept of Israel as a Jewish state. The close connections between Jewish nationality and culture on the one hand and religion on the other facilitate the introduction of religious norms and symbols to the legal system. At the same time, the normative basis of the system is that secular law and religious norms derive their legal power only when adopted expressly by legislation. The paramount example of this practice is the matter of family law (marriage and divorce), which is considered the most controversial issue in this arena as it involves, and even features, the imposition of religious norms on non-religious people.