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## Synagogue and State: Bringing Balance to the Role of Religion in Israeli Law

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**SYNAGOGUE AND STATE:  
BRINGING BALANCE TO THE  
ROLE OF RELIGION IN ISRAELI LAW**

ADAM S. KRAMAROW\*

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## I. INTRODUCTION

On May 14, 1948, after 1,878 years of statelessness, a new declaration of independence established the State of Israel and made it the third Jewish nation state in history.<sup>1</sup> In the founding document, Israel's forefathers declared "the establishment of a Jewish State in *Eretz-Israel*, to be known as the State of Israel . . . ."<sup>2</sup> The founders also declared that Israel "will be based on freedom . . . will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion . . . it will safeguard the Holy Places of all religions."<sup>3</sup> With the declaration, the founders established Israel as both a Jewish state and a free state—a nation for the Jews, but also equally for its other inhabitants.

Since its inception, Israel has styled itself as a liberal democracy in the Western tradition. Israel is a parliamentary democracy, consisting of interconnected legislative and executive branches, with a strong independent judicial branch.<sup>4</sup> Israel uses a nation-wide proportional representation electoral system, with universal suffrage for all Israeli citizens eighteen or older, regardless of ethnicity or religion.<sup>5</sup> Israel further formalized its status as a democracy in a 1985 amendment to its Basic Laws, a key component of Israel's constitutional law, by referring to the State of Israel as a "Jewish and democratic state."<sup>6</sup>

But apropos to its name,<sup>7</sup> Israel has often wrestled with its declared identity as both a democracy and a Jewish state. And while the Declaration of Independence promises freedom of religion,<sup>8</sup> a proclamation alone cannot guarantee the right will be protected and enjoyed as promised.<sup>9</sup> It is not difficult to

1. GARY JEFFREY JACOBSON, *APPLE OF GOLD* 5 (2010).

2. Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, 4 (1948) (Isr.) (emphasis omitted) [hereinafter "Declaration of Independence"].

3. *Id.*

4. See The World Factbook, Isr., Gov't, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Jan. 15, 2014).

5. See *id.*

6. Basic Laws, Basic Law: Human Dignity and Liberty, THE KNESSET, [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last visited, Apr. 18, 2014).

7. In the Torah, Jacob, one of the patriarchs of Judaism, literally wrestled with G-d in a dream. G-d later decreed that Jacob's new name would be "Israel." One common interpretation of the meaning of "Israel" is "one who struggles with G-d." Daniel J. Elazar, *Jacob and Esau and the Emergence of the Jewish People*, JERUSALEM CENTER FOR PUB. AFF., <http://jcpa.org/dje/articles/jacob-esau.htm> (last visited Apr. 18, 2014).

8. Declaration of Independence, *supra* note 2.

9. Especially considering that the Declaration of Independence's place in Israeli politics and jurisprudence has long been questioned. Early Israeli jurisprudence largely dismissed the document's purpose and usefulness, stating "the only object of the Declaration was to affirm the fact of the foundation and establishment of the State for the purpose of its

understand how non-Jews in Israel, especially Israel's 1.3 million Muslims who make up approximately 17.4% of all Israeli citizens,<sup>10</sup> could feel isolated by Israel's status as a "Jewish State."

Creating greater potential for alienation of its minority populations, the state does not take a laissez-faire approach to religion. Instead, Israel has enacted national laws and regulations based on *Halakha*<sup>11</sup> (Jewish religious law),<sup>12</sup> and has allowed local municipalities and religious authorities to do the same.<sup>13</sup> The state also recognizes and provides significant funding for religious courts, clergypersons, religious events, and the maintenance of both prominent Holy Places and local religious buildings.<sup>14</sup> And though Israel provides funding to Jewish and non-Jewish religious institutions alike, complaints of discrimination and disproportionate support for Orthodox<sup>15</sup> religious institutions persist.<sup>16</sup>

However, Israel has taken some proactive steps to protect the interests of its minority religious communities. Israel employs a system of religious courts, derived from the Ottoman Millet system, to handle personal status issues of law.<sup>17</sup> These religious courts are the courts of original jurisdiction for most personal status issues, including marriage and divorce.<sup>18</sup> Each major religious community has its own court system, which applies that

recognition by international law." H CJ 10/48 Zeev v. Acting District Commissioner, 72(1) PD 85 [1948] (Isr.). Though, as Jacobsohn notes, the Court and other legal scholars later argued that the document carries a greater significance to Israeli politics than initially recognized. JACOBSON, *supra* note 1.

10. See The World Factbook, Isr., Demography, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Feb. 26, 2013). These figures are limited to Israeli citizens and exclude Palestinians who do not hold Israeli citizenship, as well as migrants and guest workers.

11. Halakhah, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/252201/Halakhah>.

12. See, e.g., Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-1951) (Isr.).

13. Cf. CA 6024/97 Shavit v. Reshon Lezion Jewish Burial Soc'y 53(3) PD 600 [1999] (Isr.) (overturning a Local Rabbinical Authority's ruling that prohibited non-Hebrew characters on tombstones). Though, as seen in *Shavit*, the Knesset and Supreme Court generally seek to limit the application of *Halakha*-based laws to Jews or areas where there are few non-Jewish residents.

14. See Asher Maoz, *Religious Human Rights in the State of Israel*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 349, 366-71 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

15. Often included in the Orthodox spectrum are the Ultra-Orthodox, or *Haredim*, who practice an even more traditional and stricter form of Judaism than the Orthodox. As discussed below, they enjoy disproportionate political power and financial support by the Israeli government, while also benefiting from special status in the law, such as exemption from conscription.

16. See Maoz, *supra* note 14, at 366, 370.

17. See, e.g., Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.) [hereinafter "Marriage and Divorce Law"].

18. See, e.g., *id.*

community's laws to the cases it adjudicates.<sup>19</sup> This system serves to ensure that sensitive personal status issues are handled by a person's own belief system, rather than the belief system of the Jewish majority. However, as discussed below, they too have serious drawbacks.

Only officially recognized religious communities may receive direct state funding and the rights to self-regulation of their personal status issues. While Israeli law recognizes over a dozen religious communities, including nine individual Christian sects, other major denominations have had their applications for recognition pending for years or have been outright denied, such as the Jehovah's Witnesses.<sup>20</sup> As such, the religious court system is limited to just five major religious groups: Jewish, Muslim, Christian, Druze, and Baha'i.<sup>21</sup> Perhaps the system's biggest fault is that the religious authorities that administer the respective court systems are not required to take a pluralistic view of their religious laws.<sup>22</sup> But while non-Jews in Israel may feel alienated by the state's declared status as a Jewish state, counterintuitively, non-Orthodox Jews and secular Israelis often experience even more disenfranchisement than non-Jews in personal status matters.

This marginalizing, particularly of Jews that identify with the less traditionalist Reform, Reconstructionist, and Conservative denominations, stems from the monopoly that Orthodox Jews enjoy over Jewish life in the state. A continuation of the status quo that existed when Israel gained independence, Orthodox Judaism is the only denomination of Judaism fully and officially recognized by the Israeli government.<sup>23</sup> As such, Orthodox Judaism controls most aspects of state-regulated Jewish life, including governing the Jewish Holy Places such as the Western Wall, administering the Rabbinical Court system, and applying only Orthodox *Halakha*

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19. See, e.g., *id.*

20. See U.S. DEP'T OF STATE, *Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report for July-December 2010: Israel and the Occupied Territories* (Sept. 13, 2011), available at [http://www.state.gov/j/drl/rls/irf/2010\\_5/168266.htm](http://www.state.gov/j/drl/rls/irf/2010_5/168266.htm) [hereinafter "Religious Freedom Report"].

21. See YVONNE SCHMIDT, *FOUNDATIONS OF CIVIL AND POLITICAL RIGHTS IN ISRAEL AND THE OCCUPIED TERRITORIES* 110 (2001).

22. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.) ("Matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical courts . . . in accordance with Jewish religious law.")

23. Cf. Yair Ettinger, *Prominent Orthodox Rabbi Calls on Israel to Recognize Reform Judaism*, HAARETZ (Dec. 11, 2012, 11:26 PM), <http://www.haaretz.com/jewish-world/jewish-world-news/prominent-orthodox-rabbi-calls-on-israel-to-recognize-reform-judaism.premium-1.484150> (discussing a prominent Orthodox rabbi's call for other branches of Judaism to be recognized by the state, notably to the chagrin of his community).

(Jewish law). Because of its status, Orthodox institutions also receive a grossly disproportionate amount of the state religious funding allocated to the Jewish community.<sup>24</sup>

Unsurprisingly, the inequitable divide in power has led to high tensions between the Orthodox and the non-Orthodox Jewish communities. Non-Orthodox Jews are unsatisfied by their perceived status as second-class citizens in the Jewish State and protest against the Orthodoxy's imposition of religious laws on their lives. This past year, five Jewish women were arrested at the Western Wall, one of the most sacred sites in Judaism. Their crimes were wearing *tallitot*, Jewish prayer shawls, which the Orthodox Rabbinical authority that administers the holy site believes should only be worn by men, though they are also often worn by non-Orthodox Jewish women when praying.<sup>25</sup>

The current system, where the religious—namely the Orthodox and ultra-Orthodox Jews—hold a monopoly on religious matters and state-regulated personal status issues, is no longer tenable. As a liberal democracy, Israel must respect and protect the religious liberties and rights of all of its citizens, regardless of religion. In this paper, I will discuss the background of the Israeli political and religious system, the challenges the current system poses to the norm of religious liberty, and potential solutions for these issues. Part II reviews the political, constitutional, and religious foundations of the state. Part III analyzes modern challenges to religious liberty in Israel. Part IV presents potential solutions and alternatives to the issues. I conclude in Part V with a brief review of the need for Israel to protect the religious liberty of all of its citizens.

## II. THE POLITICAL, CONSTITUTIONAL, AND RELIGIOUS FOUNDATIONS OF THE MODERN JEWISH STATE

To best understand the intricacies of the current role of religion in Israeli law, it is necessary to identify the political, constitutional, and religious foundations of the state. Though these three areas are intertwined in the Jewish State, they are best viewed through their respective scopes.

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24. See Or Kashti, *In Israel, Not All Religious Funding was Created Equal*, HAARETZ (Nov. 25, 2012, 1:40 AM), <http://www.haaretz.com/print-edition/features/in-israel-not-all-religious-funding-was-created-equal.premium-1.480272>.

25. Jeremy Sharon, *Police Arrest 5 Women at Western Wall for Wearing Tallitot*, JERUSALEM POST (Apr. 11, 2013, 9:17 PM), <http://www.jpost.com/National-News/Police-arrest-5-women-at-Western-Wall-for-wearing-tallitot-309436>.

### A. *The Political Reestablishment of Israel*

The notion of *Eretz Yisrael*, the Land of Israel—the Promised Land—has been sacred to Judaism since Biblical Times.<sup>26</sup> The Jews received their Promised Land and enjoyed independence for hundreds of years until the Jewish kingdoms were conquered.<sup>27</sup> After the fall of the second Jewish nation in 70 C.E., the Jews were once again scattered to the world.<sup>28</sup> Since then, the Jewish diaspora had prayed for a return to Zion—to *Eretz Yisrael*.<sup>29</sup>

From 70 C.E. to the modern era, the Jewish people always managed to sustain at least a small but consistent presence in the ancient lands of Israel.<sup>30</sup> In the mid-nineteenth century, Jews in the diaspora began making another push to return to their ancient homeland, now called Palestine and controlled by the Ottoman Empire.<sup>31</sup> In 1917, towards the end of World War I, the United Kingdom, with the help of the Jewish Legion, captured the majority of the land of Palestine from the Ottoman Empire.<sup>32</sup> In November of 1917, shortly after the British success in World War I, and following thousands of years of exile, decades of work, and years of negotiations with the British Government, British Foreign Secretary Arthur Balfour sent a letter to the prominent Jewish and Zionist leader Baron Walter Rothschild, declaring Britain's interest in establishing a Jewish "national home" in Palestine.<sup>33</sup> In the letter, Foreign Secretary Balfour stated:

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet.

"His Majesty's Government view with favour the establishment in Palestine of a *national home for the Jewish people*, and will use their best endeavours to facilitate the achievement of this object, *it being clearly*

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26. "And the L-RD thy G-d will bring thee into the land which thy fathers possessed, and thou shalt possess it; and He will do thee good, and multiply thee above thy fathers." *Deuteronomy* 30:5.

27. See FOREIGN AREA STUDIES - THE AM. UNIV., ISRAEL - A COUNTRY STUDY x-xii (Richard F. Nyrop ed., 2d ed. 1979).

28. MARTIN GILBERT, ISRAEL: A HISTORY 3 (2008).

29. *Id.*

30. See *id.* at 3-5.

31. See *id.*

32. See *id.* at 34-35.

33. Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), available at [http://avalon.law.yale.edu/20th\\_Century/balfour.asp](http://avalon.law.yale.edu/20th_Century/balfour.asp) (last visited Apr. 18, 2014) [hereinafter Balfour].

*understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”*

I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.<sup>34</sup>

The Balfour Declaration was the first significant declaration by a world power favoring the creation of a “Jewish Home” in *Eretz Yisrael/Palestine*, and it set off new waves of *aliyah* to Israel.<sup>35</sup> In 1919, the Paris Peace Conference granted the Mandate of Palestine to Britain and accepted “the promise of the Balfour Declaration to ‘facilitate’ the establishment of a Jewish National Home there.”<sup>36</sup> Because of this, the Balfour Declaration, which notably includes explicit recognition of the “civil and religious rights of existing non-Jewish communities in Palestine,”<sup>37</sup> is recognized as a key document in the establishment of Israel.<sup>38</sup>

However, British support for the Zionist movement quickly waned. Though Zionists spent the next thirty years lobbying for a Jewish National Home independent from British control, it would take the horrors of the Holocaust, in which six million Jews were brutally and systematically murdered throughout Europe, North Africa, and the Middle East, for the Zionist movement to once again gain real traction in the international community.<sup>39</sup> Finally, on February 15, 1947, after increasing hostilities between the British, Jews, and Arabs in Palestine, Great Britain announced it would be turning over the issue of Palestine to the United Nations.<sup>40</sup>

Exactly three months later, the United Nations established a Special Committee on Palestine (UNSCOP).<sup>41</sup> Tensions continued to rise within Palestine as the committee examined reports, heard testimony from British, Jewish, and Arab leaders, and visited the land in person.<sup>42</sup> On August 31, 1947, UNSCOP held its last meeting and released its majority report the next day.<sup>43</sup> The

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34. *Id.* (emphasis added).

35. GILBERT, *supra* note 28, at 34-35.

36. *Id.* at 42.

37. Balfour, *supra* note 33.

38. *See* Declaration of Independence, *supra* note 2 (evoking the Balfour Declaration).

39. *See* GILBERT, *supra* note 28, at 123 (discussing the “turning point in the path to Jewish statehood”).

40. *See id.* at 142.

41. *See id.* at 144.

42. *See id.* at 144-49.

43. *See id.* at 149.



report, which came to be known as the Partition Plan, "proposed the creation of two separate and independent states, one Arab and one Jewish, with the city of Jerusalem as a *corpus separatum*" that would be governed by a special international regime and administered by the United Nations.<sup>44</sup>

On November 29, 1947, the United Nations General Assembly passed Resolution 181,<sup>45</sup> the Partition Plan, with some minor amendments from the original UNSCOP plan.<sup>46</sup> Notably, the final resolution referred to the future State of Israel as Jewish and democratic—referring to the future state as a "Jewish State" over twenty times and declaring that it would have a democratic government and would "draft a democratic constitution."<sup>47</sup>

On May 15, 1948, the British Mandate was set to expire, at which time independence of the Jewish and Arab states could be declared.<sup>48</sup> The UN General Assembly worked until the final moments to pass a resolution to officially put Jerusalem under UN rule.<sup>49</sup> However, all of the submitted resolutions failed to pass, with the Arab states committed to seeing the city governed by Arab powers rather than international control.<sup>50</sup> After the General Assembly failed to establish UN control of the city by the end of the British Mandate, Jerusalem became a legally open and unclaimed city.<sup>51</sup> At 5:00 PM on May 14, 1948, the Jewish leaders in Palestine declared the independence of the State of Israel, immediately establishing a provisional government and appointing David Ben-Gurion as Prime Minister.<sup>52</sup>

44. *See id.*

45. By a vote of thirty-three votes in favor, thirteen opposed, and ten abstentions. *Id.* at 150.

46. Interestingly, the anti-religious Soviet Union came out as one of the biggest proponents of the plan, with the Soviet Representative stating:

The Jewish people had been closely linked with Palestine for a considerable period in history . . . . As a result of the war, the Jews as a people have suffered more than any other people. The total number of the Jewish population who perished at the hands of the Nazi executioners is estimated at approximately six million. The Jewish people were therefore striving to create a State of their own, and it would be unjust to deny them that right.

*Id.*

47. The Future Government of Palestine, G.A. Res. 181(II), ¶14, U.N. Doc. A/RES/181(II) (Nov. 29, 1947) [hereinafter *The Partition Plan*]. As discussed below, Israel still does not have a final, formalized constitution, though Israel's constitutional law system is based on its Basic Laws, as well as precedence from the Israeli Supreme Court. Drafts of proposed constitutions also exist. *See* FACULTY OF LAW OF THE UNIV. OF TEL AVIV, PROPOSED DRAFT OF THE CONSTITUTION OF THE STATE OF ISRAEL (Steven F. Friedell trans.) (1987).

48. *See* GILBERT, *supra* note 28, at 185-189.

49. *Id.*

50. *Id.* at 185.

51. *See id.*

52. *Id.* at 186.

### B. The Constitutional Framework

The 1947 UN Partition Plan stipulated that the future Jewish State was to draft a democratic constitution.<sup>53</sup> Israel's 1948 Declaration of Independence also mandated that a constitution "be adopted by the Elected Constituent Assembly not later than the 1st October 1948."<sup>54</sup> However, the body that was to create the document—the Constituent Assembly—was unable to complete their task and instead ultimately evolved into the Knesset, Israel's legislative body.<sup>55</sup> Despite these requirements and various attempts at writing a formal constitution,<sup>56</sup> Israel still lacks a final formal constitution.<sup>57</sup>

Instead, in 1950 the constitutional question was answered with the "Harari Resolution," which established a process where subsequent governments would incrementally adopt individual chapters of constitutional law that would eventually come to form a final constitution.<sup>58</sup> The Resolution allowed Basic Laws to be passed by a simple majority of the Knesset, and was vague as to when and how the constitution would be considered complete.<sup>59</sup> This procedure allows for every subsequent Knesset to be both a legislative body and a constitutional assembly, indefinitely.<sup>60</sup> The Resolution also has the perverse effect of allowing a Knesset to pass laws that, theoretically, have constitutional superiority over subsequent ordinary laws, but, like ordinary law, only require a simple majority to pass.<sup>61</sup>

53. The Partition Plan, *supra* note 47, at ¶14.

54. Declaration of Independence, *supra* note 2.

55. *See id.*

56. *See* JACOBSOHN, *supra* note 1, at 95-110.

57. It is worth noting three of the main reasons why a constitution was not drafted as required in those early years: (1) the country was focused primarily on defending itself in the War of Independence and establishing agencies and infrastructure necessary for survival; (2) David Ben-Gurion, Israel's first Prime Minister, and his political coalition were largely against drafting a formal written constitution, calling it a "novelty" and arguing Israel was not yet ready for a formal constitution; (3) the ultra-Orthodox and other religious Jews were strongly opposed to the idea of a secular constitution—with the potential to limit their rights and authorities—as they believed the Torah should act as the fundamental law for the Jewish state. *Id.*

58. *Id.* at 106.

59. Basic Laws, *Introduction*, THE KNESSET, [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm) (last visited Apr. 18, 2014).

60. JACOBSOHN, *supra* note 1, at 106.

61. *See id.* It is worth highlighting the obvious pitfalls created by the Knesset's ability to pass Basic Laws—which are treated as constitutional law—as easily as it can pass ordinary laws. Each new government can theoretically overcome any limitations on its powers or laws created by prior Basic Laws by simply amending them, removing them, or creating new Basic Laws to overcome them with only simple majority votes. Even if the Supreme Court recognizes the precedence set by the prior Basic Laws and limits the ability of a government to marginalize or repeal the prior laws, a government could still theoretically pass

Despite the essentially identical requirements for enactment, the Israeli Supreme Court has treated the Basic Laws as Israel's constitution.<sup>62</sup> In 1969, the Israeli Supreme Court first held that the Knesset is capable of limiting itself—and therefore future governments—through entrenched clauses in Basic Laws, though the holding specifically sought to avoid ruling on larger issues of constitutionalism.<sup>63</sup> However, in 1995, the Court—led by Justice Aharon Barak as part of Israel's so-called “Constitutional Revolution”<sup>64</sup>—held that the Knesset, in its capacity as the Constitutional Authority of Israel, has the ability to enact Basic Laws with entrenched clauses of superior authority to ordinary statutes and has the ability to bind future governments.<sup>65</sup> In the style of *Marbury v. Madison*, the ruling also saw the Court recognizing its own power of judicial review, holding that the Court may invalidate laws that are unconstitutional under the Basic Laws.<sup>66</sup> This ruling treated the Basic Laws as constitutional law,<sup>67</sup> thus cementing the Court's recognition of the supremacy of the laws.

Israel's notably strong<sup>68</sup> and generally well-respected Supreme Court views the Basic Laws, together with case precedence, and, to a lesser extent, the Declaration of Independence,<sup>69</sup> as the core of

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as many Basic Laws as it wishes, with the apparent effect of future governments being unable to repeal the laws. While it is doubtful the Supreme Court would allow such an abuse of the system, it is unclear how the Court would be able to disallow such abuse while continuing to recognize the supremacy of the Basic Laws and the ability of a government to pass them by simple majorities. Fortunately, this potential constitutional crisis has yet to be realized, and the Knesset has successfully amended and repealed Basic Laws without major controversy.

62. See Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1329-30 (1999).

63. See *id.* at 1329; HCJ 98/69, *Bergman v. Minister of Finance*, 23(1) PD 693 [1969] (Isr.).

64. See generally Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 82 (1993) (discussing Israel's Constitutional Revolution of the early 1990's).

65. Dorner, *supra* note 62, at 1329-30; CA 6821/93 *United Mizrahi Bank Ltd. v. Migal Collective Vill.* 49(4) PD 221 [1995] (Isr.) [hereinafter *United Mizrahi Bank*]. It was partially translated in 31 ISR. L. REV. 754, 764 (1997). See also translated in 1995-2 ISR. L. REPORTS 1, available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

66. Dorner, *supra* note 62, at 1329-30; *United Mizrahi Bank*, *supra* note 65.

67. Dorner, *supra* note 62, at 1330; see also Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On The Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2012) (discussing Israel's treatment of constitutional law and judicial review).

68. The World Factbook: Isr.: Gov't, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Feb. 26, 2014).

69. Dorner, *supra* note 62, at 1326 (noting that, though a law cannot be invalidated on the basis that it conflicts with the Declaration of Independence, “all laws of Israel, including those enacted during the British Mandate before the establishment of the State, must be interpreted in light of the principles expressed by the Declaration”).

Israel's system of constitutional law.<sup>70</sup> As noted, the Declaration of Independence guarantees that Israel "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex; it will guarantee freedom of religion."<sup>71</sup> The Basic Law on Freedom of Occupation establishes "the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel."<sup>72</sup> Likewise, the Basic Law on Jerusalem also promises "Holy Places shall be protected . . . from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings towards those places."<sup>73</sup> However, these guarantees of freedom of religion, of equality, and of access to Holy Places have failed to protect the rights of all Israelis who these laws are supposed to protect.

### C. Religious Foundations and the Status Quo

#### 1. The Religious Court System

At the establishment of Israel there was already a system of law in place, leftover from the Ottoman period (1517-1917) with some changes made during the British Mandate period (1918-1948).<sup>74</sup> As part of Israel's preservation of the status quo between religion and state, this system was mostly adopted by Israel at its creation, and has remained largely unchanged from that time.

During its rule, the Ottoman *Caliphate* granted non-Muslim communities autonomy in matters of communal affairs and personal status issues.<sup>75</sup> The Millet system, as it was known, gave power to the leaders of the Empire's recognized religious communities to set up their own court systems and apply their own religious laws.<sup>76</sup> The Millets' jurisdictions varied by community but typically included marriage, divorce, alimony and support, inheritance, education, and charity.<sup>77</sup>

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70. *Id.* at 1325-26.

71. Declaration of Independence, *supra* note 2.

72. Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 p. 90, § 1 (Isr.).

73. Basic Law: Jerusalem, Capital of Israel, 5740, 34 LSI 209, § 3 (1979-1980) (Isr.).

74. Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L. REV. 239, 251 (2007).

75. *Id.*

76. *Id.*

77. *Id.* at 251-52.

When the British Mandate succeeded Ottoman rule in Palestine, the British maintained a similar version of the Millet system. Under Britain's 1922 Palestine Order in Council,<sup>78</sup> ten religious communities were recognized: Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic Melkite, Maronite, Syrian Orthodox, and Jewish, which was referred to as "Knesset Israel."<sup>79</sup> The 1922 Order also codified the religious courts' respective jurisdictions, and defined personal status issues as "Suits Regarding Marriage Or Divorce, Alimony, Maintenance, Guardianship, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of Absent Persons."<sup>80</sup>

One significant modification drafted by the British was a provision allowing civil marriages for persons who were neither Muslim nor a member of a recognized religious community.<sup>81</sup> As Natan Lerner notes, this provision could have solved Israel's modern problem of persons who either do not belong to one of the recognized religious communities or who opted out of the religious communities.<sup>82</sup> Unfortunately, the provision was never implemented, and civil marriage and divorce remain elusive in modern Israel.<sup>83</sup> Instead, Israel maintained the system of religious courts as part of the larger Status Quo Agreement.<sup>84</sup>

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78. It is worth noting that this Order also recognized the Balfour Declaration, while reaffirming the civil and religious rights of existing non-Jewish communities in Palestine. The Palestine Order in Council (1922-1947) preamble, in 3 *The Laws of Palestine* 2569 (Robert Harry Drayton ed., 1936), available at <http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656> [hereinafter "Palestine Order"] (stating, "[a]nd whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country").

79. *Id.* at art. 52; Lerner, *supra* note 74, at 252. As under Ottoman rule, where they were the majority and official faith and did not need recognition, the Islamic community was not considered a "recognized community," though the Islamic courts still maintained jurisdiction over personal status issues for Muslims. Lerner, *supra* note 74, at 252.

80. Palestine Order, *supra* note 78, at art. 51. The Muslim courts had a wider jurisdictional reach than the Jewish and Christian courts, including exclusive jurisdiction over all personal status issues involving Muslims. The Jewish and Christian courts only had exclusive jurisdiction over matters of marriage, divorce, alimony, and the confirmation of wills of members of their community. *Id.* at arts. 51-54.

81. Lerner, *supra* note 74, at 252.

82. *Id.* at 252-53.

83. *Id.* at 253.

84. *Id.*

## 2. The Status Quo

During the years leading up to the Partition Plan, Jews, Arabs, and the British in Palestine regularly clashed.<sup>85</sup> Shortly after Israel declared its statehood and independence, its Arab neighbors—Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan, and Yemen—launched a multi-front war on the newborn nation.<sup>86</sup> But achieving independence from the British and the threat of destruction by Israel's Arab neighbors were not the only concerns of the founders of the new state. The founders knew that Israel would not be a homogeneous society, even amongst the Jews. Instead they recognized it would be a state with Jews from all different ethnicities, political ideas, and religious beliefs, with a large Muslim minority, that would also maintain sizeable Christian communities, and be holy to all monotheistic faiths.<sup>87</sup>

Of particular concern to the forefathers at the time of founding was the potential for a civil divide between the Jewish communities that would leave the government unable to function and would mean the political failure of the state, which would likely result in its complete destruction at the hands of its Arab neighbors.<sup>88</sup> The ultra-Orthodox party, Agudat Yisrael, represented the interests of the sizeable *Haredi* (ultra-Orthodox) minority. Agudat Yisrael and the *Haredim* were notoriously anti-Zionist, as they believed that only G-d could establish a Jewish state and that the Israeli government would be too secular.<sup>89</sup> Still, Agudat Yisrael was an active political player with considerable power and influence; the party dated back to 1912 and, before the fall of Poland to Nazi Germany, even enjoyed representation in the national Polish parliament.<sup>90</sup>

David Ben-Gurion, the de facto leader of pre-state Israel and the first Israeli Prime Minister, recognized the importance of

85. Lerner, *supra* note 74, at 121-142.

86. See generally GILBERT, *supra* note 28, at 186-249 (discussing the Israeli War of Independence).

87. Letter from David Ben-Gurion, for the Jewish Agency Exec. to The World Agudat Isr. Fed'n (June 19, 1947), in ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS, PRE-1948 TO THE PRESENT 58, 58-59 (Itamar Rabinovich & Jehuda Reinharz eds., 2d ed. 2008) [hereinafter *The Status Quo Agreement*].

88. See generally GILBERT, *supra* note 28, at 186-249 (discussing the first days of the state of Israel and the Israeli War of Independence).

89. See Benjamin Beit-Hallahmi, *Israel's Ultra-Orthodox*, MIDDLE E. RES. & INFO. PROJECT, <http://www.merip.org/mer/mer179/israels-ultra-orthodox> (last visited Apr. 18, 2014).

90. Agudat Israel, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Politics/aguddat.html> (last visited Apr. 18, 2014).

maintaining a united Jewish front and the necessity of bringing Agudat Yisrael into the fold. With that goal in mind, Ben-Gurion sent a letter to the leaders of Agudat Yisrael, which became the basis for what is known as the Status Quo Agreement.<sup>91</sup> The foundation laid out in the letter would eventually be adopted by the state and, though the “status quo” continues to evolve, remains the basis for modern interaction between religion and state in Israel.<sup>92</sup>

In the letter, Ben-Gurion noted that the establishment of the state would require the approval of the United Nations, which would not be possible if Israel intended on becoming a theocratic state or failed to guarantee “freedom of conscience for all its citizens.”<sup>93</sup> Ben-Gurion also noted that, “neither the Jewish Agency Executive nor any other body in the country is authorized to determine the constitution of the Jewish state-in-the-making in advance.”<sup>94</sup> However, Ben-Gurion and the Jewish Agency nevertheless outlined what they called the “Structural Foundation for Religio-Political Accommodation.”<sup>95</sup>

The “foundation” laid out four major concessions that the Agency was willing to make for the *Haredim*. First, the letter recognized that Saturday, the Jewish Sabbath, would be the “legal day of rest,” though other faiths would be able to rest on their own “weekly holiday” instead.<sup>96</sup> Second, the letter stated that all means would be taken to “ensure that every state kitchen intended for Jews will have kosher food.”<sup>97</sup> Third, the letter promised that the Agency recognized the seriousness and sensitivity of the issue of marital affairs,<sup>98</sup> and that they would “do all that can be done to satisfy the needs of the religiously observant in this matter and to prevent a rift in the Jewish People.”<sup>99</sup> Finally, the letter guaranteed “[f]ull autonomy of every stream in education,” thus promising that the *Haredim* would be allowed to have their own independent school system, and that their students would not be required to attend a state schooling system so long as the *Haredi* schools met minimal educational requirements.<sup>100</sup> As shown in

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91. The Status Quo Agreement, *supra* note 87, at 58-59.

92. Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 618-19 (1999).

93. The Status Quo Agreement, *supra* note 87, at 59.

94. *Id.* at 58.

95. *Id.* at 58-59.

96. *Id.* at 59.

97. *Id.*

98. Inherently included in this promise is the matter of all other personal status issues. See Sapir, *supra* note 92, at 620.

99. The Status Quo Agreement, *supra* note 87.

100. *Id.*

Part III, the promises made in this foundation were not only kept, but were expanded into much greater guarantees for the *Haredi* and Orthodox than originally conceived.

### III. THE CURRENT IMBALANCE BETWEEN SYNAGOGUE AND STATE

In a 1998 self-report to the United Nations Human Rights Committee, Israel accurately described the balance between religion and state in the country as “quite labyrinthine” and “a patchwork of laws and practices that are not easily susceptible to generalization.”<sup>101</sup> Israel is not a theocracy, nor is there an official state religion; however Israel does not embrace the same principles of separation between religion and state that most liberal democracies observe. Still, Israel’s acknowledged intermingling of religion and state should not bar the state from being recognized as a liberal democracy, so long as Israel respects the democratic norm of religious liberty.<sup>102</sup> Israel’s obligations to ensure religious liberty lie not only under democratic norms, but also exist in its own Declaration of Independence,<sup>103</sup> the spirit of its Basic Laws,<sup>104</sup> and its treaty and international law obligations.<sup>105</sup> The Israeli

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101. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Initial Report of States Parties Due in 1993: Addendum: Israel, ¶¶532, U.N. Doc. CCPR/C/81/Add.13 (Apr. 9, 1998).

102. Israel must also of course respect the other democratic norms that lie outside the purview of this paper.

103. See Declaration of Independence, *supra* note 2. As noted, while the Declaration of Independence is not binding law, the Court interprets all laws “in light of the principles expressed by the Declaration.” Dorner, *supra* note 62, at 1326.

104. See Ruth Lapidoth, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 446 (1998) (noting that “the general reference to ‘Fundamental Human Rights’ in the context of ‘Basic Principles’ [of the two 1992 Basic Laws on “Human Dignity and Liberty” and “Freedom of Occupation,” respectively] may perhaps be interpreted as a recognition of . . . freedom of religion, although not specifically mentioned in the text.”); *cf.* Basic Law: Jerusalem, Capital of Israel, 5740, 34 LSI 209, § 3 (1979-1980) (Isr.) (protecting the religious rights of different religious groups by establishing that the “Holy Places shall be protected . . . from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings towards those places”).

105. Israel has signed and ratified into law the 1966 International Covenant on Civil and Political Rights, which guarantees freedom of religion. International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 172, 178 [hereinafter “ICCPR”]. However, Israel issued a reservation limiting the covenant’s application in the area of personal status law, thus avoiding application of the treaty against the religious courts’ authority over personal status issues and the lack of a civil marriage system. See International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Apr. 18, 2014). In its treaty with the Holy See, Israel also “affirm[ed] its continuing commitment to uphold and observe the human right to freedom of religion and conscience. See Fundamental Agreement Between the Holy See and the State of Israel art. 1, Vatican-Isr., Dec. 30, 1993, 33 I.L.M. 153, 154 (1994) [hereinafter “Holy See-Israel Treaty”].



Supreme Court has also explicitly recognized the right to freedom of religion in Israel.<sup>106</sup> However, by examining a non-exhaustive list of current areas of entanglement between religion and state in Israel, it is apparent that Israel is not fully upholding its responsibility to protect the religious liberty of all of its citizens.

### *A. Religious Courts and Issues of Personal Status*

#### 1. Marriage

Israel's religious court system is a true continuation of the status quo that was created under the Ottoman Millet system and survived through British Rule in Mandate Palestine.<sup>107</sup> As discussed, that system allowed religious groups in the Ottoman Empire self-rule over most legal issues within their respective communities.<sup>108</sup> Shortly after its founding, Israel codified the maintenance of the system.<sup>109</sup> In 1953, Israel enacted the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, which further defined the Jewish rabbinical courts' exclusive jurisdiction over all marriage, divorce, and other personal status issues for Jews in Israel, while also establishing Orthodox Jewish *Halakhic* law as the sole law of these courts.<sup>110</sup> Israel maintained this system for two primary reasons: (1) it allowed religious minority communities to maintain self-rule over matters of personal status, which was necessary to satisfy the communities and which the Israeli government had no interest in concerning itself with anyway, and (2) it allowed Orthodox Judaism exclusive reign over marriage and divorce for all Jews in the state.<sup>111</sup>

There are five religious court systems in Israel: the Rabbinical Courts (Jewish), the Muslim Religious Courts (Sharia Courts), the Druze Religious Courts, and the juridical institutions for the nine

106. *E.g.*, HCJ 243/62 Israel Film Studios Ltd. v. Gary, 16 PD 2407, 2416 [1962] (Isr.) ("Every person in Israel enjoys freedom of conscience, of belief, of religion, and of worship. This freedom is guaranteed to every person in every enlightened, democratic regime, and therefore it is guaranteed to every person in Israel."); *see also* Sapir, *supra* note 92, at 635-36.

107. *See* discussion *supra* Part II.B.

108. *Id.*

109. Law and Administration Ordinance, 1948, 1 LSI 7, ¶17 (1948) (Isr.).

110. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.) ("[M]atters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical courts . . . in accordance with Jewish religious law."); Sapir, *supra* note 92, at 620-21.

111. Daphne Barak-Erez, *Law and Religion under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495, 2497 (2009).

recognized Christian communities and the Baha'i community, respectively.<sup>112</sup> Each system has the power to adjudicate most personal status issues of their own communities.<sup>113</sup> The Dayanim Law of 1955 (for Jewish courts),<sup>114</sup> the Qadis Law of 1961 (for Islamic courts),<sup>115</sup> and the Druze Religious Courts Law of 1962<sup>116</sup> each set out how the judges for the respective courts are chosen.<sup>117</sup> The courts and their judges are all funded by state funds.<sup>118</sup> While the religious courts have their own internal appellate systems, their decisions are also reviewable by the Israeli Supreme Court to ensure that they conform to any superseding civil laws.<sup>119</sup>

*Dayanim* (Jewish court judges) are officially appointed by the Israeli President, based on the recommendations of the Commission to Appoint Religious Court Judges.<sup>120</sup> The commission is composed of ten members: Israel's two chief rabbis (both Orthodox or ultra-Orthodox), two *dayanim* from the Rabbinical Court of Appeals, the justice minister, another minister appointed to the commission by the prime minister, two members of the Knesset, and two practicing lawyers representing the Israel Bar Association.<sup>121</sup> By law, "[c]andidates for appointment as *dayanim* must be ordained Orthodox rabbis" and must be "examined and certified by the Council of the Chief Rabbinate," which is also run by the Orthodox.<sup>122</sup> The rabbis must be Orthodox because, by law, Orthodox Judaism is the only officially recognized branch of Judaism in Israel.<sup>123</sup> Civil marriages are not available in Israel to

112. See SCHMIDT, *supra* note 21, at 110.

113. S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 138-39 (1997). Except the rabbinical courts, which are limited to matter pertaining to marriage and divorce. *Id.*

114. Dayanim Law, 5715-1955, 9 LSI 74 (1954-1955) (Isr.).

115. Qadis Law, 5721-1961, 15 LSI 123 (1960-1961) (Isr.).

116. Druze Religious Courts Law, 5722-1962, 17 LSI 27 (1963-1964) (Isr.).

117. The Christian and Baah'i court systems are less regulated by the state and pick their own judges. SCHMIDT, *supra* note 21, at 110.

118. Sapir, *supra* note 92, at 621.

119. See HCJ 1000/92 Bavli v. Great Rabbinical Court 48(2) PD 221 [1995] (Isr.) (holding that the decisions of all religious courts, including the Great Rabbinical Court, are in principle subject to review by the Supreme Court. See also CA 3077/90 Plonit v. Ploni, 49(2) PD 578 [1997] (Isr.) (implicitly holding that *Bavli* also applied to the Islamic Sharia religious courts); see also HCJ 51/69 Rodnitsky v. Rabbinical Court of Appeals, 24(1) PD 704 [1970] (Isr.) (overruling a rabbinical court decision on the basis that it conflicted with a fundamental principle of the freedom of conscience).

120. Sharon Shenhav, *Choosing Religious Court Judges in Israel: A Case Study*, JEW. ISH POL. STUD. REV. 18:3-4 (Oct. 1, 2006), available at <http://jcpa.org/article/choosing-religious-court-judges-in-israel-a-case-study/>.

121. *Id.*

122. *Id.*

123. See Movement for Progressive Judaism in Israel Fund v. Minister of Religious Affairs, 43(2) PD 661 [1989] (Isr.). In this case, the Supreme Court rejected an appeal by an

anyone with a recognized religion under the Nationality Law, and all persons with a recognized religion—which applies to all but a few Israelis—may only be married or divorced through their respective religious court system.<sup>124</sup>

The system's two most significant challenges to the norms of religious liberty are: (1) virtually all Israelis are forced to use these courts for at least some matters of personal status, including marriage and divorce, and (2) the courts do not take a pluralistic view of the religious laws they apply, instead applying strict Orthodox *Halakha*, Shari'a, Canonical law, or Baha'i law. This creates obvious issues when the personal beliefs or desires of an individual or couple do not conform to the relevant established religious law.<sup>125</sup> For example, all Jewish marriages in Israel must be performed under Orthodox law in order to receive legal state recognition.<sup>126</sup> While secular, Reform, Conservative, and other non-Orthodox Jews may have additional ceremonies in adherence to their own beliefs and officiated by their own rabbi or other leader, they must have a ceremony under Orthodox *Halakhic* laws and officiated by an Orthodox rabbi for their marriage to be legal.<sup>127</sup> This deprives secular and non-Orthodox Jewish couples from truly being married the way they wish, by their own religious leader, and within their own religious beliefs and, instead, forces Orthodox beliefs and law on them.

Besides preventing many couples from being married in the tradition of their preference, some couples are prohibited from

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advocacy group for progressive (non-Orthodox) forms of Judaism to order the Minister of Religious Affairs to recognize Reform rabbis as having "registering authority" to perform marriages and divorces which would be recognized by the state. The ruling maintained that ceremonies and adjudications performed by Reform, Conservative, and other non-Orthodox rabbis were not recognized under Israeli law, even if all parties agreed to the forum. Cf. Ettinger, *supra* note 23.

124. Until recently, civil marriage was completely unavailable in Israel. In 2010, the Knesset passed a bill that allows civil marriages for partners who are both labeled as "lacking a religion." HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 214 & n.16 (2011). However, this law applies to very few Israelis, as most Israelis are automatically recognized as having a religion based on their parentage. For example, even if an Israeli declares herself as secular or having no religion, if her mother was recognized as Jewish, she will be legally recognized as Jewish under the Nationality Law, and will be unable to obtain a civil marriage. See Nationality Law, 5712-1952, 6 LSI 50 (1951-1952) (Isr.); see also Lerner, *supra* note 74, at 247-249 (discussing the issue of religion and nationality in Israel).

125. Including, and especially for, same-sex couples who wish to be married. It is worth noting, however, that same-sex marriages that occur abroad must be recognized by the Israeli government. HCJ 3045/05 Ben Ari v. Dir. of the Population Registry in the Ministry of Interior [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/450/030/a09/05030450.a09.pdf](http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.pdf).

126. See Movement for Progressive Judaism in Israel Fund v. Minister of Religious Affairs, 43(2) PD 661 [1989] (Isr.).

127. See *id.*

marriage entirely under the rabbinical courts' laws. For example, under Orthodox *Halakha*, *Cohens*—the descendants of the ancient Jewish priests—are not allowed to marry widows, divorcees, or persons whose parents are not both Jewish.<sup>128</sup> Interfaith couples have it much worse, as no religious court in Israel will marry them, and since they have religions they are ineligible for the limited civil marriage exception.

Under an even more unfortunate crack in the system, some partners who each identify as Jewish (but are not *Cohens*), and whom the state accepted as a Jew, are ineligible for marriage because the rabbinate considers them to be “interfaith.”<sup>129</sup> This gap exists because the rabbinate only recognizes a person as a Jew if her mother is Jewish or if she has converted to Judaism, while the Law of Return allows anyone with at least one Jewish grandparent to immigrate to Israel.<sup>130</sup> As such, people like Alexander Skudalo, whose father is Jewish but whose mother is not, may immigrate to Israel, but will not be recognized as a Jew by the rabbinate, and therefore will be unable to marry his Jewish fiancé in Israel unless he goes through an official conversion.<sup>131</sup> There are an estimated 270,000 Israelis who are not recognized by the rabbinate as being Jewish, but who also have no other religious affiliation and are not legally recognized by the state as being “without religion.”<sup>132</sup>

Unrecognized religious groups, like a number of denominations of Evangelical Christianity and the Jehovah's Witnesses, among others, also cannot be legally married in Israel.<sup>133</sup> This is because they do not have their own courts that can conduct such marriages, the civil marriage exception does not apply to them because they do have a religion, and of course none of the other religious courts can or would conduct the marriage. Hiddush, an

128. See, e.g., Amiram Barkat, *Not Jewish Enough to Marry a Cohen*, HAARETZ (Feb. 18, 2005, 12:00 AM), <http://www.haaretz.com/print-edition/news/not-jewish-enough-to-marry-a-cohen-1.150715> (discussing the rabbinate's refusal to marry a *Cohen* to his Jewish fiancé, even though she is recognized as a Jew by the rabbinate, because the fiancé's father was not Jewish. Somewhat counterintuitively, Rabbi Shaul Farber, an expert on Jewish family law, believed the rabbinate may be willing to recognize the couple's marriage retroactively “if [the female partner] becomes pregnant.”).

129. Rachael Gelfman Schultz, *Civil Marriage in Israel*, MY JEWISH LEARNING, [http://www.myjewishlearning.com/israel/Contemporary\\_Life/Society\\_and\\_Religious\\_Issues/Freedom\\_of\\_Religion/civil\\_marriage\\_in\\_israel.shtml](http://www.myjewishlearning.com/israel/Contemporary_Life/Society_and_Religious_Issues/Freedom_of_Religion/civil_marriage_in_israel.shtml) (last visited Apr. 18, 2014).

130. Law of Return (Amendment No. 2), 5730-1970, 24 LSI 28 (1969-1970) (Isr.).

131. Schultz, *supra* note 129.

132. *Id.* Notably, because of their status, these persons also cannot be married in Jewish cemeteries, even if their families are buried there. See Religious Freedom Report, *supra* note 20.

133. See, e.g., Ruth Moon, *Christians Fight Israel's Marriage Ban*, CHRISTIANITY TODAY (Nov. 06, 2012, 9:43 AM), <http://www.christianitytoday.com/ct/2012/november/marriage-petition.html>.

organization calling for religious reform in Israel, estimates that approximately 5 percent of Israelis cannot be legally married in the state due to various cracks in the system.<sup>134</sup>

However, since a 1963 decision by the Israeli Supreme Court, the Interior Ministry has had to recognize civil marriages performed abroad.<sup>135</sup> This decision allows Israelis to travel abroad to be married in their own beliefs and have their marriage legally recognized by Israel.<sup>136</sup> An estimated five to ten Israeli couples travel to nearby Cyprus every day just to be married.<sup>137</sup> With 47.7 percent of Jewish Israeli self-identifying as “not religious” or “not so religious,”<sup>138</sup> it is no wonder that this travel has turned into lucrative business for Cyprus.<sup>139</sup> Still, not all Israelis can afford to travel abroad for a civil marriage or to be married under their own beliefs; moreover this loophole is not a viable solution to the courts’ overall encroachment on the religious liberties that Israel supposedly guarantees.<sup>140</sup>

## 2. Divorce

Similarly, the status of divorce law in Israel leaves much to be desired. As noted, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law grants exclusive jurisdiction to the actual enactment of the divorce.<sup>141</sup> However, the 1974 Spouses (Property Relations) Law established that each spouse has an equal share in marital property, setting aside the *Halakhic* rule that the husband maintains total ownership over all property.<sup>142</sup> This law, along with the 1962 Capacity and Guardianship Law, which dealt with

134. *Civil Marriage in Israel*, HIDDUSH (May 26, 2011, 1:56 PM), [http://www.hiddush.org/article-2167-0-Civil\\_Marriage\\_In\\_Israel.aspx](http://www.hiddush.org/article-2167-0-Civil_Marriage_In_Israel.aspx).

135. See HCJ 143/62 Funk-Schlesinger v. Minister of the Interior, 17 PD 225 [1963] (Isr.).

136. Interestingly, just a few years after the Funk-Schlesinger decision, an Israeli Supreme Court Justice was married in New York by a Conservative rabbi and had his marriage recognized in Israel. S. CLEMENT LESLIE, *THE RIFT IN ISRAEL: RELIGIOUS AUTHORITY AND SECULAR DEMOCRACY* 58-60 (1971).

137. Sarah Stricker, *Wedding Refugees*, YNETNEWS (Nov. 20, 2009, 7:58 AM), <http://www.ynetnews.com/articles/0,7340,L-3807730,00.html>.

138. ISRAELI CENT. BUREAU OF STATISTICS, *STATISTICAL ABSTRACT OF ISRAEL* (2011), available at [http://www.cbs.gov.il/shnaton62/st07\\_04x.pdf](http://www.cbs.gov.il/shnaton62/st07_04x.pdf).

139. Stricker, *supra* note 137.

140. Lucy Endel Bassli, *The Future of Combining Synagogue and State in Israel: What Have We Learned in the First 50 Years?*, 22 HOUS. J. INT’L L. 477, 517 (2000).

141. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.).

142. Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-1973); Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. OF WOMEN & L. 333, 341-42 (2012).

child custody issues,<sup>143</sup> empowered civil courts to also adjudicate alimony, child custody, division of property, and all other ancillary matters to a divorce, save for the literal granting of the divorce itself.<sup>144</sup> But while the religious courts have to decide the principles of equality established by the civil law,<sup>145</sup> they still have jurisdiction over the ancillary matters as well.<sup>146</sup> As Margit Cohn noted in her 2004 article on the subject, “[o]nce one of the systems is chosen, the issue is ‘captured’ and cannot be decided by its brother-system, or rival-system.”<sup>147</sup> For contentious divorces, this situation has created a perverse system of forum shopping which results in a race to the courts, as the civil courts are known to be more sympathetic to women than the rabbinical courts made up entirely of male Orthodox rabbis.<sup>148</sup>

For Jewish women, even obtaining the *Get*—the official religious decree of divorce which is required for the divorce to be legal and final, and which is only awardable by the rabbinical courts—can be extremely challenging. Under Orthodox *Halakha*, the husband must agree to grant the divorce himself; the courts cannot order a divorce finalized without the husband’s approval.<sup>149</sup> Some husbands simply refuse to grant the *Get*, while others use the *Get* as leverage against the wife in the negotiations over the ancillary matters such as alimony, child custody, and division of property.<sup>150</sup> Fortunately, the rabbinical courts have recently been more willing to combat this abuse by ordering husbands to grant their wives a *Get* in some cases where the court feels that a *Get* is clearly legally justified (under *Halakhic* law), even going so far as ordering the husbands detained until they grant the *Get*.<sup>151</sup> Civil family courts have also recently shown a willingness to step in to reduce *Get* refusal, with some courts having recognized a cause of

143. Capacity and Guardianship Law, 5722-1962, 16 LSI 106 (1961-1962) (Isr.).

144. Fournier et al., *supra* note 142, at 341-42.

145. See HCJ 1000/92 Bavli v. The Grand Rabbinical Court, 48(2) PD 6 [1994] (Isr.) (nullifying the ruling of the Grand Rabbinical Court which failed to apply principles of equality to the divorce proceeding).

146. *Id.*

147. Margit Cohn, *Women, Religious Law and Religious Courts in Israel – The Jewish Case*, 27 RETFÆRD 57, 64 (2004).

148. See Fournier et al., *supra* note 142, at 341-42.

149. Deuteronomy 24:1; Basheva E. Genut, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT’L L.J. 2120, 2156-57 (1996).

150. Basheva E. Genut, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT’L L.J. 2120, 2157 (1996).

151. See Mary Oster, *Jailed ‘Get’ Refuser Escapes from Hearing*, JEWISH TELEGRAPHIC AGENCY (Mar. 6, 2013, 8:14 PM), <http://www.jta.org/2013/03/06/news-opinion/israel-middle-east/jailed-get-refuser-escapes-from-hearing>.

action for “*Get* refusal.”<sup>152</sup> Still, these cases are the exception, and only the husband can grant a divorce; if the husband should decide to sit in jail instead of granting the divorce, the wife will remain trapped in the marriage indefinitely. Similarly, in tragic cases such as a situation where the husband is in a vegetative state and cannot grant a divorce, the wife remains legally trapped in the marriage.<sup>153</sup> If a woman is unable to obtain the *Get*, she will be unable to marry again under Jewish law. Any children she might have in future relationships will be considered *mamzerim*—illegitimate—and those children will only be able to marry other *mamzerim* under Orthodox *Halakha*.<sup>154</sup>

As noted, just as secular, Reform, Conservative, and other non-Orthodox Jews are subject to Orthodox law regardless of the parties’ preferred choice of law, so must the secular, the less religious, and the members of unrecognized Muslim, Christian, Druze, or Baha’i sects submit to the officially recognized governing law of the Muslim, Christian, Druze, or the Baha’i courts, respectively. As such, a secular Muslim couple must still settle their personal status issues under the Muslim courts which apply strict Sharia law, regardless of the preference of the couple.

### B. State Codification of Religious Law

#### 1. Work and Rest Laws

The application of religious law does not end with personal status issues, but rather extends further into the public sphere. The Hours of Work and Rest Law recognizes the Jewish Sabbath—sundown Friday through sundown Saturday—as the official day of rest for Israel.<sup>155</sup> On the Jewish Sabbath, or “Shabbat,” Jewish employees and employers—including the self-employed—are obliged to rest and must obtain special permission to be allowed to

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152. See Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT’L & COMP. L. 279 (2009) (discussing the emerging cause of action for “*Get* refusal”). Like Orthodox *Halakha*, Sharia law favors the rights of the husband, allowing him to divorce his wife without her consent by simply declaring them divorced. Interestingly though, Israeli civil courts have also recognized a tort claim for women who are divorced by their husbands without their consent. *Id.* at 298.

153. See Lourdes Garcia-Navarro, *Under Israel’s Divorce Laws, Men Get the Final Word*, NPR (Apr. 07, 2010, 2:39 PM) <http://www.npr.org/templates/story/story.php?storyId=125673859> (noting one such case where a husband attempted suicide and was left in a vegetative state, leaving the wife unable to obtain a divorce).

154. Genut, *supra* note 150, at 2156-57.

155. Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-1951) (Isr.).

work,<sup>156</sup> non-essential government services completely shut down, and most public transportation ceases.<sup>157</sup> Non-Jews also receive off for their requisite weekly holy day, and the law protects them from employer discrimination based on which day they require off.<sup>158</sup> Municipalities also enjoy the right to order businesses to close on religious days such as Shabbat.<sup>159</sup>

The Work and Rest law has caused frequent headaches for secular employers, especially financial institutions that do business on the global market<sup>160</sup> and merchants and service businesses that would rather remain open for secular, less religious, and non-Jewish customers during Shabbat. However, because the law requires all Jewish employees and employers to rest on Shabbat, most businesses are forced to close. This direct application of Jewish Orthodox *Halakha* that forces most businesses to close and most public transportation to cease also results in the de facto enforcement of Shabbat on the public lives of most Israelis. Since the Israeli weekend is Friday and Saturday, this is the equivalent of most of the country shutting down in the United States from Saturday night until sundown on Sunday. This has an obvious chilling effect on the service and retail industries in Israel, especially for foreign businesses that seek to expand to the country and are unaccustomed to this situation. It is worth noting that because non-Jews in Israel tend to live in the same areas as each other, many businesses in their respective areas are allowed to remain open on Shabbat; of course these businesses still close on their respective days of rest, and government services and most public forms of transportation are still unavailable to them on Shabbat.

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156. This provision is strictly followed, especially by government offices. I learned this first hand as a Fellow with the Israeli Ministry of Foreign Affairs after I tried to go into work on a Saturday. Even though I carried the requisite employee identification card and the building was technically open, I was barred from even entering the building because it was Shabbat, and I did not have special permission to be allowed to work, though I had previously been allowed to work on other non-religious holidays.

157. Hours of Work and Rest Law, 5711-1951, 5 LSI 125, § 7, 9, 12 (1950-51) (Isr.); Arthur Gross-Schaefer & Wayne Jacobsen, *If Not Now, When? The Case for Religious Liberty in the State of Israel*, 44 J. CHURCH & ST. 539, 545-46 (2002); Sapir, *supra* note 92, at 622-23.

158. Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-1951) (Isr.).

159. Municipalities Ordinance (Amendment No. 40), 5750-1990, SH 114 (Isr.).

160. Due to the time difference, when Shabbat starts in Israel, it is still a part of the normal workweek in much of the rest of the Western world. As Shabbat starts at sundown on Friday, there are many Fridays during the winter months that the American workday has not even begun by the time many Israeli businesses must legally close.



The Supreme Court has even noted the negative effect that the Work and Rest Law has on non-Orthodox public cultural life.<sup>161</sup> However, in the same case, the Court upheld the legality of the law prohibiting Jews from working on Shabbat.<sup>162</sup> The Court acknowledged that the law was in conflict with the fundamental right to freedom of occupation established in the Basic Law concerning Freedom of Occupation.<sup>163</sup> Still, Justice Barak reasoned this conflict did not render the law illegal, noting that “[i]f the law allowed each worker to choose for himself a day of rest . . . , in many cases the real choice will be made by the employer and not by the workers.”<sup>164</sup> Of course by having the state mandate the day of rest, the actual choice is entirely out of the worker’s hands, and she does not even have the chance to contract around it.

## 2. Kashrut Laws

As set out in the Status Quo Agreement, Orthodox Kosher dietary laws are strictly followed by all government institutions, schools,<sup>165</sup> military facilities, and for all soldiers.<sup>166</sup> In 1986, the state enacted the Festival of Matzot (Prohibition of Leaven) Law, which prohibits merchants from openly displaying products that are not Kosher for Passover during the holiday.<sup>167</sup> In 1994, the state also enacted a law regulating the import of pork and other non-kosher meats,<sup>168</sup> to the point of effective prohibition.<sup>169</sup> And in 2010, the Knesset passed a tax that applies exclusively to non-Kosher meats.<sup>170</sup>

These laws, especially the Prohibition of Leaven and the Meat Products laws, create problems for both businesses and consumers, effectively turning the trade of bread during Passover and

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161. See HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Dep’t, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.); Lerner, *supra* note 74, at 263.

162. HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Dep’t, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.)

163. *Id.*

164. *Id.*

165. Except in non-Jewish areas. See Lerner, *supra* note 74, at 266.

166. Kosher Food for Soldiers Ordinance, 2 L.S.I. 37, (1948), *discussed in* Sapir, *supra* note 92, at 624 (notably, this was one the earliest laws passed by the Knesset, and it was enacted while Israel was fighting for its survival in the War of Independence, which underscores how the first Knesset viewed this law as vital to the new state).

167. Festival of Matzot (Prohibition of Leaven) Law, 5746-1986, 40 LSI 231 (1985-1986) (Isr.).

168. Meat and Its Products Law, 5755-1995, SH No. 92 (Isr.).

169. Barak-Erez, *supra* note 111, at 2500.

170. See Amnon Meranda, *Knesset Approves Taxation on Non-Kosher Meat*, YNETNEWS (Mar. 17, 2010, 9:17 PM), <http://www.ynetnews.com/articles/0,7340,L-3864363,00.html>.

non-Kosher meats into a black market industry. While previously the Prohibition of Leaven law was rarely enforced,<sup>171</sup> the state and municipalities are now more proactive in applying the law.<sup>172</sup> Israel's heavy regulation of the pork and non-Kosher meat industry also hurts Christians and other consumers in Israel who eat non-Kosher and non-Halal foods.<sup>173</sup>

Additionally, while most businesses are not required by the state to be Kosher, they receive heavy pressures from local municipalities and by the Orthodox religious community to maintain strict Kosher facilities, and often cannot stay in business without a Kosher certificate—sometimes being literally forced out by their landlords.<sup>174</sup> Private and state-backed Kosher licensing authorities have also been known to be unnecessarily severe in their application of Kosher law and in their punishments for violations.<sup>175</sup> In a recent case, a baker had her Kosher certificate revoked by a public rabbinate after they discovered that she was a Messianic Jew (“Jew for Jesus”).<sup>176</sup> The Supreme Court found the revocation illegal, as it was based not on whether the bakery met the Kosher requirements, but on the owner's religion, which is irrelevant under Kosher *Halakha*.<sup>177</sup> However, the public rabbinate refused to return the certificate and violated the Court's order.<sup>178</sup> Rather than holding the rabbinate in contempt of court for its violation—which would anger the Orthodox community—

171. *Id.*

172. See, e.g., Maayana Miskin, *Haifa's 'Chametz Hotline' for Passover*, ISRAEL NATIONAL NEWS (Mar. 24, 2013, 12:31 PM), <http://www.israelnationalnews.com/News/News.aspx/166515#.UY7vcsquCPA> (noting the Deputy Mayor of Haifa's call for residents to report illegal displays and sales of leavened bread to a police hotline).

173. See, e.g., Jeffrey Yoskowitz, *Israel's Pork Problem*, SLATE (Aug. 8, 2012, 3:45 AM), [http://www.slate.com/articles/life/faithbased/2012/08/israel\\_s\\_pork\\_problem\\_and\\_what\\_it\\_means\\_for\\_the\\_country\\_s\\_christian\\_arabs\\_.html](http://www.slate.com/articles/life/faithbased/2012/08/israel_s_pork_problem_and_what_it_means_for_the_country_s_christian_arabs_.html) (discussing the negative effects of current Kosher laws and new proposed regulations on Christian Arabs in Israel).

174. See, e.g., Yair Ettinger, *Not Kosher? No Business: Jerusalem Eatery Closes after 8 Years of Operation*, HAARETZ (Mar. 19, 2013, 5:18 AM), <http://www.haaretz.com/news/national/not-kosher-no-business-jerusalem-eatery-closes-after-8-years-of-operation.premium-1.510345>.

175. See, e.g., Patrick Cockburn, *Restaurants Rebel against Kosher Laws*, THE INDEPENDENT (July 2, 1995), <http://www.independent.co.uk/news/world/restaurants-rebel-against-kosher-laws-1589461.html>. In that incident, the public rabbinate ordered a restaurant owner to throw out all plates and utensils that may have come in contact with a spoon that was not Kosher and ordered the business closed for two days as punishment, terms that the owner said he could not afford. *Id.*

176. See Dan Izenberg & Matthew Wagner, *High Court: Jew for Jesus Baker Must Apply for New Kashrut Certificate*, JERUSALEM POST (Dec. 21, 2009, 11:00 PM), <http://www.jpost.com/Israel/High-Court-Jew-for-Jesus-baker-must-apply-for-new-kashrut-certificate>.

177. *Id.*

178. *Id.*

the Court stated that she should just apply for a new certificate at her own expense.<sup>179</sup>

Further complicating both the Shabbat and Kosher laws and policies, individual municipalities have a general authority to enact ordinances, which can include prohibiting businesses from being open on Shabbat or banning the sale of pork products within the municipality.<sup>180</sup> Even when a municipality does not have the legal authority to directly ban a business from opening on Shabbat, it can coerce a business into agreeing that it will not open on Shabbat by refusing to grant business and building permits without such a stipulation.<sup>181</sup>

### C. Religious Institutions and Funding

The religious courts are far from the only religious institutions and organizations in Israel that receive state funds. Instead, Israel also provides direct funding for the Chief Rabbinate, clergypersons, religious buildings and services, yeshivas and other institutions of religious education, religious cultural institutions, religious research organizations, religious social services, Holy Places, cemeteries for specific religious communities, and public and private religious schools, among other institutions.<sup>182</sup> Institutions that do not automatically receive funding—such as the Holy Places, the religious courts, and the Chief Rabbinate—must apply for funding from the state.<sup>183</sup> Funding comes from various ministries within the government, including the Ministry of Religious Services, the Ministry of Education, the Ministry of Internal Affairs, and the Ministry of Labor and Welfare, among others, making it difficult to track which institutions receive how much money and from where.<sup>184</sup>

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179. *Id.*

180. Cf. Jeffrey Yoskowitz, *In Israel, a Pork Cookbook Challenges a Taboo*, N.Y. TIMES (Sept. 28, 2010), <http://www.nytimes.com/2010/09/29/dining/29trayf.html> (“[I]t is up to individual municipalities to determine whether pork can be sold in each neighborhood and whether shops will incur fines for selling it, much as they would for staying open on the Sabbath.”).

181. See, e.g., Daniel K. Eisenbud, *Hundreds Protest J'lem Cinema City Shabbat Closure*, JERUSALEM POST (May 5, 2013, 3:22 AM), <http://www.jpost.com/National-News/Hundreds-protest-J'lem-Cinema-City-Shabbat-closure-312067> (“The [building] permit was accompanied by a stipulation from the municipality and the Finance Ministry that it remain closed on Shabbat.”).

182. Shimon Shetreet, *State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 442-43 (1999).

183. *Id.* at 442-46.

184. *Id.* at 442-43.

In 1985, the Knesset enacted the Budget Foundations Law to reduce discrimination and favoritism of individual institutions by appropriating a set amount of funding to each category of institution, which would then be equally distributed to all institutions within that category.<sup>185</sup> However, as former Israeli Minister of Religious Affairs Shimon Shetreet<sup>186</sup> noted in his article on the funding of religious institutions in Israel, due to loopholes purposefully left in the law, this system did little to relieve the financial discrimination.<sup>187</sup>

These funds are also supposed to be available to all recognized religious groups, which includes Orthodox Judaism and ultra-Orthodox Judasim/*Haredi*,<sup>188</sup> Islam, certain Christian sects, the Baha'i, and the Druze.<sup>189</sup> Recently, in a landmark reversal, the state even agreed to fund Reform and Conservative rabbis as well.<sup>190</sup> However, the levels of religious funding have not been proportional or equal.<sup>191</sup> Jewish institutions, and in particular, Orthodox and ultra-Orthodox/*Haredi* institutions, typically receive disproportionate amounts of state funding.<sup>192</sup> In fact, knowledge of the *Haredi* institutions' most-favored status is so widespread that non-*Haredi* organizations have been known to claim *Haredi* status on their applications.<sup>193</sup>

Unsurprisingly, institutions connected to certain Israeli political parties have also received especially large distributions of funds. As noted in a Haaretz article on religious funding, during the 2011 Israeli fiscal year, "Shas' El Hama'ayan educational network received NIS 12 million [approximately US \$3,361,344 at current exchange rates] from the Education Ministry for 'Torah and Jewish culture lessons not held within a formal learning framework.'"<sup>194</sup> The educational network is only one of many ultra-Orthodox educational institutions, and it is also worth noting that members of the Shas party have held the seat of the Minister

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185. See Budget Foundations Law, 5745-1985, 1139 LSI 60 (1985); Shetreet, *supra* note 182, at 443.

186. Shetreet served as Minister before the ministry was renamed the Ministry of Religious Services.

187. Shetreet, *supra* note 182, at 443.

188. *Id.*

189. Maoz, *supra* note 14.

190. Kobi Nahshoni, *Reform, Conservative Rabbis to Receive State Funding*, YNETNEWS (May 30, 2012, 2:00 PM), <http://www.ynetnews.com/articles/0,7340,L-4235777,00.html>.

191. Maoz, *supra* note 14.

192. See *id.* at 369; see also Shetreet, *supra* note 182, at 442-46; see also Kashti, *supra* note 24.

193. See HC 4346/92 Ma'ale, *Religious Zionist Center v. The Education and Culture Minister* 46(5) PD 590 [1992] (Isr.); see also Shetreet, *supra* note 182, at 444.

194. Kashti, *supra* note 24.

of Religious Services since 2008. To put that amount in perspective, the entire Conservative Movement in Israel received less than NIS 100,000 (approximately US \$28,011 at current exchange rates) for all of its Jewish educational activities.<sup>195</sup> This discrimination should come as little surprise, as Shas and most other ultra-Orthodox parties in Israel are notorious for their open detestation of Reform and Conservative Judaism, even going so far as to publically acknowledge their loathing in their official capacities.<sup>196</sup>

Government support for ultra-Orthodox schools and education networks like the one run by Shas has only grown in recent years. Support for ultra-Orthodox-run schools was once conditional on their program having minimal core curriculum standards, such as history and science, as Ben-Gurion delineated in the 1947 Status Quo Agreement letter.<sup>197</sup> However, due to the growing power of Shas and the other religious political parties as swing parties that can make or break a government, recent governments have regularly kowtowed to the religious parties' demands.<sup>198</sup> One such demand was for the amendments to the state education laws to allow public funding for religious schools even if they fail to meet the core curriculum requirements set out under state law, in violation of the Status Quo Agreement.<sup>199</sup>

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195. *Id.*

196. See, e.g., George Potter, *Reform, Conservative Rabbis Set to Receive Funding through Culture Ministry*, THE TIMES OF ISRAEL (May 30, 2012, 11:40 PM), <http://www.timesofisrael.com/refromed-conservative-movements-to-receive-funds-through-ministry-of-culture/>. While the Ministry of Religious Services is normally responsible for paying clergypersons, the Minister of Religious Services, a leader in the Shas party, threatened to resign if his ministry was ordered to provide direct funds for any non-Orthodox clergypersons. *Id.* As such, the recent agreement to provide limited funds to Reform and Conservative had to be delegated to another ministry. *Id.* Upon solving the impasse, the spokesperson for the Ministry of Religious Services proudly stated that "every link between the ministry and heads of the Reform and Conservative communities has been cut off." *Id.*

197. "The state, of course, will determine the minimum obligatory studies—Hebrew language, history, science and the like—and will supervise the fulfillment of this minimum, but will accord full freedom to each stream to conduct education according to its conscience and will avoid any adverse effects on religious conscience." The Status Quo Agreement, *supra* note 87.

198. See Bassli, *supra* note 140, at 506-08 (noting the power of the religious parties as swing parties, and discussing their focus on securing money for their institutions). It is also worth noting that most ultra-Orthodox Jews refuse to work and instead study Torah; "58% of all adult males in the ultra-Orthodox community are not in the workforce." *Id.* at 499. However, the government provides stipends and subsidies for their Torah study and provides welfare to their large families. *Id.* at 498. Despite all of the public assistance, over half of the community lives in poverty. *Id.* at 499.

199. See State Education (Amendment no. 7) Law, 5768-2007, SH No. 318 (Isr.); Unique Cultural Education Institutions Law, 5769-2008, SH No. 742 (Isr.); Barak-Erez, *supra* note 111, at 2505.

The state also regularly discriminates against the other recognized religious communities, such as the Islamic and Christian communities. A 2010 U.S. State Department report on religious freedom in Israel found that the 2010 budget for Jewish religious services and institutions was approximately NIS 1.6 billion (approximately US \$433 million).<sup>200</sup> Non-Jewish religious communities, which constitute slightly more than 20 percent of the population, received approximately NIS 47 million (approximately US \$12.7 million), or less than 3 percent of total funding.<sup>201</sup> Despite the high level of funding for Jewish religious education institutions, the report also noted that “[m]any mosques lack an appointed imam, which is the responsibility of the [government’s] Muslim religious affairs department. The country also lacks any academic training center for the study of Islam to educate future imams and qadis . . . .”<sup>202</sup> Religious communities that are not recognized by the state receive no public funding but may be eligible for tax exemptions.<sup>203</sup>

#### *D. Holy Places*

Despite its limited landmass, Israel is home to a disproportionate number of buildings, sites, and antiquities that are holy to one or more faiths.<sup>204</sup> Among the Holy Places in Israel are the Western Wall (a Jewish holy site), the Temple Mount (a holy site to both Jews and Muslims), the Dome of the Rock (a Muslim holy site that sits on top of the Temple Mount), the Church of the Holy Sepulchre (a Christian holy site), and the Baha’i World Centre (a Baha’i holy site and the administrative center of the faith). These sites are each some of the holiest, if not the holiest, sites for their respective faiths. Israel is also home to the city of Jerusalem, which is not only Israel’s capital, but is considered one of the holiest cities in the world and has regularly been the subject of religious conflicts and wars.

Israel has recognized its responsibility to protect the sites and has also guaranteed the maintenance and freedom of access to these sites in various laws and treaties, including the Declaration of Independence,<sup>205</sup> the Basic Law on Jerusalem,<sup>206</sup> the Protection

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200. RELIGIOUS FREEDOM REPORT, *supra* note 20.

201. *Id.*

202. *Id.*

203. Lerner, *supra* note 74, at 254-55.

204. RELIGIOUS FREEDOM REPORT, *supra* note 20.

205. See Declaration of Independence, *supra* note 2.

206. See Basic Law: Jerusalem, Capital of Israel, 5740, 34 LSI 209, § 3 (1979-1980) (Isr.).

of Holy Places Law,<sup>207</sup> and its treaties with Jordan<sup>208</sup> and the Holy See.<sup>209</sup> International law, including the ICCPR, which Israel has ratified and incorporated into its law, has also recognized the principle of freedom of religious access and worship at these sites.<sup>210</sup> However, Israel has not always met its responsibilities here. Two of the most noteworthy examples are Israel's failures to guarantee freedom of access and worship at the Temple Mount and the Western Wall.

### 1. The Temple Mount

Because the Temple Mount is holy to both Jews and Muslims, there have always been high tensions regarding the holy site. Shortly after Israel gained control of the Old City of Jerusalem during the Six Day War of 1967, Israel allowed the Muslim *Waqf* to continue its administrative control over the Temple Mount.<sup>211</sup> This was done in an attempt to maintain the status quo and to avoid conflict over the holy site. However, the Temple Mount has been the site of frequent clashes between Jews and Muslims, many of which have led to larger riots through Israel and the Palestinian Territories.<sup>212</sup> Because of the tensions, and despite the laws and treaties guaranteeing freedom of access and worship at holy sites, Jews are only allowed on the Temple Mount during limited times and are forbidden from praying or wearing any religious symbols while on the Mount.<sup>213</sup> The Supreme Court has regularly upheld or refused to hear challenges to the legality of these restrictions on public security grounds.<sup>214</sup> In some cases, the Supreme Court has even found it acceptable to temporarily ban all Jewish access to the site for public safety reasons.<sup>215</sup> However, on May 8, 2013, the

207. See Protection of Holy Places Law, 5727-1967, 21 LSI 76 (1967) (Isr.).

208. See Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, *Jordan-Isr.*, Oct. 26, 1994, 34 I.L.M. 43.

209. See Holy See-Israel Treaty, *supra* note 105.

210. ICCPR, *supra* note 105.

211. Lerner, *supra* note 74, at 257-58.

212. See, e.g., Melanie Lidman, *Palestinians Clash with Police on Temple Mount*, JERUSALEM POST (Mar. 08, 2013, 1:57 PM), <http://www.jpost.com/National-News/Palestinians-clash-with-police-on-Temple-Mount> (noting the riots on the Temple Mount and clashes between Jewish and Muslim women); see also *Temple Mount: Arabs Throw Firebombs at Police*, YNETNEWS (Mar. 08, 2013, 6:06 PM), <http://www.ynetnews.com/articles/0,7340,L-4354034,00.html> (noting the same riots on the Temple Mount and additional clashes in the West Bank).

213. See Lerner, *supra* note 74, at 257-58; RELIGIOUS FREEDOM REPORT, *supra* note 20.

214. See, e.g., HCJ, see also Maayana Miskin, *Supreme Court Rejects Temple Mount Discrimination Case*, ISRAEL NATIONAL NEWS (Oct. 8, 2009, 10:06 PM), <http://www.israelnationalnews.com/News/News.aspx/133767#.UY6XdcquCPA>.

215. HCJ 1663/94 Salomon v. Police Officer Givati, 94(1) Takdeen-Elyon 1078 [1994] (Isr.).

Director-General of the Ministry of Religious Services announced that the ministry will be reviewing the ban and will seek to allow times for Jews to pray on the Temple Mount.<sup>216</sup> Still, it is likely that current Israeli Prime Minister Benjamin Netanyahu will quash any proposed change in the interest of public security and diplomacy.<sup>217</sup>

## 2. The Western Wall

Despite the fact that it is only considered a Holy Place for Jews, the Western Wall has also been the site of numerous clashes, especially recently. The Western Wall is administered by an ultra-Orthodox rabbi and though access to the Wall is available to all who wish to visit, there are strict gender segregation and “modesty” requirements at the site, enforced by permanent dividers at the Wall<sup>218</sup> and a “modesty patrol.”<sup>219</sup> Women are also not allowed to recite prayers at the Wall while wearing *tallitot* (Jewish prayer shawls)<sup>220</sup>, nor may they read from Torah scrolls, because these forms of prayer violate Orthodox *Halakhic* laws of prayer.<sup>221</sup> In a 2003 decision on the issue, the Israeli Supreme Court upheld the right of the state, acting through the administrators of the Wall, to prohibit women from wearing *tallitot* and from reading from Torah scrolls at the Wall, so long as they provided a separate location near the wall for women to pray freely.<sup>222</sup>

However, this location—Robinson’s Arch—is located further away from the Western Wall, and recently a pro-women’s group has been holding prayers with *tallitot* and Torahs at the main women’s section of the Wall itself, in defiance of the Supreme Court’s rulings.<sup>223</sup> This “defiance” has led to clashes at the Wall

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216. Lahav Harkov, *Ministry to Arrange Jewish Prayer on Temple Mount*, JERUSALEM POST (May 8, 2013, 5:28 PM), <http://www.jpost.com/Diplomacy-and-Politics/Ministry-to-arrange-Jewish-prayer-on-Temple-Mount-312496>.

217. Cf. Barak Ravid, *Jordan Summons Israeli Ambassador over Temple Mount Riots*, HAARETZ (May 8, 2013, 10:43 PM), <http://www.haaretz.com/news/diplomacy-defense/jordan-summons-israeli-ambassador-over-temple-mount-riots.premium-1.519996> (discussing riots on the Temple Mount, after 200 Jews were allowed to visit the Mount, and noting Jordan’s statement that “Jerusalem and the Al Aqsa Mosque are a red line for Jordan”).

218. It is also worth noting that the area provided for men to access the wall is over twice the size of the area provided for women. RELIGIOUS FREEDOM REPORT, *supra* note 20.

219. *Id.* Women’s tops must cover their shoulders and their bottom clothing must go past the knees.

220. Tallit, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/581625/tallit>.

221. RELIGIOUS FREEDOM REPORT, *supra* note 20.

222. HCJ 4128/00 Prime Minister’s Office v. Anat Hoffman 57(3) PD 289 [2003] (Isr.).

223. Sharon, *supra* note 25.



and the arrests of the women involved in the prayer.<sup>224</sup> Notably though, the Jerusalem District Court recently upheld a lower court's decision to dismiss the arrests on the basis that women who wear *tallitot* at the Wall are not disobeying "local custom" or causing a de facto public disturbance, and therefore are not committing a criminal offense.<sup>225</sup> While mediators have advanced a compromise that would create an egalitarian, mixed-gender prayer section at the Wall,<sup>226</sup> the plan now appears to be in jeopardy.<sup>227</sup>

### *E. Equal Application of Law*

Israel's military is conscription-based with a mandatory three year service requirement for Israeli men and a two year service requirement for Israeli women after turning eighteen and graduating (or otherwise leaving) high school.<sup>228</sup> But, as part of the special arrangements Ben-Gurion made with Agudat Yisrael known as the *Torato Omanuto* arrangement, for most of Israel's history, ultra-Orthodox men have been able to defer conscription indefinitely so long as they continue to study in a state-sanctioned yeshiva.<sup>229</sup> While in 1948 the religious exemptions only applied to approximately 400 men, that number has increased to an estimated 40,000-60,000 able-bodied men who, if not for the exemption, would currently be required to serve.<sup>230</sup> Though all other Israeli

224. *Id.*

225. See Jeremy Sharon, *Historic Victory in Court for Women of the Wall*, JERUSALEM POST (Apr. 25, 2013, 11:37 PM) <http://www.jpost.com/National-News/Historic-victory-in-court-for-Women-of-the-Wall-311127>.

226. Yair Ettinger, *Sharansky Sees Egalitarian Section at Western Wall within Two Years*, HAARETZ (May 7, 2013, 7:42 PM), <http://www.haaretz.com/news/national/sharansky-sees-egalitarian-section-at-western-wall-within-two-years.premium-1.519761>.

227. Nathan Jeffay, *Women and Orthodox Waver Over Plan for Egalitarian Prayer at Western Wall*, FORWARD (May 10, 2013), <http://forward.com/articles/176312/women-and-orthodox-waver-over-plan-for-egalitarian/>.

228. See Gili Cohen, *Israeli MKs to Vote on Extension of Military Service for Women*, HAARETZ (Dec. 16, 2013, 1:39 PM), <http://www.haaretz.com/news/national/.premium-1.563790>.

229. BADIR BAYRAMOV, *THE TYRANNY OF THE MINORITY: THE EFFECTIVENESS OF POLICY MAKING IN ISRAEL* 5 (2013). Women can also receive exemptions for religious reasons, though they do not attend yeshivas. See Gili Cohen, *IDF Increases Probes into Female Draft Dodgers Claiming to be Religious*, HAARETZ (Dec. 12, 2013), <http://www.haaretz.com/news/national/.premium-1.563247>. (As Cohen's article notes, this exemption is sometimes sought by women who do not meet the religious requirements for exemption, with mixed success. Generally, except for women who improperly claim an exemption under the law, there has been little protest by either the government or ultra-Orthodox groups concerning the current state of female exemptions) *Id.*

230. See Bayramov, *supra* note 229; see also Douglas Stanglin, *Israel Drops Military Exemption for Ultra-Orthodox Jews*, USA TODAY (Aug. 1, 2012), <http://content.usatoday.com/communities/ondeadline/post/2012/08/israel-to-drop-military-exemption-for-ultra-orthodox-jews/1#.UsBuBrTDtbe>. These estimates include not only newly eligible would-be draftees,

women and men were required to serve in Israel's military for two and three years, respectively, the ultra-Orthodox received an indefinite "get-out-of-service" free card if they so desired.<sup>231</sup>

However, in 1998, Justice Barak led the Supreme Court in the landmark *Rubinstein v. Minister of Defense* decision that found that the Defense Ministry's practice of allowing yeshiva students to defer their conscription indefinitely lacked proper legal authority.<sup>232</sup> In response, the government formed the Tal Committee, which, in 2002, created what became known as that Tal Law.<sup>233</sup> The Tal Law codified the government's ability to grant such deferments, but set additional requirements on the applicant, including requiring that, after reaching twenty-two, the applicant perform a year of civil service in order to be permanently released from his conscription responsibilities or instead perform twenty-one days of civil service a year to receive additional yearly deferrals.<sup>234</sup> The law was created as a temporary measure, which would have to be renewed every five years.<sup>235</sup> However, in another landmark decision in 2012, the Supreme Court found the Tal Law itself was unconstitutional as it violated the rights of equality guaranteed by the Basic Laws.<sup>236</sup> In the ruling, Supreme Court Justice Dorit Beinisch also noted that the government had failed to implement the Tal Law properly, by again allowing most Haredi to avoid the draft despite the clear service requirements in the law.<sup>237</sup>

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but also those who continue to renew their deferments annually until they are too old to draft or otherwise would be exempted for non-religious reasons.

231. It is of course worth noting that Israeli Muslim and other non-Jewish Israeli citizens, except for the Druze, are also exempt from draft requirements, though they may voluntarily choose to serve. This provision has proven much less controversial and, despite the obvious inherent inequalities, has been generally accepted with little complaint from either Israeli Jews and Israeli Druze or Israeli Muslims and other non-Jewish Israeli citizens. More recently, however, in a protest to their own draft requirements, some ultra-Orthodox leaders are demanding that the government also subject Israeli Arabs to the draft. See The World Factbook: Isr.: Military, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Mar. 26, 2013); see Jonathan Lis, *Habayit Hayehudi Demands that IDF Draft Reform Includes Arabs*, HAARETZ (May 26, 2013, 8:41 AM), <http://www.haaretz.com/news/national/habayit-hayehudi-demands-that-idf-draft-reform-includes-arabs.premium-1.525928>.

232. HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PD 481, 528 [1998].

233. See Israel: Supreme Court Decision Invalidating the Law on Haredi Military Draft Postponement, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/haredi-military-draft.php> (last updated Feb. 28, 2014) [hereinafter Decision Invalidating Haredi Draft Postponement].

234. See *id.*

235. See *id.*

236. HC 6298/07 Resler v. Knesset 63 [2012]; see Decision Invalidating Haredi Draft Postponement, *supra* note 233.

237. Decision Invalidating Haredi Draft Postponement, *supra* note 233; see also Aviad Glickman, *High Court Rules against Extending Tal Law*, YNETNEWS (Feb. 22, 2012, 12:53 AM), <http://www.ynetnews.com/articles/0,7340,L-4193034,00.html> (quoting Justice Bei-

Since the Tal Law's expiration on August 1, 2012, the Israeli government has lacked the legal ability to give deferrals on the basis of religious practice.

Despite the Supreme Court's rulings, the government and ultra-Orthodox communities have returned to the status quo. The government sends out the army summons to the yeshiva students, who answer them and usually receive passes to return to their studies indefinitely.<sup>238</sup> Now, however, both sides recognize that this status quo will only be temporary. The government continues to pursue legislation that would allow for a general draft of the ultra-Orthodox that would not again run afoul of the Supreme Court while also being sufficiently palatable to the community's demands as to not result in widespread non-compliance, which would make it nearly impossible for the government to enforce the law.<sup>239</sup> In a preemptive response to such legislation, some ultra-Orthodox leaders have called for the civil unrest of the community, which has resulted in non-compliance with draft summons (even though those ignoring their summons would likely have received indefinite deferrals), the arrest of the draft dodgers, and protests that frequently turn violent.<sup>240</sup> The unrest has also resulted in attacks against the many ultra-Orthodox Jews that do serve, and proudly so,<sup>241</sup> with the soldiers being labeled as traitors, spit on, and otherwise discriminated against in their own communities.<sup>242</sup> This strife involving one of the largest communities in Israel is exactly what Ben-Gurion sought to avoid by establishing the "status quo." While part of protecting religious liberty is respecting the sensitivities and needs of diverse communities, as the Supreme Court has recognized, religious equality necessitates that Israel cannot continue to provide blanket exemptions and favoritism either under or outside of Israeli law for the benefit of the ultra-Orthodox community at the detriment of the less religious in Israel who inherently must do

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nisch, "Can one say that with the passage of nine years the enlistment of 898 haredim and the joining of another 1,122 for a short, undefined national service out of a group of 61,877 constitute fulfillment of the law's objectives?").

238. See *Protest against Arrest of Draft Dodgers Turns Violent*, TIMES OF ISRAEL (Dec. 9, 2013, 8:57 PM), <http://www.timesofisrael.com/protest-against-arrest-of-draft-dodgers-turns-violent>.

239. See *id.*

240. See *id.*

241. See Emily Harris, *Israel's Internal Battle Over Ultra-Orthodox Soldiers*, NPR (July 12, 2013, 3:19 AM), <http://www.npr.org/blogs/parallels/2013/07/12/200471990/israels-internal-battle-over-ultra-orthodox-soldiers>.

242. See Isabel Kershner, *Service Brings Scorn to Israel's Ultra-Orthodox Enlistees*, N.Y. TIMES (July 6, 2013), [http://www.nytimes.com/2013/07/07/world/middleeast/service-brings-scorn-to-israels-ultra-orthodox-enlistees.html?\\_r=0](http://www.nytimes.com/2013/07/07/world/middleeast/service-brings-scorn-to-israels-ultra-orthodox-enlistees.html?_r=0).

more than their fair part to fill in the gaps left by the mass religious exemptions.

As shown, Israel has struggled with its duty to uphold the principles of religious liberty. However, through the enactment of some or all of the proposals discussed in Part IV, Israel can better satisfy this democratic responsibility.

#### IV. PRESERVING RELIGIOUS LIBERTY

Jewish law encompasses virtually all aspects of life; even the use of computers and the internet are covered under modern *Halakha*.<sup>243</sup> Besides the laws of the Tanakh, which includes the Torah and additional books not included in the Torah, there are Talmudic laws (written by ancient rabbis), as well as the *Midrash* (later rabbinical interpretation of those laws), and modern rabbinical law.<sup>244</sup> In addition to laws pertaining to rituals and traditional religious matters, there are extensive Jewish laws that govern financial dealings, civil and criminal issues, and war and diplomatic relations.<sup>245</sup> Because Orthodox and ultra-Orthodox Jews strive to adhere to these laws as strictly as possible, and due to the laws' all-encompassing nature, it is not hard to understand why Orthodox and ultra-Orthodox Jews refuse to concede their *Halakhic* vision for the state. Similarly, secular, less religious, and non-Jewish Israelis tend to value a more secular and free public society, where they are not governed by religious law unless they choose to be governed by religious law.

As a Jewish state with a Jewish majority, some public law is inevitably inseparable from Jewish religious law and values. Even in secular nations, the religious cultural majority of the nation will inevitably be heavily influential on that nation's laws, as shown by the influence of Judeo-Christian laws and values on American law, or the influence of Islamic laws and values on Turkish law.<sup>246</sup> Even a close relationship between religious laws and values and state law can be acceptable for a liberal democracy.<sup>247</sup> However, as

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243. See, e.g., Rabbi Doniel Neustadt, *The Internet: Halachic Guidelines*, TORAH.ORG (2010), <http://www.torah.org/advanced/weekly-halacha/5770/emor.html> (discussing the need for religious Jews to install internet filters to block images of immodesty).

244. Sapir, *supra* note 92, at 625 n. 28, 626 n. 29.

245. *Id.*

246. Though the United States and Turkey each hold themselves out as being secular, the laws of each nation are heavily influenced by the large Christian and Muslim majorities that exist in these nations, respectively.

247. See generally STEVEN V. MAZIE, *ISRAEL'S HIGHER LAW: RELIGION AND LIBERAL DEMOCRACY IN THE JEWISH STATE* (2006) (discussing the concept of the separation between religion and state in regards to democracy, and the balance of Israel's status as a liberal democracy with its state religious laws and policies).

shown, Israel's religious laws have encroached on the democratic norm of religious liberty and even Israel's own Declaration of Independence, Basic Laws, and treaties.<sup>248</sup>

The role of religion in Israel today went far beyond the initial promises Ben-Gurion made in his letter to the leaders of Agudat Yisrael, which limited its assurances to protecting the religious rights of the Orthodox and ultra-Orthodox.<sup>249</sup> Instead, the laws created and fostered a system where the Orthodox and ultra-Orthodox enjoy a monopoly of power over the entire population of Israel in areas where personal status, religion, and even employment and dietary policy are concerned.

These conditions have also fostered abuse of the system where certain religious communities, including and especially ultra-Orthodox communities view themselves as above the law. This ultra vires self-image is both evident and encouraged by situations like the Supreme Court's refusal to hold the rabbinate in contempt after it willfully and publicly violated a direct order by the Supreme Court.<sup>250</sup> By showing that they will not equally enforce the law on the ultra-Orthodox communities, for example, the state and the Supreme Court have acknowledged that these groups are indeed above the law. This de facto recognition has only encouraged the communities' regular use of violent protests,<sup>251</sup> attacks on non-Orthodox clergypersons,<sup>252</sup> and a recent wave of attempted forced gender segregation in public,<sup>253</sup> especially on

248. See discussion *supra* Part III.

249. See The Status Quo Agreement, *supra* note 87. For a discussion of how the status quo evolved from the 1947 agreement to where it is today, see Barak-Erez, *supra* note 111, at 2501-04.

250. See Izenberg et al., *supra* note 176. For another such example of state-sanctioned discrimination and de facto recognition that the ultra-Orthodox are above the law, see Potter, *supra* note 196 (discussing the state's acceptance of the refusal of the Minister of Religious Services to provide direct funding to reform or conservative rabbis, despite the official change in policy).

251. See, e.g., Judy Maltz & Yair Ettinger, *Protesters Hurl Rocks in Clashes over Women of the Wall Prayer Service at Kotel*, HAARETZ (May 10, 2013, 10:57 AM), <http://www.haaretz.com/news/national/protesters-hurl-rocks-in-clashes-over-women-of-the-wall-prayer-service-at-kotel.premium-1.523333?localLinksEnabled=false> (discussing the violent protests directed at women who wore *taliot* at the Western Wall); see also Agence France-Presse, *Ultra-Orthodox Jews Attack Woman in Israeli Town*, THE RAW STORY (Jan. 24, 2012, 4:16 PM), <http://www.rawstory.com/rs/2012/01/24/ultra-orthodox-jews-attack-woman-in-israeli-town/>; see also Yori Yalon, *Ultra-Orthodox Target Non-Kosher Deli in Non-Religious Neighborhood*, ISRAEL HAYOM (July 15, 2011), [http://www.israelhayom.com/site/newsletter\\_article.php?id=360](http://www.israelhayom.com/site/newsletter_article.php?id=360).

252. Oz Rosenberg, *Ultra-Orthodox Spitting Attacks on Old City Clergymen Becoming Daily*, HAARETZ (Nov. 04, 2011, 7:50 AM), <http://www.haaretz.com/news/national/ultra-orthodox-spitting-attacks-on-old-city-clergymen-becoming-daily-1.393669>.

253. See, e.g., *Gender Segregation on Rise in Israel*, YNETNEWS (Nov. 15, 2011, 3:15 PM), <http://www.ynetnews.com/articles/0,7340,L-4145922,00.html>.

public transportation.<sup>254</sup> By enabling these incidents, while allowing restrictions on the religious freedoms of secular, less religious, and non-Jewish Israelis, Israel is heading towards an internal political struggle that may threaten its status as a “Jewish and democratic state.”<sup>255</sup> Though Israel is undeniably still a liberal democracy that generally respects religious liberty, the state must make adjustments to its laws and policies in order to better conform with democratic norms and fully meet the promises made in its Declaration of Independence, Basic Laws, and international obligations.

### A. Solutions

Below is an overview of potential methods for Israel to better conform to the modern democratic norm of religious liberty, including the strengths and drawbacks of each concept. They may be taken separately or as a whole; certain concepts are complementary—but not dependent—to each other, while other concepts can be applied completely independently with full effect.

#### 1. Basic Law Guaranteeing Religious Liberty

Though the Declaration of Independence guarantees “equality of social and political rights to all its inhabitants irrespective of religion,” as noted, the Declaration is not binding on Israeli law.<sup>256</sup> Additionally, while the Supreme Court has recognized the right to freedom of conscience<sup>257</sup> and the Basic Laws touch upon issues related to religious freedoms, none of the Basic Laws directly guarantee a blanket “freedom of religion” or “right to religious liberty.”<sup>258</sup> Therefore, Israel should enact a Basic Law clearly guaranteeing the right to religious liberty and equality for all persons and religions in Israel, including different denominations within those religions, and the rights of secular persons from religious coercion.

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254. See, e.g., *Wave of Gender Segregation and Harassment on Buses in Israel*, HIDDUSH (Feb. 21, 2013, 4:23 PM), [http://hiddush.org/article-2433-0-%20Wave\\_of\\_gender\\_segregation\\_and\\_harrasment\\_on\\_buses\\_in\\_Israel.aspx](http://hiddush.org/article-2433-0-%20Wave_of_gender_segregation_and_harrasment_on_buses_in_Israel.aspx); see also *Ultra-Orthodox Men Order Woman to Rear of Bus*, THE TIMES OF ISRAEL (Feb. 15, 2013, 7:56 PM), <http://www.timesofisrael.com/ultra-orthodox-men-order-woman-to-rear-of-bus/>.

255. YUVAL ELIZUR & LAWRENCE MALKIN, *THE WAR WITHIN: ISRAEL'S ULTRA-ORTHODOX THREAT TO DEMOCRACY AND THE NATION* (2013).

256. See JACOBSON, *supra* note 1; see also Dorner, *supra* note 62, at 1330.

257. See, e.g., HCJ 243/62 *Israel Film Studios Ltd. v. Gary*, 16 PD 2407, 2416 [1962] (Isr.).

258. See Sapir, *supra* note 92, at 638; see also Lerner, *supra* note 74, at 261.

The language of this Law should be clear and thorough in order to reduce the need for interpretation of the Law.<sup>259</sup> Most of Israel's Basic Laws are concise, not unlike most Amendments in the U.S. Constitution. However, this Basic Law should be as clear and comprehensive as possible in order to attempt to avoid the same fierce debates that arise over constitutional interpretation in America.<sup>260</sup> Israel should instead model the Basic Law off of a country with a more modern constitution, such as Canada or Germany, which tend to be more thorough and therefore require less potentially controversial judicial interpretation.<sup>261</sup>

The purpose of this Law is self-apparent: to clearly and conclusively recognize the rights of religious liberty and equality for all Israelis, religions, and religious denominations within Israel. This Law would reduce or eliminate any confusion on the status of religious liberty in Israel and would clearly extend the rights enjoyed by the controlling denominations of the recognized faiths in Israel<sup>262</sup> to other denominations in the state. With a Basic Law clearly guaranteeing religious liberty, fewer questions regarding religious liberty will turn on issues of interpretation of the current Basic Laws and other sources of law in Israel. It would also act to discourage the enactment of laws that go against the spirit of religious liberty. Moreover, it would send a clear message to secular, less religious, and non-Jewish Israelis—as well as to the more religious Israeli Jews—that Israel recognizes and will protect their personal and religious rights.

Of course, this Basic Law is likely to meet vehement opposition both within the Knesset and by the already outspoken Orthodox and ultra-Orthodox communities. It would be unlikely to pass the Knesset today, even though for the first time in recent history the governing coalition does not include any ultra-Orthodox parties<sup>263</sup> and, for the first time ever, the coalition agreement does not include a promise to maintain the status quo.<sup>264</sup> Even if it did pass the Knesset, or if it was passed through a national referendum, it would likely cause a serious rift in Israeli society and would be met

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259. See Sapir, *supra* note 92, at 662.

260. See *id.*

261. See *id.*

262. The Law would also of course effectively require that Israel recognizes more religious faiths in addition to the currently recognized faiths' unrecognized denominations.

263. Linda Gradstein, *Yair Lapid, Naftali Bennett Part Of New, Young Israeli Parliament*, THE HUFFINGTON POST, (Apr. 22, 2013, 11:40 AM) [http://www.huffingtonpost.com/2013/04/22/yair-lapid-naftali-bennet\\_n\\_3131947.html](http://www.huffingtonpost.com/2013/04/22/yair-lapid-naftali-bennet_n_3131947.html).

264. Maayana Miskin & Chana Ya'ar, *For the First Time, Religious 'Status Quo' Out of Government*, ISRAEL NATIONAL NEWS (Mar. 17, 2013, 11:20 AM) [http://www.israelnationalnews.com/News/News.aspx/166292#.UY\\_UncquCPB](http://www.israelnationalnews.com/News/News.aspx/166292#.UY_UncquCPB).

by refusals to enforce it.<sup>265</sup> Still, this Law has the best chance to pass today as it has since Israel's establishment, and the real threat of such a Law might be enough to bring otherwise generally uncooperative religious parties to the negotiating table on issues of religious liberty. As such, even if the Law cannot actually get passed, progress can likely be achieved through the mere drafting of the Law.

The Law may also be potentially difficult to implement or follow, considering the wide range of entanglements between state and religion, as discussed above. However, by making the Law as thorough as possible and by clearly delineating its intended applications,<sup>266</sup> this problem can be reduced, though not eliminated. Of course, with any major change in law, implementing the law will be challenging in the short term.

Even if a clear and defined Law dealing with religious liberties could not pass, a Basic Law that merely guaranteed "the right to religious liberty and equality for all persons and religions in Israel" would still be productive. While this Law would be somewhat empty, it would still show the clear intent of the Knesset—or the public if passed by referendum—to support the right of religious liberty in Israel, and would encourage the courts to decide questions related to issues of religious liberty on the side of the protection of that right.

## 2. Civil Marriage and Divorce

Israel should also create a civil marriage and divorce system for individuals and couples who do not want to be, or cannot be, married or divorced in the religious court system. Additionally, Israel should adopt a national forum selection law that would allow either party in a divorce to demand the action be permanently removed from religious court to civil court,<sup>267</sup> unless the party explicitly waived her right in a prior agreement, such as a

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265. As suggested by the unrest involving the forthcoming ultra-Orthodox conscription laws discussed in Part III.E.

266. For example, the Law could clearly establish that it is not meant to alter or provide cause to challenge in court the current system of funding to Holy Places and religious institutions. The Law should also take into account how Israel recognizes—or fails to recognize—certain denominations and religions, like Reform Jews, Jehovah's Witnesses, and Messianic Jews. To avoid issues of interpretation, this subject should be settled in the language of the Law, and a system of widespread recognition like the one seen in the U.S.—where many different denominations and faiths are recognized and receive tax-exempt status, but pseudo-faiths like "Jedi" are not—would be advisable.

267. Parties could make the demand up to a certain number of days or a particular stage of the trial, not unlike the ability of a party to demand a jury trial in the United States.



prenuptial agreement or a *Ketubah* (the traditional Jewish prenuptial agreement). The purpose of this system would be to allow couples to be married how they wish, instead of having to follow strict Orthodox, Sharia, Canonical, or Baha'i law. This would also create relief for the estimated 5% of Israelis who cannot be married in Israel because of their religious status,<sup>268</sup> as well as for interfaith couples, and even same-sex couples, whose marriages abroad must already be recognized by the Israeli government, but who are largely barred from marrying within Israel itself.<sup>269</sup> The national forum selection law would also eliminate the extreme system of forum shopping created by the alleged bias in favor of husbands in religious courts, which results in a race to the courts in contentious divorces.<sup>270</sup> The cases are removable only to civil court and not to religious court because of the perceived bias in religious courts and because civil law should take precedence over religious law when both parties cannot agree on applying religious law, per the norms of religious liberty.<sup>271</sup>

Notably, rather than forcing all divorces to be heard in civil courts or establishing that civil law will apply in divorce cases by default, the national forum selection law would only create the ability for a party to remove the case to civil court and can still be contracted around. Additionally, rather than forcing a religious court to only apply civil law, the case would be removed to civil court. This particular structure—recognizing the ability of the rabbinical courts to have original jurisdiction and avoiding the imposition of civil law on the religious courts—would make the law relatively more palatable to religious groups. The national forum selection law could also be extended to the other personal status issues that are handled by non-Jewish courts.

Still, these laws would likely meet stringent opposition from the more religious communities in Israel, including the non-Jewish religious communities that enjoy a monopoly over the personal status issues of all members of their faith. However, the right to civil marriage is a cause célèbre of one of the current major

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268. *Civil Marriage In Israel*, HIDDUSH (May 26, 2011, 1:56 PM), [http://www.hiddush.org/article-2167-0-Civil\\_Marriage\\_In\\_Israel.aspx](http://www.hiddush.org/article-2167-0-Civil_Marriage_In_Israel.aspx).

269. HCJ 3045/05 Ben Ari v. Director of the Population Registry in the Ministry of Interior [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/450/030/a09/05030450.a09.pdf](http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.pdf).

270. See Fournier et al., *supra* note 142, at 341-42. This system goes against the public policy of encouraging couples to avoid divorce or at least to settle their divorces amicably, by rewarding the first party to make a dash for a divorce court.

271. Under this proposal, religious liberty would still exist for the religious party as well, as she previously had the chance at creating a choice of law provision in a prenuptial agreement that would have required religious law to govern the case.

political parties in the coalition government,<sup>272</sup> and with previous, more religious, governments having shown a willingness to accept civil divorce rights,<sup>273</sup> there is real opportunity for progress on these issues.

### 3. Independent Funding Commission for Religious Services

As shown, the 1985 Budget Foundations Law was unsuccessful in eliminating favoritism and discrimination from the state's religious funding system.<sup>274</sup> The current scheme still allows widespread abuse and open discrimination.<sup>275</sup> These problems could be alleviated through the creation of an independent funding commission for religious services. This commission should be run as an independent agency, removed from the ministries and only overseen by an independent, separately appointed appellate body, and, above them, the Supreme Court. The commission should be made up primarily of independent economists, jurists, academics, and state elders, but should also include non-voting representatives from the major faiths and denominations within Israel. A committee to appoint the members of the commission should be set up similar to the Supreme Court Judge's Election Committee.<sup>276</sup> The appellate body and selection committee for the appellate body should be similarly independent. The commission would ideally have the sole power to fund any religious institution for "religious purposes," and would award all funding based on a proportional system of allotted funds for each religion, denomination, and type of institution based on the community's population and need.

This concept would likely face the harshest backlash from Orthodox and ultra-Orthodox communities and political parties of all of the proposals, as it would remove the power that they currently enjoy over most religious funding in Israel. Even ministries not dominated by Orthodox or ultra-Orthodox parties would be opposed to surrendering so much of their funds and funding power. Additionally, a procedure to prevent "double-dipping"—religious institutions requesting money from ministries for "non-religious purposes" and then using them for religious purposes—would also be required. A clause against such action

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272. See Sigal Samuel, *Lapid Demands Civil Marriage in Israel*, THE DAILY BEAST (Mar. 6, 2013, 2:15 PM), <http://www.thedailybeast.com/articles/2013/03/06/lapid-demands-civil-marriage-in-israel.html>.

273. See Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-1973).

274. See Budget Foundations Law, 5745-1985, 1139 LSI 60 (1985); Shetreet, *supra* note 182, at 443.

275. See discussion *supra* Part III.C.

276. See Basic Law: The Judiciary 5744-1984, 38 LSI 101, § 4 (1983-1984) (Isr.).

would not be overly difficult to construct; however, policing and enforcing the clause would be more challenging, especially if there is willful participation in the scheme on the part of sympathetic ministries.

Banning all religious institutions from receiving public funding from any source other than the commission is another possibility. Still, this would take even more funds and power away from the ministries and would likely prove even less popular. Further, it is not a stretch to believe that some institutions would set up shell organizations to funnel money back to them, especially with the assistance of sympathetic ministries. The proverbial devil would be in the details in ensuring the commission could successfully and proportionally fund the institutions at a level that they require and deserve, without allowing any institutions to take advantage of the system.

Another alternative would be to instead establish the commission as a strong regulating commission which would have supervision and auditing powers over all government funding for religious purposes or to any religious institutions. This system would still likely be met with tough opposition, and would require a strong enforcement power to back its decisions, or it would risk simply being ignored by obstinate ministries.

#### 4. Holy Places Committee

Set up similarly to the independent funding commission, a mixed-faith committee to oversee the administration and, where appropriate, mediate shared use of the Holy Places would help protect the freedom of access and worship at Holy Places and could also strengthen interfaith relations. The committee could be aided by independent supervising by international parties, such as the United Nations or other international organizations and independent non-governmental organizations. Instead of being protected by Israeli police and military forces, the Holy Places, or at least the shared Holy Places, could also be protected by international peacekeeping forces.

As discussed, freedom of access and worship is not currently provided at all Holy Places, most notably the Temple Mount and the Western Wall.<sup>277</sup> The United Nations Partition Plan originally envisioned Jerusalem to be an open city, with an independent governor who had final supervision over the administration of all

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277. See discussion *supra* Part III.D.

Holy Places within the Mandate of Palestine.<sup>278</sup> This domestic commission would enjoy similar power, and ideally would include all Holy Places in Israel and the Palestinian territories.

Unfortunately, this plan is likely to be vehemently opposed by all religious communities who currently administer a Holy Place. Due especially to the continued tensions and sensitivities between the various religious communities,<sup>279</sup> as well as a genuine and reasonable desire to administer their own holy sites, it is extremely unlikely any group would be willing to give up sovereignty over the Holy Places they currently control. An alternative solution to create such a committee for only shared Holy Places would run into the same difficulties. Even an attempt to create a multi-denominational committee made up only of Israeli Jews to administer the Western Wall would be strictly opposed by the Orthodox and ultra-Orthodox, though it would ensure a more pluralistic approach to the holy site and would better serve the interests of freedom of access and freedom of worship.

## 5. Halakhic Public Laws

Israel's Hours of Work and Rest Law can be viewed as a labor law protecting the interests of employees by guaranteeing they do not have to work on their holy days. Many other democracies throughout the world have similar labor laws to protect workers' interests.<sup>280</sup> However, Israel uniquely bans all employees and employers—even the self-employed—from working on their specific religious days of rest, and fines violators of the law.<sup>281</sup> While labor laws mandating rest are reasonable, the Hours of Work and Rest Law appears more concerned with encouraging the worker to adhere to her religion's laws regarding holy days, regardless of whether the worker personally subscribes to them. As noted, this law also has the—likely intended—effect of requiring most businesses to close on Shabbat, further encouraging adherence to

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278. See The Partition Plan, *supra* note 47, ch. 1.

279. See, e.g., Aviva & Shmuel Bar-am, *1,000 Years of Rivalry—and a Little Bit of Harmony—at the Church of the Holy Sepulcher*, THE TIMES OF ISRAEL (Sept. 07, 2012, 4:44 PM), <http://www.timesofisrael.com/1000-years-of-rivalry-and-a-little-bit-of-harmony-at-the-church-of-the-holy-sepulcher/> (discussing the tensions between two Christian denominations surrounding a Christian Holy Place). Notably, the issue of control over the site is so sensitive that a ladder that was left leaning against an outside window 200 years ago has remained untouched ever since for fear of disrupting the status quo between the two sides. *Id.*

280. See generally THE TRANSFORMATION OF LABOUR LAW IN EUROPE (Bob Hepple & Bruno Veneziani eds., 2010) (for a discussion of European labor law).

281. See discussion *supra* Part III.B.1.

the Jewish day of rest by greatly limiting the opportunities of the public to “break” Shabbat.<sup>282</sup>

This law should therefore be amended to allow employees to choose their own days of rest rather than tying the days directly to the official religious day of their recognized religions. While, as Justice Barak noted, this amendment may in effect give the employer the choice of which day the employee has off,<sup>283</sup> it would at least allow the employee and the employer to contract over the day, instead of the state forcing the day upon the employee. Further, the amendment could easily include a clause that guarantees that the employee can choose her religious day of rest to be the day she always receives off. While enforcement and employment discrimination issues may arise from this amendment, these issues already exist under the current law. Moreover, the negative effects of the law would be narrower in scope than the current law that simply bans employees and employers from working on their religion’s day of rest.

Even with such a clause protecting employees’ religious days of rest, religious communities and parties would likely oppose the amendment to the law, as it would make it easier for individuals to break their respective Sabbath or day of rest. Additionally, the religious Jewish community would greatly oppose the inevitable increase in public breaking of Shabbat, as more businesses would be allowed and would choose to stay open on Shabbat. However, the state and municipalities could still theoretically ban businesses from opening on Shabbat.<sup>284</sup>

## 6. Judicial Review

Finally, as noted, Israel has a strong and independent Supreme Court and civil court system.<sup>285</sup> With the self-recognition of its powers of judicial review in the “Constitutional Revolution” of the mid-1990s, the Court has presented a new outlet for opposition to

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282. *Id.*

283. HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.).

284. Municipalities Ordinance (Amendment No. 40), 5750 -1990, SH 114 (Isr.). It is worth noting that the ability of the municipalities to make religious ordinances could also be reined in by law or through judicial review, particularly when the municipalities are abusive of these powers. Municipalities can apply *Halakhic* public laws more narrowly and appropriately than the state can, as the makeup of most municipalities in Israel is more homogenous than the state as a whole. Still, municipal boards can also often overreach—especially in heterogeneous municipalities like Jerusalem—and can often affect an even harsher application of *Halakhic* public laws than the state.

285. The World Factbook: Isr.: Gov’t, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Feb. 26, 2014).

religious laws. While the Court has rejected prior blanket challenges to *Halakhic* public laws like the Hours of Work and Rest Law,<sup>286</sup> opponents of other *Halakhic* public laws,<sup>287</sup> discriminatory practices at the Holy Places,<sup>288</sup> and other religious actions against secular life,<sup>289</sup> have achieved numerous successes in the Court as well. As such, where religious actors may prevent the above proposals from coming to fruition, the use of judicial review remains a viable option.<sup>290</sup>

Critics claim that the rise of judicial review in Israel is only because of the need of an alternative system for secular, less religious, and non-Jewish Israelis to have their policies enacted when they were unsuccessful in the political arena.<sup>291</sup> In his article on political empowerment through constitutional revolutions, Ran Hirschl claims that “[f]rom the early 1990s onward, the Israeli Supreme Court has increasingly exercised its power at the expense of politicians and administrators, gaining the authority to review primary legislation, political agreements, and administrative acts.”<sup>292</sup>

However, as shown, the relatively new power of judicial review has not resulted in a secular revolution or a great reduction in the powers of the Knesset. The Orthodox and ultra-Orthodox still enjoy a monopoly on religious funding and power in Israel, and *Halakhic* public laws still fill the code books. Moreover, the Supreme Court primarily bases its decisions on the Knesset’s own Basic Laws, which a majority of the Knesset can easily amend at any time.<sup>293</sup> On occasion, the Knesset has even created an “overriding clause” that allows laws to simply state when they override any conflicting Basic Laws, which the Supreme Court has accepted.<sup>294</sup> Rather than being a tool for abuse by the “secular bourgeoisie,”<sup>295</sup> the Supreme Court’s current power of judicial

286. See HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.).

287. See, e.g., HCJ 465/89 Raskin v. Jerusalem Religious Council 44(2) PD 673 [1990] (Isr.); see generally Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 98-99, 120-21 (2000) (discussing the rise in the successful challenges of religious laws in the Supreme Court).

288. See, e.g., Sharon, *supra* note 25.

289. See, e.g., CA 6024/97 Shavit v. Reshon Lezion Jewish Burial Soc’y 53(3) PD 600 [1999] (Isr.).

290. The passage of the above proposed Basic Law guaranteeing religious liberty would greatly increase the chance of success for such challenges.

291. See generally Hirschl, *supra* note 287, at 106.

292. See generally *id.* at 98.

293. See JACOBSOHN, *supra* note 1, at 106.

294. See Sapir, *supra* note 92, at 639.

295. See Hirschl, *supra* note 287, at 106.

review allows it to appropriately and necessarily protect the norms of religious liberty and the rights of minority religious and secular communities in Israel.<sup>296</sup>

### B. Alternative Solutions

There are two oft-circulated extreme alternative solutions to Israel's current struggle with religious liberty: change Israel into a completely theocratic state, or completely end Israel's relationship between religion and state. The theocratic model, unsurprisingly, primarily receives support in the ultra-Orthodox community.<sup>297</sup> Supporters believe that because Israel was founded as the third incarnation of the Jewish nation state, and because it has declared its status as a Jewish state, Israel should follow strict Jewish religious law.<sup>298</sup> These theocrats believe that the preservation of Israel by G-d depends on its acceptance of Jewish law as its national law.<sup>299</sup> They further believe that even secular Jews possess a "spark of holiness that a religious state would reawaken" and that it is Israel's responsibility to ignite these sparks by implementing Jewish law and serving as an example to its secular population.<sup>300</sup>

Separatists, however, believe that Israel must divorce itself from its religious connections, and become a secular state. Surprisingly, support for this movement comes from both secular and Orthodox communities in Israel, as well as from non-Jewish communities.<sup>301</sup> The secular, less religious, and non-Jewish communities that support complete separation believe that their lives should not be affected or governed by the religious beliefs and laws of others.<sup>302</sup> Orthodox separatists believe that politics have a corrupting effect on religion, and that the type of religion imposed in Israel today is not "true religion," but a system of "arbitrary

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296. The continued failure of the Ministry of Defense to abide by the Court's ruling in *Rubinstein v. Minister of Defense*, coupled with the increased unrest on the in the ultra-Orthodox community—many of whom proudly proclaim that they would pick jail over the military, as a few have already done—on the matter of compulsory service has also called into question whether the government would be able to properly execute Court rulings that "go too far." HC 3267/97 *Rubinstein v. Minister of Defense*, 52(5) *Piske Din* [PD] [Decisions of the Supreme Court] 481, 491 [1998].

297. See Genut, *supra* note 150, at 2158.

298. See *id.*

299. See *id.*

300. *Id.* at 2159.

301. Julie Kamens, *Religious Law in Israel: The Debate Rages Forth Regarding the Anti-Missionary Bill and the Conversion Bill*, 13 *TEMP. INT'L & COMP. L.J.* 347, 365-66 (1999).

302. *Id.*

choices fueled by political negotiation.”<sup>303</sup> They also argue that the state’s control and funding of religious institutions have put them at the mercy of the state, further corrupting them.<sup>304</sup>

Each of these solutions would face heavy opposition from the majority of Israeli Jews who believe Israel should be both a Jewish and democratic state.<sup>305</sup> Unlike any other law Israel has seen or any evolution Israel has been through, and even unlike any of the other solutions proposed above, a move to theocracy or complete separation would require a true revolution in Israel, and would clearly go against the founding principles of Israel, its Declaration of Independence,<sup>306</sup> and its Basic Laws.<sup>307</sup> Secularizing the government completely would also not actually end the influence of religion on public life, though it would better serve the democratic norms of religious liberty. However, the benefits to religious liberties that might come from complete secularization would be far outweighed by the extreme internal strife and political disorder that would accompany it. Besides the internal strife, a move from democracy to theocracy would also likely have serious geopolitical effects on Israel’s international relations and trade, even with its strongest ally, the United States. Obviously embracing theocracy would be a rejection of all norms of religious liberty.

However, there is another alternative that comes short of complete separation: the state could completely eliminate its religious funding and religious courts. Additionally, by adopting a model of funding similar to the “Church Tax” seen in Germany,<sup>308</sup> and allowing religious laws to only be applied in civil court like in the United States,<sup>309</sup> Israel could still maintain some support for its religious communities. While this solution would serve the interests of religious liberty, they would have even less of a chance at acceptance than any of the above proposals<sup>310</sup> in the current and foreseeable Israeli political climate. Religious Israelis, regardless

303. See Genut, *supra* note 150, at 2160-61.

304. See Kamens, *supra* note 301, at 366.

305. *Israel Should be a Jewish Democratic State, Most Israeli Jews Believe*, ISRAEL HAYOM (July 1, 2012), [http://www.israelhayom.com/site/newsletter\\_article.php?id=4904](http://www.israelhayom.com/site/newsletter_article.php?id=4904).

306. Declaration of Independence, *supra* note 2.

307. Basic Law: The Knesset (Amendment No. 9), 5745-1985, 12 LSI 85, 35 LSI 192, § 7(a)(1) (1985-86) (Isr.).

308. See generally Stephanie Hoffer, *Caesar as G-d’s Banker: Using Germany’s Church Tax as an Example of Non-Geographically Bounded Taxing Jurisdiction*, 9 WASH. U. GLOBAL STUD. L. REV. 595 (discussing Germany’s Church Tax). This system lets the state tax members of religious communities and then remits those taxes to their respective religious institutions. *Id.* at 605-06.

309. Barbara Bradley Hagerty, *Religious Laws Long Recognized by U.S. Courts*, NPR (Sept. 8, 2010, 3:00 PM), <http://www.npr.org/templates/story/story.php?storyId=129731015> (noting that religious laws are recognized in U.S. courts).

310. Excluding the theocracy and secularization proposals, of course.



of religion, would still rather their religious courts apply their laws than secular judges who might not be of the same faith as them. Additionally, a "Church Tax" would likely be unable to sustain Israel's religious institutions, especially as over half of the population of ultra-Orthodox Jews live in poverty and rely on public welfare and support from the religious institutions for survival.<sup>311</sup> Finally, the "Church Tax" may encourage Israelis to disassociate from any religious affiliation in order to avoid paying the tax,<sup>312</sup> which would be unpalatable to practically all religious groups, even Reform and Conservative Jews and non-Jewish religious communities.

## V. CONCLUSION

Though Israel is undeniably still a liberal democracy that generally respects religious liberty, as shown, the state must make adjustments to its laws and policies in order to better conform with democratic norms and fully meet the promises made in its Declaration of Independence, Basic Laws, and international obligations. For the first time in recent history the governing coalition does not include any ultra-Orthodox parties, and, for the first time ever, the coalition agreement does not include a promise to maintain the status quo. Now is the time for Israel to reaffirm its commitment to democracy by directly facing its decades-long struggle with the principles of religious liberty. While many of the proposals listed above may be ambitious, Israel is known as the "start-up nation."<sup>313</sup> The current government should take this opportunity to make progress on Israel's path to meet its responsibilities to democratic norms and its secular, less religious, and non-Jewish populations, whether through negotiations with the more religious communities or through the application of the proposals suggested above.

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311. Bassli, *supra* note 140, at 498-99.

312. *Cf.* Hoffer, *supra* note 308, at 605 ("Germans who wish to avoid the tax can do so by simply disclaiming membership in the taxing organization.")

313. *See generally* DAN SENOR & SAUL SINGER, *START-UP NATION: THE STORY OF ISRAEL'S ECONOMIC MIRACLE* (2009).