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## FIELD REPORT

## The Right to Freedom From Religion in a Jewish State

by Omri Kaufman

The State of Israel was founded as a democratic country which proclaimed adherence to the principles of freedom of religion and conscience. The pluralistic social structure in Israel, in terms of culture, nationality, and religious beliefs, lends a profound significance to these rights for Israeli citizens.

Unlike the United States, which is governed by the principle of separation of Church and State, the State of Israel defines itself in its Declaration of Establishment as a Jewish state based on freedom, justice, and peace as envisaged by the prophets of Israel. The legal meaning of this self-definition of Israel is quite complex.

One of the most notable areas of religious entanglement in State affairs can be found in the religious court system which has exclusive jurisdiction over certain subjects, such as marriage and divorce. Religious involvement in the law, however, goes far beyond matrimonial issues. Religious lobbies have pushed for the enactment of statutes which adopt Jewish norms into citizens' daily lives and influence administrative procedures. Thus, religious involvement extends to almost all aspects of Israeli life and inevitably raises numerous questions regarding the religious or secular character of Israel as a Jewish-democratic State.

The focus of this article, therefore, will be on Israeli law, in particular family law issues, and the way the law accommodates religious interests on the one hand and the right to freedom from religion on the other.

## Sources of Religion in Israeli Law

The legal sources for religious liberties in Israel were created in the pre-Israeli era, when foreign sovereigns ruled Palestine. The first legal source came from the British Mandate, who enacted the Palestine Order in Council of 1922 (POC). Article 83 of the POC stated that, "all persons . . . shall enjoy full liberty of conscience and free exercise of their forms of worship, subject only to the maintenance of public order

and morals." Additionally, Article 17(1) (a) expressed that "no ordinance shall be promulgated which shall restrict freedom of conscience and the free exercise of all forms of worship." Despite these Articles, a binding Constitution establishing fundamental rights was never achieved.

The Israeli Declaration of Establishment, which was published on the day of Israel's establishment 50 years ago, asserts *inter alia*, "The State of Israel . . . will guarantee freedom of religion, conscience . . . it will safeguard the holy places of all religions." The Declaration is an unusual document in the sense that it gained widespread support at the time, including that of the Ultra Orthodox Agudat Yisrael political party. Such an achievement of consensus has never been repeated in Israeli political

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history. The Declaration itself, though it has not received a normative binding validity, is considered by the Israeli Supreme Court as the "identity card" of the State and the credo of the people. The Supreme Court views the Declaration as a source of inspiration when searching for a normative background for interpreting legislation, and uses it as a basic reference guide to determinations of legislative intent.

Contrary to the promising words of the Declaration, a binding document was not implemented. Instead, the legislature gradually enacted special laws called Basic Laws, which would become the future Constitution of Israel. Eleven Basic Laws have been enacted, including the two Basic Laws of 1992: 1) Basic

Law: Freedom of Occupation and 2) Basic Law: Human Dignity and Liberty. Through those laws, the Declaration of Establishment has gained official constitutional value.

Article 2 of Basic Law: Human Dignity and Liberty asserts, "There shall be no violation of the life, body or dignity of any person as such," and Article 4 continues, "All persons are entitled to protection of their life, body and dignity." The Israeli Supreme Court has interpreted the term 'dignity' in an exceptionally broad manner, including the right to freedom of religion and conscience. Therefore, based on the language of either the Basic Law or the Declaration of Establishment, there is a legal obligation on the part of Israel to ensure religious freedom.

## Religious Aspects of the Israeli Legal System

Among this broad corpus of laws, the most notable example is Israel's unique system of religious courts. According to Israeli law, religious courts have exclusive jurisdiction over marriage and divorce.

Other examples of the extensive role of religion in Israeli civil life can be found in the state budget allocations for religious affairs, the religious test for granting automatic Israeli citizenship, religious regulations regarding food, and Sabbath limitations and holiday restrictions.

Historically, local communities were authorized to rule in their members' personal matters according to their own religious law, in their own special courts, and by their own qualified judges. The POC, for instance, empowered religious courts to rule concurrently with civil courts on all personal matters. Such matters included: marriage and divorce, alimony, maintenance, guardianship, the legitimization and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and administration of the property of decedents.

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The Israeli legislature has since narrowed the scope of the issues falling within the jurisdiction of religious courts. Nevertheless, the scope of the religious courts' jurisdiction is still broad because they maintain ancillary jurisdiction over matters related to the primary issue in dispute.

#### Family Law as an Example of Religious Interference in Daily Life

The validity of marriages and divorces performed on Israel's soil is determined by the religious rules of the spouses. Marital status cannot be created by contract alone. Israeli law does not recognize civil marriages performed in Israel. A secular person in Israel who wishes to get married is required to go through a compulsory religious ceremony, a ceremony which may mean nothing to the person and may contradict his or her philosophy of life.

The divorce process is submitted to religious rule as well. Jewish divorce rules state that a divorce can be completed only by mutual consent, with compensation to the wife, and only after the rabbinical court has attempted to reach reconciliation. The requirement of mutual consent can be a source of difficulty and misery for the wife who may get the short-end of the bargaining stick when negotiating for a settlement. In addition, archaic Jewish rules provide only severely limited grounds for divorce, which are not always suited for the needs of the modern world. Couples can not ask a civil court, or any other tribunal, to declare them divorced if a religious court has jurisdiction over the case. Until divorced, neither spouse may remarry.

Judicial autonomy in family affairs, which was granted to various religious

communities in Israel, provided a genuine contribution to the fulfillment of the principle of Free Exercise of Religion. By authorizing the religious courts to deal with issues of marriage and divorce through the interpretation of religious law, the judicial process is divided into issues that may be submitted to religious courts and others which are subject to civil courts. In reality, many cases blend aspects covered by both civil and religious law. For instance, matters such as child custody, including adoption, inheritance and property relations between spouses are settled by civil law while the religious law determines the essence of the couple's relationship itself. The two systems, which originally aimed at complementing one another, are contradictory and waste precious time and assets by duplicating the same process. Civil courts, for example, are authorized to decide on matters of personal status and settle disputes between spouses, as are religious courts. The civil court can obtain jurisdiction when no religious court is authorized to settle the dispute due to any substantial, personal, or other reason. Having two

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different legal systems which are literally competing with one another causes a problematic phenomenon of forum shopping and jurisdiction chasing.

In recent years, the Israeli legal system has acknowledged the necessity of having special family courts which are accompanied by special procedures, judicial discretion, and technical accessories. Nevertheless, without changing the exclusivity of the religious courts jurisdiction, the problem of forum shopping and jurisdiction chasing is still not resolved. Professor Ariel Rozen-Zvi who has written about Israeli family law, has stated, "Israel's legal system is characterized by a struggle of jurisdictions in the area of family law. A large portion of

the energy inherent in the system is directed towards the development of rules of compatibility between the various courts, toward improving the techniques for deciding on the division of jurisdiction and toward solving the questions raised by the existence of the multi-judicial system sometimes engendering internal competition or confusion."

The civil-religious collision is not only between courts, it applies equally to the laws which govern the courts. In general, religious courts are authorized to decide according to the law of their religious community. Commonly, the religious courts are subject neither to the ordinary procedural rules, nor the civil law of evidence, nor private international law concepts.

#### Minimizing the Role of Religion in Daily Life

In seeking a solution to the worrisome phenomena of the expanding gap between the needs of the general public, civil law concepts, and religious rules, various entities have developed bridging techniques. For instance, the legislature has now conferred the rights of married couples to unmarried couples who live together and preserve a joint household unit. In addition, the civil courts are recognizing marriages performed outside of Israel by applying private international law doctrines. Furthermore, some administrative requirements have been imposed on religious authorities, such as maintaining marriage registrations, burial booking, and kosher inspections. Unfortunately, the religious authorities are resistant to the new administrative requirements and instead perform these functions according to their own policies.

#### Role of the Supreme Court

Because of an absence of comprehensive measures by the legislature or the executive branch, the judicial branch has taken on a prominent role in narrowing the gap between religious courts and civil courts. The religious courts are formally bound under the supervision of the High Court of Justice according to the Basic Law. Thus, the inspection authority of the Supreme Court is used, at times, to invalidate the ruling of the highest religious court on grounds outside of the religious scope such as lack of jurisdiction or *ultra vires*.

Due to the sensitive nature of the diverse jurisdictions and an awareness of

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the political forces involved, however, the Supreme Court generally avoids

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using its authority. The Court has recently made it clear that apart from matters involving marriage and divorce (where the religious courts have exclusive jurisdiction), the religious courts should abide by civil law, whether it is legislated or judge-made law. Unfortunately, the Court did not find an appropriate way to enforce its ruling on the religious courts.

The Israeli Supreme Court, because of the systematic refusal of the Knesset to deal with the issue, has the main role in endeavors dealing with the right to freedom from religion on a case-by-case basis. The Court has developed several types of tests in its attempts to examine the validity of religious authority. The first concept is that religious authority may be derived from clear and explicit legislation. The second test is that secondary legislation and executive acts are subject to "strict scrutiny," much like the U.S. concept. Another test of the secular "primary purpose," is where

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an act of authority for a secular purpose has incidental religious ramifications, or where the Court examines the legislative intent, or the scope of authority possessed by the particular entity blends elements of nationalism and religion. Under the new Basic Laws, which adopted the Declaration of Establishment concept of Israel as Jewish and democratic, the Court should move toward a second step of scrutiny,

focused directly on the acts of the legislature. Thus, if the Court finds a law to be purely religious in nature and it does not fit in with the social values of Israeli society, the Court may then invalidate the law as contradictory with Israel's democratic identity.

#### Conclusion

Israeli society is being subject to compulsion by law to a religious normative web. Whereas Israel's founders lacked the intention to create either a Jewish theocratic state or a domination of Jewish religious norms over secular norms, the future implications of their establishment of Israel as a "Jewish State" are under constant debate. Some say that subjecting the people to laws which were not enacted by the legislature, but allegedly God-created, is a violation of democratic rules. Some legal scholars, such as Ariel Rozen-Zvi, observe that the secularization of Jewish society has caused the religious courts to become increasingly entrenched in preserving existing Jewish law, refusing to recognize the existence of problems arising from secular reality. The lack of co-opera-

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tion between the public and the religious courts, and the public's unwillingness to obey the religious courts' rulings, is a recipe for social disorder. The religious rules simply cannot keep up with the pace of a rapidly changing and modernizing society.

Until the basic system is changed, namely transferring the jurisdiction that rules on the most intimate issues from the hands of religious authorities to a civil legal system, Israel's majority rights will continue to be abused. The democratic nature of the country, as such, requires stiff protection of the right of the individual to live with the maximum freedom possible. As the nature of the choices become more personal, the protection must become greater to abolish any attempt at religious coercion. ☐

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