

The Place of Orthodoxy in the State of Israel

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As the head of the Center for Women's Justice, I encounter on a daily basis the intractable entanglement—the “Gordian knot”—of State and (Orthodox) religion in Israel. This union of religion and state supports a gendered society, infringes on the basic rights of women, challenges the democratic values of the State, and threatens to undermine Israel's integrity as the political expression of the Jewish nation.

Using some of the cases that have come my way at CWJ, I will illustrate the above and argue that the place of “Orthodoxy” in Israel should not be within the coercive sphere of the “state,” but within the voluntary sphere of “civil society,” alongside other expressions of Jewishness.

An Intrinsically Gendered Society

In Israel, the Chief Rabbinate Law of 1980 states that the Chief Rabbinate is authorized to give answers and opinions regarding Jewish law, to bring the public closer to the values of the Torah and its commandments, to issue kashrut certificates, and to decide who shall sit as rabbinic judges and as official city and community rabbis. The Rabbinic Courts Jurisdiction Law of 1953 (Marriage and Divorce) gives rabbinic courts sole jurisdiction over matters of marriage and divorce.^[i] The Chief Rabbinate and the Rabbinic Courts are exclusively Orthodox, and they are gendered. Men and woman are not equal.

No woman serves on the Chief Rabbinate Council, or as an official rabbi of any city in Israel. No woman is permitted to sit on rabbinic courts as a judge.^[ii] The

Chief Rabbinate and its Rabbinic Courts are run by men. The Rabbinic Court Administration Office has tried to bar women from applying for positions as law clerks.[\[iii\]](#) In the Petah Tikvah Rabbinic Court, until recently, no woman sat in any position, even an administrative one.

Rabbinic Courts apply religious laws that discriminate between men and women. Women appearing before rabbinic courts have little say in their attempts to divorce their husbands. Grounds for divorce for women are few, if any, and are not mutual. [\[iv\]](#) If a woman refuses to accept a Jewish divorce (a *get*), the state has a specific exception to its bigamy laws[\[v\]](#) to allow him to marry another woman and continue with his life (*heter-meah rebbanim*). If a man refuses to give his wife a *get*, she can be bound to him forever.[\[vi\]](#)

This taken-for-granted gendered, and discriminatory, world of the Orthodox rabbinic courts trickles down into other parts of Israeli society in the name of pluralism, and tolerance. So, for example, Egged, the state bus company, had (until recently) allowed, facilitated, and enforced “separate” buses in which women were expected to sit at the back of the bus, separate, apart, and unequal to men.[\[vii\]](#) The Supreme Court of the State of Israel has barred women from praying at the Western Wall in prayer shawls and phylacteries and has, instead, delegated the women to a separate, but not quite equal, section of the wall.[\[viii\]](#)

The Infringement on the Bodies—and Basic Rights—of Women

In Israel, the state authorizes the Chief (Orthodox) Rabbinate and its (Orthodox) Rabbinic Courts to “discipline and punish”[\[ix\]](#) the bodies of women.

The Chief Rabbinate Office is responsible for monitoring, registering, and conducting all marriages between Jews in Israel. It requires all Jewish women, as a precondition to their marriage, to immerse in a ritual bath (*mikveh*); to undergo a course on when and how to conduct their sexual lives with their husbands; and to set a date of their wedding in accordance with their menstrual cycle.[\[x\]](#) The Chief Rabbinate issues directives that determine the way to operate the (state built) ritual baths that service (the bodies of) Jewish women, and has recommended that attendants refuse access to women who are single or divorced.[\[xi\]](#)

The Rabbinic Courts set and interpret all laws regarding divorce between Jews in Israel. According to those courts, adultery on the part of a woman is absolute grounds for divorce; whereas adultery on the part of a husband can be forgiven. [\[xii\]](#) The court sometimes conduct “sex” trials to try to bar a woman from engaging in sexual relations after marriage with a man who may have been her lover; and, should the trial prove the allegations true, the rabbinic court can direct

the Ministry of Interior to note the fact on the woman's divorce ruling, thus literally branding her with a letter "A" and "outing" her lover on official state documents.[\[xiii\]](#) Should a Jewish woman commit adultery and bear a child of that illicit relationship, the court can conduct a hearing that will put such child on a blacklist that prevents the child from marrying another Jew (mamzer).[\[xiv\]](#) Moreover, under Jewish law as applied by Israeli Rabbinic Courts, a man can withhold a divorce from his wife indefinitely, infringing on her autonomy and freedom.[\[xv\]](#)

Challenges to the Values of a Liberal, Democratic State

By deferring to the (Orthodox) Chief Rabbinate and its Rabbinic Courts in all matters relating to marriage and divorce, the state infringe directly on the freedom of conscience of Israelis by subjecting them to religious irrespective of their religious beliefs, or lack thereof.

Israelis are not free to marry in the religious ceremony of their choice. Only Orthodox ceremonies are recognized by the state. Conservative and Reform ceremonies are not allowed, though many non-Orthodox rabbis conduct such ceremonies for their constituents despite the fact that those marriages will not be registered by the Ministry of Interior. (Members of Parliament have proposed to make such ceremonies specifically illegal.)[\[xvi\]](#) No civil marriage or intermarriage is conducted in Israel.

Israelis are also not free to divorce in a manner of their choice. Even if they married abroad in a wedding recognized by the state under the rules of reciprocity (thus managing to bypass religious coercion at the wedding stage), if both husband and wife are Jewish, the couple will find themselves back on the steps of the rabbinate at the time of divorce. Recently, a rabbinic court held that such a couple must undergo the religious *get* ceremony in order to be divorced, and even incarcerated the husband until he gave the *get*.[\[xvii\]](#) Such order was a gross infringement on the husband's freedom of conscience, not to mention his physical freedom, and ironically, in direct contradiction of halakhic decisors, both in Israel and the Diaspora, who have held that Jewish couples who marry in a civil ceremony do not need a *get*. The husband had agreed to the divorce and simply wanted a decision of the court declaring that he was no longer married.

Israelis are not free to follow their conscience when going to the mikveh. Recently a young high school woman studying at a well-respected Jerusalem High School asked CWJ to petition the High Court of Justice to order the attendants at the mikveh to allow her to use the facilities when the attendant refused her access because she was single.

A Threat to the Viability of the Jewish Nation-State

One can argue that the Israeli state has effectively, and perhaps inadvertently, rendered “Orthodoxy” as the established “church” of the state of Israel^[xviii] or as its official state religion.^[xix] This gives voice, authority, and validation to “Orthodoxy” as a reflection of the “Jewishness” of the Israeli nation state, while in reality the (Orthodox) Rabbinic and Rabbinic Courts are not at all concerned with the values and interests of the state, but rather with what they feel are the values and interests of the pan-national, or tran-national, Jewish people/religion. And the two are not necessarily in sync.

Thus, for the sake of the integrity of both the Jewish people and the Jewish nation, I posit that it is necessary to separate the Jewish “nation” from the Jewish “people,” and leave the imagining of the Jewish nation to its own separate sphere and consideration. This separation is not an easy feat, conceptually or practically, and it is one that has challenged the mighty and great. In 1970, Judge Moshe Zilberg, pondering the question whether one could be a Jew by nationality but not by religion,^[xx] could not find a way to separate the two conceptions. He wrote: Nation (*leum*) and People (*am*) are synonyms and have the same meaning.”^[xxi]

Judge Haim Cohen, on the other hand, understood that one's Jewishness from a religious perspective is not necessarily the same as one's Jewishness from a national perspective and that, when imagining what is a Jewish nation, the courts or whoever else is doing such imagining, must be guided by considerations such as human rights and freedoms. He wrote:

The halakha has its place of honor... I can imagine other purely legal considerations, with basic constitutional consideration at the fore, among them basic freedoms and human rights, that must guide a court's steps when it will, in the future, have to decide the question of a person's “nationality.” All of these considerations are legitimate and must move the court, and even obligate it, to decide the issue in a way that is not consonant with laws of religion.^[xxii]

A Jewish nation, Cohen seems to be saying, must, first and foremost, be one that is consonant with and sensitive to human rights and freedoms.

The Need for a Place in “Civil Society”

While I have made a strong argument to take the Jewish (Orthodox) “religion” out of the Jewish state and its coercive state apparatuses, I would also like to make a strong argument for nurturing and sustaining Jewishness in the “nation” sense as a reflection of the morals and values of the Jewish state. To do this I would not relegate the Jewish religion to the very private sphere of the individual and family. Instead, I would place Jewishness in all its manifestation, as culture/tradition/religion, in the very public sphere of civil society—the space inhabited by voluntary civic, social, and religious organizations and institutions.

I would like Jewish culture/ tradition/religion to flourish in the State of Israel, thus sustaining the Jewish nation. I would even suggest that the state support the various activities of the various civic and social expressions of Jewish culture/tradition/religion without preferring one expression of Jewishness over the other. Israel should become the Mecca for Jewish learning, writing, art, music, and religious denominations of all sorts, including of course Orthodoxy in all its permutations. In the public sphere, and subject to human rights and religious freedom, Judaism would be the cultural capital of all Jews, Israeli and otherwise.

[\[xxiii\]](#)

No religion—whether the current Orthodox, or any other variation thereof, be it benevolent Orthodox, Open Orthodox, Reform, or Conservative—should be thrust on the citizen of a democratic state. Today's benevolent Orthodox is tomorrow's fundamentalist. The democratic and liberal values of a modern state must allow for freedom of conscience, or reflections of Judaism that may not be the ones that we personally espouse. Only such pluralism and tolerance will keep us together. Forcing all of us into one narrow, square hole for the sake of supposed unity and uniformity, is not working. Instead, it is alienating the great majority of us Jews from both the state and the religion.

Haval, what a shame. We Israelis and Jews of all denominations, including the ultra-Orthodox, deserve a more hopeful, pluralistic, and tolerant reality.

[\[i\]](#) Rabbinic Courts Jurisdiction Law (Marriage and Divorce). 1953.

[\[ii\]](#) See, for example, Convention for the Elimination of Discrimination Against Women (Israel expressly notes its reservations to section 7(b) of the law stating: “1. The State of Israel hereby expresses its reservation with regard to article 7(b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel. Otherwise, the said article is fully implemented in Israel,

in view of the fact that women take a prominent part in all aspect of public life.”)

[iii] Jerusalem Labor Court File 3252/08, Center for Women's Justice vs Rabbinic Administration (2008) (holding that tender for law clerks issued by rabbinic courts administration was discriminatory and void) (unpublished).

[iv] For example, if a woman has committed adultery, this is grounds for her husband to divorce her. It is not absolute grounds for ordering a man to divorce his wife, especially if he expresses remorse for his waywardness. Multiple wives were permitted in the Torah. Moreover, under Jewish law, men do the divorcing, not women. Women can, at best, ask for rabbinic intervention to convince their husbands to divorce them.

[v] § 179 Israel Penal Code (1977).

[vi] Talmud Bavli *Yebamoth* 112b.

[vii] In October 2010, the Ministry of Transportation adopted the recommendations of a committee set up in 2009 to deal with the legality of “separate” buses (http://img2.timg.co.il/forums/1_138417519.pdf). The ministry agreed that a person cannot be prevented from sitting in his or her seat of choice on the bus, thus overturning the policy that Egged had adopted regarding this buses since the beginning of the 1990s.

[viii] Dan Gat'z 4128/00 Prime Minister's Office vs Anat Hoffman (2003).

[ix] Cf. Michelle Foucault, *Discipline and Punish* (1975) (describing how the state has used its power to discipline and punish the bodies of criminals).

[x] One rabbi recently refused to perform a wedding when the bride could not present a *mikvah* attendant's certification that she had undergone the required ritual immersion

[xi] Apparently a recent directive of Chief Rabbi Metzger disallows the use of the *mikvah* by unmarried women. The Chief Rabbi's office has refused our requests to see the directives in writing.

[xii] See note 4.

[xiii] See, e.g., Bagatz File 982/04 citing Bagatz File 212/74 P'D 29 (2) 433 (2004) (describing under what circumstances reference can be made to the *boel* on official documents).

[xiv] The Rabbinate has a “black list” of “*mamzerim*” who were born of illicit relationships. See <http://www.justice.gov.il/NR/rdonlyres/EC880D06-9620-44AC-9CC2-3A1ED52643F8/0/lineage.pdf> (directive setting up special courts for minors who are suspected of being *mamzerim*, signed by Rubinstein and Rav Amar) (January 11, 2004).

[xv] See Jerusalem Family Court File 3950/00, P”M (2001) 29 (2001) (Greenberger, J. BenZion denying motion to dismiss claim for damages for *get* refusal, Judge BenZion Greenberger, an Orthodox rabbi, explains how husbands who refuse to give their wives a *get* are also infringing on their autonomy and freedom). J. Greenberger writes:

Every woman, every person, is entitled to write the story of their life as they wish and in accordance with their choice—as long as they do not trespass into the domain of others—and this is the autonomy of free will.... The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person. (<http://2335666652275703265-a-1802744773732722657-s-sites.googlegroups.com/site/centerforwomensjustice/file-cabinet-test/ETortGreenberger2001.pdf>)

[xvi] Zevulun Orlev Proposed Amendment of Penal Code (Private Marriages) (2009). www.knesset.gov.il/privatelaw/data/18/1023.rtf.

[xvii] Haifa Rabbinic Court File 587922/5 (Dec. 16, 2010) (ordering incarceration of husband) (unpublished).

[xviii] Jose Casanova, *Public Religions and the Modern World* (1994), at 47 (defining a national “church” as one whose coercive and monopolistic capacities

have the backing of the state).

[\[xix\]](#) See Chief Rabbinate Law (1980). Wikipedia (in Hebrew) (referring to the Chief Rabbinate as the “highest rabbinic establishment” of the state).

[\[xx\]](#) Bagat”z 58/68 Shalit, et al. vs Ministry of Interior and Haifa Registration Clerk, P”D 23 (2) 477–608 (1970) (holding that the registration clerk cannot interfere with a person’s discretion to register himself as a Jew by nationality, regardless of whether he was considered Jewish under religious law). Six months after the decision, the Knesset amended the Registration Law to overturn the majority holding in Shalit.

[\[xxi\]](#) *Ibid.*, 494.

[\[xxii\]](#) *Ibid.*, 491.

[\[xxiii\]](#) See Casanova, *supra* n. 18 (reaching the conclusion, that, should religion have a public dimension, it must be subject to the values of human rights and freedom of conscience).