Institute of the World Jewish Congress
מכון הקונגרס היהודי העולמי

Policy Forum No. 11

*Ariel Rosen-Zvi*

# State and Religion:

## Changing the Israeli Status Quo ?

# State and Religion: Changing the Israeli Status Quo?

*Ariel Rosen-Zvi*

**Cover**
Front: Moritz Oppenheim, a Jewish wedding in the courtyard of the Frankfurt synagogue before the Emancipation.
(Courtesy of Trionfo Collection, Jerusalem)

Back: *Ketubah* (Jewish marriage contract)
Livorno, Italy, 1728
(Courtesy of S.U. Nahon Museum of Italian Jewish Art, Jerusalem)



ISSN 0793-2596

Printed in Israel
Design & Production: Studio Efrat 02-6522144

# State and Religion:
# Changing the Israeli Status Quo?

*Ariel Rosen-Zvi*

## Summary

Balancing the democratic and Jewish nature of the State of Israel has been one of the major challenges confronting its lawmakers since the establishment of the State. The Jewish nature of the State is asserted by various binding provisions based on Jewish law. This arrangement, dating back to the Ottoman period and the British mandate, is called the *status quo*. It was retained by the first prime minister David Ben-Gurion and has been in place ever since. The nature of the political system prevailing in Israel in which religious parties generally hold the balance of power have upheld the status quo even in the face of considerable discontent.

Over the years, broad segments of the Israeli public have come to look upon the status quo as a form of religious coercion — imposing the dictates of religious law upon people who reject them. This problem is particularly acute in matters of personal status, especially questions of marriage and divorce which are entrusted to the religious courts. Although this system has been seen as the supreme expression of the religiousness of the State in terms of the lifestyle of its Jewish citizens it has created defaults in several areas. Those unable to marry for religious reasons (among others); the difficulty of obtaining a divorce without the consent of both parties; and the large number of *agunot*, women who have been unable to obtain a divorce from their husbands. The infringement on the status of women in various areas of marriage and divorce. The fact that the religious courts (*batei din*) are largely out of touch with the secular society whose lives are affected by their rulings has worsened the problem.

For much of its history Israel's security concerns have forced this issue on to the back burner. However, in recent years the social tension caused by the *status quo* has been exacerbated by the arrival of tens of thousands of non-Jewish immigrants (spouses and children of Jews) from the former Soviet Union and by Israel's rapid adaptation to a western life-style and the pluralistic norms with which it is associated. This problem occupies an increasingly important place on the current agenda. Clearly, there is a need for boldness in finding innovative *Halakhic* solutions. The religious public has a special responsibility of putting pressure on the religious establishment to restructure the religious courts.

# The Author

Professor Ariel Rosen-Zvi is Dean of the Faculty of Law at Tel Aviv University and has written several award-winning books including *The Law of Matrimonial Property* and *Israeli Family Law: The Sacred and the Secular* (Hebrew) as well as numerous articles. Prof. Rosen-Zvi has served on more than 15 public committees for reform in family law and administrative law, and is a member of the Official Commission of Inquiry on the Assassination of Prime Minister Rabin. He has been the Editor-in-Chief of the *Yearbook on Israeli Law* since 1991.

*THE FORMALITIE OF THE JEWS IN GIVING BILLS OF DIVORCE.*

*Augustin Antoine Calmet, copperplate, England, ca. 1730*

# State and Religion:
# Changing the Israeli Status Quo?

*Ariel Rosen-Zvi*

## Introduction

The State of Israel is a Jewish and democratic state. It is identified as such in Israel's Declaration of Independence, and the Basic Laws which were recently passed clearly indicate this dual reality. One can say that Judaism and democracy are a set of Siamese twins which have been attempting to keep in step with one another ever since the beginnings of Zionism and the return to Zion.

When one refers to the Jewishness of the State, there are many aspects involved in regard to the general culture: ideology, education, the press, the theater, etc. But that is not the subject of this study. Here, Jewishness of the State is limited to the normative aspect.

The Jewishness of the State is expressed in a number of spheres.

First, there is the symbolic sphere: the flag, the State emblem and anthem, all of which express the State's Jewishness.

Second, the national sphere: The State of Israel grants preferential treatment to Jews applying to be citizens under the Law of Return. The State's national holidays are those of the Jewish religion. Preferential treatment is also given to Jewish settlement of the land, especially because State land, which comprises 93% of all the land in the State, is under the jurisdiction of the State Lands Authority. Other aspects of the national sphere are to be found in various provisions in the laws which specify the application of Jewish values. For example, the Compulsory Education Law states that the acquisition of Jewish values is one of the aims of education. The Broadcast Authority Law gives this as one of its aims as well. The national sphere has two major components. It grants precedence to various national principles of the Jewish People in the State of Israel and lays down normative provisions in regard to the imparting of the Jewish tradition. At the same time the State seeks to be involved in the free flow of ideas accepted in Western society.

These two spheres, the symbolic and the national, do not only affect the perception of the Jewishness of the State within the internal boundaries of Israel. They extend beyond its territorial

boundaries, by creating a special tie between the State of Israel and the entire Jewish People throughout the world. The Law of Return creates a community of fate between the State of Israel and every Jew in the world. The Education Law and the Broadcast Authority Law take as self-evident that one of the aims of education in Israel and of the duties of the Broadcast Authority is the fostering of ties between the State of Israel and the Jewish People in the Diaspora.

The State of Israel is not only a Jewish state, it is also the State of the Jewish people. It is for this reason that the Knesset Elections Law contains a far-reaching provision which states that any party whose platform or conduct indicate that it denies the existence of the State of Israel as the State of the Jewish People is disqualified from running for election to the Knesset.

The third sphere is the one which is expressed in the observance of a Jewish lifestyle by those who maintain links to Jewish tradition. Consequently, children whose parents so desire are entitled to receive a State religious education at public expense. The Chief Rabbinate of Israel has a legal status nationally and in certain areas — as for example, in offering rabbinic endorsements on food products — represents the Jewish religion vis-a-vis the State. Courts have ruled that local authorities have the right to close various streets to vehicular traffic on the sabbath in religious neighborhoods, even if as a consequence this has a somewhat adverse effect on other residents. The State funds *yeshivot* and other Torah institutions. It also offers governmental financial grants to religious institutions and finances various religious services.

The fourth sphere is one which arouses profound debate in Israel, and to a certain extent among the Jews of the world. The core of this issue is the assertion of the Jewish nature of the State by various binding provisions which are based on Jewish law. This sphere, based on an arrangeement which dates back to the Ottoman period and the British mandate, is known as the *status quo*. Much of Israel's population, however, regards it as religious coercion. The *status quo* involves the imposition of elements of a religious life style upon a public which does not accept the dictates of the religious world, and which is not prepared to adopt a religious life style.

These provisions were originally formulated in a letter sent by David Ben-Gurion, just prior to the establishment of the State, to the heads of the strictly Orthodox political party, the Agudath Israel. In this letter, Ben-Gurion stated that in four areas — education, observance of Jewish dietary laws (*kashruth*), the sabbath and personal (i.e., family) law — there would be special arrangements which would impart a Jewish orientation to the State within the national context.

In terms of public perception this sphere can be divided into two distinct elements. Some of the provisions, although religiously based and imposed on the public at large, are matters of general concern, and thus acceptable to the public at large. This, for example, includes the law requiring that *kashruth* and the sabbath be observed in the Israel Defence Forces. The principle of uniformity and of preserving the morale within the army as a single unified whole enables those who are not religious to accept such concessions.

Similarly, the idea of striking a balance between conflicting interests existing among different groups, including the special needs of religious communities, enjoys widespread support.

*The struggle by the State for its survival has created a system of priorities that has prevented these issues from being at the forefront, in spite of the "explosive nature" embodied in them*

As opposed to this, there is a great deal of disagreement about legislation which imposes religious strictures on the public at large, without any self-evident redeeming societal aspect, as, for example, the raising of pigs or the sale of pork, as well as those laws forbidding the opening of places of entertainment on the sabbath or of operating a public transportation system on the sabbath. This type of legislation is regarded as affecting the public domain and as affecting the Jewish character of the State.

For years there has been a vigorous debate in this area. Nevertheless, the political and social tension relative to these issues and others of a similar divisive nature has never been vented fully. This stems primarily from the fact that the tension regarding security in the country and the struggle by the State for its survival has created a system of priorities that has prevented these issues from being at the forefront, in spite of the "explosive nature" embodied in them. The political need of the leading party after every election for a coalition with the religious political parties, who were the ones who held the balance of power, generally brought about an arrangement whereby the leading party was entrusted with the responsibility for external affairs and state security in return for its acquiescence in religious matters. However, the ideology of the Jewish character of the state cannot be ignored. At the time the State was established, its leaders thought that, following the Holocaust, it was proper to "give in" to the religious in order to maintain some elements of the religious nature of the earlier Jewish generations. This ideology was also to a certain extent an expression of guilt by some of the secular leaders at their abandonment of their parents' and grandparents' religious standards. The agreement was also aided by the fact that the secular public regarded it as being no more than temporary in nature, for in less than a generation, it was believed, the Jewish religion would be but a relic in the life of the State.

This rationalization is not necessarily convincing to the members of the public who are today subject to these norms. A large part of this public regards this selective religious coercion as being inherently unfair. In their opinion, it represents coercion of their conscience, an infringement on freedom of religion and of the basic democratic rights of the individual. This public does not regard these laws as being of religious value and believes that the effects of these laws upon the Jewish nature of the State are negligible or non-existent.

Most people recognize that it is very difficult to enforce religious prohibitions when public opinion is against them. For years, a slow and gradual wearing away has taken place, which has brought about erosion in these areas. In a large number of towns in the State of Israel, cinemas were opened on the sabbath and the local authorities did not act vigorously to enforce the law.

That was also the fate of the laws forbidding the sale of pork. The *status quo* has been eroded gradually, even though it is still maintained formally. In a democratic, pluralistic society, most of whose members do not observe Jewish law, it is very difficult to enforce laws when the principles upon which they are based are not accepted by the majority. Thus, a situation has arisen whereby, even though the laws remain formally on the books, in reality the situation has been changing gradually.

The national provisions related to religious matters, including religious institutions, are subject to the supervision of the High Court of Justice. The High Court of Justice has, over the years, increased its involvement in various different provisions of religious legislation. It has intervened in the composition of religious institutions, ordered the acceptance of women and Reform or Conservative represention into religious councils, annulled decisions reached by religious authorities, and even required the Rabbinate to award a *kashruth* certificate when it felt that the rabbinate's refusal to do so could not withstand accepted tests.

Before we launch into a discussion of the major area of marriage and divorce, a few words on the issue of "Who is a Jew?", which continues to cause political disputes and strong arguments, and which even involved the Jews of the Diaspora. The Law of Return is a national law, not a religious one, and over the years it has been interpreted in a national-secular context. Following one of the rulings of the court, tremendous political pressure was exerted and the Knesset changed the law and defined the term "Jew" according to principles of *Halakhah* (Jewish law). At the same time, in order to balance the religious definition members of intermarried couples found it easier to immigrate to Israel under the Law of Return.

Once it became apparent that even within the realm of *Halakhic* principles there were questions related to converts, a fierce and extended battle took place, the aim of which was to modify the law and to determine that only a person converted under Orthodox auspices should be recognized as Jewish in terms of the Law of Return. In the legal field the Orthodox were not triumphant. The High Court of Justice ruled that the Ministry of the Interior had to recognize conversions signed by communal rabbis of any Jewish organizational group abroad. The pendulum, which had swung before from the secular to the religious interpretation, now moved in the opposite direction, to the secular interpretation. The legal realities of the situation, along with the failure of the religious groups to change matters, created a certain balance which enabled the various religious groups and ideologies to accept the solution as a lesser evil.

From this we see that religious legislation also has a price, and not only in terms of the non-religious public. Governmental involvement in religious issues creates a certain subordination of the religious establishment to the secular framework and imposes the external supervision of the civilian authorities. This supervision has increased throughout the years. The court has become ever more bold and increased its involvement in religious affairs, extending its involvement even into the area of Jewish law, rather than limiting itself to administrative and procedural issues, as in the past.

The dynamics of what is paradoxically known as the *status quo* are greater than anything laid down in the law. The complexities of Israeli reality and the special Jewish link of Israel have led, in a convoluted and non-systematic way, to the striking of a certain balance where, even though no one is totally satisfied, it has enabled those in Israel to live together and to remain in harmony with the Jews of the Diaspora.

The main area of concern in the fourth sphere which is the primary expression of the Jewish nature of the State and of the preservation of the unity of the Jewish people in Israel and abroad is that of the laws governing personal status. For its Jewish citizens marriage and divorce in Israel, as well as other aspects of family law, are judged in accordance with Jewish law, in its Orthodox interpretation. Moslems, Christians and Druze have parallel religious authorities. This is the greatest expression of the *status quo* and is the one area with which every person in Israel must come in personal contact. It deals with the most intimate issues and is inextricably bound up with the social system and political reality.

## Marriage and Divorce

In Israel, Jews can be married or divorced only in accordance with Jewish law. There is no civil marriage in Israel. These issues are dealt with primarily by rabbinic courts, and the only marriage registrars who are recognized are Orthodox rabbis. The attempt by a Reform rabbi to become a marriage registrar failed, and the court did not grant him relief.

The justification given for the religious provisions in the area of marriage and divorce is of greater substance than those given for the general application of religious law norms in Israeli society. The main argument is that civil marriage will split the Jewish people in both Israel and in the Diaspora. It is also claimed that as long as the majority of the Jewish people are abroad, the State does not have the moral right to make so momentous a decision as to permit civil marriages. Another reason given is that it will be impossible to combat assimilation and intermarriage in the Diaspora if these are permitted in Israel by instituting civil marriage.

Throughout all the years, the field of marriage and divorce in accordance with Jewish law was considered the supreme expression of the Jewishness of the State in terms of the lifestyle of its Jewish citizens. This expression creates difficulties in three areas: 1) Those unable to marry, for religious (among other) reasons; 2) the difficulty of obtaining a divorce without the consent of both parties, and the resulting large number of *agunot* — women who have been unable to obtain a Jewish divorce from their husbands; 3) the infringement on the status of women in various areas of marriage and divorce.

From here on, we will concentrate on the laws of marriage and divorce. We will examine the reciprocal relations between Jewish law, the public and the religious courts. This examination will take place against the background of the special situation which characterizes the State of Israel at the present time, almost 50 years after its establishment. The reasons given for

maintaining the religious arrangement indicate that this issue has special implications for both Israel and the Diaspora. The State of Israel is the only place where Jewish law is binding in the areas of marriage and divorce. A religious marriage between Jews, even when they are not Israeli citizens, is generally recognized in Israel. The intermarried couples who have immigrated to Israel create difficulties.

An analysis of this issue is also important because of the problems in a modern democratic state which also seeks to give expression to its religious tradition.

At the beginning of the 1950's, when Dr. Zerah Warhaftig of the National Religious Party, the Deputy Minister of Religious Affairs, presented the bill of Rabbinical Courts' Jurisdiction to the Knesset, he claimed that in the future Jewish *batei din* (religious courts) would become so beloved that the people would beat down the doors to appear before them, preferring them to the civil courts.

This vision, based on the profound understanding of the ethos of *Halakhah* and the way conflicts are resolved in Jewish society, is very far from being realized in our days. In the years that have passed a different process has taken place: the people have voted with their feet, but in the opposite direction.

Whenever people have a choice between using the *batei din* or the civil courts, they have shown clearly — gradually but consistently — that they prefer the civil courts. In 1992, a larger number of cases was submitted to the civil courts in regard to alimony and child support than to the *batei din*. This fact is of great significance if we take into account that in 1960 the number of such cases submitted to the *batei din* was eleven times greater than the number submitted to the civil courts. Note how great a change has taken place within the past 30 years.

Since 1971, the Jewish population of Israel has grown by 56%, whereas the number of couples being married in a religious ceremony has remained constant — about 25,000 each year. On the other hand, the number of divorces has grown considerably, almost tripling during that same time period. Close to 6,000 Jewish couples are divorced annually, as opposed to 2,300 in 1971; we are approaching a situation where close to a quarter of all the Jewish couples who marry in Israel are eventually divorced.

The fact is that people often prefer to live together without being married. They also show that people now have different expectations from marriage, and that, in turn, has led to the increase in the number of divorces.

In a parallel process, the number of women who have not been able to obtain a divorce — including *agunot* whose husbands' whereabouts are unknown and women whose husbands simply refuse to give their wives a *get* — a divorce in accordance with Jewish law — amounts to many thousands. Estimates as to how many women are involved range from 500 to 5,000. Each year, the number of divorce cases which has come to the *batei din* without the deliberations coming to some type of final conclusion increases.

There is no doubt that the distress faced by those women who have been unable to obtain a divorce is very real, and that this problem is more prevalent in Israeli society than in any other. This is also a unique phenomenon in the history of the Jewish people: Jewish society was always considered to be more attentive to the distress of the weak, and to be more open and realistic. Instances of *agunot* are not new. They have been discussed in rabbinic literature from the time of the Talmud to our days. Our Sages stated: "Where there are *agunot* there is no peace." Rabbis of all generations have gone to very great lengths to solve the problems of *agunot*, going as far as invoking the rule that "when it is time to do for God, one may infringe on Your Torah" and have even modified the rules of proof and evidence governing such cases.

However at a certain stage, a few generations ago, a new, multi-faceted situation arose. Thus, for example, the problem of the *agunah* became much more a problem of recalcitrant husbands who simply refused to give their wives a *get* than of husbands who had vanished and whose death needed to be proved. A more fundamental phenomenon is characterized by the fact that the *Halakhot* of marriage and divorce have been imposed on a public which does not observe Jewish law. Thus a gap was created between the *batei din* and the reality. There is a distance between the existing binding (Jewish) law and the view that upholds it. The law has the power to coerce legal consequences, but it falls short of the ability to inculcate the values on which it is based. The legal consequence no longer reflects the live presence of religious values, but merely their external wrapping.

## The *Bet Din* and the Rabbinic Judges

The system of *batei din* in the State of Israel, which is supposed to deal with the problem of *agunot*, is entirely different from those which existed in Jewish communities in the Diaspora. In a homogenous religious society, with a clear rabbinic hierarchy which had the ability to impose social sanctions, in which a rabbinic authority reigned supreme and all accepted the dictum that "one is obligated to listen to the words of the Sages," cases of husbands simply refusing to divorce the wives or abusing their power in this regard were few and far between.

That is not the case in our society, which is modern and open, and whose norms are non-religious. Rabbinic authority is not accepted as binding by a large segment of the Israeli society, and it necessarily follows that the power which it had in the past, derived from the fact that it was accepted by the community, has largely dissipated.

The religious Jewish society fashioned informal solutions to many problems and created social and religious rewards to the members of the community which eased the stress within the family. Many religious and social options of a non-coercive character, which in the past enabled solutions to be found in a homogenous and hierarchical religious society, are no longer valid. What effect can a rabbinic court today have on a non-religious person, if, as Jewish law decrees, the punishment it can mete out is that it can declare him a sinner, or rebuke him, or preach to him, or excommunicate him, or require him to take an oath?

In the past 200 years, secularization has burrowed deep into the social fabric of the Jewish people. For the first time, we have a State with powers to coerce people and to enforce the law, but which imposes religious norms on a society which does not recognize the religious view which underlies them. No new legal sanctions have been formulated to substitute the informal solutions, nor have any bridges been built to span the gap.

In order to enable it to function, a judicial system — every judicial system — must, first and foremost, enjoy the confidence of the public which it is judging. The sanctions which it can levy are also based on a broad-based, internalized trust in the institution. In Israel, the religious court judges enjoy, at best, the trust of the religious sector, and seek approval for their conduct from an even smaller sector — the strictly Orthodox.

A considerable number of the rabbinic court judges hail from the ranks of the strictly Orthodox — a social milieu which is very far removed from the cultural and spiritual world of the majority of those who require their services. This enormous chasm of mutual non-comprehension and of the vast social and ideological distance between the two creates a tension of mistrust. As a result there is mutual alienation, sometimes going as far as mutual contempt.

In the existing situation, the way the rabbinic court judge and those of his milieu regard his position is totally different from the way the public as a whole regards it. It is this mutual alienation which is the cause of much of the disagreement between the two.

The world of the *yeshivah* student is one of study and discussion. In the *yeshivah* students constantly debate the proper interpretation of passages. This is a world of differing views, a world where no final decision must be reached. In the Rabbinic Courts, things are totally different. When a rabbinic court judge is confronted with a case in which a decision must be reached, he has a responsibility. There — unlike the *yeshivah* milieu — fear of making a binding *Halakhic* decision is not an advantage but a distinct disadvantage. When the decision-making process is not a clearly delineated one, a free-for-all situation arises characterized by survival of the fittest.

*Most rabbinical court judges in Israel are, at best, totally alienated from the modern values which are the basis for the non-religious view of married life*

Some of the rabbinic court judges are appointed to the rabbinic court bench directly from *yeshivah*, without ever having served as local rabbis in any neighborhood or town, without ever having been confronted with the need to determine whether a given chicken was kosher or not or having to try to reconcile two parties involved in a dispute. A very considerable percentage have never served in the army, most do not have any secular education – and they certainly have no high school diploma. This sudden transition makes it exceptionally difficult for them to understand what the secular society is all about and what issues are of concern to it. Among those factors which Maimonides lists as being required of a religious court judge are a knowledge of secular studies

and being acceptable to the public. In other words, the judge must be a person who is part of the public, who grew up within it, and who should have as broad a range of knowledge as possible.

Thus, before we deal with the major problems and the gap between the law and reality and between the law and the public, we must first deal with the institutional-organizational problem. Both the work ethic of the religious court judges and the way they view their role are problematic. Because the religious public represents a minority, there is a certain amount of camaraderie and an easygoing relationship among the members of a group who wish to internalize its values. As a result, the Ministry of Religious Affairs, which is responsible for the rabbinical courts and the rabbinical court judges, for the supreme rabbinical council and for the chief rabbis — one of whom serves as President of the Supreme Rabbinical Court — finds it very difficult to exert any authority over the rabbinic court judges, even disciplinary authority.

"Authority" is the very foundation stone for the existence of such a system. This includes, first and foremost, basic discipline, the proper conducting of deliberations, proper judicial methods in decision-making, spelling out the reasons for having reached a particular conclusion, a proper work ethic, proper judicial behavior, and the requirement of responsibility. The incentives to have a person act responsibly are a hope for advancement coupled with the fear of not advancing; as well as the possibility of being invited, from time to time, for a few "words of encouragement," where these are needed. Do these exist in the rabbinical court system today, as should be the case and as Jewish law demands?

## The Growing Gap

Most rabbinical court judges in Israel are totally alienated from the modern values which are the basis for the non-religious view of married life. For the majority of Israelis, living with a partner outside wedlock is viewed primarily as a way to further one's own self-realization. Communal responsibility plays a limited role in one's considerations, while the concept of the family as the basic cell within the nation is in decline. The majority of Israelis also believe that if there is any incompatibility between a couple, either mental or sexual, the marriage should be terminated.

The religious view regards the concept of holiness as central to family life, and the communal obligation of forming a family as the basis for the nation. It holds that a marriage is not to be terminated unless there is some "fault" of some kind. However, Western society is fast losing faith in this view. The religious public, especially its establishment component, is scornful of the new values; and transfers the problem to the responsibility of those who appear before it in judgment. The *Halakhah,* they claim, is not to blame for the gap which was created, the secularists are. It is their permissiveness, their revision of traditional moral values that is responsible. Such an approach is a way of shedding one's own responsibility. Instead of normative solutions, we find moralistic rhetoric along the lines of "Go and solve the problem yourselves.

We have no intention of changing our holy Torah because of your promiscuity and your throwing off of the yoke of Jewish observance."

Such a gap is very difficult to bridge: if you refuse to recognize the distress of the public which you are judging, if you do not recognize its legitimacy, if you are not willing to exert yourself to help it in its distress, you remain beleaguered within a position which used to be normative, legally and socially, a few generations ago.

Moralistic rhetoric which is not accompanied by public power to determine its own norms, leaves its target population — the general public — the hapless loser in any case. That public does not enjoy the benefits of the religious segment of society and it does not receive practical solutions to its pressing problems. One must understand that Jewish law is based on a very large number of fundamental principles and rules for determining the law, but first and foremost on the common denominator of those who hold positions in the Torah world and their public: acceptance of its legitimacy. In such a situation, the possibility of narrowing the gap between Jewish law and reality is easier, and a certain amount of flexibility can be manifested. However, if the target population no longer regards Jewish law as binding, a situation is created in which every "change" is regarded by the rabbis as endangering the entire fabric of Jewish law, because — as it were — it grants legitimacy to the negative phenomenon of secularization.

Thus, we find that the religious court judges develop "a fear of judging" — a desire to avoid making any pathbreaking decision, sometimes even to the extent of avoiding making any decision at all in a specific case. Under these circumstances the root causes of severe distress are ignored, the problem of the *agunah* being but one of them.

The fact that many panels of rabbinic court judges refuse to make decisions and instead return the dispute to the parties themselves, asking them to come to some type of agreement between themselves, is not only the product of a weak work ethic but also due to the gap which is built in the new reality.

Another basic example of the problematic nature of the situation is the conversion of children. Infants brought to Israel from abroad for the purpose of adoption are no longer a marginal phenomenon: we are speaking of thousands of children each year. The conversion of minors has always been a *Halakhic* problem, which was in most cases solved by the fact that the child grew up in a religious environment. This basically ensured that the convert would remain committed to observance of the Jewish law. Today, in most cases we are dealing with children adopted by secular parents who create a secular environment for their child. For years, a number of rabbinic court judges who have been appointed to deal with the issue by the Chief Rabbinate did so quietly. They, in their wisdom and understanding, based on the accepted rules in this regard and by a liberal interpretation of the concept of "the observance of the commandments" (the condition required before a Jewish court can convert anyone) ensured that in most cases there would not be any problems in this regard.

However, in the absence of a fundamental *Halakhic* solution, there was tremendous pressure from the ultra-Orthodox in this regard, and, as a result, there was pressure on the religious establishment and on the Chief Rabbinate. The result was that all such channels were blocked off, and the problem has again become a matter of public concern.

The gap between the rabbinic courts and the public at large has become even more acute with the immigration of tens of thousands of non-Jews from the states of the former Soviet Union. Under the Law of Return the non-Jewish spouses of Jewish immigrants have the right to immigrate to Israel along with their children, and they have all the rights of new immigrants. In Israel, a community is being created which defines itself socially as Jewish in every way, even though there is no doubt that by Jewish law a significant protion of its members are in no way Jewish. Some of them, incidentally, don't even know that that is their status, including young men and women now studying in institutions of higher Talmudic learning.

As there is no barrier separating Jews and non-Jews, there is no doubt that within a short period of time there is going to be a tremendous pressure for mixed marriages on a very large scale. Such a mass phenomenon cannot remain unsolved. Today, though, there are almost no conversions in Israel. And according to the stringent view which now prevails in the religious establishment due to pressure by the ultra-Orthodox, there is almost no prospect of a fundamental and broad solution on this issue. The problem will only become worse. What solution can be offered to this group when its members are not being converted and there are no civil marriages in Israel?

Another expression of the gap between the rabbinic courts and the general public is the new phenomenon of poverty among women who are separated or divorced. In the social system prevailing in Israel, wealth is mainly concentrated in the hands of men. When a couple parts, the division of property between them and the amount of alimony awarded the wife will have a decisive impact on the way she and her children are able to readjust. Based on authoritative data of the research department of the National Insurance Institute and on the estimates of lawyers who are involved in family law, there is a tremendous difference between the amount of alimony and child support awarded to women and their children in the rabbinic courts, and the amounts awarded in the secular courts.

We are dealing here with a population of the same general background, and thus there is a valid basis for comparison between the two. The rabbinic courts awarded an average of 30% less in alimony and child support than did the civil courts. The average amount of alimony awarded (for those who needed to resort to the services of the National Insurance Institute) by the religious courts in 1993 was NIS 500 a month, whereas in the civil courts it was close to NIS 700. It appears that the amounts awarded in the rabbinic courts are even lower than those awarded by the religious courts of the non-Jewish religious communities in Israel.

This fact is glaring for two reasons: first, there is no special *Halakhic* provision or special problem why this should be so. Second, we are often dealing with people from a low

socio-economic group, some of whom went to the rabbinic courts simply because they were unable to afford the lawyer they would need to represent them in the civil courts, and who assumed naively that the rabbinic courts, the judge of widows and orphans, would be more ready to deal with their distress, without needing the services of a mediator.

People, the *Midrash* tells us, are more merciful to men than to women, whereas "the Holy One, Blessed be He, is merciful to all His creatures". The religious society in Israel has not yet attained that optimal stage: the status of women in the ultra-Orthodox world, from which most religious court judges come, subconsciously affects their views regarding the needs of women and the standard of living they need. The religious courts almost never award "temporary alimony," i.e., an amount to be paid to the woman during the course of deliberations. As there is generally a considerable amount of time between the wife's claim and the final verdict, the husband is granted a tremendous advantage, as he has the economic means to remain socially and economically independent during this period. He generally is not burdened with children, has a steady job and owns real estate. He is also able to live with another woman, with the consequences of his behavior, as far as Jewish law is concerned, being far less severe (if a married woman lives with another man, she is forbidden permanently to both her husband and to her lover).

The imposition of the principles of Jewish law, based on a specific economic and social reality, on a totally different reality, sometimes results in the exact opposite of what the law had wished to accomplish, with those provisions meant to protect a specific party losing all their force. This is not a problem due to unbending legal rules, but rather to the failure to take heed of reality.

In many cases, the procedural rules can also be a source of discrimination. Thus, for example, every time the hearing of a case is postponed and every time a rabbinic court panel refuses to reach a verdict, it is the strong who benefit and the weak who lose economically, and this even further limits their bargaining power.

The gap which was created between the implementation of Jewish law and reality has led to instances of blackmail by unscrupulous husbands in granting their wives a divorce. Some abuse religious law by exploiting it to obtain advantages which are not always fair and are often incompatible with the purposes that law was designed to pursue. In many cases, it is the sinner who comes out ahead. On occasion, the divorce proceedings cause the split between the sides to deepen and prevent any possible reconciliation.

One cannot state that the religious court judges are not interested in solving distressing problems. They are indeed interested in doing so, but are simply not sensitive to the very existence of many of these problems due to the great divide between them and the public which appears before them.

In every generation, solutions were found within the framework of Jewish law. However, the religious court judges, the rabbis, the transmitters of the Torah of our generation do not want to grant legitimacy to a corrupt reality. Instead of seeking solutions to meet the needs of reality

and ignoring the ideological controversies, they want to narrow the gap in order to have everyone live within the Jewish common denominator, under the assumption that time and proper education would take care of everything.

## Finding a Solution

There are numerous *Halakhic* tools and precedents to solve the existing problems, but space is too limited to enter into these here. All the *Halakhic* solutions given in earlier times to solve the problem of the *agunah*, for example, were divergences from the traditional Jewish law: the acceptance of hearsay evidence from a witness, the acceptance of evidence from a non-Jew, the acceptance of testimony from a woman, and the provision that one does not investigate "too closely". However, in the past 200 years, the view has become entrenched that any attempt to deal with breaches in the wall is tantamount to breaching the wall itself. This view, as well as that of imposing religious norms on a secular society, did not halt the developing secularization of the Jewish people, did not make people draw closer to the world of the Torah, and certainly did not bring Torah law closer to the public. The influence of Jewish law on the institution of marriage and on the couple is purely external. The values underlying the rules were not internalized by Israeli society.

When Hillel the Elder sought to solve a serious problem of *mamzerut* — "illegitimacy" — in regard to the Jews of Alexandria during the Second Temple era, he "employed the language of the common man", i.e., he interpreted the laws in such a way as to solve the problem at hand. When a person acted improperly, the Sages treated him improperly and annulled his marriage, thereby protecting the woman and her offspring.

In the past, the Sages devised reasons for forcing a man to grant his wife a *get*, with the aim of protecting the woman. In formulating these, they attempted "to fathom the minds of women, as to what they are unable to tolerate". The Jerusalem Talmud goes even further, using the factor of "life of the soul" — what one might today call "mental health". On the other hand, the Talmudic category of "bad breath", which was considered grounds for forcing a divorce, is almost no problem today; what bothers people today is emotional or sexual incompatibility.

In later generations, too, Jewish law took into account the dictates of reality. The claim by a woman that "I cannot stand him" was recognized by Maimonides as a valid reason to force the husband to give his wife a *get*. The Talmudic commentary *Tosafot Rid* recognized such a claim as reflecting a legitimate need, and Rav Hayyim Palache, about 100 years ago, believed that it was enough for the couple to have been separated for 18 months to be the basis for forcing a *get*.

These assumptions, translated into the reality of our times, are the ones which offer the keys to a solution. In many *Halakhic* contexts we must recognize the fact that we do not have the power "to impose the laws of the [Jewish] religion upon the public". In a generation in which Torah is not favorable, it is our obligation, in the words of Hillel, "to gather in and not to scatter".

From a social standpoint we are living in one of the most difficult times which the Jewish nation has ever known. In this context, the Jewish legal concept of "difficult times" (*she'at ha'dehak*) is a concept in Jewish law which does not represent a concession to secular society. What underlies this is the desire to sanctify the Name of Heaven and to give expression to the ability of Jewish law to solve the problems of the generation. If one insists on always taking the most stringent position, it only results in the stringency turning into leniency, where people simply ignore the law in its entirety. The *Halakhic* recognition of such an approach, both on the level of principle and on the individual level, will cause a change of perception and will automatically create a different character to *Halakhic* decision-making.

The *Maharsha* a celebrated rabbi of the 16th/17th century, stated, at the end of his commentary on the Talmudic Tractate *Yevamot*, that the meaning of the verse, "the Lord will give strength to His people, the Lord will bless His people with peace" (Ps. 29:11), is that "the Lord will give strength to the sages in order to bring peace, and where there are cases of *agunot* there is no peace". This is a basic concept, which is at the base of the world of the *Halakhah*: That peace — *shalom* — in the sense of wholeness, perfection — *shelemut* — means ensuring that the world lives in a state of harmony.

Opposed to this is the view that claims that we do not have the power, in our days, to employ the bold measures used by sages throughout the generations. This is especially true when many of these bold measures are still considered controversial to this very day. Why, then, should we become involved in such weighty debates?

On the individual basis, incidentally, there are solutions rendered here and there. These take place "back-stage", without publicity, without "upsetting the system," and without disturbing the harmony of the unblemished *Halakhic* decision process. This is an approach which characterizes a non-democratic society, in which there is a select group which has the knowledge and ability to read the "small print", in terms of "We have the ability to pull all types of tricks and to solve problems, but you, the masses, are to refrain from any intervention or involvement. We will do whatever we can."

A true, comprehensive solution, must include an understanding of the problem, knowing it and acknowledging it, and — as a consequence — a direct confrontation with it. The way this is confronted will also dictate the result. Jewish law has enough realism and pluralism in it to permit different opinions and approaches. It could, for example, permit the establishment of special panels of religious court judges who would be willing to assume the responsibility for far-reaching decisions. It is an accepted principle that where there is no *Sanhedrin* (higher judicial and legislative body), each rabbinic court renders its own legal decisions for its own city.

If we are willing to examine possible options which can aid us in finding a solution, a number of methods may be proposed. First, one can consider a separation of Religion and State, with the religious marriage system only one possible option available to people and civil marriage an alternate option. Whoever chooses the religious marriage option will be subject to the

religious court system (in matters such as divorce, etc.). Whoever chooses the other option will be subject to the civil courts.

From a religious point of view this is a difficult solution, more symbolically than in terms of Jewish law. Its advantage is that the problems with which the non-religious public is faced will be solved by a system which is close to it, and the solutions it provides will be in accordance with those employed in most court systems in the world. Such a separation would "free" the rabbinic courts from responsibility for solving the problems of the generation. Then again, it might just have the opposite effect, and cause the religious courts to "compete" with the civil courts, in order to expand the circle of those willing to marry in accordance with Jewish law.

In terms of Jewish law, such a solution would be faced with two major questions: the first must deal with the problem of what the *Halakhic* status of civil marriage is. The second refers to those couples that Jewish law forbids to marry (a *kohen* to a divorcee, a *mamzer* — the product of an adulterous or incestuous union — to a Jew, marriage to a non-Jew): if such marriages are permitted through the civil courts without any record of this being kept, the State of Israel will be divided up into two separate sects, with the one forbidden to marry anyone from the other.

As to the *Halakhic* status of civil marriage, most rabbinic authorities hold that in an open situation where people can exercise their own free will (i.e., where they could have been married by a rabbi, there being no *Halakhic* barriers, but elected not to do so), such a union is not considered to be a marriage as far as Jewish law is concerned. This will certainly make things easier if the couple decides to separate. The problem of those forbidden to marry by *Halakhah* — and who are nevertheless married by a civil court — is a much more serious one, and the only way to be able to deal with this is by the maintenance of a detailed record of all marriages and the *Halakhic* impediments in weddings of such types. But even if it is agreed that such a registry be kept, another problem will arise: who and how will a check be made of the details of the status of those registering to be married — a check which *Halakhah* requires?

This is a complicated and difficult solution. At the same time, it is possible that the time will come where we will have no choice but to adopt it. This will be the least of all evils. If there is no wholesale conversion in Israel of immigrants from the former Soviet Union — and the chances of this happening seem extremely remote at this time — it is possible that we will simply be forced into permitting civil marriage.

Today, theoretically, such a solution can be implemented partially, as, for example, by instituting civil marriage only for those unions which Jewish law forbids. This would define these people as a separate group and would diminish the danger of assimilation.

The second solution is to leave things as they are, but at the same time to extend the alternatives available in the realm of marriage and divorce. Already at present there are indirect solutions available for those who wish to use them. There are "substitutes for marriage" and "substitutes for divorce", and there are relationships which are like marriage. For example, if one

was married abroad, even if this was done through the mail, such a marriage is registered and is valid in Israel. Mixed marriages carried out by a Moslem cleric are registered by him entirely legally.

In other words, even though religion has hegemony in regards to marriage, in practice a parallel system is being created of civil family laws, and this parallel system is constantly expanding. Some of these alternatives simply circumvent problems, while others create substitutes, while yet others create a new reality which is different from "the law on the books".

In practice, Israeli society has adopted this "solution", but only partially, and it leaves unsolved the difficult human problems mentioned here. In addition, in practice the rabbinical courts have gradually lost much of the power, and have, in reality, stopped being a court for the family, becoming instead a court for divorce. What is harmed by this is the public's perception of the traditional Jewish marriage. This is exactly an example of a case in which one can state, "its stringency has been transformed into leniency" — by applying the *Halakhic* rules too stringently, the rabbinic courts have contributed to having people simply ignore them entirely.

Our day-to-day experience teaches us that any attempt to preserve the *status quo*, as it were, by binding the public's daily life to a law which is against the viewpoint of the majority, is totally illusory. In a western, pluralistic, modern society, a black hole cannot exist within the system. Problems have to be solved. And if the religious courts do not supply them, the civil courts will fill the vacuum wherever they can.

This has occurred in various ways. Recently, the civil courts took another significant step. They imposed constitutional norms, such as the Basic Law regarding Man's Dignity and Freedom, on the religious courts as well. The religious courts were also forced to accept norms from the secular law in areas which are not related purely to marriage and divorce, such as the presumption of community or property.

Halakhah, *requires boldness and a readiness to enter into a religious struggle aimed at finding* Halakhic *solutions*

The third solution, perhaps the most desirable one, is that the entire religious public, and especially its Torah leaders and religious court judges, understand the great responsibility thrust upon them and do not let the opportunity available to them pass them by. This solution is divided into two areas: institutional and organizational on the one hand, and questions of principle and *Halakhah* on the other.

There is a need to reorganize the religious courts. I am not referring to minor, cosmetic changes, but to the introduction of modern, appropriate work practices, a correct perception of the position of the religious court judges, and an understanding of the responsibility of the religious court judges in the given reality of today.

The religious courts are the show windows of the world of *Halakhah* before the Israeli public, with an ever-increasing number of members of the public needing its services in basic

areas, and with existential significance to the survival of the nation. Today, there are many religious court judges who claim openly that the religious court system should be moved to the jurisdiction of the Ministry of Justice. They believe that such a step will contribute to a change in the way these courts are perceived, as well as to the responsibility and discipline in the courts.

The second area, that of principle and *Halakhah*, requires boldness and a readiness to enter into a religious struggle aimed at finding *Halakhic* solutions, not ones which are carried out behind closed doors by a lone religious court judge. He who refuses to forgo some of his power and authority must know that if there is no responsibility, there is no power and there is no authority. There is no such thing as short cuts in *Halakhah*. But even small developments can be of significance. It would be enough, for instance, for it to become clear that more and more panels of religious court judges are prepared to force recalcitrant husbands to divorce their wives, for the message to circulate among the lawyers and among other such husbands and to bring about a change in the entire system.

The question underlying the chances of change is the degree of dissatisfaction among the religious public about the existing condition. Protest against the current state of affairs is a religious duty. If internal pressure is created, at least part of the problem will be solved. To the present, those who have been involved in the struggle to restructure the religious courts were secular bodies. This created a negative reaction. The system will not be able to remain apathetic if pressure comes from the religious public. If that is what happens, it will no longer be considered to be "giving in" to a decadent reality.

This is undoubtedly a long process, and the political forces and administrative structure will make it more difficult. The more time passes without solutions, the more difficult will be the process of undermining the religious courts.

The Mishnah in *Yevamot* describes how the regulation regarding *agunot* expanded in Eretz Israel. At first, Rav Yehudah ben Baba was the only one who was willing to act based on the testimony of a single witness. Over time, other *Tanna'im* joined him. Rabban Gamliel was delighted at this and he said, "We have found a companion for Rav Yehudah ben Baba." We must hope that in this generation, too, there will be other companions for Rav Yehudah ben Baba.


# Institute of the World Jewish Congress

Dedicated to the study and analysis of current Jewish affairs

## World Jewish Congress

| | |
|---|---|
| President: | *Edgar M. Bronfman* |
| Secretary General: | *Israel Singer* |
| Chairman of the Executive: | *Mendel Kaplan* |
| Chairman of the Governing Board: | *Isi Leibler* |
| Executive Director: | *Elan Steinberg* |

## Institute Staff

| | |
|---|---|
| Executive Director of WJC Jerusalem Office and Institute: | *Dr. Avi Beker* |
| General Editor: | *Dr. Geoffrey Wigoder* |
| Editor of *Gesher* (Hebrew Journal of Jewish Affairs): | *Dr. Shlomo Shafir* |
| Senior Research and Editorial Officer: | *Dr. Laurence Weinbaum* |
| Assistant Editors: | *Arieh Doobov*<br>*Simona Kedmi* |
| Publications Manager: | *Ziva Fox* |
| Typesetting and Administration: | *Hana Kimche* |

# Current Jewish Topics

## Policy Dispatches

Brief and timely analysis of issues of immediate concern

1. The Changing United Nations (October 1994)
2. The Swiss Anti-Racism Law (October 1994)
3. Community Update: South African Jewry Faces the Future (November 1994)
4. Syria: Closing a Chapter in Jewish History (November 1994)
5. The Extreme Right in West Europe: An Electoral Scorecard (December 1994)
6. Re-evaluating the Law of Return (January 1995)
7. Auschwitz-Birkenau: Protecting Jewish Memory (February 1995)
8. Restitution of Jewish Property in Central and East Europe (April 1995)
9. The New Aliya from the former Soviet Union: A 5-Year Balance Sheet (June 1995)
10. Unfreezing the Swiss Bank Accounts of Holocaust Victims (September 1995)
11. Canada at the Crossroads (November 1995)
12. Russia: Antisemitism and the December Elections (January 1996)
13. Foreign Workers in the Jewish State (March 1996)

## Policy Forum

A series on current developments through the eyes of noted authorities and researchers

| | | |
|---|---|---|
| 1. | Jerusalem - Past and Future | *Martin Gilbert* |
| 2. | The Vatican-Israel Agreement:<br>A Watershed in Christian-Jewish Relations | *Geoffrey Wigoder* |
| 3. | The Aftershock of Argentina:<br>Picking up the Pieces | *Anthology* |
| 4. | The Israel-Diaspora Identity Crisis:<br>A Looming Disaster (a special essay) | *Isi Leibler* |
| 5. | Casablanca: Sowing the Seeds<br>of Economic Cooperation | *David Kimche* |
| 6. | Post-Zionism, Post-Judaism? | *Avi Beker & Laurence Weinbaum* |
| 7. | Israel's Long Corridor:<br>Ambiguity and Nuclear Non-Proliferation | *Avi Beker* |
| 8. | The Worldwide Jihad Movement<br>Militant Islam Targets the West | *Steven Emerson* |
| 9. | World Jewry at the Crossroads | *Symposium* |
| 10. | The American Jewish Crisis of Confidence | *Jonathan Sarna* |
| 11. | State and Religion:<br>Changing the Israeli Status Quo? | *Ariel Rosen-Zvi* |
| 12. | Still No Peace for the Jews of Norway:<br>The Unresolved Restitution Claims | *Bjørn Westlie* |

## Policy Studies

Comprehensive examination of topics in Jewish Affairs

1. Righting an Historic Wrong: Restitution of Jewish Property in Central and East Europe — *Laurence Weinbaum*

2-3. Russian Jewry in Flux: Two Reports
On Communal Life — *Ephraim Tabory*
On Antisemitism — *Stefani Hoffman*

4. Environmental Protection: A Jewish Perspective — *Nahum Rakover*

5. Reinventing World Jewry: Summary and Recommendations (with the Jerusalem Center for Public Affairs) — *Daniel Elazar*

## Periodicals

1. **Dialogues:** Discussions between Jews, Christians and Moslems

2. **Gesher:** Journal on Jewish Affairs (Hebrew)

3. **Batfutsot:** Bulletin on Jewish Life in the Diaspora (Hebrew)



For more information on Institute publications write, call or email:


**Institute of the World Jewish Congress**
21 Jabotinsky Street, P.O.B. 4293, Jerusalem 91042
Israel

Tel: 972-2-635261 Fax: 972-2-635544

E-mail:wjc@jer1.co.il
Internet Home Page:
http://www.wjc.jer1.co.il


מכון הקונגרס היהודי העולמי
Institute of the World Jewish Congress

רח׳ ז׳בוטינסקי 21, ת.ד. 4293, ירושלים 91042
21 Jabotinsky St., P.O.B. 4293, Jerusalem 91042
טל: 02-635261 פקס: 02-635544
Tel: 02-635261 Fax: 02-635544