

**The Israeli Millet System: A Fragmenting Ideology Or An
Intercultural Instrument, And What Can Be Done If The Answer Is
The Former?**

by

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1. Introduction

This paper is a response to the Ministry of Justice of Israel which oversees the religious courts that are recognised by the state of Israel and function as an organ of the state.

Many officials in the Ministry became concerned with the newest statistical data, which indicates that polarisation and division are on the rise in Israel¹. According to several surveys and scholars, one of the main reasons for the rising polarisation in Israel has to do with how religious courts in Israel function².

Israel's legal system is distinctive as it recognises not only its state law but also the customary and religious law of fourteen ethnoreligious communities within the country. This results in the state of Israel granting jurisdiction to courts and tribunals of these communities over personal status matters, which include marriage, divorce, succession, maintenance, and alimony.

To be more precise, religious courts are granted exclusive jurisdiction over matters of marriage and divorce. This means that these courts have sole authority to hear and decide cases related to marriage and divorce within their respective communities. Concurrent jurisdiction with the civil courts is granted to religious courts on all other issues of personal status. This implies that both religious courts and civil courts have the authority to hear and decide cases related to other personal status matters, and individuals have the option to choose which court they wish to approach for such issues. The name of this pluralistic legal system is the *millet* system.

As was mentioned above, some have correlated the rising polarisation in Israel's society to the way the *millet* system functions. We were tasked by the Ministry of Justice to outline the historical context of the *millet* system and summarise its current

¹ Pew Research Center, 'Israel's religiously divided society' (pewresearch.org, 8 March 2016) <<https://www.pewresearch.org/religion/2016/03/08/israels-religiously-divided-society/>> accessed 1 April 2023. See also Judy Maltz, 'First Pew Study in Israel Finds Increasing Polarization Amongst Jews' Haaretz (Tel Aviv, 8 April 2016) <<https://www.haaretz.com/jewish/2016-03-08/ty-article/first-pew-study-in-israel-finds-increasing-polarization-amongst-jews/0000017f-e795-d97e-a37f-f7f5769f0000>> accessed 1 April 2023

² Ibid. See also Yuksel Sezgin, 'The Israeli millet system: Examining legal pluralism through lenses of nation-building and human rights' (2010) 43 IILR 631, 645. See also Yuksel Sezgin, 'A Political Account for legal confrontation between state and society: The case of Israeli legal pluralism' (2004) 32 SLPS 197, 219

scope and the way it functions presently. Additionally, we were assigned to provide a comprehensive and balanced overview of the key legal and philosophical debates between the critics and proponents of the system. Lastly, depending on the findings and conclusions that we would draw - whether the *millet* system is fragmenting Israel's society - we were commissioned with the duty of presenting the Ministry with policy recommendations.

Throughout the research, we encountered a divergence of conflicting and corresponding opinions concerning the reason(s) for which Israel adopted and maintained the *millet* system. We believe that each one of them has a point and therefore in the section that covers this topic (Section 4), we propose a more nuanced theory.

Moreover, while researching the criticism towards the *millet* system, we identified three recurring areas of concern. Two of them rebuke not only the system but more broadly legal pluralism and its 'dark side'³.

Additionally, looking through academic papers and scholarly works, we noticed two things. Firstly, most of those academics and scholars, if not all, are critical towards the system and do not seem to support it and its existence in any way⁴. Secondly, the scholars are predominantly secular.

Because we were tasked with providing a balanced and impartial overview of the matter, we decided to interview (ultra) Orthodox Jewish intellectuals and ask them why they think the *millet* system is necessary and beneficial. The most persuasive arguments that were encountered are included in the paper.

Lastly, after going through everything that was mentioned above, we will pose the question (and attempt to answer) whether the potential polarisation that is caused by the *millet* system is a 'catch-22', a situation from which one cannot escape, or something that can be changed.

This paper will use both doctrinal and empirical methods to analyse the research question. The doctrinal approach will involve summarising and analysing relevant

³ Ruth Kaderi, 'More on Legal Pluralism in Israel' (2000) 23 Tel Aviv U L Rev 559, 570 [Hebrew]

⁴ With the minor exception of the following author (although the paper is also quite critical): Giovanni M Quer, 'Beyond Territorial Protection: Millet and Personal Autonomy as Instruments for (New) Minorities in Europe?' (PhD thesis, University of Trento 2010)

legislation, legal texts, and case law. Additionally, the paper will present and analyse quantitative data from surveys conducted by Pew Research Center, and other researchers and organisations. Finally, the paper will conduct qualitative analysis through interviews.

2. The Millet System In The Past: Historical Context

Ottoman Empire

The *millet* system was first developed during the reign of the Ottoman Empire, which is widely regarded as one of the most tolerant empires of its time, even by historical figures like Voltaire and Locke⁵. The Ottoman rulers instituted a tolerant form of governance for the minorities residing in their domain, offering them group rights and a degree of semi-autonomy based on their religious rights as defined in Muslim scriptures⁶.

Under this system, minorities were given the ability to govern many aspects of their lives, particularly matters of personal status such as marriage and divorce, “which are generally considered central to the collective identity of a minority community”⁷.

Unlike other empires of the era, the Ottoman Empire actively encouraged the preservation of personal identity among minority groups by allowing them to exercise jurisdiction over personal matters through tribunals and courts governed by their own customary laws⁸. This type of pluralistic governance was named the *millet* system.

Nevertheless, some authors are sceptical of this idealistic illustration of the Ottoman *millet* system. They are quick at pointing out that the utopian illustrations of the empire are “undermined by well-documented breakouts of religious violence,

⁵ Ergun Cakal, ‘Pluralism, Tolerance and Control: On the Millet System and the Question of Minorities’ (2020) 27 IJMGR 34, 36

⁶ Ibid

⁷ Maria F Cavalcanti, ‘Muslim Religious Jurisdiction: Neo Millet System in Israel and Greece’ (2020) 11 CLR 143, 146. *See also* Briana N Nirenberg, ‘Regulating Demographics through Regulating Marriage: Israel’s Millet-Based Approach to Personal Status Law and its Ramifications on the Social Hierarchy’ (Master’s thesis, The American University in Cairo 2020), 21

⁸ Cakal (n 5) 37

cleansing, deportations [and] routine segregation and inequality”⁹. Moreover, they argue that the pluralistic *millet* system existed only because it had something else to contribute; tolerance was only a means, not an end¹⁰. The Ottoman Empire was aiming at establishing peace, order and loyalty within its realm¹¹. While this again seems to be noble, it was all in the name of preserving hegemony and power¹².

In the region of Palestine, the Ottoman Empire applied the *millet* system to 11 ethnoreligious groups, which were allowed to govern many aspects of their life, including personal status matters¹³.

British Mandate

From 1917 until 1948 Britain imposed its rule on the region. It adopted the *millet* system with no substantial modifications¹⁴. This kind of pluralistic system was not alien to the British, they used a very similar system in other parts of their empire¹⁵. Like the Ottomans, the British used the system to preserve its hegemony and rule. But as a colonial power, it had two more reasons to adopt it. The first one was to “exclude the subaltern groups from the spoils of power, and deny them the terms of equal membership in the political community”¹⁶. And the second reason was to preserve the racial purity of the hegemony¹⁷.

3. The Israeli Millet System: Legal Framework And Scope

General Overview

⁹ Ibid 36

¹⁰ Ibid 37

¹¹ Ibid 36

¹² Ibid 37

¹³ Sezgin (2010) (n 2) 632

¹⁴ Josh Goodman, ‘Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel’ (2009) 32 HICLR 477, 490. *See also* Cavalcanti (n 7) 153-154

¹⁵ Ibid 485

¹⁶ Sezgin (2010) (n 2) 633

¹⁷ Ibid 636

Following Israel's declaration of independence in 1948 and the departure of the British, the Israeli government enacted the Law and Administration Ordinance, which, like its predecessor (i.e. the British Mandate), adopted the *millet* system¹⁸. Since then, additional ethnoreligious communities have been recognised by the Israeli government, including the Druze Community in 1957, the Evangelical Episcopal Church in 1970, and the Bahai Community in 1971¹⁹. In total, there are currently 14 ethnoreligious communities recognised under the *millet* system in Israel²⁰.

The legal framework and scope of the Israeli *millet* system are complex and multi-layered. The first layer consists of the Palestine Order in Council (1922) which regulates the functioning of Christian courts²¹, and the Law and Administration Ordinance (1948) which serves as the basis of regulation of all other religious courts (Jewish, Muslim and Druze)²². The Jewish, Muslim and Druze courts also have supplementary legislations that stipulate the scope of the courts.

The second and third layers serve as constraints on the scope of the religious courts. The second layer is composed of several civil laws that do not directly address the religious courts but are nevertheless “intended to provide indirect solutions to certain perceived inequities in the religious laws”²³. Finally, some decisions that are taken by the High Court can affect the procedural and substantial application of law in religious courts.

For the purposes of this paper, only the legal framework and scope of the Jewish and Muslim courts will be elaborated.

Jewish Courts

¹⁸ Moussa A Ramadan, ‘Islamic Legal Hybridity and Patriarchal Liberalism in the Shari‘a Courts in Israel’ (2015) 4 JLS 39, 57. *See also* Cavalcanti (n 7) 154

¹⁹ Stephen Goldstein, ‘Israel: A Secular or a Religious State’ (1991) 36 St Louis U LJ 143, 145

²⁰ Sezgin (2010) (n 2) 633

²¹ Goodman (n 14) 490

²² Sezgin (2010) (n 2) 631

²³ Goodman (n 14) 493

Before 1953, Jewish people in Israel could choose to take their legal claims to one of several Jewish communities due to the principle of voluntary association²⁴. However, the enactment of the 1953 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law terminated this plurality, limiting jurisdiction over personal status to only Rabbinical courts that applied the Orthodox interpretation of *halacha* (Jewish law)²⁵. Despite this, the law also reduced the exclusive jurisdiction of rabbinical courts to only matters of marriage and divorce, allowing for concurrent jurisdiction with civil courts regarding all other personal status matters²⁶. The Dayanim Law, passed in 1955, then made Rabbinical judges, called *dayanim*, equal in position to civil judges as state officials²⁷.

Muslim Courts

Initially, there was no official Israeli legislation governing the Muslim (*shari'a*) courts. However, in 1953, the Israeli government enacted the Shari'a Courts Law to delineate the scope and jurisdiction of these courts²⁸. The Qadi Law of 1961, which was subsequently amended in 2002, established the procedure for appointing judges²⁹. Until 2001, Muslim courts had the broadest jurisdiction. However, with the passage of the Law of Family Courts Amendment (No. 5) in 2001, similar to Jewish courts, Shari'a courts now have exclusive jurisdiction only over marriage and divorce matters, while maintaining concurrent jurisdiction with civil courts over all other personal status issues³⁰.

Checks and Balances of the Religious Courts

²⁴ Sezgin (2010) (n 2) 641

²⁵ Ibid

²⁶ Nirenberg (n 7) 39

²⁷ Ibid.

²⁸ Cavalcanti (n 7) 155

²⁹ Ibid. 157. *See also* Quer (n 4) 104

³⁰ Ramadan (n 18) 40. *See also* Sezgin (2010) (n 2) 652. *And* Ido Shahar, 'State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism' (2008) 9 TIL 416, 438. For a more elaborate historical description *see* Cavalcanti (n 7) 155

The remaining two layers of the *millet* system function to constrain and limit the inequalities and discrimination that can arise from the application of religious law³¹. The first layer consists of civil laws that religious courts must consider when making a judicial ruling. For instance, the Women's Equality Rights Law of 1951 aims to address the unequal treatment of women in the application of religious law³². However, there is a disagreement about the effectiveness of these laws and the extent to which judges in religious courts are willing to apply them³³.

The second constraint and third layer of the *millet* system is the High Court. The Court serves as an appellate body and according to the Courts Law (1957) is granted the power to annul religious courts' acts contrary to secular norms³⁴. Moreover, the Court can exercise judicial review and strike down religious laws that conflict with secular values and human rights. This power of judicial review is based on the Basic Law: Human Dignity and Liberty (1992)³⁵ and the *Bavli* case³⁶.

Until the 1980s, the High Court hesitated to review and apply civil and secular law, such as the Women's Equality Rights Law of 1951, to cases involving unequal treatment in religious courts³⁷. However, since the 1990s, the High Court has adopted an opposite stance that has been referred to as a “constitutional revolution”³⁸. As a result, the High Court is now seen by many Israelis as the protector of secularism and human rights.

Criticism Towards the High Court

Nevertheless, the High Court has faced criticism from three different angles. First, although the Court and government have made progress in addressing some inequalities, many fundamental issues remain unresolved. One prominent example is that Jewish women still require their husband's consent to obtain a divorce, which

³¹ Quer (n 4) 102

³² Goodman (n 14) 493. *See also* Ramadan (n 18) 40. *And* Cavalcanti (n 7) 154

³³ *Ibid.* (n 14)

³⁴ Quer (n 4) 108

³⁵ Goodman (n 14) 507. *See also* Quer (n 4) 109-110

³⁶ *Ibid.* (n 14) 507-511

³⁷ Quer (n 4) 108-109

³⁸ Goodman (n 14) 508. *See also* Quer (n 4) 109

contradicts the liberal ideal of personal autonomy³⁹. Second, religious courts, including the Rabbinical courts, have demonstrated a reluctance or outright unwillingness to enforce decisions made by the High Court⁴⁰. Lastly, while the "constitutional revolution" has been applied to Jewish courts, there has been a more lenient approach to *shari'a* courts⁴¹.

It should be mentioned that the role of the High Court will become relevant again in a later section of the paper. Additionally, this section should not be taken as a comprehensive outline of the legal framework of the Israeli *millet* system, it merely offers a brief explanation that will serve as a guiding tool for the following sections.

4. The Rationale Of The Current Millet System

If the reader is familiar with Israeli demographics, they would know that the majority of the Jewish segment of the country has always been secular. Currently, it is roughly 40%⁴². Therefore, one might question the reason for which religious law came to govern a secular majority. This becomes even more bewildering when one takes into account that Israel is a democratic state and that according to several surveys over 60% of Israelis would like to have an alternative civil procedure for marriage and divorce⁴³. The following section will present several theories that attempt to shed light on this conundrum: How come religious law came to govern a reluctant secular majority in a democratic state?

The Status Quo Agreement

³⁹ Sezgin (2010) (n 2) 646

⁴⁰ Goodman (n 14) 511

⁴¹ Ibid. 514

⁴² Pew Research Center (n 1)

⁴³ Sezgin (2010) (n 2) 649

One theory suggests that the *millet* system was adopted by Israel as a result of a compromise made in the 1947 Status Quo Agreement⁴⁴. That year, the United Nations sent a special committee to Palestine to evaluate the situation and determine if both the Jewish and Arab populations could establish their own independent states. The committee planned to interview the local population, including representatives of the Ultra-Orthodox Jewish community. However, the Jewish secular leadership feared that the Jewish Orthodox community's opposition to the establishment of Israel, due to its secular character, would influence the committee's evaluation and make it conclude that the Jewish people were not yet ready to build their own state due to this internal disagreement. In an effort to prevent this, the secular Jewish leadership offered the Orthodox community what later became known as the Status Quo Agreement: "[T]he ultra-Orthodox would agree not to undermine diplomatic efforts to create a Jewish state, and in exchange would receive influence over the Jewish character of that state"⁴⁵. Thus, some authors argue that the *millet* system was only adopted as a result of this compromise

Multicultural Rationale

While the theory mentioned above may explain how a secular Jewish majority came to be governed by religious law, it fails to account for the situation of other minorities. Some scholars argue that the *millet* system was also implemented to allow the Arab population and other minorities to govern matters that were important to their identities, such as personal status. This was done to "reduce a potential source of social conflict"⁴⁶. Additionally, it is worth noting that throughout their history, Jewish people were often a minority in other countries and preferred to have their personal status issues governed by their own institutions. Therefore, it is possible that the Jewish majority adopted the *millet* system out of a sense of empathy and understanding for the plight of minorities.

⁴⁴ Goodman (n 14) 507

⁴⁵ Micah Goodman, *Catch-67: The Left, The Right, And The Legacy Of The Six-Day War* (Yale University Press 2018) 134-135.

⁴⁶ Goodman (n 14) 484

Imperial Rationale

Others have rejected both of the aforementioned theories and instead argue that Israel has adopted the system due to Imperial reasons. They contend that just like the British, the Israeli government desired to exclude the Arab minority from control and power, to preserve Jewish racial ‘purity’, and to divide and rule the minorities⁴⁷.

Nation-Building Rationale

The following theory has been presented by Sezgin and has been furtherly developed in this paper. Sezgin does not deny the role that the 1947 Agreement had in shaping the religious character of the state. However, he argues that the Jewish religious minority lacked political power to keep enforcing the system over the years on a predominantly reluctant secular majority. Therefore, Sezgin states that “[r]eligious courts were retained not [solely] because of a compromise reached in 1947 but [also] as a natural consequence of Israel's ruling ideology”⁴⁸. Through this statement (and other assertions) Sezgin confirms that part of the Israeli rationale for adopting the system resembles that of imperial and colonial regimes⁴⁹. Nevertheless, the author provides some historical context into the exclusionary and imperialistic nature of Israel’s policies. He explains that the Jewish people were dispersed across the world for around two thousand years. When they started regathering in Palestine, the Jewish leadership’s primary objective became to (re)build a nation and to create a uniform Israeli-Jewish identity. To achieve this, the Israeli leadership decided to grant a monopoly to Jewish rabbinical courts over marital affairs⁵⁰. The purposes of it were to prevent Jewish people from intermarrying and to preserve the ‘purity’ of their identity. Hence, the exclusion of the ‘other’ (e.g. Arabs) did not occur in the name of

⁴⁷ Cakal (n 5) 34. See also Nirenberg (n 7) 35

⁴⁸ Sezgin (2010) (n 2) 637-638

⁴⁹ Ibid. 654

⁵⁰ Ibid. 639-641

exclusion itself, as was the case for many imperial regimes, but in the name of inclusion; inclusion of all the Jewish people in Israel. This is not to say that the Israeli rationale for adopting the *millet* system does not have an Imperial character, it simply means that Israel's reasons are much more nuanced.

5. Criticism Of The Millet System

In this section, we will discuss three recurring areas of concern and criticism that have been identified in the literature. The first area of concern directly relates to the title of the paper, as it rebukes the fragmenting and polarising attributes of the system. The remaining two lines of criticism approach the system's flaws from different perspectives. These criticisms not only rebuke the Israeli *millet* system but also highlight the broader shortcomings of a legal pluralistic system.

A. Three Divisions

Arabs and Jews

The authors assert that the *millet* system in Israel has resulted in the fragmentation and polarisation of three segments of society. The first division is between the Jewish and Arab populations. Scholars argue that the Israeli *millet* system has an imperialistic character that forcefully separates the Jewish and non-Jewish, particularly Arab, population⁵¹. While the Israeli government may claim that the system promotes multiculturalism or prevents tensions with the Arab population, critics argue that its true intention is to exclude Arabs from adequate governance in order to maintain control.

⁵¹ Sezgin (2010) (n 2) 640. *See also* Nirenberg (n 7) 48

For instance, until 2001, the shari'a courts had extensive control over personal status matters, surpassing other religious courts⁵². Additionally, the High Court, which is meant to safeguard secular ideals, has been hesitant to overrule judicial decisions by Muslim courts that contradict liberal values⁵³. Again, the authors argue that these actions by the Israeli government are not indicative of benevolence or tolerance, but rather a deliberate effort to exclude the Arab population from adequate governance.

As a result, Jewish individuals enjoy better protection of their individual rights. This furtherly increases the difference in treatment that Jewish and Arab people receive, which exacerbates the division between the populations.

Secular and Orthodox Jews

The second division within Israeli society is one that may come as a surprise - it is among Jewish people themselves, specifically between secular and Orthodox Jews. The extensive surveys that were conducted by the research institution Pew, demonstrate just how polarised are those two groups⁵⁴. In one of the surveys, both groups were asked questions on key public policy issues, and over 80% of their answers were in stark opposition to each other, highlighting their significant disagreements.

Moreover, when asked about the prospect of their child marrying someone from the other group, over 90% of both Orthodox and secular respondents expressed discomfort.

There could be multiple reasons for this polarisation, but Sezgin argues that the *millet* system is one of the fundamental factors. According to him, secular Jews have been forced to have their matrimonial matters governed by religious law for decades, despite being a majority. This situation furtherly deteriorated the relationship between the two groups⁵⁵.

⁵² Ramadan (n 18) 40

⁵³ Goodman (n 14) 514

⁵⁴ Pew Research Center (n 1)

⁵⁵ Sezgin (2010) (n 2) 645

Sezgin finds this situation ironic, as the purported aim of maintaining the Rabbinical courts and the *millet* system was to homogenise the Jewish population, yet it has instead undermined the unity of the Jewish people, according to him⁵⁶.

Division Between Minorities

Lastly, some scholars argue that the *millet* system has been utilised as an imperial divide-and-rule mechanism, leading to conflicts between minority communities in Israel⁵⁷. Specifically, the Muslim and Druze communities are cited as examples. Overall, both communities share a similar faith. Therefore, up until the 1960s, the latter's personal issues were administered by the Muslim courts. However, this changed when the Israeli government recognised the Druze community as a separate community with its own religious courts⁵⁸. Several authors argue that this differentiation between Muslims and Druze is a deliberate attempt to separate the two communities and to “prevent them from forming an overarching Palestinian identity”⁵⁹.

B. The Dark Side Of Legal Pluralism

An Individual Trapped in a Group

Proponents of multiculturalism, tend to point out that tolerance and social cohesion can be achieved by implementing plural legal systems. Moreover, they emphasise the importance of liberal democracies to recognise group rights⁶⁰. While many critics of the Israeli *millet* system would agree with the benefits and importance of bestowing group rights to minorities, they are not reluctant to illustrate the shortcomings of such

⁵⁶ Ibid. 650

⁵⁷ Cakal (n 5) 35

⁵⁸ Quer (n 4) 104

⁵⁹ Sezgin (2010) (n 2) 643. *See also* Nirenberg (n 7) 37

⁶⁰ Zvi Bekerman, ‘Israel: Unsuccessful and Limited Multicultural Education’ (2009) 6 SA-eDUC 132, 133

a system. They argue that Israel is a vivid example of a flawed plural legal system that does not only make group rights reign supreme over individual rights but also a system that makes ethnoreligious courts their only recourse for legal enforcement⁶¹.

As was mentioned above, individuals from Jewish, Muslim, Druze or any of the other 14 recognised ethnoreligious communities do not get to choose whether they want their personal status matters to be administered by their corresponding religious courts. Not only that, many times they do not even get to choose if they want to be included in the group itself, as is most notably the case for Jews. Consequently, individuals are coerced into group inclusion and subjected to the legal and institutional authority of their supposed faith⁶².

Clash of Civilisations

Furthermore, it is worth noting that the law administered in these religious courts is based on religious principles, which may not always align (and often conflict) with liberal values, such as personal autonomy⁶³. Critics have also noted that those who are often adversely affected by religious law are individuals in marginalised societal positions, such as women and children.

For example, Jewish law provides a clear illustration of this issue. A Jewish woman who wants to divorce her husband has to get the latter's consent. This does not apply in the same manner to the husband. Thus, the liberal value of personal autonomy of a woman is superseded by religious law⁶⁴.

6. A Fragment Of Goodness

⁶¹ Cavalcanti (n 7) 147-148

⁶² Sezgin (2010) (n 2) 633. *See also* Nirenberg (n 7) 38

⁶³ Sezgin (2010) (n 2) 644

⁶⁴ *Ibid.* 646

The following section consists of arguments that attempt to illustrate the benefits and necessity of the *millet* system. They were presented by several rabbis and other influential Orthodox Jewish figures who were interviewed for the purposes of this paper. All of them asked to remain anonymous, hence none of the names are mentioned here.

Necessary for Israel's Legitimacy

Most people take for granted the legitimacy of their national claim to live in their state, assuming that their ancestors have resided in the same land for generations. However, the Jewish people and their relationship with Israel present a unique narrative. Despite being physically detached from their ancestral land for nearly 2,000 years, many Jewish people today consider Israel their rightful homeland. This poses challenges as Israel was rebuilt in the mid-20th century, with the presence of another nation, the Palestinians, on the same land⁶⁵.

Consequently, many Israelis feel the need to justify their recent settlement in a land that was already occupied by others⁶⁶. Some argue that the legitimacy of Israel's existence rests solely on the recognition granted by the international community⁶⁷. Others argue that it is based on the Jewish religion, citing the concept of 'The Promised Land'⁶⁸. However, there are more nuanced and academically appealing arguments that also draw on religious beliefs.

After conversing with several prominent rabbis and Orthodox intellectuals, a persuasive argument stood out: the Jewish people's enduring yearning to return to their ancestral land was deeply rooted in their religious beliefs and traditions. This desire to return to their land had become an integral part of their religious identity, and as long as their identity remained intact, so did this longing.

⁶⁵ William Safran, 'The Jewish Diaspora in a Comparative and Theoretical Perspective' (2005) 10 IS 36

⁶⁶ Sorek & Ceobanu, 'Religiosity, National Identity and Legitimacy: Israel as an Extreme Case' (2009) 43 Sociology 477

⁶⁷ Goodman (n 46) 29

⁶⁸ Sorek & Ceobanu (n 63) 477

Historically, this was atypical, as many dispersed nations lost their sense of identity and the yearning to return to their place of origin. This unique circumstance prompted the international community to recognise the legitimacy of Israel's existence and grant the Jewish people the right to rebuild their country in Palestine.

This is where the *millet* system comes into play. As mentioned earlier, some scholars argue that the adoption of Rabbinical courts and the *millet* system by the secular Israeli government was intended to prevent intermarriage and preserve Jewish identity⁶⁹. According to the views expressed by the interviewed figures, Rabbinical courts do not unnecessarily restrict people's autonomy; rather, they play a crucial role in maintaining Jewish identity, which is essential in legitimising Israel's existence.

Numerous academic studies support this compelling argument. Research suggests that intermarriage among Israeli Jewish people is relatively low, and it can be reasonably correlated with the restrictions imposed by Rabbinical courts⁷⁰. Additionally, studies indicate that intermarriage is associated with lower levels of ethnic identity among the offspring of such marriages⁷¹. To put it in different words, children of one Jewish parent and one non-Jewish parent are less likely to identify as Jewish.

To conclude the argument, several figures posit that Jewish identity is intricately tied to the deep-seated desire of the Jewish people to rebuild their homeland. This unbroken sense of identity has been acknowledged by the international community, which has granted the Jewish people the right to establish their homeland. The preservation of Jewish identity through institutions such as Rabbinical courts and the *millet* system, which prevents intermarriage, is crucial in legitimising the existence of Israel and supporting the rightful claim of the Jewish people to the land.

Prevents Further Polarisation

Some of the individuals interviewed have voiced concerns about the potential for increased fragmentation within Israeli society if the system is amended. They have

⁶⁹ Look at Section 4, particularly the subsection named 'Nation-Building Rationale'.

⁷⁰ Nirenberg (n 7) 52

⁷¹ Goldstein & Segall, 'Ethnic Intermarriage and Ethnic Identity' (1985) 17 ACES 60

argued that the Arab population in Israel perceives the government and its institutions as colonial and foreign, and therefore may not wish to be subjected to them. As a result, they believe that allowing the Arab population to self-govern through the *millet* system would be more conducive to maintaining social tranquillity. Similarly, the Jewish Orthodox community may also resist any changes to the system. The interviewed individuals further contend that the *millet* system does not exacerbate polarisation, but rather serves as a preventative measure against further fragmentation. Remarkably, even Sezgin and Goodman⁷², who are critical of the system, seem to concur with this argument, stating that "a symbolic change could potentially fuel and intensify the existing trend towards division and polarisation"⁷³.

7. Catch 22: Can The Millet System Be Escaped?

So what is it, is the *millet* system a fragmenting ideology or an intercultural instrument that prevents further polarisation? By this point, the reader is probably confused. Initially, it seemed like an identifiable problem and an easy solution - the *millet* system polarises Israel's society and it should be abolished, or at the very least modified. However, as the interviewers and several scholars contended, the system contains fragmentation from getting worse and even a small change to it might deteriorate polarisation. On the one hand the *millet* system fragments, but on the other hand it prevents it from getting worse. Does that mean that there is no other way but to maintain the system because it is the lesser of two evils?

One potential solution to the problem is to limit the use of civil courts for marriage and divorce issues to Jewish people only while maintaining the *millet* system for other ethnic and religious groups. According to most surveys the demographic group that resists the system the most is secular Jews, and not Arabs or any of the other minorities⁷⁴. Therefore, Jewish people solely should have the option to go to a civil court for marriage and divorce issues. This might still cause fierce disagreement by

⁷² Goodman (n 14) 484

⁷³ Sezgin (2010) (n 2) 650

⁷⁴ Michael Mitchell, 'Israeli Marriages: More Ottoman Than Jewish' (*Haaretz*, 2 July 2014) <<https://www.haaretz.com/jewish/2014-07-02/ty-article/.premium/israels-ottoman-i-do/0000017f-dbba-df9c-a17f-ffbacc1540000>> accessed 26 April 2023

the Orthodox community but at the very least it will not provoke the Arab population, which will make the resistance more bearable.

However, this solution presents a challenge because it creates different treatments for different groups. The Israeli government and judiciary have been hesitant to intervene with illiberal decisions made by shari'a courts, and this has led to unfair treatment of marginalized groups, such as women⁷⁵. For example, until 2001, shari'a courts had exclusive jurisdiction over maintenance issues, and they awarded significantly lower amounts of alimony and child maintenance than the other courts. This created a different treatment for the Muslim population, which Muslim and Jewish women protested until the situation was amended in 2001 by granting Muslim women the right to go to a civil court for those issues⁷⁶.

As previously stated one of the main reasons for which the *millet* system is criticised is the different treatment that Arab and Jews receive, which exacerbates the division between the populations⁷⁷.

Thus, while this solution may seem good on the surface, in reality, it highlights that there may be no easy escape from the *millet* system. Abolishing it could worsen polarisation while amending it only for certain groups (i.e. Jews) would perpetuate the different treatment that the Jewish and Arab populations receive and eventually, it will also deteriorate fragmentation between the groups.

8. Silent Opposition

Despite the seemingly inescapable deadlock that was described above, many Israelis took it upon themselves to resist their entrapment. The most prevalent form of resistance is marrying abroad, with over 15% of Israelis choosing to do so⁷⁸. This is because the Israeli government recognizes civil ceremonies performed overseas. Nevertheless, it should be noted that if a couple of the same ethnoreligious group,

⁷⁵ Look at Section 3, particularly the subsection named 'Criticism Towards the High Court'. And Section 5, particularly the subsection named 'Arabs and Jews'.

⁷⁶ Sezgin (2010) (n 2) 652-653

⁷⁷ Look at Section 5, particularly the subsection named 'Arabs and Jews'.

⁷⁸ Nirenberg (n 7) 41. *See also* Sezgin (2010) (n 2) 648

such as Jewish, marries abroad, they are still required to have their divorce settled in a Rabbinical court⁷⁹. Other forms of civil resistance include cohabitation or *de facto* marriage, as well as secular marital contracts⁸⁰.

Another front where resistance to the system has been coming from is the High Court. Despite the inability of the Court to rectify certain laws and decisions, as was mentioned above⁸¹, it has been attempting to alter the situation.

One way it has done so is by recognising the validity of civil marriages performed abroad⁸². Additionally, the Court has been attempting to extend rights previously associated with marriages to non-married cohabitants⁸³.

9. Recommendations

After analysing Sections 7 and 8, it can be argued that maintaining the status quo is the most logical recommendation. While the *millet* system has a polarising effect, any amendment to it could be even more disastrous. Despite this, citizens and the judiciary have found tacit and unofficial means to uphold their individual rights and avoid being completely trapped by the system. Although the current situation is far from perfect, it appears to be the best option given the deadlock described above.

However, it seems like the status quo has already been broken. Counter-intuitively, it is not because an amendment to the system has been sought but because the religious political parties have become frustrated with the judicial activism that was described above.

The most recently elected government of Israel sought to reform the judiciary branch. In particular, it sought to gain greater control in the elections of judges and to diminish the power of the High Court to review or throw out laws (i.e. to perform

⁷⁹ Ibid. 43

⁸⁰ Sezgin (2010) (n 2) 648

⁸¹ Look at Section 3, particularly the subsection named 'Criticism Towards the High Court'

⁸² Nirenberg (n 7) 40

⁸³ Ibid. 42. See also Shahar Lifshitz, 'The External Rights of Cohabiting Couples in Israel' (2014) 37 ILR 346

judicial review)⁸⁴. The ultra-Orthodox and Zionist religious political parties, which are part of the governing coalition, were the most fervent supporters of those changes. For a while, they have been frustrated with the active and liberal role that the judiciary has taken with regard to religious laws and decisions made by Rabbinical courts⁸⁵. This led to unprecedented clashes between demonstrators who support and oppose the reform, and some have warned of a possible civil war⁸⁶. Therefore, because the status quo has been broken, some sort of change to the *millet* system is necessary.

The authors of this paper believe that the judiciary's active role in upholding individual rights has been crucial in preventing further frustration by the secular segment, which could have led to a social upheaval sooner. Therefore, empowering the High Court with judicial review seems to be a wise decision. However, public and political concerns have arisen over the undemocratic nature of such empowerment, which led to the current situation. The argument is that judges are not elected officials and therefore they should not rule over policies that were legislated by elected representatives⁸⁷.

As this opinion seems to be prevalent, we recommend facilitating a negotiation between both sides - supporters and opposers of the reform - to produce a draft document that delineates the scope and limits of the power of the High Court to overrule legislation. To make the process more democratic, we suggest holding a referendum on the draft document once a compromise is reached. If two-thirds of Israeli voters vote in favour of the draft, we recommend legislating it and giving it constitutional status to prevent its abolition by future governments.

Therefore, our recommendation concludes that the High Court has a leading role to play when it comes to religious laws and courts and that acceptable and

⁸⁴ Raffi Berg, 'Israel judicial reform: Why is there a crisis?' (*BBC*, 29 April 2023)

<<https://www.bbc.com/news/world-middle-east-65086871>> accessed 1 May 2023

⁸⁵ Haviv R Gur, 'Haredi parties were at forefront of overhaul push. Then they weren't. What changed?' (*The Times of Israel*, 31 March 2023)

<<https://www.timesofisrael.com/haredi-parties-were-at-forefront-of-overhaul-push-then-they-werent-what-changed/>> accessed 1 May 2023

⁸⁶ Bethan McKernan, 'Israeli president warns of civil war as Netanyahu rejects judicial compromise' (*The Guardian*, 16 March 2023)

<<https://www.theguardian.com/world/2023/mar/15/israeli-president-civil-war-is-within-touching-distance>> accessed 1 May 2023

⁸⁷ Goodman (n 14) 526

comprehensive legislation that covers its scope and boundaries should be produced through a negotiation process and a referendum.

10. Conclusion

In conclusion, the purpose of this paper was to examine whether the *millet* system is contributing to the increasing polarisation of Israeli society and to provide recommendations for policy changes if necessary. To achieve this, we provided a historical overview of the *millet* system and presented a summary of the current legal framework in Israel. In addition, we examine various theories explaining why the Israeli government has adopted and maintained the system, and we balanced our discussion by presenting both the main criticisms and support for the millet system.

After analyzing the information, we conclude that the millet system does indeed polarise Israeli society. However, we also acknowledge that attempts to change the system could lead to further fragmentation of Israeli society. Nevertheless, we also highlight some unofficial ways in which individuals have resisted the system and avoided being trapped by it unwillingly. Under these circumstances, we would have recommended leaving the system as it is without any amendments. However, due to current political attempts to implement a judicial reform, we recommend negotiating a draft document that clearly outlines the scope and limits of the High Court to perform a judicial review. This draft should be subject to a referendum, and if a supermajority approves it, the draft should become binding legislation with constitutional status.