

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

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1. Introduction

This paper serves as a policy recommendation that was commissioned by the Ministry of Justice of Israel. Its request was to address the polarising effect of the *millet* system and religious courts, and to provide recommendations if necessary.

Many officials in the Ministry became concerned with the statistical data, which indicates that political and social polarisation is on the rise in Israel¹. According to some 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 laws 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 variety 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, after reviewing the academic literature, two themes emerged. Firstly, most of those 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 interviewed (ultra) Orthodox Jewish intellectuals and asked 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 present our answer to the question of 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 uses both doctrinal and empirical methods to analyse the research question. The doctrinal approach involves summarising and analysing relevant legislation, legal texts, and case law. Additionally, the paper presents and analyses

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)

quantitative data from surveys conducted by Pew Research Center, and other researchers and organisations. Finally, the paper conducts qualitative analysis through interviews.

2. The Millet System In The Past: Historical Context

2.1. 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. In contrast to other empires of the time, the Ottoman Empire actively supported the preservation of minority groups' personal identity. They accomplished this by allowing them to exercise jurisdiction over personal matters through their own customary laws in courts and tribunals⁸. This type of pluralistic governance was named the *millet* system. In the region of Palestine, the Ottoman Empire applied the system to 11 ethnoreligious groups, which were allowed to govern many aspects of their life, including personal status matters⁹.

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

⁹ Sezgin (2010) (n 2) 632

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, cleansing, deportations [and] routine segregation and inequality”¹⁰. Moreover, they argue that the pluralistic *millet* system existed only because it had something else to contribute; tolerance was only a means, not an end¹¹. These scholars suggest that through the *millet* system, the Ottoman Empire sought to establish peace, order and loyalty within its realm as a means of maintaining its control¹². As such, despite its tolerant guise, its underlying purpose was the preservation of hegemony and power¹³.

2.2. British Mandate

From 1917 until 1948 Britain imposed its rule on the region. It adopted the *millet* system with no substantial modifications to how minorities governed their personal status matters¹⁴. 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. However, as a colonial power, it had two additional reasons to adopt it. Firstly, they sought to “exclude the subaltern groups from the spoils of power, and deny them the terms of equal membership in the political community”¹⁶. Secondly, central to the British colonial strategy was the preservation of the racial purity of the hegemony¹⁷.

¹⁰ Cakal (n 5) 36

¹¹ Ibid 37

¹² Ibid 36

¹³ Ibid 37

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. The *millet* system facilitated the second point by permitting religious courts, which prohibit intermarriage, to function.

3. The Israeli Millet System: Legal Framework And Scope

3.1. General Overview

Please note that this section is not intended to provide a comprehensive outline of the legal framework of the Israeli *millet* system. Rather, it aims to offer a concise explanation that will serve as a guide for the following sections.

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.

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

3.2. Jewish Courts

Before 1953, Jewish people in Israel could choose to take their legal claims, related to personal status matters, to one of several Jewish communities - Orthodox, Conservative or Reform²⁴. However, the enactment of the 1953 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law terminated this plurality, limiting jurisdiction over personal status to only Jewish (Rabbinical) courts that applied the Orthodox interpretation of *halacha* (Jewish law)²⁵. Nevertheless, this legislation 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.

3.3. 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 control, extending their exclusive jurisdiction over all personal status matters. 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

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

maintaining concurrent jurisdiction with civil courts over all other personal status issues³⁰.

3.4. Checks and Balances of the Religious Courts

The remaining layers of the *millet* system function to constrain and limit the inequalities and discrimination that can arise from the application of religious law³¹. The second 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

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. *And* Rabea Benhalim, ‘Religious Courts in Secular Jurisdictions: How Jewish and Islamic Courts Adapt to Societal and Legal Norms’ (2019) 84 CLSC 745, 752

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

result, the High Court is now seen by many Israelis as the protector of secularism and human rights.

3.5. Criticism Towards the High Court

Nevertheless, the High Court has faced criticism for the way it deals with religious courts 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 contradicts the liberal ideal of personal autonomy³⁹. Second, religious courts, especially 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.

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, as is currently the case⁴². 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 several surveys have found that 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 did religious law come to govern a reluctant secular majority in a democratic state?

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

4.1. The Status Quo Agreement

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 was concerned that the Orthodox community's opposition to the establishment of Israel, because it was a secular state, could affect the committee's assessment. They worried that this disagreement within the Jewish community could lead the committee to conclude that the Jewish people were not yet prepared to form their own state. 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.

4.2. 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

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. If the reader would like to know more about the religion-state conflict of Israel and the way it struggles with being both a secular and Jewish country, I would refer them to Dan Horowitz & Moshe Lissak, *Trouble in Utopia : The Overburdened Polity of Israel* (State University of New York Press 1989) 51-64

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.

4.3. Imperial Rationale

Others have rejected both of the aforementioned theories and instead argue that Israel has adopted the system for the same imperial reasons that were mentioned above (Section 2.2.). 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.

4.4. Nation-Building Rationale

The following theory has been presented by Sezgin and has been further 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

⁴⁶ Goodman (n 14) 484

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

⁴⁸ Sezgin (2010) (n 2) 637-638

⁴⁹ *Ibid.* 654

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 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, three recurring areas of concern and criticism that have been identified in the literature are discussed. 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.

5.1. Three Divisions

5.1.1. Arabs and Jews

Some 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)

⁵⁰ Ibid. 639-641

populations⁵¹. 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 control⁵².

For instance, until 2001, the *shari'a* courts had extensive control over personal status matters, surpassing other religious courts, which led to discrimination against Arab women⁵³. Additionally, the High Court, which is meant to safeguard secular ideals, has been hesitant to overrule judicial decisions by Muslim courts that contradict liberal values⁵⁴. Again, the authors argue that these actions by the Israeli government are not indicative of religious tolerance, but rather a deliberate effort to exclude the Arab population from adequate secular governance that protects, for instance, men and women equally.

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.

5.1.2. 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 Pew Research Center demonstrate just how polarised are those two groups⁵⁵. 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.

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

⁵² Silvie Fogiel-Bijau, 'Why Won't There Be Civil Marriage Any Time Soon in Israel? Or: Personal Law--The Silenced Issue of the Israeli-Palestinian Conflict' (2004) 6 *Nashim* 28

⁵³ Ramadan (n 18) 40. *See also* Benhalim (n 30) 784. Section 7 elaborates on this matter more.

⁵⁴ Goodman (n 14) 514

⁵⁵ Pew Research Center (n 1)

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 further deteriorated the relationship between the two groups (i.e. Orthodox and secular Jews) ⁵⁶.

5.1.3 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.

5.2. The Dark Side Of Legal Pluralism

5.2.1. An Individual Trapped in a Group

⁵⁶ Sezgin (2010) (n 2) 645. Additionally, Sezgin finds this situation ironic, as the purported aim of maintaining the Rabbinical courts and the *millet* system, according to him, was to homogenise the Jewish population (Section 4.4.), yet it has instead undermined the unity of the Jewish people - p. 650

⁵⁷ Cakal (n 5) 35

⁵⁸ Quer (n 4) 104

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

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 a system.

They argue that Israel is a vivid example of a flawed plural legal system that not only prioritises group rights 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.

5.2.2 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

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

⁶¹ Cavalcanti (n 7) 147-148

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

⁶³ Sezgin (2010) (n 2) 644

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

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.

6.1. 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

⁶⁴ Ibid. 646

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 45) 29

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: Israel's legitimacy to exist rests primarily on the fact that the majority of the Jewish people did not lose their ethnic identity since they have been dispersed across the globe (roughly 2,000 years ago).

The argument begins by stating that ever since Jewish Diaspora, Jews continued to practise their religious belief and traditions⁶⁹. A fundamental part of these religious customs includes praying three times a day to be reunited in the land of Israel as a nation, and many other similar religious practices that symbolise the Jewish people's longing to return to their land⁷⁰. Thus, the desire to go back to Israel derived from a religious belief in Judaism (at least up until the 19th century). Therefore, throughout history, as long as Jews did not lose their ethnic identity, their longing to go back to their land did not cease.

The argument continues by asserting that despite being dispersed across the world for 2,000 years, Jews maintained their ethnic identity which is historically uncommon. This unprecedented event led the international community to recognise the Jewish people's right to rebuild their homeland. Hence, Israel's recognition and legitimacy to exist rests on the fact that the majority of Jews did not lose their ethnic identity, which in turn made them keep longing for Israel until their desire was recognised.

This is where the *millet* system comes into play in this argument. Several of the interviewed figures supported the functioning of the Rabbinical courts because it prohibits and prevents intermarriage. According to them, intermarriage can negatively affect the ethnic identity of Jews. Therefore, they argue that without Rabbinical courts, Jewish people would lose their ethnic identity - the main reason for which their right to rebuild their nation was recognised. In other words, religious courts are necessary for legitimising Israel's existence.

⁶⁸ Sorek & Ceobanu (n 66) 477

⁶⁹ This included marrying and divorcing in their communities under Jewish law. For a more comprehensive overview of the matter, I would refer you to Hasia Diner, *The Oxford Handbook of the Jewish Diaspora* (Oxford Academic 2021)

⁷⁰ Safran (n 65) 36

Numerous academic studies support this argument. Research suggests that intermarriage among Israeli Jewish people is relatively low, and it can be reasonably correlated with the restrictions imposed by Rabbinical courts⁷¹. Additionally, studies indicate that intermarriage is associated with lower levels of ethnic identity among the offspring of such marriages⁷². To put it in different words, children of one Jewish parent and one non-Jewish parent are less likely to identify as Jewish.

6.2. Prevents Further Polarisation

Some of the individuals interviewed voiced concerns about the potential for increased fragmentation within Israeli society if the system is amended. They 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 scholars, such as Sezgin and Goodman⁷³, 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"⁷⁴. In like manner to the interviewed figures, scholars acknowledge the potential for social upheaval among Arab and Orthodox Jewish communities if the system is amended. Additionally, academics recognise that the significant political influence of Orthodox parties has hindered any changes to the system⁷⁵.

⁷¹ Nirenberg (n 7) 52

⁷² Goldstein & Segall, 'Ethnic Intermarriage and Ethnic Identity' (1985) 17 ACES 60. It should be mentioned that Jews are one of the studied ethnic groups of the paper and that the same assertion applies to them: intermarriage negatively affects ethnic identity.

⁷³ Goodman (n 14) 484

⁷⁴ Sezgin (2010) (n 2) 650

⁷⁵ Benhalim (n 30) 776

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

So, 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 interviewees and several scholars contended, the system may actually act to prevent fragmentation from getting worse, with concern that even a small change to it might accelerate 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 as it is 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 minorities⁷⁶. 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 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 marginalised groups, such as women⁷⁷. 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 issues⁷⁸.

⁷⁶ Michael Mitchell, 'Israeli Marriages: More Ottoman Than Jewish' *Haaretz* (Tel-Aviv, 2 July 2014) <<https://www.haaretz.com/jewish/2014-07-02/ty-article/.premium/israels-ottoman-i-do/0000017f-dbba-df9c-a17f-ffbac1540000>> accessed 26 April 2023

⁷⁷ Look at Sections 3.5. and 5.1.1.

⁷⁸ Sezgin (2010) (n 2) 652-653

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 populations⁷⁹. 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 worsen fragmentation between the groups.

Furthermore, it is important to consider the political influence of Orthodox parties when contemplating changes to the system. These parties constitute a significant portion of the current coalition⁸⁰, and as in the past, they are unlikely to remain passive if a proposal to alter the system is put forth⁸¹.

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 so⁸². This is because the Israeli government recognises civil ceremonies performed overseas. Other forms of civil resistance include cohabitation or *de facto* marriage, as well as secular marital contracts⁸³.

Nevertheless, it should be noted that if a couple of the same ethnoreligious group, such as Jewish, marries abroad, they are still required to have their divorce settled in a Rabbinical court. Moreover, intermarriage performed abroad is not recognised in Israel⁸⁴.

⁷⁹ Look at Section 5.1.1.

⁸⁰ Isabel Kershner, 'In Power With Netanyahu, Ultra-Orthodox Parties Chart Israel's Future' *The New York Times* (New York, 9 January 2023) <<https://www.nytimes.com/2023/01/09/world/middleeast/israel-ultra-orthodox-parties.html>> accessed 12 May 2023

⁸¹ Sezgin (2010) (n 2) 649 & 653

⁸² Nirenberg (n 7) 40-41. *See also* Sezgin (2010) (n 2) 648

⁸³ Sezgin (2010) (n 2) 648

⁸⁴ *Ibid.* 43

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 above⁸⁵, it has been attempting to alter the situation through different channels. For example, the High Court motioned to recognise the validity of civil marriages performed abroad⁸⁶. Additionally, the Court has attempted to extend rights previously associated with marriages to non-married cohabitants⁸⁷.

9. Recommendations

Based on the presented facts and research, it is evident that the *millet* system politically and socially polarises Israel's society. Moreover, the system infringes basic human rights by: 1) depriving women of equal rights through the application of religious law; 2) preventing individuals from the liberty to choose who they want to marry by forbidding intermarriage; and 3) restricting one's choice of forum only to one court - the religious court of their supposed faith - for matters of marriage and divorce.

To address these issues, we recommend amending the system by allowing civil courts to have concurrent jurisdiction over marriage and divorce. This would provide individuals with the option to choose which forum and law they want to be subject to, whether secular or religious. However, it is important to note that proponents and critics have expressed concerns about the potential social upheaval that such an amendment may cause. Additionally, Orthodox parties hold significant political power, making it difficult for any legislation seeking to amend the system to pass a parliamentary vote.

Considering these challenges, we suggest focusing on non-legislative recommendations⁸⁸ to address the issues with the *millet* system in Israel. One particularly effective approach is to empower civil society organisations. They can raise awareness of the polarising effect of the system and of the way it undermines

⁸⁵ Look at Section 3.5.

⁸⁶ Nirenberg (n 7) 40

⁸⁷ Ibid. 42. See also Shahar Lifshitz, 'The External Rights of Cohabiting Couples in Israel' (2014) 37 ILR 346

⁸⁸ By 'non-legislative' we mean actions that do not require a parliamentary vote.

human rights. One example of successful civil society activism was the protest by a group of mainly Jewish and Muslim women against the exclusive jurisdiction of *shari'a* courts over all personal status matters of Muslims. As a result of this protest, the Israeli parliament passed an amendment bill that reduced the exclusive jurisdiction of *shari'a* courts to matters of marriage and divorce only⁸⁹. This type of organised activism seems to have triggered the most significant amendment to the system to date. Therefore, we would recommend funding similar organisations after careful choice.

Another recommendation that we would make is related to the current political situation in Israel. 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 judicial review)⁹⁰. 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 courts⁹¹. The call for judicial reform led to clashes between demonstrators who support and oppose the idea, and some have warned of a possible civil war⁹².

As was repeatedly mentioned, the High Court plays a pivotal role in keeping the religious courts in check by preventing decisions and laws that infringe on human rights from taking place. This has helped to maintain social stability and prevent major clashes between the unsatisfied secular majority and the religious establishment. However, if judicial reform were to take place, it could potentially lead to unprecedented upheaval. Therefore, we recommend that the current government carefully consider the potential consequences before pursuing any significant changes to the judiciary system.

⁸⁹ Look at Section 7.

⁹⁰ Raffi Berg, 'Israel judicial reform: Why is there a crisis?' *BBC* (London, 29 April 2023) <<https://www.bbc.com/news/world-middle-east-65086871>> accessed 1 May 2023

⁹¹ Haviv R Gur, 'Haredi parties were at forefront of overhaul push. Then they weren't. What changed?' *The Times of Israel* (Tel-Aviv, 31 March 2023) <<https://www.timesofisrael.com/haredi-parties-were-at-forefront-of-overhaul-push-then-they-werent-what-changed/>> accessed 1 May 2023

⁹² Bethan McKernan, 'Israeli president warns of civil war as Netanyahu rejects judicial compromise' *The Guardian* (London, 16 March 2023) <<https://www.theguardian.com/world/2023/mar/15/israeli-president-civil-war-is-within-touching-distance>> accessed 1 May 2023

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 analysing 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. Furthermore, due to the political influence of Orthodox parties, it is very likely that any such legislative attempt would be blocked. Nonetheless, we also highlight some unofficial ways in which individuals have resisted the system and avoided being trapped by it unwillingly.

Given the evidence that the *millet* system polarises and infringes upon human rights, we would have suggested introducing a civil framework for marriage and divorce that allows individuals to choose their forum and law, either religious or secular. However, considering the political and social resistance, our recommendations are non-legislative in nature. We propose providing funding to civil society organisations that address these issues, as past examples have shown the effectiveness of civil society activism in raising awareness and driving change.

Furthermore, we strongly recommend the current government reconsider its pursuit of judicial reform. The active role of the High Court has successfully prevented any significant clashes between the secular majority and the religious establishment. If the reform were to occur, it could result in an unprecedented social upheaval within Israel.

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