

The Role of Halakhah (Jewish Law) in the Legal System of the State of Israel

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1. The State of Israel is not a theocracy, and the ethos of its legal system is primarily secular and liberal in nature. There are, however, certain areas in which *halakhah* does play an official role in Israeli law. The foremost example is the provision that all marriages and divorces of Jewish citizens of Israel fall within the sole jurisdiction of the Rabbinical Courts. Another well known example is the determination of Jewish identity, which is an important factor in Israel's secular citizenship law. These examples are discussed in sections two and three below.

2. Family Law in Israel

Judicial autonomy in matters of personal status i.e. marriage, divorce and related matters, was granted under Ottoman law to the different religious communities living in what is today the State of Israel, and this arrangement was also adopted by the British Mandatory government. Jurisdiction in matters other than personal status was in the hands of the secular courts system, and was not linked to religious-communal affiliation. The Rabbinical Courts charged with administering family law for Jews in both the Ottoman and the Mandatory periods were staffed by traditional rabbinical scholars, and applied pure *halakhah*.

The legal system which came into existence at the time of the establishment of the State of Israel in 1948 was that of the British Mandate, and, as a result, matters of personal status affecting Jewish citizens of Israel remained in the hands of the Rabbinical Courts. Under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Act, 5713-1953, "matters relating to the marriage and divorce of Jewish citizens or residents of the State of Israel shall be within the sole jurisdiction of the Rabbinical Courts", and the law to be applied in these matters is "the law of the Torah". The sole jurisdiction of the Rabbinical Courts in this area is well-entrenched

in the Israeli legal system, and the *Women's Equal Rights Law*, 5711-1951, specifically excludes matters of marriage and divorce from the principle of equality between the sexes enshrined in this law.

Rabbinical Court decisions are, however, subject to judicial review by secular Israeli courts in relation to jurisdictional disputes, and breaches of natural justice.

Under Jewish law, the only way a woman may be divorced from her husband is by receiving a *get* (bill of divorce) from him. Rabbinical Courts may bring certain forms of pressure to bear upon the husband, and recent legislation permits the withholding of licenses, passports, and credit from recalcitrant husbands, in addition to the option of imprisonment referred to above. At the end of the day, however, if the husband refuses to grant his wife a *get*, she remains legally married to him. Since the wife is ultimately dependent upon her husband for the divorce, it is not difficult for him to use his superior legal position in order to gain a more favourable settlement than he deserves. In some cases, husbands resist all types of pressure to divorce, and cause their wives years of anguish before the *get* is finally granted. A woman who is unable to re-marry because of a halakhic impediment generated by her husband's refusal to give her a *get*, or lack of certainty

regarding his death, is referred to as an *agunah*, and the failure of the halakhic authorities to provide an effective solution for these women is, undoubtedly, a major problem in contemporary Israeli family law.

Other problematic areas of Jewish family law, from the perspective of the secular community at any rate, are the prohibition on marriages between Jews of priestly descent (*kohanim*) and divorcees (or converts), and the ban on marriages between the progeny of incest or maternal adultery - known as *mamzerim* - and other Jews. Secular Israeli couples who are unable to marry as a result of these prohibitions often marry abroad, and upon their return to Israel their married status is recognized, for all non-religious purposes, by secular Israeli law. Their children, however, suffer from the same impediment as far as Jewish marriage inside Israel is concerned, and need a foreign marriage certificate in order to obtain the practical advantages of marital status under Israeli law.

Both the *agunah* issue and the impediments to marriage arising from the laws applying to priests and *mamzerim* are important items in the ongoing discussions in contemporary Israel between religious and secular Jews. Amongst the solutions suggested for the solving of the *agunah* problem is the Talmudic principle that in certain cases, the rabbis are empowered to annul marriages (*hafka 'at kiddushin*). The introduction of a form of civil marriage is the preferred solution for the other problems.

3. Jewish Identity

Under the *Law of Return*, 5710-1950, "every Jew has the right to come into Israel as an immigrant". This law was passed shortly after the establishment of the State of Israel and in the aftermath of the European Holocaust. The intention was to provide every Jew in the world with automatic Israeli

citizenship so that no Jews would ever again be forced to wander the world as stateless persons. In the leading case of *Rufeisen v Minister of the Interior*, H.C. 72/62, P.D. 16, 2442, the Supreme Court ruled that the petitioner, although born to a Jewish mother, and hence, halakhically Jewish, would not be granted citizenship under the *Law of Return*, on the grounds that he had converted to Catholicism during the Second World War, and now stood before the court in the garb of a Carmelite monk with the name of Brother Daniel. The Court held that the *Law of Return* is a secular law, and hence, the definition of term "Jew" is not a halakhic one. It is, in fact, to be defined by non-halakhic criteria i.e. empathy with the history of the Jewish people, and affinity with its religion. On this basis, Brother Daniel could not be recognized as a Jew for purposes of automatic citizenship. The outcome of the case, which occurred not long after the end of World War II, was undoubtedly influenced by the negative view of Israeli society at the time towards both Holocaust apostates and the Catholic Church. The Catholic Church was particularly resented because of its attitude towards the Jews during the Holocaust period.

A few years after the Brother Daniel episode, the Court applied its secular approach to Jewish identity in a case involving an Israeli naval officer who had married a non-Jew, and wished to register his children in the Population Registry as "Israelis without any religious affiliation" (*Shalit v Minister of the Interior*, H.C. 58/68, P.D. 23, 477). Since the children were not born to a Jewish mother, they were not halakhically Jewish. The Court, however, following the Brother Daniel precedent, held that in principle, there would be no legal bar to this type of secular registration. Nevertheless, it was unable to order the Minister to register the Shalit children as secular Israelis, since there was no such category in the *Population Registry Law*, and any change in the law would have to come about as a result of legislation by the Knesset. This decision sparked off a heated public debate between religious and secular Israelis over the issue of Jewish

identity in Israeli law, and in its wake, the *Law of Return* was amended, and a Jew for the purposes of this law was defined as someone "born to a Jewish mother, or converted to Judaism, and who is not the member of another faith" (Sec. 4B). The amendment to the law also provided that the right of a Jew, as defined under section 4B, to automatic citizenship "was to be vested in a child and grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew, and the spouse of a grandchild of a Jew, except for a person who has been a Jew, and has voluntarily changed his religion" (Sec. 4A). This legislation incorporated both the halakhic definition of Jewish identity, and the precedent established in the Brother Daniel case into the enacted law. It also gave expression to the secular belief that the right to automatic citizenship should not be withheld from close family members who are not halakhically Jewish for at least three generations.

The issue of non-orthodoxy conversion to Judaism has been considered by the Supreme Court on a number of occasions. In *Association of Torah Observant Sefardim-Tenuat Shas v Director of the Population Registry* H.C. 264/87, P.D. 40(4) 436, the Court held that a declaration on the part of an immigrant that he or she had been converted to Judaism in the Diaspora, together with an official certificate attesting to that fact, would be sufficient for the purposes of citizenship under the *Law of Return*, and registration in the Population Registry. Once again, the Court followed the secular approach to Jewish identity for citizenship purposes established in its earlier decisions. It also followed the principle of international law according to which certificates in matters of personal status issued by other countries must be accepted at their face value unless they are patently false. This principle also applies to certificates of conversion to Judaism.

Until recently, the underlying assumption in Israeli law was that conversions carried out inside Israel would only be valid if they were approved by the Chief Rabbinate. The

legal basis for this assumption lay in a Mandatory Ordinance dating from 1925 which required the authorization of any conversion by the head of the religious community which the convert was seeking to join. Since the legal heads of the Jewish community are the Chief Rabbis of Israel, it was evident that non-Orthodox conversions inside Israel would not possess any legal validity. This changed, however, with the decision of the Supreme Court in *Pessaro (Goldstein) v Minister of the Interior* H.C. 103 1/93, P.D. 49 (4) 661. In this case, the majority held that the 1925 Ordinance only applied to matters of family law, it did not affect citizenship; hence, the validity of a Reform conversion carried out inside Israel did not turn on the 1925 Ordinance. The Court justified its ruling in terms of statutory interpretation, and the argument that the democratic rights of non-Orthodox Jews would be adversely affected by any other interpretation of the Ordinance, both in relation to their freedom of religion, and in the light of the principle of equal protection before the law. It is worthwhile emphasizing, however, that the Court limited its decision to the scope of the 1925 Ordinance; it did not provide a direct answer to the question of whether a Reform conversion would be recognized by Israeli law in relation to citizenship and registration. This point was made repeatedly and forcefully by the President of the Supreme Court, Barak J., more than once in the course of the decision:

"We have decided that in order to recognise a conversion pursuant to the *Law of Return and the Population Registry Law*, it need not comply with the requirements of the 1925 Ordinance. We are not taking this matter any further. We are not deciding which conversion is valid under these two laws. We are also not deciding whether a Reform conversion is valid pursuant to the *Law of Return*. Hence we have not ordered that the petitioner be recognised as Jewish under the *Law of Return*, and we have not ordered that she should be registered as Jewish in the Population Registry."

The strength of this caveat and its repetition attest to the tension

generated by the debate over the definition of Jewish identity for the purposes of Israeli citizenship and registration. The issue of Jewish identity is fraught with symbolism, and is one of the main flashpoints in the ongoing conflict between the religious and secular populations in the State of Israel. The Supreme Court has often been required to act as an arbiter with regard to the determination of Jewish identity in Israel, and it has never been very comfortable in this role. Clearly, the Court in the *Pessaro* case did not want to make a definitive pronouncement to the effect that Jewish identity for citizenship purposes is a totally secular matter, and chose, therefore, to limit its decision to the clarification of the scope of the 1925 Ordinance.

The Supreme Court's decision was strongly criticized, and the Ne'eman Committee was set up by the Israeli government in 1990 in order to find a way to resolve the conversion issue in relation to citizenship and registration. In its report, the Committee recommended the establishment of an educational institution for the training of candidates for conversion from all the streams of contemporary Judaism. The actual conversion ritual, however, would be performed by a Rabbinical Court consisting of Orthodox rabbis only, and the conversions would be recognized as valid by the Chief Rabbinate. There is halakhic precedent for setting up such special Rabbinical Courts for the purpose of converting candidates of dubious motivation in order to maintain Jewish unity, and to stem the tide of assimilation.

However, the Ne'eman Committee's proposals were not accepted by the Chief Rabbinate, and as a result, the national initiative collapsed. One such conversion institute was established on a private basis in Jerusalem. The struggle for a formula which will accommodate both liberal democracy and fidelity to the halakhah in the area of conversion to Judaism, is one of the focal issues in the contemporary dialogue between Orthodox and non-Orthodox Jews in Israel.

Rabbi Daniel Sinclair will be continuing his theme on Halakhah in the next edition where he will discuss its application in areas other than family law and Jewish identity.

Star Trek into the past

Answers in the next issue



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