National Identity and Religion–State Relations: Israel in Comparative Perspective

GILA STOPLER

I. INTRODUCTION

D IFFERENT STATES HAVE different models of relations between religion and the state. There are diverse reasons why a state chooses to adopt a particular model of religion– state relations, one of which may be the role given to religion in creating and strengthening national identity. Israel is defined as a Jewish and democratic state and the Orthodox Jewish religion is established in the state in several ways.[1] While there is an ongoing debate in Israel on whether its definition as a Jewish state should be understood as referring to the Jewish religion or merely to Jewish nationality, there can be no doubt that the partial establishment of the Orthodox Jewish religion in the state plays an important role in Jewish national identity in Israel.[2] This phenomenon is not unique to Israel. Since religion and nationalism are often closely related, many times religion–state relations play a significant role in a polity's national identity.

  This chapter will explore the connection between national identity and religion–state relations in Israel and will place it in a comparative perspective. It will argue that with respect to national identity religion can serve two functions: first, the *unity function* (an inclusive function) – to unite different individuals or groups under a unitary national identity; and second, the *gatekeeping function* (an exclusionary function) – to make sure that the boundaries of the national group remain clear and to exclude from the group anyone who may dilute or threaten its identity. Next, the chapter will discuss several countries in which religion is a central component of national identity, including Greece, Malaysia and Turkey. It will show how the nexus between national identity and religion finds expression in different religion–state structures, and point to the functions that it serves. Finally, the chapter will describe religion and state relations in Israel, discussing in what ways Israel's chosen model of religion–state relations was expected to aid the strengthening of the Jewish national identity. The chapter will claim that the Israeli model has been partially successful, at best, in achieving both its *unity function* and its

---

[1] D Barak-Erez, 'Religion and the Secular State – An Israeli Case Study' 1–3 www.juridicas.unam.mx/wccl/ponencias/11/329.pdf.
[2] Y Shapira, 'Secular Politicians and the Status of Religion in the State of Israel' in M Mautner et al (eds), *Multiculturalism in a Democratic and Jewish State, The Ariel Rosen-Zvi Memorial Book* (Tel-Aviv, Tel-Aviv University Press, 1998) 663 (in Hebrew).

gatekeeping function and will argue that a major cause for the Israeli model's limited success is the state's lack of control over its own religious establishment.

II. THE ROLE OF RELIGION IN NATIONAL IDENTITY

Prominent writers on nationalism, such as Anderson and Gellner, tend to ignore the role that religion often plays in the creation and preservation of nations.[3] In fact, modern Western discourse has until recently maintained a dichotomy between nationalism as the product of modernization and secularization, and religion as a phenomenon of the past, which is destined to disappear with the triumph of the enlightenment.[4] Nevertheless, a closer examination of the relationship between religion and nationalism shows that religion has played and still plays an important role in many national movements in both the Western and the non-Western world.[5] Moreover, religion continues to play an important role not only in national movements but also in the nation-states that they create and even in the constitutional structure of these states. Thus, even among Western democracies one can find countries such as England, Ireland and Greece, in which the dominant religion, which has played an important role in the creation of the nation, is given some constitutional recognition, from the largely symbolic, as is the case in England, to the more robust as is the case in Greece.[6] Giving constitutional recognition to a national religion can be done in a variety of forms and can serve various functions. I will suggest that two central functions that religion plays in national identity are the *unity function* and the *gatekeeping function*.

A. The Unity Function

Just as with other types of communities, the formation of a national community depends on the creation of a mutual bond around which the community can be united and sustained. Benedict Anderson famously suggested that a nation should be understood as 'an imagined political community'.[7] According to Anderson nations are imagined because their members 'never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion'.[8] Nations are communities because 'regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship'.[9] National communities, according to Anderson, 'are to be distinguished . . . by the style in which they

---

[3] B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, Verso, 1991); E Gellner, *Nations and Nationalism*, 2nd edn (Blackwell, 2006).

[4] P van der Veer and H Lehmann, 'Introduction' in P van der Veer and H Lehmann (eds), *Nation and Religion: Perspectives on Europe and Asia* (Princeton, Princeton University Press, 1999) 1.

[5] See, eg ibid 4; PW Barker, *Religious Nationalism in Modern Europe: If God be for Us* (Oxon, Routledge, 2009).

[6] See SV Monsma and JC Soper, *The Challenge of Pluralism: Church and State in Five Democracies*, 2nd edn (Lanham, Rowman & Littlefield Publishers, 2009) 131 (discussing the largely symbolic constitutional recognition of religion); see section IIIA of this chapter (discussing Greece's hearty constitutional recognition of religion).

[7] Anderson (n 3) 6.

[8] ibid.

[9] ibid 7.

are imagined'.[10] One way of imagining the nation and creating the necessary mutual bond is through a common religion, which can create a sense of comradery between the members of the nation and serve as the basis of national identity.

Ernest Gellner suggests that the concept of the nation, although contingent and elusive, includes two important elements, the cultural and the voluntaristic.[11] According to Gellner, the cultural element suggests that 'two men are of the same nation if and only if they share the same culture, where culture in turn means a system of ideas and signs and associations and ways of behaving and communicating'.[12] The voluntaristic element suggests that 'Two men are of the same nation if and only if they *recognise* each other as belonging to the same nation'.[13] The voluntaristic element is crucial since

> [a] mere category of persons (say, occupants of a given territory, or speakers of a given language, for example) becomes a nation if and when the members of the category firmly recognise certain mutual rights and duties to each other in virtue of their shared membership of it. It is their recognition of each other as fellows of this kind which turns them into a nation, and not the other shared attributes, whatever they might be, which separate that category from non-members.[14]

Thus, common religion can serve to unite its members into a nation, but it will only do so if the co-religionists recognise each other not merely as co-religionists but also as members of a common nation that share mutual rights and duties as members of the nation. As will be further discussed below, in cases where other factors may hinder the creation of a unified national identity, nation-states may look to religion as a means of uniting their potential members and garnering their support, and may even give religion official status and authority in the state in order to do so.

B. The Gatekeeping Function

Nations are founded and preserved not only on the basis of the unity of their members, but also by preserving the difference between those who belong to the nation and those who do not. In this respect national communities resemble religious communities. One way through which religious communities control their membership is through restrictive rules of marriage. It has even been suggested that the function of religious family law for the religious community is akin to the function of citizenship laws for the sovereign state. In both cases the laws serve to demarcate the boundaries of the community and decide who belongs to the community and who is excluded.[15]

State laws that give a monopoly to religious communities over family law, and recognise only religious marriages between community members, may serve the need of religious communities to preserve and demarcate their boundaries and thus may have an important gatekeeping function for the religious communities. At the same time, as will be demonstrated below, in nation-states that wish to demarcate the boundaries of the

---

[10] ibid 6.
[11] Gellner (n 3) 6–7.
[12] ibid 6.
[13] ibid 7.
[14] ibid.
[15] A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, Cambridge University Press, 2001) 45–47.

nation along religious lines, the maintenance of a religious monopoly over family law, at least with respect to the majority religion, has an important gatekeeping function for the national community as well.

However, one must not forget that this manner of preserving community boundaries, both religious and national, may result in violations of the rights of individuals within and outside the community. These violations may include the violation of women's right to equality through the imposition of patriarchal and discriminatory religious laws; the violation of the right to family life through restrictions on inter-religious marriages; and the violation of the right to freedom of conscience and to freedom from religion by the compulsory imposition of religious laws.[16]

III. RELIGION–STATE RELATIONS AND NATIONAL IDENTITY – A COMPARATIVE PERSPECTIVE

A. Greece

The close ties between Greek national identity and the Greek Orthodox religion are officially articulated in the Greek Constitution through the status that it grants to the Eastern Orthodox Religion. Article 3 of the Constitution stipulates that:

> The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ

and Article 16 states that the development of

> national and religious consciousness

through education is a fundamental state objective.[17] These provisions are the basis for the daily prayers in Greek schools and for state financing of the teaching of Orthodoxy in these schools.[18] The interrelationship between the Greek Orthodox Church and Greek national identity goes back to the establishment of the modern Greek state in the 1820s.[19] Prior to the establishment of modern Greece, the Ottoman Empire ruled over the region through its *millet* system which divided the population into groups according to their religion. The Orthodox Church used its relative freedom under the *millet* system in order to teach its members the Greek language and customs and played an important role in the Greek revolution.[20]

During and after the revolution a struggle was waged over the direction in which modern Greek national identity should be developed, between those who favoured the cultivation of a Westernised secular liberal identity and those who favoured promoting a Byzantinist nationalist identity of a Greek Orthodox nation.[21] While Greek political leaders decided to fashion the state along European lines in order to appeal to central powers such as Britain and France, they also realised that Church support would legit-

---

[16] See nn 59–65 below and accompanying text.
[17] 1975 Syntagma [Constitution] Arts 3, 16(2) (Greece).
[18] E Karagiannis, 'Secularism in Context: The Relations between the Greek State and the Church of Greece in Crisis' (2009) 60 *European Journal of Sociology* 133, 146.
[19] CP Danopoulos, 'Church–State Relations, National Identity, and Security in Post-Cold War Greece' (2004) 30 *Journal of the Hellenic Diaspora* 7, 13.
[20] ibid 16–17.
[21] ibid 14.

imise their nation building efforts.[22] Consequently, Greece's dual commitment to Western democracy and to an Eastern Church, which continues to this very day, is reflected in Greek law and society.[23] This duality makes Greece, which has never directly experienced the reformation or the enlightenment, and which is highly homogenous religiously, with around 97 per cent of the population Orthodox Christians, quite different from Western European countries.[24] Thus, the state established Orthodox Christianity as its official religion in order to utilise religion's unifying function, while at the same time subjecting the Church to state control through measures such as appointing the members of the Church's governing body (the Synod) and subjecting all synodal decisions to government approval.[25] Until recently the state enabled the Church to maintain its gatekeeper function by allowing it to retain exclusive control over marriages and divorces, but this changed in 1982 when a socialist government introduced civil marriage after much conflict and debate.[26]

B. Malaysia

Malaysia is a state in which the Muslim religion and the Malay national identity are closely intertwined. Article 3 of the Malaysian Constitution defines Malaysia as an Islamic Federation. It states that:

> Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.[27]

Around 40 per cent of Malaysia's population is non-Muslim.[28] While the country maintains a façade of interracial harmony and religious pluralism, clear preference is given in the Constitution and in federal law to the Malay ethnic group, who are Muslims.[29] The Constitution defines 'Malay' as a person, who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and was born in Malaysia or Singapore, or is the issue of such a person.[30] Because Islam is such an important component of the Malay national identity the state exercises tight control over Islam and the ruling coalition is promoting a relatively moderate form of Islam (Islam Hadhari or civilizational Islam) in order to prevent the spread of more radical forms of Islam.[31]

The Malaysian Constitution guarantees individual religious freedom and the right of every religious group to manage its own religious affairs.[32] However, the Constitution

---

[22] ibid 17.

[23] L Molokotos-Liederman, 'The Greek ID Cards Conflict: A Case Study on Religion and National Identity against the Challenges of Increasing EU Integration and Pluralism' 1 www.faithineurope.org.uk/idcards.pdf; Karagiannis *(n 18) 147*; Danopoulos (n 19).

[24] Karagiannis (n 18) 147.

[25] ibid 149.

[26] Danopoulos (n 19) 18; Molokotos-Liederman (n 23) 2.

[27] Federal Constitution of Malaysia 27 August 1957, Art 3.

[28] FA Noor, 'From Pondok to Parliament: The Role Played by the Religious Schools of Malaysia in the Development of the Pan-Malaysian Islamic Party (PAS)' in FA Noor et al (eds), *Madrasa in Asia: Political Activism and Transnational Linkages* (Amsterdam, Federal Constitution of Malaysia Amsterdam University Press, 2008) 191, 192.

[29] R Hirschl, *Constitutional Theocracy* (Harvard, Harvard University Press, 2010) 128.

[30] Federal Constitution of Malaysia 27 August 1957, Art 160(2).

[31] Hirschl (n 29) 128–29.

[32] Federal Constitution of Malaysia 27 August 1957, Art 11(1)–(3).

includes special provisions for Islam, which both give preference to Muslims and at the same time restrict their behaviour. For example, the Constitution allows state and federal law to restrict

> the propagation of any religious doctrine or belief among persons professing the religion of Islam.[33]

Consequently, it is forbidden to propagate non-Muslim religious doctrines to Muslims, and those wishing to propagate Muslim religious doctrines and beliefs to Muslims must obtain permission from state religious departments.[34] The control over the propagation of Muslim religious doctrines granted to the government in the Constitution has enabled the government, among other things, to clamp down on dissident Muslim organizations and shut down their schools.[35]

In addition to establishing Islam as a state religion and attempting to unite the Malayan nation around the relatively moderate Islam Hadhari, Malaysia uses Islamic personal law as a gatekeeper for the Malayan nation. Thus, personal law in Malaysia clearly distinguishes between Muslims and non-Muslims for the purpose of marriage. While Muslims can only marry Muslims and must do so according to Islamic law, non-Muslims can marry in a civil marriage, irrespective of their religion.[36] Furthermore, if a non-Muslim wishes to marry a Muslim they must convert to Islam before the marriage.[37] In this manner Malaysian law is able to minimise intermarriage between Malays and non-Malays and maintain the distinction between citizens belonging to the Malay nation and citizens who do not, which stands at the core of Malaysia's national identity.

C. Turkey

Unlike Malaysia Turkey is a secular country. When the Republic of Turkey was proclaimed in 1923, religion was banished from the public sphere in order to pave the way for modernization.[38] Hundreds of religious Muslim schools (*medreses*) that were seen as incompatible with modern academic requirements were closed, and the state established compulsory schools that followed a national curriculum devoid of any religious instruction.[39] Secularization was central to the Kemalist[40] modernization project, and various

---

[33] ibid Art 11(4).

[34] AF Abdul Hamid, 'Islamic Education in Malaysia' (RSIS Mono No 18, 2010) 25 www.rsis.edu.sg/publications/monographs/monograph18.pdf.

[35] Eg in 1994 the Malaysian Government banned the Darul Arkam Movement and closed its schools. See ibid 60–63.

[36] See the Malaysia Government's official portal, 'myGovernment', 'Marriage': www.malaysia.gov.my/en/relevant%20topics/society%20and%20life/citizen/family/marriage/pages/marriagemain.aspx.

[37] See The Malaysia Government's official portal, 'myGovernment', 'Marriage Procedures between Muslims and Non-Muslims': www.malaysia.gov.my/en/relevant%20topics/society%20and%20life/citizen/family/marriage/proceduremarriagemuslimandnonmuslim/pages/marriagebetweenmuslimandnonmuslim.aspx.

[38] B Agai, 'Islam and Education in Secular Turkey: State Policies and the Emergence of the Fethullah Gulen Group' in R Hefner and MQ Zaman (eds), *Schooling Islam the Culture and Politics of Modern Education* (Princeton, Princeton University Press, 2007) 149, 150. Nevertheless, the 1924 Constitution stated that Islam was the religion of the Turkish State and while this Article was removed in 1928, the principle of *laicism* (secularism) was inserted into the Constitution only in 1937. L Köker, 'Religion, Education and the Turkish Constitution: A Critical Assessment', *Turkish Review*, 14 October, 2010, 36–45.

[39] Agai (n 38) 150.

[40] Mustafa Kemal Atatürk was the founder of the Republic of Turkey.

Muslim practices such as the pilgrimage to Mecca (*hajj*) were banned by law until 1947. Nevertheless, Islam played an important role in the Kemalist understanding of the Turkish nation due to Islam's importance as the 'unspoken bond' that created the Turkish nation from a multitude of separate ethnic groups including Anatolians, Kurds, Caucasians, Albanians, Bosnians Tartars, etc.[41] Thus, while on the one hand the early Kemalist state repressed Islam, on the other hand it promoted its own interpretation of Islam in order to legitimate its secular nationalism.[42]

The introduction of democracy in 1946 along with the realization that the ban on public expressions of religion is leading many to seek it via channels over which the state has no control, has led to the gradual reintroduction of religion into the public sphere and into the state system of education.[43] Consequently, the notion of laicism, which initially meant a complete ban on Islam, was transformed to mean the control of religious expression by the state, and the following years saw a gradual increase in state-controlled Islamic education.[44] In the 1980s the role of Islam in Turkish society has further strengthened. Islam was portrayed as a national trait of the Turks and as a source of social and moral stability, and obligatory religious courses were introduced in state schools.[45] As a result, perhaps paradoxically, although Turkey is defined in its 1982 Constitution as a secular state,[46] state control over Islamic education and its compulsory introduction into state schools are enshrined in the Constitution, which stipulates that

> education and instruction in religion and ethics shall be conducted under state supervision and control

and

> [i]nstruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools.[47]

Furthermore, the secular state through its Department of Religious Affairs (DIR) controls 70,000 mosques and thousands of Qur'anic courses, and supervises private forms of religious activities.[48] Thus, the state, whose control over religion is so tight that it even distributes the Friday sermons to the mosques around the country, is the most important religious player in Turkey.[49] The Turkish Constitution expressly instructs the DIR to use Islam in order to foster national unity when it stipulates that

> [t]he Department of Religious Affairs . . . shall exercise its duties . . . aiming at national solidarity and integrity.[50]

Accordingly, the DIR promotes a relatively progressive form of Islam, which has been called 'Turkish-Islamic-Synthesis', and which is aimed at undermining Islamic influences

---

[41] Agai (n 38) 151.

[42] UC Sakallioglu, 'Parameters and Strategies of Islam–State Interaction in Republican Turkey' (1996) 28 *International Journal of Middle Eastern Studies* 231, 236; U Azak, *Islam and Secularism in Turkey: Kemalism, Religion and the Nation State* (London, IB Tauris, 2010) 12.

[43] Agai (n 38) 152; see also D Çakmak, 'Pro-Islamic Public Education in Turkey: The Imam-Hatip Schools' (2009) 45 *Middle Eastern Studies* 825, 829.

[44] Agai (n 38) 152.

[45] ibid 152–53; Çakmak (n 43) 833.

[46] Constitution of the Republic of Turkey 7 November 1982, Art 2.

[47] ibid Art 24.

[48] Agai (n 38) 153–54.

[49] Azak (n 42) 12.

[50] Constitution of the Republic of Turkey (n 46) Art 136.

outside of state control and assisting in the project of national homogenization.[51] While Islam performs an important unity function for Turkey's national identity, it is not used as a gatekeeper to preserve the boundaries between Muslims and non-Muslims, and civil marriage is the only legally valid form of marriage in Turkey.[52] The redundancy of religion's gatekeeping function in Turkey is undoubtedly related to the fact that 98 per cent of Turks are Muslims.

IV. RELIGION–STATE RELATIONS AND NATIONAL IDENTITY IN ISRAEL

A. Religion–State Relations in Israel

Israel is defined in its Basic Laws as a Jewish and Democratic state. This definition is relatively new, and was adopted along with the two Basic Laws on human rights – Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. The origins of this definition can be traced to the Israeli Declaration of Independence, which states that Israel is to be a 'Jewish state', but at the same time that it will

> ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.[53]

It is important to note that there is an ongoing and as of yet unsettled debate with regard to the exact meaning of the definition of Israel as a Jewish state in the Basic Laws. While some consider that the definition of Israel as a Jewish state constitutes an establishment of the Jewish religion in the state through the Basic Laws, others argue that the term 'Jewish state' should be understood merely as designating the character of Israel as the home of the Jewish people, where Jews realise their right to self-determination.[54] The persistence of this debate is in itself proof of the extremely fuzzy lines between Jewish national identity and religion in Israel.

The definition of Israel as a 'Jewish state' was enacted in the Basic Laws only during the 1990s. However, the Orthodox Jewish religion, which is represented in Israel by the Zionist Orthodox community and by the ultra-Orthodox community, has been established in the state from its inception in 1948 through laws granting legal status to Orthodox Jewish religious authorities in several areas. The most important area is that of personal status law, which was left to the exclusive control of the religious authorities.[55] In addition, there are several other areas in which the Orthodox Jewish religion is

---

[51] Agai (n 38) pp 152–53, 156.
[52] Constitution of the Republic of Turkey (n 46) Art 174.4.
[53] Declaration of the Establishment of the State of Israel, 1 LSI 7 (1948).
[54] See A Levontin, '"Jewish and Democratic" – Personal Reflections' in JE David (ed), *The State of Israel: Between Judaism and Democracy* (Jerusalem, The Israel Democracy Institute, 2000) 251 (taking a position against interpreting the term Jewish in the Basic Laws to include the Jewish religion). See CF M Alon, 'Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom' (1993)17 *Tel-Aviv University Law Review* 659, 668–70 (in Hebrew), republished in English in A Maoz (ed), *Israel as a Jewish and Democratic State* (Jewish Law Association Studies, 2011) 21 (taking a position supporting the inclusion of the Jewish religion in the term 'Jewish'); R Gavison, *Can Israel be Both Jewish and Democratic? or: Israel between Jewishness and Democracy* (1 January 2011): www.gavison.com/c935-book-can-israel-be-both-jewish-and-democratic-or-israel-between-jewishness-and-democracy.
[55] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, s 1-2.

given preferential status by the state, either through statutes or through administrative decisions, which confer to it state power as well as money. Thus, the state has established a Chief Rabbinate and has given full control over it to Orthodox Judaism.[56] The Chief Rabbinate is a powerful state organ which enjoys large budgets and which controls the religious services given by the state to the Jewish population.[57] Some of the state and municipal institutions established and financed by the state and subject to the religious authority of the Chief Rabbinate are the Rabbinical Courts that deal with matters of marriage and divorce of Jews in Israel, the regional religious councils which deal with the supply of religious services – such as burial (public cemeteries in Israel are overwhelmingly religious), synagogues, *kashrut* (the requirement that food be kosher), etc – to Jews on a regional basis, and the conversion courts which deal with conversion to Judaism.[58]

B. Religious Personal Law's Gatekeeper Function

The most important aspect of the partial establishment of Orthodox Judaism is that all Jews in Israel are subject to Jewish religious personal laws. Members of other recognised religious communities, such as Muslims and various Christian denominations, are also subject to the personal religious laws of their particular religions.[59] The current system of personal laws is essentially a continuation of the Ottoman *millet* system, which was based on the principle of community self-rule, giving each religious community full control over the personal status of its members, regardless of whether they wish to abide by the religious rules and even regardless of whether they consider themselves members of the community.[60] This state of affairs has been maintained by the British Mandate and later by the State of Israel, which until this very day does not have a procedure for civil marriage.

By recognizing only religious marriages conducted by a religious tribunal of a recognised religious community Israeli law in effect prevents people of different religions from marrying in Israel.[61] One of the main reasons for the decision of the Israeli legislature to adopt this statutory scheme was its wish to prevent mixed marriages that would dilute the Jewish community, obscure the boundaries between the Jewish majority and the Arab (Muslim and Christian) minority and threaten Jewish national identity.[62] When introducing the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law in 1953[63] the Deputy Minister for Religious Affairs explained that one of the purposes of granting

---

[56]   Chief Rabbinate of Israel Law, 5740-1980.

[57]   H Lifshitz and G Sapir, 'Jewish Religious Services in Israel – a Normative and Administrative Assessment in Preparation for Reform' (2006) 23 *Bar Ilan Law Studies* 147–56.

[58]   Jewish Religious Services Law (Consolidated Version), 5731-1971.

[59]   The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law. See King's Order in Council, 1922, sign 51(1). The detailed authority of the Jewish Rabbinical Courts is set out in the Rabbinical Courts Jurisdiction Law (n 55). The detailed authority for the Muslim Religious Courts can still be found in the King's Order in Council, 1922, sign 52.

[60]   R Halperin-Kaddari, *Women in Israel – A State of Their Own* (Philadelphia, Penn Press, 2004) 227–28.

[61]   King's Order in Council, 1922, sign 51; Rabbinical Courts Jurisdiction Law (n 55).

[62]   S Fogiel-Bijaoui, 'Why Won't There be Civil Marriage Any Time Soon in Israel?' (2003) 6 *Nashim: Journal of Jewish Women's Studies & Gender Issues* 28–34.

[63]   n 55 above.

legal recognition exclusively to religious marriages was to exclude the possibility of mixed marriages that might result in the conversion of Jews to other faiths.[64] Similarly, when it became known that the Muslim Sharia Courts in Israel were willing to marry Muslim men to Jewish women, the Ministry of Religious Affairs has instructed the Sharia Courts to refrain from conducting such marriages.[65]

Has the use of Orthodox Jewish personal law as a gatekeeper for the Jewish nation been successful? On the one hand the number of interreligious marriages and especially of interreligious marriages between Jews and Arab Muslims or Christians in Israel is very low. Thus, unlike Jews outside Israel whose interreligious marriage rates are often high, the rate of interreligious marriages of Jews in Israel is less than five per cent.[66] It is likely that the lack of civil marriages in Israel has contributed to the dearth of inter-religious marriages. Nevertheless, it is important to note that Israeli law does recognise civil marriages that have been held abroad, and although more than 10 per cent of Israeli couples marry civilly abroad, the number of interreligious marriages remains small.[67] The fact that more than 10 per cent of the couples shun religious marriage and marry abroad is in itself proof that the use of Orthodox Jewish personal law as the gatekeeper for the Jewish nation has been only partially successful. A major reason for the Orthodox religious law's limited success as a gatekeeper is the human rights violations that occur as a result of its imposition.[68] One obvious violation is the violation of the right to freedom of conscience and belief of all those who do not wish to marry in a Jewish Orthodox religious ceremony.[69] Many Jews are not religious and do not want to marry in a religious ceremony. In addition, within Judaism there are different streams, including for example Reform and Conservative Judaism, whose members wish to marry in ceremonies conducted by their own Rabbis, according to their traditions. Because Israeli law grants the power to marry Jewish couples exclusively to Orthodox and ultra-Orthodox Rabbis anyone who wants to marry in a Reform or Conservative ceremony and have her marriage recognised by the state is denied that right.

Furthermore, while allowing only religious marriages restricts the rights of both men and women, it has a particularly severe impact on women's equality rights. This is because the Jewish Orthodox personal laws as applied by Israeli Rabbinical Courts are highly patriarchal and give clear preference to men over women in most matters pertaining to the marriage relationship, especially the resolution of the marriage.[70] Moreover,

---

[64] Z Triger, 'There is a State for Love: Marriage and Divorce between Jews in Israel' in O ben Naftali and H Nave (eds), *Trials of Love* (Tel-Aviv, Ramot, 2005) 173–226 (in Hebrew).

[65] P Shiffman, 'Civil or Sacred: Marriage and Divorce Alternatives in Israel – A Necessary and Feasible Change' (ACRI, 2001): www.acri.org.il/he/wp-content/uploads/2011/07/kadat-o-kadin.pdf, n 16 and accompanying text (in Hebrew). It is interesting to note that although according to Islam, the Sharia Courts can marry Muslim men to non-Muslim women, they cannot marry Muslim women to non-Muslim men. This is presumably because women will eventually convert to men's religion, and, thus, become non-Muslim.

[66] Z Triger, 'Love and Prejudice: On the Paradox of the Phenomenon of Interfaith Marriages in Israel' in D Barak-Erez et al (eds), *Readings in Law, Gender, and Feminism* (New York, Oceana Publications Inc, 2007) 733, 753–54 (in Hebrew).

[67] See Israel Central Bureau of Statistics (CBS) data and compare the numbers of all marriages registered in Israel with the number of Israelis married abroad. See CBS websites: www.cbs.gov.il/www/population/marrige_divorce/luach1.pdf and www.cbs.gov.il/www/population/marrige_divorce/marriage_all.pdf.

[68] This claim holds true not just for Israel but for any country that imposes religious obligations on a population which contains a considerable number of people who are unwilling to accept such impositions. This segment of the population will try to find ways to by-pass these impositions.

[69] See, eg F Raday, 'On Equality' in F Raday et al (eds), *Women's Status in Israeli Law and Society* (Jerusalem, Schocken, 1995) 241 (in Hebrew).

[70] Halperin-Kaddari, *Women in Israel* (2004) (n 60) 233–39.

the subordination of women within the marriage has far-reaching effects on their ability to achieve equality in all areas of life.[71] While partial attempts have been made to ameliorate this situation by means such as the establishment of civil family courts, which have parallel jurisdiction to religious courts in matters that do not pertain directly to marriage and divorce, these attempts do not weaken the hold that Orthodox Judaism has on marriage and divorce themselves.[72]

The use of Orthodox Jewish personal law as a gatekeeper for the Jewish nation leads many Jews to reject the option of marrying in Israel and to criticise the state for the human rights violations that the Orthodox monopoly creates. However, an even more serious problem for the state in its attempt to use Orthodox Judaism as gatekeeper for the Jewish nation is the fact that the strictness of Orthodox Jewish precepts prevents many people whom the state has an interest in integrating into the Jewish nation from being able to marry in Israel. During the 1990s the state has brought hundreds of thousands of Jews and people of Jewish descent from the former Soviet Union to Israel under the Israeli Law of Return,[73] and has taken numerous steps since then in order to integrate them into the Jewish community for the explicit purpose of strengthening the Jewish majority in Israel and the Jewish nation. Contrary to the intentions of the state, the control of Orthodox Judaism over marriages of Jews in Israel is preventing a vast majority of these new immigrants from marrying other Jews, and even each other, and from fully integrating into the community.[74] Thus, from the perspective of the state the use of Orthodox Judaism as a gatekeeper for the Jewish nation has backfired.

It is worth noting that the Law of Return itself could arguably be seen as an example of the use of religion as a gatekeeper for the nation, since it defines its beneficiaries in relation to their Jewishness and grants only Jews the right to immigrate to Israel. However, unlike personal status law, which was entrusted to the Orthodox religious establishment and given a strictly Orthodox interpretation, the Law of Return, which makes only a partial use of the religious definition of who is a Jew, was never entrusted to the Orthodox establishment or given a strictly Orthodox interpretation. It is precisely the discrepancy between the definition of a Jew under the Law of Return and the definition of a Jew under Orthodox religious law that has been the cause of the inability of so many new immigrants, who were brought to Israel by the state, to marry within its borders.[75]

C. Religious Establishment and the Unity Function

The Zionist movement that struggled for the establishment of the State of Israel was a national secular movement, led by Eastern European secular Jews who were staunchly opposed to the traditional religious leadership of Eastern European Jewish communities and aspired to create in Israel a modern national and secular Jewish state.[76] Nevertheless,

---

[71] ibid 239–40.
[72] ibid 228–29, 233–35.
[73] Law of Return, 5710-1950 (hereinafter: Law of Return).
[74] Y Sheleg, 'Not Halakhically Jewish: The Dilemma of non-Jewish Immigrants in Israel' (Policy Paper 51, Jerusalem, The Israel Democracy Institute, 2004) 43–44 (in Hebrew).
[75] A Yakobson, 'Joining the Jewish People: Non-Jewish Immigrants from the Former USSR, Israeli Identity and Jewish Peoplehood' (2010) 43 *Israel Law Review* 218, 219–20, 235–36.
[76] Shapira, 'Secular Politicians' (1998) (n 2) 663–65.

the leaders of the Zionist movement, who later became the leaders of the new state, decided to partially establish Orthodox Judaism in the state. One historical explanation to this decision revolves around the Zionist leaders' need to get the support of Orthodox religious factions in the struggle to establish the state. In order to secure their support the secular Zionist leaders have come to an agreement with the Orthodox factions which is known as the 'Status Quo' and which outlined in general terms what later became the contours of the partial establishment of the Orthodox Jewish religion in the new state.[77] A second explanation for the partial establishment of Orthodox Judaism was the secular Zionist regime's need to enhance the legitimacy of the Jewish nation-state in the eyes of its Jewish citizens and of diaspora Jews, who were thought of as potential future citizens, by maintaining a connection with the Jewish past.[78] Thus, secular national leaders, and especially the head of the Zionist movement and Israel's first Prime Minister, David Ben-Gurion, decided to use the Orthodox Jewish religion as a legitimating and unifying force. They believed that in due time, after the establishment of the state, the religious element of Jewishness, which was initially used to buttress the emerging national element of Jewishness, would gradually disappear and be replaced by a fully-fledged Jewish nationalism.[79] This assumption was closely related to the assumption that Orthodox Judaism was in itself in a gradual process of disintegration as an inevitable result of modernity, and that consequently no harm could be done by acceding to the demands of Orthodox religious leaders.[80]

Contrary to Ben-Gurion's expectations, not only has Orthodox Judaism not disappeared, but with the help of generous state funding, of its control over the religious establishment, and of its increasing political power, Jewish Orthodoxy and in particular its radical ultra-Orthodox branch, has experienced an unprecedented revival and expansion in Israel.[81] However, far from promoting Jewish national unity, the existence of an extensive religious establishment in Israel and the continued exclusive Orthodox and ultra-Orthodox control over it, have been main causes for a deepening divide within Israeli Jewish society, which has come to be known as the religious–secular divide.[82] In recent years the increasing radicalization of those controlling the religious establishment, and especially of the ultra-Orthodox, has put unprecedented pressure on Jewish national unity within Israel as well as on the relations between Israel and more liberal diaspora Jews, particularly those from the Reform and Conservative streams of Judaism. Due to lack of space I will focus only on one manifestation of this problem, which exposes the depth of the divide, not only between 'religious' Jews (ie Orthodox and ultra-Orthodox) and 'secular' Jews (who also include Reform, Conservative and some modern-Orthodox), but also between the Jewish nation-state and its own religious establishment.[83]

---

[77] D Barak-Erez, 'Law and Religion under the Status Quo Model: Between Past Compromises and Constant Change' (2009) 30 *Cardozo Law Review* 2495, 2496–97.

[78] Shapira (n 2).

[79] Z Zameret, 'Yes to the Jewish State, No to a Clericalist State: The Mapai Leadership and its Attitude to Religion and Religious Jews' in M Bar-on and Z Zameret (eds), *On Both Sides of the Bridge: Religion and State in the Early Years of Israel* (Jerusalem, Yad Ben Zvi, 2002) 175, 177, 197–98 (in Hebrew).

[80] ibid 198.

[81] G Gorenberg, *The Unmaking of Israel* (HarperCollins, 2011) 165–91.

[82] See, eg H Eden et al, *Being Citizens in Israel: A Jewish and Democratic State* (Tel-Aviv, Ma'alot, 2001) 299–316 (in Hebrew). This is an official high school citizenship textbook, which dedicates almost 20 pages to describing this divide and its causes, as a major internal divide within Jewish society.

[83] In discussing the Jewish nation-state, I am referring to Israel's civil state institutions, such as the government, the Knesset (the Israeli Parliament) and the Supreme Court.

As already mentioned in the previous section, during the 1990s Israel has brought hundreds of thousands of Jews and people of Jewish descent from the former Soviet Union for the express purpose of strengthening the Jewish nation by increasing the Jewish majority. Because of the strong relationship between the Jewish religion and Jewish national identity the state has from the onset viewed it as an important national interest to help those immigrants who wish to do so to convert to Judaism. Since the Jewish Orthodox conversion process in Israel is protracted and complicated the state has attempted to facilitate the process by establishing Special Conversion Courts, which although staffed by Orthodox Rabbis and following Orthodox practice, were at the same time expected to be committed to the national mission of assisting the new immigrants who wish to convert. However, these courts turned out to be of very little use to those wishing to convert. Faithful to strict interpretations of Orthodox conversion requirements these courts have been very slow in approving conversions and in particular have been rejecting many candidates for conversion on the basis of their alleged failure to commit to observing Jewish religious commandments.[84] While one could argue that religious courts should be free to apply their own understanding of religious law, it is important to note two things. First, this strict interpretation of Orthodox Jewish religion is not the exclusive interpretation and the official stance of the courts as published by the government is that a declaration of intent to observe Jewish religious commandments is sufficient.[85] Second, and perhaps more importantly for our purposes, the failure of these state appointed religious courts to follow government policy, and to assist immigrants who wish to convert into Judaism and facilitate their inclusion in the Jewish nation, is a stark example of the paradoxical nature of the Israeli attempt to use the establishment of religion as a means for advancing national unity.

Furthermore, the paradox does not stop here. Despite the fact that the Special Conversion Courts are the official state organs in charge of conversion, the Rabbinical Courts, which have exclusive jurisdiction on matters of marriage and divorce, and are controlled by ultra-Orthodox Rabbis, have several years ago decided that the conversions conducted by these courts were religiously invalid and have pronounced them retroactively void.[86] While this does not affect the validity of the conversions in the eyes of the civil authorities of the state, it does have crucial implications in all realms governed by religious law and especially with respect to the status of the converts' marriages and for the status of their children. Thus, the Rabbinical Court's declaration that these conversions are retroactively void leads to the retroactive annulment of the converts' marriages to Jewish spouses (since under religious law Jews cannot marry non-Jews) and, in cases where the converts are women, to the annulment of their children's status as Jews (since the children have not been born to a Jewish mother). Recently, the Israeli Supreme Court published its decision

---

[84] See, eg R Mendel, 'Through the Agony of Conversion. I don't want to be Jewish Anymore', *Ynet,* 20 March 2012: www.ynet.co.il/articles/0,7340,l-3863646,00.html (in Hebrew) and the statistics brought there, as well as ITIM (Organization for Resources and Advocacy for Jewish Life), 2012 Conversion Report page, itim.org.il/_uploads/dbsattachedfiles/doch_giyur_2012.pdf (in Hebrew).

[85] The state's position on the issue can be found on the Israeli Government's website – which provides information for potential converts. See 'Israel Citizenship Guide': www.gov.il/firstgov/topnav/situations/spopulationsguides/ipnationality/ipgiur (in Hebrew). On the various religious opinions in this debate, see A Adrei, 'Are We Not Responsible for Them? – More on the Conversion Debate' (2000) 24 *Akdamot* 178 (in Hebrew).

[86] HCJ 5079/08 *Jane Doe v Rabbinical Court Judge, Rabbi Sherman* 2-3 (25 April 2012), Nevo Legal Database (by subscription) (in Hebrew).

in the case of two women whose conversion was retroactively declared void by the Rabbinical Courts.[87] After the women's appeal to the Supreme Court the Rabbinical Courts have reconsidered the women's individual cases and have decided that their conversions were not void. The Supreme Court relied on this change in the Rabbinical Courts' position in order to reject the petitioners' request to issue an order declaring that the Rabbinical Courts have no authority to question a convert's conversion.[88] The Supreme Court's refusal to issue such a declaration is unfortunate, because it leaves Rabbinical Courts with the discretion to retroactively declare conversions void in the future, thereby violating the basic rights of the converts and undermining the state's attempt to facilitate conversions.

V. CONCLUSION

As the Israeli example clearly demonstrates, using the establishment of religion as a means of facilitating national unity is a dangerous gamble, and the deeper the establishment, and the more the state relies on religion as a gatekeeper and/or as a unifying factor, the greater is the risk. Ben-Gurion has famously confided to the renowned Jewish philosopher Yeshayahu Leibowitz, who was a vociferous advocate of the separation of religion and state, that he (Ben-Gurion) established religion in the state so that the state could control religion.[89] Having come from a strong collectivist Eastern European background, and not having been exposed to enlightenment liberalism, Ben-Gurion and other Zionist leaders of that time could not have anticipated the effects of the unhealthy combination of thick religious establishment and liberal ideals which is the marker of Israel's religion and state relations for the past decades. In a bizarre twist on the liberal ideal of religious freedom the Israeli state, including its Supreme Court, has ended up respecting the freedom of religion of the ultra-Orthodox and Orthodox judges staffing its state religious tribunals much more than it respects the religious freedom of most of its citizens, and has consequently lost control over its own religious establishment. Putting aside for a moment the serious rights violations that a thick establishment of religion in the state can cause, and which deserve separate treatment, the comparative cases discussed in this chapter, and especially the cases of Malaysia and Turkey, reveal an awareness on the part of both these states, of an important truth that Ben-Gurion identified but which the State of Israel failed to implement, which is that tight state control over a powerful national religion is a prerequisite if a state intends to use it to promote its national interests. Perhaps paradoxically, such state control, illiberal though it may be, can be more conducive to promoting a moderate form of national religion than an allegedly liberal defence of the religious freedom of those who control the religious establishment.

---

[87] ibid.
[88] ibid.
[89] Y Leibowitz, 'Separation of Religion and State – Summary and Prospects' (1960) *Beterem* tpeople.co.il/leibowitz/leibarticles.asp?id=8 (in Hebrew).