

Pepperdine Law Review

Volume 41

Issue 5 *Religious Law in the 21st Century*

Article 12

5-15-2014

“A Jewish And Democratic State:” Reflections on the Fragility of Israeli Secularism

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Recommended Citation

Zvi Triger “A Jewish And Democratic State:” *Reflections on the Fragility of Israeli Secularism*, 41 Pepp. L. Rev. 1091 (2013)

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“A Jewish And Democratic State:” Reflections on the Fragility of Israeli Secularism

Zvi Triger*

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I. INTRODUCTION

While Israel self-defines itself as “a Jewish and democratic State,”¹ the Israeli laws that pertain to the most intimate of choices—the choice of a life partner—are ancient religious laws and not laws that were enacted in a democratic process.² The only way to get married in Israel is in a religious ceremony according to one’s religion.³ The determination of a person’s religion, as will be discussed below, is also under the sole jurisdiction of

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1. Basic Law: Human Dignity and Liberty § 1a, 5752-1992, SH No. 1391 p. 150, as amended by SH No. 1454 p. 90 (Isr.), translation available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Mar. 7, 2014).

2. Isaac S. Shiloh, *Marriage and Divorce in Israel*, 5 ISR. L. REV. 479, 479 (1970) (distinguishing Israel’s “ramified system of religious tribunals for the administration [of marriage]” from the secular marriage laws of European legal systems).

3. *Id.* (“[N]early all [must] achieve either marital bliss or, if necessary, the happiness resulting from the dissolution of a miserable marriage in the manner sanctioned by the authorities of their own religious denomination.”).

religious tribunals according to religious law.⁴

This regime creates numerous problems from a secular point of view, three of which will be discussed in this Essay. First, religious affiliation is not a matter of self-definition, nor is it a matter of determination by secular state law. It is determined according to ancient religious laws and the secular state therefore has no way of altering or adapting them to our time. Second, Israelis have apparently a very narrow right to freedom from religion.⁵ Secular Israelis, whether Jews, Muslims, or Christians, who do not wish to marry in a religious ceremony or to have a religious divorce have no civil procedure or ceremony available in Israel.⁶ They must travel abroad and get married in a country that allows non-citizens to get married on its territory.⁷ Third, Israeli citizens who wish to get married in Israel are limited to choose only partners from their own religion, since most religions regard interfaith marriages as void.⁸

After briefly introducing the roots of the religious monopoly over personal status issues in Israel, this Essay will discuss these three limitations on the “democratic” part in Israel’s self-definition and the impact they have on Israeli secularism.

II. THE ORIGINS OF THE RELIGIOUS MONOPOLY OVER PERSONAL STATUS ISSUES IN ISRAEL

The existing religious monopoly in Israel over personal status issues originated during the Ottoman Empire’s rule over Palestine.⁹ During the

4. See generally Pinhas Shifman, *Religious Affiliation in Israeli Interreligious Law*, 15 ISR. L. REV. 1 (1980).

5. See generally Zvi Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 ISR. STUD. REV. 1 (2012) [hereinafter Triger, *Freedom from Religion in Israel*].

6. *Id.* at 5.

7. *Id.*

8. See *id.* at 9 (“Judaism, Islam, and other religions impose restrictions on marriage between people of different faiths and, in many cases, even regard this kind of marriage as void.”). A narrow exception to this principle exists in the case of Islam, which recognizes the marriage of a Muslim man with a non-Muslim woman under certain circumstances (but not vice versa). See, e.g., Alex B. Leeman, Note, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 IND. L.J. 743, 755–59 (2009).

9. See ABIGAIL JACOBSON, *FROM EMPIRE TO EMPIRE: JERUSALEM BETWEEN OTTOMAN AND BRITISH RULE* 9–10 (2011).

empire's four-century rule, the Ottomans gave the various religious communities throughout the empire almost full autonomy concerning family issues.¹⁰ Family matters were dealt with within the communities' and tribes' religious tribunals according to their own religious laws.¹¹ When the British occupied Palestine in 1917, they left the autonomous family law systems in place.¹² The British Mandate Government that ruled in Palestine between July 24, 1922 and May 15, 1948¹³ continued the Ottoman policy with regard to family issues without any significant changes.¹⁴

When the State of Israel was founded, the Israeli legislature preserved this system.¹⁵ While some matters of personal status were removed from the religious tribunals' jurisdiction and became subject to secular law only,¹⁶

10. *See id.*

11. *See* M. Chigier, *The Rabbinical Courts in the State of Israel*, 2 ISR. L. REV. 147, 147–48 (1967). This policy was considered at the time to be highly progressive. Louisa Culleton, *Armenian Rights in the Ottoman Empire*, 2004 UCL JURISPRUDENCE REV. 144, 155 (2004) (noting the liberal quality of the Ottoman *millet* system and explaining that “it was in fact a very progressive system for its time”). Today, some might view this policy as an expression of a multi-cultural sensitivity, yet the Ottomans most likely implemented it based on their own political reasons rather than sensitivity to the other. *But cf. id.* (“The objective of the *millet* system was . . . simply to protect the non-Muslim minorities from the Muslim-majority. . . . It was actually to protect individuals as members of a national community against possible illiberal religious laws of a religion that was not theirs.”). Interestingly, many colonial regimes tend to adopt such policies. *See* Carmel Shalev, *Freedom of Marriage and Cohabitation (Cohabitation and Marriage Outside the Religious Law) in WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY* 459, 464 (Frances Raday, Carmel Shalev and Michal Liban-Kooby eds., 1995) (Hebrew).

12. *See, e.g.*, Daphne Tsimhoni, *The Status of the Arab Christians Under the British Mandate in Palestine*, 20 MIDDLE E. STUD. 166, 166–69 (1984) (detailing the preservation of the *millet* system under the British Mandate).

13. S. Shepard Jones, *The Status of Jerusalem: Some National and International Aspects*, 33 LAW & CONTEMP. PROBS. 169, 176 (1968).

14. *See, e.g.*, Tsimhoni, *supra* note 12, at 166–69. From its occupation by Britain in 1917 until the establishment of the British Mandate by the League of Nations, Palestine was governed by a British military administration. *See generally* Yair Wallach, *Creating a Country Through Currency and Stamps: State Symbols and Nation-Building in British-Ruled Palestine*, 17 NATIONS & NATIONALISM 129 (2011). All in all, the British rule in Palestine lasted thirty-one years.

15. Law and Administration Ordinance, No.1 of 5708-1948, 1 LSI 7 (1948) (Isr.). “The Ordinance was enacted on 10th Iyar, 5708 (May 19, 1948), and published in the *Official Gazette*, No. 2 of the 12th Iyar, 5708 (May 21, 1948).” Triger, *Freedom from Religion in Israel*, *supra* note 5, at 15 n.3.

16. *See* Ariel Rosen-Zvi, *Family and Inheritance Law*, in INTRODUCTION TO THE LAW OF ISRAEL 75, 76-77 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). Some examples of this include matters of communal property, successions, wills and legacies, and the administration of property belonging to absent people. *Id.*

matters of marriage and divorce remained subject to religious laws.¹⁷ As the late Israeli family law scholar Ariel Rosen-Zvi put it, “[i]n the area of family law, Israel’s legal system is characterized by a laminated structure of religious laws, territorial legislation unique to family law, judge-made law grafted onto religious laws and general, civil and criminal laws.”¹⁸

Perhaps one of the most peculiar implications of this hybrid system is the criminal law’s response to polygamy. While polygamy is prohibited by law,¹⁹ there is a religious exemption from criminal liability for bigamous men who marry an additional wife without divorcing the first one pursuant to a religious tribunal’s permission.²⁰

Another consequence of the religious monopoly over marriage and divorce is related to women’s status. All major religions are patriarchal, and, therefore, all religious family laws discriminate against women.²¹ While the Declaration of Independence promises gender equality,²² the Israeli legislature has made sure that the realms governed by religious law will remain exempt from this requirement, as explained below.²³

The constitutional regime in Israel is comprised of the Declaration of

17. *Id.* at 75.

18. *Id.*

19. Josh Goodman, *Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel*, 32 HASTINGS INT’L & COMP. L. REV. 477, 514 (2009).

20. See, e.g., Pascale Fournier & Pascal McDougall, *False Jurisdictions? A Revisionist Take on Customary (Religious) Law in Germany*, 48 TEX. INT’L L.J. 435, 458–59 (2013). Both Jewish law and Islamic law allow men to marry more than one wife, but not vice versa. See Ruth Lapidot, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 448–49 (1998). See generally P. Shifman, *English Law of Bigamy in a Multi-Confessional Society: The Israel Experience*, 26 AM. J. COMP. L. 79 (1977). Jewish men receive such permissions when their wives refuse to divorce them or unable to accept a divorce due to mental incapacity. Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women’s Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 445–49 (2009). The rabbinical court began collecting data on approvals of bigamous marriages for Jewish men in 2004, and between 2004 and 2007 the rabbinical court issued forty-two such approvals. See WOMEN AND THE FAMILY IN ISRAEL: STATISTICAL BI-ANNUAL REPORT 95 (Ruth Halperin-Kaddari and Inbal Karo eds., 2009) (Hebrew).

21. See generally Gila Stopler, Article, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 WM. & MARY J. WOMEN & L. 459 (2004).

22. THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (1948), available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>.

23. To be sure, secularism in and of itself is not necessarily committed to gender equality. See generally Seval Yildirim, *Expanding Secularism’s Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901 (2004).

Independence and a series of Basic Laws that have been enacted gradually over the years.²⁴ The Basic Laws that have been enacted enjoy a superior constitutional status, and the Supreme Court has used them—in a series of controversial decisions—as a tool for judicial review.²⁵ There are eleven Basic Laws.²⁶ Two of them, namely Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, secure certain human rights and civil liberties; however, neither contains the word “equality,” and neither applies to previously enacted laws.²⁷ They lack retroactive power in part because of the religious monopoly in the area of personal status.²⁸ Religious laws of most religions are notoriously discriminatory, first and foremost against women.

Indeed, the Supreme Court has read equality into the value of human dignity protected by the first Basic Law,²⁹ but the constitutional infrastructure that the Court has built through its judgments is significantly fragile, as it does not rest on explicit legislative language, but rather on interpretation.³⁰ The next section explores the question of religious affiliation, which is crucial for determining to which religion an Israeli citizen “belongs,” and thus, which religious tribunal has jurisdiction over his or her personal status issues.

24. See Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT'L L.J. 345, 352–53 (2008).

25. See *id.* at 353 (describing a specific Israeli Supreme Court case in an effort to illustrate the limited “constitutional power of judicial review . . . under the Basic Law system”).

26. See Knesset, *The Existing Basic Laws: Full Texts*, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm (last visited Mar. 7, 2014).

27. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 150, as amended by SH No. 1454 p. 90 (Isr.), translation available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Mar. 7, 2014); Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 p. 90, translation available at http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm (last visited Mar. 7, 2014).

28. See generally Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U PA. J. CONST. L. 851 (2001) (discussing the issue of retroactive application of Israel’s Basic Laws).

29. See Judith Karp, *Basic Law: Human Dignity and Liberty—A Chronicle of Power Battles*, 1 MISHPAT UMIMSHAL 323, 345–61 (1992) (Hebrew). Indeed, the principle of equality was deliberately omitted from the Basic Laws. *Id.* at 346.

30. See Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT’L & COMP. L. REV. 617, 643–48 (1999).

III. RELIGIOUS AFFILIATION OF ISRAELIS

The question of religious affiliation, known also in Israeli politics as the “Who is a Jew?” debate,³¹ is central to the maintenance of segregation between religious and ethnic communities in the country. This segregation, facilitated by the religious marriage regime, was viewed in the early 1950s by the Knesset—the Israeli parliament—as necessary in the wake of the Holocaust and the murder of 6 million Jews by the Nazis and their allies.³² It was considered a means to revive the Jewish people by avoiding assimilation through marriage.³³ It also stemmed from the view that being a Jew is not only a matter of religion, but also a matter of ethnic identity as well as of national identity.³⁴

Interestingly, however, the definition of a Jew had not been set on religious criteria during Israel’s first two decades. While it was highly debated, it was still open to a secular interpretation. In the mid-1950s, David Ben-Gurion, Israel’s founder and first Prime Minister, declared that being a Jew is a matter of personal choice and self-definition, and it does not require any type of official religious conversion.³⁵ The Minister of the Interior, Israel Bar-Yehuda, instructed in 1958 that “a person who declares in good faith that he is a Jew, shall be registered as a Jew, and shall not be required to provide any further evidence [for his claim].”³⁶

The resulting governmental crisis led to a gradual narrowing of Ben-Gurion’s and Bar-Yehuda’s definition.³⁷ Following two high-profile Supreme Court cases that basically followed the self-definition test,³⁸ the

31. See *Who is a Jew? The Great Debate*, JEWISH CHRON. ONLINE (Sep. 30, 2009), <http://www.thejc.com/judaism/judaism-features/20463/who-a-jew-the-great-debate>.

32. Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law*, 30 WOMEN’S RTS. L. REP. 479, 482 (2009) [hereinafter Triger, *The Gendered Racial Formation*].

33. *Id.* at 521–22.

34. See Izhak Englard, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 193–94 (1987) (discussing the secular definition of a Jew).

35. Zvi Zameret, *Judaism in Israel: Ben-Gurion’s Private Beliefs and Public Policy*, 4 ISRAEL STUD. 64, 74 (1999).

36. DAPHNE BARAK EREZ, MILESTONE JUDGMENTS OF THE ISRAELI SUPREME COURT 49 (2003) (Hebrew).

37. See, e.g., Zameret, *supra* note 35, at 73–74.

38. HCJ 72/62 Rufeisen v. Minister of the Interior, 16 P.D. 2428 [1962] (Isr.); HCJ 58/68 Shalit v. Minister of the Interior, 23(2) P.D. 477 [1970] (Isr.); see also Englard *supra* note 34, at 193–96

religious parties in the coalition demanded in the late 1960s a legal reform in the definition of a Jew that would conform to the Jewish Orthodox interpretation of Jewish law, which meant that only a person born to a Jewish mother or who converted to Judaism can be recognized as a Jew.³⁹ Religious affiliation thus became a matter of an objective fact (either birth or proper conversion), and no longer of self-definition.

One of the problems with the religious definition of one's religion is that it creates such absurdities as people with dual religions (those born to a Jewish mother and a Muslim father, since in Islam the religious affiliation rule is paternal), or people with no religion at all (for example, those born to a Muslim mother and a Jewish father). As I mentioned above, in order to know how and with whom one can get married in Israel, we have to first determine his or her religion. The lack of a civil definition creates a problem of circularity: which religious law should be applied for the purpose of determining a person's religion when in doubt? Doesn't the choice of law in this case already determine the result? The absence of civil marriage in Israeli law makes these questions even more burning because they have serious implications for a person's right to choose a partner.

IV. THE LACK OF CIVIL MARRIAGE IN ISRAEL AND THE DE FACTO PROHIBITION ON INTERFAITH MARRIAGE IN ISRAEL

There is no civil marriage in Israel.⁴⁰ People who either wish to marry a person of a different religion or wish to exercise their freedom from religion and not marry in a religious ceremony cannot get married in Israel.⁴¹ While Israel's secular laws do not prohibit interfaith marriage directly, there is an indirect prohibition on such marriages.⁴² However, following the Supreme

(discussing the two cases and the subsequent political pressure to create a legislative definition of a Jew that conforms to Jewish law).

39. See Ofrit Liviatan, *Judicial Activism and Religion-Based Tensions in India and Israel*, 26 ARIZ. J. INT'L & COMP. L., 583, 605 (2009); see also Law of Return (Amendment No. 2), 5730-1970, 24 LSI 28, §4.B (1969-1970) (Isr.) ("For the purposes of this Law, 'Jew' means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.").

40. See Zvi Triger, *Freedom from Religion in Israel*, *supra* note 5, at 5.

41. See *supra* notes 3-8 and accompanying text.

42. Triger, *The Gendered Racial Formation*, *supra* note 32, at 481.

Court's ruling in the landmark 1963 *Funk-Schlesinger* case, Israeli authorities must register as married couples who marry abroad, regardless of the religion of the spouses.⁴³ This opened up the door for interfaith couples to get married, as well as for Jewish couples who did not want to get married in a religious ceremony or could not do so.⁴⁴ However, this is a costly option,⁴⁵ and the additional economic and bureaucratic requirements that are imposed on such couples are, from a liberal point of view, clearly discriminatory.

Since virtually all countries that allow marriage tourism do not allow divorce tourism when both spouses are non-citizens or non-residents,⁴⁶ Israeli couples who got married abroad and wish to get a divorce need a local solution. After decades of vague and sometimes conflicting court rulings, the Supreme Court finally ruled in 2006 that the rabbinical court system has jurisdiction over the divorce of Jewish couples who marry civilly abroad.⁴⁷ The Court's decision was based on Jewish law principles and was pre-approved by a rabbinical court panel.⁴⁸ However, because of the ongoing power struggles between the secular courts and the rabbinical court,

43. HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*, 17(1) PD 225 [1963] (Isr.).

44. *See id.* Under certain circumstances, Jewish law also prohibits marriages between Jews. For example, a man who belongs to the class of priests (Cohanim) cannot marry a divorced woman, and a married woman who has an affair with another man cannot marry him if she divorces her husband. *See* Marc Galanter & Jayanth Krishnan, *Personal Law Systems and Religious Conflict: A Comparison of India and Israel*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT* 282 (Gerald James Larson ed., 2001). These are ancient laws that are enforced in modern Israel as a result of the religious monopoly over marriage and divorce. *See id.* ("Jews wishing to marry in Israel must seek the approval of the rabbinical courts that apply [traditional] Jewish religious law, or *Halachah*. Some observers note that since 1947, the rabbinical courts have interpreted the *Halachah* more strictly than before the creation of the state."). Secular modern Jews who do not observe the religious commandments do not see these ancient laws as relevant to their lives. *See id.* at 281 ("[S]ecularists and non-Orthodox Jews [in Israel] resent being subject to any Orthodox rabbinical control, particularly in matters of vital concern such as marriage and divorce."). Nevertheless, they are prohibited from getting married in Israel; therefore, civil marriage abroad provides them with a good solution. *Id.* at 282.

45. *See id.* (noting the significant expense to some Israeli couples of having to travel outside of Israel to get married).

46. For a general overview of the phenomena of marriage tourism and divorce shopping see Elisabeth Beck-Gernsheim, *From Rights and Obligations to Contested Rights and Obligations: Individualization, Globalization, and Family Law*, 13 *THEORETICAL INQ. L.* 1 (2012).

47. HCJ 2232/03 *Jane Doe v. Tel Aviv Rabbinical Court* 61(3) PD 496 [2006] (Isr.).

48. *See* Triger, *Freedom from Religion in Israel*, *supra* note 5, at 1, 2, 6.

the latter has been insisting on performing a full *get* (Jewish religious divorce) procedure even for civilly married couples.⁴⁹

V. CONCLUSION: ISRAELI SECULARISM—AN UNFULFILLED PROMISE

Israeli secularism is stumbling. The enclaves of religious laws within Israeli law significantly limit Israelis' freedom of conscience, freedom from religion, the right to marry, and gender equality.

This Essay discussed two issues that demonstrate the problematic and troubled relationship between state and religion in Israel: the question of religious affiliation⁵⁰ and the lack of civil marriage due to the religious monopoly over marriage and divorce.⁵¹ Both issues are connected to the notion that Israel is a Jewish state, both ideologically and demographically, and that its Jewish definition and character are in the hands of the rabbinical institutions, which are all Orthodox and male.⁵² Moreover, the complete overlap between religion, ethnicity, and nationality leaves no space for civil and secular definitions of "Jewish"; it renders the "democratic" in the Basic Laws the only carrier of secularist values, and thus in constant competition with the "Jewish" element.⁵³

The rabbinical institution does not welcome attempts to inject secular values into the definition of "Jewish." The example discussed above of civil marriage between two Jews performed abroad demonstrates the monolithic approach to "Jewish" that the rabbinical court is trying to impose: Despite the couple's effort to avoid the rabbinical court, they must dissolve the marriage, should they decide to divorce, by a full Jewish divorce ceremony in the rabbinical court.⁵⁴ This is because the rabbinical court has chosen to

49. *Id.* at 7.

50. *See supra* Part III.

51. *See supra* Part IV.

52. *See* Gila Stopler, *Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims*, 1 *LAW. & ETHICS HUM. RTS.* 309, 332–33 (2007); Triger, *The Gendered Racial Formation*, *supra* note 32, at 519–20.

53. Basic Law: Human Dignity and Liberty § 1a, 5752-1992, SH No. 1391 p. 150, as amended by SH No. 1454 p. 90 (Isr.), *translation available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Mar. 7, 2014) ("The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.").

54. *See supra* Part IV (describing the jurisdiction of rabbinical courts over divorce proceedings).

disregard a Supreme Court ruling, which relied on halakhic principles as interpreted by the secular court.⁵⁵ The rabbinical court views itself as bound by religious laws only, and its interpretation of the validity of civil marriage between two Jews leads it to the conclusion that they too need a *get*.⁵⁶

Secularism cannot exist without separation of state and church.⁵⁷ The monopoly awarded to religion in countries where there is no such separation is bound to result in such legal enclaves in which the territorial law does not apply. And in the Israeli case it weakens the “democratic” component of the state’s definition as “a Jewish and democratic” state.⁵⁸

55. See *supra* Part IV.

56. See *supra* notes 47–49 and accompanying text.

57. For a somewhat different conclusion in the Turkish context see Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 *TEX. INT’L L.J.* 1 (2006); Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 *PACE INT’L L. REV.* 347, 365–68 (2005).

58. See Basic Law: Human Dignity and Liberty, § 1a, *supra* note 53 (defining Israel as a “Jewish and democratic state”).