LAW AND RELIGION UNDER THE STATUS QUO MODEL: BETWEEN PAST COMPROMISES AND CONSTANT CHANGE

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CONTENTS

INTRODUCTION

Among the different approaches to the regulation of the legal status of religion, it is worthwhile to study the Israeli experience, traditionally depicted as based on a decision not to decide—that is, on preserving an existing status quo that acknowledges the priority of religious demands in some areas in a way that reflects a social-political compromise rather than a principled decision-making. This approach has been labeled the "status quo" model. The practical meaning of accepting the status quo model was supposed to be refraining from changing the compromises that had been crystallized in the early days of Israel. This abstention was planned to apply to all forms of law-making—either by legislation, administrative decisions or judicial decisions. This Article will look into the practice of the status quo regime and will argue that in fact, contrary to its reputation, the status quo was ever-changing, and in this respect does not represent a workable compromise anymore.

Following this introduction, Part I of this Article describes the

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basic arrangements of the status quo in its formative years. Part II analyzes the conditions that shaped the status quo and enabled it to function. Part III describes the changes that the status quo has gone undergone, exposing it as a particularly unstable regime. Part IV analyzes the processes that transformed the application of the status quo, and the institutional mechanisms through which they were implemented. Part V continues this analysis by evaluating the impact that judicial review had on both the preservation of the status quo and the changes introduced to it. The Article ends with reflections on the viability of adopting a status quo model for the regulation of religion within a constitutional regime.

I. THE INITIAL STATUS QUO COMPROMISE

The status quo compromise that has shaped the relationship between law and religion in Israel dates back to political understandings and negotiations between Jewish leaders even before the establishment of the state, and to this date it is mainly shaped by the tensions within the Jewish majority in Israel.[1] More specifically, the negotiations regarding the legal status of religion had started as soon as the international processes, which eventually culminated in the creation of the state, had matured. The most representative document in this context is the letter that the Jewish Agency—the main Zionist institution at the time (which was controlled by the secular Labor Party)—sent in 1947 to the international organization of Agudat Israel, the hegemonic movement within the ultra-Orthodox Jewish public. This letter, also known as the "status quo document," included commitments to observe certain traditions in the future state, and IT centered on issues considered important from a religious perspective. It mentioned the recognition of the Jewish Sabbath (Saturday) as the official day of rest; the provision of kosher food in public institutions; the exclusivity of the religious law of marriage and divorce;[2] and a commitment to ensure the autonomy of the ultra-Orthodox educational

[1] At the same time, it is worthwhile to mention that these compromises were not a particular source of tension with the Arab minority of Israel. First, the Arab group is on average relatively traditional, and therefore open for awarding some legal status to religion in the law of the state. Second, as explained below, the acknowledgement of some legal status to the various religions (especially in the area of family law) is often regarded as a partial recognition of group rights, from the perspective of the minorities. Therefore, this analysis will focus on the tensions within the Jewish majority group.

[2] This norm reflected the status quo in the area of family law also with regard to other religions, following a compromise set in the past by the Ottoman Empire, which governed Palestine for about 400 years, until 1917. This arrangement also was adopted later by the British Mandate in Palestine, which replaced the rule of the Ottoman Empire as part of the results of World War I.

system. Currently, it is accepted that this document should not be considered as the only source of the status quo regime, but it is certainly a good representative of its spirit.[3]

The first years of Israeli independence have been a period in which legislative initiatives as well as administrative decisions have formulated the basic structure of the status quo.

First, several laws have fulfilled the main promises of the status quo understandings. The Hours of Work and Rest Law of 1951[4] has recognized the Sabbath as the official day of rest in the country. The *Kasher* Food for Soldiers Ordinance of 1948 secured that kosher food would be supplied to Jewish soldiers by the army. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953[5] has established the monopoly of Jewish Halakhic law with regard to the marriage and divorce of Jews in Israel. The State Education Law of 1953[6] has recognized the existence of autonomous religious schools outside the regular framework of public education, in addition to the option of choosing a religious school within the public system, thus preserving the autonomy of ultra-Orthodox education. These laws were supplemented by other administrative arrangements and policy decisions that complemented them, such as the policy to serve only kosher food in other government institutions and the policy of not operating public transportation on Saturdays and Jewish holidays (subject to exceptions when transportation was operating without such limitations before the establishment of the state).

Second, the formative period of Israeli independence has seen other compromises that became part of the status quo understanding. One example in this regard is the exemption from military service for Yeshiva students (religious men who study Torah in traditional religious institutions). This exemption was not mentioned in the Defense Service Law of 1949.[7] However, David Ben-Gurion, the first Prime Minister, had already agreed in 1948 to postpone the service of several hundred Yeshiva students. This compromise apparently reflected a readiness to preserve the world of Yeshiva studies following the destruction of the European Jewish communities during the Holocaust. At the time, it was perceived as an anchor for a vanishing world considered valuable to

3 *See* Menachem Friedman, *The Chronicle of the Status-Quo: Religion and State in Israel*, *in* TRANSITION FROM "YISHUV" TO STATE 1947-1949: CONTINUITY AND CHANGE 47 (Varda Pilowski ed., 1990) (Hebrew); CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 31-34 (1984).

4 Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-51).

5 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-53).

6 State Education Law, 5713-1953, 7 LSI 113 (1952-53) [hereinafter State Education Law].

7 Defense Service Law, 5709-1049, 3 LSI 112 (1949).

Jewish society for cultural and historical reasons.[8] Another example is the willingness to enact special laws that prohibited pig-raising and pork-trade (inspired by the historical taboo on pigs in Jewish tradition), which at the time was also supported by non-religious politicians who understood them as reasonable compromises—and to some extent, as a reflection of Jewish culture in the broad sense.[9]

The manner in which the status quo has crystallized during these years may be described by reference to the well-known quote stating that the life of law has been experience and not logic.[10] The regulation of public transportation during Saturdays, varying according to the local traditions, is an excellent example to the preference of experience over mere logic.

II. THE CONDITIONS OF THE STATUS QUO

The status quo could survive and flourish in the first three decades of Israel as an independent state due to a special combination of political, cultural, and legal conditions.

On the political level, the existence of the status quo was based on the hegemonic power of the Labor Party, which had formed all the Israeli governments until 1977. The status quo was the culmination of the political cooperation of the Labor Party and the religious parties that served as its political allies, mainly the National Religious Party. In the past, when the Labor Party could be assured of its hegemony, it advocated compromises with the religious public; hence, political life in this area was generally characterized as "consensual."[11]

On the cultural level, the status quo reflected a spirit of the secular Israeli public's partial identification with some traits of Jewish religious culture. Large segments of the secular public could identify, at the time, with ideas such as following the norm of religious marriage. Indeed, these compromises were always resisted by certain groups—such as politicians from the left, and women activists (mainly with regard to

8 On the eve of independence, Chief Rabbi Yitzhak Herzog wrote to the first Chief of Staff, Gen. Ya'acov Dori: "The holy Yeshivas in Israel deserve special treatment because, after the destruction of the Diaspora, they are the remnant of the Torah institutions and their students are a small minority . . . . Requiring them to enlist, even if partially, could undermine them, and Heaven forbid that we should do that." ZERACH WARHAFTIG, A CONSTITUTION FOR ISRAEL: RELIGION AND STATE 232 (1988) (Hebrew).

9 *See* DAPHNE BARAK-EREZ, OUTLAWED PIGS: LAW, RELIGION AND CULTURE IN ISRAEL 33-42 (2007).

10 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.").

11 The original status quo arrangement was based on mechanisms of compromise. *See* ELIEZER DON-YEHIYA, RELIGION AND ACCOMMODATION IN ISRAEL (Shunamith Carin ed., Deborah Lemmer trans., The Florsheimer Institute for Policy Studies 1999) (1996).

family law)—but as a whole they enjoyed relative support or at least understanding. In the 1950s, when the status quo compromise was crystallized, the Israeli public was relatively close to Jewish religious tradition. Even the secularists who opposed it were familiar with tradition at least in the sense that many of them were exposed to it in their childhood. In addition, the atmosphere of the time can be characterized as leaning toward national unity and hence compromise. Accordingly, even some of those who were critical of applying religious law in the area of marriage and divorce were willing to accept it for the sake of unity.

On the legal level, as far as the status quo has expressed itself in legislation, and this was the case with regard to some of its basic tenets, it was impossible to challenge it in court, due to the constitutional culture which reigned Israel until the 1990s—a culture of legislative sovereignty, following the British constitutional tradition.[12]

III. THE CHANGING NATURE OF THE STATUS QUO

The case study of the Israeli status quo is worth analyzing especially due to the changes that it has gone through under the disguise of stability. As the discussion that follows will show, it has in fact been anything but a status quo.[13]

The potential instability of the status quo arrangement was ingrained in its flimsy nature from the very beginning. First of all, there was no one document that applied to all the agreements that had formed the status quo. Second, the understandings and agreements left much space for various interpretations and contradicting views in the future. For example, the decision to acknowledge that the general day of rest in Israel is the Jewish Sabbath was implemented by a law that recognized it as the day of rest for employees,[14] and not by a general law which provided for all of the other implications of the Sabbath in the public realm (regarding transportation, commercial activities, etc.).[15]

Consequently, it should come as no surprise that the application of the status quo regime has significantly transformed in many ways since the establishment of the State of Israel. First, the material consequences

[12] *See generally* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

[13] Concerning the instability of the status quo, see also Aviezer Ravitzky, *Religious and Secular Jews in Israel: A Kulturkampf?* 15-16 (The Israel Democracy Institute, Position Paper No. E1, 2000) (1997).

[14] *See supra* note 4.

[15] HCJ 5016/96 Horev v. Minister of Transp., [1997] P.D. 51(4) 1 (providing an example of bitter litigation regarding a decision to limit the driving of private vehicles on Saturdays and High Holidays through a religious neighborhood in Jerusalem).

of some of the arrangements included in the status quo understandings have dramatically changed. For example, the number of Yeshiva students exempted from military service has risen with the passage of the years, from a few hundred to several thousand every year. The result was a de facto exemption of the ultra-Orthodox group from service, in contrast to the spirit of the original arrangement. Likewise, the practical meaning of the ban on public transportation on Saturdays and Jewish holidays has changed. In the past, this ban had left its mark on the streets. At present, however, with the rising level of living standards, the streets are not free from massive (private and taxi) transportation on Saturdays (although public transportation is still not provided in most areas). Another example comes from the area of meat import to Israel. In the past, the import of meat to the country was conducted exclusively by the government, which had limited itself to the import of kosher meat. When meat import was privatized (as part of larger developments diminishing government involvement in economic life), the immediate effect was the possibility that non-kosher meat would be imported by private merchants.[16] In other words, changes in economic administrative policies tended to impact the availability of kosher and non-kosher meat. Eventually, the controversies resulting from these developments had led to the enactment of a new law that prohibited the import of non-kosher meat.[17] This law was understood by some as a necessary step for the protection of the status quo, but at the same time was viewed by others as an infringement of the status quo because it had broadened the prohibition on the import of non-kosher meat to private initiatives.[18]

In addition, although the main laws that formulated the status quo (such as the Rabbinical Courts Law) have not been seriously challenged in the political arena, it seems that both religious and secular politicians feel free to initiate legislation or administrative policy decisions that encroach on the status quo. After 1977, when the religious parties had joined the Likud Party as its political allies, several new legislative initiatives were promoted to introduce new religious-spirited laws, such as the Festival of *Matzot* (Prohibition of Leaven) Law of 1986,[19] which prohibits merchants from displaying Leaven in public during the Jewish holiday of Passover. Some other changes were introduced through government initiatives, such as the growing scope of government

[16] HCJ 3872/93 Meatrael Ltd. v. Prime Minister and Minister of Religions [1993] P.D. 47(5) 485 (Hebrew).

[17] Import of Frozen Meat Law, 1994, S.H. 104 (Hebrew) (later amended by Import of Frozen Meat (Amendment) Law, 1995, S.H. 92 (Hebrew), which changed its name to Meat and Its Products Law, 1994).

[18] *See* HCJ 4676/94 Meatrael Ltd. v. Knesset of Israel [1996] P.D. 50(5) 15 (Hebrew).

[19] Festival of *Matzot* (Prohibition of Leaven) Law, 5746-1986, 40 LSI 231 (1985-86) [hereinafter The Passover Law].

allocations to religious institutions and schools.

On the secular side, the pressures to open businesses and entertainment places during the Sabbath have grown to an unprecedented level. In this sense, the meaning of preserving the Sabbath as a day of rest has changed completely.[20]

IV. THE PROCESSES OF CHANGE

The sources of change in the status quo mechanism are complex. Different views have been offered in this regard, coming from the religious side as well as from the secular side of Israeli public life. Representatives of the religious public argue that the secular public does not respect old compromises, using its majority power. A prime example is the steady pressure to open businesses on Saturdays and other Jewish high holidays. Another example is the lack of enforcement of the Passover Law by the Ministry of Interior.[21]

From the secular side, it is possible to point out that religious politics, and not only secular politics, has instigated change. Since 1977, when the Likud replaced the Labor Party in government and cooperated with the religious parties that were its main political partners, these parties had aimed at promoting religious interests and increasing religious impact on the public sphere. The demands for increasing the quotas of Yeshiva students who got exemptions from military service had increased. In a similar manner, the demands for government allocations to religious institutions had increased as well. In addition, the religious parties tried to promote religious-oriented legislative initiatives, in contrast to the spirit of the status quo understandings.

More generally, and putting aside the different views of the religious public and the secular public regarding the relative "guilt" of

[20] During the 1980s, many struggles focused on the opening of entertainment venues like cinemas. *See, e.g.*, CrimC (Jer) 3471/87 Israel v. Kaplan, [1987] P.M. 1988(2) 265 (Hebrew) (a court decision invalidating a by-law that prohibited the opening of a movie theater on Saturdays); Naomi Gutkind-Golan, *The Heikhal Cinema Issue: A Symptom of Religious—Non-Religious Relations in the 1980s*, *in* RELIGIOUS AND SECULAR: CONFLICT AND ACCOMMODATION BETWEEN JEWS IN ISRAEL 67 (Charles S. Liebman ed., 1990). As a result, the Knesset enacted the Municipalities Ordinance (Amendment No. 40) Law, 1990, S.H. 34 (Hebrew), which authorized the enactment of bylaws banning the opening of businesses and entertainment venues on Saturdays. This amendment opened the door for a ban, but made it clear that it is a matter for the decision of each and every locality. In practice, movie theaters are open on Saturdays almost everywhere (though sometimes subject to restrictions concerning their location). The new battles concern the opening of regular commercial activity on Saturdays, including regular shopping.

[21] Recently, a Court of Local Affairs ruled that displaying Leaven (during Passover) inside stores is not considered "in public," and therefore does not constitute a violation of this law. CrimC (Jer) 4726/07 Israel v. Terminal 21 Ltd. (unpublished op. Apr. 2, 2008) (Hebrew). This judgment led to furious reactions from the Orthodox side.

each side for the curtailment of the status quo, it is clear that the status quo has become more and more unworkable since the basic conditions which had facilitated it have changed.

From a political perspective, since the shift to a dual-blocks system in 1977 (when the Labor Party had lost its hegemonic power), the religious parties were in a position to demand the expansion of religious-oriented legislation. Accordingly, they had incentives to desert the status quo, at least partially.[22]

From a cultural and social perspective, Israelis who grew up as second and third generation secular Jews feel less attachment to old traditions. Accordingly for them, the compromises in religious matters constitute a bigger sacrifice. In addition, Israelis have become more aware of the growing gap between the standards of the status quo and the norms prevalent in the western world with regard to family law (the availability of civil marriage), the official day of rest (the availability of transportation, entertainment and commercial activities)[23] and more. In other words, the perception of sacrifice associated with the preservation of some of the status quo arrangements has intensified. For example, as the availability of the option of civil marriage has established itself as the norm in liberal democracies, the awareness regarding the special situation of Israel in this area intensified. Later on, it has become even more significant with the immigration to Israel of about a million new citizens from the former USSR during the 1990s. These new citizens were educated with hardly any connection to Jewish culture. A significant number among them are not even Jewish according to Halakhic standards, and therefore cannot marry in Israel according to the Rabbinical Courts Law.

From a legal perspective, the possibilities of challenging status quo-based compromises have significantly broadened. First, the Court is currently willing to review administrative decisions with regard to the

[22] For an argument claiming that undermining of the status quo mechanism is connected to the changes in the political situation, namely the move from the hegemony of the Labor Party to politics of two opposing blocs, based on clear-cut resolutions, see Asher Cohen & Baruch Susser, *From Consensus to Majoritarian Politics: The Decline of Israeli Consociationalism*, *in* MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: THE ARIEL ROSEN-ZVI MEMORIAL BOOK 675 (Menachem Mautner, Avi Sagi & Ronen Shamir eds., 1998) (Hebrew); Asher Cohen, *Shas and the Religious-Secular Cleavage*, *in* SHAS: THE CHALLENGE OF ISRAELINESS (Yoav Peled ed., 2001) (Hebrew); ASHER COHEN & BARUCH SUSSER, FROM ACCOMMODATION TO ESCALATION: SECULAR-RELIGIOUS CONFLICT IN ISRAEL (2003) (Hebrew).

[23] It is interesting to note that new legislative initiatives aimed at regulating activities on Saturdays acknowledge, in different degrees, the need to enable certain services that do not conform with Halakhic standards. The proposals differ in their degree of openness to divergence from tradition. Whereas some secularists support the overall legalization of regular commercial activities, modern religious people together with secularists, who recognize the social value of a day of rest, tend to support a differentiation between regular commercial activity (which they believe should be banned) and activities in the area of culture, entertainment, and leisure (which would be legal).

quality of the discretion practiced by the relevant decision-makers—asking whether the decision is reasonable or proportionate.[24] Indeed, some aspects of the status quo were always subject to review by the courts, but in a more limited manner. In the 1950s, for example, the Israeli Supreme Court had interfered in administrative decisions and regulations that professed to enforce pig-related prohibitions. However, at the time, the Court had based its intervention mainly on the *ultra vires* principle, stating that the invalidated arrangements had not been based on legislative authorizations.[25] Second, the new case law of the Court insists that substantive regulatory schemes will be dictated by primary legislation (in a manner that reflects a non-delegation approach). The practical outcome of this view is that status quo arrangements may require new legislation, as the Court had specifically stated with regard to the exemption of Yeshiva students from military service.[26] Third, due to changes in the doctrines of justiciability and standing,[27] the Court is more open than ever to public petitions that raise human rights concerns regarding status quo arrangements that infringe on individual free choice. Fourth, and last but not least, is the constitutional aspect. The Basic Laws on human rights from 1992—Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty—also opened the door to judicial review with regard to primary legislation.[28] Indeed, Basic Law: Human Dignity and Liberty limits this possibility only to new legislation, introduced after 1992. However, Basic Law: Freedom of Occupation is applicable to former laws.[29] At any rate, the more that Israel moves toward completing its

[24] *See, e.g.*, HCJ 5016/96 Horev v. Minister of Transport [1997] P.D. 51(4) 1 (reviewing a decision to ban driving during the Sabbath in a religious area from the perspective of reasonableness and proportionality); HCJ 953/01 Solodkin v. Municipality of Bet Shemesh [2004] P.D. 58(5) 595 (reviewing by-laws on pork trade from the perspective of proportionality. *See also* BARAK-EREZ, *supra* note 9, at 81-122.

[25] HCJ 122/54 Axel v. Mayor of Netanya, Members of its Mun. Council and the People of Netanya Region [1954] P.D. 8(2) 1524 (Hebrew); HCJ 98/54 Lazarovitz v. The Food Controller [1956] P.D. 10 40 (Hebrew); HCJ 72/55 Fridi v. Municipality of Tel-Aviv-Yafo [1956] P.D. 10 734 (Hebrew). Following these precedents, the Knesset enacted Local Authorities (Special Enablement) Law, 5717-1956, 11 LSI 16 (1956-57), and Pig-Raising Prohibition Law, 5722-1962, 16 LSI 93 (1961-62).

[26] HCJ 3267/97 Rubinstein v. The Minister of Defense [1998] P.D. 52(5) 481.

[27] The landmark precedent in this regard is HCJ 910/86 Ressler v. Minister of Defense [1988)] P.D. 42(2) 441.

[28] The original versions of these basic laws were changed in 1994. Basic Law: Freedom of Occupation, 1992, S.H. 114, was later replaced by a new version, Basic Law: Freedom of Occupation, 1994, S.H. 90. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, was partially amended by provisions included in the new version of Basic Law: Freedom of Occupation. For more background information, see Barak-Erez, *supra* note 12. For the interpretation of the basic laws as recognizing the possibility of judicial review, see CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village [1995] P.D. 49(4) 221.

[29] This law, however, is subject to the possibility of overriding legislation, following the Canadian constitutional model, as authorized by section 8 of Basic Law: Freedom of Occupation., 1994, S.H. 90.

constitutional project,[30] the more significant the availability of judicial review will become to the analysis. It is expected that when the stage of drafting the full constitution arrives (based on the existing basic laws), old legislation and regulations will not enjoy a blanket immunity from judicial review (although it may be the case that some particular arrangements will get such immunity, as part of a possible political compromise). Accordingly, the process will need to open and rethink old arrangements and understandings. The main problem here is that even compromises that are tolerated as a matter of practice will probably not be considered tolerable in the context of a formal constitution. This is likely to be the case with regard to the law of marriage or divorce. The application of religious law to matters of marriage and divorce (as the only legal alternative) carries discriminatory consequences for many of Israel's citizens—especially immigrants from Jewish origin who are not considered Jewish according to Halakhic standards[31] and therefore cannot marry according to the Rabbinical Courts Law, and women whose rights under religious law are regulated differently than those of men.[32] The result of all of these changes is that controversies regulated through political agreements and understandings have been taken over by conflicts that aim for clear-cut resolutions (including legal rulings), in which there are winners and losers instead of compromise.

V. THE ROLE OF JUDICIAL REVIEW

Against this background of an ever-changing status quo, the emerging question concerns the role of the courts—mainly the Israeli Supreme Court—in the curtailment of the political compromise. Religious politicians tend to argue that the activist stand that the Israeli

[30] The basic laws are supposed to be consolidated to a full constitutional document. This status of the basic laws was established by a Knesset decision from 1950, known as the Harari Resolution, to enact the future Israeli constitution gradually, chapter by chapter, so that each chapter constitutes a basic law by itself. The idea was to embark on a process that would address controversies one by one, so that every single compromise could serve as the basis for a basic law. Together, these basic laws would eventually form the Israeli Constitution. The resolution states: "The First Knesset directs the Constitution, Law and Justice Committee to prepare a draft constitution for the state. The constitution will be composed of separate chapters, each one constituting a basic law by itself. Each chapter will be submitted to the Knesset if the Committee completes its work, and all the chapters together will make up the constitution of the state." 5 Knesset Protocols 1743 (1950) (Hebrew).

[31] According to the Jewish Halakha, a person is considered Jewish only if he or she were born to a Jewish mother (or else converted according to the religious rules).

[32] Many women in Israel do not oppose the application of religious family law, in accordance with their religious or traditional view. Yet, this is certainly a feminist concern in Israel, since the law as it stands now does not recognize a civil alternative for marriage and divorce for those who would prefer this option.

Supreme Court has been taking in dealing with religious-related issues make the status quo impossible. To some extent, this allegation is correct. As noted, when religious matters are debated in courts, the decisions based on the political understanding do not always withstand review. However, this is only one part of a broader picture. This section of the Article is dedicated to a more nuanced understanding of the role of judicial review in the current regulation of the status quo.

It is worthwhile to start this discussion by noting that the growing involvement of the Supreme Court in status quo-related issues should be assessed within the context of the intensifying activities of the legislature and the government in shifting the balance of the status quo. In the legislative arena, one can easily point to new laws enacted in order to change the status quo. In addition to the Passover Law already mentioned, which has relatively limited effects on everyday life, it is possible to mention significant reforms, such as the new laws which secure public funding for religious schools even if they do not meet the standard of basic curriculum as stated in the State Education Law.[33] Various changes have also been introduced through government decisions and even through lower level administrators. As already noted, the numbers of Yeshiva students exempted from service were increased during the years, using the power of the Minister of Defense to exempt individuals from service. When the Supreme Court finally decided against this form of exemption,[34] it was after decades of gradual changes that had been introduced in the form of administrative decision-making. In a similar manner, the Supreme Court has started to review the allocation of government money to religious institutions without criteria,[35] when the scope of this phenomenon has broken new records.

An even more important argument regarding the involvement of

[33] *See* State Education (Amendment no. 7) Law, 2007, S.H. 318 (Hebrew) and Unique Cultural Education Institutions Law, 2008, S.H. 742 (Hebrew). These laws complement a gradual process of growing government allocations to the Ultra-Orthodox education system. In general, the ultra-Orthodox education remained independent, but the extent of government participation in its financing created a new phenomenon of autonomous education subsidized by the government. The growth of the Shas party had led to the creation of yet another new Orthodox education network based on government support. For general information, see RIKI TESLER, IN THE NAME OF GOD: SHAS AND THE RELIGIOUS REVOLUTION 277, 277-83 (2003) (Hebrew). Originally, the State Education Law had conditioned government support of private schools in the inclusion of general "core" curriculum in their programs. In fact, even the original status quo document from 1947 stated, with regard to the independence of the religious Ultra-Orthodox education, that: "The state, of course, will determine the minimum of compulsory studies . . . history, science, etc., and will supervise the fulfillment of this minimum." *See generally* sources cited *supra* note 3 (describing the content of the status quo document). Later on, however, due to the growing influence of the Orthodox parties in the political arena, Orthodox schools had gradually succeeded to get state funding, even when they did not meet the core curriculum requirements.

[34] *See* HCJ 3267/97 Rubinstein v. The Minister of Defense [1998] P.D. 52(5) 481.

[35] This issue was discussed under the title "designated funds." *See, e.g.*, HCJ 59/88 Tzaban v. Minister of Fin. [1989] P.D. 42(4) 705.

the Israeli Supreme Court in status quo-related issues states that the decisions of the Court, ostensibly curtailing some aspects of the status quo regime, have in fact also contributed to its preservation. More specifically, the argument here is that the original compromises struck at the very beginning of the state have become unworkable due to changes in the conditions of life (economic, cultural and more). If the status quo had been applied according to its original specifics, decision-makers in Israel would have realized earlier that it does not meet the new social circumstances. However, since it was applied in a soft manner and partially curtailed, it has adjusted itself to reality and hence survived (while causing many paradoxes and strange results).

The prime example for this phenomenon is in the area of family law. The exclusivity of religious law with regard to marriage and divorce has left many citizens and residents of Israel without legal options in the country—in circumstances of mixed marriages (usually not accommodated by religious law without an act of conversion); same-sex couples (taking into consideration the official view of many religions against homosexuality); and other situations. In partial response to this problem, the Israeli Supreme Court has formulated some limited solutions. The Court has recognized equal rights and privileges to cohabitants (similar to those awarded to married couples).[36] The Court has also recognized the possibility of formally registering in Israel couples who got married abroad,[37] and later on applied this precedent to same-sex couples who got married abroad in countries that facilitate such marriages.[38] As a result, the status quo in the area of family law seems to be more bearable. In other words, the same processes that have shifted the status quo also secured its preservation.

[36] *See* CA 563/65 Yeger v. Palevitz [1966] P.D. 20(3) 244 (Hebrew); *see also* Daniel Friedmann, *The "Unmarried Wife" in Israeli Law*, 3 TEL-AVIV U. L. REV. 459 (1973) (Hebrew); Menashe Shava, *The "Unmarried Wife"*, 3 TEL-AVIV U. L. REV. 484 (1973) (Hebrew).

[37] By virtue of the principle set by HCJ 143/62 Punk-Schlesinger v. Minister of Interior [1963] P.D. 17 225 (Hebrew). The option of civil marriages abroad has often been described as a reasonable solution for those who cannot get married in Israel. However, in fact, it has many shortcomings. First, it does not afford due weight to the recognition of the right to family life as a basic constitutional right, derived from the right to human dignity (protected under Basic Law: Human Dignity and Liberty). *See* HCJ 7052/03 Adalah: The Legal Center for Arab Minority Rights in Isr. v. Minister of Interior (unpublished op. May 14, 2006) (Hebrew). Second, this is a more expensive alternative for marriage. Third, it carries the message of a lesser citizenship of those who cannot marry in Israel. Fourth, it raises difficult legal questions regarding the regulation of divorce of the couples married abroad.

[38] HCJ 3045/05 Ben Ari v. Dir. of the Population Registry in the Ministry of Interior (unpublished op. Nov. 21, 2006) (Hebrew). For more background, see Dan Yakir & Yonathan Berman, *Same-Sex Marriages: Is It Really Necessary? Is It Really Desirable?*, 1 MA'ASEI MISHPAT 169 (2008) (Hebrew).

CONCLUSION

Should the regulation of state and religion in Israel be studied as a viable model for the regulation of law and religion in the context of comparative constitutional law? An overview of the development of the status quo in the Israeli context sheds significant doubts on this suggestion. The shortcoming of the Israeli status quo as a model is manifold: First, it is not stable but rather disguises constant change; second, it is changing in an unruly manner, as a result of the developments in the constitutional, cultural and political conditions which have originally shaped it; and third, some of its aspects are entangled with serious infringements of human rights, especially in the area of marriage and divorce. In fact, the reference to the status quo is currently no more than a reification of something that does not exist anymore.

At the same time, it would probably be too extreme to overrule the possibility of recognizing the importance of compromises in shaping the relations of religion and state, taking into consideration that tradition and existing social practices are central to this area. However, for a status quo to be workable, it has to be based at least on some basic understandings regarding the "rules of the game"; that is, on the legitimate ways to deal with proposed changes. In the Israeli context, the disagreements on the status quo go beyond the controversies over the actual compromises and reflect lack of any consensus also regarding the ways to bring about change. Currently, both religious and secular politicians are trying to promote their interests in any scene that is available to them—the government, the legislature and the courts—and at the same time present the status quo as an important concept in order to resist initiatives coming from the other side.