

# SECTION 1

## CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

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### CONSTITUTIONAL REGULATION OF CIVIL MARRIAGE IN ISRAEL

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#### Summary

The purpose of this paper is to review the history of the constitutional regulation of marriage and divorce in British mandate Palestine and the state of Israel from 1918 on. Israel was subject to British rule (mostly under a mandate of the League of Nations) from 1918 to 1948, and was called Palestine at the time. In 1948 some of this territory claimed its sovereignty as an independent state called Israel. The paper will highlight the different constitutional norms and procedures that govern the field of family law in British mandate Palestine and the state of Israel from the beginning of the British mandate to this day.

The paper is based upon historic scrutiny of the legislation of British Palestine and the state of Israel in the field of family law, analyzing the law in accordance with the historic developments in the region. The results of this scrutiny are that from 1948 to the third decade of the 21<sup>st</sup> century, the Israeli legislator has repeatedly acted to prevent the constitutional regulation of civil marriage, preserving the archaic millet system, an Ottoman system of marriage within religious communities, that was the basis of the British mandate's regulation of marriage and divorce in Palestine. But as much as the original millet arrangement was enacted by the British as a voluntary system, it was given new and compulsory features by the Israeli legislator, all the while avoiding a comprehensive constitutional regulation of Israeli family law.

The paper concludes that a constitutional regulation of civil marriage is probably not possible in Israel, due to the political inability to reach an agreement between religious and secular Jews in Israel. But this did not prevent the Israeli legislature from fundamentally changing the British mandate constitutional arrangement, leaving behind a patchwork of improvised legislation that violates the basic civil rights of Israeli citizens.

**Key words:** British mandate on Palestine; constitutional regulation of marriage; Israel; Family Law; millet system.

#### 1. Introduction

The subject of this article is the constitutional regulation of civil marriage in the State of Israel; or rather the denial of the constitutional possibility for the legal regulation of civil marriage, theoretically possible until the mid-1980s.

The existing system in Israel for regulating personal status matters (a term mainly referring to matters of marriage and divorce) is a product of the previous regime that ruled the territory of Palestine before the establishment of the State of Israel on the

larger part of this territory – the British Mandate on Palestine.

The system, enacted by the British authorities in 1922 in the «Palestine Order in Council» (POiC) divides the residents of Israel into separate religious communities – Jews, Moslems, several Christian denominations, Druze, and Bahais. These communities have jurisdiction over their members' matters of personal status and settle these matters in religious courts according to their personal religious law. Thus, a Jew can marry a Jew according to Jewish law and divorce in a Jewish court according to Jewish law, a Moslem can marry a Moslem according to the Sharia and divorce in a Sharaite court, etc. Intermarriages are not possible as most personal religious laws do not recognize them. Likewise, if one is not a member of one of the 14 specified religious communities, one cannot legally marry or divorce in the state of Israel.

This is a rigid system, not allowing for the legal regulation of marriage of many Israeli citizens – those who wish to marry a person not of their religion, those who are subject to ritual marriage prohibitions of their religion, such as the prohibition of a male member of a priestly clan (Cohanim) to marry a female divorcee in Jewish law, or those who do not belong to a recognized Religious Community. Accordingly, the British arrangement was a voluntary and softened arrangement, leaving a theoretical constitutional possibility for arranging civil marriage in various cases. When the State of Israel was established, the Israeli legislature left the British arrangement in this field intact.

In 1950, when the Israeli Parliament, the Knesset, tried to enact a constitution and reached a deadlock, a partial constitutional arrangement was adopted. The Israeli constitution, it was determined, will be enacted in chapters called «Basic Laws». The enactment of these basic laws has not ended to this day, more than seventy years after the establishment of the state in 1948. In a state of constitutional uncertainty, the Israeli legislature felt free to change the British arrangement as he willed. The arrangement was thus turned from a voluntary arrangement into a coercive one, and the theoretical constitutional possibility for civil regulation of marriage was abolished.

This became a serious problem when hundreds of thousands of citizens of the former USSR immigrated to Israel at the end of the last century. Many of them had the right to immigrate to Israel under the «Law of Return». This law enables those of Jewish origins to immigrate to Israel and become Israeli citizens if they so wish. However, Jewish ethnic roots do not guarantee being «Jewish» according to Jewish law, as it only takes into consideration the maternal lineage. Thus, a person whose father is a Jew and whose mother is not will be eligible for Israeli citizenship according to the «Law of Return», but will not be considered a part of the Jewish Religious Community, and thus the arrangement

of such persons' marriage was not possible under the existing legal arrangement. An improvisation known as the «Spousal Covenant Law» provided a partial and problematic solution to this problem.

This paper will briefly review the history of the constitutional regulation of marriage and divorce in mandate Palestine and Israel from 1918 on – The creation of the Religious Community Arrangement in the «POiC» in 1922, the amendment intended to allow civil marriages in 1939, the adoption of the system by the young State of Israel in 1948, and the way the Israeli legislator repeatedly acted to prevent the regulation of civil marriages since.

I would argue that a constitutional regulation of civil marriages is probably not possible in Israel, for the same reason the Israeli constitution was never fully formalized, due to the political inability to reach an agreement between religious and secular Jews in Israel. But this did not prevent the Israeli legislature from fundamentally changing the «POiC» constitutional arrangement, leaving behind a patchwork of improvised legislation that violates the basic civil rights of Israeli citizens.

## 2. British mandate era.

The modern political entities, the state of Israel and the Palestinian Authority were until 1918 a part of the Ottoman Empire. These territories were taken over by the British army in the First World War and consequently subjected to a British mandate by the League of Nations in 1922. The British ruled these territories as a unified political entity until 1948.

Upon their arrival to these territories in 1918, the British found a complex system of tribunals and courts that dealt with various areas of life according to different sets of laws. Among other courts, different religious communities (some Jewish communities and a plethora of Christian sects) operated autonomous religious courts, with certain jurisdiction over the members of these communities regarding some fields of family law, inheritance, and sacred communal property (such as the Moslem Waqf). Sharia courts, operating parallel to these courts, had much wider jurisdiction.

The complex structure of the court system in Palestine was the result of historical development over the long history of the Ottoman Empire, which ended with the British occupation (Rubin, 2011). Whether this system created an organized Ottoman «millet system» (Millet – in Ottoman Turkish: *مِلَّت*). This word is interpreted in the legal and historiographical discourse as an autonomous religious community, usually within the framework of the Ottoman Empire) granting jurisdiction over matters of «personal status» to different religious courts is a matter of some controversy (Amir, 2016; Braude, 2014; Kermeli, 2012). For the sake of clarity, this article will regard the marriage and divorce

arrangement in British mandated Palestine as a novel British arrangement, disregarding its possible Ottoman roots.

In August 1922 the British has enacted the «POiC», a legal instrument for the mandated territories, which served as a kind of constitution during the mandate period. It is this legal instrument, parts of which are still valid in Israel today, that shaped the so-called British millet system.

The «POiC» was not a constitution, as it was not enacted by the representatives of a sovereign people, but dictated by a colonial ruler, residing on a far-away island, King George V, King of the United Kingdom, the British Dominions and Emperor of India. However, it had some of the formal characteristics of a constitution. It determined the structure of government, including the structure of the legal system, the mechanism of legislation, the various courts and tribunals and their jurisdiction, and even such matters as the official languages.

Although it was probably drafted at the Colonial Office, the «POiC» was presumed to be a product of the king's consultation with his Privy Council, and as such a norm higher than regular legislation. Primary legislation in mandate Palestine was called «an ordinance» and was enacted by the British High Commissioner of Palestine. The «POiC» was considered the source of the High Commissioner's authority to issue ordinances. Even after the establishment of the state of Israel, the Israeli Supreme Court ruled that an ordinance that contradicts an article of the «POiC» is not valid (Yossipof vs. Attorney General, 1951). The «POiC» was the closest thing to a constitution in mandate Palestine except for the Mandate of Palestine itself.

The «POiC» was a long and detailed document, regulating every facet of the administration of the mandated territories. Among its other arrangements, it detailed the arrangement of religious communities, that had jurisdiction over the personal status affairs of their members.

The basis of the arrangement is a list of 'matters of personal status' in which Jurisdiction was given to religious courts. Before the enactment of the «POiC» the term 'personal status' was not defined, and the jurisdiction of religious courts did not relate to it.

These are the main arrangements, laid out in the «POiC», concerning personal status and religious courts –

Article 47 of the «POiC» granted the civil district courts residual jurisdiction in matters of personal status. These matters were listed in article 51 as «Marriage Or Divorce, Alimony, Maintenance, Guardianship, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of

Absent Persons.» (a somewhat different list is listed in article 52 of the POiC regarding Moslem courts). During the decades the list was shortened by Israeli legislation granting civil courts jurisdiction over most elements in the list, but its core element – matters of marriage and divorce – remained untouched to all courts – Jewish Christian and Moslem.

Articles 53 and 54 granted Jewish and Christian religious courts sole jurisdiction in matters of marriage and divorce, alimony and wills, and granted these courts parallel jurisdiction vis-a-vis the civil district courts over other matters of personal status, depending on the consent of the involved parties. Article 52 applies an equivalent arrangement to Moslem courts.

The effect of these articles was that Jews, Christians, and Moslems, belonging to a closed list of recognized religious communities, will settle matters of personal status in the religious courts of their communities according to their personal law, that is – the religious law of each community.

When enacted, the «POiC» didn't include a list of the religious communities. The list was finalized in 1939 in the form of an appendix to the «POiC». The list of communities included nine Christian denominations – different variations of Roman-Catholic and Orthodox Christianity – and the Jewish community. The Moslem community has not been listed, but in fact, Moslem courts were recognized by the authorities and were referred to explicitly in the «POiC». Although the legislator ignored the Moslems in this list, the Moslem community was recognized as a Religious Community in all respects.

From the beginning of its operation, the system was inflicted with two flaws – the will of large Jewish communities to escape the jurisdiction of the formal Jewish Religious Community for various religious, political, and ideological reasons, and the fact that for various reasons some citizens were left without a formal Religious Community (the Druze community was not recognized until the 1960's, and Druze Palestinian subjects had to use the Moslem Sharaite court as their religious tribunal. The Russian-Orthodox Church is not recognized to this day. Protestant churches are not recognized, except for the Evangelic-Episcopal Church, which has a small following of several thousand Arab-Israeli citizens. This church was recognized in the early 1970s. Larger Protestant denominations are not recognized). These two issues have since created tensions and ongoing problems.

The Jewish Religious Community was organized under an umbrella organization called «Knesset Israel». This mandate era institution is not to be confused with the Israeli parliament, bearing the same name. The word «Knesset» (in Hebrew – כנסת) is used in Jewish sources to indicate a legislative body since the age of the second temple. «Knesset Israel» was an organizational framework for Jewish religious and polit-

ical institutions, which included an elected leadership, and was the official organizational framework of the Jews in Palestine during the British Mandate. In 1928, regulations were published to regulate its actions and its membership registry. The Chief Rabbinate acted within this framework, and operated the courts of the Jewish community. However, any tribunal consisting of three rabbis could adjudicate personal status, if it could be approved by the Chief Rabbinate that the judgment was given in accordance with the Jewish Law (Sheftelovich, 1941, p. 8).

«Knesset Israel» was a voluntary organization. A Jewish Palestinian subject could choose whether to register to «Knesset Israel» or not. Large population groups preferred, for various reasons, not to join this organization. The ultraorthodox movement «Agudat Israel», had its members retire from «Knesset Israel» en masse, and pretend to manage its own courts (Harris, 2002, p. 37).

This situation, in which many Jews didn't belong to the Jewish community created four types of citizens who couldn't regulate their affairs within the system. This is one of the major distortions created by the system, that exists to this day. Israeli scholar Baruch Bracha lists the types of these citizens as follows (Bracha, 1971, p. 169):

A. Lacking religion.

B. Belonging to a religion that has no formal organization, such as Buddhists.

C. Belonging to a religion that has no recognized community, such as various kinds of Protestants.

D. People belonging to a religion with a recognized community who withdrew from it, or did not join it.

Bracha's classification ignores the ethnic character of the system. The term Religious Community is formal, and the system in fact regulates ethnic division (Amir, 2014). For this reason, and because the division indeed roughly matched the ethnic divisions in Palestine at the time, the second and third classifications did not constitute a real problem, and the first classification posed a problem of modest dimensions up to the great immigration wave from the former USSR in the 1990s. But the fourth class was deemed a real problem, that only worsened over the years.

As the tragic events of the 1930s and 1940s unfolded, and the illegal immigration of Jews into Palestine increased, updating the «Knesset Israel» registry became an impossible task, as illegal Jewish immigrants tended not to register in formal registries. This fact, combined with the retirement of the ultraorthodox from «Knesset Israel» meant that a very large percentage of the Jewish population was not a part of the formal Jewish Religious Community, arranged by «Knesset Israel». These unorganized Jews had to regulate their matters of personal status in the civil courts, outside the religious tribunal system. These courts discussed matters of personal sta-

tus according to the personal law of the litigant, that is according to Jewish law. This situation, in which Christian British judges ruled in complicated Jewish law matters, was perceived as problematic by judges and litigants alike.

This state of affairs led to an interesting amendment to the «POiC». In 1939 Article 65 A of the «POiC» was enacted, stating as follows:

Provision may be made by ordinance for the Celebration, dissolution and annulment of marriages of persons neither of whom is a Moslem or a member of a Religious Community and for the granting by the Courts of orders or decrees in connection with the marriages of such persons or their dissolution or annulment.

This amendment, which supposedly enabled the legislator to introduce a course of civil marriage and divorce for those outside the framework of a Religious Community, required a change in legislation. The «POiC» was a constitutional norm, and the amendment could only enable legislation establishing civil marriage and divorce. To implement such a change an ordinance had to be enacted by the High Commissioner. In the last decade of the British mandate, from 1939 to 1948, the British, fighting the Second World War while trying to manage the violent Arab-Jewish conflict and an armed revolt against their own rule, did not have the initiative to enact a law of civil marriage.

### 3. The Israeli era

The British mandate on Palestine came to an end in 1947-8, as the declining British Empire, weakened by the Second World War, being forced into a decolonization process, was not able to control the Arab-Jewish conflict in the mandated territories. UN resolution 181 divided the territory into an Arab state and a Jewish state in November 1947. The mandate was terminated in May 1948. Following the Arab-Jewish war that followed the collapse of the mandate, the state of Israel was founded on a large part of the once-mandated territory of Palestine.

One of the first legislative acts of the young state was to accept all former British legislation. Article 11 of the «Law and Administration Ordinance» provided that the law that was in effect in the Mandate period, including the «POiC», would remain in effect in the state of Israel.

The «POiC» was a legal instrument for ruling a colony, and could not serve as a constitution for an independent state. In the 1949 elections, a legislative and constituent body was elected, named «Knesset» (not to be confused with the now-defunct «Knesset Israel»). It set out to draft a constitution. However, it soon became very clear that the big cleavage that divided the Israeli public (and still does, to this day), between secular and religious Jews would make the

drafting of a constitution impossible. In 1951, Knesset Member Yizhar Harari suggested a compromise – the constitution will be accepted in parts, called «Basic Laws». Thus, it would be possible to constitutionally regulate vital aspects of government, such as the status of the Knesset, the government, or the President, and indefinitely postpone the constitutional regulation of problematic subjects like the separation of church from state, or civil marriages. This compromise was accepted, and is known as «the Harari decision» (Navot, 2007, p. 35). Many Basic laws were enacted since, yet a full constitution, regulating all aspects of civil and public life never materialized. The sensitive subject of the marriage legal regime and the Religious Community Arrangement was never regulated by a basic law. The relevant articles of the «POiC» remained in force to this day.

The «POiC» lost its semi-constitutional status when the state was founded, and the British monarch no longer had authority in the new state. The Knesset had the authority to amend or nullify articles of the «POiC» and most of its articles were subsequently replaced with original Israeli legislation. However, the articles that constituted the Religious Community Arrangement remained in force.

Soon it became clear that for the Jews, who became after the 1948 war the majority of the population of Israel, the arrangement was no longer possible to implement. Those registered in «Knesset Israel» were now a minority. In the early years of Israel's independence, the majority of its Jewish population consisted of persons who were not members of «Knesset Israel», either because they have retired from the outset, or because they immigrated to Israel and didn't register. These people were not subject to the judgment of the millet Rabbinical Court system, creating a legislative and practical loophole that was hard to bear. This problem was exacerbated when the Knesset decided, in February 1949, on the disintegration of «Knesset Israel». It was just a technical step. The registry was not updated since 1944. Due to the mass immigration of Holocaust survivors to Israel, and even a bigger wave of immigration of Jews from Arab countries in Israel's early years, within a few years the majority of Israel's Jewish citizens were never registered in «Knesset Israel».

At this stage, the Israeli legislator could turn to one of two ways. As article 65A of the «POiC» remained valid, one possible way was to establish an institution of civil marriage. This would enable those not registered in a recognized Religious Community a civic institution in which to arrange their matters of personal status. The other way was to coerce its Israeli citizens to belong to a Religious Community according to their ethnicity.

None of these two options was obvious. In 1951 the Supreme Court ruled in the Yossipoff case (Yos-

sipof vs. Attorney General, 1951) that article 65A of the «POiC» sets the legal ground for civil uniform personal status arrangement for those not belonging to a recognized Religious Community, but implementing such an arrangement will require additional legislation. The court thus recognized that the first way is legitimate, should the legislator choose to follow it. The Yossipoff case did not engage the core issues of the question of civil marriage but rather dealt with the validity of the law articles relating to bigamy. The statements regarding article 65A were obiter dicta, and yet, at this early stage of Israel's legislative arrangements, when the state was controlled by the secular socialist «MAPAI» party, turning to a course of enacting an arrangement of civil marriage seemed possible.

The Israeli legislator has decided to choose the second path. On May 12<sup>th</sup>, 1953 the Israeli government brought before the Knesset a bill intended to remedy the situation created by the cancellation of «Knesset Israel» and create a new Jewish Religious Community whose members, «Jews in Israel» (a term not implying voluntary registration) would settle their affairs of marriage and divorce in the Rabbinical Court system according to Jewish law. The bill was eventually accepted on April 9<sup>th</sup>, 1953 as Rabbinical Courts Jurisdiction (Marriage and Divorce) Law. The essence of the law is in these articles:

1. Matters of marriage and divorce of Jews in Israel being nationals or residents of the state shall be under the exclusive jurisdiction of Rabbinical Courts.
2. Marriage and divorce of Jews shall be performed in Israel in accordance with Jewish religious law.
3. When a suit for divorce has been filed in a Rabbinical Court, whether by the wife or by the husband, a Rabbinical Court shall have exclusive jurisdiction in any matter connected with such suit, including maintenance for the wife and for the children of the couple.

Since 1953 the law has undergone several changes. All changes left intact the principle that «Matters of marriage and divorce of Jews in Israel... shall be under the exclusive jurisdiction of Rabbinical Courts.»

The Religious Courts Law enforces religious marriages upon a largely secular population and places the most important needs of these citizens in the sensitive field of family law under the control of the religious foundation of the Chief Rabbinate who is in control of the Rabbinical Court system. This is an arrangement no religious politician in Israel would ever give away.

The Rabbinical Courts Law was a minor revolution that changed the voluntary nature of the British system into a strict, compulsive, ethnical-based order. Resetting the ground rules for the Jews has given the system as a whole a rigid frame, which also affects the non-Jewish citizens subject to the system.

The British legislator saw fit in enacting article 65A of the «POiC», to create a conceptual framework that would allow civil marriage for those unwilling to register to a Religious Community. The Israeli legislator made belonging to a Religious Community into a compulsory matter not dependent on the will of the citizen, and his self-definition. From 1953 on, this matter was determined by the clerics in one's ethnical group. Following the enactment of the Rabbinical Courts Law, the Knesset enacted in 1963 the Druze Religious Courts Jurisdiction Law, taking a similar approach, and Article 4 of that law stated that subject to the court's jurisdiction are «Druze Israeli citizens or residents». Enforcing the arrangement on these two significant populations gave the whole arrangement a rigid character, and took away any flexibility it might have had.

The enactment of the Rabbinical Courts law did not eliminate the possibility of using Article 65 A to create an institution of civil marriage. There still existed some citizens, albeit not many, labeled «Devoid of Religious Affiliation» who would benefit from such a law. But the demographic reality of the first decades of Israel roughly matched the ethnic division existing when the «POiC» was enacted, because although the 1948 war reduced the number of Arabs in Israel, and consequent massive Jewish immigration turned the Jews into a large majority, still it could roughly be stated that up to 1990, the inhabitants of Israel were Jews, Moslems, Druze, Roman-Catholic and Greek-Orthodox Christians. The community of those «Devoid of Religious Affiliation» was at the time small and ineffectual.

Other distortions and problems inherent in the millet system, such as the large number of those who could not marry under the existing system despite belonging to a Religious Community such as mixed couples, have created a large number of alternatives to the system's arrangement, used with relative ease. These alternatives include the «Yedum Batsibur» arrangement, a kind of institutionalized common-law marriage, and the «Cyprus marriage», in which the state recognizes marriages committed abroad between Israeli citizens, an arrangement adopted by the Israeli Supreme Court in the Funk-Schlezingler case of 1963. The alternatives give couples most of the rights given to those married within the millet system, thus creating a simple and convenient solution also for those «Devoid of Religious Affiliation». Thus, for several decades, the problem did not become a serious problem that must be immediately addressed.

And yet, the closed nature of the system, based on rigid ethnic categories, called for the closure of the theoretical door article 65A has left open. In the early 1980s, the Israeli Ministry of Justice initiated a comprehensive legislative process aimed at establishing Israeli law on original Israeli legislation and trying

to cleanse the law from dependence on foreign sources. Among other steps taken, the Knesset enacted in 1984 the Abolition of Archaic Laws Law, which annulled Ottoman and British statutes that appeared to be archaic. This law also abolished Article 65A of the «POiC».

The bill for the Abolition of Archaic Laws was proposed by the Israeli government. When referring to article 65A, the bill laconically stated that «Article 65A gives the power to make law provisions for the divorce of foreign nationals. This provision is superfluous since independence». This was obviously an incorrect statement, whether according to the language of Article 65A, or the Israeli court rulings that followed its enactment. There is no telling how deeply the 1984 legislators inquired into the legal situation before canceling article 65A, and if any of them was aware of the misstatement in the bill. However, the door leading to civil marriage in Israel was closed in 1984, several years before the great wave of immigration from the former USSR brought to Israel a million new citizens, eligible for citizenship according to the secular Law of Return, but not Jewish according to Jewish religious law, that has different criteria for being Jewish. Tens of thousands of these were thus labeled «Devoid of Religious Affiliation», and could not marry or divorce within the millet's framework.

This situation has created a problem that the legislature had to address. A radical change in the system was politically out of the question. The inclusion of immigrants in any category other than «Jewish» within the system, such as the creation of the «Russian-Orthodox Religious Community», would also have missed the goal. The immigrants from the former USSR were brought to join the hegemonic sociocultural Jewish group, of which they considered themselves a part, whatever their formal religious affiliation may be. Categorizing them anywhere else within the system would identify them as belonging to a lower group within the social hierarchy, those who are «not Jewish». The need for a solution became urgent as the number of those unable to marry within the existing system increased, and accordingly, their political power in the Knesset, in the final decade of the 20<sup>th</sup> century and the first decade of the 21<sup>st</sup> century.

#### 4. The Spousal Covenant

Upon realizing the extent of the problem, The Knesset has begun a complex legislative process aimed at solving the problem of those «Devoid of Religious Affiliation», who suddenly turned from being a marginal minority into a large population group with substantive political influence. The procedure, lasting about a decade, started with a general statement about creating an institution comparable to civil marriage, and changing

the system radically while creating an alternative arrangement to the millet system. But a typical Israeli political upheaval led to moderating this radical move and ended with a partial arrangement regarding only a small fraction of the population. The law, enacted in 2010 was named the Spousal Covenant for Those Devoid of Religious Affiliation Law.

The law creates a new legal status, contractual in its nature, separate from marital status. By law, a person who is «Devoid of Religious Affiliation» (defined in article 1 of the law as one «Who is not Jewish, Moslem, Druze, or a Christian») can engage in a Spousal Covenant, defined as «...a contract between spouses to live together and cohabit». This status is not marriage. It is a contractual framework awarding the spouses a limited number of the many rights and benefits awarded to married couples. A Spousal Covenant Registry was established to register couples «Devoid of Religious Affiliation» engaging in the Spousal Covenant. Article 14 of the Law reassures that «...this law does not affect marriage and divorce laws and the jurisdiction of the religious courts according to any law».

The desire to distinguish between marriage and the Spousal Covenant is reflected in many articles of the law, which weaken the strength of the bond created by the Spousal Covenant, give those couples lesser rights than married couples, and try to give the Spousal Covenant an entirely different character from that of marriage. Such is the waiting period required for adoption or surrogacy (Article 13 (c) (1)), the fact that the Spousal Covenant does not grant rights under the citizenship and entry into Israel laws (Article 13 (c) (2)) or the authority given to the court under article 11 (d) of the Spousal Covenant Law to dissolve the partnership according to one spouse's request.

It seems that the law is far from solving the problem of those «Devoid of Religious Affiliation», if only because of the provision that they can only engage in Spousal Covenant with each other. The law creates, in effect, a kind of new millet, the Religious Community of those «Devoid of Religious Affiliation». These, like the rest of the religious communities, can legally couple only among themselves.

It seems the Spousal Covenant provides a limited solution to a limited problem. Official statistics (Spousal Covenant Registry Statistics, 2020) reveal that up to 2021, during the decade of the law's operation, only 138 Spousal Covenants were registered, a very small number when compared to the five digits number of those «Devoid of Religious Affiliation».

The Spousal Covenant is not marriage and does not constitute a worthy model for future enactment of civil marriage law in Israel if ever the political situation will enable such enactment. The legislator has differentiated this institution from marriage in many ways, keeping the Spousal Covenant inferior to marriage in many aspects.

## 5. Conclusion

The constitutional regulation of the sensitive area of family law and religious denominations requires one of these two – wide public consent or dictation from a colonial ruler. The current arrangement was dictated by a colonial ruler. The «POiC» was not the result of an agreement between religious denominations, ethnic communities, or religious and secular groups. It was the result of a decision made in a distant colonial center that ruled the periphery. This kind of regulation is no longer possible in Israel, an independent and sovereign state. But it turns out that regulation based on broad consensus is not possible in the State of Israel, due to the deep rift between the religious and the secular, making the possibility of constitutional arrangements on matters of religion and state impossible.

A constitutional arrangement that is by nature difficult to change. When the Religious Community Arrangement lost its constitutional status with the establishment of the State of Israel, the possibility of relying on a mere parliamentary majority to change it became real. Thus, the arrangement lost its original character, due to legislation that is not constitutional in nature, the Rabbinical Courts Law, whose adoption or amendment requires a parliamentary majority and not broad public consent. Thus, the arrangement is often changed, in legislation and case law, in order to deal with challenges arising from being outdated and archaic, and the product is a patchwork of legislation, which does not meet the needs of the citizens of the State of Israel. When it comes to the Religious Community Arrangement, strengthening the religious system that does not tolerate civil arrangements is the way the Israeli legislature takes time and again.

There's no telling what would have happened had article 65A of the «POiC» remained in force when the wave of immigration from the former USSR came to Israel in the early 1990s. It surely gave a constitutional framework for creating a foundation of civil marriage, giving a better, more powerful tool than the Spousal Covenant for easing the suffering of tens of thousands of citizens who are labeled 'Devoid of Religious Affiliation'. The legislator chose to eliminate this option in 1984 when article 65A was abolished.

The state of Israel is 74 years old. For three quarters of a century the Israeli legislature has refrained from constitutionally regulating the most sensitive areas of citizens' lives, leaving regulation to the coincidences of a passing parliamentary majority on specific questions. It is time for the people of Israel to decide to deal with the problem and to give family law appropriate constitutional regulation, designed to cater to the needs of citizens of a culturally and religiously heterogeneous state, including, rather than excluding, those who fail to fit the narrow patterns of the current Religious Community Arrangement.

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## КОНСТИТУЦІЙНЕ РЕГУЛЮВАННЯ ЦИВІЛЬНОГО ШЛЮБУ В ІЗРАЇЛІ

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### **Анотація**

Метою цієї статті є огляд історії конституційного регулювання шлюбу та розлучення в Палестині під британським правлінням та державі Ізраїль з 1918 року. З 1918 по 1948 рік Ізраїль перебував під британським правлінням (здебільшого під мандатом Ліги Націй) і в той час називався Палестиною. У 1948 році частина цієї території заявила про свій суверенітет як незалежна держава під назвою Ізраїль. У статті буде висвітлено різні конституційні норми та процедури, які регулюють сферу сімейного права в Палестині під британським правлінням та державі Ізраїль від початку британського правління до сьогодні.

Стаття ґрунтується на історичному дослідженні законодавства Британської Палестини та держави Ізраїль у сфері сімейного права, аналізуючи законодавство відповідно до історичних подій у регіоні. Результати цього дослідження полягають у тому, що з 1948 року до третього десятиліття 21-го століття ізраїльський законодавець неодноразово вживав заходів для запобігання конституційному регулюванню цивільних шлюбів, зберігаючи архаїчну систему міллета, османську систему шлюбу в релігійних громадах, тобто основа регулювання шлюбу та розлучення в Палестині під Британським правлінням. Але незважаючи на те, що первісна домовленість міллета була прийнята британцями як добровільна система, ізраїльський законодавець надав їй нові й обов'язкові особливості, уникаючи при цьому комплексного конституційного регулювання ізраїльського сімейного права.

У статті робиться висновок, що конституційне регулювання цивільного шлюбу, ймовірно, неможливе в Ізраїлі через політичну неспроможність досягти згоди між релігійними та світськими євреями в Ізраїлі. Але це не завадило ізраїльському законодавчому органу докорінно змінити конституційний механізм британського правління, залишивши позаду клаптик імпровізованого законодавства, яке порушує основні громадянські права ізраїльських громадян.

**Ключові слова:** британське правління щодо Палестини; конституційне регулювання шлюбу; Ізраїль; сімейне право; система міллета.