1

Judicial Power and National Politics in Israel

Religious-Secular Conflict*

In the last quarter of the twentieth century, social groups in Israel turned to the judicial arm of the state in an effort to force the state to change its laws and policies on religious personal status law. This chapter asks why one crucial social group in the religious law debates in Israel, the women's movement, turned to litigation in the High Court in the early and mid-1980s and argues that the phenomenon is best analyzed in terms of the changing relationship between state and society in Israel throughout the 1970s, '80s and '90s.

By the close of the twentieth century, the state had become one of the major subjects of political studies in the United States, and for good reason: it, and particularly the nation-state, had become "the dominant form for organizing political power" throughout the world.[1] It is not a surprise that political scientists should focus on the state in their political analyses, nor that social groups should direct many of their efforts at social and political change to the state. What is, perhaps, a surprise is that more political scientists have not directed their attention to the bottom-up aspects of the nexus between state and society visible in states' and scholars' concerns with legitimacy,[2] the lobbying of social groups,[3] and in the last several decades, a growing movement toward litigation as a social group strategy for social and political change.[4]

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This chapter begins with the model of state-society relations developed by Migdal and others.[5] In this model, the state should be viewed as neither unitary nor all powerful. Although the twentieth-century state sought to control a vast spectrum of personal and public institutions and behavior,[6] the limited nature of the state is an important insight offered by the state-society model.[7] Certainly many factors exist that limit the powers of a state, including international influence or status,[8] internal battles between political officials,[9] or struggles amongst major political structures such as the military.[10] The state-society model suggests that the interaction between the state and society offers a more universal key to understanding politics across a spectrum of specific empirical circumstances.[11] The Israeli women's movement's initial motivation for turning to the judiciary cannot be explained in terms of any one factor. Rather, five major components came together to lead the women's movement to the High Court. These include structural constraints, individual action, cross-national models for effecting political change, new activism of the Israeli High Court in some areas of individual rights, and the ideological appeal of the court as a source and protector of higher ideals independent of political trends (i.e., natural law and individual rights law). In analyzing the women's movement and the High Court, a symbiotic relationship emerges that appears to explain this and other important and perplexing questions that come out of the religious law debates in Israel. Namely, why did the High Court, in the late 1980s, begin to challenge Rabbinical Court (Jewish religious court) jurisdiction despite the tendency of the former to avoid highly charged political issues? The relationship of mutual support that emerged between the High Court and the women's movement (among others) goes a long way toward answering both of these questions.

Before setting into the history of the interactions of the women's movement with the High Court over religious personal status law, the first section, below, briefly outlines the roots and jurisdictional questions in religious personal status law in Israel. The second section is a discussion of the role of the women's movement in the battle over jurisdiction of personal status questions in the Israeli courts. The third section sets this empirical case in terms of larger theoretical issues of independence of the judiciary and judicial power. And throughout, I suggest a model of mutual support between the women's movement and the High Court. I do not argue that the actions of either group were directed in any way by the other. Rather, both the women's movement and the High Court derived benefit from the other's actions. This relation cannot be construed as directly causing specific behaviors or decisions of the other. Rather, it

is a symbiotic relationship of mutual indirect influence stemming from common interests and common gain.

Jurisdiction of Personal Status

In Israel, as in many countries in the Middle East, personal status law, or family law, is governed by the laws of official religious communities. In Israel, there are fourteen different official religious communities with fourteen different legal jurisdictions. Citizens are registered in the Ministry of Interior as Jewish, Muslim, Druze, Bahai, or ten different denominations of Christian churches (primarily Eastern). Whatever their personal association or lack thereof with one of these religions, for most matters of family law, and notably all matters of marriage and divorce, citizens have no alternative but to go through the religious courts. Citizens have freedom of religion in the sense that one's religious rights are guaranteed within these fourteen different communities. But there is no freedom to choose not to participate in one's official religion when it comes to family law.

This situation has raised questions among Israelis and among scholars about democracy and freedom of religion in Israel. One question is: How can a small minority, the Jewish Orthodox establishment, continue to control family law when the state and the people are secular? Does this not run counter to a representative democracy? The second question, raised less often, is whether public opinion should have any bearing on freedom of religion as an individual right.[12] One premise behind these questions is the assumption that public opinion in Israel is, indeed, against the current status quo on religious law. However, some evidence suggests that public opinion on religion and the state is more complex and tends toward an acceptance of the current status quo.

Origins and Maintenance of Rabbinical Jurisdiction: Identification of Israel with the Jewish Religion qua Religion

Religious jurisdiction over personal status law is the product of a bargain made by the early Zionist leaders with the existing Orthodox community (Yishuv) in Palestine in the 1940s. During the British Mandate, the Yishuv was the official representative of the Jewish community to the Mandate authorities in Palestine. In an apparent concern for unity and legitimacy, in 1947 the socialist, secular, Zionist leader David Ben-Gurion made a bargain with the Yishuv leaders. He committed the future state of Israel to

> (1) the establishment of Sabbath (Saturday) as the legal day of rest for the Jews and for state institutions; (2) the observance of the Jewish dietary laws (kashrut) in all state institutions; (3) the continuation of rabbinical control over matters of personal status for Jews; and (4) the establishment of a religious school network, subject to minimal secular requirements set by the State.[13]

In return, Ben-Gurion was assured Yishuv support for the new state.

In later years, Ben-Gurion explained his conciliatory agreement with the Orthodox establishment in terms of the importance of the Jewish character of the state, the need for the support of the Orthodox community to gain legitimacy within Israel and abroad, and the need to include the Orthodox within the state rather than allowing them to become an opposition force.[14] For Ben-Gurion, the paramount concerns were the unity of the people and the integrity of the state, all under a common religious-cultural banner. In a series of interviews with Moshe Pearlman in 1964, Ben-Gurion expressed a deep spirituality connected with the Jewish people. His understanding of God was highly abstract: "a being, intangible, indefinable, even unimaginable, but something infinitely superior to all we know and are capable of conceiving."[15] Ben-Gurion expressed his spirituality as closely connected with the Jewish religion and the Jewish people. "The twin idea of the Messianic vision informs the whole of Jewish history and the Jewish faith. It is the core of the religious, moral and national consciousness of the Jewish people."[16] For Ben-Gurion, the Jewish religion and people were always connected to "national and territorial themes."[17] It was the contribution of Zionism to offer a new, territorial mode of Jewish expression as an alternative to traditional Judaism.[18]

In arguing against groups he called "religious zealots," such as the Natorei Karta, Ben-Gurion held Zionism up as the new religious and cultural alternative with a "revolutionary approach to Jewish salvation."[19] Salvation now lay in a state for the Jews rather than traditional forms of religiosity. Ben-Gurion's approach to Orthodox Jews, even those who broke the law in the service of their religion, illustrates some of the tensions in his own thinking about the relationship between Judaism the religion and Judaism the state, the Orthodox community and the new secular community:

> Why then do we not deal with them as we should any other lawbreaker? For one thing, it is always more difficult when acts are prompted by a deep religious belief. They are not common law-breakers. For another, they represent a world

> most of us came from, a world we knew as infants, the world of our grandfathers—they have the same beliefs, the same outlook, the same dress, the same beards; they look like our grandfathers. How can you slap your grandfather into jail, even if he throws stones at you? Moreover, they claim that they are upholding the same tenets for which our forebears were prepared to give their lives.[20]

At the same time, Ben-Gurion personally favored a relationship between religion and state closer to the model of the United States:

> Unfortunately we could not keep religion completely out of politics, for religious parties existed, as a hangover from the pre-State Zionist Congresses. I am sorry about this, for I feel, and I used to tell this to my religious party colleagues, that they should do what they can to spread their religious beliefs through the accepted channels in most (although not all) democratic States—through the synagogue, parochial schools, religious youth movements, newspapers and magazines, lectures and so on.[21]

However, on top of religious-cultural considerations, the institutional constraints of coalition politics were always a concern. Ben-Gurion's desire to maintain unity with religious communities overrode his personal, highly abstract form of spirituality in which religion and the state should remain separate:[22]

> I have spoken of the religious parties in the coalition. They are Zionist, completely identified with the national interests of the State, thoroughly responsible. But on religious issues, they are in agreement with some of the demands of Natorei Karta. They too would like to see traffic halted on the Sabbath, although they are opposed to its being forced on the public by violence. However, they would find it hard to remain as partners in a government that took strong action against a group that fought, even illegally, for Sabbath observance.[23]

When it came to religious family law, however, another factor was equally important: "I did not consider questions of personal status to be a first priority."[24]

Many explanations of the continuing existence of religious law in Israel have focused on the side of the state, analyzing the role of political

coalitions in Israel's proportional electoral system. As Ben-Gurion made clear in his interviews with Moshe Pearlman, including religious parties in the state coalition(s) was a high priority for him. By the 1960s, however, he saw the proportional system as problematic.[25] Scholars have pointed to the constraints that the proportional electoral system puts on coherent governing in Israel. In his work on the crystallization of the Israeli state, Migdal notes:

> The proportional electoral system made it less likely that any party could achieve an absolute majority, thus increasing the chances of small religious parties to become integral parts of government coalitions. The continuing presence of these parties in Israel's cabinets has cut deeply into the unity of purpose of the state and the ability of the central leadership to apply many aspects of its conception of the state during the period of state crystallization.[26]

The proportional electoral system seems to be the most important institutional explanation—at the level of the state—of continuing religious jurisdiction over personal status law in Israel. Some surveys suggest another important factor located within Israeli society. Namely, the majority of the public is not, as many have assumed, against the connection between the Orthodox establishment and the state in Israel. In fact, there is important evidence of a conceptual and practical link between the Jewish state and the Jewish religion as Orthodox Judaism for most Jewish Israelis.

For most of the history of the state, Israelis and others have thought of Israel as a secular state with a largely secular population and a religious minority. These conceptions were supported by popular surveys that asked Israelis to identify themselves as either religious or secular. In common parlance in modern spoken Hebrew, however, the word "religious" (דתי) means Orthodox, or even ultra-Orthodox. Thus, a methodological problem inherent in the surveys led to a skewed vision of the religiosity of the Israeli public as bipolar. Moreover, the Guttman Institute saw a potential conflict between the apparent secular-religious divide and some of its own work on religiosity per se going back to the 1960s.

In direct translation דתי means "religious" in Hebrew. However, in spoken Hebrew for many decades, דתי is slang for Orthodox and ultra-Orthodox Jews. The plural, דתיים, means Orthodox and ultra-Orthodox Jews in direct translation in modern Hebrew. In fact, the term "Orthodox Jews" is usually translated into Hebrew as חרדים יהודים, or "Haredi Jews." Thus, there is a blurring of the lines in common Hebrew slang between

Orthodox and ultra-Orthodox communities so that all of the above fall into the broad, imprecise category of דתיים, or "religious" (pl.), in modern slang. This slang holds for the whole population. Thus, the Guttman report argued that basing survey questions on the simple binary terms, "religious" (דתי) and "secular" (חילוני), did a disservice to the reality of Israeli Jewish religious identity and religious practices. It biased the results of previous surveys in favor of presenting the Jewish Israeli population as secular, when in fact it is a population highly practicing of Judaism in an identifiable range of ways.

The first surveys to break the binary assumptions regarding religiosity and religious practice in Israel were published in the Guttman Report, discussed in some detail below. The findings of the survey published in 1993[27] have been reaffirmed in Israel Democracy Institute surveys in the decades since. While the Israel Democracy Institute, through the Guttman-AVI Chai Center, found a decrease in religiosity in the late 1990s it found levels returning to 1991 levels or even higher in the years from 1999 through 2009.[28] Thus, the general finding that the Israeli population is far more oriented toward religion than previously assumed holds. Some international surveys have more recently returned results again suggesting a binary picture, similar to that assumed in Israel in the 1960s, 1970s, and 1980s. However, those surveys have tended to fall into the same methodological problem—asking, "Are you religious?" or "Are you secular?"—as with pre-1990s surveys conducted by Israeli institutions.[29]

The first Guttman Institute report found that only 21% of the Jewish Israeli population identified itself as "totally non-observant"; 14% as "strictly observant"; 24% as "observant to a great extent"; and 41% "somewhat observant." Thus, 65% of the Israeli public was at least moderately observant, and another 14% were completely observant, adding up to a shocking 79% of the Israeli public that fell within a spectrum of "practicing." The Guttman Institute understood these findings to indicate that, rather than a religious minority and secular majority, Israeli society is made up of a spectrum of belief and practice, with most Jewish Israelis closely connected with the religion in both belief and practice. The institute found that "Israeli Jews are strongly committed to the continuing Jewish character of their society, even while they are selective in the forms of their observance."[30]

The Guttman findings on specific belief and practice are indeed indicative of an overall link in the Jewish Israeli public between Judaism as a religion and the Jewish state. Over 60% surveyed "believe completely" that "There is a God"; 55% that the Torah was given to Moses on Sinai;

just under 50% that "the Torah and mitzvot are God's commands"; and 21% that "a non-observing Jew endangers the Jewish people."[31] Among Western respondents, there was an all-or-nothing tendency with regard to religious practice not notable in the Middle Eastern Jewish communities.[32] Observance of the Sabbath was high, even amongst those identifying as "totally nonobservant." "Overall, 77 percent say that marking Shabbat [Sabbath] in some way is a very important or important principle in their lives, including 39 percent of those who consider themselves 'totally non-observant.' "[33] Non-observant Western groups are more likely to observe these rituals without attributing to them a religious content.[34] But perhaps most significantly, an overwhelming 95% of respondents answered that the establishment of Israel "influences" or "influences a lot" their feeling that they "are part of the Jewish people."[35]

My own observations from ethnographic research and from interviews suggested to me that in Israel Judaism is defined in public and private discourse as current forms of Orthodox Judaism. The Guttman report confirms this observation. Regarding religion and the state, almost half of the population believed it should be "a concern of the government that public life comply with Jewish religious tradition." While 49% were critical of the status quo on religion and the state, 33% of those believed public life should be more religious (16% of the total sample).[36] 51% of those surveyed supported the current arrangement of religion and the state, meaning that 67% of Israelis preferred the status quo on religion and state, or wanted *more* religion in public life. Over 80% responded that their own life-cycle rituals (birth, marriage, death, etc.) should have a "Jewish character." Only 4–7% felt religious life-cycle rituals were not important.[37] At the same time, specific questions about making civil marriage possible resulted in a more complex picture. Concerning civil marriage, 44% responded "no" or "definitely no"; 39% answered "yes" or "definitely yes;" and only 17% wavered, answering "perhaps yes" or "perhaps no."[38] It is important to note here that the current status quo on religion and the state in Israel is in fact primarily Orthodox rabbinical jurisdiction of personal status law. With the exception of autonomy inside the religious education system (applied only to religious communities, not to the public at large), the religious bureaucracy has been willing to be more flexible on other areas included under the original 1947 agreement between Ben-Gurion and the Yishuv. It should be noted, for example, that religious officials have not tried to enforce religious education on the public at large. And they have been relatively more flexible on issues of Sabbath observance and Kosher Law observance outside the borders of their own communities, socially and geographically. There have, however, been conflicts over

these issues when the wider public is seen as invading those social and geographical boundaries.

For secular activists (who, in the Guttman report, would fall under "totally nonobservant" and "somewhat observant"), the question over religious law in Israel has been, how can the Orthodox maintain this power in a secular and democratically elected state? This question, of course, is predicated on the assumption that the population of Israel is indeed secular. The Guttman report indicates quite clearly that the population at large is mostly "traditional,"[39] identifies strongly with Judaism as Orthodox Judaism, and identifies strongly with the need for Judaism to be expressed in and protected by the state. In a representative democracy, the most obvious answer to why this ostensibly strange policy or law is allowed to remain is that the population basically supports it. Thus, despite the previous conceptions of scholars and of many Israelis,[40] there is no real paradox in the existence of religious personal status law from the perspective of Israeli society. True, a sizable minority does not support it (33%), and some Isrelis even approve of civil marriage to some extent (39%). However, the majority of the public supports the existing arrangement of religion and the state (51%), and some would like to see religion expanded in the public arena (16%), for a total of 67% of the Jewish population in Israel either supporting the existing relationship between religion and state, or preferring more religion in the public sphere. And, importantly, minority communities in Israel tend to favor this modified *millet* system because it ensures them some degree of communal autonomy over their own personal status and family law issues.

Courts and Personal Status Law

The civil courts in Israel are separated into three different levels: magistrate (trial) courts, district appeals courts, and the Supreme Court. The Supreme Court in turn functions both as the highest court of appeal for trial cases and as the High Court of Justice. The Supreme Court hears regular appeals based on falsified evidence, evidence that was never presented, or if another person has been convicted of the crime in question. As the High Court, it decides whether lower courts have acted within their jurisdiction, within the parameters of natural justice, or in other "exceptional cases" where it sees fit to intervene in the interest of justice.[41] Next to the civil courts there exist three other complete court systems in Israel: religious, military, and labor. Each of these also includes trial and appellate levels. Cases can, under certain conditions, be appealed from these separate tribunals to the civil district courts, the Supreme Court, or

the High Court of Justice (HCJ). In the case of Rabbinical Court decisions, cases can only be appealed on grounds of lack of appropriate jurisdiction or lack of a reasonable opportunity to appeal within the religious court system. Thus cases appealed from the Rabbinical Courts often go to the HCJ. Lack of jurisdiction triggers hearing in the HCJ, whereas normal appeals go to the Supreme Court. This is significant because many cases, when appealed, go directly to the HCJ, which is the judicial body that hears constitutional-type questions. Israel has no written Constitution but it does have a long constitutional tradition dating to the 1950s within jurisprudence.[42] The fact of moving directly to the HCJ—Israel's constitutional body—due, often, to jurisdictional questions in religious law cases has had important implications for the jurisdictional questions inherent in many of the tensions between the High Court and the Rabbinical Courts.

The religious courts are founded on a principle of differential (particular) law by religious community; the civil courts, on the principle of universal law. The fundamental conflict between the two systems is highlighted by the Israeli Declaration of Independence and the 1992 Basic Law on Human Dignity and Freedom, which outline a political and legal system based on universal citizenship and law: "The State of Israel . . . will uphold the full social and political equality of all its citizens, without distinction of religion, race, or sex."[43] Religious law clashes with these principles of universal law on at least two levels: (1) the religious personal status laws themselves vary by community, with fourteen completely separate legal jurisdictions by official religious community within the state of Israel; (2) within each community the laws vary by gender as well, in effect creating twenty-eight different bodies of personal status law within the same state, most of which entail fewer legal rights and a lower legal status for women. This chapter focuses on the HCJ and the Rabbinical Court, within the Jewish community, because it is here that the political decisions are largely made. The conflict between Rabbinical Courts and the HCJ highlights the internal social and political battle within the Jewish sector of Israeli society over the appropriate place in the Jewish state of universal law versus communal religious law.

Although away from a heated public forum, debates over religious law continued after the initial conciliation between Ben-Gurion and the Yishuv in 1947. The sites of these debates have varied. In the state-building years of the 1950s and 1960s, the discussion took place mainly in the parliament (Knesset) (Shifman 1990), under the auspices of the extremely strong parties.[44] During that time the HCJ did make some decisions regarding what would count as personal status law and thus be under

the jurisdiction of the Rabbinical Court. This includes the 1951 *Kutik v. Wolfson*[45] decision that paternity is to be decided in civil courts. However, overall, the HCJ was not a significant player in the decisions over defining personal status law. Rather, legislation was implemented on adoption (1960), guardianship (1962), succession (1965), and dissolution of marriage (1969). Each of these laws followed in the spirit of *halakhic* norms (e.g., norms of Jewish religious law) with the exception of the dissolution of marriage law, which allowed people from mixed marriages a means of civil divorce.

Then, in 1969, Benjamin Shalit asked the Israeli High Court to force the Ministry of the Interior to register his children as Jewish. Shalit's wife, the children's mother, was not Jewish. But, Shalit contended, the Jewish religious law (*halakhah*) for deciding Jewishness, by which a child is Jewish if his/her mother is Jewish, should not be the law of the land in an ostensibly secular, civil state. The case caused an uproar in Israel, both in political circles and in society at large. Termed the "Who is a Jew?" case, *Shalit v. the Minister of the Interior*[46] highlighted many of the inconsistencies that had previously lain under the surface of the new Israeli state. How could Israel be both a modern, secular, civil state and be the Jewish state? If Israel was "the Jewish state," then who gets to define who is a Jew? If the Orthodox have a complete monopoly within the state's Ministry of Religion and its Rabbinical Courts, then what about immigrants or natives who are from the Reform or Conservative movements? These questions foreshadowed equally difficult problems that would arise in later decades: What about Jews from Ethiopia who had not been in contact with Rabbinical Judaism, and thus could not possibly follow Orthodox rabbinic practice? Were they—whose Judaism was closer to Ancient Israelite religion than to Rabbinical Judaism—Jews? What about immigrants from the former Soviet Union many of whom did not practice at all, either by ideological choice, or by (prior) state enforcement? These questions cannot be discussed further in this chapter. All of these questions mark, however, the depth and breadth of social unease with the inherent religious-secular tensions in Israel's political structure and institutions. Of Israelis, 79 percent may fall within a spectrum of "religious." They appear to agree in large part on the necessity of a connection between the Jewish religion and the Jewish state. But agreement does not go further. And ease does not go with it.

Shalit foreshadowed a deep internal conflict in Israel that would remain suppressed for many years, but which would reemerge in the late 1980s in full force. In the landmark case, the HCJ decided in favor of

Shalit. In explicit, ideological language that appealed to principles of natural law, the HCJ asserted that the religious law defining Jewishness had no place in the laws of the civil state. The HCJ decision was dramatic enough. The drama was heightened still further when the Knesset (Israel's parliament) overturned the decision with legislation within three weeks.[47] The HCJ took this symbolic slap on the wrist and refrained from challenging the Orthodox establishment or the Rabbinical Courts for nearly twenty years. The conflict was suppressed, but the lines became more and more clearly drawn as Israeli social groups became increasingly politicized and polarized during that period.[48]

The High Court in Context

In the early 1970s the Israeli HCJ took for itself the right of judicial review. Since that time, according to Hofnung, judicial review has become an important consideration in legislative and administrative decision making in Israel.[49] Beginning in the 1970s and 1980s, the Israeli High Court took a more activist stand in areas of individual rights outside the purview of the religious courts.[50] Corollary to this new activism was a change from a formalistic approach to law in the court's early years to one based on the principles of natural justice.[51] One scholar of Israeli law called this change a "judicial revolution" as early as 1990.[52]

And yet, despite this activism, between the founding of the state and 1988, only in the Shalit case did the High Court challenge rabbinical authority. After this one attempt, the High Court refrained from challenging Rabbinical Court jurisdiction until 1988, at which point an open and heated conflict erupted between the courts. From 1988 to 2002, the High Court challenged Rabbinical Court authority making explicit decisions that attempted to undermine the status quo on jurisdiction of personal status issues. Since 2000, these challenges seem to be on a decline. Why did the High Court make explicit jurisdictional challenges to Rabbinical Court authority between 1987–2000, having avoided conflict before, and appearing to do so since?

Why did it take so long for the inherent conflict of principles between universalized civil law and religious communal law to express itself in the courts? On the other hand, given the High Court's prior categorization of religious law as off-limits and as a purely political issue more appropriate for representative politicians, a better question may be, why did the High Court challenge Rabbinical Court authority at all?

The Women's Movement and Judicial Change

The battle lines between the secular and religious models of law were institutionalized, in some ways, through the Declaration of Independence and the basic laws, which define the responsibilities of the branches of government. Although open conflict was largely avoided until the late 1980s, tensions between the fundamental principles of universal civil law versus communal religious law were simmering below the surface within the state, and within two extreme poles of society. The histories of the women's movement and the High Court existed side by side for many years with little if any overlap. In the religious law debates, the judicial branch of the state and a tiny movement of grassroots women found an intersection of interests that led to mutual gain and, ultimately, to mutual support.

The women's movement in Israel began before the establishment of the state.[53] It was part of the "first-wave" of twentieth-century women's movements in the world.[54] In one of the few systematic analyses of the political history of the Israeli women's movement, Yael Yishai suggests that the movement has developed with a continuous tension between loyalty to the nation and loyalty to the particular needs of women.[55] In the early years, the Israeli women's movement was dominated by "establishment associations" coming out of the state apparatus (including national parties). The best known associations included Naamat (part of the national union, the Histadrut) and the Women's International Zionist Organization (WIZO). Both of these organizations, until at least the late 1980s and early 1990s, consistently favored the national cause over that of women. Although there was a short-lived women's party in 1949 that did in fact push gender equality, the party was extremely small and lasted only one year. Naamat and WIZO, at the time, by contrast, emphasized women's traditional roles in the family rather than asserting revolutionary demands for legal, political, or social equality.[56]

Established in 1970, the second wave of the Israeli women's movement actively sought to influence the state through lobbying, court cases, and grassroots work. The women's movement immediately sought access to the state, with one of the movement's founders joining Shulamit Aloni's party, Citizens Rights Movement. From January 1974 through February 1977, a member of the women's movement sat as a member of the Knesset.[57] Thus the second-wave movement, initially, gained direct access to the state. However, the movement's representative was always considered a radical outsider by those in the Knesset.[58] And, by 1977, women's

organizations within the women's movement were no longer fielding candidates to political office, a trend that would last for many years. Thus, by 1977, the second wave of the women's movement went against the model of the first wave of the women's movement by avoiding joining the state. In this way, the second wave also avoided being appropriated by the state in ways that its predecessors in the first wave had been, according to some scholars.[59] State appropriation has been a notable problem for women's movements from the Middle East to Asia to Europe.[60]

Since 1984, the Israel Women's Network (IWN) has maintained a permanent lobbyist in the Knesset, and a number of the Knesset members are or were members of the women's movement. The movement has used these ties in an attempt to influence state policy on a range of women's issues, including religious law, and particularly marriage and divorce law. The women's movement began its political work on religious law in 1984 and 1985 with lobbying, conferences with leading rabbinical authorities, and legal advising. Despite lobbying efforts, and despite their attempts to negotiate with rabbinical authorities and politicians, the most politically effective women's organizations (grassroots and voluntary organizations) have succeeded in negotiating with the state without that type of access.

The Second Wave: The Formative Years, 1970–1984

The second wave of the Israeli women's movement was established in Haifa in 1970 by Marcia Freedman and Judy Hill, both American-born Israelis, and both junior faculty at Haifa University;[61] together with two Haifa-born sisters with roots predating the establishment of the state, and whose grandmother was the famous first wave Pioneer feminist, Ada Maimon. The movement quickly spread within Haifa University, and then to Tel Aviv, to become predominantly peopled by Israeli-born, *sabra*[62] women. The Haifa group focused on consciousness raising, and opened up a women's book store that quickly became a women's center. Separate women's organizations emerged quickly in Jerusalem and Tel Aviv, followed by other cities. In 1974, Freedman was elected to the Knesset on the Citizens Rights Movement platform. In these early years, the young, very small women's movement focused on issues of domestic violence, working in the Knesset for legislative reform, and lobbying the local Haifa police department to enforce the laws that did exist. It successfully advocated legislative changes as early as 1972. By 1977, the Haifa group opened the first battered women's shelter in Israel with municipal funding from the city. By 1983, women's shelters had been established in Herzliya, Jerusalem, and Ashdod (IWN archives).

During this same period, the High Court ruled on the Shalit case (1969–70). As already discussed, after that case the High Court maintained the status quo on religious law. For example, in one 1983 case, a divorced man from the United States and an Israeli woman decided to get married. However, his US divorce papers were not forthcoming, so the Rabbinate asked to delay the wedding. Instead, the couple married in a private ceremony. Ultimately they divorced, and in this case, the man appealed a lower court decision requiring him to pay alimony. He argued that he should not have to pay because theirs was not a legal marriage ceremony in Israel. She entered a counterappeal, but he won the case, as well as ten thousand NIS in lawyers' fees (a hefty sum for the average Israeli). This case highlights the High Court's support of a status quo in which there is no legal option for non-religious marriage conducted on Israeli ground,[63] and there is no way out except through religious courts. Increasing numbers of Israelis have "unofficial" marriage ceremonies inside Israel, which are not then registered with the state; more still fly to other countries to marry if their marriage is one barred by traditional religious law, e.g., interreligious marriage, etc. Marriages conducted legally in a jurisdiction outside of Israel are registered as marriages with the Ministry of the Interior. In this case, the woman had the legal burdens (e.g., the requirement of a religious divorce process) but not the legal rights (e.g., alimony) that are usually granted in a marriage and divorce. Rabbinical authorities in Israel tend to err on the side of caution and *accept* the validity of marriages that they have barred or would have barred when it comes to requiring a religious divorce. However, the rights that adhere to marriage (such as alimony) may not pertain if one of the parties willfully avoided a Rabbinical Court decision, as in this case. The human tragedy of this situation has been repeated in many cases around the country.

New Activism, 1984–1987

The Israeli war with Lebanon saw broad public criticism of the state's military-security policy on a level never before seen in the history of the state.[64] This broad base of peace mobilization included sizable numbers of women. Parents against Silence was mainly made up of women who were unwilling silently to see their children go to an unsupported war.[65] This nation-wide peace mobilization brought many women into contact with each other and with the women's movement for the first time. Peace mobilization provided the women's movement with a new source for recruitment during that period.

The Israel Women's Network (IWN), based in Jerusalem, was founded in 1984 by Alice Shalvi, a British-born Israeli. The IWN immediately installed a lobbyist in the Knesset. In 1986, lawyer and professor Franses Raday (also British born) established the IWN's legal center. Raday herself litigated several cases involving women's legal status in the business world, both as a private lawyer and as director of the IWN's legal center (including cases involving sexual harassment, equal employment rights, equal retirement age, etc.). On issues that were not related to religious law, litigation and legislative lobbying were successful quickly and decidedly, creating an increasing sense of delight and efficacy in the women's movement. According to Raday, however, when it came to issues of religious law, the women's movement came up against a wall:

> In other words, everything else we got through almost like butter. I mean, we did have to work hard on it, but things went through fairly easily on all the economic issues, and on violence in the family, and on amending the rape laws, and on a whole series of things the reforms went through quite easily. We got very good decisions from the Supreme Court on equality for women. And when it comes to religion and law, full stop.[66]

The court's continued support of the status quo on religious law is evident in the 1985 case in which the High Court decided that civil courts do not have any jurisdiction over alimony in Muslim divorce cases. This decision maintained the traditional legal authority of the Muslim courts, but actually went against the long-existing norm that the financial and custodial aspects of divorce cases can be taken to civil courts. The High Court decision in 1985 established that this latter legal norm—which is understood to assist women—applies to the Jewish population only.

The Women in Black Years (the Intifada Years), 1987–1993

With the onset of the Intifada, public protest of Israeli military policy reached a new high. Again, the women's movement benefited from this peace mobilization. Women in Black began its weekly curb-side silent vigils two months after the first Palestinian uprisings. The group had the minimal platform of objection to the military occupation's policies on responding to the uprisings. This platform was, of course, somewhat limiting, but in other ways it was very broad. It did not require any litmus test on security issues, the Arab-Israeli conflict in general, or gender issues.

This breadth allowed a broad spectrum of women to participate. Their participation, in turn, brought them into contact with each other and with the women's movement. The movement capitalized on the renewed peace mobilization, adopting the same "non-political" stance for the first time. Most groups had never specifically required a political litmus test, but the early movement members were decidedly leftist, generally secular humanist, and had correspondingly leftist positions on security and gender. Now the movement sent out a clear call for participation based on specific small areas of interest to each activist, rather than a larger political platform. Thus, women of differing political stances on security and gender began to work together on issues such as Mizrahi neighborhood education; consciousness-raising for women in Arab towns; information lines; counseling to women with legal problems; lobbying, and of particular interest, lobbying on issues of marriage and divorce. This specialization to specific interest areas was very important to the expansion of the activist roster.

Several important High Court cases emerged during this period. In the 1987 *Shas* case, the High Court decided that non-Orthodox conversion outside Israel would stand for the purposes of immigration. The *Shas*[67] case marked the beginning of a tenacious jurisdictional conflict between the HCJ and the Rabbincial Courts. In 1988, Leah Shakdiel won the right to sit on the Local Religious Council in Tel Aviv-Yaffa in a case sponsored in part by Naamat.[68] Meanwhile, the case of the Women of the Wall was presented to the High Court, in which a group of Orthodox women petitioned for the right to pray as a group at the Western Wall.[69] This was the first in a series of cases regarding the rights of the Women of the Wall to pray, using rituals often traditionally limited to men, at the Western Wall of the Temple Mount. The HCJ has typically supported the rights of the Women of the Wall. On a variety of issues relating to religious law, the court established a position in favor of principles of universal law as against those of communal religious law. The women's movement experienced real litigation successes in the 1980s and especially in the 1990s; these successes gave it momentum to move forward with its political demands despite some setbacks.

Broad Success on Women's Legal Status, 1993–1995

By 1993, the women's movement had gained momentum with its expanded membership and its legislative and judicial successes. In 1993, the International Coalition for Agunah Rights (ICAR) was established to deal with women waiting for divorce (*agunot* and *mesuravot get*),[70] which is

the main concern of the women's movement vis-à-vis religious law. In its first year, ICAR met with a committee of leading rabbis to try to find a solution to the problem. The next year, the committee recommended five *halakhicly* acceptable remedies, of which only prenuptial agreements were approved by the Rabbinical Courts.[71] In 1995, ICAR and the women's movement at large saw two major legal successes: the establishment of the Sanctions Law; and, after negotiations with the Directorate General of the Rabbinical Courts and others, the institutionalization of the Family Court, also known as the Shalom Court. The Family Court can hear the economic questions arising from divorce, inheritance, and other religious cases, although it has been limited to the Jewish population, so non-Jewish women can be in a more difficult legal situation. It gave a regular institutional forum for the right that had already existed to bring economic questions to the civil courts. The Sanctions Law allowed the Rabbinical Court to use civil punishments against recalcitrant husbands. Immediately after its enactment, a group of men sued to have it apply to women as well; they won. The Sanctions Law has been used more extensively in some legal districts than in others. In the years immediately after its passage, the Northern district around Haifa implemented the law the most often, although it was actively used in all districts.

From 1993 through 1995, the women's movement saw the height of its successes in challenging the status quo on religious law. In 1994, a marriage between a Jew and a non-Jew in the Brazilian consulate was upheld by the High Court.[72] Cases such as the 1994 *Bavli* case also show the court's continuing insistence on universal law above communal religious law.[73] In Bavli, the High Court decided that civil laws on property rights must be used in the Rabbinical Courts in deciding division of property in divorce cases. The Rabbinical Court maintained that it did not have to abide by this decision.

The Women's Movement: Context and Conclusions

In the early part of the 2000s, several important High Court cases affirmed the legitimacy of non-Orthodox conversion for adopted children and lesbian women's maternal rights under the law.[74] Since that time, Reform and Conservative conversions continue to be a contested issue in Israel and in the HCJ. However, much of the focus religious-secular tensions has moved away from the judicial arena and has moved more into grassroots arenas. At national level, the debate in recent years has centered on questions of Orthodox men's rights to Yeshiva education rather than military service;

Orthodox women's rights to sit where they want on public busses driving within Orthodox neighborhoods; and public social tensions meted out in streets, malls, and other public spaces, these latter particularly centered in the city of Jerusalem but fostering debate nationally. With the exception of arguments regarding conversion, Reform and other forms of marriage—both issues requiring a national-level solution—religious-secular tensions have moved to a few key neighborhoods and cities in Israel. They have largely moved away from national political institutions, where debate, and legal conflict, between the late 1980s and early 2000s centered on gender equality broadly construed for the non-Orthodox populations, as well as questions regarding non-Orthodox conversion. Since 2002, the conflict has begun to center, instead, within the social arena of public (streets and neighborhoods), privatized (malls and businesses), and private (homes) spaces.

We know from work on state-society relations in Israel that the establishment and growth of political activity in the women's movement is in keeping with trends in Israeli society throughout the 1970s and 1980s. Scholars have shown that before the 1970s, Israel was run by a strong, party-dominated state with little input from independent social groups.[75] However, through the 1970s and 1980s, social groups making specific political demands on the state mushroomed, leading to a polarization in society so deep that Migdal has argued it threatened the state's ability to rule.[76] Interestingly, in outlining the development, expansion, and polarization of a politicized society in Israel through the 1970s and 1980s, most literature on state-society relations and civil society in Israel has been remarkably quiet on the women's movement, although a few works in English have begun to detail its activities. Mayer, Emmett, Kanaaneh and others have written about the effects of the Israeli-Palestinian conflict on Palestinian and Israeli women and their political mobilization.[77] Sharoni has focused on the masculinization and militarization of Israeli society through its long history of wars.[78] Raday addresses the women's movement in her work on women's status in Israeli society and law.[79] Yishai's work on women's political participation in Israel focused on party- and state-related women's associations.[80] There are a number of works in English on women's movement pioneering women in the prestate years, or collections that address both prestate and poststate periods.[81] Hanna Herzog has contributed an important work on women's mobilization to political office around the country.[82] And there is fascinating work, worthy of note although not on the women's movement per se, on issues surrounding gender and reproduction in Israel, as well as gender and nationalism in that

context.[83] However, there remains a significant amount of work to be done on women's mobilization, and women's movement mobilization, in Israel.

Legal mobilization in the Israeli women's movement has been part of its political development and its growing political influence, despite the small membership numbers noted by Yishai.[84] Why did the movement turn to litigation? First, the structural factors are two-fold. Success in the legislature has been traced to the level of popular support for an issue. Because popular pressure, nationally or internationally, could not be brought to bear on the Knesset to change the status quo on religious law, another alternative was needed. The existence of the judicial branch made it a potential resource. The court's increasing emphasis on natural law made it a more likely alternative than the Knesset to enforce the changes the women's movement sought. These respective roles of the legislature and the judiciary are a function of the institutionalized structure of the political system in Israel.[85]

Second, individuals played a large part in this process. Lawyer and scholar Frances Raday was the first to bring suit to the High Court over equal pay and job opportunity. She later established the Israel Women's Network Legal Center in 1984 (today she is a member of the Rapporteur-Chair of United Nations Human Rights Council Working Group on Discrimination Against Women). As an attorney with an interest in civil rights, born in England and aware of the civil rights struggles there and in the United States, Raday turned to the courts because law was her profession and her model for enacting political change. Third, women in the Israeli women's movement in general were aware of cross-national models emphasizing litigation as part of an effective strategy for political change. They were familiar with the lobbying and litigation techniques used by the U.S. and British women's movements in the 1970s and beyond, as well as the revolutionary civil rights gains that had occurred through litigation in the United States. The fact that a few of the key leaders in the second wave were of American and British or German origin in this immigrant-based country probably heightened the movement's awareness of these cross-national models.

Fourth, with the High Court's changed position on issues of individual rights in the 1970s and 1980s, there appeared to be a strong possibility for change through litigation. And fifth, turning to the court marked an ideological support for the idea that the job of the court is to protect individual rights and principles of natural law independent of any influence by mass opinion or ephemeral political trends. The women's movement gained publicity, a sense of efficacy, and some court cases in its favor as a result of its litigation efforts.