Women as the Bearers of the Nation: Between Liberal and Ethnic Citizenship

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Between liberal and ethnic citizenship

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Introduction
The situation of women in Israel is a complex one. While in many respects women enjoy advanced liberal citizenship rights, in other respects, especially in the domain of personal status law, they suffer from serious restrictions on their rights and from discrimination. It is customary to attribute these flaws in women’s citizenship rights in Israel to the political influence exercised by powerful religious political parties (Halperin-Kaddari 2004: ch. 11). However, in this chapter I wish to suggest a different, more foundational, explanation for this state of affairs; an explanation, which, despite its apparent plausibility, is, to a large extent, hidden from the public eye and seldom discussed. I will claim that these flaws in the generally liberal regime of women’s citizenship rights in Israel are the result of two factors: First, the fact that the state of Israel, which defines itself as a Jewish and democratic state, is the home of two national communities – the Jewish community and the Palestinian Arab community; and second, the fact that the Jewish community is in a continuous conflict with the Arab world and perceives itself as being in the midst of a struggle for self determination and for continued existence.

I will argue that from the perspective of the Jewish community the aforementioned facts create a foundational imperative that Israel maintain its character as a Jewish state through a preservation of a Jewish majority in Israel, an imperative which results in legal restrictions on the right to marry and on the right to have an abortion, both of which, as I will show, are strongly related to communal preservation. While explaining these legal restrictions in this manner may be unconventional and controversial, it is an explanation worth considering both because it highlights the uneasy relationship between democratic aspirations and ethnic aspirations, from the perspective of women’s rights, and because identifying the true reasons behind these restrictions on rights is an important step in the struggle against them. In what follows I will briefly describe the relationship between law, citizenship and ethnicity in Israel and explain its factual and historical origins. I will then discuss women’s citizenship rights in Israel, analyzing the way in which women are affected by the relationship between law, citizenship and ethnicity. I will show how women’s special role as mothers and as those responsible for the preservation of the Jewish ethnic community can account for...
the flaws in the generally advanced liberal rights regime that women enjoy in Israel, and will discuss the legal arrangements maintaining these flaws. Subsequently, I will offer some reflections on the question of how these flaws can continue to exist, almost unchallenged, despite the considerable advance in Israeli women’s rights regime in recent years.

**Law, citizenship and ethnicity in Israel**

The Israeli declaration of establishment states that the state of Israel will be a Jewish and democratic state. Although the declaration of establishment itself does not have the force of law and its power is merely interpretive, the two fundamental features of Israel as a Jewish and democratic state, first set out in the declaration, are seen by many as the substantive basic norm of the Israeli state. This view has gained prominence after Israel’s character as a Jewish and democratic state has been given constitutional status in the two basic laws on human rights – the Basic Law: Human dignity and liberty and the Basic Law: Freedom of Occupation. The purpose clauses of these basic laws state that the Basic Law’s purpose is to give constitutional status to the rights specified in them in order to give constitutional status to the values of the state of Israel as a Jewish and democratic state.

These two basic features of Israel – a Jewish state and a democratic state – manifest the inherent and permanent tension that exists in Israeli constitutional and public law, as well as in Israeli society as a whole, between the universalistic aspiration to become a democratic liberal state that respects and promotes human rights, and the particularistic aspiration to become and to remain a Jewish state – the state of a specific ethnic community in which the community preserves itself and realizes its right to self determination. The possible implications of the Jewish character of the state are contested. While some regard it as a justification for making religious Halakchic law the law of the land, others see it as mandating respect only to some aspects of the Jewish religion or even to none, while emphasizing Jewish nationality and focusing on national symbols, language, shared history and the like (Gavison 1998).

Nevertheless, a minimum feature of the Jewish state on which there seems to be a general agreement among Israeli Jews is the need to ensure the continued existence of a solid Jewish majority in Israel. This is regarded not only as a cultural imperative but also, and even more importantly, as an existential imperative, which stems from the fear that the loss of a Jewish majority will result not only in the cultural annihilation of the Jewish community in Israel, but in its physical annihilation as well. Thus, while the exact meaning and scope of the “Jewish” component of the state is bitterly contested among Jews, the core commitment to the continued “Jewishness” of the state is rarely challenged, and any such challenge invokes deeply set existential fears and goes straight to the heart of what Saban terms the taboo area (Saban 2002: 307).

Not surprisingly, the situation described above has significant implications for the contours of citizenship in Israel. Three models of citizenship are relevant to
the discussion of citizenship in Israel; the liberal model, the republican model and the ethnic model. The liberal model emphasizes personal liberty and protects the freedom of the individual to pursue her conception of the good and to author her life free from any government interference. Thus, in the liberal model of citizenship individual rights are what Dworkin calls trumps, which cannot be sacrificed for the benefit of the community. Critiques of the liberal model argue that because liberalism is neutral with respect to its citizens’ conceptions of the good and treats them all as abstract subjects entitled to universal and equal rights, it fails to develop within citizens a sense of identity and a sense of belonging to a community of value, and therefore leaves them strangers to each other (Shafir and Peled 2002: 4). Conversely, the republican model of citizenship views citizens as members of a moral community who acquire civic virtue by participating in the life of their political community, by identifying with its purposes, and by actively pursuing a shared common good. Civic virtue is measured through the active participation of citizens in the fulfillment of societal duties, such as army service. The higher a citizen’s civic virtue is, the larger is her entitlement to a share of the community’s resources (Shafir and Peled 2002: 5).

While the republican model of citizenship allows all citizens to belong by participating in the moral community and acquiring civic virtue, the third model of citizenship – the ethnic model – links citizenship inextricably to membership in a certain national ethnic group that is based on a common descent and on common cultural markers such as language, religion and history. The ethnic model of citizenship perceives nations as being radically different from one another and negates the possibility of cultural assimilation (Shafir and Peled 2002: 6). In this model the state and the ethno national group converge and the state is committed to advancing only the interests and wellbeing of the members of the ethno national group, treating non-members as second-class citizens (Smooha 1998: 199–200). Smooha defines countries espousing such a model, including Israel, as “ethnic democracies.” An ethnic democracy, according to Smooha, is located in the democratic section of the democracy–non-democracy continuum and operates on the basis of two contradictory principles – the democratic principle which requires equal rights and equal treatment of all citizens and the ethnic principle which aspires to create a homogenous nation-state and privileges the ethnic majority (Smooha 1998: 199–200).

Thus, Smooha explains, Israel is an ethnic democracy that grants its Palestinian Arab citizens individual civil and political rights and even some collective rights, such as separate education and an official status for Arabic, but as a state Israel identifies with the Jewish majority residing in it and aspires to create a Jewish state of and for the Jews. Consequently, Israel promotes the Hebrew language, Jewish culture, the Jewish majority and the economic status and political interests of the Jews, while the Palestinian Arab citizens are treated as second-class citizens, feared as a threat, excluded from the national power structure and placed under various forms of control (Smooha 1998: 205–206, 216–227).4

This chapter seeks to highlight a less explored consequence of Israel’s character as an ethnic democracy; the way in which the relationship between
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democracy and ethnicity affects the legal rights of women in Israel. While the
liberal and collective rights of the Palestinian Arab citizens of Israel are
restricted because they are not part of the ethnic group for whom the state is con-
stituted, I will show that Jewish women’s liberal rights are restricted because
they are an indispensable part of the ethnic group for which the state is consti-
tuted and because it is seen as their primary duty to help the group survive by
keeping and enhancing its numerical strength. Thus, Israel’s character as an
ethnic democracy exacts a price not only from the ethnic “others” but also from
those of the “right” ethnicity, especially women.

Women’s citizenship rights in Israel

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The feminist critique of citizenship holds that women are perceived as entitled to
citizenship rights not because of their humanity but because of their role as
mothers. Thus, women’s individual liberal rights are contingent on their fulfill-
ment of their republican or ethno national duty as mothers (Yuval-Davis and
Anthias 1989). Building on this critique, I will show that the legal rights of all
women in Israel are subordinated to the imperatives of preserving the Jewish
majority in Israel and sustaining the Jewish people. Increasing the birth rate of
Jewish community in Israel was always seen as the best way to achieve these
imperatives. In April 1967, following a report by the Commission for Natality
Problems (the Beky Report), the Israeli government released its first official
decision concerning Israel’s demographic policy. At the heart of the decision
stood the need to promote Jewish natality in order to ensure the survival of the
Jewish people. This focus was reiterated in the government’s second official
decision regarding Israel’s demographic policy, from 1986. The decisions estab-
lished a Center of Demography (COD) and entrusted it with implementation of
the government’s demographic policy.

In what follows I will describe the ways in which the legal regime of
women’s citizenship in Israel is crafted by the need to promote Jewish natality
and to sustain the Jewish majority. In this respect it is important to note that
although the conflict that the Jewish community (through its embodiment – the
Jewish and democratic state) is engaged in is an ethnic conflict, the boundaries
of the Jewish ethnic collective in Israel are determined almost exclusively by
orthodox religious law. Consequently, religious law and doctrine play a direct
and indirect role in determining women’s citizenship rights and legal status in
Israel. Thus, the perpetuation of the religious-national nexus is not merely the
result of pressures applied by strong religious political parties, but is no less the
result of the wish to use state law to demarcate and preserve the boundaries of
the ethno religious Jewish community in order to ensure its continued physical
and cultural existence.

Through a discussion of the laws pertaining to women’s rights in Israel and
their evolvement, I will show that within a general legal framework of a demo-
ocratic state that grants women quite extensive and continuously expanding liberal
citizenship rights there exist areas – namely, abortion control and marriage and
divorce – in which the imperative of maintaining the Jewish majority prevails and the legal framework of liberal rights retreats and is replaced by illiberal legal restrictions on rights. The ethnic motivation of these legal restrictions is obscured by their universal application and by the generally liberal character of the Israeli rights regime. I will start by giving a theoretical background on the importance the control over natality has to ethnic, religious and cultural groups. I will then describe the legal restrictions on abortions and on interreligious marriage in Israel, and finally, I will analyze the Israeli Women’s Equal Rights Act, highlighting these two flaws in the legal protection of women’s rights in Israel against its highly liberal setting.

**Controlling natality**

Women have the biological function, and to a large extent the cultural function, of ensuring the continuity of ethnic and national groups. As hostility between ethnic, national and cultural groups deepens, the reproductive role of women is emphasized and with it the monitoring of the woman’s body and actions (Yuval Davis 1997: 22–23, 29–31). Every state and every society has a strong interest in natality rates. Natality rates can determine the future of the community; will it grow enough or too much, will it grow smaller or perhaps even disappear altogether. Throughout history states’ population policy was pronatalistic and was based on the assumption that a constant increase in population size was necessary to ensure national strength, economic growth and protection from outside aggression (Finkle and McIntosh 1994: 3).

Pronatalistic population policy is also consonant with religious ideologies – such as Christianity, Islam and Judaism – which hold that procreation is a sacred duty, and with ethnic and nationalistic ideologies, which view the size of the ethnic/national community as the key to its strength. Thus, for example, the Catholic Vatican vigorously opposes abortions, and even any form of contraception, because of its belief that the holy purpose of the sexual act, which can only take place between married spouses, is procreation (Keely 1994: 222). According to Islam woman’s role is bringing children into the world, and it encourages procreation as well as early motherhood (Mazrui 1994: 121–122). Similarly, in Judaism the duty to procreate is of the highest order and the use of contraception and abortion is highly restricted (Portugese 1998: 45–47). Controlling natality is equally important for ethnic and national communities, and especially in times of national or ethnic conflict. One of the main ways in which women contribute to the community in ethnic and national conflicts is as biological reproducers of members of the struggling community (Yuval-Davis and Anthias 1989: 7). Women’s reproductive role is central to ethnic and national communities because the “common origin” of the community members, whether true or imagined, is the central and sometimes the exclusive criterion for belonging (Yuval Davis 1997: 26–27). Consequently, control over women’s fertility is, in addition to control over immigration, the central means ethnic and national groups, as well as states, have for controlling a community’s demographic composition.
Restrictions on abortions

One strategy through which the Israeli Center of Demography (COD) attempted to promote Jewish natality was focused on attempts to decrease abortions. At the time of the Beky Report Israeli law criminalized all abortions, making both the woman and the performing doctor criminal offenders (Beky Report: 20). However, the law was not being enforced and illegal abortions were being carried out freely. The committee concluded that abortions constituted a serious demographic concern and that a drastic decrease in abortions could significantly raise birthrates (Beky Report: 19–20). Consequently, it recommended the enactment and strict enforcement of a new law that would criminalize all abortions unless they are approved by a special committee, which would only approve a minimal number of abortions and only after an attempt was made to persuade the woman to carry the pregnancy to term (Beky Report: 44). Thus, Israeli law, which was amended in 1977 according to these recommendations, criminalizes all abortions, except for those that have been approved by a Termination of Pregnancy Committee, which can only approve abortions that meet the specific criteria stipulated by law, and only after the woman has met with a social worker whose task it is to persuade her not to file the request, and to carry the pregnancy to term. While the Termination of Pregnancy Committee approves almost all the requests brought before it, many of the women seeking abortions never file a request, either because they realize that they do not meet the criteria stipulated by law, or because they have been persuaded by the social worker to carry the pregnancy through. Consequently, the number of illegal abortions carried out in Israel each year matches the number of legal abortions carried out (Stopler 2008: 488–491).

A full discussion of the denial of abortion with all its implications to women’s rights is beyond the scope of this chapter. Suffice it to say that the usurpation of a woman’s control over her body, the demand that she expose the most intimate details of her life before a committee of strangers and entrust her wellbeing, her health and her entire future in their hands, and her coercion, in some instances, to carry the pregnancy to term, all constitute severe infringements of women’s fundamental right over their bodies, as well as their fundamental rights to liberty, dignity, privacy and equality. The most common consideration justifying restrictions on abortions around the world is the right to life of the fetus. However, importantly, the Israeli law on abortion is not motivated by a concern for the fetus’ right to life, but by demographic considerations. This is evident from the fact that in addition to authorizing the committee to approve abortions due to health risks for the mother and the fetus, the law authorizes the committee to approve abortions whenever the pregnancy is out of wedlock. The reason that an out-of-wedlock pregnancy constitutes a good cause for abortion is that according to strict orthodox interpretations of Jewish religious law, under certain circumstances children who are born out of wedlock can constitute a threat to the continued existence of the Jewish collective (Amir and Shoshi 2007: 796). Thus, this provision prioritizes the continued existence
of the Jewish collective over the life of the fetus, just as the law restricting abortions prioritizes the continued existence of the Jewish collective over women’s rights.

Restrictions on intermarriage

The attempts by communities to control women’s reproductive capacity are not restricted to attempts to control their fertility rates, but also extend to restrictions on whom they can marry, whose purpose it is to maintain the purity of the community and its boundaries. Thus, for example in South Africa during Apartheid women were not allowed to become sexually involved with men from racial groups other than their own (Yuval-Davis and Anthias 1989: 9), and in the US it was not until 1967 that the Supreme Court held that the anti-miscegenation state laws that criminalized interracial marriage were unconstitutional.\textsuperscript{17} Israeli law also includes a statutory limitation on mixed marriages, albeit of a less coercive nature. Thus, Israeli law does not include a criminal prohibition against interreligious marriages, but by recognizing only religious marriages conducted by a religious tribunal of a recognized religious community the law in effect prevents people of different religions from marrying in Israel.\textsuperscript{18}

Unlike other liberal democratic countries Israel does not have any procedure for civil marriages. The current system of personal laws is essentially a continuation of the Ottoman \textit{millet} system, which was based on the principle of community self-rule, giving each religious community full control over the personal status of its members, regardless of whether they wish to abide by the religious rules and even regardless of whether they consider themselves members of the community. Thus, religious prohibitions that are intended to protect the boundaries of the various religious communities by prohibiting interfaith marriages, have been turned into compulsory state laws, that apply to all, regardless of their religious convictions.

One of the main reasons for the decision of the Israeli legislature to adopt this statutory scheme was its concern that allowing civil marriages might lead to a decrease in the Jewish majority through social mixing and conversion. When introducing the Rabbinical Courts Jurisdiction (Marriage and Divorce) Act in 1953 the Deputy Minister for Religious Affairs explained that one of the purposes of granting legal recognition exclusively to religious marriages was to exclude the possibility of mixed marriages that might result in the conversion of Jews to other faiths (Triger 2005: 204, Fogiel-Bijaoui 2003).\textsuperscript{19} Similarly, when it became known that the Muslim Sharia courts in Israel were willing to marry Muslim men to Jewish women, the Ministry of Religious Affairs instructed the Sharia courts to refrain from conducting such marriages (Shifman 2001).\textsuperscript{20} One could argue that this prohibition does not stem from the fear of losing potential members of the Jewish people because the children of a Jewish woman are considered Jewish even when the man is of a different faith. However, the assumption behind the prohibition is that after marrying a man of a different faith the Jewish woman would convert to the man’s faith, and consequently, their children
will no longer be Jewish. These restrictions on intermarriage also serve the purpose of preventing marriages between Israeli Jews and non-Jewish foreign workers and are in line with other restrictions on the number of non-Jews in Israel (Triger 2007: 747–753; Fogiel-Bijaoui 2003: 33).

While allowing only religious marriages in Israel restricts the rights of both men and women, it has a particularly severe impact on women’s equality rights. This is because the religious personal laws as applied by the religious courts of the various religious communities are highly patriarchal and give clear preference to men over women in most matters pertaining to the marriage relationship, especially the resolution of the marriage (Halperin-Kaddari 2005: ch. 11). Moreover, the subordination of women within the marriage has far reaching effects on their ability to achieve equality in all areas of life (Halperin-Kaddari 2005: 239–240). While partial attempts have been made to ameliorate this situation by means such as the establishment of civil family courts, which have parallel jurisdiction to religious courts in matters that do not pertain directly to marriage and divorce, these attempts do not weaken the hold that religion has on marriage and divorce itself. (Halperin-Kaddari 2005: 228–229, 233–235). Thus, in this matter the Israeli legislature has chosen to subordinate the individual rights of women to the preservation of the Jewish nation.

The revised Women’s Equal Rights Act

As early as 1951 the state of Israel passed the Women’s Equal Rights Act (the original WERA) guaranteeing equality to women. In her research on the original WERA Nitza Berkovitch has shown that at the basis of WERA’s legislation stood the perception that women deserve equality because of their role as mothers. Thus, she quotes Ben Gurion explaining the motivation for the law as follows:

I will talk about my mother, but refer to all mothers. Mother is the most precious person to everybody… my mother died when I was ten … but still I know that she was the symbol of purity, love, devotion, and nobility. And there is nothing more desecrating and more offensive than thinking that my dear mother is not equal to me … I cannot accept that my mother, our mothers, my sister who is also a mother, and my daughter, who will also be a mother one day, will be inferior to anyone else. This is the simple, human reason for this law.

(DH, vol. 9, p. 2131, quoted in, Berkovitch 1997: 611–612)

While the original WERA purported to guarantee equality to all women in any legal action it had one clear exception – the first flaw – the subordination of women to the discriminatory religious laws of marriage and divorce of their respective religious community (sec. 5). This subordination cannot be explained merely by the need to ensure women’s continued role as mothers. Quite to the contrary, restricting women’s options in marriage to spouses of their own
religion actually decreases their options to become mothers. However, by preventing Jewish women from marrying non-Jewish spouses such restrictions significantly increase the chances that Jewish women’s children will be born and remain Jewish, and thus will promote Jewish natality and the Jewish majority in Israel. The original WERA, which was passed at a time in which abortions were still strictly forbidden, did not refer to the issue of abortion or to woman’s right to control her own body.

In 2000 as a result of vigorous feminist lobbying the Knesset revised the WERA to include a progressive and extensive list of rights for women. Among other things, the revised WERA adopts the legal doctrine of disparate impact, stating that any legislation adversely affecting women relatively to men will be considered discriminatory without a need to show discriminatory intent (sec. 1A); it includes an explicit sanction of affirmative action and requires all public bodies to actively ensure women’s equal representation in all positions and at all levels (sec. 1B and 6C); it guarantees women the equal right to serve in any military and security position (sec. 6D); it guarantees women’s right to equality in all social and economic rights, stating that woman and man have an equal right to exist in conditions of human dignity, including the right to equality in employment, education, health, housing, environmental conditions and social welfare (sec. 6); it guarantees women protection against violence, sexual harassment, sexual exploitation and sexual slavery (sec. 6B); and it declares that every woman has a full right over her body (sec. 6A).

Thus, the revised WERA contains an extensive protection for women’s equality in civil and political rights, as well as their equality in economic and social rights, and imposes on the state both negative and positive duties toward women. Moreover, it goes well beyond the classic liberal feminist notion of equality as sameness and incorporates both the tenets of difference feminism, which prescribe that different treatment may be required in order to achieve substantive equality, as well as the tenets of radical feminism, which holds that affording women protection against violence, sexual exploitation and sexual harassment is essential in order to guarantee their equality.22

Within this impressively progressive legal framework for women’s equality in Israel two provisions stand out. One is the first flaw – the unrevised section 5 of the original WERA which subordinates women’s equality to the discriminatory religious laws of marriage and divorce of their respective religious communities. The second flaw is a new addition to the revised WERA, which was needed due to the fact that the revised WERA purports to guarantee a woman’s full control over her body. The same sec. 6A that guarantees women full control over their body contains an enigmatic exception stating that this section is not intended to annul any prohibitions set by law. First and foremost among these prohibitions, which are not specified in the WERA, is the criminal law prohibition on abortion. Thus, under the guise of a progressive liberal law the revised WERA reveals itself as a unique blend of women’s progressive liberal rights and women’s ethnic duties which is aimed at ensuring the continued existence of a Jewish majority in a democratic Israel.
How can these flaws persist?

Until now I have argued that the citizenship regime that applies to women in Israel is a mixed one. Alongside a liberal citizenship regime guaranteeing women extensive and progressive legal protection of their individual rights, there exist legal restrictions on rights that at first glance seem to stem from a republican view of citizenship, which measures women’s civic virtue through their role as mothers and hence views restrictions on their attempts to reject this role (for example through abortions) as justified. However, I have tried to show that what may seem to be republican duties are perhaps better understood as duties stemming from the requirements of ethnic citizenship – the preservation of the Jewish majority in Israel. An interesting question is what enables these flaws in women’s liberal citizenship rights to continue to exist and obscures their ethnic motivation?

I would like to offer three possible responses to this question. The first answer is that although according to its own official policy Israel is concerned only with promoting Jewish natality, the aforementioned restrictions are universal, applying to all Israeli citizens with no distinction on the basis of race, religion or ethnicity. While differential application of these legal restrictions would have exposed the state to accusations that it is constituting a regime of ethnic citizenship, the universality of the restrictions allows them to be perceived as manifestations of a republican form of citizenship that emphasizes the civic virtue of motherhood, rather than manifestations of the differential treatment of members of different ethnic groups. This shields these legal restrictions from accusations of ethnic, racial and religious discrimination, thereby decreasing their incompatibility with Israel’s democratic nature. Thus, while restricting abortion rights of Jewish women alone would constitute clear discrimination on the basis of ethnicity, and would be unacceptable in terms of human rights, restricting the abortion rights of all women can pass as a regrettable, but not unusual, use of the supervisory power of the state over women’s bodies.

Similarly, the universal prohibition on interreligious marriage through the universal application of religious laws in matters of marriage and divorce is even more consonant with the democratic nature of the state, because it is encouraged by the communities themselves, and is presented as a way of sharing power with minority communities and granting them group rights. Furthermore, the narrative attributing the application of religious personal laws in Israel to political pressures by the religious political parties is so dominant that it too serves to obscure the existence of the Jewish majority imperative, and to explain religious personal laws as a politically necessary aberration rather than as an inherent feature of an ethnic democracy engaged in both an internal and external conflict and set on preserving the dominance of its ethnic majority.

The second answer to the question of how these flaws can persist unchallenged, is that the restrictive bite of these legal restrictions is mitigated by the fact that in practice they both can be bypassed relatively easily by most of the population. Thus, the restriction on interreligious marriage can be circumvented
by marrying abroad, while the restrictions on abortions can be evaded by having illegal abortions. Both these ways around the restrictions can be obtained at a cost which is quite considerable but still affordable to most of the population. It seems quite clear that had the state established a criminal ban on intermarriage and strictly enforced the criminal prohibition on illegal abortions both of these restrictions would have been very difficult to maintain within the Israeli regime of liberal individual rights.

The ability to bypass the restrictions serves another important purpose – it facilitates the postponement of the inevitable public debate over the measures that the Jewish Israeli society is willing to take in order to ensure the continued existence of a Jewish majority in Israel. As already mentioned, according to Saban there is a taboo on questioning the continued existence of Israel as a Jewish state (Saban 2002: 307). Similarly, Triger argues that there is a taboo within the Jewish community in Israel surrounding interfaith marriage between Jews and non Jews. This taboo is facilitated by the fact that interfaith marriage is not explicitly prohibited, but merely unavailable (Triger 2007: 737). As to the issue of abortions, it has been remarked more than once that the silence surrounding this issue in Israel is quite extraordinary, considering the restrictive nature of Israeli abortion legislation on the one hand, and the visibility and the agitation surrounding abortion in other countries on the other (Amir and Shoshi 2007: 808). The continuation of these taboos would have been impossible had the state applied and enforced strict restrictions in these areas. The unacknowledged clash between the Jewish nature of the state and its democratic nature would have then been fully exposed, forcing the Jewish community to face up to hard questions regarding the nature of the state, which it would rather not face.

Finally, a third answer that can also explain the relative feminist and public inaction with respect to both restrictions on abortions and on interfaith marriages, is the belief of many members of the Jewish community, including many feminists, that some restrictions on individual rights may be justified in order to avoid the existential threat that would be posed by the loss of the Jewish majority in Israel. In the US for example, which is built on a highly individualistic ethos and faces no existential threat, most women’s rights activists would find the notion that the state may have a legitimate demographic interest in controlling abortions untenable. Conversely, the Jewish community in Israel is a community with strong collective roots (both socialist and religious), which feels that it faces a continuous existential threat. These facts may affect the willingness of feminist activists to struggle for free abortions and civil marriages, as well as their ability to garner public support for such a struggle (Yishay 1997: chs 7–8).

Thus, it seems that by obscuring the ethnic motivation for these legal restrictions, thereby minimizing their conflict with Israel’s democratic nature; by leaving open the possibility of going around the restrictions; and due to the existence of the Jewish collective ethos and of collective existential fears, the legal restrictions on abortions and intermarriage – the two flaws in the Israeli women’s rights regime that are designed to maintain the Jewish majority in Israel – can
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continue to exist within an otherwise progressive legal regime of liberal citizenship rights for women in Israel.

Conclusion

After declaring the establishment of a Jewish state named Israel, the Israeli Declaration of Establishment goes on to make an explicit guarantee of full equality on the basis of race, religion and sex, as well as to guarantee freedom of religion, conscience, language, education and culture. For political reasons, none of the rights and freedoms enumerated in the Declaration of Establishment were explicitly included in Israel’s Basic Laws on human rights, which were enacted over 40 years later. Despite the fact that the Declaration of Establishment does not enjoy the force of law, the first two clauses of the Basic Laws on human rights, which set the constitutional framework within which the Basic Laws should be understood, refer the reader to the principles set out in the Declaration of Establishment and to the values of Israel as a Jewish and democratic state. Consequently, the reference in the Basic Laws to the Declaration has become an interpretive channel through which legal scholars have been trying to widen the scope of the rights protected in the Basic Laws (Barak 1994: 305).

The Women’s Equal Rights Act is not a basic law, though the court has ruled in the past that it is a “majestic law” that sets out the fundamental principle of full equality between men and women.2 In order to emphasize its alleged majesty, signify its importance, and make it reminiscent of a Basic Law, the legislature has amended the first section of the revised WERA so that similarly to the Basic Laws it now includes a reference to the Israeli Declaration of Establishment. Thus, the first section of the revised WERA reads: “The purpose of this law is to set out the principles guaranteeing full equality between woman and man, in the spirit of the principles set out in the declaration on the establishment of the State of Israel.” Ironically, while the presence of this provision in the WERA is intended to enhance and expand women’s rights, its existence points to the opposite. In fact, the existence of this provision lends support, perhaps inadvertently, to the central claim of this chapter: that the two flaws in Israel’s women’s rights regime, that were enacted into the WERA, do not necessarily reflect a contingent political necessity, but rather may be seen as part and parcel of the defining feature of Israel, as set out in its Declaration of Establishment and reiterated in its Basic Laws; its incontestable nature as a Jewish and democratic state, which must be ensured through the preservation of a Jewish majority, even at the cost of restricting women’s rights.

Notes

1 The Declaration of the Establishment of the State of Israel, May 14, 1948, Published in the Official Gazette, No. 1 of the 5th, Iyar, 5708 (May 14, 1948).

2 Basic Law Human Dignity and Liberty; Sefer Ha-Chukkim No. 1391 of the 20th Adar Bet, 5752 (March 25, 1992); Basic Law Freedom of Occupation; Sefer Ha-Chukkim No. 1454 of the 27th Adar, 5754 (March 10, 1994) p. 90.
This fear stems from the fact that from its inception the state of Israel has been in a continuous state of emergency and often in a state of war. The state of emergency declared in 1948 has not been removed until this very day, and there is an ongoing situation of war and hostilities with Israel’s Arab neighbors, as well as a situation of permanent tension between the Jewish and Palestinian citizens of Israel. Consequently it has been suggested that Israeli democracy is a “garrison democracy” (Yishay 1993: 223).

Smooha’s characterization of Israel as an ethnic democracy has been criticized by scholars who claim that the existence of an ethnic democracy is inherently impossible because a state that identifies only with the majority ethnic group cannot be considered a democracy. Consequently those critics claim that Israel should be understood as an ethnocracy (cf. Ghanem, Rouhana and Yiftachel 1998).

I will claim that while the main purpose of these legal restrictions on rights is to control the conduct of Jewish women, they apply to all women, for reasons that I will explain below.

This is because while increasing the number of Jews in Israel through the emigration of Jews from abroad can help strengthen the Jewish community in Israel, it can neither help to solve the larger problem of sustaining the overall Jewish population of the world, nor is it a long-term solution for ensuring the continued growth of the Jewish community in Israel.


Israeli Government decision number 428, 9.4.67 reads as follows: “Suggestions regarding the demographic policy . . . 2. The Government recognizes the need to act systematically in order to implement a demographic policy targeted at creating an atmosphere that will encourage natality, considering its importance to the future of the Jewish people . . . 3. For that purpose: a. Constant advertising campaigns will be held, economical and social barriers will be removed and incentives will be given, in the fields of education, housing, insurance and so on, within the scope of the state’s ability, in order to encourage families to increase their number of children. b. artificial abortions will be curbed as their high rate is cause for concern, in both national-demographic terms, and in terms of women’s health.” (Italics added by author, G.S.)

Israeli Government decision number 1596, 18.5.86 reads as follows: “1596. The demographic trends among the Jewish people Decision:

a The government is concerned by the demographic trends in Israel and the Diaspora and is particularly worried about the slow-down of population growth in Israel, the decreasing Aliyah, and the rate of emigration as well as by the increase in assimilation and in mixed marriages in the Diaspora.

b The government decides to establish a comprehensive, coordinated, long-term demographic policy, that will strive to achieve a proper level of Jewish population growth and in order to achieve this goal it encourages cooperation with organizations representing the Jewish people and the Diaspora Jews.

The policy will be based on direction, coordination and the implementation of measures that can affect population growth such as: encouraging the creation of families and their desire for children, strengthening families and removing barriers in their way, preventing unnecessary abortions – through proper information and guidance; welfare assistance for families who have difficulties in raising their children, encouraging Aliyah; and taking steps to stop the emigration and to encourage Israelis living abroad to return to Israel.” (Italics added by author, G.S.)

Family law in particular is regarded as having a crucial role in the preservation of the community and the demarcation of its borders, and it has even been argued that the function of family law vis-à-vis the community is parallel to the function of citizenship law vis-à-vis the sovereign state (Shachar 2001: 45–47).
Women as the bearers of the nation

11 According to Davis and Anthias there are five major ways in which women participate in ethnic and national processes: “(a) as biological reproducers of members of ethnic collectivities; (b) as reproducers of the boundaries of ethnic/national groups; (c) as participating centrally in the ideologically reproduction of the collectivity and as transmitters of its culture; (d) as signifiers of ethnic/national differences – as a focus and symbol in ideological discourses used in construction, reproduction and transformation of ethnic/national categories; (e) as participants in national, economic, political and military struggles.”

12 On historical examples of the effects of nationalism and ethnic conflict on state reproductive policies see Albanese 2006.

13 Penal Law Ordinance, 1939.

14 The importance of the meeting with the social worker stems from the fact that if the woman files a request and meets the criteria stipulated by law for allowing abortions, such as that the pregnancy is out of wedlock, the committee will most likely approve the abortion. The social worker’s job is both to alert women to the fact that they do not meet the criteria and should therefore not file a request, and even more importantly to persuade those women that do meet the criteria not to file the request and to carry the pregnancy to term. It should be noted that the committee does not require a woman who claims that the pregnancy is out of wedlock to prove her claim, and thus potentially almost any woman can obtain an abortion by lying to the committee.

15 On the importance of the right to abortion and on the various rights that it implicates see Balkin 2005; Thomson 1971.

16 According to Jewish religious law there is a risk that a child born out of wedlock will be a Mamzer or Safek Mamzer, who is not allowed to marry another Jew (unless he/she too is a Mamzer). The fact that a person is a Mamzer or Safek Mamzer places him/her as well as all his/her future generations outside the Jewish collective and has long-term effects on the community.


18 King’s Order in Council, 1922, sec. 51; Rabbinical Courts Jurisdiction (Marriage and Divorce) Act, 1953.

19 Zvi Triger, There is a State for Love: Marriage and Divorce between Jews in Israel, in Trials of Love (Orna Ben Naftali and Hanna Nave eds., Ramot, 2005) 173–226, at 204.

20 It is interesting to note that although according to Islam the Sharia courts can marry Muslim men to non-Muslim women, they cannot marry Muslim women to non-Muslim men, most probably because of the assumption that the woman will eventually convert to the man’s religion, and thus become non-Muslim.

21 Recently further restrictions were added that make it more difficult for Israeli Jews to marry non-Jews. These restrictions target marriages between Israeli Jews and non-Israeli non-Jews. While in the past an Israeli Jew marrying a non-Israeli non-Jew could acquire Israeli citizenship for her spouse automatically through the law of return, recently it was decided that non-Israeli non-Jewish spouses would have to go through a five-year process in order to acquire permanent status in Israel, during which the application may be denied for various reasons. See H.C.3648/97 Stamka v. Ministry of Interior.

22 Other progressive Israeli laws that embody the tenets of difference feminism and of radical feminism are the Equal Pay for Women and Men Act which was revised in 1996 to include a guarantee of equal pay for comparable worth and the 1998 Prevention of Sexual Harassment Act.

23 E.g., H.C. 1000/92 Bavli v. The Rabinical Court.
References


Israeli Government decision number 428 (9.4.67).

Israeli Government decision number 1596 (18.5.86).


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