

A decorative graphic consisting of a grid of grey dots of varying sizes, with several dots highlighted in red. The dots are arranged in a pattern that roughly outlines the shape of the map of Israel.

## Family Law

### The »Neglected Backyard« of the Israeli Legislature

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- The numerous changes of family models and intra-familial gender roles have not yet been addressed in Israeli family law. For this reason, it is mainly the civic courts in Israel who respond to the public discourse and trends in society and determine the changes in family law.
- Two parallel and partly concurrent legal jurisdictions of civil and religious courts often lead to uncertainty and injustice. In this respect, gender is a significant issue, particularly in religious courts, regarding the results of the proceedings. When it comes to matrimonial or divorce matters, as well as child support or child custody, women suffer from gender-discriminatory attitudes, which are manifested in the jurisprudence of religious courts.
- A central issue of today's public and gender-related controversy is joint custody and its impact on child support obligations of men. The example of family law reveals the far-reaching difficulties women face because of the lack of separation between church and state in Israel.





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## Introduction

The field of family law is the »neglected backyard« of the Israeli legislature. As a result, the last substantive law that was legislated on the subject – the *Spouses' Property Relations Act* – was in 1974.<sup>1</sup> Clearly, many changes have occurred to the structure of the families in the Western world in the past four decades. Same-sex marriages and single-parent families have become widespread, common-law partners (cohabitation) are also more common and as well as second marriages. The internal structure of heteronormative families has changed and so have the intra-familial gender roles. These numerous changes have not been addressed in Israeli legislation. In effect, the civic courts in Israel respond to trends in society and determine the changes in family law. The actual legal rulings are affected by the public discourse and the changes in the dynamics of the families themselves and are not the result of a systematic reform. Therefore, the new rulings of the courts are the somewhat uncoordinated reaction to special cases which are brought to the courts – often by citizens and organizations with special interests, such as women's and men's organizations. Consequently, family law in Israel is complex and, in many respects, does not live up to Western standards.

In addition to the lack of up-to-date legislation, a main challenge results from the presence of two parallel, co-existing legal systems that deal with family law in Israel. The first is a religious judicial system with religious courts for each recognized religious denomination.<sup>2</sup> The second is a civil legal system in the form of the Family Court. The religious courts have legal jurisdiction over the personal status issues of couples who belong to the same religious group or denomination. Currently, they have sole jurisdiction over marriage and divorce. Other associated issues such as child support, child custody, assets division, etc. come under the parallel legal jurisdiction of the Civil Courts for Family Law. This reality has many problematic consequences. One of them is the absence of the possibility of civic marriage and divorce

in Israel; therefore, inter-religious marriage and same-sex marriage are not legally feasible. Another major flaw is the so-called »jurisdiction race« that results from the existence of two parallel legal systems.

## Family Law in Israel – A Complicated Mix of Religious and Civil Jurisdiction

### The Jurisdiction Race

The religious courts in Israel draw their status from historical tradition. Even before the establishment of the State of Israel, the Ottoman regime granted independent legal jurisdiction to religious minority groups on personal-status issues. These remained in place after the establishment of the State of Israel in 1948, but were limited to marriage and divorce alone. Over the years the status of the religious courts has strengthened – mainly the rabbinic courts of the Jewish community, which constitutes most of the country's population. This is largely due to the complicated politics of the State of Israel with its lack of real separation of church and state.

With the exception of marriage and divorce where the religious courts in Israel have sole jurisdiction, the religious and civil courts have parallel or co-existing legal jurisdictions. In other words, the religious and civil courts both have jurisdiction over issues connected to, and associated with, the dissolution of the family unit. These issues include: child- and wife-support, custody, and division of assets. The »jurisdiction race« is the way in which a specific tribunal is picked to be in charge of the legal proceedings. In other words: whichever side is the first to turn to the law court of its choice (religious or civil), will determine the jurisdiction.

By its very nature, the jurisdiction race speeds up proceedings. In certain cases, the essence of the legal tribunal (religious or civil) can tilt the probable outcome of the proceedings. As a result, each side is fueled by the fear that the other spouse will rush to file first for divorce with the opposing legal tribunal. This drastically lowers the chances for a negotiated arrangement and increases the chances for escalation of the conflict. The difference between litigation when the parties agree and litigation subject to the jurisdiction race, is no minor matter. In practice, the agenda and conduct of the court varies depending upon whether the issue under discussion needs the agreement

1. It should be noted that subsequent to that date, a law related to pension rights was legislated as well as a temporary order related to mediation before submitting claims to the court.

2. The recognized religious communities in Israel are: the Jewish community, the Muslim community, the Druze community, and twelve Christian church sects (Latin church, Armenian Catholic church, Chaldean Catholic church, Melkite Greek Catholic church, Syriac Catholic church, Syriac Maronite church, Greek Orthodox church, Armenian Apostolic church, Syriac Orthodox church, Episcopal church, Armenian Gregorian church, and the Evangelical Apostolic church).

of both parties or whether the issue comes under the rubric of the jurisdiction race. For example: on the issue of inheritance, the rabbinic court is given jurisdiction only when all the litigants agree. As a result, the rabbinic court adopts a very liberal approach toward inheritance that closely resembles that of the civil court. This is in juxtaposition with divorce-related issues in which the rabbinic court adopts a severe ultra-Orthodox approach due to its exclusive jurisdiction in this matter.<sup>3</sup>

In July 2016, the Israeli legislature created a temporary order called the *Obligatory Mediation Law*. This law requires spouses to undergo mediation before filing their divorce pleas in any court. One of the goals of the mediation proceedings is to decrease the intensity of the conflict between the sides and avert litigation in court. However, mediation only skirted the real problem – the jurisdiction race. As of now, mediation proceedings only delay the jurisdiction race. If mediation proceedings are not successful and the sides do not attain a comprehensive agreement within 45 days, the party that first submitted a request to settle the conflict is given 15 days to choose the court that will preside over the case.

The current situation in which two courts of law, one religious and one secular, function in tandem creates built-in uncertainty and lack of uniformity regarding the results of the proceedings. Ostensibly, both court systems are supposed to render judgment according to the same laws. However, the identity of the judge has significant impact on the outcome. Judges in the religious courts interpret civil laws and rulings differently than the judges in civil courts, and the reverse is also true. In this respect, gender is a significant issue: the religious courts are intrinsically patriarchal and routinely discriminate against women. For example, the rabbinic court of the Jewish community does not allow women to sit on the court or even serve in high-level administrative roles. The Shari'a court of the Muslim community appointed its first a female qadi<sup>4</sup> this past year and the Druze court has never appointed a female qadi.

The consensus in the general public is that women are better off in the secular family court, while the men are better off in the religious court. True, there are cases

when lawyers representing women might prefer to conduct proceedings in the religious court. Nevertheless, women in general are leery of proceedings in the religious courts. This fear is enough to heighten the damage caused by the jurisdiction race.

## Marriage

The minimum marriage age in Israel has been 18 since 2013. A wedding ceremony in Israel is valid only if it is conducted by an authorized representative of the religious body relevant to the religion of the two members of the couple. The institution of marriage in Israel, in each of the religious streams, is closed to members of same-sex and mixed-faith couples. This is in addition to the unique restrictions of each individual religion. Couples who are not interested in conducting a religious ceremony or cannot marry according to religious laws yet want to be listed as married in Israel's Interior Ministry, must fly abroad, marry in a civil marriage ceremony, then return to Israel and register as a married couple in the Interior Ministry. In 2010, Israel passed the *Civil Union Law for Citizens with no Religious Affiliation*, allowing a couple to form a civil union in Israel if they are both registered as officially not belonging to any religion.

## Divorce

As in the case of marriage, religious courts have exclusive jurisdiction over divorce in Israel. This means that even couples who were married abroad in a civil marriage ceremony have to turn to a religious court in order to get divorced in Israel. This gives the rabbinic courts great power and influence over Israeli families and especially over women. With regard to the matters ancillary to dissolution of the marriage, the court of law (religious or civil) chosen by the party that first submitted the request will be the one to preside over the case.

The court is also aware of the fact that women in Israel have a much greater chance of being extorted by their spouses in the divorce-process compared to women in other countries. According to *din ivri*,<sup>5</sup> men have almost complete control over the issuance of the Get.<sup>6</sup> This situ-

3. Hacker, Dr. Daphne (2012): »Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts«, in: *Journal of Law and Religion* 27(1), pp. 59–82.

4. Magistrate or judge of the Shari'a court.

5. Rabbinic law.

6. Hebrew for bill of divorce.

ates the male in a superior bargaining position that is often exploited to the detriment of the woman. According to *din ivri*, the Get must be given by the husband to the wife with full agreement of both partners. However, the man and woman are not equal here because the man's agreement is much more important in the religious court. Thus, the rabbinic court still adopts an ultra-Orthodox, conservative approach toward Get (divorce) refusal by men. The result is that women are in danger of being denied a divorce; in other words, Israeli women are at risk of being held hostage by their husbands. The withholding of a Get prevents the »chained« wife from having children with another male (as the child of such a union would be a *mamzer*, a bastard). She cannot move ahead in her life and re-marry. However, under certain circumstances, the husband can receive a special dispensation allowing him to marry a second wife; and even if he doesn't, an out-of-wedlock child will not be considered a *mamzer*. In short, the woman is dependent on the man to release her from the marriage and not the reverse. That alone constitutes a tool for possible extortion in which the woman is pressured to make financial concessions to the man.

It should be noted that Islamic Shari'a law grants the husband the authority to divorce his wife when and how he wants without considering her wishes and without giving her a chance to object. However, in actual practice in Israel, the two parties must make use of 'arbitration tribunals' wherein both parties can request a separation under the rubric of a dispute or quarrel. The arbitrators are allowed to recommend separation, even without the husband's agreement. Attorneys appearing in Shari'a courts in Israel note that Muslim women do not have the problem of being unable to get a divorce from their men. But we must view this subject in the broader context of a Muslim society with relatively low divorce rates<sup>7</sup> wherein precedent-setting rulings may not be as relevant.

### Child Support and Custody

Child support and the physical custody of minors, with an emphasis on joint custody and its effect on obligatory child support payments, is at the very heart of the public

and gender-related controversy in Israel. This is currently in the middle of a legal revolution.

Israel's civil law states<sup>8</sup> that, when it comes to child support, the religious personal status law is applied to the litigant. Even in a civil court, religious law<sup>9</sup> determines the scope of child support. Civil laws only apply in cases where the person has no religious affiliation.

Both Jewish law (*din ivri*) and Shari'a law place the absolute obligation for child support on the father. This obligation is disconnected from issues such as how much the parents earn or the permanent custody arrangement. In Jewish law, the obligation for child support changes in accordance with the age of the children. In Shari'a law in Israel it is an absolute obligation until the children reach 18.

In recent years, cases have started to appear in family courts in which Jewish fathers demanded a reduction in child support payments due to extended visitation and/or joint custody arrangements. The fathers claimed discrimination and inequity, saying that the law is not fair in imposing full child support on fathers when the fathers are already spending half of their time with the children. Thus, slowly but surely, the absolute obligation of fathers to pay child support for their children is being whittled down in the court rulings with regards to Jewish litigants. At first, certain components of child support payments were reduced when there was joint custody. Later on, in certain cases the father was not required to pay child support at all to the mother. For years, the High Court issued no precedent-setting rulings regarding joint custody and its effect on child support payments. The results were uncertainty and lack of uniformity in rulings.

In July 2017, the High Court with an expanded line-up of seven justices issued a landmark ruling on this issue that determined that fathers could only withhold child support in cases in which the spouses earn equal or similar salaries. The High Court ruling was supported by an official statement of the Chief Rabbinate Council that *din ivri* could be understood in such a way that the father could be exempted from paying child support in certain cases. This official opinion is nothing to sneeze at; the

7. According to the Central Bureau of Statistics during the past five years on the average 29.2 percent of Jews who married got divorced, among Moslems the divorce rate is 17 percent, among Christians and Druze 14 percent.

8. Family Law Amendment (Maintenance) Law 1959.

9. Rabbinic law (or *din ivri*) for Jews, Shari'a law for Moslems, etc.

religious courts in general, and the rabbinic court in specific, are very protective of their interpretations of *din ivri* and their power and jurisdiction. Their decision to »stay out of the picture« and allow the civil court to come to a decision based on considerations of equality – on an issue touching upon the reduction of financial obligations of fathers for that matter – is not coincidental.

The High Court ruling does not imply ignorance of the gender inequality that is engraved in Israeli personal status laws or discriminatory religious law. The High Court justices are aware that Jewish women in Israel face unreasonable pressures and the threat of extortion from men in divorce proceedings conducted according to Torah law. Therefore, the ruling was meant to protect women whose economic situation after divorce is usually worse than that of men. The court even went so far as to address the ongoing discrimination faced by women in the workplace. However, the fact that such a ruling was issued on a matter that relates to the reduction of financial obligations of men in certain cases is notable. In addition, the nuances and sensitivities of the High Court ruling above do not appear in the rulings of local courts. As a result, lower courts have started to exempt fathers from support payments, even when there are large discrepancies in the earnings of fathers and mothers. Thus, lack of uniformity in the system only worsens outcomes for women and injustice reigns.

At the same time, Family Court judges no longer view the »tender years presumption« as something necessarily to be taken into consideration in their rulings. This is the understanding that it is in the children's best interest to be in the physical custody of their mothers until the age of six unless there are special circumstances justifying a different arrangement.<sup>10</sup> Men's organizations representing divorced fathers have crafted proposals calling to abolish or limit this presumption. The erosion of the tender years presumption is not coincidental; it constitutes part of a trend in which the mother as main custodial parent has been undermined. In practice, joint custody has become the default option in most Israeli civil courts. Women pay a high price for this change, as many fathers battle the mothers in court for physical custody of the children, and are often subsequently not obliged to provide monetary support.

10. This pertains to civil, not religious law: The Legal Capacity & Guardianship Law of 1962.

Law suits over custody have become far more common, while previously they appeared only in extreme cases. Thus, custody issues have become another weapon in the hands of unscrupulous men to coerce their wives into forfeiting some of their rights in order to receive the divorce.

While it is indeed too early to draw conclusions about how the new child support ruling has affected women, we cannot escape the perception that matters have not improved. For many women seeking divorce, the situation may be worsening. When it comes to divorce, women are now often forced to settle for lower child support payments from the father early in the negotiations; this had not been the norm previously. The magic words »joint custody« are bandied about as a threat, even by fathers who were never involved in child rearing. Consequently, significant reductions of child support have become the ruling default. These are new legal and familial trends and vary from past norms.

These changes are primarily visible within the Jewish community in Israel. Even though all the religious communities in Israel tend to be familistic<sup>11</sup>, today's secular Jewish families are less familistic than in the past. Another change in the Jewish community is that most women have paying jobs. By contrast, in the Israeli Arab population (which is about 20 percent of the population), in 2015 only about 32 percent of women aged 25–54 worked outside their homes compared to 74 percent of the males.<sup>12</sup> According to Shari'a law, fathers get custody of sons over age 7 and girls over age 9. However, the Shari'a courts in Israel do not enforce this ruling. As of the time of writing, the default option in the Shari'a courts is that mothers have custody of minors until they turn 18. In order to change this, it must be proved (on the highest levels) that the mother is incapable of raising her children. It is too early to know whether the above-mentioned High Court's ruling of July 2017 has trickled down to this legal realm as well. The context is multifaceted and unique: though the divorce rate is increasing, the Muslim population is still very family oriented and has relatively low divorce rates.

11. Familistic: the subordination of the personal interests and prerogatives of an individual to the values and demands of the family.

12. Hacker, Dr. Daphne (2012): »Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts«, in: *Journal of Law and Religion* 27(1), pp. 59–82.



Another fact we must keep in mind is that the majority of Family Civil Court judges are Jews, as are most of the litigants. Thus, new laws and changes in trends naturally appear first among the Jewish litigants and as a result are mainly relevant to Jewish religious law (*din ivri*) at this point in time.

## Conclusion

When church and state are combined, situations in which important court rulings and significant laws become relevant to only part of the population. The result is uncertainty, lack of uniformity, and unfairness. Time will tell what the result of the revocation of the »tender years presumption« (civil law) will be, and changes of rulings concerning child support and child custody within non-Jewish populations in Israel. However, it cannot be ignored that all the recognized religions in Israel have the world-view that the pillar of the family is the male, the husband. He is given authority over his children and his wife, in accordance with a clear double standard in which women are treated stringently while men are treated more leniently.

The gaps will only deepen if we continue to limit our work to specific issues; the main problem is the discriminatory ultra-Orthodox religious system. Clear separation of church and state that will help facilitate just civil marriage and divorce proceedings and outcomes and

nullify the jurisdiction race. However, in the light of the fact that today only 44 percent of the Israeli population regard themselves as secular – with the number of traditional, religious, and ultra-Orthodox Jews increasing every year – and considering the veto-power of the (mainly Jewish) religious parties, the complete separation of church and state in Israel is an unrealistic aspiration.

The religious courts and their unique jurisdiction over everything connected to marriage and divorce have very deep roots in Israeli society and in Israeli politics. In fact, even attempts made by left-wing parties to bring about change, at the time of writing, focus on marginal issues and not the very heart of the problem of parallel jurisdiction of the religious and civil courts.

Litigation in the religious courts should be conditional on the agreement of all the parties involved. Moreover, such a change would also lead to liberalization of the religious courts. Unfortunately, such a solution is not on Israel's horizon yet. While both the government and most of the opposition parties, except Israel Beytenu and Meretz, are not prepared or interested to take any steps that will minimize the power of the religious courts – some due to their own religious beliefs, others on the grounds of realpolitik which recognizes the status quo and the political power of the religious parties – this issue is being raised by women organizations in Israel and a few (mainly female) Knesset members.







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