

Freedom from Religion in Israel:

Civil Marriages and Non-Marital Cohabitation of Israeli Jews Enter the Rabbinical Courts

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ABSTRACT: The only form of marriage that is recognized under Israeli law is religious marriage. Following the Supreme Court's ruling in the landmark 1963 *Funk Schlesinger* case, Israeli authorities must register couples who marry abroad as married. Many couples who wish to avoid the religious monopoly on marriage and divorce choose this route. However, they are mistaken in thinking that they achieve freedom from religion by doing so.

In a 2006 landmark decision the Supreme Court held that the rabbinical court system has jurisdiction over the divorce of couples who marry civilly abroad. While they do not need to undergo a full *get* [religious divorce] procedure, the decision held that the rabbinical court has exclusive jurisdiction over the dissolution of civil marriages of Jews residing in Israel. The Court's decision was based on halachic principles, and was pre-approved by a panel of the rabbinical court. However, rabbinical courts have nevertheless been insisting on performing a full *get* procedure even for civilly-married couples. This article analyzes this phenomenon, and speculates as to the reasons for and the direction of these developments.

KEYWORDS: Civil Marriage, Divorce, Jewish law, Rabbinical Court, Supreme Court, Reputed Spouses, Women.

In the spring of 2007 I served as a witness in a Jewish divorce ceremony performed at the Tel Aviv District rabbinical court. The ceremony was held according to strict halachic rules: the *get*, the Jewish bill of divorce, was written on a sheet of parchment with a turkey's feather purchased, for the purpose of the ceremony, by the divorcing husband. The wife waited most

of the time outside the courtroom, while the men – the judge, the *sofer stam* [scribe] and the witnesses (all male) participated in the ancient ceremony, strictly adhering to all the rituals. The wife was called to the courtroom only for the final stage of the ceremony, in order to receive the *get*.

What was unusual about that ceremony was that the divorcing couple had married fourteen years earlier in the New York City Hall. Their marriage was civil, because they had not wanted to submit themselves to the rabbinical court's jurisdiction. Furthermore, just over a year earlier, in November 2006, the Israeli Supreme Court, backed by a rabbinical court opinion, ruled that although Jewish couples who married civilly were under the formal jurisdiction of the rabbinical court, in such cases the divorce procedure should be quicker and formalistic, and not a full *get* procedure, for these marriage are considered equivalent to marriages of non-Jews (See the full discussion below).

Since then, several similar cases have come to my attention, and other instances have been reported in the media. While some judges in the rabbinical court system follow the 2006 ruling, it seems that the majority do not, and require a full religious *get*. Moreover, in recent years, the rabbinical court has demanded a full *get* ceremony in several separation cases of cohabiting couples (*yedu'im be-tzibur*, or 'reputed spouses'), on the grounds that there might have occurred 'betrothal by cohabitation' (*kidushey bi'ah*) over the course of their non-marital cohabitation period.

Strictly speaking, Jewish marriage does not have to be officiated at by an authority, nor does it have to be performed in a ceremony. The Mishnah states that "a woman is acquired in three ways... by money, by document, and by sexual intercourse [referred to here as "betrothal by cohabitation" - ZT]"¹ (Labovitz 2009: 29). However, the Israeli Rabbinate promulgated in 1950 a regulation that states that only betrothal by money, officiated at by a

¹ Mishnah Kiddushin 1:1.

licensed (Orthodox) rabbi is allowed in the State of Israel (Schereschewsky 1992: 451-453). This regulation does not invalidate marriage by document or by sexual intercourse, but rather renders them forbidden pursuant to the 1950 regulation, albeit with no effective legal sanction. Once they have been performed, they are valid according to Jewish law, and a *get* is needed in order to dissolve them.

If these recent cases represent a trend in the rabbinical court's approach to its jurisdiction over Israeli Jewish couples who seek to dissolve their relationship, it means that there is no way under current Israeli law to bypass Jewish divorce and thus, as I shall argue, Jewish religious marriage. This trend then signifies a dramatic setback from the *status quo* as it was for a number of years. Currently, those who wish to avoid the official rabbinical institution and its jurisdiction over their relationship have no recourse.

II. A Brief History of Israeli Family Law

A. The Legal Framework

The Ottoman Empire that ruled Palestine for four hundred years until its defeat by the British Empire in 1917, viewed family issues as religious issues. Therefore, it granted the various religious communities autonomy with regard to family law. Family matters were dealt with by the communities' own religious tribunals, according to their own religious laws (Shalev 1995: 464).

The British Mandatory Government that ruled in Palestine between July 1922² and May 15, 1948 adopted the Ottoman arrangement with regard to family issues without any significant changes. Interestingly, while the Mandate Declaration and the Palestine Order in Council did not include any recognition in gender equality, it was included as a guiding principle in the United Nations' Partition Plan of November 29, 1947, in which the

² From its occupation by Britain in 1917 until the establishment of the British Mandate by the League of Nations in 1922, Palestine was governed by a British military administration. All in all, the British Mandate in Palestine lasted twenty-six years.

establishment of two states in Palestine, Jewish and Arab, was decided (Rubinstein & Medina 1996: 43-4, 312). According to Section 47 of the Palestine Order in Council 1922-1947, enacted by the British Mandatory Government in Palestine, various matters of personal status, mainly issues of marriage and divorce, “continue to be judged under the personal, that is, in this context, the religious, law applying to the parties involved” (Rosen-Zvi 1995: 75).

When the State of Israel was founded, the Knesset preserved this system.³ A few noteworthy changes were nevertheless made. It removed issues of adoption, inheritance, wills, and legacies from the list of personal status matters which are under the jurisdiction of the religious tribunals (Rosen-Zvi 1995: 76-7). Israeli family law is thus a hybrid system, “characterized by a laminated structure of religious laws, territorial legislation unique to family law, judge-made law grafted onto religious laws and general, civil and criminal laws” (Rosen-Zvi 1995: 75).

Over the years the extent of the applicability of religious law has been dramatically reduced. This reform was a result of a gradual enforcement of constitutional principles on the religious courts. However, marriage and divorce law still remains an area that is almost exclusively settled by religious law. Generally speaking, interventions on the part of civil law are minimal.

B. Religious Marriage and Divorce and its implications of Gender Equality

This issue has been extensively researched, debated, and written about. I do not aim to provide an exhaustive account here of the extensive literature on it, but rather to highlight several key points for the purpose of the underlying discussion in this article, which focuses on seemingly egalitarian alternatives to religious marriage.

³ Article 11 of the Law and Administration Ordinance, No.1 of 5708-1948, 1 Laws of the State of Israel (Authorized Translation from the Hebrew), 7. The Ordinance was enacted on 10th Iyar, 5708 (May 19, 1948), and published in the Official Gazette, No. 2 of the 12th Iyar, 5708 (May 21, 1948).

All the religious systems that govern marriage and divorce in Israel are patriarchal. Under Jewish law, for example, marriage is a contract that creates property relations between the man and the woman. The man becomes the woman's owner, as the Hebrew word for husband, *ba'al*, suggests, through *ma'aseh kinyan* (the transfer or acquisition of ownership). The married woman has very limited property rights under Jewish law. The husband also has complete control over the divorce, and in certain circumstances he may marry other women without divorcing his first wife.⁴ Under these traditions, women have no legal competence and they are regarded as needing to be restrained, controlled, and protected by men.

Family law has been excused as a painful exception to the rule of gender equality in Israel, caused by the need to create unity among the various communities in the young state. The political compromise made with the ultra-Orthodox, known as the *status quo*, is perhaps the most venerable building block of Israeli politics. The *status quo* is seen as the source of the adoption of religious family law. As Nitza Berkovich has observed, for the most part what is viewed as a conflict between state and religion in Israel, in fact revolves around women's rights (Berkovich 1999: 283).

As Frances Raday has noted, the adoption of religious law in the realm of family law has had a double effect. First, it embraced the position that women are subordinate to men, as the religious systems are traditionally patriarchal. Second, it has prevented women from participating as judges and lawyers in the religious courts' legal process (Raday 1995: 19, 26). The result was that women have been denied access to most effective participation in the construction and shaping of the law in this field. In recent years, however, there has been a change with the evolvement of a new paralegal profession, namely "rabbinical advocates." The rabbinical advocates may represent parties before the rabbinical courts (but not in the

⁴ Bigamy is a felony under Israeli criminal law. Nevertheless, Jewish law allows it for men, though with significant reservations and restrictions; nevertheless if a man marries more than one woman, the marriage is valid. The symbolic message that the adoption of such a system conveys is clear. In some cases, such as setting a minimum age for marriage, Israeli law has deviated from Jewish law; however, for the most part Jewish law governs the lives of Israeli Jewish men and women. Such is the case for the other religions in Israel as well.

civil courts, since they are not lawyers, and have no legal education). Women are allowed to be rabbinical advocates. However, the scope of this progress is rather limited, as women are still banned from serving as judges in the rabbinical courts, and as this change applies only to the rabbinical courts, and not for other religious courts (Shamir et al 1997: 73-88).

While civil marriage and non-marital cohabitation were originally used during the first two decades of Israel by couples who could not get married according to Jewish law (for example, because the man was a *Cohen* and the woman a divorcee), they were later regarded as an alternative for couples who wish to avoid the harsh consequences of religious marriage in terms of gender equality and freedom from religion. As we shall see in the following sections, to the extent that civil marriage and non-marital cohabitation have been used, at least by some Jewish couples, in order to bypass or alleviate the discriminatory consequences of Jewish law, these options now run the risk of becoming irrelevant.

III. Civil Marriage of Jews in Israel

A. Legal Recognition

As discussed above, there is no formal civil marriage option in Israel. There is one commonly practiced way of avoiding the civil marriage ban (and thus the monopoly of religion over marriage), which is to get married abroad in countries that allow civil marriage for non-citizens and non-residents. Many Israelis who choose this option fly to the nearest (and most affordable) country – Cyprus, but Prague is a popular marriage destination as well. Pursuant to the landmark 1963 *Funk Schlesinger* decision,⁵ Israeli authorities must register these couples upon their return as married. However, under *Funk Schlesinger*, registration of married couples is carried out for statistical purposes only. Such registration does not, in and of itself, prove the validity of the marriage under Israeli law.

⁵ H CJ 143/62 Funk-Schlesinger v. Minister of Interior [1963] IsrSC 17(1) 225.

In addition to such marriages being recorded solely for statistical purposes and their validity not fully recognized by Israel, there are other disadvantages for Israelis who marry abroad. For example, flying abroad to get married is not only cumbersome, it is available only to those middle- and upper-class Israelis who have the means to travel. For many Israelis, marriage abroad is not an option. Freedom from religion can be quite costly.

It should be noted that requiring the registration of civil marriages performed abroad was originally intended to alleviate the harsh consequences of the religious monopoly in this area for couples, both interfaith and intrafaith, who were legally forbidden to marry in Israel because of various religious requirements or prohibitions. The Supreme Court, practicing its liberal commitments, came to their aid and ordered Israeli authorities to register their foreign marriages. In recent decades, however, many Israeli couples who are eligible to marry under religious law have nevertheless chosen to marry abroad. Their main reasons are to protest against the religious law's monopoly over their intimate relations and a desire to be free of the jurisdiction of the religious courts, should they eventually have to seek a divorce. The rabbinical court's discriminatory approach to women, its endorsement of men's refusal to give a *get*, and the general notion of religious coercion are all reasons that couples wish to avoid the rabbinical court's jurisdiction.

According to various estimates, between 9.6 percent-12 percent of the registered marriages of Israelis in 2004, 2005 and 2006 were civil marriages (CBS website; Halperin-Kaddari and Karo 2009: 33). The CBS does not collect information on the reasons for civil marriages; therefore it is impossible to know how many couples who marry abroad do so because they are banned from religious marriage, and how many do so simply in order to avoid the religious establishment (Triger 2009). Furthermore, there is not legal duty to register in Israel marriages performed abroad, and therefore the figures that Israeli authorities

have reflect only those couples who did register their marriages (Halperin-Kaddari and Karo 2009: 33).

B. The Rabbinical Court's Treatment of Civil Marriages of Israeli Jews

Perhaps the most underexplored aspect of civil marriages performed abroad and registered in Israel is the “freedom from religion” aspect, i.e., those Israelis who choose civil marriage abroad despite their eligibility to get married religiously in Israel. They do so in order to protest against the Israeli marriage law and to exercise what they believe is their right to freedom from religion. They believe that by doing so, they bypass the religious tribunals' jurisdiction. But they are mistaken. According to the Israeli Ministry of the Interior, around 4,000 people married abroad in civil marriages in 1999. According to the Center for Alternative Marriages, an NGO that maintains a private registry of people who got married in civil marriages, 6400 couples married in civil marriages abroad, or made an alternative, unofficial marriage contract in Israel. This may explain the gap, since such contracts are ineligible for registration with the Ministry of the Interior, and thus are not recognized as marriage according to Israeli law (Shehori and Sheleg 2000).

In a 2006 landmark decision, one of the last written by Chief Justice Aharon Barak before his retirement, the Supreme Court rule held that the rabbinical court system has jurisdiction over the divorce of couples who married in civil ceremonies.⁶ The Court did rule, however, that such a divorce should be performed in a shorter procedure than a religious divorce, according to a principle of Jewish law known as “The Marriage of Children of Noah,” which means that while marriages performed according to gentile laws are valid, their dissolution is much simpler than that of Jewish marriages. The Court's decision was based on

⁶ HCJ 2232/03 Jane Doe v. Tel Aviv Rabbinical Court (issued 21 November 2006).

halachic principles, and adopted a decision by a panel of the rabbinical court,⁷ which the Supreme Court invited, in order to settle this issue with the rabbinical court's cooperation and approval. This ruling put an end to the long-held popular assumption that marrying civilly means avoiding the rabbinical court system. It was supposed to put an end also to the troubling practice of some rabbinical courts that did require full *get* in the dissolution of civil marriages between Israeli Jews.

Rabbinical courts have since been largely ignoring this ruling by the Supreme Court. Even the rabbinical opinion underlying the Supreme Court's 2006 ruling left the door for a *get* procedure in cases of civil marriage open (The Law and its Decisor 2004: 9). Evidence for this troubling trend, which means that for Israeli Jews there is no way to avoid a religious divorce, even when avoiding a religious marriage, is somewhat anecdotal, but consistent. Since there is no systematic publication of rabbinical court decisions, and since divorce cases that end with mutual consent, like the one I had served as a witness for, are not reported, we remain with a handful of case law that concern divorces of civilly married couples. Even if these cases, in which the rabbinical court requires a full *get*, are not representative, the bottom line is that such couples are forced to divorce in a religious tribunal, even if they are not religious and they reject religious marriage or divorce. Amihai Radzyner argues that the "Sons of Noah" ruling adopted by the Supreme Court is halachically incorrect, and that this explains why by and large rabbinical courts have continued with the practice of requiring a *get* even in civil marriages (Radzyner, forthcoming). The lack of a doctrine of binding precedent in the rabbinical courts further complicates matters, because despite that fact that this rabbinical ruling was submitted to the Supreme Court, and the Court adopted it, rabbinical courts do not see themselves bound by it.

⁷ Case No. 4276/63 Jane Doe v. John Doe (a Higher Rabbinical Court decision, 11 November 2003).

An October 2010 ruling of the Netanya rabbinical court, in a divorce case of a couple that had married in Cyprus, is representative of the courts' current approach to civil marriages in reported cases.⁸ In this case, the man and the woman were eligible for religious marriage, but married in Cyprus because as secular Jews they wished to avoid religious requirements. Nevertheless, instead of performing a quick dissolution pursuant to the Supreme Court's 2006 ruling, the court required a full *get*, noting "this is the custom of the rabbinical courts in the country," and completely ignoring the 2006 ruling.⁹

A June 2010 decision of the Haifa rabbinical court states that the notion that a full *get* is necessary in the dissolution of civil marriages is held only by a minority of the rabbis.¹⁰ The type of *get* that is required in these circumstances, according to this ruling, is only *leravha demilta*, for the sake of comity.¹¹ Such a *get*, according to this ruling, can be given one-sidedly, even if the wife does not wish to divorce.

The explanation for the discrepancy between these two rulings is that the common law principle of *stare decisis* is foreign to Jewish law, and rabbinical court judges view themselves as committed to follow only the rulings of the particular rabbi they adhere to and not necessarily those that in the civil system would be deemed as binding precedents. However, even rabbinical courts that accept the Supreme Court's framework have tried to extend their jurisdiction into a couple's dissolution process; ruling, for example, that the rabbinical court has jurisdiction not only over the dissolution of a civil marriage, but also over alimony and communal property division issues.¹²

⁸ Case No. 293122/1 (October 21, 2010).

⁹ *Id.* Similar decisions were handed down on 5 January 2011 by the Haifa Rabbinical Court in Case No. 765411/4, and on 3 February 2011 by the Beersheba Rabbinical Court in Case No. 155387/1. According to the Haifa decision, while it is customary to perform a full *get* procedure even in civil marriages, if the couple married civilly because they could not marry religiously, a full *get* will not be required.

¹⁰ Case No. 583236/1 (2 June 2010).

¹¹ *Id.*

¹² *See, e.g.*, Case No. 764411/1 (rabbinical court, Netanya, 3 October 2010).

Family law scholars such as Professor Ruth Halperin-Kaddari and women's rights NGOs have warned against the rabbinical court's insistence on a full *get* procedure in the dissolution of civil marriages, noting that the result of its adoption would be more women who are chained to their marriages should their husbands refuse to give them a *get* or demand that they forfeit their share of the communal property and their right to alimony (quoted in Ettinger 2011).

Media attention to this phenomenon is minimal.¹³ Most Israelis are still unaware of this legal complication, and they believe that, as limited as it may be, there is still an option to avoid the religious system and practice their perceived right to freedom from religion by marrying abroad.

Why did the rabbinical court opine that civil marriages should be dissolved in a quick procedure, but, when the Supreme Court adopted its approach, retreat and begin to demand a religious divorce despite the marriage being civil? What are the reasons, admitted and hidden, for this approach? And why do secular Israeli Jews still believe that when they marry abroad they escape the reach of religious law? Discussing the meaning of Jewish religious marriage and divorce, as well as religion's hegemony in this area, I will offer some explanations for these phenomena, which I call "the illusion of civil marriage in Israel."

IV. Cohabiting Couples ('Reputed Spouses')

A. Legal Recognition

According to the CBS data, in 2009 there were 62,000 cohabiting couples in Israel, 95 percent of which were Jewish. Israeli law recognizes cohabiting couples to an unusual degree. 'Reputed spouses,' or *yedu'im be-tzibur*, enjoy a wide array of rights, very close in their scope to those enjoyed by married couples. The 'reputed spouses' doctrine differs from

¹³ A rare reference to the rabbinical court's deviation from the Supreme Court ruling is Yair Ettinger, "Rabbis claim new powers in divorces of couples married in civil unions," Haaretz, 14 January 2011.

the Anglo-American concept of common law marriage in the sense that the former is not a status. The Israeli Supreme Court has expressly stated that “reputed spouseship” is not common law marriage.¹⁴ Unable or unwilling to marry according to the laws of the state, many couples have found themselves cohabitating without marriage, partly because there are many possible bans on marriage in Judaism. For example: a child born to a married woman from another man is labeled as a bastard (*mamzer*), and is not eligible to marry another Jew; a married woman who had a sexual relationship with another man is not allowed to marry the latter once her marriage is dissolved; a Cohen (a man belonging to the priestly caste) may not marry a divorced woman; a woman who has been separated from her husband for reasons beyond her control, such as war or disappearance – unfortunately, this is not a rare case in Israel – may not remarry at all. Moreover, women whose husbands refuse to divorce them are also banned from remarriage. Same-sex couples are also excluded from marriage (as well as from the ‘reputed spouses’ category). Interfaith marriages are not recognized either, since Judaism, Islam, and other religions impose restrictions on marriage between people of different religions, and in many cases even regard this kind of marriage as void. The effect of awarding exclusivity to religious law in regard to marriage and divorce is, therefore, a *de facto* prohibition on interfaith marriage. The Supreme Court has refused to acknowledge the existence of common law marriage in a case of an interfaith couple (Rosen-Zvi 1991: 75, 338).¹⁵

Naturally, ‘reputed spouses’ face crises and break-ups just like married couples, and all the usual problems of division of common property, child custody, etc. The courts, beginning in the first years of the state, have developed an extensive case law that recognizes these relationships, and have gradually awarded these couples the same or similar benefits as

¹⁴ For a comparative analysis of the “reputed spouses” concept vis-à-vis common law marriage, see CA 384/61 *The State of Israel v. Pessler*, PD 16, 102, 105-106; CA 4/66 *Peretz v. Helmut*, PD 20(4) 337, 347-351 (Hebrew).

¹⁵ CA 373/72 *Teper v. The State of Israel*, 28(2) PD 7 (1972).

those to which married couples are entitled (Rosen-Zvi 1991: 380-1). This may seem paradoxical given the religious monopoly over marriage in Israel, but as Professor Rosen-Zvi noted:

The necessity to bridge the gaps between the religious law on the one hand and the prevalent world view and the reality of common practice on the other, also explains the paradox whereby a system expressing ultra-Puritanism through its marriage laws as settled under religious law, simultaneously gives normative expression to ultra-liberalism through the institution of “reputed spouses.” (Rosen-Zvi 1995: 98)

The extent of rights and obligations between ‘reputed spouses’ has triggered criticism from the liberal direction. Shahar Lifshitz, for example, has argued that by recognizing spousal rights for reputed spouses the courts and the legislature have ignored the variety of reasons that Jewish Israeli couples have for not getting married. While there is a strong case for applying rights for alimony or equitable distribution of the communal property in committed longterm relationships of couple who could not get married under religious law, couples who expressly reject the marriage institution should not be part of the rights and obligations system that stems from marriage (Shiffman 1995: vol. 1, 163; Lifshitz 2005, 2009).

B. The Rabbinical Court's Jurisdiction over 'Reputed Spouses'

The Israeli Supreme Court has ruled that the dissolution of reputed spouseship is outside the jurisdiction of the rabbinical courts.¹⁶ In recent years, however, despite the case law, the rabbinical courts have increasingly asserted jurisdiction over such cases, amounting to

¹⁶ See, e.g., HCI 673/89 Meshulam v. The Higher Rabbinical Court.

demanding a *get* as part of the dissolution process. In other words, the rabbinical courts have concluded that the couples must get divorced even though they never married.

In July 2007, the Haifa rabbinical court ruled that a *get* is required when a divorced couple re-cohabits after the divorce.¹⁷ This is because the couple might have executed betrothal by cohabitation (*kidushey bi'ah*).¹⁸ In another case, not involving a pre-married couple who reunited after their divorce, the Tel Aviv rabbinical court also asserted jurisdiction over a non-marital cohabitation dissolution case, accepting the framework of previous rulings requiring a full *get* as well.¹⁹

As opposed to civil marriages, however, rabbinical courts have been very reluctant to assert jurisdiction over reputed spouses. While non-marital cohabitation is not sinful in Judaism as in Christianity (for example, children of cohabitants are fully legitimate), it is considered undesired, and somewhat immoral. Fearing to be perceived as sanctioning reputed spouseship, the rabbinical courts have not been so quick to embrace jurisdiction of cohabitants as they did with civil marriage. In the past the rabbinical court asserted jurisdiction over reputed spouses in rare cases, and has been criticized for doing so (Shochetman 1993). But this now seems to be changing. While the rabbinical court's stance concerning the first case described here (the divorced couple who got back together but did not re-marry) has some justification in Jewish law, it is nevertheless an alarming case, given the Rabbinate's own 1950 regulations concerning the exclusivity of betrothal by money which has to be performed by a licensed rabbi in the State of Israel.

Thus, it seems that freedom from religion for Jewish couples in Israel has been severely weakened by giving the rabbinical courts exclusive jurisdiction over civil marriage dissolution in the 2006 *Jane Doe* case. This alone undermined the possibility for couples to avoid the requirements of the rabbinical court. The rabbinical courts' growing tendency to

¹⁷ Case No. 591085/1 (27 July 2009).

¹⁸ *Id.*

¹⁹ Case No. 344858/3 (1 June 2006).

require civilly married couples to obtain a *get*, has added insult to injury, and placed them in the same fragile position as religiously married couples, making women in particular vulnerable to extortion on the part of the husband in return for a *get* (Halperin-Kaddari 2004: 235-240).²⁰

But perhaps the most alarming of these developments is the rabbinical court's imposition of a religious divorce on 'reputed spouses', who expressly chose not to get married. While they traditionally avoided jurisdiction over such couples, in recent years it seems that rabbinical courts are beginning to consider embracing such couples and undermining their intention to avoid Jewish divorce law, and, indeed, marriage and divorce law altogether, whether religious or civil. In the next section I propose some tentative explanations for these phenomena.

V. Tentative Explanations

A. Power Struggles between the Supreme Court and the Rabbinical System

Over the years, the Supreme Court has consistently strived to narrow the scope of the rabbinical courts' jurisdiction (Radzyner 2010). It ruled that on issues not related to personal status, the rabbinical court must apply Israeli civil law, and not Jewish law (Hofnung 1996: 591).²¹ It also ruled, in the 2006 *Jane Doe* case, that while the rabbinical courts have jurisdiction over the dissolution of civil marriages, they lack jurisdiction over all other issues related to the dissolution of the relationship (such as alimony and division of property).

While the Supreme Court is the highest authority in the Israeli system, the rabbinical courts have been more than reluctant to conform to its rulings. The lack of binding precedents in Jewish law and in the rabbinical courts could be one reason, but its treatment of both civil

²⁰ A typical case is HCJ 5548/00 *Rachel Abraham (Cohen) v. The Higher Rabbinical Court in Jerusalem* (2 May 2001).

²¹ See, e.g., H.C. 1000/92 *Bavli v. the Higher Rabbinical Court* 48(2) P.D. 6 (1994); H.C. 3914/92 *Lev v. the Grand Rabbinical Court* 48(2) P.D. 457 (1994).

marriage and reputed spouseship could be interpreted as a reaction to the gradual reduction in its powers over religiously married couples. If this is true, it would not be the first time that the public pays the price for the power struggles between the dual and dueling systems of justice (Rosen-Zvi 1990: 127-130).

B. The Backlash against the Women's Rights Movements and Their Achievements

The displacement of otherwise religiously irrelevant legal institutions by the rabbinical courts can be explained in terms of the gender wars these courts have been invested in since their creation. Under Jewish law, women would undoubtedly lose due to the patriarchal nature of Jewish law. However, liberal institutions such as civil marriage and non-marital cohabitation were steadily advancing, which the rabbinical courts could not accept. Therefore, the appropriation of jurisdiction over civil marriage and non-marital cohabitation by the rabbinical courts seems to be a corrective measure meant to prevent women from choosing more egalitarian marital arrangements.

As Ruth Halperin-Kaddari has argued, there is a direct link between discriminatory marriage and divorce law, and discrimination within family life:

[T]he harsh discrimination against the woman and the blatant power discrepancy concerning the *get* influence the relationship itself, even if it does not end up in divorce. Awareness of her legal inferiority influences also the way in which the woman perceives herself and her relationship with her spouse. Women internalize their inferiority within the relationship, and this internalization seeps into their general self-image...

These notions seep into family life, and continue to construct the relationships between the genders with the children's generation. The family is the first and the basic site for social construction and for the socialization process the family's children

– the boy and the girl – undergo. When this site is saturated with injustice, imbalance, abuse, and discrimination, how could they form an alternative lifestyle in the future?

(Halperin-Kaddari 2001: 161-2)

We are apparently in the midst of a power struggle not only between the civil and religious court systems, but also between liberal, feminist, and egalitarian trends in parts of Israeli society, on the one hand, and the Rabbinate and the ultra-Orthodox communities on the other. Recent controversies over women's "modesty" and gender segregation attest to this powerful current within Israeli discourse on gender roles and gender equality. Raday (2003) and Gilligan & Richards (2008) believe that the patriarchal backlash against women's rights and liberation is a world-wide trend fueled by religious fundamentalism.

C. Slow Dissemination of Rabbinical Court Cases (or: Denial)

It is striking how little Israeli Jews know about religious marriage, the rabbinical court, and recognition of civil marriage and non-marital cohabitation. I have taught my family law course more than a dozen times since 2004 to hundreds of students in various institutions in Israel, and the level of ignorance concerning the consequences of various forms of marriage or non-marital cohabitation is consistently high.

This means that most students believe that civil marriage or non-marital cohabitation are paths out of the grip of the rabbinical court. There is no reason to believe that the level of awareness of other Israelis, who are not law students, is significantly different. While the slow dissemination of the recent 'reputed spouses' cases is understandable, given the rarity and novelty of the cases, it is hard to explain Israelis' ignorance concerning developments regarding the dissolution of civil marriages. Rabbinical court jurisdiction has been asserted over such cases for decades, and the 2006 case only clarified the procedure (apparently not very effectively).

Perhaps this ignorance is more accurately described as denial, which is characteristic of many marrying couples of all sorts: denial of the possibility of divorce. This is the same psychological mechanism that deters many couples from signing a prenuptial agreement, believing that this will destroy romance,²² and the general belief that although the divorce rate is constantly on the rise, “this is not going to happen to us,” and “you only get married once.”

Such denial mechanism could feed the notion that there is freedom from religion for those who get married abroad in a civil marriage, or choose not to get married at all, instead of taking political responsibility over the religious monopoly in the area of marriage and divorce, and committing to changing the system. As I explain below, perhaps Israeli Jews do not want to change the system, because they believe that the religion-nation nexus is too important and that, despite their own secularism, Orthodox Judaism has come to be a natural and taken-for-granted component of the Jewish-Israeli identity.

D. The Significance of Judaism in the Identity of Israeli Jews

A 2009 Central Bureau of Statistics (CBS) survey found that 62 percent of Israeli Jews over the age of 20 thought that civil marriage should be allowed in Israel. Fifty-seven percent believed that separation between state and religion should be instituted in Israel (CBS website). A 2011 survey revealed, however, that only 44 percent of Israeli Jews believe that in the case of a collision, democracy should override Judaism (Arian et al, 2011: 18).

According to that survey, only 51 percent of Israeli Jews supported civil marriage (Arian et al, 2011: 16), but 80 percent answered that “it is ‘important’ or ‘very important’ to be married by a rabbi” (Arian et al 2011: 42).

²² According to a recent survey of the Bureau for the Promotion of Women's Status, 34 percent think that prenuptials “compromise romantics”. Seventy-five percent would have signed a prenuptial agreement had they known that it could prevent *get* extortion (<http://portal.knesset.gov.il/Com11women/he-IL/Messages/14311.htm>).

Seval Yildirim has pointed out that “Secularism as an ideology and a political system was born in Christian Europe” (Yildirim 2004: 903). Secularism does not necessarily mean gender equality (Yildirim 2005: 350-1). In fact, there are reasonable grounds to believe that the current system of religious monopoly over marriage and divorce is the result of secular male interests as much as it is the result of religious lobbying (Lahav 1994; Berkovich 1999; Triger 2005). Patriarchy is not necessarily religious; it can be secular as well. In addition, patriarchal values are not necessarily male; Women can share them and enforce them (De Beauvoir 2011: 294-295). Could it be that Israeli Jews, even those who characterize themselves as secular and committed to gender equality, choose to comply with the discriminatory patriarchal family law system because they identify with its core values?

Perhaps such complicity, even if unconscious, could be attributed to some of those who marry civilly and register their marriages in Israel. But those who chose to cohabit probably do not share the notion that marriage, religion, and nationalism are related.

VI. Conclusion

This purpose of this article is to draw attention to the gradual depletion of carefully developed alternatives to Jewish marriage in Israel. Decades of case law and legislation which have recognized the rights of civilly married couples and reputed spouses are now facing the risk of becoming moot, as the rabbinical courts increasingly require a *get* in order to dissolve these relationships, just as if these couples had married according to halacha.

I have also offered four possible explanations for these developments, namely:

- 1) Power struggles between the civil and the religious court systems conducted on the backs of couples during their most vulnerable period in life, namely the dissolution of their relationships;

2) Part of a backlash against the improvement in women's status in general and in family law in particular, many of these championed by the Supreme Court;

3) Facilitated by the ignorance of many Israeli Jews regarding the centrality of the rabbinical courts even in the process of the dissolution of civil marriages;

4) Related to a shared set of values between religious and secular Jews in Israel, especially when it comes to women's status, the connection between marriage and religion, and between marriage, religion, and national identity.

Further investigation into these issues is needed, as the jurisdiction battles will continue to unfold and the trends sketched here will become clearer and more entrenched. What is already quite evident, even from the handful of reported cases that exist, is that Israelis' freedom from religion in the realm of marriage and divorce, and indeed Israelis' freedom from marriage in general, is under serious risk because of the rabbinical courts' increasing tendency to disrespect couples' express choices in this vitally important area.

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