

# ISRAELI FAMILY LAW AS A CIVIL-RELIGIOUS HYBRID: A CAUTIONARY TALE OF FATAL ATTRACTION

*Karin Carmit Yefet\**

*Marriage in the United States changed overnight when the U.S. Supreme Court legalized same-sex marriage in Obergefell v. Hodges. In response, many religious conservatives are seeking to abolish civil marriage and fill the regulatory vacuum with substitute regimes, including making marriage an exclusively religious zone. Another country's experience, however, indicates that this privatizing of marriage law would pose particular perils to some of women's hard-won marital rights and jeopardize children's welfare. This Article explores a unique case study of privatized family law in a liberal democratic state in the Western world: Israel. With an insider's perspective, I argue that the Israeli family law system, a hybrid creature of civil and religious legal elements, serves as a cautionary tale counseling against any state placing too much faith in religious marriage because the system creates what we might expect of a dysfunctional family: bitter rivalry, instability, overcorrection, and unintended consequences that fall most heavily on Israel's women and children.*

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\* Dr. Karin Carmit Yefet, Assistant Professor, Faculty of Law, University of Haifa; alumna Yale University School of Law, LL.M, J.S.D. programs; Bar Ilan University, LL.B., LL.M honors program, *summa cum laude*. This Article is dedicated to Professor Robin Fretwell Wilson, whose scholarship has been a source of inspiration for me as a scholar and for this research project in particular. My deep gratitude to Professor Robin B. Kar for challenging comments and deliberations and to Dr. Ido Shahar for always extending his valuable help. I also wish to thank Gal Amir and Laura Femino for excellent research and editorial assistance.

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## I. INTRODUCTION

Marriage in America seems to have changed overnight. On June 26, 2015, the U.S. Supreme Court rendered its historic decision in *Obergefell v. Hodges*, the latest in a long line of cases rendering marriage in America not only color blind (*Loving v. Virginia*),<sup>1</sup> for richer for poorer (*Zablocki v. Raidhail*),<sup>2</sup> but now also sex blind as well.<sup>3</sup> Not everyone is joining the wedding party, however. For many religious conservatives, *Obergefell* is the last nail in the coffin of the institution of marriage as they know it. Anticipating the Court's decision to open the marital market to same-sex couples, several state bills and legal scholars have called for the abolition of civil marriage altogether and for filling the regulatory vacuum with substitute regimes, including a return to marriage as an exclusively religious zone.<sup>4</sup> Under such a scheme, each religious tradition could offer its own vision of marital life, enforced by "tribunals specialized in the religious traditions of the relevant family," limited only by respect for "the minimal norms of a liberal democratic society."<sup>5</sup>

Translating academic theory into action, conservative Christian couples that resist the queering of civil marriage are now increasingly opting for private religious marriage in order to disentangle the State from holy matrimony and dissociate themselves from an institution now "tainted," in their view, by same-sex couples. Religious conservatives in a way are doing to gays and lesbians what states did to blacks in the wake of *Brown v. Board of Education* in closing down public facilities, just as blacks gained equal access to them, to eschew racial integration.<sup>6</sup> Some

1. *Loving v. Virginia*, 388 U.S. 1 (1967).

2. *Zablocki v. Raidhail*, 434 U.S. 374 (1978) (invalidating a Wisconsin statute requiring noncustodial parents to obtain a court order before receiving a marriage license and provided they are not in arrears on their child support).

3. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that same-sex couples cannot be deprived of the right to marry).

4. See, e.g., Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006). For a detailed analysis of such bills, see Robin Fretwell Wilson, *Getting Government out of Marriage Post Obergefell: The Ill-Considered Consequences of Unwinding Civil and Religious Marriage*, 2016 U. ILL. L. REV. 1445 (2016).

5. Crane, *supra* note 4, at 1251–53.

6. *Palmer v. Thompson*, 403 U.S. 217 (1971).

scholars have conceptualized this tactic as a precaution against “state coercion of religious institutions to conform to progressive views of marriage” and the perceived threat of obliging religious authorities to perform same-sex unions with the same authority preventing religious institutions from engaging in racial discrimination.<sup>7</sup>

One such experimental privatized marriage track is that of covenant marriage. Three states to date have established this optional marital regime, under which entry to and exit from marriage is significantly restricted.<sup>8</sup> Unsurprisingly, the most faithful clientele of this super-vows system have been religious couples.<sup>9</sup> Most partners who learn about covenant marriage do so from religious authorities,<sup>10</sup> and a number of religious leaders have gone so far as to refuse to marry couples unless they submit to the covenant regime.<sup>11</sup>

While fears that covenant marriage may prove coercive and abusive to women have not significantly materialized, the nascent attempt to re-buff civil marriage is alarming. This envisioned new form of privatized marriage may signify the surrender of women’s hard-won rights to certain marital rights, including the right to leave an abusive marriage and the right to spousal support, as well as jeopardize children’s welfare. In other words, a trend that starts with a prejudicial attitude toward homosexuals may end with prejudice toward other vulnerable minorities—women and children.

What are the particular perils of privatizing marriage law? More generally, what are the consequences of the decision to give religious authorities jurisdictional pockets of an otherwise civil family law regime? This Article explores a unique case study of privatized family law in a liberal, democratic state in the Western world: Israel. With an insider’s perspective, I argue that the Israeli family law system, a hybrid creature of civil and religious legal elements, serves as a cautionary tale counseling against any state placing too much faith in religious marriage. In particular, the Israeli experience highlights the hazards of allowing Christian couples to subvert marriage equality by granting them license to devise their own ultra-religious and discriminatory alternatives. As the Article

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7. Crane, *supra* note 4, at 1255–56.

8. Joel A. Nichols, *Louisiana’s Covenant Marriage Law: A First Step Towards a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 929–30; *see also, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-901–906 (West 1998); LA. REV. STAT. ANN. §§ 9:272–275 (West 2000).

9. Margaret Brinig & Steven Nock, *What Does Covenant Mean for Relationships*, 18 ND J.L. ETHICS & PUB. POL’Y 137, 152–59 (2004); Steven L. Nock et al., *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169, 187 (2003) [hereinafter Nock, *Covenant*].

10. Nock, *Covenant*, *supra* note 9, at 186 (finding that covenant married couples “mostly learned about the option from a religious authority”).

11. Susan Hager, *Nostalgic Attempts to Recapture What Never Was: Louisiana’s Covenant Marriage Act*, 77 NEB. L. REV. 567, 580 (1998) (stating that some churches require all marriages performed in their buildings to be covenant marriages); Nichols, *supra* note 8, at 954; Sandy Banisky, *Altering the Way to the Altar: Louisiana’s New “Covenant Marriage” Option Forces Couples to Slow Down and Act Cautiously*, BALTIMORE SUN (Oct. 20, 1997), [http://articles.baltimoresun.com/1997-10-20/news/1997-293017\\_1\\_covenant-marriage-divorce-rate-marriage-relationship](http://articles.baltimoresun.com/1997-10-20/news/1997-293017_1_covenant-marriage-divorce-rate-marriage-relationship) (describing one Baptist minister who requires covenant marriage for all weddings).

shows, Israel's civil-religious hybrid, as I will call it, creates what we might expect of a dysfunctional family: bitter rivalry, instability, overcorrection, and unintended consequences that fall most heavily on Israel's women and children.

Upon its inception, Israel adopted the ancient Ottoman *millet* system, under which entry and exit into state-recognized marriage is an entirely religious affair.<sup>12</sup> The organizing principle of Israel's religion-based family law is that the religious identity of the spouses controls the choice of both applicable law and jurisdictional forum. The Jewish State accords official recognition to fourteen religious communities, including Jewish, Muslim, Druze, Baha'i, and ten different Christian denominations.<sup>13</sup> Each recognized religious community has its own state-funded tribunals and a separate set of religious codes, and each is state empowered to exercise its jurisdictional authority over all the residents who belong to it by birth or baptism, irrespective of their subjective religious beliefs or lack thereof.<sup>14</sup> This is because in the Jewish State, a person who is born into a certain faith is forced to remain faithful to it, unless she properly converts to a different religious community.<sup>15</sup> In other words, it is not the individual who chooses religion, rather religion chooses the individual.

Israel's civil-religious family law hybrid comes in all possible forms. For example, religious courts enjoy exclusive jurisdiction in adjudicating matters of marriage and divorce according to religious law, which becomes hybrid when the civil law interferes with or overlays the religious system in a variety of ways. Another iteration of the hybrid occurs when religious and civil courts share concurrent jurisdiction over family law matters. Both must apply secular civil law, as in matters of child custody and property distribution, and both must apply religious law, as in issues of wife maintenance and child support. A final form occurs when religious and civil courts share concurrent jurisdiction, but each may apply its own religious or civil law respectively, as in the case of succession.

This Article explores how the conflict between the secular and the sacred has played out in all of its hybrid manifestations, paying special heed to the rarely told story of Israel's chronic religio-national minority group—the Palestinian-Arab community. The Article concludes that the ensuing Frankenstein, stitched together from pieces of civil and religious law alternatively, may keep appearances as a liberal-multicultural exer-

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12. For the Ottoman (and later British) origins of the *millet* system and subsequent developments see Yüksel Sezgin, *The Israeli Millet System: Examining Legal Pluralism Through Lenses of Nation-Building and Human Rights*, 43 *ISR. L. REV.* 631, 631–32 (2010); Gal Amir, *What We Talk About When We Talk About the Millet*, 30 *MEHKAREY MISHPAT* (forthcoming, 2016).

13. *Id.*

14. Michael M. Karayanni, *In the Best Interests of the Group: Religious Matching under Israeli Adoption Law*, 3 *BERKELEY L.J. MIDDLE E. & ISLAMIC L.* 1, 8–9 (2010); Michael M. Karayanni, *The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 5 *NW. J. INT'L HUM. RTS.* 41, 53–54 (2007) [hereinafter Karayanni, *Religious Accommodations*]; Frances Raday, *Israel—The Incorporation of Religious Patriarchy in a Modern State*, 4 *INT'L REV. COMP. PUB. POL'Y* 209, 210 (1992).

15. Nicole Brackman, *Who Is a Jew? The American Jewish Community in Conflict with Israel*, 41 *J. CHURCH & ST.* 795, 809 (1999).

cise in religious pluralism—that is, one that allows each religious community the autonomy of self-governance. Yet, in effect, the “intermarriage” of the civil and the religious systems has fostered *illiberalism* by exchanging one set of problems for another, while extracting an unconscionable price from the minority within the minority—women and children.

## II. EXCLUSIVE RELIGIOUS JURISDICTION, PLURALITY OF CIVIL PRICES

It is perhaps surprising that the religious and civil systems in Israel interact so profoundly in matters of marriage and divorce—after all, the State vests religious courts with exclusive jurisdiction to apply religious codes to determine the law of state-sanctioned marriage and divorce. As this Part will show, these religious laws invariably envision a very limited conception of both the right to enter and the right to exit matrimony. While the resulting system appears to be accommodating to cultural subgroups, I argue that it in fact undermines the very right the State seeks to protect in its purportedly multiculturalist approach—religious liberty. Worse, the collateral damage to a grant of unchecked privilege to religious *group* rights is the violation of the sacred *individual* rights the liberal State claims to hold dear.

Religion’s formal monopoly on these areas of family law breeds an irreconcilable value conflict between the patriarchal Muslim, Christian, and Jewish religious systems, on the one hand, and the liberal, egalitarian, and progressive civil system, on the other. In a well-meaning attempt to navigate between these two value systems, civil law, operating in the shadow of religious law, has developed an underground set of civil alternatives to religiously defined marriage and divorce. The result of this secular subterfuge, we shall see, is a perturbed hybrid, a civil-religious entanglement rife with costs and complications largely borne by the most vulnerable members of society: women and children.

### A. *Formal Religious Marriage and its Underground Civil Alternatives*

Israel is the only Western regime where *civil* marriage and divorce are nonexistent.<sup>16</sup> Although the State grants religious authorities the power to set and enforce the rules of marriage and divorce, the State recognizes religious marriage—indeed, recognizes it exclusively—as an institution with civil meaning, namely, the countless legal, social, and economic consequences marital status confers.<sup>17</sup> While each of the fourteen recognized religions enjoys full autonomy to shape and implement

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16. Michael Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT’L L. REV. 239, 252 (2007); see also Gidon Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy Over Who Is a Jew as an Illustration*, 39 VAND. J. TRANSNAT’L L. 1233, 1260 (2006).

17. See Zvi H. Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 ISR. STUD. REV. 1, 3 (2012).

its own idiosyncratic marriage regime and its dissolution, marriage takes on civil meaning through a formal registration process with the State.<sup>18</sup>

Since the only way to achieve married status in Israel is to marry in accordance with one of the recognized religion's rules, the family law system in an otherwise secular liberal state presents myriad impediments to marriage that would be flagrantly unconstitutional elsewhere. To begin, same-sex or interfaith marriages are a legal impossibility in Israel, as is marriage between individuals with an unrecognized religious affiliation (e.g., protestants), or those not born into a religious community (e.g., those from a Communist nation).<sup>19</sup> Further, many marriage-hopefuls are blocked by *intra*-religious rules. For example, a "bastard" may marry only another bastard or a Jewish convert, and a female divorcee may not marry her paramour or a descendant of the ancient Jewish priesthood caste (a *Cohen*).<sup>20</sup> Finally, many individuals may technically be eligible for religious marriage but reject that form of partnership on ideological grounds. Would-be spouses who are born to a religious faith as a matter of genetics and community, but who embrace atheism as a matter of subjective belief, may wish to marry in a civil framework without the religious oversight of a system they have rejected. Israel denies them this option. There is no freedom from religion in Israeli family law, and as a consequence those who wish to exercise their right to marry must do so at the expense of their right to conscience.

Any of this exhausting list of marriage-ineligibles or religion-resisters must either travel outside Israel to marry civilly overseas or forgo the institution of marriage altogether in favor of nonmarital cohabitation.

### 1. *Civil Spouses Married Abroad*

This strategy, by which civil-minded couples bypass religious marriage in favor of a civil marriage, is in a sense a reverse parallel to the recent phenomenon in the U.S., where social-conservative Christian couples are considering to renounce sex-blind civil marriage in favor of religious marriage. It is illuminating to explore the civil law's reaction to the circumvention of religious law.

Conscious of the inequities imposed by religious law, the activist Israeli civil judiciary has employed a procedural legal methodology to en-

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18. See Gidi Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855, 2868 (2009).

19. Eric Cortellessa, *Why Is There No Civil Marriage in Israel?*, TIMES OF ISRAEL (July 12, 2015), <http://www.timesofisrael.com/why-is-there-no-civil-marriage-in-israel/>. In 2010, Israeli law crafted a special form of a civil legal union available only if both partners are religiously unaffiliated. This union is called "covenant partnership" since the monopoly of the label marriage is strictly reserved in Israel for religiously sanctioned unions. See Covenant Partnership for the Religionless Law 5770 – 2010, SH No. 2235, p. 428 (Isr.).

20. See CA 1354/92 Attorney General v. X 48 (1) PD 711 (1994) (Isr.); Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 122–23 (2000); Akiva Miller, *The Policing of Religious Marriage Prohibitions in Israel: Religion, State and Information Technology*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 23, 25 (2014).

sure that the State in effect recognizes all marriages performed abroad.<sup>21</sup> Under case law starting in the 1960s, the State must register all marriages conducted overseas evidenced with a foreign marriage certificate in the official Population Registrar—their religious invalidity notwithstanding.<sup>22</sup> While this formalistic procedural act does not attest to the substantive validity of the marriage, in effect registration confers upon registered couples virtually the entire range of civil benefits and burdens concomitant to official marriage license in Israel.<sup>23</sup> Remarkably, even same-sex marriages, if performed legitimately abroad, are recognized through this procedural mechanism, rendering Israel the only country on earth that considers such a union null and void if executed domestically, yet valid if solemnized outside the country.<sup>24</sup> In short, as long as a couple can find a country—any country—able to marry them under its laws, their unions will be registered and *de facto* recognized in Israel.<sup>25</sup>

The extraordinary judicial commitment to fortifying civil alternatives to religious marriage has in practice created a paradoxical tiered or classist marriage system. At the top of Israel's marriage caste system—and the bottom of any scale measuring individual rights protection—sits state-recognized religious marriage. These marriages are formally endorsed by the State and thereby granted the greatest degree of symbolic prestige. At the same time, they subject women to a discriminatory religious code adjudicated in the patriarchal judicial setting of the religious court. Divorce options are strictly limited, even nonexistent, in the case of several Christian denominations. The right to female support is dependent, across all fourteen recognized religious communities in Israel, upon obedience to a gendered vision of marital roles and sexual chastity norms. In many cases, women's right to marital property may also be severely endangered. Religious courts may disregard the civil community property regime and apply the religious separate property regime instead—a law which often denies joint property ownership and has proven inimical to women's economic security.<sup>26</sup>

The middle marriage caste consists of opposite-sex civil marriages performed abroad but later registered and recognized in Israel. Surprisingly, civil marriages, too, are trapped in the exclusive jurisdictional web of religious courts in matters of divorce. Civil couples will be assigned the

21. The first case to develop this strategy, in the context of interfaith marriage, is H CJ 143/62 Funk-Shlezinger v. Ministry of the Interior 17(1) PD 225 (1963) (Isr.).

22. Talia Einhorn, *Same-Sex Family Unions in Israel*, 4 UTRECHT L. REV. 222, 226–27 (2008).

23. RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 244 (2004).

24. H CJ 3045/05 Ben-Ari v. Dir. of Population Admin, Ministry of the Interior 61 (3) PD 537 (2006) (Isr.), *translation available at* [elyon1.court.gov.il/files\\_eng/05/450/030/a09/05030450.a09.htm](http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.htm).

25. For a discussion of the substantive validity of civil marriages see LFA 9607/03 Ploni v. Plonit 61 (3) PD 726 (2006) (Isr.) (expressing a preference for the American conflict-of-law rule, *lex loci celebrationis*, since this most lenient regime results in the recognition of almost all civil marriages celebrated abroad). For a useful overview, see Ayelet Blecher-Prigat, *A Constitutional Right to Mary: Israeli Style*, 47 ISR. L. REV. 433, 434, 439–42 & n.7 (2014); see also Crane, *supra* note 4, at 1245.

26. See, e.g., H CJ 9734/03 Plonit v. The High Rabbinical Court, 59 (2) PD 295 (2004) (Isr.); Yitzhak Reiter, *Qadis and the Implementation of Islamic Law in Present Day Israel*, in *ISLAMIC LAW: THEORY AND PRACTICE* 205, 216–217, 227 (R. Gleave & E. Kermeli eds., 1997).

religious divorce law of one of the fourteen recognized religions.<sup>27</sup> The problem here, of course, is not only the conceptual inconsistency of using *religious law* to sever a *civil union*, but the fact that couples who so opposed religious marriage that they went through the trouble of marrying at a far-flung location are at divorce subject to the very system they so vehemently sought to escape. Adding further to the confusion, while the dissolution grounds are dominated exclusively by religious law, all other legal consequences of terminating civil marriages are under the sole territory of the secular family court system and are governed by judge-made, women-friendly civil family law.<sup>28</sup>

In the bottom caste, same-sex civil marriages suffer symbolic degradation in the eyes of the State and yet benefit from the greatest scope of individual rights. Homosexuality is uniquely rewarded in that only gay couples completely escape the clutches of religious courts and the application of divine law; they are subject instead to the jurisdiction of the secular family court and to progressive civil family law in the areas of property division and spousal support.<sup>29</sup> Since Israel does not have a statutory nonreligious divorce regime, however, the right to marital exit may become a sort of a legal lottery that remains wholly contingent on the particular views of each presiding family law judge regarding the concept of same-sex love.<sup>30</sup>

## 2. *Reputed Spouses: The Institution of Unmarried Cohabitants*

The second way the civil courts have neutralized the religious monopoly over formal marriage is by conferring on the informal institution of cohabitation legal recognition sufficient to render it a legitimate civil

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27. There is still a difference in the divorce processes of the religiously and the civilly married. While the latter must obtain a *get* (Jewish divorce decree), it is only a *get le-humra*, that is, a *get* issued as a precautionary measure, and as such it is generally a more lenient procedure. See AVISHALOM WESTREICH & PINHAS SHIFMAN, A CIVIL LEGAL FRAMEWORK FOR MARRIAGE AND DIVORCE IN ISRAEL 23, 38 (Ruth Gavison ed., 2013). Note that the divorce process proves intractable when the two spouses come from different religious communities. Inter marriages are governed by the Jurisdiction in the Matter of Dissolution of Marriage (Special Cases and International Jurisdiction) Law, 5792-1969, SH No.573 p. 248 (Isr.).

28. See, e.g., LCA 8256/99 Plonit v. Ploni 58(2) PD 213 (2003) (Isr.) (stating that spousal support is governed by civil contractual principles). The courts developed a rich body of civil family law through reliance on contract, property, and tort doctrines. See Blecher-Prigat, *supra* note 25, at 455. See also HCJ 2232/03 X v. Regional Rabbinical Court 61(3) PD 496 (2006) (Isr.) (the family court has exclusive jurisdiction over the financial aspects of civil marriage). The Rabbinical courts at times resist this precedent and subject civil marriages to religious law nonetheless. See e.g., Triger, *supra* note 17.

29. Dr. Amir Paz-Fuchs, *The Ironies of Gay Divorce in Israel*, OXFORD HUMAN RIGHTS HUB (Dec. 20, 2012), <http://ohrh.law.ox.ac.uk/the-ironies-of-gay-divorce-in-israel/>.

30. A conservative judge, for example, may side with a speedy unilateral no-fault divorce on demand as a token of his disapproval of the relationship, but he may just as likely renounce the civil court's authority to adjudicate matters of divorce altogether, thereby binding the gay couple before it to an eternal (undesired) union. So far, the few gay couples who have approached the civil court seeking divorce—each after a religious court had suspended its divorce case indefinitely—received judicial decrees of marital termination by virtue of their mutual consent. See MDC (Tel Aviv) 52224-11-13 In the Matter of Plonim (Dec. 8, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); FC (Tel-Aviv) 56248-10-12 Plonit v. Almonit (Feb. 19, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

alternative. Progressive forces in the civil legislature and the judiciary have raised the formal status of “reputed spouses” to nearly equal that of proper religious spouses—and in some instances have achieved an overcorrection, such that unmarried cohabitants may paradoxically enjoy stronger individual rights than lawfully wedded couples. For example, while a married woman may lose her spousal support entitlement upon marital misconduct and religious transgressions, a cohabitant’s entitlement is independent of fault considerations and contingent solely on economic considerations.<sup>31</sup>

Israel’s civil courts have also increasingly relaxed the admissions criteria for cohabitant status, which now require no minimum lifespan for the relationship,<sup>32</sup> no actual cohabitation,<sup>33</sup> and tolerate the maintenance of strictly separate finances,<sup>34</sup> as well as nonmonogamous relationships.<sup>35</sup> The floor for legal cohabitation status is so low that even *married individuals* may be simultaneously recognized as the cohabitants of their extramarital lovers—a doctrinal peculiarity of surpassing importance as discussed in the next Section.<sup>36</sup>

Given this generosity in its recognition of unmarried cohabitants, one may be tempted to characterize Israel as an avatar of progressive liberalism, and cohabitation law as a civil ray of light in the darkness of religious family law. And, indeed, cohabitation law was partly designed to overcome the legal impediments of the religious rules and provide couples unable or unwilling to marry religiously a civil alternative to marriage.<sup>37</sup> Upon deeper inquiry, however, Israel’s cohabitation law reveals surprising pockets of oppression and a litany of consequences unpalatable to the liberal perspective. Most importantly, the imposition of a marriage-like regime on cohabiting couples is oblivious to the fact that many couples do not institutionalize their informal relationship precisely because they want to stay outside the reach of the law and avoid the legal obligations of marriage. According to sociological studies, Israeli couples increasingly choose to live together without the benefits of marriage either because they are such “marriage resisters,” or because they are giving their partnership a trial run before committing to formal marriage.<sup>38</sup>

31. See Shahar Lifshitz, *The External Rights of Cohabiting Couples of Israel*, 37 ISR. L. REV. 346, 352–355 (2003/04); Blecher-Prigat, *supra* note 25, at 443–44.

32. Indeed, courts have found legal cohabitation between couples who had lived together for as short as a few months. See, e.g., EC (TA) 3693/90 Amir v. Zager (1991) (Isr.) (unpublished).

33. See, e.g., CA 79/83 Attorney General v. Shukran 39(2) PD 690 (1985) (Isr.); EC (Hi) 833/81 Meir v. Attorney General, PM 5742(2) 428 (1982) (Isr.).

34. CA 107/87 Alon v. Mendelson 53(1) PD 431, 438 (1989) (Isr.).

35. CA 4385/91 Salem v. Carmi 51(1) PD 337 (1997) (Isr.).

36. The first case to establish this ruling is CA 384/61 Israel v. Fessler 16(1) PD 102 (1962) (Isr.); see also Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT’L & COMP. L. 279, 298–99 (2009).

37. Lifshitz, *supra* note 31, at 348.

38. See YOCHANAN PERES & RUTH KATZ, *THE FAMILY IN ISRAEL—CHANGE AND CONTINUITY*, in *FAMILIES IN ISRAEL* 9–32 (Lea Shamgar-Handelman & Rivka Bar-Yosef eds., 1991) (In Hebrew); SYLVIE FOGEL-BIZAWI, *FAMILIES IN ISRAEL: BETWEEN THE FAMILIAL AND POSTMODERNISM*, in *SEX, GENDER & POLITICS* 107 (Daphna Israeli et al. eds., 1999) (in Hebrew).

Yet Israeli courts have imposed on cohabiting couples the legal commitments of marriage even in cases when it was clear that they did not marry not because they opposed *religious* marriage, but because they oppose the very institution of *legal* marriage.<sup>39</sup>

Stated differently, the civil system is so anxious to protect the right to marry that it readily, if inadvertently, sacrifices the right *not* to marry in the process. The perverse result of using cohabitation law as a substitute for marriage—yet another symptom of the civil-religious Frankenstein that is Israeli family law—is a profound disrespect toward the fundamental liberal values of autonomy and freedom of choice, namely, the choice to reject the legal commitments of formal marriage. The hybrid system also impedes the liberal commitment to pluralism, depriving Israelis of a wide spectrum of relationship possibilities easily accommodating a range of romantic choices. Indeed, in other western legal systems, cohabitation remains distinct from marriage, even in those regimes that have gone great distances toward assimilating the two.<sup>40</sup>

In short, the hyperactive development of cohabitation law, as manifested in the wholesale equalization of the status of official marriage to other unofficial intimate relationships, is a civil add-on to the religious regime that substitutes new problems for those it purports to fix.

### B. *Marrying the Civil-Religious Hybrid to Divorce Law*

In the case of the right to divorce, the Israeli system nominally adheres to exclusive religious law and jurisdiction. Under this system, almost all of the recognized religious communities in the Holy Land feature patriarchy as the overarching theme of the dissolution regime. Jewish law, for example, imposes strict fault-based requirements which severely limit the right to marital exit and ultimately condition the divorce decree—termed a *get*—upon the husband's consent. Consequently, recalcitrant men infamously leverage their veto power over the divorce into a bargaining chip used against their wives to demand property concessions, evade financial obligations, and even win child-custody rights. Many of Israel's Christian denominations feature the same phenomenon of matrimonial chains and extortionist practices, though it is hardly documented and critiqued.<sup>41</sup>

This Section will show that, as in the arena of marriage law, the gendered inequalities and inequities produced by the religious monopoly on formal divorce, have prompted the civil system to respond with a se-

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39. The first scholar to voice a thoughtful liberal critique of the trend to treat cohabitation as the legal equivalent of marriage is Professor Shahar Lifshitz. For a comprehensive account, on which this analysis relies, see his award-winning book SHAHAR LIFSHITZ, COHABITATION LAW IN ISRAEL FROM THE PERSPECTIVE OF A CIVIL LAW THEORY OF THE FAMILY (2005) (in Hebrew).

40. Lifshitz, *supra* note 31, at 363; Ann Laquer Estin, *Unmarried Partners and the Legacy of Marvin v. Marvin: Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1403 (2001).

41. For an analysis of Israeli divorce law see Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 101 (2009).

ries of ill-devised add-ons, which are not only awkward, but also unjust. A closer look at Israel's Muslim community will reveal a particularly destructive form of hybrid, one in which civil oversight has reduced religious law to its most traditional and restrictive form. Across all religions, however, the hybrid theme remains the same: an uneasy tradeoff which safeguards certain fundamental rights, especially the right to marital liberty, only at the expense of certain others—including the right to religious liberty, the very freedom fundamental to Israeli family law's multiculturalist architecture.

### 1. *Civil Augmentations to Religious Divorce: A Botched Job*

As we saw in the realm of marriage law, civil law has attempted to augment the religious divorce regime by providing alternative means to the end goal of marital exit. While examples abound across many of Israel's recognized religions, this Section will explore two of these augmentations, particularly striking for their innovation and, in some cases, for the severity of their collateral damage.

Consider the plight of Israel's minority Christian community. Some of the Christian denominations recognized in Israel do not permit divorce under any circumstances, and those that do, as with Greek Orthodox Christianity, allow marital outlet only subject to a discriminatory, fault-based regime dating back to the fourteenth century<sup>42</sup>—one so eager to keep marriages intact that it considers life-threatening violence a reconcilable form of marital discord.<sup>43</sup> Under this reign of indissoluble marriage, couples in Catholic and Maronite communities have developed ingenious ploy to escape the deadlock of the no-exit regime: temporary conversion to Orthodox Christianity, which does (if begrudgingly) grant religious divorce.<sup>44</sup> This “solution” makes everybody happy; the divorcing couple is happy in that they got what they bartered for: freedom. But the ecclesiastical courts are even happier: converting clients comprise forty percent of their divorce business and are the most profitable; they constitute the most expensive of all judicial services across all family courts in Israel.<sup>45</sup>

In effect, Israel's Catholic and Maronite couples enjoy a *de facto* divorce law that permits marital freedom upon mutual consent. The problems begin, however, when one party refuses to cooperate with the temporary conversion plan, either for the love of religion or for the love of blackmailing one's spouse. And this is where the civil law interfered with surprising severity, attesting to the extremes to which the unintended consequences of the civil-religious hybrid may extend. In one recent case, and the first of its kind to date, a Maronite husband sought divorce over

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42. SHIRIN BATSHON, *THE ECCLESIASTICAL COURTS IN ISRAEL: GENDER OUTLOOK* 9–11 (2012).

43. *Id.* at 9–11, 13–14.

44. *Id.* at 7, 13.

45. *Id.* at 7–8, 13.

the objections of his determined wife who refused to participate in the conversion acrobatics.<sup>46</sup> In a radical move, the desperate husband who desired to marry his new lover, asked the civil family court to force his wife to convert to Orthodox Christianity in order to commence divorce proceedings in the ecclesiastical court.<sup>47</sup> Unprecedentedly, the court did just that. Under the aegis of civil tort law, the court held that to keep a spouse hostage in a lifeless marriage constitutes a tort of negligence.<sup>48</sup> By refusing to acquiesce to a temporary and merely formal conversion, the court reasoned, the wife in bad faith violated the duty of care she owed her husband. She therefore was liable for damages for that negligence thus far and would further be fined *going forward* for each year in which she persisted in her refusal to convert to Orthodox Christianity.<sup>49</sup>

This, of course, is a manifestation of the civil-religious Frankenstein at its worst. The civil attempt to augment the archaic rules of an exclusively religious domain may have been well-intentioned, but the results are a startling tradeoff: a sacrifice of religious freedom at the altar of marital freedom. Thus a multicultural-family-law system designed to respect community identity and individual religious liberty ironically leads to one of the most severe forms of rights violation: coerced conversion.

While this example is a clear extreme, it is useful for precisely that reason: it demonstrates the chilling potential consequences of a regime which, rather than properly addressing its religious and civil conflicts, attempts to sew the two together in a patchwork both unworkable and unjust.

Another example of a botched civil solution to religious adversities does not arise in any one particular religious community, but rather functions as a general quick-fix to deeply rooted gender inequities that know no denominational barriers. For these communities, the civil legal system has provided no individually tailored response, but instead an augmentation available to all Israeli citizens: civil cohabitation law. Recall that Israeli civil law disrupted religion's monopoly on marriage by creating a civil (if unofficial) alternative in the form of unmarried cohabitation. But cohabitation law serves as more than a civil alternative to marriage for a single individual cohabitating with a partner. It also fulfills the dual role of a civil alternative to *divorce* for a married individual cohabitating with an extramarital partner.<sup>50</sup> Because the State recognizes extramarital cohabitation, a woman seeking divorce effectively achieves a quasi-marriage status, at least in the sense that her new union is rewarded with almost all the attendant civil benefits and privileges concomitant to for-

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46. FC (Hi) 14177-03-09 H v. H. (Jan. 17, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

47. *Id.*

48. *Id.* at §§ 22, 25–28, 32.

49. *Id.* This decision was summarily overruled on appeal by mutual consent. See FA (Hi) 45532-02-13 Plonit v. Almoni (Jun. 20, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

50. Pinhas Shifman, Family Law in Israel: The Struggle Between Religious and Secular Law, 24 ISR. L. REV. 537, 551 (1990).

mal marriage. This reduces some of the leverage that a recalcitrant husband holds over a wife eager to move on in her personal life to a new (and more perfect) union.

As is typical of the civil-religious hybrid, however, what at first sight may seem an ingenious civil intervention sensitive to women's rights is in fact revealed as counterproductive upon a closer look. The above account assumed that cohabitation law extends to married individuals in order to provide a civil alternative to religious divorce. Yet the case law reveals that courts confer cohabitation status on spouses seeking divorce and on spouses *resisting divorce* indiscriminately.<sup>51</sup> This indiscrimination may tip the scales further in the direction of gender inequality when a recalcitrant husband, possessive of exclusive veto power over a divorce, is empowered to chain his wife to their marriage without crippling his own ability to move on with a new adulterous partnership. In this scenario, cohabitation law grants the already-powerful husband the added weapon of a *de facto* remarriage license to a new partner, even while he refuses to grant his official wife her own freedom. Worse, in this scenario the first and formal wife is replaced by the new cohabitating wife in the eyes of civil law, meaning that she loses certain civil rights and privileges to her husband's new lover.<sup>52</sup> This regime also betrays an irreconcilable hypocrisy in Israel's family law; by allowing men to maintain multiple, legally recognized "wives," civil law enables a form of *de facto* bigamy that subverts the Israeli criminal law.<sup>53</sup> The problem is particularly salient among Israel's Muslim and Bedouin communities, where the *Qur'anic* privilege of polygamous marriage persists.<sup>54</sup>

Cohabitation law further exacerbates the male appetite for extortion described earlier, as a husband can hold his wife in marriage limbo while he is legally and socially empowered to build a second partnership without a formal divorce (*get*) from his first. In other words, even a man ready to remarry can play hard to *get* with his first wife, forcing her to pay for the divorce he desires. Cohabitation law produces these unintended gendered effects because what is good for the goose is unfortunately not so good for the gander, given the patriarchal socio-legal milieu in which women operate. The unequal consequences are especially pronounced in the local Palestinian-Arab society, where gendered social and religious codes—enforced in present-day Israel by the unmitigated threat of 'honor killing'—bar women from relationships unsanctioned by formal marriage. Moreover, female cohabitation in these circumstances is not

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51. See, e.g., CA 384/61 State of Israel v. Pasler 16 PD 102 (1962) (Isr.) (developing this policy).

52. For example, a "new wife" has even been entitled to change her last name to that of her "husband's" in the face of the legal wife's opposition. HCJ 6086/94 Ela Nizri v. Office of the Population Registration 49 (5) PD 693 (1996) (Isr.); see also Shahar Lifshitz, *Married Against Their Will: On the Non-Liberal Facet of Cohabitation Law*, 25 IYUNEI MISHPAT 741 (2001) (in Hebrew).

53. Penal Law 5737-1977, Art. 8, § 176 (1977) (Isr.); Rawia Abu Rabia, *Redefining Polygamy Among the Palestinian Bedouins in Israel: Colonialism, Patriarchy, and Resistance*, 19 J GENDER, SOC. POL'Y & L. 460, 471 (2011).

54. Aharon Layish, *The Status of the Shari'a in a Non-Muslim State: A Study Based on Decisions of the Shari'a Courts in Israel*, 27 ASIAN & AFRICAN STUD. 171, 177 (1993).

simply the gravest gendered crime on the religious law books, it can produce only illegitimate children who may later be marriage disabled.<sup>55</sup> As a result of this asymmetry, in which cohabitation law operates in a grossly gendered manner benefitting recalcitrant husbands, women are left at the mercy of a formal divorce under religious law. Indeed the numbers bear this out in a phenomenon I term “the feminization of divorce”—over ninety percent of all divorce petitions in Israel are initiated by women.<sup>56</sup>

## 2. *Muslim Religious Law in a Jewish Secular State: A Special Case of Unintended Consequences*

We have now seen how particular cases of civil interference in the religious domain have been so counterproductive in Israel’s various divorce-law regimes. The case of its Palestinian Muslims, however, is a special one, requiring its own analysis and independent critique. In this case study, we again meet the uneasy coexistence of civil and religious law that paradoxically exacerbates, rather than relieves, the tension between multiculturalism and feminism. But it is here that the hybrid also takes on a unique structural incarnation: it is the very application of a minority religious law within a civil framework and by force of the secular State that creates such powerful if unintended effects.

It is important to understand the unusual—and unusually hybrid—framework governing *Shari’a* authorities in Israel. The Muslim community is the most regulated and subordinated religious minority within the Jewish State. This relatively tight civil oversight manifests in various ways. First, the *Shari’a* court system does not stand on its own but is integrated into the Jewish State, with its judges appointed by a secular, non-Muslim civil body and with supervisory oversight by the Israeli Supreme Court (populated by an entirely non-Muslim judiciary).<sup>57</sup> It is also subject to key secular legislation, including the Women’s Equal Rights Act and the Israeli Constitution (which establishes Israel as a *Jewish* and democratic nation and pledges allegiance to Jewish values and heritage).<sup>58</sup> On top of it all, the secular civil legislature itself endorses a particular vision of Islamic family law, thereby refusing to entrust *Shari’a* authorities with the power to define for themselves the substance of their own religious law, a privilege it readily affords their Jewish and Christian counterparts.<sup>59</sup> Secular criminal law contributes to the oversight as well by out-

55. Jewish law is the paradigmatic example of a faith that subjects bastards (*mamzerim*) to legal disabilities. See RUTH LEVUSH, ISRAEL: SPOUSAL AGREEMENTS FOR COUPLES NOT BELONGING TO ANY RELIGION—A CIVIL MARRIAGE OPTION? 4 (2015); see also HALPERIN-KADDARI, *supra* note 23, at 260; Layish, *supra* note 54, at 177.

56. Yefet, *supra* note 41, at 111.

57. See Moussa Abou-Ramadan, *Islamic Legal Hybridity and Patriarchal Liberalism in the Shari’a Courts in Israel*, 4 J. LEVANTINE STUDIES 39, 44 (2015) [hereinafter Abou-Ramadan, *Islamic Legal Hybridity*].

58. See generally *id.* at 40.

59. For example, in the case of the Jewish denomination, the civil legislature entrusted the Rabbinical courts with the authority to define “Torah Law” for purposes of marriage and divorce law,

lawing Muslim men's right to *talaq* divorce—Muslim husbands' most cherished patriarchal privilege over their wives—and by drastically restricting their Islamic polygamy entitlement.<sup>60</sup>

By overseeing, limiting, and otherwise interfering with Islamic law and the *Shari'a* court system, the State has created a special form of civil-religious hybrid, with malicious—if unintended—consequences. In their zeal to defend their threatened minority community against the values and traditions of the Jewish majority, Muslim religious authorities have endorsed a remarkably traditional and patriarchal construction of Islamic law, to the detriment of Muslim women and to the nation's constitutionally vetted goal of gender equality.<sup>61</sup> The most compelling evidence of this thesis is that Israeli Islamic divorce law differs greatly from that applied in majority-Muslim countries, many of which have championed a modern and liberal construction of Islamic family law, a phenomenon I term the “Westernization” and even “feminization” of the *Shari'a*. As I have detailed elsewhere, pioneering Pakistan, as well as Israel's Muslim neighbors, Egypt and Jordan,<sup>62</sup> have over the last half-century effected a liberal redesign of Islamic law. They have shaped a divorce law Islamic in flavor yet Western in operation, by modernizing an old Islamic doctrine called *khul'* to constitute a female right to no-fault divorce on demand.<sup>63</sup> While *khul'* in theory requires payment by the wife (return of dower to the husband), in practice that duty has been marginalized, most notably in Pakistan, by the construction of carefully-crafted doctrinal innovations.<sup>64</sup>

The Israelization of the *Shari'a*, in marked contrast, may be characterized as the hybrid-driven adoption of patriarchal Islam, where the all-male *Shari'a* judges (*qadis*) have largely cherry picked Islamic legal doc-

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without specifying its content. See The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, S.H. 165 art.2.

60. See generally Karin Carmit Yefet, *The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, 34 HARV. J.L. & GENDER 553 (2011).

61. Karayanni, *Religious Accommodations*, *supra* note 14, at 48–49 (Israel's Palestinians are “the most remote, excluded community from the state's metanarratives”, with the status of second- or even third-class citizenship”); see also Moussa Abou-Ramadan, *The Recent Developments in Custody Law for Muslims in Israel: Gender and Religion*, 8 HAWWA 274, 278 n.10 (2010) [hereinafter Abou-Ramadan, *Custody Law*]; Hoda Rouhana, *Muslim Family Laws in Israel: The Role of The State and The Citizenship of Palestinian Women*, DOSSIER 27, Dec. 2005, at 37, available at <http://www.wluml.org/node/514>.

62. Karin Carmit Yefet, *Lifting the Egyptian Veil: A Constitutional Road Map to Female Marital Emancipation in the Islamic World*, 5 FAMILY IN L.J. 87 (2011); Moussa Abou-Ramadan, *Divorce Reform in the Shari'a Court of Appeals in Israel (1992-2003)*, 13 ISLAMIC L. AND SOC'Y 242, 253 (2006) [hereinafter Abou-Ramadan, *Divorce Reform*].

63. Azizah Y. al-Hibri, *Muslim Marriage Contract in American Courts*, MINARET.ORG (May 20, 2000), <http://www.minaret.org/azizah.htm>.

64. Pakistani courts ingeniously devised doctrinal tools to minimize, and even eliminate, the economic consequences of *khul'* divorce. Thus, for example, the courts spared the wife from monetary reimbursement in cases of longstanding marriages or where the wife risked destitution upon fulfilling the duty of reimbursement. Courts also diminished, and at times even eliminated, the pool of property returnable to the husband by deducting reciprocal benefits he received from his wife, such as housework and childrearing. Yefet, *supra* note 60, at 553, 589–90.

trines that cater to male interests and values.<sup>65</sup> Patriarchal Islam has proven a favored instrument in combating the crisis of legitimacy suffered by the *Shari'a* courts, which, in response to threats both structural (Muslim judges are appointed by a Jewish authority) and substantive (the *Shari'a* system is ultimately accountable to civil law), holds ever more tightly to its increasingly rigid and uncompromising traditional views.<sup>66</sup>

Of greatest consequence is the fact that *Shari'a* courts remain staunchly opposed to female *qadis*. In doing so, they have effectively closed the door to the constitutive condition for the feminization of *Shari'a* jurisprudence. This judicial obstinacy has been blessed by the civil legislature, as the keystone Women's Equal Rights Act not only exempts the religious law of marriage and divorce from gender equality norms, but also protects the rights of religious courts to disallow female religious judges.<sup>67</sup> Israel has thus blocked the important structural reform seen in some other Muslim jurisdictions, including Israel's Palestinian brothers in the neighboring Palestinian Authority.<sup>68</sup>

Exacerbating the *Shari'a* courts' protectionist stance is the operation of the civil legislature which, in large part—due to the hybrid's awkward malfunction—has endorsed an arcane Muslim family law statute and refused to grant Muslim religious authorities the freedom to modify and modernize it, even if those authorities were so inclined. The Ottoman Law of Family Rights of 1917—an antique legislation that has undergone major liberal reforms in most Muslim countries aimed at ameliorating its patriarchal postulates—still reigns in Israel, where it has stagnated since its almost century-long implementation.<sup>69</sup>

The civil intervention in religious law has thus imposed on modern Israeli Muslims an outdated, patriarchal version of the Islamic law, large-

65. Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 39, 48, 55; Naifa Sarisi et al., *Introduction*, in *FACING THE SHARI'A COURT: TRANSFORMATIONS IN THE STATUS OF MUSLIM WOMEN IN ISRAEL AND THE MIDDLE EAST 1*, 17 (Liat Kozma, ed., 2011) (in Hebrew).

66. Moussa Abou-Ramadan, *Judicial Activism of the Shari'ah Appeals Court in Israel (1994 - 2001): Rise and Crisis*, 27 *FORDHAM INT'L L.J.* 254, 261–62 (2003) [hereinafter Abou-Ramadan, *Judicial Activism*] (stating that since the *Shari'a* court suffers from illegitimacy it “has frequently found itself in situations that have forced it to ‘prove itself’” and a key to doing so has been “its frequent declaration of relying exclusively upon the *Shari'a*.”); Mousa Abou-Ramadan, *The Shari'a in Israel: Islamization, Israelization and the Invented Islamic Law*, 5 *UCLA J. ISLAMIC & NEAR E. L.* 81, 83 (2005) [hereinafter Abou-Ramadan, *Shari'a in Israel*]. For a thorough analysis of the status of *Shari'a* courts in Israel and their legitimacy crisis, see generally Moussa Abou-Ramadan, *Notes on the Anomaly of the Shari'a Field in Israel*, 15 *ISLAMIC L. AND SOC'Y* 84 (2008) [hereinafter Abou-Ramadan, *Anomaly*].

67. For a denial of a petition challenging the absence of female presence in the *Shari'a* court system, see HCJ 891/01 Obeyd v. the Minister for Religious Affairs 55 (3) PD 857 (Isr.).

68. Meital Pinto, *The Absence of the Right to Culture of Minorities Within Minorities in Israel: A Tale of a Cultural Dissent Case*, 4 *LAWS* 579, 594 (2015); Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 55; Rouhana, *supra* note 61, at 45–46.

69. Rouhana, *supra* note 61, at 40; see also MARTIN EDELMAN, *COURTS, POLITICS, AND CULTURE IN ISRAEL* 88 (1994); Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 42, 55 (stating that Muslim countries liberalized the law and softened patriarchal rules); Abou-Ramadan, *Shari'a in Israel*, *supra* note 66, at 97 (“the codified Islamic law applied in Israel has been rendered static, because there is no representative body that can amend or supplement it.”).

ly because the civil law's hybrid interference does not grant Muslim religious courts the same freedom it does their more "trusted" counterparts.

The combination of *Shari'a* courts' protectionist traditionalism and the legislature's distrusting limitations has proven a deadly consequence of the civil-religious hybrid, particularly for Muslim women and children. Consider, for example, Muslim women's right to divorce. Under the archaic Israeli-Islamic scheme, Muslim women do not have at their disposal the unilateral no-fault *khul'* right that women in prominent Muslim-majority jurisdictions enjoy. Instead, an Israeli Muslim woman seeking divorce must submit herself to a long and cumbersome fault-based dissolution process, one which involves an intrusive dissection of the marital relationship by both the court and a designated "family council" of layman arbitrators.<sup>70</sup> Upon a finding of "discord and strife" (*niza wa shiqaq*), the *Shari'a* courts nominate two arbitrators from the couple's family—and an additional new board of arbitrators if the first two cannot reach consensus.<sup>71</sup> The arbitrators' goals include reconciling the couple and, failing the first, estimating whether the woman is entitled to marital emancipation and determining how much she must pay for that freedom based on the extent of her fault.<sup>72</sup>

This purportedly balanced arbitration process may often prove arbitrary and anti-feminist; the "family council" is controlled by men, reflects male perspectives and values, and "operates within the context of domination where women are inferior to men."<sup>73</sup> The *Shari'a* courts have remained adamant in their refusal to qualify women as arbitrators, notwithstanding the repeated pleas of the Israeli Supreme Court to the *Shari'a* Court of Appeals to reconsider its position and the contrary view of the Hanafi school.<sup>74</sup> Hanafi law is at the same time the leading school of Islamic thought prevailing in Israel's *Shari'a* courts and often the most unfavorable to women. It is thus telling that the *qadis* chose to deviate from Hanafi doctrine at the one instance that it proved congenial to women.

The case law indeed provides ample examples of the gender bias so deeply entrenched by the workings of the civil-religious hybrid. For example, women have been faulted for transgressing gendered formulae governing marital and sexual behavior.<sup>75</sup> Women may even be found at

70. Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 49–50.

71. Hoda Rouhana, *Practices in the Shari'a Court of Appeal in Israel; Gendered Reading of Arbitration Decisions*, DOSSIER 25, Oct. 2003, at 49, available at <http://www.wluml.org/node/470> [hereinafter Rouhana, *Gendered Reading*].

72. Yitzhak Reiter, *Judge Reform: Facilitating Divorce by Shari'a Courts in Israel*, 11 J. ISLAMIC L. & CULTURE 13, 16–17 (2009); Rouhana, *supra* note 57, at 44; Rouhana, *Gendered Reading*, *supra* note 71, at 55–56.

73. Rouhana, *Gendered Reading*, *supra* note 71, at 68.

74. After the *Shari'a* Court of Appeals refused to back down, the Supreme Court had no choice but to rule that women must be allowed to serve as arbitrators. H CJ 3856/11 Doe v. Sup. Sharia Ct. App. (Jun. 27, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), translated in X v. Sup. Sharia Ct. App., VERSA, <http://versa.cardozo.yu.edu/opinions/doe-v-supreme-sharia-court-appeals> (last visited Mar. 26, 2016). It is not clear, however, that this ruling is enforced in practice.

75. Rouhana, *Gendered Reading*, *supra* note 71, at 58; Reiter, *supra* note 68, at 26.

fault for reporting their abusive husbands to the police or obtaining restraining orders against them in defiance of the court's obedience order (*ta'a*).<sup>76</sup> In fact, the arbitration process may result in the forfeiture of a woman's financial rights despite a finding that fault lies solely with the husband.<sup>77</sup> All of these examples show that Israeli-style Muslim divorce law is almost the antithesis of the law governing their Pakistani and Egyptian sisters, nations where Muslim law is not subject to the same strange hybrid oversight of a civil legislature endorsing a different majority religion. The disparity is particularly ironic given that the *Shari'a* courts so heavily rely on Egypt for its interpretation of Islamic law<sup>78</sup>—an irony explained only by the awkward workings of the unique hybrid creature that is Israeli family law.

In short, the special form of hybrid in the context of a Muslim religious minority within a secular Jewish state has crippled Islamic divorce law in Israel. It is ultimately Muslim women who pay the socio-legal price for Israel's preservation of multicultural interests: The protection of the Muslim community's *group* rights to apply their own religious law effects a severe violation of Muslim women's *individual* human rights to marital exit and to gender equality in divorce law. The story of Israeli-Islamic divorce law thus serves as a cautionary tale for other Western regimes seeking to grant religious minorities jurisdictional authority in the name of multicultural accommodation.

### III. CONCURRENT JURISDICTION: A LEGAL RECIPE FOR SUBVERSION AND RADICALIZATION

This Part focuses on the most hybrid of possible hybrids—a system that does not grant exclusive jurisdiction to either of its competing components but instead allows the two to share jurisdiction in one form or another. The two most prominent examples in Israeli family law are the marital property and the child custody regimes, in which both civil and religious courts adjudicate cases by applying civil law, and the spousal and child support regime, in which both civil and religious courts apply religious law. As this discussion will show, each and every variation of concurrent jurisdiction proves unworkable and ultimately threatening to the rights of society's most vulnerable groups.

Most notably, this “hybrid hybrid” fails because the courts of each system, if asked to apply the laws of the other, resist and indeed subvert those laws in creative and disruptive ways. This feeds the “forum competition” that exists when two different judicial regimes are both entitled to

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76. Rouhana, *Gendered Reading*, *supra* note 71, at 58; Reiter, *supra* note 68, at 26.

77. Rouhana, *Gendered Reading*, *supra* note 71, at 65.

78. See Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 40; Moussa Abou-Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992–2001)*, 26 *FORDHAM INT'L L.J.* 595, 650 (2002) [hereinafter Abou-Ramadan, *Transition*] (citing YA'AKOV MERON, *L'OBLIGATION ALIMENTAIRE ENTRE EPOUX EN DROIT MUSULMAN HANÉFITE* 4 (1971)).

adjudicate the same cases but would do so very differently. The open choice does everything to accelerate the conflict between divorcing individuals (who race to the courthouse of their choosing instead of seeking reconciliation), but does nothing to reconcile the competing civil and religious systems (as the latter seeks to self-preserve and to distinguish itself from the former). The result is a radicalized religious law and a widening divide between the religious and secular judiciaries.

*A. When Failed Supervision Invites Legal Subversion*

The concurrent jurisdiction hybrid is premised on the assumption that both civil and religious courts are equally competent—and willing—to apply both civil and religious law. Israel's family law scheme, however, reveals a reality far different from this sanguine premise.

Let us start with the civil-dominated hybrid, the “hybrid hybrid,” in which both systems apply civil law. The compromise seems at first a promising solution for accommodating multicultural interests (by allowing religious minorities to handle disputes in their own community courts) while checking those interests with certain minimum, state-guaranteed protections (by imposing national civil norms). While appealing in theory, this hybrid fails entirely in practice—particularly where women's rights and children's best interests are concerned. The distribution of marital property law provides one apt example, as religious courts (both Rabbinical and *Shari'a*), while formally required to apply the civil community property regime mandating equal distribution of marital assets, in fact often resort instead to their own religious property regimes denying joint ownership.<sup>79</sup>

As to the Rabbinical court, two schools of religious thought dominate. While the minority opinion has painstakingly sought to harmonize Jewish law with secular Israeli law, the majority opinion maintains that the Rabbinical court is not permitted, under religious law, to apply the civil property law at all—a conclusion that would obviously cripple a concurrent jurisdiction hybrid. Accordingly, many rabbis have wholly rejected the civil regime in all circumstances, even when both partners have explicitly agreed in a written contract to the application of community property principles.<sup>80</sup> The end result is that Jewish women's economic security hinges on something of a legal lottery, as case outcomes depend largely on which school of thought a particular rabbi happens to favor.

In the *Shari'a* courts, in contrast, the *qadis*, unanimous in their staunch opposition to secular property law, routinely apply Islamic law's separatist property regime—one that deprives women of their share of

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79. See *supra* note 26.

80. This is the well-known Sherman-Dichovsky controversy. See, e.g., CHAIM JACHTER, 3 GREY MATTER 150 (2008). Many Rabbinical courts do apply the secular rule but interpret it according to religious guidelines that may harm women. See Ruth Zafran, *The 'Jurisdiction Race' is Alive and Kicking—Rabbinical Courts Gain Power over Civil Family Courts*, 43 MISHPATIM 571, 580 (2013) (in Hebrew).

the marital assets.<sup>81</sup> In their quest to circumvent the civil law, the *qadis* have gone so far as to instruct marriage registrars to persuade couples to stipulate in their marriage contracts that any marital property disputes will be governed by Islamic law, rather than Israeli civil law.<sup>82</sup> Today, it has purportedly become a “widespread” practice for marriage registrars to insert this condition *sua sponte* and in secret, *after* the couple (i.e. the future husband and his wife’s male patron) has executed the contract.<sup>83</sup>

This pattern of disregard and subterfuge also appears in the child-custody regime, with the same recurring ill-effects of a religious Muslim minority functioning within a Jewish majority that we saw at work in the misshaping of adult intimate relations. Threatened by their minority status and anxious to preserve their Palestinian identity and Muslim legitimacy,<sup>84</sup> *Shari’a* courts have gone out of their way to distance themselves from the Jewish State and to resist the legal mandate to apply civil law. Indeed, the *Shari’a* Court of Appeals has consistently renounced its obligation to apply the civil Legal Capacity and Guardianship Law (“Child Custody Law”), insisting that Islamic law overrides it and that the *Shari’a* will not bow even to the Israeli constitution.<sup>85</sup> For the *qadis*, the very duty to apply civil law violates their freedom of religion and serves as its own *casus belli*.<sup>86</sup> Adding insult to injury is the fact that the Child Custody Law endorses the tender-years presumption—that is, the presumption that the best interests of a child age six or younger are served by granting custody to the mother<sup>87</sup>—which itself originated in the religious tradition of a rivaling faith, Jewish law.<sup>88</sup> The consequence of the hybrid’s failure operates primarily to the detriment of women or their children, as the following trilogy will demonstrate.

First, the Islamic *Shari’a* establishes a rule of maternal custody (*hadana*) for boys up to the age of seven and girls up to the age of nine, and a rule of paternal custody (*wilaya*) for children older than the cut-off ages of seven and nine.<sup>89</sup> The religious rationale is to shield boys from developing “feminine attributes” that would prove lethal to their preordained social function and to better guard girls’ chastity, a protection mothers are considered too weak and untrustworthy to provide.<sup>90</sup> The

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81. Reiter, *supra* note 26, at 216–17.

82. *Id.* at 216.

83. *Id.* at 217.

84. Abou-Ramadan, *Transition*, *supra* note 78, at 641–42 (stating that the Jewish nature of the State conflicts with the religious authority and Palestinian identification of the Muslim minority, and the very secular appointment process of *qadis* in Israel “led to a crisis in which the *Shari’a* Courts lacked the confidence and trust of the public who tended to deride them”).

85. Abou-Ramadan, *Judicial Activism*, *supra* note 66, at 278–79; Abou-Ramadan, *Custody Law*, *supra* note 61, at 276, 279–80.

86. Anat Scolnicov, *Religious Law, Religious Courts and Human Rights Within Israeli Constitutional Structure*, 4 INT’L J. CONST. L. 732, 734, 738 (2006).

87. Karin C. Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 YALE J.L. & FEMINISM 47, 73 (2015).

88. HCJ 268/80 Jansell-Zohar v. Zohar, PD 35(1)1(1980) (Isr.) (Landau, C.J.) (explaining at section 18 the relationship between child custody law and Jewish law).

89. Abou-Ramadan, *Transition*, *supra* note 78, at 629.

90. *Id.* at 603, 629; Abou-Ramadan, *Custody Law*, *supra* note 61, at 294–95.

prospect of losing custody of children who are not of tender years, as a report to the Israeli Parliament found, has caused many women to forgo divorce altogether, even when their husbands have moved on to second wives.<sup>91</sup>

The issue of custody transfer also provides powerful evidence of the judicial subversion of civil law in a way that calls into question the *qadis'* commitment to children's best interests. If a mother is found ineligible to serve as a custodial parent of a child of tender years, custody is granted or transferred not to the father—as Israeli civil law envisions—but to a woman from the mother's family, notwithstanding that natural parents are generally recognized as the best caretakers for their own children.<sup>92</sup> Muslim children may thus be deprived of their right to be cared for by their own parents—a right protected by both Israel's Constitution and the United Nations.<sup>93</sup> Further, although experts in child development generally agree that custodial stability is best for children's welfare,<sup>94</sup> the *Shari'a* courts administer a rebuttable presumption of custody transfer from maternal to paternal custody when boys reach the age of seven and girls the age of nine.<sup>95</sup> The *Shari'a* Court of Appeals has further ruled that if children do remain in the mother's custody during the *wilaya* (that is, after the cut-off ages of seven and nine), the father is exempt, under Islamic law, from child support payments, leaving the children the sole economic responsibility of the mother.<sup>96</sup> Finally, the *Shari'a* Courts do not hesitate to implement what I call the Islamic "remarriage penalty" rule, one that divests mothers of custody upon remarriage to a new husband.<sup>97</sup> For the *qadis*, under the grip of patriarchy, women are upon remarriage presumed to be at their new husbands' service—a condition which necessarily renders them unfit to care simultaneously for children

91. Orly Lotan, *Polygamy Among the Bedouin Population in Israel*, THE KNESSET-THE CTR. OF RES. AND INFO. 5 (2006), available at <http://www.knesset.gov.il/mmm/data/pdf/m01600.pdf> (in Hebrew).

92. See, e.g., File No. 178/05 *Shari'a* Court of Appeals X v. X (Aug. 31, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.) For a Supreme Court case establishing that even minimal parental functioning serves children's welfare better than a third-party custody, see CFH 6041/02 Plonit v. Ploni 58(6) PD 246 (2004) (Isr.).

93. Convention on the Rights of the Child, G.A. Res. 44/25, at 3, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), available at <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>; see also LCA 3009/02 Plonit v. Ploni 56(4) PD 872, 894 (2002) (Isr.).

94. See generally JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979) (outlining a psychological theory of continuity which stresses the importance of continuity of care to children's development). On the widespread acceptance of this theory in the academic and legal scholarship, see ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 16–18 (2004).

95. Abou-Ramadan, *Custody Law*, *supra* note 61, at 294–95; Abou-Ramadan, *Transition*, *supra* note 78, at 603, 629; see, e.g., *id.* at 630 (quoting *Qadi* Ahmad Natur and citing the *Shari'a* Appeals Court's rule that to refute Islam's paternal presumption the burden of proof is on mother to convince the *Shari'a* court that the children should remain with her); Raday, *supra* note 14, at 213.

96. Abou-Ramadan, *Transition*, *supra* note 78, at 631–32 (documenting the ruling and presenting a cogent Islamic critique of it).

97. The penalizing nature of the rule is particularly evident in Maliki doctrine which negates remarried women of custody even if they subsequently get divorced since they married out of their own free will and knowingly lost custody. Abou-Ramadan, *Custody Law*, *supra* note 61, at 300.

from a previous marriage.<sup>98</sup> In such cases, the *qadis* have ordered custody transferred even when the father is deceased or otherwise absent to care for the child; even in the face of expert opinion that maternal custody is necessary for the child's continued well-being,<sup>99</sup> and notwithstanding that several other Muslim countries, equally committed to Islamic law, have long abolished the remarriage penalty.<sup>100</sup>

In all these examples, the *Shari'a* courts deliberately defy their obligation to apply civil law in favor of their own religious law. This form of hybrid malfunction proves particularly pernicious because the civil sphere remains powerless to police the brazen disobedience—if it attempts to do so at all. First, while Israel's Supreme Court enjoys limited supervisory authority to review the application of secular law in religious courts, it has at times turned a blind eye to the failure of religious courts to follow the Child Custody Law and affirmed decisions that improperly apply Islamic law in its stead.<sup>101</sup> Second, even when the civil judiciary does attempt to police the application of civil law by religious courts, its efforts may prove fruitless. The following example reveals the hybrid system's invitation to subversion.

In child-custody battles, the *Shari'a* courts typically disfavor mothers who have converted to Islam (as opposed to mothers born into Islam). They justify this policy with the general suspicion that convert mothers may re-convert to their original faith and in so doing deprive their children of an Islamic education.<sup>102</sup> This bias, of course, is not permitted in the civil, child-custody law, and decisions influenced by it are examples of the willful refusal to apply civil law as required by the hybrid system. After one such disobedient ruling by a *Shari'a* court, the Israeli Supreme Court responded by admonishing the *qadis* that a mother's religious identity lies outside the ambit of legitimate considerations in determining a child's best interests.<sup>103</sup> This attempt to enforce the application of civil law, however, proved futile; the *Shari'a* court simply responded with a new opinion awarding again paternal custody on different grounds, making a point of downplaying the mother's conversion

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98. For a discussion of the seminal case detailing this doctrine, see Abou-Ramadan, *Transition*, *supra* note 78, at 632–33.

99. For a case in which the custody transfer from the remarried mother to the paternal uncle won the Supreme Court's blessing, see HCJ 8906/04 Plonit v. Ploni (Jul. 20, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

100. See, e.g., Fatima Sadiqi, *Morocco*, in *WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AND RESISTANCE* 311, 313 (Sanja Kelley & Julia Breslin eds., 2010); Fatima Sadiqi, *The Central Role of the Family Law in the Moroccan Feminist Movement*, 35 *BRITISH J. MIDDLE E. STUD.* 325, 331 (2008).

101. See, e.g., HCJ 2578/03 Fahmawi v. Fahmawi (Aug. 8, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.), available at <http://elyon1.court.gov.il/files/03/780/025/19H/03025780.19h.htm>. When the Israeli Supreme Court reviewed this remarriage penalty, for example, it myopically held that awarding custody to a paternal aunt over a remarried mother does not constitute gender discrimination. HCJ 187/54 Briya v. Qadi of the Muslim Shari'a Court, Acre, 9(2) PD 1193, 1196 (1955) (Isr.).

102. See Abou-Ramadan, *Custody Law*, *supra* note 61, at 304–05.

103. *Id.* at 306–07.

history in the rhetoric of its opinion—a strategy successfully repeated in a similar subsequent case.<sup>104</sup>

The consequence of the civil judiciary’s attempt to enforce the application of civil law, then, has proven to be both an exercise in legal futility and painfully clear evidence that the civil-dominated “hybrid hybrid” is unworkable. The civil law and its safeguards are thwarted, while Muslim women, the poorest segment in Israeli society,<sup>105</sup> are burdened with the costs of appealing subversive decisions to a civil system that cannot, or will not, assist.

Israel’s regime of wife maintenance reveals yet another manifestation of judicial subversion, confirming that a religion-dominated hybrid (that is, a “hybrid hybrid” applying religious law) also proves an impossible legal Frankenstein. As with property and child-support law, both civil and religious courts may adjudicate cases of alimony; unlike property and child-support law, however, both are supposed to apply *religious law* in so adjudicating.<sup>106</sup> Indeed, alimony is an unusual creature in that civil courts are forced to tread, in rare form, into the treacherous territory of religious interpretation. Yet just as we saw the religious courts refuse—either openly or *sub rosa*—to apply the governing civil property and child-support laws, we here see civil courts refusing to religiously apply religious law in the arena of spousal support and instead finding sophisticated ways to subvert it.<sup>107</sup>

To begin with, civil family courts follow civil laws of procedure and evidence,<sup>108</sup> even while applying religious substantive law, a practice which may severely alter case outcomes. A most notable example is that *Shari’a* courts employ an evidentiary rule that accords women’s testimony half the weight of men’s—a rule that civil courts fortunately decline to follow.<sup>109</sup> Procedure aside, civil judges at times ignore their obligation to apply *substantive* religious law—just as the *Shari’a* courts flagrantly apply their own property and child-custody doctrines.<sup>110</sup>

When they do facially apply religious law, Israeli civil courts have intentionally introduced secular elements in an attempt to mitigate gender bias while still formally following the mandates of the hybrid sys-

104. See HCJ 1129/06 X v. Shari’a Court of Appeals (June 5, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.), available at <http://elyon1.court.gov.il/files/06/290/011/R06/06011290.r06.htm>; see also Abou-Ramadan, *Custody Law*, *supra* note 57, at 304–07, 313 (presenting illuminating analysis of the case and its aftermath).

105. See WORKING GROUP ON THE STATUS OF PALESTINIAN WOMEN CITIZENS OF ISRAEL, THE STATUS OF PALESTINIAN WOMEN CITIZENS OF ISRAEL 7, 39 (2010), available at [www2.ohchr.org/english/bodies/cedaw/docs/ngos/WomenCitizens\\_of\\_Israel\\_for\\_the\\_session\\_Israel\\_CEDAW48.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WomenCitizens_of_Israel_for_the_session_Israel_CEDAW48.pdf).

106. Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 40.

107. *Id.*; Rouhana, *supra* note 61, at 42.

108. Layish, *supra* note 54, at 187; Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 40.

109. Iyad Zahalka, *The Identity of the Sharia Courts in Israel*, in *FACING THE SHARI’A COURT: TRANSFORMATIONS IN THE STATUS OF MUSLIM WOMEN IN ISRAEL AND THE MIDDLE EAST* 75, 88 (Liat Kozma, ed., 2011) (in Hebrew); Abou-Ramadan, *Shari’a in Israel*, *supra* note 66, at 126.

110. See Abou-Ramadan, *Divorce Reform*, *supra* note 62, at 246–47, (citing relevant cases).

tem.<sup>111</sup> For example, while Jewish and Islamic law condition wife maintenance on sexual fidelity, the civil reconstruction of religious law is pivoted on a “mutuality principle” that awards an adulterous wife support if her husband was himself unfaithful to her.<sup>112</sup> This “you play, you pay” philosophy has thus become the religious law of the land—with a secularist twist.<sup>113</sup> When Jewish law conditions maintenance on religious lifestyle, civil courts understand religious law to incorporate a “hypocrisy principle” that bars a nonobservant husband from pointing to his wife’s religious nonobservance as grounds for denying her support. When Orthodox Christian law denies a wife economic support for whatever reason, the civil court reconstructs the religious law to encompass a minimal support duty for impoverished wives based on the constitutional principle of human dignity.<sup>114</sup>

Unlike most of the hybrid “fixes” we have seen so far, these civil augmentations to religious law have proven to be friendly to women. Like most of the hybrid “fixes,” however, the benefit does not come free. As we will see next, the civil-religious monster inflicts collateral damage that overwhelmingly outweighs these benefits of civil intervention, namely, by discouraging reconciliation and encouraging judicial radicalization, and all the while casting women as the unintended casualties of its ideological battle.

### B. *The Ill-Effects of Forum Competition*

We have seen that in the shared-jurisdiction hybrid, even where civil and religious courts are required to apply the same body of law, in practice their adjudications vary widely. When both courts have authority to hear the same case, the first party to file chooses the forum—a rule that has led to a race to the courthouse between spouses and competition between the judiciaries, both with far-reaching consequences to Israel’s women and children.<sup>115</sup>

As between spouses, the first-in-time rule obviously disincentivizes reconciliation, to the detriment of all family members. The race to the courthouse has indeed become a national sport, especially among Israeli-Jewish couples.<sup>116</sup> Incredibly, spouses often spend years in legal proceedings battling over the procedural question of which court won jurisdiction, rather than focusing on the amicable resolution of their substantive

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111. The civil courts also debated who is the supreme authority on religious interpretation, eventually “permitting” the religious courts to be the final arbiters of their own religious law and follow what they deem the correct understanding of its tenets. HCJ 5969/94 Aknin v. Rabbinical Court (Haifa) 50(1) PD 370 (2006) (Isr.).

112. See CA 277/81 Grinhouse v. Grinhouse 36(3) PD 197 (1981) (Isr.) (Shamgar, C.J.).

113. *Id.*

114. CA 7038/93 Solomon v. Solomon 51(2) PD 577 (1995) (Isr.).

115. Yefet, *supra* note 41, at 102 n.3 (citing Menashe Shava, *The Relationship Between the Jurisdiction of the Family Court and the Jurisdiction of the Rabbinical Court*, 44 HAPERAKLIT 44 (1998) (in Hebrew)).

116. HALPERIN-KADDARI, *supra* note 23, at 233–34.

disputes, an unfortunate hybrid consequence that exposes the children of divorce to extended parental conflict.<sup>117</sup>

The competing judiciaries fare no better. While the demonopolization of the judicial marketplace should in theory work in favor of the litigant consumer, we see here a violation of this free-market expectation—and another hybrid by-product detrimental to women. Rather than competing forums moving toward the center and consensus, as the median-voter theorem predicts of competitors at opposite ends of an ideological spectrum, we instead observe just the opposite, a radicalization effect in which the forums move further apart ideologically. *Shari'a* courts competing with civil courts for cases, for example, have not liberalized their jurisprudence in the hopes of winning female litigants, but instead have clung ever more tightly to their patriarchal roots.

A fine example of lack of liberalization, and even radicalization, is found in the law governing both child custody and wife maintenance of Israel's Palestinian Muslims, where civil and religious systems often heavily conflict and where a relatively recent shift to concurrent jurisdiction allows for a before-and-after comparison of religious adjudications.

Until late 2001, only Jewish women seeking custody rights or spousal support enjoyed a jurisdictional choice between the civil and religious courts, while Muslim and Christian women were limited to exclusive jurisdiction in their communities' religious courts. Today, after a multi-year struggle by a coalition of Israeli women's organizations, the forum-selection privilege granted to majority-Jewish women for half a century was finally extended to minority Palestinian-Arab women.<sup>118</sup>

The shift, of course, was not met with enthusiasm by the *Shari'a* Judiciary. The Islamic courts took the loss of jurisdictional exclusivity as yet another threat to their rapidly shrinking legal domain. In a telling coincidence, ever since 2001—the time of the jurisdictional reform—scholars have begun to identify a trend of patriarchal radicalization in the *qadis'* adjudication of child-custody cases.<sup>119</sup> In the pre-reform reign of exclusive jurisdiction, for example, the *qadis* often obeyed the civil Child Custody law, while Islamizing its mandates in a painstaking endeavor to reconcile it with Islamic doctrines. In the post-reform period of concurrent jurisdiction, however, the *Shari'a* judiciary has vehemently renounced the woman-friendly civil law, championing in its stead a protectionist stance termed a “purification” of Islamic law from secular Israeli elements.<sup>120</sup> Guarding religious law from civil contamination, the *Shari'a* Court of

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117. Menashe Shava, *Family Court Law Bill (Amendment no. 4) (Equaling Jurisdiction) 1998 – Is that Truly a Blessing for Muslim and Christian Women?* 44 HAPERAKLIT 358, 364–68 (in Hebrew). For the detrimental effects of parental conflict on children, see Karin Carmit Yefet, *Marrying Dissolution to the Constitution: Divorce as a Fundamental Right* ch. 6 § III.B.1 (2012) (unpublished J.S.D. dissertation, Yale University); see also Dennis P. Sacuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. REV. 425, 425–26 (2003).

118. Rouhana, *supra* note 71, at 39.

119. Abou-Ramadan, *Custody Law*, *supra* note 71, at 314.

120. Abou-Ramadan, *Judicial Activism*, *supra* note 66, at 278–79; Abou-Ramadan, *Custody Law*, *supra* note 71, at 276, 279–80.

Appeals even went so far as to chastise the eight regional *Shari'a* courts subject to its appellate authority for following, even if aberrantly, Israeli legislation rather than pledging allegiance to the “perfect and comprehensive” *Shari'a*.<sup>121</sup>

Further, in order to justify its institutional legitimacy, the *Shari'a* Court considers itself ideologically compelled to adjudicate cases differently than the civil family courts. In the *Shari'a* Court of Appeals’ own words:

This Court is a religious Islamic court committed to the implementation of Islamic *Shari'a*, it was established solely for the reason of implementing the refined *Shari'a*. If the legislator wanted the religious court to implement the positive law the way civil courts do, then what would legitimize the existence of the *Shari'a* court? The assumption that each group needs to manage its familial affairs according to its religious rules is the principle that lies behind the existence of religious courts, and the Islamic *Shari'a* is a unique legal method, and we need to preserve the *Shari'a* rules and implement them.<sup>122</sup>

The conclusion is unassailable: The subjection to concurrent jurisdiction and civil jurisprudence has perversely motivated *qadis* to accentuate the disparity rather than search for the common ground and attempt harmonization with the secular legal system. And accentuating that “disparity,” we saw, tends to have a disparate impact on women and children.

A different manifestation of a similar story appears in wife-maintenance law, where the *Shari'a* judiciary fervently fought to maintain its exclusive jurisdiction, voicing concerns over the fate of Islamic law in the hands of civil judges and over the religious legitimacy of allowing Jews to preside over Muslim couples.<sup>123</sup> Interestingly enough, the imminent threat of forum competition did induce the *qadis* to administer an internal reform as a type of “switch in time to save the nine” judicial strategy, designed to increase the support payments allocated to women.<sup>124</sup> This positive trend reversed its course at least somewhat, however, once the “threat” materialized and the civil courts gained concurrent jurisdiction to hear maintenance cases of Muslim women as well, the effect,

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121. See, e.g., File No. 279/2005 *Shari'a* Court of Appeals X v. X (2005) (Isr.) (unpublished); Reiter, *supra* note 26, at 210–11. For an instructive summary of *Shari'a* court decisions, see Abou-Ramadan, *Transition*, *supra* note 78, at 612–15 (criticizing the *qadis* for “wav[ing] a red flag in the eyes” of Israel’s Supreme Court); Abou-Ramadan, *Judicial Activism*, *supra* note 66, at 277–79 (stating that the *Shari'a* Court of Appeals forbids the regional courts to apply civil Israeli law).

122. See Abou-Ramadan, *Custody Law*, *supra* note 61, at 280 (quoting and translating A 98/58 (1998) (Isr.) (unpublished)); see also *id.* at 281 (quoting the President of the *Shari'a* Court of Appeals, *Qadi* Ahmad Natur) (“Those citizens who wish a ruling based on positive law can turn to a civil court, and we, on our part, shall operate to remove positive law from the *Shari'a* Court of Appeals.”).

123. Abou-Ramadan, *Anomaly*, *supra* note 68, at 100; Shava, *supra* note 117, at 395–96.

124. As the president of the *Shari'a* Court of Appeals was willing to concede, the longstanding practice of empowering *mukhbirun* (informants) to set maintenance awards led to grave injustice since they “were exclusively men and for this reason, would tend to perpetuate male social attitudes,” which resulted in “absurd” awards. Reiter, *supra* note 26, at 219–20.

as we have seen in other iterations, was a retreat to patriarchal Islam.<sup>125</sup> The very notion that both the civil and religious judicial tribunals are supposed to apply the same body of law has induced the *Shari'a* court system to build itself as a distinctive alternative to the civil court forum. For example, while the *Shari'a* courts emphasize a distinction between their own judiciary and that of the civil courts, viewing themselves as more firmly committed to family integrity, *Shari'a* courts in fact (ab)use the alimony system to discourage divorce by “find[ing] ways to reduce the sums of maintenance adjudicated to wives and minors.”<sup>126</sup> Muslim wives whose maintenance cases are adjudicated by the *Shari'a* courts indeed receive substantially lower support payments than their sisters in cases before the civil courts.<sup>127</sup>

Further, as the self-perceived “true” guardians of “Islamic Justice,”<sup>128</sup> *Shari'a* courts have tended to encode Islamic law with a commitment to the patriarchal model of marriage, in contradistinction to the Israeli civil vision of marriage as a joint enterprise between equal partners.<sup>129</sup> While the civil judiciary applies a more liberal and feminist form of religious law, the *Shari'a* judiciary, protective of the little authority remaining to it, endorses traditional Islamic norms and yields notably unprogressive family law rulings. For example, the *Shari'a* courts insist on wifely obedience as a precondition to male support and use patriarchy as a guidepost to defining the range of female behavior that costs a “rebellious” woman (*nashiz*) her right to support.<sup>130</sup> Women may also lose support if they transgress strict norms of chastity and fail to cohabit with their husbands absent “justified *Shari'a* cause”—a showing difficult to make under the patriarchal social ethos endorsed by the all-male *Shari'a* judiciary. To illustrate, women who leave the home for work purposes meet the justification—but only if they work in a profession appropriate to their gender role prescriptions in the eyes of traditional Palestinian-Arab society.<sup>131</sup> Even domestic violence may prove an insuffi-

125. Moussa Abou-Ramadan, *Islamic Legal Reform: Shari'a Court of Appeals and Maintenance for Muslim Wives in Israel*, 4 HAWWA 29, 33 (2006) [hereinafter Abou-Ramadan, *Islamic Legal Reform*]; Ido Shahar, *Legal Reform, Interpretive Communities and the Quest for Legitimacy: A Contextual Analysis of a Legal Circular*, in LAW, CUSTOM, AND STATUTE IN THE MUSLIM WORLD: STUDIES IN THE HONOR OF AHARON LAYISH 199, 200–02 (Ron Shaham ed., 2006).

126. IDO SHAHAR, LEGAL PLURALISM IN THE HOLY CITY: COMPETING COURTS, FORUM SHOPPING, AND INSTITUTIONAL DYNAMICS IN JERUSALEM 127 (2015) (quoting Daphna Hacker, ‘Motherhood’, ‘Fatherhood’, and Law: A Sociological Analysis of the Field that Shapes Custody and Visitation Arrangements 166 n.63 (2003) (unpublished Ph.D. dissertation, Tel Aviv University)). See also Ido Shahar, *Forum Shopping Among Civil and Religious Courts: Maintenance Suits in Present-Day Jerusalem* 14–15 (unpublished manuscript, on file with author) [hereinafter Shahar, *Forum Shopping*].

127. *Id.* at 126–27.

128. Case A. 60/2001 (2001) (Isr.).

129. Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 41, 43–44; SHAHAR, *supra* note 126, at 100.

130. Abou-Ramadan, *Divorce Reform*, *supra* note 62, at 257, 258; Abou-Ramadan, *Islamic Legal Hybridity*, *supra* note 57, at 42 (“The woman’s range of movement is limited; to receive her maintenance she is confined to her husband’s house and rules, including the obligation she has to allow him sexual intercourse.”); Abou-Ramadan, *Islamic Legal Reform*, *supra* note 125, at 66.

131. Abou-Ramadan, *Islamic Legal Reform*, *supra* note 125, at 47–48.

cient justification for a woman leaving her husband's home, given that strict evidentiary requirements according little weight to medical reports and police complaints often allow the *qadis* to ignore claims of wife battering.<sup>132</sup> Even if the abuse is formally recognized, it does not justify the woman's departure from the home unless the violence is continuous and the husband unregretful; if the battering is "in the manner of husbands" and not severe in nature, the court would order the wife to obey her husband and continue conjugal life or otherwise lose all rights to financial support as a rebellious woman.<sup>133</sup>

Given all these inequities, one might expect Muslim women with a choice of forum to avoid lawsuits in the *Shari'a* courts at all costs, instead taking advantage of recourse to the civil courts for more gender-equal adjudications. Reality, however, reveals just the opposite—a perplexing paradox explained by the power of cultural coercion. As part of a national-ethnic religious minority, Muslim women are pressured to subordinate their individual rights to their group's interests—that is, to choose communal *Shari'a* courts over civil Jewish courts even if the latter are more advantageous to them as wives.<sup>134</sup> In so doing, women help the *Shari'a* courts to maintain their shrinking domain of authority over Muslim couples, despite the civil court's intrusion into the community's governing family law. Socialized to inequality founded in religious belief and cultural tradition, a Muslim woman's "choice" to submit herself to the jurisdictional power of the *Shari'a* court amounts to her forced consent to patriarchy.<sup>135</sup>

Muslim women's undeviating loyalty to *Shari'a* courts exposes concurrent jurisdiction as a misleading panacea offered by the liberal State for minority women; the pseudo jurisdictional "choice" may look good for the liberal State, but it does nothing to mute the concerns for gender justice and the welfare of Israel's children.

Succession cases illustrate best the proposition that communal pressure to preserve Muslim culture heavily constrains women's free autonomy to forum shop. While succession law offers a uniform civil-territorial scheme rendering all Israeli women of any religion fully equal to men in their capacity as heirs, it also provides a limited concurrent jurisdiction for religious courts subject to the written consent of all parties involved. Interestingly enough, the *Shari'a* courts neither apply the egalitarian civil law nor do they apply their own religious, *Qur'anic* inheritance law,

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132. SHAHAR, *supra* note 126, 125–26.

133. EDELMAN, *supra* note 69, at 81; SHAHAR, *supra* note 126, at 12–14; Abou-Ramadan, *Islamic Legal Reform*, *supra* note 125, at 64–65.

134. Israel's civil family court may be properly regarded as Jewish since according to data provided by the Judicial Authority website, only one non-Jewish judge, out of a total of fifty-one judges, presides in the family court system.

135. For the complex considerations that guide Muslim women litigants in the choice of forum, see generally SHAHAR, *supra* note 126, at Ch. 11. See also Haim Sandberg & Adam Hofri-Winogradow, *Arab Israeli Women's Renunciation of Their Inheritance Shares: A Challenge for Israel's Courts*, 8 INT'L J. L. CONTEXT 253, 259 (2012); EDELMAN, *supra* note 69, at 86; Raday, *supra* note 14, at 215–16.

which grants to female heirs half of the shares it grants to men. Instead, they apply an *un-Islamic* patriarchal customary law that completely excludes women from any share in family assets.<sup>136</sup> Still, Muslim women habitually “consent” to bring succession cases in *Shari’a* courts, notwithstanding the negation of both their civil and Islamic rights to a share of the bequeathed property.<sup>137</sup>

The lesson is as simple as it is powerful: all different kinds of jurisdiction allocation allotted to the *Shari’a* courts—whether exclusive, concurrent, or consensual jurisdiction—yield the same discriminatory effects. In all possible iterations, multiculturalist accommodation of religious minorities functions as a liberal pretext that disguises patriarchal greed and castrates state protections accorded to the minority within the minority. At the end of the day, Muslim women lose twice: they lose because they glean no advantage from concurrent jurisdiction—they cannot genuinely prefer the Jewish civil courts over their religious community counterparts—and they lose as the main casualties of its radicalizing effects.

#### IV. CONCLUSION

This Article has explored the gendered dimensions of Israel’s hybrid family law system. In analyzing multicultural legal pluralism Israeli-style, the Article sought to shed light on the plight of religious minorities in Israel and to illuminate the heavy prices imposed by what I term the civil-religious Frankenstein. The mal(e)functioning of the hybrid system and its perverse effects on the Palestinian-Arab community has for too long remained hidden from scholarly scrutiny; the surrender of individual autonomy, children’s welfare, and gender equality dismissed as a laudable experiment of the liberal State in extending multicultural tolerance and accommodating religious needs. The complexity of the system, however, cannot hide the bare truth that men are the primary beneficiaries of the hybrid-family regime, and women and children its ultimate victims.

Piecemeal civil intervention designed to curb the injustices of religious law has failed to offset patriarchal religious rules and to maintain a baseline of fundamental human-rights guarantees. Worse, it often deserves its very objective by exacerbating religious conservatism and familial conflict. In short, the secular and the sacred are fatal opposites that attract disharmony, uncertainty, and rivalry, with women’s rights and children’s best interests sacrificed as collateral damage. The important lesson from Israel’s turbulent union of civil and religious law is that when

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136. Daphna Hacker, *Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, 7 J. EMPIRICAL LEGAL STUD. 322, 342 (2010). For an extensive discussion on women’s inheritance rights under Islamic law and the Israeli practice of female renunciation of their inheritance shares, see Sandberg, *supra* note 135.

137. Josh Goodman, *Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel*, 32 HASTINGS INT’L & COMP. L. REV. 477, 515 (2009); see Reiter, *supra* note 26, at 208, 218.

one legal system speaks in two voices, it is not pluralistic, but chaotic, and that this unhappy marriage counsels in favor of a unified, exclusive jurisdiction of the civil family court system.