Journal of Law and Religion 33, no. 3 (2018): 481–503 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2019.1

ACCOMMODATING RELIGIOUS LAW WITH A CIVIL LEGAL SYSTEM: LESSONS FROM THE JEWISH LAW EXPERIENCE IN FINANCIAL FAMILY MATTERS

AVISHALOM WESTREICH

Associate Professor, College of Law and Business, Ramat Gan, Israel; Research Fellow, The Kogod Research Center for Contemporary Jewish Thought, Shalom Hartman Institute, Jerusalem; Honorary Research Fellow, School of Arts, Languages and Cultures, University of Manchester

ABSTRACT

The discussion of legal pluralism focuses on the coexistence of several legal systems, mainly religious and civil ones. But what happens when a process of assimilation—whether imposed or voluntary—characterizes the relationships between the systems? This article analyzes the fascinating process of assimilation of civil principles into religious law in the context of Jewish law and Israeli civil family law. Assimilation, as the article shows, is not the whole picture. The article reveals a corresponding (both open and implicit) struggle for the preservation of religious law principles despite the continuing efforts of civil law for their curtailment, or sometimes, elimination. The result, which is somewhat internally contradictory, suggests a normative pluralistic framework that enables both regimes—the civil and the religious—to preserve their core principles in family law matters.

INTRODUCTION

The discussion of legal pluralism focuses on the possibilities, legitimization, and borders of the coexistence of several legal systems, mainly religious and civil ones.[1] But what happens when a process of assimilation—whether imposed or voluntary—characterizes the relationships between two legal systems? In this article I analyze the fascinating process of assimilation of civil principles into religious law in the context of Jewish law and Israeli civil family law. Assimilation, as I show, is not the whole picture. My analysis reveals a corresponding (both open and implicit) struggle for the preservation of religious law principles despite the continuing efforts of civil law for their curtailment, or sometimes, elimination.

This somewhat internally contradictory process is found in the following context. In the famous *Bavli* case (1994), the Israeli High Court of Justice obliged state rabbinical courts to adjudicate financial matters in divorce according to civil law. Specifically, the court ruled that equal property sharing is a fundamental principle that reflects values of gender equality and human dignity, and it must be adopted by religious courts even if against religious law, and despite the jurisdiction afforded to the religious court under Israeli law in (some) family law matters.

1 *See, e.g.*, Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights 1–16 (2001) (discussing legal pluralism based on multiculturalism, and its borders), and see *id.* at 2 n.3 for further references. Several scholars have examined the coexistence in practice of different legal systems. For a recent example, see Michael J. Broyde, Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West (2017).

The decision led to an intensive debate on the relationships between religious law and civil law and the superiority of one over the other, particularly in cases in which religious law seems to violate human dignity and equality. Today, however, we can examine this debate from the perspective of more than twenty years and point to a fascinating process of the assimilation of civil principles within rabbinical courts as regards equal property sharing, while justifying it by religious law principles.

But not everything is rosy. Together with this fascinating process of assimilation, rabbinical courts find ways to give expression within the civil financial regime to concepts of fault, including faults that influence the property sharing, although fault's influence on property sharing is less accepted today from a civil perspective. The result is quite complex, since it includes two contradictory and concurrent actions: accepting civil law and rejecting it. I argue that this is due to the unilateral imposition of the modern financial regime on the rabbinical courts. Its assimilation within rabbinical courts' adjudication is astonishing, but it is not an organic part of their doctrine, and therefore, when possible, concepts of fault based in Jewish law influence the rabbinical courts' decisions.

Based on a study of this somewhat contradictory result of the financial matters debate, I examine an integrated normative approach, that enables both regimes—the civil and the religious—to preserve their principles. I then suggest, very cautiously, that property sharing can serve as a test case for the accommodative potential of religious worldviews in pluralistic legal systems in general: the current analysis can teach of the potential for using a faith-based system's internal doctrines for accommodation with (at least parts of) a civil legal system. It might be done in a coercive way, but a better result could be achieved if the process is effected by consent, with mutual recognition of different worldviews.

RELIGIOUS LAW AND CIVIL LAW IN FINANCIAL MATTERS: THE GAPS—AND THEIR BRIDGING

Background

There are significant gaps between Jewish law and modern civil law as regards property distribution in divorce. Modern legal systems strive for equal sharing of property and other assets that belong to the marital assets, with less consideration of formal ownership. There are various ways to achieve the goal of equal sharing, but all have the common denominator of achieving equality between the two spouses in financial matters at the time of separation.[2] The rationale behind equal property sharing is (a) the (factual) assumption that the property was acquired with equal efforts by both spouses, (b) the (contractual) presumption of an implied consent of equal sharing of the property of the marital assets, or (c) a (normative) determination of the appropriate financial arrangements between spouses, taking into account considerations of gender equality and the like. Generally

2 *See* SANFORD N. KATZ, FAMILY LAW IN AMERICA 98–104 (2d ed. 2015). In the Israeli legal system, there are two different routes: one according to the Financial Relations Law, 5733-1973 and the other according to the Sharing Legal Presumption. The first is applicable to couples who were wed after January 1, 1974. The second is applicable to cohabitants and to couples who were wed before 1974. According to the first, the right to equal property sharing is a postponed obligatory right, i.e., a right for financial compensation of half of the property rights that comes into effect at the time of divorce. According to the second, the right is an immediate proprietary right, i.e., each spouse owns half of the property, and this comes into effect immediately at the time of its acquisition. *See* Joint Civil Appeals (JCA) 1915/91, 2084/91, and 3208/91 Yakobi v. Yakobi and Knobler v. Knobler 49(3) PD 529, 548–50 (1995) (Hebrew) (Isr.).

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

speaking, both spouses are considered to be equal contributors to the family, and therefore the family's property should be divided in an equal (or equitable) way.[3]

The financial arrangements according to Jewish law are basically different. Jewish law recognizes the spouses as two different legal entities (in this respect, similar to the modern civil approach); therefore enabling either single or joint ownership of the property,[4] although with the husband's control of significant parts of it.[5] In contrast to the modern civil approach, however, Jewish law would normally follow the formal ownership (in Israel, at least before the *Bavli* case, which is discussed below). Thus, in the patriarchal family structure in the past, most property was under the formal ownership of the husband, and might still be so in the present (depending on the socioeconomic situation, the traditionalism of the family, and additional sociological factors). For instance, if the family car is registered in the husband's name, it would be considered the husband's property. If the husband—often the main breadwinner—has a pension or other funds, they would be considered his.

As a point of fact, in the present middle-class context, one of the most important marital assets, the apartment, is normally registered in the name of both spouses. Since, as mentioned above, Jewish law recognizes the spouses as two different legal entities, the apartment will normally be equally divided between the couple.[6] When the apartment is registered under the name of one spouse, however, rabbinical courts would be more reluctant to provide the other spouse with half of it, with a possible disparity between them and the civil courts. In the latter case (for example, when the apartment was bought by one spouse before the marriage) civil courts would require very weak indications for attributing the asset to both spouses.[7] Rabbinical courts, on the other hand, would probably adhere to the formal registration, instead of equal sharing.[8]

---

3 For the initial expressions of this idea, see MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); *see also*, Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME LAW REVIEW 1251, 1270–74 (1998) (analyzing Glendon's primary contribution to equal property sharing and to the need for spousal support, and indicating the developments since her book); KATZ, *supra* note 2, at 71–73.

4 The legal status of the wife in Jewish law as an independent legal entity is reflected, for example, in the husband's liability for her damages, including damages caused (negligently) in sexual relationships. *See* BABYLONIAN TALMUD, Bava Kamma 32a (defining the husband as one who enters "his friend's property"). Common law in the past viewed the family "as 'one,' and that 'one' was the husband. That meant that in terms of property interests, the husband was paramount." See KATZ, *supra* note 2, at 71, and the summary of the changes in this respect in the second half of the twentieth century: *Id*., at 81–85.

5 According to classic Jewish law, a certain type of the wife's property is controlled and managed by the husband, who is also entitled to the benefits that are derived from that property. *See* MAIMONIDES, MISHNEH TORAH, Ishut (Marital Relations) 16:1 (definitions of different types of property); 22:7 (the husband's right to property benefits).

6 On the status of the formal registry of the family apartment in Jewish law, see File No. 956318/1 Rabbinical Court (Jerusalem), Ploni v. Plonit (Mar. 21, 2016), Nevo Legal Database (Hebrew) (Isr.); High Rabbinical Court File 993174/8, Plonit v. Ploni (Dec. 1, 2016), Nevo Legal Database (Hebrew) (Isr.). Some rabbinical judges dispute the view that the registry reflects joint ownership of the family apartment; see, e.g., the minority opinion in File No. 956318/1 at 5–12. The common view, however, is that registration reflects joint ownership, and the apartment should be equally divided. See the majority opinion, *id*., arguing that "the accepted ruling [of the rabbinical courts] is that of equal division between the parties," *id*., at 21.

7 The law regards assets that were bought before the marriage, given as a present during marriage, or inherited during marriage as assets external to the shared property, which therefore should not be divided. *See* Financial Relations between Spouses Law, 5773-1973, § 5(a)(1). When the other spouse, however, has invested money or efforts in the external asset, or when there are other indications that the couple intended to make the asset a shared one, it would be equally distributed. This depends on the specific circumstances, but the tendency is toward moderating the criteria for the required indications. *See* Family Appeal Request 1398/11, Almonit v. Almoni (Dec. 26, 2012), Nevo Legal Database (Hebrew) (Isr.).

8 *See, e.g.*, File No. 956318/1 Rabbinical Court (Jerusalem), Ploni v. Plonit (Mar. 21, 2016), Nevo Legal Database (Hebrew) (Isr.). In that case, the apartment was registered in the husband's name, but the couple drew up a contract

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

In regular cases, however, the apartment is registered in both spouses' names, and would be recognized by rabbinical courts as a shared property, according with the civil law view. The problem, or the collision, between Jewish law and civil law on matters of property sharing is today more acute regarding the second important asset of a (normal middle-class) family: its financial assets. This includes pensions, provident funds, and other assets, which might come to a very large amount. Jewish law decisors would have difficulty in recognizing this as shared property, and as long as this money was gained by the husband's work, it would (in principle) be considered his.

The difficulty in recognizing the financial assets as shared property becomes stronger due to the history of the laws of income from work in Jewish law, which are related to the laws of maintenance during marriage. According to Jewish law, the wife upon marriage is entitled to receive maintenance from her husband, but the husband receives her income in return. The wife accordingly has two options: in the first, she could keep her income from work, without being entitled to maintenance during marriage. In the second, she could receive maintenance from her husband, but in this case she would have to give her income to her husband. This arrangement was originally made in order to protect the wife from unstable financial status. She could therefore say "I do not [wish to] receive maintenance, and [therefore] would not give my income to my husband."[9] In a patriarchal financial culture, she would probably prefer the option of receiving maintenance and the financial stability that it provides.[10]

As time passed, both spouses are now recognized as equal contributors to the marital assets, and in practice, in most cases they practically function as a single financial unit. The difficulty arises, however, at the time of marital breakdown, when the wife often claims maintenance, as part of her divorce suit. Jewish law may well acknowledge that the wife is entitled to maintenance, if she does not have sufficient financial resources. But the traditional understanding of the relationship between the spouses regarding income from work makes it quite difficult to accept the next step: recognizing the husband's assets (including pension, provident funds, etc.) as shared property.

This leads to a significant practical difference between the civil and the Jewish legal systems: whereas the civil legal system ignores formal ownership and strives for equal sharing, Jewish law decisors focus on formal considerations. And this focus, as mentioned, may lead to the practice (and possibly also ideology, due to the perception of different gender roles) of the husband acquiring most of the property, in addition to the possible right to receive his wife's income (if she receives maintenance). I show, however, in the next section that present-day Jewish law decisors find creative legal constructions to accommodate Jewish law and civil law as regards equal property sharing,

in which the husband committed himself to provide his wife with half of the apartment's acquisitional rights even though he had not changed the formal registration. The majority viewed the apartment as being in sole ownership of the husband, while the minority opinion accepted the wife's claim for mutual ownership. I assume that a civil family court would view the apartment in this kind of case as a shared asset. See also HCJ 4602/13 Plonit v. Haifa Regional Rabbinical Court (Nov. 11, 2018), Nevo Legal Database (Hebrew) (Isr.). In that case, the rabbinical court rejected the wife's claim for an implied consent for an equal sharing of the family apartment which was registered in the husband's name. The High Court of Justice (in a majority opinion) approved the decision, and did not accept the claim that the rabbinical court ruling was motivated by the wife's adultery. The decision, which was strongly criticized in the public sphere, requires further examination.

9 For the maintenance enactment, see Babylonian Talmud, Ketubbot 83a; Maimonides, Mishneh Torah, Ishut (Marital Relations) 12:4.

10 I am speaking here of traditional wife support during the course of the marriage, which was then part of the regular financial arrangements of normative families. In modern-day families that is, of course, less relevant, due to the dramatic changes in the financial structure of the family. When there is a marital breakdown, however, the husband's obligation often reemerges, as discussed below.

and that even at the core of Jewish law, there is room for equal property sharing. But a disparity still exists.

IMPOSING CIVIL LAW ON RELIGIOUS LAW

In 1994, the decision of the Israel High Court of Justice in the landmark *Bavli* case obligated the state rabbinical courts to follow civil law in financial family matters.[11] In that case, Ms. Bavli demanded equal property sharing on the basis of the Sharing Presumption (the couple were wed before 1974, so the Financial Relations between Spouses Law was not applicable to them),[12] but the rabbinical court refused and granted the husband the right to the property that was formally owned by him, which resulted in an unequal distribution of the property. The High Court of Justice ruled that in financial family matters the state rabbinical courts must follow civil, rather than religious, law. Therefore, financial matters must be adjudicated according to civil principles, that is, the Sharing Presumption or the Financial Relations Law.[13]

The formal reasoning behind this decision was as follows: according to the Rabbinical Courts Jurisdiction Law, rabbinical courts have sole jurisdiction in matters of marriage and divorce (section 1), and these matters should be adjudicated according to Jewish law (section 2). Matters that are related to divorce, such as property distribution and wife and children's maintenance, are under the jurisdiction of rabbinical courts when one party binds those issues to his or her divorce suit (section 3).[14] Traditionally, in cases like the *Bavli* case, in which the Financial Relations between Spouses Law was not applicable, those matters were adjudicated by rabbinical courts according to religious law.[15] In the *Bavli* case, however, the High Court of Justice ruled (counter to the practice that preceded this decision) that although property distribution is under the jurisdiction of the rabbinical court when there was a proper "binding" according to section 3, it should be adjudicated

11 Although there were other potential points of conflict regarding financial matters, including the Financial Relations between Spouses Law itself (which rabbinical courts were compelled to follow) or § 2 of the Equal Rights for Women Law 5711–1951, which cancelled the husband's control of his wife's property, the actual and severe conflicts occurred following the *Bavli* case, followed by assimilation, as discussed here.

12 *See supra* note 2.

13 *See* HCJ 1000/92, Bavli v. High Rabbinical Court 48(2) PD 221 (1994) (Hebrew) (Isr.).

14 This law is at the heart of the problematic nature of the legal arrangements in the Israeli marriage and divorce system. Its application was (and in many aspects, still is) unclear, and it was, and still is, a fertile ground for forum shopping, or, in the worst case, for a struggle between the religious and civil legal systems. Usually, the procedure of binding issues related to divorce to enable rabbinic jurisdiction over them must be explicitly stipulated in the divorce suit, with sufficient detail and, according to the court's consideration, it must be sincere, and not for tactical purposes. Child custody is the only exception: according to the Israel Supreme Court, this is considered as "bound by nature" to the divorce suit, so no explicit binding is required. *See* Ariel Rozen-Zvi, Israeli Family Law—The Sacred and the Secular, 48–65 (1996) (Hebrew).

15 In the Ottoman Empire and the succeeding British Mandate, matters of personal status were adjudicated according to the religion of the parties. The rationale was that the colonial empires did not want to intervene in matters that were considered an essential part of the local native culture. The Israeli system did not change this basic arrangement, but modified it in some aspects (e.g., regarding Jews, in the Rabbinical Courts Jurisdiction Law). More interestingly is that it underwent a fascinating ideological transformation. While initially the object of this arrangement was to enable autonomy for various communities in those personal matters, the arrangement would later be viewed as an inherent aspect of the character of the state as a Jewish state (despite the similar arrangements for other religions). *See* Avishalom Westreich & Pinhas Shifman, A Civil Legal Framework for Marriage and Divorce in Israel 22–24 (Ruth Gavison, ed., Kfir Levy, trans., 2013).

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

(by the rabbinical courts!) according to civil law, rather than according to religious law.[16] The High Court of Justice argued that property distribution is not a matter of personal status, as opposed to other matters such as child and spousal maintenance, and therefore should be adjudicated according to civil law.[17] It might be possible to explain the distinction between property distribution and maintenance in some doctrinal ways, but obviously the High Court of Justice here was not motivated by a doctrinal distinction. It was motivated by its values of women's equality, together with a general institutional (some might say political) objective, to limit the authority of religious courts and religious law, and to strengthen civil family law. The Court stated this outright ("In civil matters, all judicial bodies, including the rabbinical court, are obliged to act in accordance with the general [i.e., civil] law"),[18] and it accords with other decisions that sought to circumvent the scope of religious law in Israeli family law.[19]

Not surprisingly, the reactions to the decision were highly emotional, and it led to a profound controversy regarding the relations between religious and civil law in Israel. Alongside the public debate, the religious legal system itself was internally conflicted on the question of accepting or rejecting this newly imposed legal arrangement.[20] But the passage of time achieved what scholarly writings did not. During the more than twenty years since the *Bavli* decision, the application of civil principles and civil law in financial matters in divorce (whether through the Sharing Presumption or the Financial Relations between Spouses Law) became widespread among rabbinical courts, whether willingly, unwillingly, or with hesitations (and from time to time the High Court of Justice had to reemphasize the obligation of rabbinical courts to apply civil law in financial matters).[21] From a civil perspective, this process was imposed and supervised by the High Court of Justice on the basis of the *Bavli* decision. From a Jewish law perspective, the application of civil principles was justified by several halakhic constructions, which I describe below.

Jewish Law Constructions for Adopting Civil Principles in Financial Matters

There are three main halakhic constructions on the basis of which civil principles in financial matters can be adopted by and integrated into Jewish law. The first views the law of the land in financial matters as binding, based on the Talmudic principle "the law of the kingdom—is [considered a valid] law."[22] A few rationales were proposed for this principle, but it suffices for our purposes to

16 *See* HCJ 1000/92, Bavli v. High Rabbinical Court, *supra* note 13, at 246 (§ 28 of the Opinion of the Court by Justice Barak) (Hebrew).

17 *Id*., at 232–34 (§ 8).

18 *Id*., at 249 (§ 31).

19 Such as the civil alternatives for religious divorce (e.g., providing the cohabitant spouse with rights similar to those of a married spouse); *see* PINHAS SHIFMAN, FAMILY LAW IN ISRAEL 1, 424–39 (1995) (Hebrew).

20 Two leading High Rabbinical Court judges, Rabbis Shlomo Dichovsky and Avraham Sherman, wrote an exchange of articles in the TCHUMIN rabbinical journal on the validity of the civil equal property sharing arrangement. *See* Shlomo Dichovski, *The Presumption of Sharing—Is It the Law of the Kingdom?* 18 TCHUMIN 18 (1998) (Hebrew); Avraham Sherman, *The Presumption of Sharing in Light of Torah Law*, 18 TCHUMIN 32 (1998) (Hebrew); *id*., *The Presumption of Sharing Is Not Anchored in Jewish Law*, 19 TCHUMIN 205 (1999) (Hebrew), and the response of Rabbi S. Dichovski, *id*., at 216. The theoretical discussion within the Jewish law arena continues to the present, but the practice has taken a very clear direction, as I discuss below.

21 On the willingness of rabbinical courts to apply civil law in financial matters and the need to continue supervising this application of civil law, see Justice Rubinsten's statement at HCJ 5416/09 Plonit v. Ploni § 10 (Feb. 10, 2010) (Nevo Legal Database) (Hebrew) (Isr.).

22 BABYLONIAN TALMUD, Bava Kamma 113b; Bava Batra 54b and more.

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

mention the following one, which bases the validity of this principle on societal acceptance.[23] The rationale behind this principle, accordingly, is that society—including the Jewish community—accepts the laws of the state, and therefore these laws are binding according to Jewish law: "All the inhabitants of the kingdom willingly accept upon themselves the laws and rules of the king. Consequently, this is a law in full force."[24] In our case, the couple—or the court—is accordingly obliged to adopt civil law, as long as it does not contradict prohibitions of Jewish law, and equal property sharing *prima facia* does not contradict other Jewish law principles. The scope of this principle and its validity to the Jewish state, however, are not agreed. Post-Talmudic scholars tend to limit the scope of this principle, and some even argue—somewhat ironically in my opinion—that it is valid solely for Jewish Diaspora communities under non-Jewish governments, while the Jewish state should adhere to Jewish law without providing any halakhic validity to other legal systems. The former High Rabbinical Court judge Rabbi Avraham Sherman, for example, argues that this principle is not applicable in the case of property sharing for several reasons, including the interesting argument that the concept "kingdom" does not include a Jewish state.[25] There are accordingly reservations to basing the validity of civil principles on the principle that "the law of the kingdom—is [considered a valid] law." Therefore, the next two constructions, which are based on the couple's agreement, are almost always preferred.

The second construction views civil law as a widespread custom ("the custom of the land") which thereby affords it legal validity.[26] Customs in monetary matters, such as merchants' customs, are legally valid from a Jewish law perspective, even if they do not adhere to Jewish law's formal demands (or even contradict them).[27] Accordingly, when civil practices in financial matters become common (even if as a result of state legislation), we can assume that the couple agreed to adopt the practice for themselves as well. "The custom of the land" thus creates an implied consent of the couple to resolve financial matters according to civil law.[28]

The third construction is also based on the consent of the couple, but seeks explicit agreement. It achieves the couple's agreement to rule according to civil law by a formal act, which is defined as an act of acquisition (*kinyan*). Although this act is defined as an acquisition, it is effective according to Jewish law in the contractual dimension as well. That is, an act of *kinyan* creates a binding agreement between the spouses. By this act, the agreement of each spouse to adjudicate according to civil law gets legal force, and, here as well, gives validity to civil law from a Jewish law perspective.[29]

---

23 Societal acceptance as the basis for legal obligation, rather than coercive power, has an interesting parallelism in modern legal positivist jurisprudence. See H.L.A. HART, THE CONCEPT OF LAW 79–88 (1961).

24 As explained by the twelfth-century Talmudic commentary of Rabbi Samuel ben Meir (Rashbam) to BABYLONIAN TALMUD, Bava Batra 54b. For this and other rationales, see MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 64–74 (Bernard Auerbach and Melvin J. Sykes, trans., 1994). For views of present day Jewish law decisors see Ron S. Kleinman, *The Halakhic Validity of Israel's Judicial System among Israeli Ultra-Orthodox Halakhic Decisors: Building and Condominium Housing Laws as a Test Case*, 18 REVIEW OF RABBINIC JUDAISM 227 (2015).

25 *See* Sherman, *supra* note 20. For further discussion, see ELON, *supra* note 24.

26 *See* (including additional discussion on the first principle, "the law of the kingdom") ELON, *supra* note 24, at 122–41.

27 The classic Talmudic source of this principle is BABYLONIAN TALMUD, Bava Metsia 74a, in which the Talmud provides legal validity to merchants' methods of acquisition, even to those which are not formally recognized by Jewish law as forms of acquisition.

28 *See* BROYDE, RELIGIOUS ARBITRATION, *supra* note 1, at 154–63 (justifying from a Jewish law perspective the validity of religious courts functioning as arbitration panels, based on the parties agreement and established customs).

29 *See, e.g.*, File No. 918948/7 Rabbinical Court (Haifa), Plonit v. Ploni 3 (Nov. 6, 2016), Nevo Legal Database (Hebrew) (Isr.): "This method of the act of acquisition is accepted by many rabbinical courts, with the main

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

All three constructions are mentioned and discussed by rabbinical courts. Some rabbinical judges are satisfied by the general principle of "the law of the kingdom" or by assuming implied consent on the basis of "the custom of the land."[30] Others seek an explicit agreement, represented by the formal act of acquisition.[31] The common denominator is that in the vast majority of cases the judges are, in fact, quite open to the adoption of civil law principles by Jewish law in financial matters.

In fact, some rabbinical judges and halakhic decisors object to these three constructions and oppose the very idea of integrating civil law concepts into Jewish law in any possible way. The former High Rabbinical Court judge Rabbi Avraham Sherman led this approach in the first years after the *Bavli* ruling[32] and continued to hold it during his term in the High Rabbinical Court. Sherman rejected the very idea of property sharing according to civil law principles, even when the couple explicitly consents. He writes,

> The spouses contesting the division of property between themselves are not permitted to give their consent for the rabbinical court to adjudicate their case in accordance with the Sharing Presumption or the Financial Relations between Spouses Law. The rabbinical court is similarly forbidden to adjudicate in accordance with these laws, even if the spouses give their consent to this.[33]

To the best of my knowledge, however, the dominant trend among state rabbinical courts[34] today is toward acceptance.[35] Even rabbinical judges who have some reservations about incorporating civil law into religious law, in practice (due to the pressure by the civil system, and mainly by the High Court of Justice), follow civil law in their rulings. Rabbi Chayim Shlomo Sha'anan, a former rabbinical judge, for example, rejects the idea that equal property sharing is considered a binding practice according to Jewish law. He suggests, however, that the (civil) concept of equal property sharing can be considered—from a Jewish law perspective—as a compromise between the parties,

---

approach being that the act of acquisition removes any halakhic doubt regarding the possibility of the rabbinical court to decide in accordance with the Financial Relations between Spouses Law."

30 See, for example, File No. 1059097/4 Rabbinical Court (Haifa), Ploni v. Plonit (Apr. 6, 2016), Nevo Legal Database (Hebrew) (Isr.), in which the decision is based on implied consent between the parties: "Clearly, the Financial Relations Law has the standing of a binding contract that relates to the assets acquired by the spouses during their life together." (This verdict deals with determining the time for property division; see *infra* section titled "The Influence of Religious Principles on Civil Financial Rights.")

31 These courts usually agree that the basis in Jewish law for applying civil law is (also) an implied agreement on the basis of a general custom or "the law of the kingdom" principle, but they require additional elements that would strengthen the legitimacy of their practice. See File No. 593163/2 Rabbinical Court (Tiberias), Plonit v. Ploni 12 (Jan. 5, 2014), Nevo Legal Database (Hebrew) (Isr.): "The halakhic force given to the instructions of the Law is based on the consent of the parties to act in accordance with the Law and the custom of the land . . . in order to avoid any doubt, it is the practice in some rabbinical courts to effect *kinyan* that gives halakhic validity to the instructions of the Law."

32 See his correspondence with Rabbi Shlomo Dichovski, *supra* note 20.

33 Sherman, TCHUMIN, supra note 19, at 216. Sherman applied his approach during his term as a High Rabbinical Court Judge. See High Rabbinical Court File No. 811921/1, Plonit v. Ploni, 6 (Jun. 30, 2011), Nevo Legal Database (Hebrew) (Isr.).

34 That is, state courts that have jurisdiction concerning marriage and divorce (see *supra*, text accompanying note 14). The picture is different as regards private courts, an issue which is beyond the scope of this article.

35 The rabbinical verdicts cited in this and in the following two sections support this argument. See also Justice Rubinstein's statement, *supra* note 21. It should be noted that the concept of binding precedent is not part of Jewish law jurisprudence. Therefore, regional courts usually do not feel bound by the High Rabbinical Court's decisions. We thus find different views on many issues which are based on various Jewish law sources, without one decisive decision.

even if according to Jewish law the property should be divided in a different way, since otherwise the verdict would be reversed by the civil court. It is easier (according to his view) to apply civil law when there is an explicit agreement of the spouses (based on an act of *kinyan*) to apply civil law, although here, as well, he would have preferred to rule according to the classic Jewish law view. Yet, due to this pressure of the civil system, the agreement is valid and the rabbinical court may follow civil law.[36]

Adopting civil law does not solve all problems, and there still are gaps and conflicts. In what follows I attempt to explain the disparity between accepting and rejecting civil law. But first, I analyze the existing gaps and conflicts, which I divide into two categories: explicit and implicit.

By *explicit conflict* I mean cases in which religious financial rights openly compete with civil financial rights as two alternatives for financial arrangements. For example, when the husband has to pay both the dowry payment to which he obliged himself in the marriage document (the *ketubbah*; see below) and part of (what is formally considered as) his financial assets according to the principle of equal property sharing—does he have to pay them both, or does one override the other? An implicit conflict occurs when rabbinical courts try to integrate values and principles of religious law into civil law using interpretative methods, for example, when rabbinical courts try, with whatever degree of sophistication, to integrate considerations of fault into the financial discussion. Here the conflict is not expressed, and its disclosure requires close reading of rabbinical verdicts. Below, I examine these conflicts.

CIVIL AND RELIGIOUS FINANCIAL RIGHTS: THE COMPETITION

A central element of the financial arrangements in divorce according to Jewish law is the *ketubbah* payment. The *ketubbah* is a marriage document which regulates the rights and obligations of the couple in their marital life. It includes the monetary obligation of the husband to be paid to his wife upon his death or divorce. The *ketubbah* was enacted by early Sages[37] for two purposes. First, in order to prevent the husband from unilaterally divorcing his wife.[38] Second, in order to provide the

36 *See* CHAYIM SHLOMO SHA'ANAN, IYYUNIM BA-MISHPAT: FROM DECISIONS THAT AROSE IN THE RABBINICAL COURT 81–92 (2005) (Hebrew). His view is reflected in the title of the chapter: "Is the Rabbinical Court Permitted to Decide upon a Compromise in a Suit for Property Sharing in Order to Prevent Adjudication in the Secular Court?"

37 Some Jewish law scholars argue that *ketubbah* is a commandment derived from Biblical law (from the Torah; *de'orayta*), i.e., it has a high normative status within Jewish law. Others attribute it to the enactment of early rabbis of the Second Temple period (Simeon ben Shatah [ca. second to first centuries BCE]; see BABYLONIAN TALMUD, Ketubbot 82b). Both views are rooted in the BABYLONIAN TALMUD (Ketubbot 10a), but the latter view is more common among post-Talmudic scholars (the views are summarized and discussed in the classic Jewish law code, ARBA'AH TURIM, EVEN HA-EZER 66). According to both views, the details of the *ketubbah* obligation were developed by the rabbis in the Mishnaic period (from the destruction of the Second Temple [70 CE] to the redaction of the Mishnah [ca. 200 CE]) and in the Talmudic period (ca. 200–500 CE), as detailed in length in tractate Ketubbot of the Mishnah and Talmud.

38 According to Talmudic law, the husband could unilaterally divorce his wife, and the resulting need to pay the *ketubbah* could prevent or delay him from doing so. At the beginning of the second millennium, however, Rabbenu Gershom of Germany enacted that unilateral divorce would be prohibited (known as "the Ban of Rabbenu Gershom"), and his enactment was widely accepted; see ELIMELECH WESTREICH, TRANSITIONS IN THE LEGAL STATUS OF THE WIFE IN JEWISH LAW—A JOURNEY AMONG TRADITIONS (2002) (Hebrew). Accordingly, the first object of the *ketubbah* became in many cases unnecessary (some still approve unilateral divorce in some cases, and according to them the *ketubbah* might still have some relevancy; see *infra* notes 85–86 and the accompanying text).

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

wife with financial resources after being divorced from her husband.[39] The first purpose is more common in Talmudic and post-Talmudic literature, but the second is also taken into account (and may have some practical implications, for example, in evaluating the *ketubbah* as an amount equal to the present average yearly cost of living, or in viewing the *ketubbah* as an alternative to the wife's maintenance.)[40]

Throughout the years, the content of the *ketubbah* became subject to general enactments and more local customs, including the imposition of additional financial and other obligations on the husband.[41] Today, the *ketubbah* is an integral part of the wedding ceremony. In it, the husband commits himself to pay his wife a certain sum of money: the original 200 *zuz* and an additional sum of money, which—in the Israeli practice—may be equal to a few thousand U.S. dollars, and sometimes even more.[42]

So where is the competition between the *ketubbah* and civil financial rights?

In the past, rabbinical courts divided the property according to its formal ownership. In many cases, the husband received more than the wife did, but had to compensate her by paying the *ketubbah* payment. In the years after the *Bavli* decision, as mentioned above, ruling according to the civil principles of equal property sharing (on the basis either of the Sharing Presumption or of the Financial Relations Law) became widespread among rabbinical courts. Now the question arises: would the wife be entitled to both civil financial rights and rights provided to her by the religious-law contract, the *ketubbah*? Israeli law states explicitly that civil financial relations and financial rights do not affect rights based on religious law.[43] Nevertheless, many rabbinical courts argue that the wife cannot win "double deals," so that if she receives assets according to civil law when she was not so entitled according to Jewish law, she will not be entitled to the *ketubbah* payment.

---

39 The basic sum of the *ketubbah* was 200 *zuz*, which at that time was equal to the average yearly cost of living. The nominal value of 200 *zuz* today is disputed, but it is quite low. Some, however, argue that the *ketubbah* obligation should be evaluated according to its purpose, thereby setting this obligation as a sum equal to the yearly cost of living. See the discussion in High Rabbinical Court File No. 1687/24/1, Ploni v. Plonit (Sep. 2, 2007), Nevo Legal Database (Hebrew) (Isr.). The court (opinion by Rabbi Shlomo Dichovski) set the *ketubbah* amount at NIS 120,000, an amount that reflects a reasonable yearly cost of living.

40 See Dichovski, *id.*; File No. 585140/2 Rabbinical Court (Haifa), Ploni v. Plonit (Nov. 11, 2013), Nevo Legal Database (Hebrew) (Isr.); File No. 575141/19 Rabbinical Court (Haifa), Ploni v. Plonit (Jan. 1, 2017), Nevo Legal Database (Hebrew) (Isr.) at 6: "The *ketubbah* is the wife's lifeline and security after her divorce; the maintenance she had during the marriage is gone. For until her husband divorces her she had maintenance from him, but once her husband divorced her, her right to maintenance from her husband has expired, but as a substitute for this she has the payment of her *ketubbah*."

41 *See, e.g.*, Maimonides, Mishneh Torah, Ishut (Marital Relations) 16:7–8 (regarding paying the *ketubbah* payment from all of the husband's belongings, and not only from his real estate, as was the case in the original law). Sometimes, however, due to local enactments and cultural changes, some stipulations were no longer required and were omitted from the *ketubbah*. *See, e.g.*, Simcha Assaf, *The Cancellation of a Ketubbah Stipulation Regarding Male Children*, 10 Ha-Zofeh le-Hokhmat Yisrael (Hazofeh Quartalis Hebraica) 18, 25–27 (1926) (Hebrew) (accessible at http://www.hebrewbooks.org/37234) regarding a *ketubbah* stipulation that provides the wife's sons with the right to inherit her, which, due to other enactments, became superfluous in the medieval period.

42 Many couples see the *ketubbah* obligation as a symbolic obligation or ceremonial act, and therefore write in the *ketubbah* high round numbers or other symbolic numbers (e.g., NIS 555,555 or the like). The rabbinic establishment objects to this practice and in many cases would not view these amounts as a binding obligation; see *infra* note 81.

43 *See* Financial Relations between Spouses Law, section 17: "This law does not detract … from the wife's rights according to her *ketubbah*."

Offsetting the *ketubbah* obligation by the civil financial rights without considering them as the wife's two parallel rights accordingly became a common practice in the rabbinical courts.[44] Admittedly, some rabbinical judges do not accept this practice (at least when both spouses agreed to adjudication according to civil law), and argue that these are two separate rights, and one cannot override the other. Rabbi Eliyahu Hishrik, a High Rabbinical Court judge and formerly a judge in the Tel Aviv rabbinical court, writes,

> Regarding the spouses who consented to adjudicate property matters before the [civil] court, when the husband is not impelled by the wife, but rather is a full partner in the decision regarding the venue of the judicial proceedings, and this is also their natural way according to their way of life—in such a case the rabbinical court will award the wife what is coming to her in accordance with her *ketubbah*.[45]

Many (apparently most of the rabbinical court judges), however, accept the offsetting approach in its entirety.[46] As Rabbi Uriel Lavi, a well-known rabbinical judge at the time in the Tiberias regional rabbinical court, and today in the Jerusalem court, writes clearly (followed by a review of the dominance of this opinion in recent verdicts and its basis in classic Jewish law sources), "The decisions of the rabbinical courts in recent years are generally unanimous in disallowing double rights."[47] So what motivates those who accept the offsetting practice and do not provide the wife with the right to the *ketubbah* payment when she receives financial rights on the basis of civil law?

In order to answer this question, we should mention an interesting phenomenon regarding the practice that rejects "double deals": this practice does not refer to every possible asset of the couple; it does have some limits. Even those who do accept the practice in general may well acknowledge that some financial rights are stable enough that they exist together with the right for the *ketubbah* payment. This is so regarding the family apartment, which is considered joint property, especially when it is registered in both spouses' name.[48] It is probably the case also regarding a joint bank account that is recognized by rabbinical courts as belonging to both spouses, and therefore should be equally distributed between them.[49] Some rabbinical judges argued (mainly in the past) that, according to Jewish law, the registration cannot affect the husband's ownership, and even those

44 *See, e.g.*, File No. 575141/19 Rabbinical Court (Haifa), *supra* note 40, at 1 (emphasis added): "It is *a well-known judiciary practice* that the wife is not entitled to her *ketubbah* [payment] if she received additional rights from the husband in accordance with a civil court ruling which does not follow Torah law. Consequently, the decision regarding the *ketubbah* cannot be given before the conclusion of the financial proceedings in the civil court."

45 *See* File No. 838835/8 Rabbinical Court (Tel Aviv), Plonit v. Ploni 19 (Jan. 24, 2013), Nevo Legal Database (Hebrew) (Isr.). Hishrik's view was a dissenting opinion. The majority argued, similar to the dominant view in rabbinical courts today, that the wife cannot receive both the *ketubbah* and civil financial rights.

46 In addition to the citation *infra* see the views cited *supra* notes 44, 45 (majority), and more.

47 *See* File No. 593163/2 Rabbinical Court (Tiberias), Plonit v. Ploni, *supra* note 31, at 2.

48 *See* High Rabbinical Court File No. 1075070/1, Plonit v. Ploni (Dec. 8, 2016), Nevo Legal Database (Hebrew) (Isr.). The court obligated the husband to pay NIS 150,000 (part of his *ketubbah* obligation), which would be collected from his part in the family apartment, i.e., the wife would receive her part in the apartment, and an additional NIS 150,000 from her husband's part (so that her part in the apartment would not offset the *ketubbah* obligation). On the other hand, this partial *ketubbah* obligation would be reduced if and when the wife were to receive additional financial rights on the basis of a family court decision (*id.*, at 1).

49 On the status of a joint bank account according to Jewish law, see File No. 989884/1, Rabbinical Court (Haifa) Plonit v. Ploni, 13–14 (Oct. 28, 2014), Nevo Legal Database (Hebrew) (Isr.). In that case the couple requested the court to rule according to Jewish law (rather than according to the Financial Relations between Spouses Law). The court accordingly ruled that a joint bank account, the family apartment, and other assets that are registered in both spouses' name, should be equally divided.

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

assets should not be divided. But this view is not accepted today.[50] Rabbi Uriel Lavi, who is cited above as a supporter of the rejection of the "double deals," follows his extensive discussion of the basis of his view by emphasizing that this is not the case regarding the family apartment. The wife is entitled to half of the family apartment according to Jewish law without the adoption of civil concepts of property sharing, so its division should not affect her right to the *ketubbah* payment. In his words, "This does not refer to property that, by Torah law, belongs to the wife, even without the Financial Relations Law, such as the part registered in her name of the apartment."[51]

It appears that when a financial right is recognized and accepted as part of the classic Jewish law view, it can live happily ever after with the right to the *ketubbah* payment. This is not so, however, when the financial right is imposed by civil law, even if it is then accepted by the rabbinical courts on the basis of the above three constructions.[52] The necessary conclusion is that those rights, although they are provided by rabbinical courts and justified on the basis of Jewish law doctrines, are still considered somehow illegitimate, and therefore, when possible, they are counterbalanced by the cancellation of other, established financial rights, such as the *ketubbah* payment.

Thus, despite the apparent acceptance of the equal property sharing principles, the above practice reflects a reaction to the coercive imposition of civil principles on religious courts. Rabbinical courts were forced to adopt civil financial rights into their rulings and implement them in practice. They did so, and as described above, even found internal Jewish law doctrines to justify this. But since this process was effected mainly by coercion, it is not straightforward.

In theory, rabbinical courts had the option to claim that equal property distribution provides the wife with her own assets (for example, due to the implicit intention of the parties when they wed to co-own the future marital assets).[53] All family assets—not only the family apartment—could be considered shared property. In this case, sharing the property by rabbinical courts would be no more than a declarative decision (sharing what already belongs both to the wife and the husband) and not providing the wife with new financial rights to which she was not entitled *prima facie* according to Jewish law. The *ketubbah* could be considered as providing the wife with *additional* financial resources for certain objectives, and thus it could accord with property sharing.[54] Moreover, if indeed the adoption of equal property sharing by rabbinical courts is based on its being a general custom, it is presumed that the couple agreed to this financial regime. The husband's unilateral obligation to pay the *ketubbah* is thus irrelevant to the property sharing, and accordingly should not be affected by this property sharing. The rabbinical courts, however, choose not to do so. In their opinion, one offsets the other, and therefore the wife is not entitled to both.

50 *Id*., citing (and rejecting) the disputed opinion of Rabbi Avraham Atlas regarding a joint bank account. *See also*, High Rabbinical Court File 993174/8, Plonit v. Ploni (Dec. 1, 2016), Nevo Legal Database (Hebrew) (Isr.). In that exceptional case, the majority opinion determined that an apartment that had been purchased by the wife from money that she had inherited would not be considered in partnership, even though it was registered in both spouses' names. The court recognized in principle the status of the formal registry but excluded the specific case.

51 File No. 593163/2 Rabbinical Court (Tiberias), Plonit v. Ploni, *supra* note 31 at 14.

52 It is obviously necessary to define what is considered as accepted and what not. As mentioned in previous notes, there is not complete consensus on this question. There are, however, dominant views in this matter, mainly regarding the marital apartment (as discussed above).

53 This is the argument of Rabbi Hishrik (*supra* note 45), although he limits this to nonreligious couples. In my opinion, this could be applied to religious couples—most of whom live their marital life in full partnership—on the basis of similar arguments.

54 For example, the *ketubbah* can fulfil the object of replacing maintenance. Toward the end of this article I elaborate on this option of a doctrine that could recognize both civil financial rights and that of *ketubbah*.

The result is fascinating. Rabbinical courts are forced to follow civil law as regards property sharing. They do so—and even integrate it into the Jewish law discourse—but they do not completely internalize property sharing as a legitimate right. Therefore, they view civil financial rights and the *ketubbah* payment as competitive rights rather than supplementary or independent ones, and thus one overrides the other.

THE INDIRECT INFLUENCE OF RELIGIOUS PRINCIPLES ON CIVIL FINANCIAL RIGHTS

The *ketubbah* payment, as analyzed in the previous section, generates an explicit competition between rights based on civil law and those founded in religious law. Sometimes, however, the complex relationships between the two are reflected in a much more indirect way—as an interpretative influence of one on the other; an internal (sometimes silent) influence that enables the application of Jewish law principles. More specifically, rabbinical courts are obliged to provide the couple with civil financial rights and to follow civil concepts of property sharing. Perhaps the implicit expectation of those who formed this demand was that rabbinical decisions would express civil values such as equality and freedom (in their modern sense). The rabbinical courts, however, apply these rights while using a broad and creative interpretation that makes it possible to integrate some religious law principles in the civil decision, sometimes in a quite different manner than expected from a civil perspective. How so?

The Financial Relations between Spouses Law is based on a financial regime of delayed obligatory property sharing. That means that the financial right comes into effect at the time of separation.[55] Initially, the Law ruled that property sharing is to be implemented only at the time of actual divorce. This made the Law ineffective (or, as the Supreme Court defined it, "a dead letter"), since spouses who wanted to delay or prevent property sharing raised difficulties for the divorce proceedings, or sometimes completely refused to divorce. Divorce, it should be recalled, is performed in Israel according to religious law, and the structure of divorce law in Jewish law often enables divorce refusal.[56]

Following the fourth amendment of the Financial Relations between Spouses Law in 2008, property sharing can be executed if there is a permanent marital breakdown, without the need for formal divorce (as had been required before the amendment). According to section 5a of the amended law, property distribution would be executed in one of the following cases: (1) after a year from the submission of a formal suit that initiates procedures of separation (whether a divorce suit or various kinds of property distribution suits); (2) there is a marital breakdown, or nine months of actual separation between the couple.[57] The rationale behind this law is that when there is a permanent breakdown, the spouses no longer participate in a shared financial enterprise and the property is no longer a shared property. It is not, however, merely a purely financial rationale. Rather, the law also aims to assist in solving the problem of divorce refusal which had been encouraged by the previous arrangement (as described above). After the amendment, the law detaches property sharing from the actual divorce (which is performed according to religious law), so its delay will not provide the recalcitrant spouse with any financial benefits. By this, the

55 *See supra* note 2.

56 *See* Joint Civil Appeals 1915/91, 2084/91, and 3208/91, Yakobi v. Yakobi and Knobler v. Knobler, *supra* note 2, at 552.

57 Financial Relations between Spouses Law, §§ 5a(a)(1)–(2). The first part of § (2) mentions marital breakdown, without providing any details. I refer to this point below.

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

law transforms divorce refusal by those who wish to avoid property sharing into a completely ineffective act.

Nonetheless, the court that adjudicates the case (either civil or rabbinical court) is given broad leeway in its considerations.[58] The first part of section (2) mentions "marital breakdown" as a cause for property distribution, but does so without providing any details to what characterizes this "breakdown." The second part of this section, which mentions nine months of separation, uses the word *or*, thereby providing a second option for executing property sharing. If "marital breakdown" is not separation, what does this term mean? It is a fine example of open texture that provides the court with a wide range of options. Even more explicit are the third part of section 5a(a)(2) (whose first and second parts are the marital breakdown and nine months separation mentioned above) and section 5a(b) of that law. According to section (2), the court may shorten the separation period required for proving marital breakdown when there is "a judicial decision that affirms the existence of a breakdown between the couple."[59] Section 5a(b) adds that in certain circumstances, the court may also shorten the other periods suggested by the law. Thus, the court may order the execution of property sharing even less than a year after opening divorce procedures, when, for instance, the other spouse was convicted of domestic violence.[60]

It is important to note that both civil family courts and rabbinical courts commonly interpret the concept of family breakdown as applied retroactively rather than prospectively. Thus, when the court is convinced that there is a permanent marital breakdown, it might indicate a specific time in the past at which the breakdown occurred, and property sharing should be done retroactively, on the basis of the property that existed at that time. This is quite significant, since the financially stronger spouse would be interested in the determining time of breakdown being set as early as possible, and then all assets that were acquired by him or her from that point onward would not be divided.[61]

The key for executing property sharing is therefore marital breakdown. But what can be considered as a breakdown between the couple that justifies property sharing? Since the no-fault revolution, fault considerations are not a necessary cause for divorce, and usually would not affect the property and financial rights of each of the spouses.[62] But rabbinical courts, very creatively, integrate fault considerations in the process of property sharing. They usually do not do so directly by arguing that fault influences property rights, since in financial matters they are under the purview of civil law, and Israeli civil law shares the above no-fault concept of financial rights. They do so indirectly, by using fault as an *indication* of marital breakdown. Let me explore this point a bit further.

According to Jewish law, when the wife commits adultery, she is "forbidden to her husband" (and to the one with whom she committed adultery), the couple must divorce, and she does not

58 The jurisdiction in financial matters is given to civil family courts, unless one of the spouses bound these matters to his or her divorce suit; *see supra* text to note 14.

59 *Id.*, end of § 5a(a)(2).

60 *Id.*, § 5a(b).

61 The verdicts cited below provide examples; *see*, *e.g.*, *infra* note 65.

62 *See* Katz, *supra* note 2, at 94–99. This view was adopted by the Israeli civil courts; *see infra* text to notes 73–75. Although, generally speaking, reducing the place of fault in monetary matters is a global trend, it continues to play a role in some jurisdictions (as regards alimony, and sometimes even regarding property distribution). For the process and its complexity, *see, e.g.*, Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Continues to Matter to (Some) Wronged Spouses*, 66 Washington & Lee Law Review 503 (2009).

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

receive her *ketubbah* payment.[63] Adultery committed by the husband is condemned, but sometimes is more tolerable, especially as regards the lack of a religious demand to divorce.[64] Some rabbinical courts claim that the wife's adultery (even a single time) is an indication of a marital breakdown, and property sharing should be executed on the basis of the assets that existed at that moment (even if the adultery has taken place long before the actual separation).[65] Assuming a traditional family structure, in which most marital property is under the husband's formal ownership and the husband is the main financial resource, the wife would get much less than she would receive had the property been divided later.

This result introduces the concept of fault into property sharing. Rabbinical courts claim, many times probably rightly, that adultery reflects marital breakdown. It is not, however, always a sufficient condition for a marital breakdown, and marriage could possibly be restored after a single instance of an extramarital relationship. This argument can be proved from the rabbinical courts' internal argumentation itself: when it comes to an extramarital relationship on the part of the husband, rabbinical courts are more forgiving. They would not necessarily view this as an irretrievable breakdown of marriage, but would recognize the option of restoring the marriage.[66]

The necessary conclusion is that the issue is not—or not only—the factual marital breakdown, but rather the view regarding the religious fault of adultery. Jewish law considers a wife's adultery to be a cardinal sin, which results directly in the demand for divorce (and, if there are children from the relationship, they might be declared bastards, or *mamzerim*).[67] A husband's adultery, on the other hand, is not on the highest level of the religious-prohibitions scale, and does not necessarily result in divorce. The difference between men and women in this respect has a legal historical explanation. It is a reflection of the history of polygamy: originally, polygamy was permitted by Jewish law, and the husband's marriage, or sexual relationships, with more than one woman were permitted (although not encouraged). A wife's multiple relationships, on the other hand, were strictly prohibited. Since the Ban of Rabbenu Gershom (around the beginning of the second millennium CE), most Jewish communities accepted the prohibition of polygamy, but this did not lead to declaring a husband's out-of-marriage sexual relationships as a sin equal to that of the wife's. Admittedly,

63 *See* MAIMONIDES, MISHNEH TORAH, Ishut (Marital Relations) 24:6.

64 *See infra*, text accompanying note 66.

65 *See, e.g.*, File No. 585140/2 Rabbinical Court (Haifa), *supra* note 40 (establishing the time of the marital breakdown at the beginning of the wife's extramarital intimate relationship); File No. 1059097/4 Rabbinical Court (Haifa), Ploni v. Plonit 4 (Mar. 23, 2016), Nevo Legal Database (Hebrew) (Isr.) (arguing that "the wife's infidelity is opposed to all social norms and to the essence of marriage. Infidelity completely shatters the covenant between the spouses,").

66 *See, e.g.*, High Rabbinical Court File No. 947597/1, Plonit v. Ploni (Oct. 7, 2013), Nevo Legal Database (Hebrew) (Isr.) (accepting the wife's request not to obligate her to divorce despite her husband's adultery).

67 A *mamzer* is prohibited from marrying according to Jewish law (*see* MAIMONIDES, MISHNEH TORAH, Ishut (Marital Relations) 1:7). I have used here nondecisive language ("might be declared") since rabbinical courts usually refrain from declaring one a *mamzer* due to the harsh results of this declaration. They would prefer to use a fictional legal presumption in order to attribute the child to the wife's husband, rather than to his or her biological father, thereby precluding the need to declare him or her a *mamzer*. *See* Michael Wigoda, *Examination of Suspicions Concerning Proper Lineage in the Rabbinical Courts* (opinion submitted to High Rabbinical Court, Jul. 7, 2003) (Hebrew) (accessible at http://www.daat.ac.il/mishpat-ivri/havat/45-2.htm). The legal option, however, that the child from that relationship should be declared a *mamzer* (even if such a declaration is usually not actually issued) evinces the severe attitude of Jewish law toward adultery on the part of the wife.

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

upon the wife's demand, it can be considered as a sufficient ground for divorce (and may also have some effect on property distribution),[68] but not one as severe as adultery by the wife.[69]

Adultery is therefore, for the most part, a religious fault and not necessarily an indication of marital breakdown. The rabbinical courts, however, present this as an indication of the law's civil conception of marital breakdown, which, as mentioned above, directly influences the couple's property sharing. Integrating the religious concept of fault is not done in these cases explicitly, since the discourse is a civil one and the principles are civil principles, but the result is that the rabbinical courts' view of fault influences civil property rights.

Sometimes the traditional religious concepts of fault are entered into civil law in an even more explicit way (although, still, while using interpretative tools)—and therefore with less success. According to section 8 of the Financial Relations between Spouses Law, the court can deviate from equal property sharing if there are "special circumstances." The deviation from equal property sharing may be done by (1) not including some assets in the division, (2) division into unequal parts, (3) determining the value of the property on the basis of its evaluation at a time earlier than the actual property sharing, or (4) determining the scope of the divided property on the basis of the couple's assets at an earlier time (so that, for instance, if the husband sold an asset before the separation, it would still be considered shared property, and he would have to compensate his spouse for half of its value).[70] The purpose of this law is to support the weaker spouse when the gaps between them are significantly deep, and equal sharing will produce injustice. For example, the law states that human capital can be part of the "special considerations" for deviation from equal division. Thus, if the husband gained high professional status and has the potential to further develop his career, while the wife did not develop hers, she might be compensated by getting more than half of the property (while the husband will bridge the gap with his human capital).[71]

Not surprisingly, some rabbinical courts found section 8 to be fertile ground for incorporating concepts of fault. Some claimed that adultery can be part of section 8's special considerations, and in those cases the spouse at fault would receive less than 50 percent of the property.[72] Thus, by viewing adultery as a legitimate consideration for applying section 8, the fault consideration could influence property sharing more directly than as an indication of marital breakdown.

68 *See, e.g.*, the interesting case of File No. 480172/6 Rabbinical Court (Haifa), Ploni v. Plonit 4 (Mar. 9, 2017), Nevo Legal Database (Hebrew) (Isr.). In that case, the couple had a prenuptial agreement in which they agreed that the property would be divided according to Jewish law. The court, however, found some flaws in the agreement and therefore provided the wife with full financial rights according to the Financial Relations between Spouses Law (the right for the *ketubbah* payment was offset with the other rights, but she still received much more than she would have if the prenuptial agreement had been declared valid; *id.*, at 14, 17–18). In my analysis of this verdict, the court's view that divorce was the husband's fault in having extramarital sexual relationships (*id.*, at 12) is at the basis of the invalidation of the prenuptial agreement (on the basis of flaws which, in my view, could be resolved relatively easily). The indirect influence of fault in this case is astonishing: it leads the court to invalidate an agreement which could make possible the application of religious law, and apply instead civil law's rival financial regime.

69 *See, e.g.*, such ambivalence in File No. 862728/1 Rabbinical Court (Netanya), Plonit v. Ploni, 6–9 (Jan. 28, 2015), Nevo Legal Database (Hebrew) (Isr.); Ruth Halperin-Kaddari, *Husband's Adultery as a Ground for Divorce*, 7 Mehkarei Mishpat, Bar-Ilan Law Studies 297 (1989) (Hebrew); Eliav Shochetman, *Adultery and Living with a Cohabitant—A Ground for Coerced Divorce?*, 1 Family in Law Review 259 (2007) (Hebrew).

70 *See* Financial Relations between Spouses Law, § 8.

71 *Id.*, § 8(2). This means that human capital is not considered as property to be valuated and divided, but rather as an additional consideration that can influence the property distribution at the court's discretion.

72 *See, e.g.*, File No. 1059097/4 Rabbinical Court (Haifa), Ploni v. Plonit 4, *supra* note 65.

This step is much easier from an interpretative perspective, since "special circumstances" is a very vogue concept, which depends almost entirely on (subjective) interpretation. The use of section 8, however, is very patent, much more explicit than the other, and therefore the fault-based motivation of rabbinical courts in using section 8 was quite easily revealed by the High Court of Justice—and rejected. The Israeli Supreme Court denied the applicability of fault considerations in determining civil financial rights already in 1978,[73] and in 2008 (sitting as the High Court of Justice) ruled that, on this basis, adultery cannot be considered as "special circumstances" for applying section 8. According to the High Court of Justice, "section 8 allows for greater flexibility which enables the court to balance the assets between the parties in a fair manner, according to financial and other considerations."[74] Nonetheless, it does not include adultery, since "a person is not to be punished for his part in the breakdown of the relationship by means of economic sanctions, within the framework of the division of property between the spouses."[75]

Thus, following the position of the High Court of Justice, section 8 can no longer be a basis for using fault considerations in financial decisions. Indirectly, however, rabbinical courts continue to take into account fault considerations in financial decisions by viewing them as an indication of marital breakdown, as described above. Fault as an indication of marital breakdown is a much more sophisticated way to integrate fault considerations into property sharing as compared to the use of section 8, and therefore much harder to be uncovered. The result is that fault-based considerations continue to play a role, even if only through the backdoor, in rabbinical court decisions on civil financial matters.

In conclusion, the relationships between religious and civil law discussed here are quite complex. On the one hand, we witness a fascinating process of assimilation: despite significant gaps in handling financial matters, rabbinical courts adopt almost completely the basic civil attitude of equal property sharing. On the other hand, rabbinical courts find ways to give expression within this regime to concepts of fault, including faults that influence the property sharing, although fault's influence on property sharing is not accepted today from a civil perspective.

The result is quite complex, since it includes two contradictory actions at the same time: accepting civil law and rejecting it. This is due, in my opinion, to the unilateral imposition of the modern civil financial regime on the rabbinical courts. Its assimilation within the rabbinical courts' adjudication is astonishing, but it is not an organic part of their doctrine, and therefore, when possible, concepts of fault influence the rabbinical courts' decisions.

73 *See* CA 264/77, Dror v. Dror 32(1) PD 829, 832 (1978) (Hebrew) (Isr.). *See also* CA 384/88, Ziserman v. Ziserman 43(3) PD 205 (1989) (Hebrew) (Isr.) (discussing the husband's rights in an apartment which his wife inherited and had given him half as a present). The Supreme Court ruled that fault considerations (the husband's adultery) do not affect property rights, and therefore the husband should not be stripped of his rights. The Supreme Court explicitly distanced itself from the opposite decision, which (according to the petitioner) would have been taken had the court followed Jewish law.

74 HCJ 8928/06, Plonit v. High Rabbinical Court 63(1) 271, 279 (2008) (Hebrew) (Isr.).

75 *Id.*, at 283. Interestingly, Justice Rivlin (from whom the last citation is taken) hints in an obiter dictum to the deep ideological gap between the High Court of Justice and the rabbinical view. Rabbinical courts view adultery as a cardinal sin, while according to Rivlin, "infidelity by itself does not make one of the spouses the sole guilty party" (*id.*). Cf. Family Appeal Request 7272/10, Plonit v. Ploni (Jan. 7, 2014), Nevo Legal Database (Hebrew) (Isr.). In this very exceptional case, the Supreme Court used section 8 to deny the husband's right to half of his ex-wife's pension, due to his attempt to murder her.

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

WHAT SHOULD BE THE RELATIONSHIP BETWEEN RELIGIOUS AND CIVIL LAW IN FINANCIAL MATTERS? AN INTEGRATED NORMATIVE SUGGESTION

Following my conclusion in the previous section, and on the basis of our analysis of the different natures of the financial elements of the divorce process, I would like to suggest a framework which might moderate this anomaly. The framework is based on the *ketubbah* payment, and it has some support from recent writings in rabbinical courts, as follows.

The *ketubbah* payment is an obligation of the husband to his wife. It has several objectives, including protecting the wife from unilateral divorce (when this was possible according to Jewish law, before the Ban of Rabbenu Gershom) and providing her with financial resources that would enable her to continue her life after divorce.[76] The *ketubbah* payment, however, is subject to fault considerations, and when there is a recognized fault (mainly those of a sexual nature), the wife's entitlement is negated.[77] Today, many of the aims of the *ketubbah* are no longer relevant. The husband cannot divorce his wife without her consent (with only very rare exceptions, and subject to the approval of a rabbinical court), and the concept of equal property sharing can provide her with financial resources for continuing her life after divorce.

But this is not always so. At times there is a significant financial gap between the husband and the wife (usually in favor of the husband), and the wife lacks sufficient qualifications for continuing her life at a standard of living similar to what she was accustomed while still a couple (when she was "investing" her efforts in the family assets). In those cases, there are few alternatives for supporting the financially weaker spouse and preserving her interests. First, the property can be distributed in an unequal way on the basis of section 8 of the Financial Relations between Spouses Law. This may include the nonequal distribution of the property or the inclusion of other elements in calculating the distributed assets, for example, human capital.[78] Second, the court might order rehabilitating maintenance for a certain period in favor of the wife. This is a civil route, since according to Jewish law the wife's right to maintenance ceases when the couple divorces. Yet, in the Israeli context, although maintenance is considered a matter of personal status, and therefore is adjudicated according to religious law, in recent years civil courts have been willing to impose civil rehabilitating maintenance on the husband when necessary.[79] Religious courts, however, have their own possible route—the third one: the *ketubbah* payment. When the gap between the husband and the wife is significant, and there is a reasonable fear that equal sharing of the property

76 The main object is to protect the wife from unilateral divorce. *See* BABYLONIAN TALMUD, Ketubbot 82b; MAIMONIDES, MISHNEH TORAH, Ishut (Marital Relations) 16:10. The *ketubbah*, however, has additional objectives (including financial support). For a review of the purposes of the *ketubbah* and their practical implications, *see, e.g.*, File No. 575141/19 Rabbinical Court (Haifa), *supra* note 40; and see the discussion *supra*, text accompanying note 37–40.

77 *See* BABYLONIAN TALMUD, Ketubbot 101a: "women concerning whom the Sages have ruled, 'They are not entitled to [i.e., may be divorced without receiving their] *ketubbah*,' as, for instance, [a wife who] transgresses the [Mosaic] law, and others enumerated in the same context, are not entitled to [their *ketubbah*]."

78 *See* Financial Relations between Spouses Law, § 8, and *supra* text to note 70–71. When the "special circumstances" for applying the exception to equal sharing is the wife's financial inability to continue her life properly, it is plausible that this exception would be accepted by both civil and religious courts.

79 The Israel Supreme Court acknowledged in principle this right (even when there is no right for maintenance according to religious law); *see* Family Appeal Request 3151/14, Plonit v. Ploni (Nov. 5, 2015) (accessible at http://elyon1.court.gov.il/files/14/510/031/a08/14031510.a08.htm) (Hebrew) (Isr.), §§ 46–55 (Barak-Erez); §§ 12–15 (Rubinstein). This approach was applied in practice by family courts. *See, e.g.*, Family Court File (Tel Aviv) 39614-12-14, A.N. v. 'A.N. (Jan. 23, 2017), Nevo Legal Database (Hebrew) (Isr.).

will not suffice for the wife's financial needs, religious courts might adhere to one of the rationales of the *ketubbah*: providing the wife with financial resources for a limited time.[80]

If we take this rationale seriously, in this kind of case there should be no competition between the *ketubbah* and property sharing. Quite the opposite: the *ketubbah* here supplements equal property sharing. Needless to say, in this case no offsetting of the *ketubbah* payment is required. In this respect, *understanding the different objectives of the two financial tools, the ketubbah and civil property sharing, may lead to legitimizing their coexistence*, while one adds elements needed to complement the other.

Rabbi Shlomo Dichovski, a former High Rabbinical Court judge, seems to accept the approach suggested here. When he explains his view, that a *ketubbah* which obligates the husband for an unrealistic, symbolic amount (e.g., NIS 1,000,000) should be set to a reasonable amount of NIS 120,000, he writes:

> It is known to all that the property of the parties is divided equally in accordance with the Financial Relations between Spouses Law, or in accordance with the Sharing Presumption [...] The division of property also includes future rights, such as social rights and pension rights, as well as the professional reputation that a person gained during his marriage. It could hardly be assumed that a reasonable groom would agree to a double or triple blow, to both divide his assets in accordance with civil law and the decision of the civil courts, and to pay the *ketubbah* to an enormous sum.[81]

Accordingly, if the *ketubbah* amount is reasonable, which, according to Rabbi Dichovski, is an amount that suffices to cover living expenses of one year, it is possible to impose a *ketubbah* obligation *together* with full civil property sharing (which may include pension, human capital, and more). It is not explicit in his opinion, and even less accepted in today's rabbinical courts (as discussed in the preceding section), but in my opinion it has great potential for legitimizing the coexistence of religious and civil financial rights from both religious and civil perspectives.[82]

---

80 *See supra* text to note 39–40. The Israel (civil) Supreme Court recognized this rationale of the *ketubbah* as an alternative to rehabilitative maintenance. *See* Family Appeal Request 3151/14, *supra* note 79, § 50 (Barak-Erez). Another possible route is divorce compensation that is given to the wife in addition to the *ketubbah*, a route which is less practiced today. Here as well, the rabbinical courts usually offset it against payments received according to civil law. *See* (including references to early sources of this custom and its offsetting against civil payments) File No. 68607/6 Rabbinical Court (Ashkelon), Plonit v. Ploni[t] (July. 12, 2017), Nevo Legal Database (Hebrew) (Isr.).

81 High Rabbinical Court File No. 1687/24/1, Ploni v. Plonit, *supra* note 39, at 3. *See also supra* text accompanying note 39–40, regarding the object of the *ketubbah* as maintenance, that serves as a basis for this decision. Limiting the amount of a *ketubbah* (when the amount is symbolic and unrealistic) is not rare. In fact, the Israeli rabbinical system directs the rabbis who perform marriages not to exceed a certain amount in the *ketubbah* (NIS 1,000,000) that is deemed unrealistic. *See* CHIEF RABBINATE OF ISRAEL, REGULATIONS AND DIRECTIVES FOR MARRIAGE REGISTRATION 29 § 48.6 (2012) (Hebrew). Rabbinical courts, when dealing with an unrealistic *ketubbah*, very frequently reduce it to a more reasonable amount, as in the case discussed here. Rabbi Dichovski's approach regarding reducing the *ketubbah* obligation to a reasonable amount (*id.*) was cited later in several other decisions, and it seems to be widely accepted. For a review of rabbinical court decisions on this matter (including some that object to this approach and impose a *ketubbah* obligation as written), see File No. 83475/4 Rabbinical Court (Beer Sheva), Plonit v. Ploni, 5–6 (Oct. 10, 2016), Nevo Legal Database (Hebrew) (Isr.).

82 The court in File 585140/2, *supra* note 40, does not accept this approach. Although it recognizes the rehabilitating objective of the *ketubbah* payment, it subjects it to the civil property sharing, and if the wife were to receive extra civil rights, the *ketubbah* payment might be offset. Rabbi Dichovski, however, might agree with the approach suggested here, as reflected in his decision.

The possible supplementary use of the *ketubbah* payment may even be taken a step further, in a bit more complicated way. This step recognizes in a very moderate way a traditional concept of fault which might be used by religious courts, but here as well, as a tool supplementary to civil equal property sharing. It might not be easily accepted from a liberal civil perspective, but in my opinion should be considered as a possible way of reconciling the two competing worlds: religious and civil, and as a possible reflection of a legitimate legal pluralism.[83] If accepted, it should be emphasized that its use must be done carefully, with continuing attention to prevent a "slippery slope."

A moderate and limited *ketubbah* payment[84] might be used to reflect the classic Jewish law approach toward fault, which sees it as a significant parameter in the divorce process, but with limitations. The influence of fault would be limited to some financial aspects of the divorce, while other important divorce aspects would continue to be adjudicated according to no-fault principles. Thus, the basic right to divorce and the concept of equal property sharing would be adjudicated according to civil law principles (and both can be accepted by Jewish law, as described below), while the *ketubbah* payment would reflect the response of the rabbinical court to the element of fault (when relevant).

Despite the apparent complexity of this idea, its application is quite simple. Rabbinical courts would acknowledge the right of a couple to divorce in a marital breakdown, together with full equal property sharing. Yet they could use the *ketubbah* payment as a reflection of the concept of fault, either by obliging the husband to pay a moderate *ketubbah* payment to his wife (when divorce is the husband's fault) or by exempting the husband from any additional payments mandated by Jewish law (when divorce is the wife's fault).

In this respect, it should be noted that this construction may be applied not only in the Israeli context but also in other Western countries, such as the United States and Canada, by recognizing the *ketubbah* financial obligation as a binding agreement. The *ketubbah* obligation might be executed on the basis of the limited fault considerations described above, alongside the civil procedures of (no-fault) divorce.

In the Israeli legal context, this construction is not merely theoretical. Rather, first steps toward this approach are already being taken in some Israeli rabbinical courts. This is being done in two stages: first, by acknowledging a moderate right to no-fault divorce (when there is an irretrievable marital breakdown), and second, by providing the *ketubbah* payment with a role in this kind of divorce. In recent years, a growing number of rabbinical courts have recognized a moderate concept of no-fault divorce, and when there is an irretrievable breakdown of marriage, they have obligated the recalcitrant spouses to divorce.[85] When fault considerations are completely disregarded, divorce

83 In the terminology of Hirschl and Shachar, this proposal reflects a move from a "non-state law as competition" conflict (that presumably stands behind the contradictory process of assimilation and rejection, described in this article) to a "diversity as inclusion" model, that enables various legal systems to coexist. *See* Ran Hirschl and Ayelet Shachar, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 CARDOZO LAW REVIEW 2535 (2009), and *see also supra* note 1.

84 Imposing a limitation on the *ketubbah* amount is fundamentally accepted. *See supra* note 81.

85 *See* Avishalom Westreich, *The Right to Divorce in Jewish Law: Between Politics and Ideology*, 1 INTERNATIONAL JOURNAL OF THE JURISPRUDENCE OF THE FAMILY 177 (2010). Unfortunately, there are no data regarding the measure of acceptance of this approach by the rabbinical courts (since many rabbinical verdicts are not published). My impression, however, on the basis of reading dozens of verdicts, is that it is quite common today. This impression is shared by rabbinical judges themselves. See the poetic description of the acceptance of this approach by the Haifa Regional Rabbinical Court judge, Rabbi Avraham Meir Chelouche, File No. 1061137/1 Rabbinical Court (Haifa), Plonit v. Ploni (Dec. 6, 2016), Nevo Legal Database (Hebrew) (Isr.), at 30: "We know the

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

should be executed together with equal property sharing, and no additional elements are required (unless the wife needs rehabilitating maintenance, as discussed above). The *ketubbah* payment, however, gives rabbinical courts room to deviate from the pure no-fault divorce regime, without (in my opinion) violating its essence. Accordingly, when divorce is one spouse's fault (even if not "fault" in its classic meaning—usually adultery and the like—but rather responsibility for the marital breakdown), although the other spouse is obligated to divorce, the *ketubbah* payment comes into effect. In this case, it can be (and in some cases already is) used in order to compensate the wife (by the *ketubbah* payment) or the husband (by exemption from the payment) for the divorce. The spouse that is responsible for the marital breakdown has the right to divorce, but still needs to compensate his or her spouse.

The use of the *ketubbah* for this aim is practiced in some courts.[86] I propose broadening this practice and making it a supplementary element to full equal property sharing. The *ketubbah* payment should, accordingly, not be influenced by civil property sharing. According to the proposed framework, these are not two competitive rights, but rather two supplementary tools that give expression to two different purposes. Thus, according to this construction, the rabbinical courts would, on the one hand, accept the civil financial regime (on the basis of their own internal constructions), and, on the other, apply the Jewish law *ketubbah* regime, not as a substitute, but rather in order to reflect their view on fault in divorce. The first part of this construction is becoming more common today. The second part—the *ketubbah* as a supplementary element to equal property sharing—has yet to enter judicial practice. We have, however, some indicators of its potential, as in an obiter dictum of the High Rabbinical Court Judge Rabbi Zion Luz, in a footnote of a decision that discusses the *ketubbah* payment. Rabbi Luz writes as follows:

> It should be stated, as an aside to this decision, that although, within the framework of this appeal, we were not required to discuss the question of 'double rights,' in our opinion, the question cannot relate to the entire sum of the *ketubbah*. The element of the *ketubbah* that comprises a fine, which the husband fines himself if he divorces her, and which is meant to ensure and expand the original rationale of the *ketubbah*, 'that the man might not find it easy to divorce her'—*this component does not pertain to the rights which a woman receives in the framework of property sharing*, which are coming to her and are not a fine. Consequently, they are also mutual. Obviously, the question that arises is what part is the fine and what is parallel to the receipt of rights, but this is not the place to discuss this.[87]

Acknowledging this construction as a compromise between the two competitive, sometimes contradictory, worldviews would enable them to coexist. It would accept the practice of no-fault divorce due to marital breakdown and equal property sharing on the basis of the widely accepted civil principles, but with a moderate traditional *ketubbah* payment at the discretion of the rabbinical court. In this way, rabbinical courts would not—and should not—have to artificially incorporate fault considerations in civil financial sharing. Rather, these two different value-based frameworks would be able to coexist.

---

words of our master, R. Jerocham [one of the most important classic Jewish law sources that supports no-fault divorce], as well as the practice of the courts that we have heard and known; this has also been practiced in rabbinical [court] decisions . . . the further the hand reaches to search, the more an abundance of decisions such as this will be found on this question."

86 *See, e.g.*, High Rabbinical Court File No. 1053135/3, Ploni v. Plonit (Oct. 27, 2016), Nevo Legal Database (Hebrew) (Isr.); High Rabbinical Court File No. 1098277/1, Ploni v. Plonit (Feb. 14, 2017), Nevo Legal Database (Hebrew) (Isr.) (see esp. the view of Rabbi Shlomo Shapira, *id.* at 5–7).

87 High Rabbinical Court File 1075070/1, *supra* note 48, at 7 note 5 (emphasis added).

https://doi.org/10.1017/jlr.2019.1 Published online by Cambridge University Press

To summarize, in the proposed construction (which has begun to be adopted by some Israeli rabbinical courts), civil financial rights should not be harmed by fault considerations, not even indirectly, as opposed to what seems to be practiced by some rabbinical courts today. The *ketubbah*, nevertheless, would be the means by which the rabbinical court would apply the Jewish law view on the influence of fault or responsibility (that is, not necessarily the classic sense of fault) in marriage cases, but moderately and with certain limitations. That is, the rabbinical courts would have the authority to decide whether the divorce resulted from one spouse's fault. If the husband were to be found at fault, he would have to pay the *ketubbah* payment, and thereby give expression to this classic Jewish tradition. If the wife is at fault, the husband would be exempt from this payment, thus reflecting her responsibility for the divorce from a Jewish law perspective.

EPILOGUE: THOUGHTS ON POSSIBLE EXPANSION OF THE NORMATIVE CONSTRUCTION

Jewish law is dynamic, as is civil law, although Jewish law usually changes through an interpretive process rather than by legislation. In the property sharing debate, the rabbinical courts were forced to adopt what seemed to be correct and just according to liberal considerations of women's freedom and equality, and they did so using their internal doctrines. Nonetheless, the coercive aspect, in my analysis, led to anomalies in the application of the equal property sharing regime, so, together with the integration of civil law into Jewish law, we can identify an opposite process, of integrating Jewish law's classic views into this civil legal regime.

Jewish law and the civil, liberal legal systems are in collision on quite a few issues, similar to common conflicts between (more traditionally oriented) religion and state law in general. This is so, for example, as regards same-sex marriage: the former sees same-sex marriage as religiously forbidden, while the latter accepts it on the basis of the principles of freedom, equality, and human dignity (mainly following the *Obergefell* decision, in which the American Supreme Court ruled that same-sex couples have a constitutional right to marry throughout the United States).[88] On the basis of my findings, can faith-based worldviews and civil law be reconciled?

I—very cautiously—suggest that property sharing can serve as a test case for the accommodative potential of religious worldviews in general. Comparing different religious (or faith-based) worldviews must, of course, be done with a great degree of care, due to the deep differences between religious systems. Moreover, even within a single such system, comparing different arenas is no less difficult—for example, when trying to draw analogies between the property sharing debate and issues of marriage and divorce (like same-sex marriage), which usually have a very high normative status in faith-based systems, whether Jewish or others. This said and done, the current analysis can teach of the potential for using a religious system's internal doctrines in order to reconcile with (at least parts of) a civil legal system, but the degree of its effectiveness depends on the degree of cooperation between the systems. This might be made, for instance, by the recognition by religious systems of same-sex marriage as a legitimate social practice, on the one hand,[89] and, on the other, by leaving room for the religious system to retain its own beliefs and understandings of marital life. That is, for example, when religious agents who refuse to take an active part in the recognition

88 Obergefell v. Hodges, 135 S. Ct. 2584, 2625–26 (2015).

89 *See* Avishalom Westreich, *An International Perspective on Same-Sex Marriage Post Obergefell (and Some Thoughts on Legal Positivism as a Means of Reconciliation): The Israeli Case*, 30 Brigham Young University Journal of Public Law 303, 319–23 (2015).

of alternative (although socially legitimate) family practices are not coerced to do so, or in general, by not forcing faith-based institutions to act—internally—in a way contrary to their own beliefs.[90] This kind of process might be done in a coercive way, but, as I show regarding property sharing in Jewish law, a better result could be achieved if the process is effected consensually, with mutual recognition of different worldviews.

ACKNOWLEDGMENTS

I am grateful to the Shalom Hartman Institute and the Hadassah-Brandeis Institute for supporting this research; to the participants of the "Restoring Religious Freedom Conference: Law, Religion, Equality, and Dignity" at the Center for the Study of Law and Religion, Emory Law School (November 6–7, 2016); the participants of the 2017 Family Law Workshop, Hebrew University of Jerusalem (April 26, 2017); the participants of the 2017 Israeli Association for Private Law Annual Conference, College of Law and Business, Ramat Gan (June 15, 2017); the participants of the 2018 Faculty Seminar, IDC Herzliya (April 24, 2018); and to the editors and the anonymous reviewers of the Journal of Law and Religion *for their helpful comments and suggestions. Special thanks to Edward Levin for excellent linguistic editing and assistance in translation of Hebrew sources.*

90 *E.g.*, this understanding might affect the approach toward the present-day debate as to whether religious institutions should be exempted from the prohibition of discrimination of transgender people through "gender-segregated restrooms." *See* Robin Fretwell Willson, *The Nonsense about Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 Lewis & Clark Law Review 1373, 1410–14 (2017) ("[I]t is possible to allow businesses to open restrooms and other facilities to transgender persons in a way that ensures the safety, dignity, and privacy of all their patrons. This is possible without sacrificing the discretion of religious groups to determine questions of sexuality important to their faith communities.").