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Achieving Equality without a Constitution: Lessons from Israel for Queer Family Law

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Introduction

In recent decades, it has seemed as though queer people and women's rights advocates were making progress in the culture war over the family. From 2001 and 2021, thirty-one countries legalized marriage for same-sex couples.[1] Majorities in the United States and European Union countries came to support same-sex marriage and other fundamental rights for LGBTQ+ families.[2] Although some variation remains, divorce is now relatively easy to attain in most Western nations around the world.[3] Parentage and custody rights for same-sex couples are increasingly the norm in Western democracies.[4]

Yet, despite this growing support for pluralistic family forms, divisions remain, and, in many countries, legal victories for religious conservatives threaten to scale back progress for women and sexual minorities. For example, in 2018, the United States Supreme Court decided *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[5] in favor of a baker who refused service to a same-sex couple because of the baker's religious beliefs. In the past seven years, three politically motivated lawsuits challenging the Affordable Care Act's contraception mandate[6] on religious and moral grounds landed in the Supreme Court.[7] In 2021, the Court sided with a Catholic adoption agency that refused to work with LGBTQ couples.[8] Women's and girls' right to terminate a pregnancy, even before viability and even in cases of rape or incest, is in peril, with the Supreme

Court deciding to sit by and watch for months as Texas, the country's second-largest state, passed a law criminalizing abortion and effectively rendering *Roe v. Wade* a dead letter.[9] With a new supermajority on the Supreme Court since 2020, social conservatives in the United States have pressed forward with a sweeping set of religious exemptions from public services and nondiscrimination laws that threaten to turn respect for group differences into a license to discriminate.[10] And these recent attacks go well beyond the conservatives' bread and butter issues of abortion and "the family"—as evidenced by pandemic-era religious freedom challenges to even basic public health measures such as mask mandates, immunizations, and restrictions on large gatherings.[11] That is, despite increased acceptance of pluralistic family forms, it seems that the United States is suddenly awash in a tide of religiosity. Against this backdrop, the question posed by this volume about the possibility of religious and secular alliances to recognize diverse family forms seems more pressing than ever.

This chapter will use the country of Israel as a window into this issue. While Israel may at first blush appear to be the last place that feminists and queer theorists should look for solutions to modern conflicts between democratic and religious values, this chapter argues that the Israeli experience has much to offer critical family scholars working to develop pluralistic legal approaches to family regulation. Israel is a country with a diverse population and unique political and legal context that has generated a rich (if imperfect) set of compromises among its religious, secular, and ethnic populations in the realm of family law. These solutions have emerged despite —or perhaps because of—Israel's lack of a written constitution guaranteeing its citizens a basic right to equality. Moreover, women's and gay rights activism are highly developed in Israel. As such, Israel serves as a potentially generative case study to examine the possibility of developing

pluralistic legal responses to family regulation, particularly in contexts without robust, universal, constitutional protections for women and LGBTQ citizens, a circumstance that the United States seems to be approaching.

At the most immediate level, then, this chapter examines the legal structure of Israel's system of personal status[12] (family) law, the conflicts between religious and secular approaches to family law that have emerged, and how they have been resolved in practice. The primary example that will be examined is Israeli divorce law. The task confronting Israel on the issue of divorce is formidable, since Israel did not adopt a written constitution upon its founding and maintains the rule of religious legal control over marriage and divorce.[13] That is, at least formally, there is no separation of church and state in Israel on matters of family law, particularly marriage and divorce. Nor is there a robust constitutional right to equality.[14] Because of this unique legal context, the development of marriage equality for same-sex couples and no-fault divorce—two core features of modern family law regimes in most Western states—have not emerged in Israel.

Yet, in the face of legal and political constraints presented by Israel's constitutional context, the country has developed several legal workarounds and creative responses to religious authorities' control over marriage and divorce that are consistent with secular principles of equality and freedom. Moreover, at times, religious courts and law have been a source of liberalization of family law in Israel. Taken together, these secular and religious legal innovations have produced a fair degree of autonomy, choice, and legal recognition for those choosing to live outside the traditional marital family, at least more than one would expect given religious control of marriage and divorce in Israel. It is this legal pluralism, suppleness, and flexibility in Israeli family law that is my main

focus in this chapter. My claim is that an examination of Israeli family law may reveal matters of enduring theoretical and practical significance regarding potential pluralistic legal approaches to the family.

I begin by focusing on recent developments in the religious law of divorce in Israel, starting with an explanation of Israel's personal status system and the Jewish and Sharī'a laws on divorce. After mapping the basics of personal status law, I examine a recent decision by a private rabbinical court to grant an annulment to a woman trapped in a dangerous marriage because her abusive husband of twenty years refused to grant a divorce, as well as a recent change in position of the Sharī'a Court in Israel paving the way for the appointment of the first female *qadi* or judge. The chapter concludes with a broader consideration of the implications of the Israeli experience for the United States. In particular, I suggest that the Israeli experience helps to illuminate conditions that may incentivize cooperation between religious and queer/feminist/secular communities around issues of family diversity absent strong constitutional protections for family equality. It also suggests how American reformers might facilitate greater legal pluralism to address queer families' legal needs through private dispute resolution or other mechanisms that are less dependent on the state for their validity and enforcement than constitutional rights litigation.

Israeli Personal Status Law

Israel is a small country that maintains a system of personal status that it inherited from the Ottomans and the British.[15] Like the law of other countries that inherited plural personal status systems from their imperial or colonial predecessors,[16] Israeli law imposes certain restrictions and disabilities on women, LGBTQ+ individuals, and non-religious people in matters of marriage and

divorce. For example, Jewish divorce law in Israel adopts sex-based rules that limit women's exit from marriage and empowers men to extract financial compromises in divorce. Many categories of citizens may not legally marry in Israel, including same-sex couples. Others are effectively prevented from marrying because the country's personal status laws apply differently to each officially recognized religious group; for example, interreligious marriages are practically impossible in Israel.[17] A multitude of humanitarian harms and logistical complications[18] result from this system.[19]

These humanitarian violations are rooted in Israel's special form of legal pluralism characterized by the jurisdictional split between religious and civil courts on matters of personal status. In this system, state-sanctioned[20] religious courts have exclusive jurisdiction in matters of marriage and divorce. All other ancillary matters related to divorce disputes, such as child custody, child support, spousal support, and property claims, fall under the concurrent jurisdiction of both the civil and religious courts.[21] This jurisdictional split means that all Jews in Israel, whether religious or secular, can be divorced only in the rabbinical courts, which apply religious law. Along the same lines, all Muslims in Israel, whether religious or secular, can be divorced only in Sharī'a (Islamic) courts, which apply Sharī'a law. Christians have their own courts as well, and so on. Religious tribunals apply religious rules of procedure and evidence and generally ignore substantive civil law, despite efforts of the Supreme Court at various points in Israel's history to direct religious courts to bring religious legal doctrines more in line with principles of civil law.[22]

Women Under Israeli Personal Status Law

Because religious courts in Israel follow traditional, patriarchal, and heterosexist norms, and, like most religious institutions, have as one of their principal aims the control of women by men,[23] the law of marriage and divorce in Israel rests on a system of explicit sex-based classifications holding men and women to different and unequal legal standards. As Israeli family law expert Zvi Triger explains, "all Israeli family laws discriminate against women."[24]

A central component of Jewish law is the doctrine that a woman may not obtain a divorce without her husband's permission. This is accomplished when the husband gives the wife a *get* or Jewish divorce decree.[25] With few exceptions,[26] a husband's power to refuse a divorce is retained even if the wife can prove egregious fault grounds such as domestic violence.[27] A woman whose husband refuses a divorce is known as an *agunah*, which in Hebrew means a "chained woman."[28]

The potential consequences for married women under this sex-based system are grave. Until a consensual transfer of a *get* from the husband to the wife and her consensual receipt of it take place, the marriage is not dissolved, and the wife cannot remarry under Jewish law.[29] If she cohabits with another person or obtains a civil divorce in another country and thereupon remarries, there are harsh legal, economic, and religious consequences for both her and any children born outside of the marriage.[30] These consequences serve as a strong deterrent to forming new relationships and to seeking a divorce in the first instance and have no equal with regard to men. Due to the power imbalance created by Jewish divorce law, blackmail and extortion are a routine part of divorce negotiations in Israel.[31] The problem of the *agunah* in Israel is not simply one experienced by Orthodox Jewish women; even secular Jewish couples who marry civilly outside

of Israel will find themselves stuck in this Kafkaesque system in the event of divorce if they register their marriages in the country.[32]

Palestinian Muslim women are in an even worse position than Jewish women under Israel's religiously-dominated family law system.[33] They face double discrimination, first as women living in a traditional, patriarchal culture, and second, as religious and ethnic minorities in a Jewish state.[34] Sharī'a courts have exclusive jurisdiction over marriage and divorce for Muslim citizens of Israel,[35] just as rabbinical courts hold exclusive jurisdiction over marriage and divorce for Jewish Israelis.[36] In 2001, a jurisdictional reform of the Sharī'a courts granted civil family law courts concurrent jurisdiction in matters of paternity, spousal, and child support, thereby, in theory, providing Muslim women with a civil avenue to adjudicate at least some legal issues in their divorces.[37] However, this has not improved the situation for Muslim women as much as concurrent jurisdiction has benefitted Jewish women. Religious, social, linguistic, cultural, and national inhibitions continue to impede access to civil family courts, especially when there is an option to litigate a divorce in a Sharī'a court, which is likely to be more familiar, comfortable, and congenial for Palestinian Israelis.[38]

Like Jewish personal status law, Sharī'a law elevates the husband's position over the wife's in divorce. A wife may obtain a divorce only through a judicial decree, and only if her marriage contract provides for this option, and, in any event, only on limited grounds, such as his failure to support her or the husband's marriage to another woman.[39] And to achieve even this, she must typically withstand a long and burdensome fault-based divorce process, one which involves

placing the marital relationship under a microscope by the court and a council of lay arbitrators selected from the couples' families.[40]

Religious control over marriage and divorce in Israel emerged out of Israel's unique post-colonial history. And it has persisted due to Israel's unique geopolitical circumstances, as if frozen in time, for more than half a century, while the rest of the world moved on.[41] If we ended the story here, it might seem to be a tragic but simple story. But instead, the story gets more interesting, and a little less tragic.

Civil Workarounds and Marriage Alternatives

In the context of this religious control over marriage and divorce in Israel, a number of civil legal workarounds and functional alternatives to traditional marriage and divorce have developed. First, couples can marry civilly outside of Israel and then register their marriage in Israel; such registration confers benefits (and obligations) equivalent to an official Israeli marriage license.[42] Second, Israel is one of the most progressive Western countries with respect to recognizing legal rights and obligations of partners without formal marital ties.[43] "Reputed spouses" (*yedu'im be-tzibur*) are afforded a wide range of rights that are almost identical to the rights enjoyed by married couples, including third-party rights such as social security disability and death benefits.[44] As a result of civil rights litigation, same-sex couples enjoy the same opportunity to achieve the status of reputed spouses as heterosexual couples in Israel.[45]

The ability to cohabit while enjoying basically all the rights of a married couple in Israel allows Israeli citizens who cannot legally marry—there are many categories of such couples[46]—or who

object on ideological grounds to religious authorities' control of marriage, to entirely circumvent the institution of formal marriage.[47]

Progressive Interpretations of Religious Law by Religious Authorities and Courts

Israeli religious courts have developed innovative interpretations of religious law to (at least modestly) even the divorce playing field for women in Israel. The result has been some notable revisions of religious doctrine. I will briefly touch on two recent examples: the development of a doctrine permitting annulments of dead marriages by rabbinical courts and the progressive interpretation of Sharī'a law allowing the appointment of female qadis as family law judges in the Sharī'a court in Israel.

Hafka'at Kiddushin: The new kosher "divorce"

Recently, a rabbinical court found a textual basis in Jewish law to annul a marriage where a husband refused to grant a bill of divorce for an extended period. Zvia Gordetsky requested a divorce from her husband in 1995 due to his violent and abusive behavior toward her, which included beating her while she was pregnant, which caused a miscarriage when she was near full-term, and throwing acid on her.[48] Gordetsky's husband stubbornly and unfalteringly refused to grant a *get* for almost twenty years. Gordetsky's made her situation a public cause, going on two hunger strikes and protesting in front of the Knesset, which was covered in the media.[49] Finally, in 2018, with the assistance of a women's rights legal organization and its pathbreaking legal founder Susan Weiss, a more centrist rabbi was enlisted to convene a second, private panel of Orthodox rabbis, and Gordetsky was freed from her abusive marriage.[50]

To achieve this outcome, the rabbinical panel invoked an ancient Talmudic legal doctrine known as *hafka'at kiddushin* or annulment of a marriage. Traditionally, the application of this doctrine was limited to a narrow set of circumstances mainly concerning repellent bodily conditions making cohabitation (and, in essence, procreation) impossible.[51] However, in 1969, a broader interpretation emerged out of the Conservative movement in the United States that authorized application of the doctrine where it is clear that a husband will never agree to give a *get*, among other modern circumstances.[52] Although the Chief Rabbinate of Israel, which oversees the rabbinical courts and Jewish personal status law in Israel, will not follow this more progressive interpretation, the private rabbinical panel convened at the urging of Gordetsky's lawyer agreed to follow it. Satisfied that she won her battle, Gordetsky withdrew her request with the official Israeli Rabbinate for a *get*.[53]

Women's rights advocates point out that hafka'at kiddushin is still not officially recognized by the *Beit Din* or routinely granted in Israel. Moreover, when rabbinic authorities use Jewish legal (*halachic*) remedies to free an agunah, "they do so in ways that assure such action is not easily replicated."[54] Still, the recent annulment cases suggest the ways that organic, religious responses to the agunah problem in Israel might yet develop, as well as the potential for partnership between religious courts and civil authorities on this matter, however insufficient and complex.

Israel's first female qadi: Internal reform of the Israeli sharī'a court

A second example of the role of religious authorities and institutions in developing progressive interpretations of religious law to address the injustices of religious divorce law in Israel is the appointment of the first female qadi in the Israel Sharī'a Court.[55] For decades, the Sharī'a courts

in Israel opposed the appointment of female judges, even though female qadis serve in the Sharī'a courts of many majority Muslim countries, including Indonesia, Malaysia, Pakistan, Egypt,[56] and Jordan, as well as in the West Bank under the jurisdiction of the Palestinian Authority.[57]

As early as the 1990s, a coalition of Israeli women's organizations, the Working Group for Equality in the Personal Status Law, began advocating for the appointment of female Islamic court judges in Israel. There was not much progress on this issue until the Palestinian Authority permitted its first female qadi in 2009,[58] which reenergized the cause. From 2013 to 2015, Jewish feminist and Muslim voices from within the Justice Ministry and Knesset were added to the campaign through a series of negotiations and a legislative bill,[59] which, although formally unsuccessful, brought enough attention to the issue for the Sharī'a court to reconsider its position. Ultimately, the court found a basis in Sharī'a law, particularly a Hanafi school ruling permitting women to be judges and the writings of jurist Ibn Jarir al-Tabari. In its official statement announcing its decision, the court explained that while it was "fully aware of the doctrinal dispute on the matter," it was bound by the Hanafi school "like other Islamic countries surrounding us," which have "preceded us by appointing women to the post of sharia justice, as did the Palestinian Authority."[60] In April 2017, the Israeli Justice Minister appointed Hana Mansour-Khatib, an attorney and mediator specializing in Sharī'a and personal status law, to the Sharī'a court in Israel.[61]

Although historic, the appointment of Israel's first female qadi is a bittersweet achievement. Whether representation of women on the Israeli Sharī'a court bench will make a difference in the court's divorce decisions or the liberalization of Sharī'a family law is an open question,[62] a concern

acknowledged even by Judge Khatib, Israel's first female qadi.[63] Moreover, this development reveals the anomalous and subordinated position of the Sharī'a courts in Israel, however potentially positive from a feminist perspective.[64] While the Israeli government pressures the Sharī'a courts to modernize by diversifying its bench,[65] it permits the Rabbinical courts to retain exclusive jurisdiction over Jewish marriage and divorce, and women are still not allowed to serve as judges, or *dayanim*, in Jewish religious courts.[66] On the other hand, and perhaps a bit less cynically, the appointment of Israel's first female qadi illustrates what many scholars of plural legal systems have noted for some time, which is that religious courts in plural legal systems "often accommodate both substantive and procedural secular norms,"[67] even when primarily relying on interpretations of religious law.[68] In this view, the change in position of the Sharī'a courts represents an evolving and "continuous legal and political negotiation[] game between the state and its Muslim jurists."[69]

Finally, it is important to note that Israeli feminists supported the annulment remedy to solve the *agunah* problem and the appointment of Israel's first female qadi to the Sharī'a court. As these two examples demonstrate, religious courts and law in Israel have been involved in the liberalization of family law in Israel to a greater extent than is often acknowledged.

Lessons Learned

What lessons can be drawn from the Israeli experience for developing both practical approaches and theoretical frameworks that would facilitate feminist/queer/religious convergences around the regulation of families? Here, I am particularly interested in insights relevant to the United States context.

Nonmarital partnerships are not a threat to marriage

The first, I would suggest, is the lesson that legal recognition of nonmarital partnerships does not have to be understood as a threat to the institution of marriage. Instead, the availability of alternative legal frameworks for adult partnerships can be conceptualized as preserving the religious, traditional meaning of marriage. In Israel, the maintenance of religious law in matters of marriage and divorce is considered a basic tenet of the country's polity—a legal system necessary for the maintenance of the country as a Jewish state. For the majority Jewish population of the country, then, marriage workarounds such as the reputed spouses doctrine represent a compromise between the religious and secular segments of Israeli society furthering a shared national purpose to preserve Israel as a Jewish state. That is, although marriage workarounds in Israel functionally deliver essentially all the rights of marriage, their purpose is mainly to enable the continuation of the religious monopoly over marriage.[70]

The political context in the United States is different. Yet reformers and civil rights lawyers in the United States might find certain benefits to embracing a similar framework in their rhetoric and legal strategies. Promoting rights for nonmarital cohabitants as something other than marriage is likely to be attractive to progressives and religious constituencies alike. As many critical family law scholars have observed, all adult partners do not wish to be married.[71] Marriage brings with it a staggering number of legal consequences as well as normative status. While many individuals wish for these legal and expressional consequences, many do not. Many are offended by marriage's gendered, racist, heteronormative past and its rigid expectations of gender and sexual expression.[72] Marriage is also rooted in religious meaning that secular people may not wish to ascribe. Others may desire to remain economically independent to protect their limited assets for

themselves or their children from other relationships.[73] Framing legal rights for nonmarried partners as something entirely different from marriage would also be more acceptable to Christian Americans who believe marriage is a sacred institution that deserves a special, elevated status in American society.

Moreover, as a practical matter, the understanding that marriage alternatives are *not* marriage seems essential to any serious move to secure legal recognition for nonmarital partners in the United States. Many state lawmakers and judges in the United States are reluctant to equate marriage and nonmarriage. For example, as recently as 2016, the Illinois Supreme Court refused to recognize legal claims to enforce a contract because the parties were cohabitants.[74] The court emphasized the state's continuing interest in distinguishing between marital and nonmarital relationships. Even in states recognizing legal remedies for nonmarital cohabitants when their relationships dissolve, courts are often reluctant to award relief due to a desire to preserve marriage.[75] If marriage alternatives—whether they be domestic partnerships, contracts that the parties tailor to their particular circumstances, or *post hoc* remedies—were limited in scope or customizable and conceptualized as true *alternatives*, lawmakers and judges may be more willing to afford rights to unmarried couples, at least to mitigate the harshest injustices of the legal erasure of nonmarital relationships. Winning some rights could, in turn, promote opportunities for new meanings of family and intimacy within the law without forcing nonmarried families to assimilate into a heteronormative, white, middle-class marital model.[76]

Finally, this approach might be achievable through the democratic process without resorting to constitutional equal protection litigation because it rests on a framework of legal pluralism rather

than nonmarriage equality per se. And if the Supreme Court were to take up such a case, the conservative justices might be more willing to find an equal protection violation if the claims were framed as a limited, incremental effort to gain specific rights rather than a wholesale design to gain all the rights and benefits of marriage for nonmarried people. Or perhaps there could be targeted litigation that, in turn, helps to build a larger movement for nonmarital partnership rights in the long run. In any case, strategically approaching the question of nonmarital partnership rights as a pragmatic, legal necessity that preserves the privileged status of religious marriage—rather than an expression of idealized status or equality—is arguably a queer and feminist project. In this way, the United States could learn from the Israeli approach.

Incentivizing Internal Religious Reforms

As the case of Israel's Jewish religious annulments and first female qadi demonstrate, under the right conditions, progressive, queer, and feminist approaches to the family may emerge from within religious communities and institutions. In the face of sustained pressure from civil legal institutions, religious leaders may come to see the negative human rights dimensions of their doctrines and practices on their members and be willing to make sensible concessions to modern, secular, civil norms. Scholars of multiculturalism, law, and religion, such as Ayelet Shachar, Yüksel Sezgin, and Daphna Hacker, have observed that concessions by religious authorities are most likely to occur under conditions of institutional competition.[77] As discussed in this chapter, Israel's personal status system reflects this type of competition, because it formally maintains religious and civil laws and courts with overlapping jurisdiction in its legal system; this creates competition for legal authority and litigants. Such institutional competition is not formally present

in the United States, as the First Amendment protects the autonomy of religious institutions such as churches and synagogues *vis-à-vis* the state.[78] Yet even religious institutions that operate in secular democratic states are not immune from criticism and pressures to reforms by secular society. In response to such pressures, they may, to varying degrees, adopt the strategy of self-reform to maintain legitimacy and retain members.[79] The question for queer and feminist family law reformers in the United States, then, is how to generate this pressure.

Negative publicity certainly helps, as when the media reported that the Church of Jesus Christ of Latter-Day Saints (formerly, the "Mormon Church") played a central role in funding and supporting a ballot measure in California outlawing same-sex marriage.[80] Subsequently, the Church engaged in a series of negotiations with leaders of Utah's LGBTQ community that led to the passage of housing and employment nondiscrimination laws protecting LGBTQ people in the state.[81] As Bill Eskridge has persuasively argued, the Church's theology already contained certain strands consistent with the nondiscrimination bill.[82] Still, the public relations aspect of legislation's passage cannot be ignored, especially considering the LDS Church's global missionary orientation.

Strategic litigation may also persuade religious authorities to reconsider their discriminatory theologies. Revisiting the Utah example, it is notable that the housing and employment nondiscrimination laws covering sexual orientation and gender identity were negotiated and passed just as the state's ban on same-sex marriage was being challenged in the federal district court.[83] The two-track approach—conceding equality for LGBTQ+ individuals in housing and employment with exemptions for religious objectors, while seeking to hold the line on heterosexual marriage—is the paradigmatic example of how religious institutions may undergo

self-reform in the face of pressure from civil, secular society. As many law and religion scholars have observed, religious institutions in both secular and quasi-secular states do not operate in a vacuum; they are in a dialectical relationship with the legal framework in which they operate. In practice, they often embrace, or at least accede, to secular norms, even if primarily justifying their transformation through religious doctrine.[84] That it, convergences are most often the result of power dynamics, not a pure meeting of the minds.

However, given the Supreme Court's recent capture by the conservative Christian movement, one challenge is that civil rights litigation may currently be an unrealistic source of secular pressure. In the battle between religious freedom and equality, a majority of the Court has taken the side of religion. These justices seem set on reconfiguring the First and Fourteenth Amendments in ways that substantially expand religious freedom in American society at the cost of equality. Therefore, in addition to civil rights litigation, it may be a good time for progressive family reformers in the United States to consider approaches that have been successful in countries without robust constitutional protections for individual rights, such as Israel.

Toward this end, advocates for family pluralism might consider ways to encourage and develop what scholars of plural legal systems refer to as "informal pluralism," that is, "situation[s] where the state and non-state normative orderings—each with a different source of content legitimacy—coexist within the same socio-legal space."[85] For example, taking a page from the Center for Women's Justice in Israel, which convened a private rabbinical court to hear Zvia Gordetsky's divorce case, could queer and feminist communities in the United States develop their own legal system? Imagine a private court staffed by a "bench" of queer and feminist judges to hear

separation, custody, or parentage disputes of LGBTQ+ and other nonnormative families, who might have an interest in opting into such a system. When one considers the robust respect that private arbitration agreements receive under United States law,[86] this idea is not beyond the pale.[87] A detailed discussion of how to institutionalize an alternative legal system for the queer and feminist communities is beyond the scope of this chapter, but the larger point is that critical family lawyers in the United States might look to Israel and other plural legal systems for inspiration in developing "rival normative orderings"[88] to circumvent conservative religious values that have begun to overtake American constitutional and family law.

Conclusion

Due to the rise in power of the Christian Right, the United States is experiencing a period of retrenchment, even cruelty,[89] when it comes to the family rights of women and LGBTQ+ people. Americans are often doubtful that we have anything to learn from other countries, especially those we consider to be less democratic. Israel has developed a set of legal and political solutions to the conflicts about the role of religion in family law. While not by any means perfect, the Israeli experience suggests that progress may still be achieved in an unfavorable legal environment.

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[1] Kessler (2020, 910 n.33).

[2] For example, based on polling in 2019, a majority of Americans (61%) support same-sex marriage, while 31% oppose it. Pew Research Center (2019). In 2019, more than three quarters of respondents (76%) surveyed in the 28 Member States of the European Union agreed that gay, lesbian, and bisexual people should have the same rights as heterosexual people; further 72% agreed that there is nothing wrong with a relationship between two persons of the same sex and 69% agreed that same sex marriages should be allowed throughout Europe. European Commission (2019, 6).

[3] Glendon (1989, 31–34); Grossman and Friedman (2011, 176–77); Antokolskaia (2014, 87); Estin (2017, 486); Shakargy (2021, 575–76).

[4] Büchler and Keller (2016) (discussing the expansion of family forms and parenthood in European Union contracting states); NeJaime (2020, 262) (discussing the expansion of definitions of legal parenthood in the United States).

[5] 138 S.Ct. 1719 (2018).

[6] Specifically, the Patient Protection and Affordable Care Act (ACA) requires most employers with group health insurance to provide benefits for certain health care services, which for women include contraceptives, and counseling, without the imposition of cost-sharing. 42 U.S.C. § 300gg-13(a)(4).

[7] Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020); Zubick v. Burwell, 578 U.S. 403 (2016); Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014).

[8] Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868 (2021).

[9] United States v. Texas, 142 S. Ct. 14 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("For the second time, the Court is presented with an application to enjoin a statute enacted in open disregard of the constitutional rights of women seeking abortion care in Texas. For the second time, the Court declines to act immediately to protect these women from grave and irreparable harm."). A second case challenging a Mississippi law banning abortion after the fifteenth week of pregnancy is also pending in the Supreme Court. Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021) (mem.) (granting certiorari). Oral arguments in the Mississippi case suggest that the Court's conservative justices are prepared to discard the Court's previous standard that prevented states from banning abortion before a fetus becomes viable, which is generally considered to be at about 24 weeks of pregnancy, if not overturn *Roe* outright. Liptak (2021).

[10] Nejaime and Siegel (2015, 2516).

[11] Grahm (2020, 5); Redding (2022, [page(s)]).

[12] Personal status systems, a remnant of colonialism and imperialism, operate in most Middle Eastern and North African countries, and have two defining features. First, religious law governs matters of "personal status" such as marriage, divorce, child custody, maintenance, inheritance, legal capacity, and/or ownership and control of family property, as well as matters of religious affiliation. In contrast, a uniform, secular, civil law governs other fields such as criminal and commercial law. Second, individuals are held subject to the religious family laws and courts of the religious community to which they belong. As such, the countries that retain personal status systems are plural legal systems in two senses. Civil law and religious law concurrently operate in a single country, oftentimes through separate religious and civil court systems. Second, religious communities have the autonomy to apply their religious laws to members of their communities, resulting in the existence of multiple religious legal systems and bodies of law in a single country. Sezgin (2013, 3); Sangari and Vaid, eds. (1989); Tagari (2012, 231).

[13] Halperin-Kaddari (2004, 24). Although Israel enacted two "Basic Laws" in 1992 providing for the basic human rights guarantees of human dignity, liberty, and freedom from occupation, and the Israel Supreme Court subsequently elevated these two laws to a kind of quasi-constitutional status, these Basic Laws addressing human rights do not specifically mention equality or "derogate from the effect of any enactment, which was in effect immediately before the Basic Law came into effect." Ibid. Thus, the structural arrangement of religious control over family law in Israel is locked into place until legislative action or further judicial interpretation enshrine equality in Israel's Basic Laws. Ibid. Such a development is opposed by those in Israel who claim that a Jewish state, by definition, cannot be democratic or egalitarian, or it will cease to exist.

[14] Sapir, Barak-Erez, and Barak (2013); Navot (2016); cf. Basic Law: Israel as the Nation-State of the Jewish People, 5778-2018, SH 2743 898 (Isr.) (Nationality Law) (the latest Basic Law, intended to restrain the Supreme Court's interpretation of the Basic Laws on Human Dignity and Liberty to encompass unenumerated individual rights, particularly the right to equality, and shift the country's constitutional balance toward Jewish national interests).

[15] This account, however, is contested, as recent scholarship has argued that the British substantially modified the personal status system to fit its colonial purposes, but justified it as a continuation of the status quo. See, e.g., Agmom (2016-17, 125–26).

[16] Sezgin (2013, 25).

[17] For example, a Muslim woman may not marry a Jewish man in Israel, nor can couples of the same faith where one party cannot prove their religious affiliation according to strict religious rules.

[18] Lifshitz (2003–04, 417–18).

[19] Triger (2012, 3); Weiss and Gross-Horowitz (2012, 20).

[20] Hacker (2012, 62) ("[R]abbinical court judges receive their salaries from the state and sit in state-owned buildings designated as religious courts.").

[21] Family Court Law, 1995, S.H. 393; Family Court Law (Amendment), 2001, S.H. 16.

[22] See, e.g., HCJ 1000/92 Bavli v The High Rabbinical Court 1994 PD 48(2) 221. In this decision, the Israeli Supreme Court ruled that the rabbinical courts must apply civil law creating presumption of shared marital assets in divorce cases. The effort was not entirely successful, however, as the rabbinical courts still refuse to apply the civil community property rule. Cohn (2004, 71–72); Barzilay and Yefet (2018, 647–48).

[23] Okin (1999, 13); Raday (2003, 664–65).

[24] Triger (2014, 1094); see also Yefet (2009, 442) ("[I]n the domain of divorce law, women are subject to a blatantly discriminatory regime. . . .").

[25] Yefet (2009, 446).

[26] These exceptions mainly pertain to repulsive bodily conditions such as halitosis or impotence. Riskin (2002, 3).

[27] Yefet (2009, 446–47).

[28] Ibid.at 443. According to Professor Yefet, "the term was originally used for galley slaves whose arms and legs were bound together. . . ." Ibid.

[29] Triger (2014, 1094).

[30] Specifically, the woman is considered to be an adulteress. Yefet (2009, 450 n.56). She loses her right to spousal support under religious law and is blocked from marrying the person with whom she committed adultery. Any progeny born to an adulteress with a new partner are considered to be *mamzerim,* who, in turn, suffer their own legal disabilities, including being permitted to marry only other *mamzerim*. Halperin-Kaddari (2004, 236); Gross (2001, 24–25).

[31] Degani and Degani (2013, 10) (finding that 36% of the women surveyed reported being subject to threats of *get* refusal). Statistics on the number of agunot in Israel are disputed in Israel. Sharon (2017).

[32] Barzilay and Yefet (2018, 653–54); Blecher-Prigat and Naaman (2022, [page(s)]).

[33] Palestinian women citizens of Israel are part of the national minority of Palestinian Arabs, who comprise approximately 20% of Israel's population. Specifically, the population of Israel is about 9,138,400, of which 74% are Jewish and the rest are non-Jewish, primarily Arabs (Central Bureau of Statistics, 2019), https://www.cbs.gov.il/he/publications/doclib/2020/yarhon0120/b1.pdf.

[34] Working Group on the Status of Palestinian Women Citizens of Israel (2016).

[35] The Sharī'a courts' jurisdiction over personal status matters is enshrined in the Ottoman Law of Family Rights (OLFR), which was the state-promulgated codification of Muslim family law. This law was codified by the British in the Ottoman Empire in 1917 and implemented in Palestine in 1919. It remained in force after the creation of the state of Israel in 1948.

[36] Halperin-Kaddari (2004, 258).

[37] Ibid.; Family Court Law (Amendment), 2001, S.H. 16.

[38] Sezgin (2018, 242).

[39] Halperin-Kaddari (2004, 259).

[40] Abou Ramadan (2006, 254); Yefet (2016, 1521).

[41] Kessler (2022, 23).

[42] Barzilay and Yefet (2018, 650–52) Blecher-Prigat and Naaman (2022).

[43] Lifshitz (2008, 362–65).

[44] Ibid. at 385–96; Triger (2012, 8).

[45] Gross (2015, 91–93).

[46] For example, as discussed previously, women whose husbands refuse to grant them a bill of divorce (*get*) are unable to marry, as are same-sex couples, and couples of different religions. There are many other such categories of prohibited marriages in Israel.

[47] Barzilay and Yefet (2018, 657–60). The reputed spouses doctrine is not without criticism, even from progressives. For example, some have argued that extensive recognition of partnership rights, particularly ex-post at the point of relationship dissolution, unfairly imposes obligations on individuals who did not intend to be married. Lifshitz (2009).

[48] Sharon (2018)

[49] Ettinger (2017).

[50] Sharon (2018)

[51] Specifically, the doctrine applied to repulsive bodily conditions, odors a husband bears on account of a husband's profession, or impotence: "'One afflicted with boils, one stricken with a polypus [whose nose or mouth is ill-smelling], a scraper [of canine excrement], one who smelts copper, or a tanner.'" Riskin (2002, 3).

[52] Rabinowitz (2021, 266). To reach this interpretation, the rabbis supplemented with other Talmudic doctrines, including the principle that rabbis use leniency when dealing with cases of women chained in marriage. Ibid. at 273. See also Fine (2011).

[53] Newman (2019).

[54] Magnus (2021). For example, except for the convening rabbi, the other members of the rabbinical court that granted Gordetsky's annulment have refused to reveal their identities. And in a second, similar case involving an unofficial rabbinical panel in Israel, the rabbinical court refused to publish the basis for the annulment. Ibid.

[55] The Ministry of Justice, Sharia Courts, https://www.gov.il/en/Departments/about/about_sharia.

[56] Egypt abolished its Sharī'a courts and merged them into a system of civil courts in 1955; however, Egypt still applies Sharī'a law in its civil legal system. Sezgin (2013, 119).

[57] Zahalka (2017, 5).

[58] Jacobs (2020, 211–12). The first two *qadiyat* (female qadis) appointed by the PA were Kholoud al-Faqih and Asmaa Dhaidy; al-Faqih was instrumental in this achievement, having herself conducted the research justifying the appointment of qadiyat under Sharī'a principles and presenting it to Palestinian Supreme Judge Sheikh Tayseer Tamimi. Ibid. at 211.

[59] Specifically, in 2013, Justice Minister Tzipi Livni gained an agreement from the Qadi Appointment Committee to start a process to locate women to serve as qadis in the Sharī'a courts. Zahalka (2017, 7); Haseisi (2015, 5). In 2015, Knesset member Issawi Frej, of the Meretz party, introduced a bill requiring at least one female nominee for each qadi position. Qadi Bill (Amendment - Choosing a Female Qadi). The legislation was fiercely opposed by the Jewish religious parties, particularly the ultra-Orthodox United Torah Judaism (Haredi/ultra-Orthodox) party, for fear of setting a precedent requiring appointment of female rabbis to Jewish rabbinical courts. Zahalka (2017, 7).

[60] مؤسسة المحاكم الشرعية :اختيار قاضية شرعية يجيزه المذهب الحنفي (Translation: "Sharia Courts Institution: Choosing a Sharia Judge is Permitted by the Hanafi School") (Sharia Courts Foundation: The Selection of a Female Sharia Judge Authorized by the Hanafi School), Apr. 28, 2017, www.taybee.net.

[61] Lidman (2017). Mansour-Khatib graduated at the top of her high school class, studied law in England at Staffordshire University, received a Masters of Law in mediation from Bar-Ilan University, and "handled thousands of cases" before the Sharī'a courts, before being appointed. Maltz (2017).

[62] Feminists and social scientists disagree among one another about the impact of female judges in "feminizing" the judiciary. Compare, e.g., Bogoch (1999) (in a study of criminal cases in the Israeli courts, where one-third of the judges were women, finding that female judges imposed significantly lighter sentences than male judges), with Crawford, Stanchi, and Berger (2019) (questioning the common wisdom that having more female judges, per se, makes a difference to the decisions that courts reach or how courts arrive at those decisions).

[63] Maltz (2017) ("As I see it, the key to achieving equal rights for women is to act sensibly and to understand that things don't happen overnight. . . .These are long-term processes. After all, look at how long it took for me to get this appointment.").

[64] According to Professor Abou Ramadan, Sharī'a Courts in Israel enjoy unprecedented centrality within the Islamic religious field, are subordinated to Israeli legislation, and are constituted of qadis that are appointed by a non-Muslim authority. Abou Ramadan (2008, 84–111).

[65] Consistent with this interpretation, immediately after the appointment, several Muslim clerics, led by deputy head of the Northern Branch of the Islamic Movement in Israel, slammed then Justice Minister Ayelet Shaked and warned her "not to intervene in matters of Islam." Lidman (2017).

[66] Hacker (2012, 62). Indeed, one may argue that the idea that the Sharī'a courts are independent is a façade, as the Sharī'a courts' lost control upon the establishment of the State of Israel, when operation shifted from Muslim sovereign control of a majority population to operation under a Jewish sovereign and serving a minority population. Subsequently, the Muslim population formally lost control over the appointment of qadis with the enactment of the 1961 Qadi Law, which provide that "Qadis are salaried state officials . . . nominated by the President of the State of Israel."

[67] Benhalim (2019, 747); see also Broyde (2017) (examining the same dynamic with regard to the development of faith-based arbitration by the Beit Din of America in the United States and the Muslim Arbitration Tribunal in England).

[68] Sezgin (2018, 252); Shachar (2001). Shachar argues that were there is jurisdictional overlap or competition, this response may be due to institutional pressure to maintain a court's authority and clientele.

[70] To borrow from Janet Halley's taxonomy, Israel's formula for resolving the tension between its self-definition as a Jewish (j) and democratic (d) state is to accept j>d and carry a brief for j. Halley (2006, 23–25) (describing American feminism in brief as "m/f", "m>f", and "carrying a brief for f").

[71] See, e.g., Franke (2006); Warner (2002); Paula Ettelbrick (1989, 8); Fineman (2004, 4).

[72] Polikoff, 2008, 552).

[73] Edin and Kefalas (2005); Kessler (2020, 948–49).

[74] Blumenthal v. Brewer, 2016 IL 118781, ¶ 79.

[75] Antognini (2021).

[76] Of note, something like this approach is presently afoot in the form of the Uniform Law Commission's proposed Uniform Cohabitants' Economic Remedies Act (UCERA), a model law for states to adopt that provides a mechanism to address the division of cohabitants' property interests when the cohabitation ends. The Act is limited in scope and does not create any special status for cohabitants. UNIFORM COHABITANTS' ECONOMIC REMEDIES ACT, Prefatory Note, at 1 (UNIF. L. COMM'N 2021), https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5

[77] Shachar (2001, 146–50); Sezgin (2018, 238, 241–42); Hacker (2012, 80–81).

[78] U.S. CONST. amend. I.

[79] Broyde (2017, [page]); Shachar (2001, 35).

[80] McKinley and Johnson (2008). Media coverage also concluded that blame could be placed on conservative Black and Latino voters, a conclusion that was subsequently contested and complicated by additional analysis Cummings and NeJaime (2010, 1296–97); Murray (2009, 359); Robinson(2014).

[81] Antidiscrimination and Religious Freedom Amendments, S.B. 296, 60th Leg. 2015 Gen. Sess. (Utah 2015). The 2015 Amendments added sexual orientation and gender identity to the list of traits that cannot be the basis for employment or housing discrimination, but with a number of specific religious exemptions. Ibid. at §§ 5, 7, 10, 14 (amending Utah Code §§ 34A-5-106, -109, -110, -112 and 57-21-5). These exemptions included, for example, allowing employers to require reasonable dress standards, permitting employees to engage in some religious expression within the workplace, and exempting religious nonprofit organizations, such as private religious colleges, from the housing nondiscrimination mandate. Ibid.

[82] Eskridge (2016, 1250).

[83] Herbert v. Kitchen, 571 U.S. 1116 (2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013).

[84] Sezgin (2018, 238, 242); Shachar (2018, 146–50).

[85] Some critical family law scholars have promoted contracts to fulfill this need. See, e.g., Margalit(2019). However, this is an incomplete solution, for two reasons. First, while contracts may promote normative understandings and communities, when disputes arise, they must be enforced by the state. Second, courts are often unwilling to enforce contracts between intimate partners. Antognini (2021, 67).

[86] Federal Arbitration Act, 9 U.S.C. §§ 1-16. This Act directs courts to defer to binding arbitration agreements and subject them only to procedural review for matters like voluntariness and procedural fairness.

[87] For example, deciding that secular civil law does not reflect their values, Orthodox Jewish communities in the United States have successfully stepped outside the framework of civil law, developing model arbitration agreements and training religious legal experts in their own religious laws to decide disputes. Broyde (2017). An example of such an agreement and legal framework can be found at Beth Din of America, www.theprenup.org.

[88] Sezgin (2013, 20).

[89] Serwer (2021).

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