

TORT AND FAMILY LAW: CIVIL ACTIONS FOR ACTS THAT ARE VALID ACCORDING TO RELIGIOUS FAMILY LAW BUT HARM THE RIGHTS OF SPOUSES / BENJAMIN SHMUELI

Background

This project aims to analyze civil actions for practices that are valid according to religious family law, but simultaneously seriously harm the rights of the spouse (usually the wife). This is a case study of the implications of legal pluralism when religious family law conflicts with state civil (= tort or contract) law.¹

The application of religious norms by legal systems of the state is deeply problematic in countries like Israel that have retained colonial-era practices. This is because these countries apply only a portion of religious law, religious family law, which does not support fundamental human rights in the same way as liberal laws do. Refusal to grant a *get*—a Jewish bill of divorce—in Jewish law and divorcing a wife unilaterally and against her will in *Shari'a* law (*talaq* / repudiation) are practices permitted—even if not desirable—by religious law. In some countries, these laws constitute the state law in matters of divorce. In other countries they constitute non-state law, and the cases are adjudicated before the private courts of the various religions as arbitrators, with judgments enforced at times by civil state courts. These private religious courts have the authority to issue orders (e.g. that the husband should divorce his wife), but they lack the power to enforce them. One broad area of conflict between Western societies and religious law is that many countries still operate under a system in which churches have a formally established status in the state. Some countries are able to deal partially with this conflict by committing themselves to the defense of religious freedom even where there is no separation between church and state.

In Israel, the state, in practice, speaks in two different voices; viewing the same act as valid as to the status of the couple in family law, but as being unacceptable according to criminal law (there is an explicit offense of divorcing wives against their will in Israel, and an indirect offense in cases of refusing to grant a *get*, that is of reluctance to follow the decision of a rabbinical court to divorce the wife). In the last few years, first in Europe and the USA and lately also in Canada and Israel, civil law was introduced to adjudicate these practices, in considering them as a tort, or breach of contract. In awarding damages, civil law seemingly may harm family autonomy, cultural rights, and freedom of religion—lofty values, in order to enable the spouse to break free from the marriage, or to obtain compensation for *talaq*. This is a collision between significant values that have not yet been addressed in any depth.

Civil—tort and contract—law conveys the message that when the outcome of religious family law is incompatible with liberal human rights with regard to status, civil law seeks to eliminate harmful practices by awarding damages, even at the cost of confrontation with religious family laws and courts (within certain limits), and in this way it shapes religious family law along liberal lines. In the Jewish case, the idea is that the damages awarded provide the victim bargaining power for the purpose of achieving a change in marital status, when religious family law leads to a dead end. Hence, this study will examine the different interactions between civil (mostly tort) and religious-family laws. In the normative aspect, the study will describe a desirable model as to the type and extent of civil laws' interventions in the family arena, and provide theoretical grounds and justifications for this intervention, and examine the collision of the civil and religious laws. Methodologically, the study will integrate theoretical and multicultural analysis. This project focuses on the Israeli legal system, but there will be a comparison to other countries as well. In conjunction with this analysis, the study

¹ As opposed to family law and criminal law. The reference is not to European civil law, as opposed to common law.

will examine civil law's existing tools in handling this collision, vis-à-vis the possible need to create unique civil tools in intra-familial cases.

Objectives

This is a case study in multiculturalism, law and religion, separation of church and the state, human rights, law and inequality, the question of commodification and trading personal-family rights, feminism, law and society, the right to personal autonomy, the sanctity of the family and its autonomy, and the implications of legal and cultural pluralism when religious family law conflicts with state civil law.

There is a dearth of literature on this topic. Usually, one will find a page or two on intra-familial torts in tort and family text books, usually on intra-familial common law immunities. This means that the access of torts to the family arena is blocked by the reluctance to intervene in family autonomy and privacy, a principle that trumps the rights of the spouse who is harmed as a result of the acts. Lately, an entire textbook was written on intra-familial torts, but mainly on domestic violence in the eyes of tort law. This work joins some classic articles on the subject from the distant past, and some of them on specific issues such as emotional abuse and child maltreatment. There is much work to be conducted, especially given the fact that in recent years there has been much more progress as to intra-familial tort and contract litigation, some of which create a conflict of laws and jurisdictions. One can find judgments in some countries that acknowledge these actions, but they lack a solid theoretical basis.

There is a relatively poor literature on intra-familial tort actions in general, and specifically in cases of collision with Jewish and Muslim practices. There is a need for an updated study that will establish the theoretical foundation of these actions. There is some writing, mostly in Hebrew, on tort actions for *get* refusal. There are only a few more articles worldwide on civil actions for refusal to divorce, and almost no literature on tort actions for *talaqs*. Naturally, there is extensive literature on law and religion, especially in a multicultural society, which is relevant to the book. The proposed study does not intend to offer religious solutions to the abovementioned problems, but it will address these issues to the extent that they are related to the subject. E.g., several halakhic solutions have been offered to the problem of *get* refusal, but there has been no consensus among the rabbis and decisors on this matter. In this regard, the monumental *Agunah* Research Unit of the Univ. of Manchester, led by Prof. Bernard S. Jackson is of great importance (but it barely deals with civil actions for *get* refusal). There is much literature on the fear of a coerced *get*. This situation is relevant to our case, because the monetary coercion (*ones mammon*) inherent in the damages awarded in a civil judgment may render the *get* invalid. Regarding *talaq*, there is relevant literature on Islamic family law in a Western society. Finally, the literature on the U.S. Constitution (mostly on the First Amendment and the separation of church and state) is relevant in order to make a comparison.

The research will analyze the following important questions: Should civil law be independent in considering the case studies, or should there be some compromise between laws that have different objectives? Should civil law overrule family law in cases of conflict, but with the proviso that civil law be applied with sensitivity—and not sweepingly—when deciding family matters? Or does liberal civil law simply complete non-liberal religious family law by supplying remedies in the form of damages only? These questions reflect a sense of urgency because they impact daily family and communal life. In addition, no in-depth thought was given in how to handle these cases of collision between two legitimate branches of law acting in the same arena, especially in countries such as Israel, in which both branches are state agents. A theoretical foundation is needed to introduce the support of intra-

familial tort actions, together with the need to draw the line and to expressively explain when civil intervention in the family arena is not to be justified and why not. The challenge is to balance between the need to protect the religious sphere from governmental intervention, and the need to ensure that the religious practices in the family arena do not become a tool for oppression.

I intend also to move from the specific to the general and examine the extent to which intra-spousal civil actions can serve as leverage for promoting human rights and for shaping religious norms, as a part of the question of multiculturalism. Can a liberal state actually speak in two voices, tolerating religious practices even if they harm spousal rights while putting a price tag on religious practices in civil law? This question also relates to the question of the role of tort law in effecting social change, vis-à-vis the possibly more natural option of advancing regulation and solutions in public and constitutional law spheres. One may think the state should confront oppressive religious practices more directly and speak in one clear voice. However, this mission is sometimes not entirely possible, especially in a multicultural society. In some liberal countries, the existence of religious norms, even as a part of the state law, is an outcome of a political compromise. As such it is difficult to change the delicate balance. However, the two ways—public and private law—are not contradictory; the two—private law, which gives reliefs to individuals, and public law, which seeks to change the norms directly—are complementary. Together, they can present a stronger front to confront harms wrought by religious practices. In this way, oppressed spouses of religious communities will have a wider range of doctrinal tools to navigate their multiple identities, as both citizens of the state and members of the religious community, and also the state will have another—indirect and more sensitive—tool to try to fight oppressive practices, without opening a direct front against the religious communities. Specifically as to Israel, a process for direct change in regulation and legislation seems distant, whereas an indirect change via private law is more modest, but seems more realistic in Israeli reality.

The Objectives:

- (1) To provide a much needed theoretical basis for the process of existing intra-familial civil actions in which there is a clash between religious family law and civil law and between laws, cultures, and beliefs, and for accepting new types of actions, according to the goals of tort law. The theoretical bases for these actions have remained almost completely unexplored, both in themselves and in terms of their confrontation with the religious practices and laws. The theoretical bases to be presented and analysed in the study are an economic basis, legal pluralism, and justice. This objective is important especially given the fact that although such cases involve civil actions, and they are litigated in civil courts, most of the scholars who write on this subject are from a family law—and not tort—background.
- (2) To establish that intra-familial relations in cases of harm to a spouse should be arranged both by family law and by other separate legal fields, among them tort law; and explore the argument that civil law should be independent in their considerations regarding evils inflicted onto a spouse, even if the outcome is a *de facto* direct or indirect circumvention of family law decisions. The study will suggest sensitive ways to implement these actions and to draw the line and explain when civil intervention in the family arena is not to be justified and why not.
- (3) To examine civil law's existing tools in handling the clashes with religious-family law vis-à-vis the possible need to create unique civil tools to handle these delicate situations.

This project will also help to make this field accessible to all the players involved. Civil actions seem foreign to lawyers who are involved with family issues. They do not usually practice torts, yet it

is only natural that the ones, who represent the spouse in the divorce proceedings, would also represent her in the civil action. In some countries, just a few of family-civil court judges come from a background of expertise in torts. Likewise lawyers and researchers of torts usually are ignorant of the unique procedures in the family courts and the unique background of family law and the jurisdiction struggle that exists in countries such as in Israel, where both torts and religious-family law are state agents. It is also important to make this field accessible to those who teach or research family, private (especially tort), law and religion, pluralism, law and economics, law and society, feminism, human rights, and gender, and to those who influence the design of legislation. Researchers in family law are more familiar with a possible clash between these laws, but are less familiar with civil law theory. The religious court judges are not always aware of torts, and they are not always familiar with the dilemmas that face the judges deciding these cases. In addition, religious laws should be accessible to all those involved in this field—the lawyers, judges, and women’s organizations. Focusing also on new players—other than the wives-plaintiffs and the husbands-defendants in cases of *get* refusal—will open up a space for intense new discussions on issues such as gender, distributive justice, and assistance to a tortfeasor by relatives and friends is considered a tort. This is a period in which the norms for intra-familial civil actions are being shaped. It is therefore important to provide both a theoretical and practical basis for acknowledging these claims.

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He has published about 40 articles in the US and Israel in these areas, in publications including: HARV. NEGOT. L. REV.; MICH. J.L. REFORM; L. & CONTEMP. PROBLEMS; COLUM. HUMAN RIGHTS L. REV.; COLUM. J. GENDER & L.; DUKE J. COMP. & INT’L L.; YALE J. L. & THE HUMAN.; BERKELEY J. GENDER; DUKE J. GENDER, L. & POL’Y; VAND. J. TRANSNAT’L L.; BOSTON UNIV. INT’L L.J.; UCLA WOMEN’S L.J.; EMORY INT’L L. REV.; JEWISH L. ANNUAL (Boston Univ.); and leading Israeli Law Journals, among them: TEL AVIV L. REV.; JERUSALEM (HEBREW UNIV.) L. REV.; BAR-ILAN L. REV.; HAIFA L. REV.; LAW, SOCIETY & CULTURE OF TEL AVIV UNIV.; CRIMINAL LAW – PELILIM (Tel-Aviv Univ.).

Dr. Shmueli received his PhD degree from Bar-Ilan University in 2005. The thesis: “Legal Intervention in Relationships between Parents and Children: Corporal Punishment, False Imprisonment, and Neglect.” He was awarded the university president's scholarship for outstanding post-graduate students as well as a few other prizes for his research.

During 2006-2008 he served as a Visiting Professor of Law at the Duke University School of Law, teaching seminars on “Legal Intervention in Parent-Child Relationships: A Comparative View” and “Domestic Torts – Theory and Practice.”

Dr. Shmueli is the Editor-in-Chief and the founder of an Israeli peer-reviewed law review named The Family in Law Rev. Formerly (2004-2010) also co-directed and founded the Center for the Rights

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Dr. Shmueli has participated in over a hundred national and international conferences, among them: Yale Law School, Yale Judaic Studies and Middle East Programs, with the response of Prof. Robert Post, Dean of Yale Law School; the ALEA (American Law and Economics Association) Annual Conference, Princeton University, 2010; Yale Law School, 2012, during the Jewish Law Association 17th International Conference, with the response of the Hon. Prof. Guido Calabresi; the 2011 Annual Conference of the European Association of Law & Economics (EALE), Hamburg; the 2012 Annual Conference of the European Association of Law and Economics (EALE), Stockholm; Duke Law School, 2006; Uconn Law School 2014; Widener Law School 2014. He is scheduled for several invited talks including Harvard Law School, Stanford, and the Fordham Law School Annual Wolff Lecture. He organized over twenty conferences.