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RELIGIOUS TRIBUNALS IN DEMOCRATIC STATES: LESSONS FROM THE ISRAELI RABBINICAL COURTS

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RELIGIOUS TRIBUNALS IN DEMOCRATIC STATES: LESSONS FROM THE ISRAELI RABBINICAL COURTS

Daphna Hacker[*]

INTRODUCTION

In democratic countries where the law might be influenced by religious communities, family law cases can present one of the most sensitive and complex challenges. Religious laws governing personal status and the supervision of family relations are vital components of many religions and, in some cases, crucial to the cultural survival of the religious community.[1] However, the family laws of some religions are discriminatory towards women, same-sex couples, people of other religions, and other groups.[2] Currently, there is heated political and scholarly debate about the tension between the norms of multiculturalism, which dictate that religious communities be allowed to preserve their values and culture, including through autonomy over family law, and liberal norms prohibiting the discrimination that religious family law can perpetrate.

One of the best known liberal advocates for restricting discriminatory cultural practices of minority groups was Susan Moller Okin. Okin maintained that many cultural minorities are more patriarchal than the surrounding culture and that the female members of the patriarchal culture might be much better off were the culture into

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1. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 46 (Cambridge Univ. Press 2001); RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 228 (Univ. Pa. Press 2004).

2. Jewish family law, for example, prohibits inter-religious marriage and same-sex marriage and limits the ability of divorced women to remarry. Moreover, it discriminates against women in divorce, as will be detailed further on. *See* Eliav Shohatman, *Women's Status in Marriage and Divorce Law*, *in* WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY 380 (Frances Raday, Carmel Shalev & Michal Liban-Kooby eds., Shoken 1995) (Hebrew).

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which they were born to become extinct, if, that is, it could not be altered so as to uphold women's equality. She pointed to religious personal law as one example of a sphere in which patriarchal cultures strive to maintain autonomy at the cost of women's and girls' freedom and basic rights.[3] Consistent with her view, nation states should not give legal autonomy over family matters to patriarchal minorities unless these minorities reform their religious laws so as not to discriminate against or impair the rights of women and girls.

Opposing Okin's view is Gad Barzilai's communitarian approach, which calls for national jurisprudence that takes the needs and interests of non-ruling religious communities into account within the broader framework of a multicultural democracy. According to Barzilai, communities are central to the formation of human needs, interests, and desires. Accordingly, state intervention in a community's internal life is justified only in the rare cases of physical communal violence against a community member who wishes to leave the community or who has asked for state intervention within the community.[4] Barzilai's position would thus advocate state recognition of religious tribunals that govern personal law as long as those tribunals do not inflict physical violence that is not consented to by its recipients.

Ayelet Shachar has offered perhaps the most interesting and comprehensive proposal for contending with the dilemmas presented by the conflict between minority groups wanting to preserve their culture and the need to protect the weaker members of the community, particularly women: she calls for *transformative accommodation* that, through dialogue, will encourage both the liberal state and minority *nomoi* groups to be more responsive to all their constituents. At the foundation of this model lie several precepts. The first principle is that any given legal matter can be divided into sub-matters, which allows the division of the jurisdiction between the state and the minority group. Second, neither the minority group nor the state can wield exclusive control over a contested social arena that affects individuals both as group members and as citizens. Third, all constituents must have clear options that allow them to choose between state jurisdiction and their group's jurisdiction. In the area of family law, Shachar explains, the first two principles could be translated, for example, into a division of

3. Susan Moller Okin, *Is Multiculturalism Bad for Women*, *in* IS MULTICULTURALISM BAD FOR WOMEN 9 (Joshua Cohen, Matthew Howard & Martha Craven Nussbaum eds., Princeton Univ. Press 1999).

4. GAD BARZILAI, COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES ch. 2 and pp. 251-53 (Princeton Univ. Press 2003).

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jurisdictional power in which the minority group has the authority to decide how to demarcate the status of persons in the family (e.g., who may marry), while the state has authority over the distribution of rights to those persons, given their status as determined by the religious community (e.g., allocation of marital property upon divorce). The third element of choice of jurisprudence could be manifested in a religious adherent's ability to select either a religious or civil marriage with the attendant legal consequences; and, in cases of a severely discriminatory religious legal decision, the right to appeal to the civil court even after she has opted for a religious marriage.[5]

This article seeks to contribute to the search for the appropriate balance between legal multiculturalism and liberal norms, such as gender equality, and to the understanding of the circumstances in which Shachar's *transformative accommodation* or similar concepts become plausible, by presenting empirical evidence of the variables that actually affect the operation of religious courts in democratic states. Using the example of Jewish religious tribunals in Israel, known as the rabbinical courts system, I argue that three variables shape the praxis of such tribunals: the religious variable—the content of the religious law governing the subject matter; the cultural variable—the cultural background of the religious judges; and the institutional variable—whether the religious tribunals have exclusive jurisdiction over the subject matter or compete with state civil courts.

I will begin with a brief introduction to the jurisdiction of rabbinical courts in Israel, clarifying the system's unique location within the Israeli legal field. In Part II, I will discuss the methodology of two studies I conducted on the rabbinical courts' praxis. In Part III, which explores the two studies' findings, I will develop a preliminary model that explains the praxis of religious tribunals in democracies, with the potential to predict tribunals' willingness to adapt to liberal values.

I. THE ISRAELI RABBINICAL COURTS SYSTEM

The Israeli rabbinical courts are part of a legal system that was formed in Palestine prior to the establishment of the State of Israel. The Ottoman Empire, which ruled the region for four hundred years from the fifteenth century, had granted religious minority groups, including the

5. SHACHAR, *supra* note 1, ch. 6. Seyla Benhabib emphatically criticizes Shachar's approach and would strengthen the individual's rights within her general theory of deliberative democracy, including the right of voluntary self-ascription to a cultural group. *See* SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA ch. 5 (Princeton Univ. Press 2002).

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Jewish population, judicial autonomy in matters related to personal status.[6] Under this legal structure, known as the *millet* system, these groups could resort to their religious tribunals in such matters, which would apply religious law. In the case of the Jewish minority, the rabbinical courts were the relevant forum.[7] Under British Mandate rule, which lasted from 1920 to 1948, the Ottoman millet system remained in effect, and religious minorities retained legal autonomy over their personal status. This jurisdiction was defined as including "Marriage Or Divorce, Alimony, Maintenance, Guardianship, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of Absent Persons."[8]

When the State of Israel was founded, the millet legal structure was adopted,[9] with the rabbinical courts being accorded the status of a state judicial system.[10] To this day, rabbinical court judges receive their salaries from the state and sit in state-owned buildings designated as religious courts.[11] They are required by law to be ordained Orthodox rabbis[12] and, consequently, are always male. There are currently twelve regional rabbinical courts and one Great Rabbinical Court, which is the appellate court for regional court decisions.[13] The rabbinical courts system is supervised administratively by the Ministry of Justice[14] and, like any other state organ, is bound by rulings of the Israeli Supreme Court.[15]

Over the years, the rabbinical courts' jurisdiction has been eroded by both the Israeli legislature and the Supreme Court. Matters relating

6. Josh Goodman, *Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel*, 32 HASTINGS INT'L & COMP. L. REV. 477, 490 (2009).

7. Moshe Chigier, *The Rabbinical Courts in the State of Israel*, 2 ISR. L. REV. 147 (1967).

8. Palestine Order in Council, 1922, § 51, 3 L.O.P. 2569 (1934) (Isr.).

9. The Law and Administration Ordinance, 1948, 1 LSI 9 (1948) (Isr.).

10. Chigier, *supra* note 7, at 179. The Muslim and Druze tribunals are also accorded the status of state organs, in contrast to the Christian tribunals, which, although recognized by the state and having exclusive jurisdiction over the marriage and divorce of Christians, are not part of the state's legal bodies. *See* MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL ch. 4-5 (Univ. Press Va. 1994); Amnon Rubinstein, *Law and Religion in Israel*, 2 ISR. L. REV. 380, 384-99 (1967); HCJ 9611/00, Marie v. Marie, [2004] 56(4) IsrSC 256.

11. *See* HCJ 8638/03, Amir v. Great Rabbinical Court [Apr. 6, 2006] (unpublished).

12. Religious Judges Regulations (Ordination and Its Arrangements), 1955, KT 537, 1273.

13. *See* http://www.rbc.gov.il/hierarchy/courts/index.asp (last visited Mar. 2011) (Hebrew).

14. In 2003, the Israeli government decided to abolish the Ministry of Religious Affairs, which had supervised the religious tribunals, and to transfer this authority to the Ministry of Justice. *See* Government Resolution No. 900: The Abolition of the Ministry of Religion (Oct. 8, 2003). In 2008, the Ministry for Religious Services was established, but the authority over the rabbinical courts remained with the Ministry of Justice. *See* Government Resolution No. 2903 (Jan. 6, 2008).

15. Basic Law: Judicature, 1984, ch. 3, § 15(d)(4), 38 LSI 104 (1984) (Isr.).

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to the property of legally incompetent persons and absentees from Israel have been excluded by law from rabbinical court jurisdiction.[16] Civil courts have been granted juristic priority in matters of adoption and inheritance, with rabbinical court jurisdiction in these matters subject to the consent of all parties involved.[17] Moreover, although the rabbinical courts retain sole authority to issue divorce decrees and to determine who is married and who is not,[18] the civil courts have been granted parallel jurisdiction in matters related to divorce, such as child custody and property division.[19]

Both the civil family courts and rabbinical courts must apply Jewish religious law governing divorce, unless an overriding norm is set in a specific civil law provision. Yet in some matters of procedure and evidence, the two systems diverge, with the rabbinical courts adhering to religious rules and the family courts applying civil regulations.[20] The Supreme Court has, however, ruled that the rabbinical courts must apply certain civil laws, such as those guaranteeing equal property rights to women[21] and those protecting personal privacy.[22] The rabbinical courts are not indifferent to these interventions and restrictions and react with

16. Capacity and Guardianship Law, 1962, ch. 4, §§ 78, 117, 16 LSI 106 (1962) Isr.); Absentees' Property (Compensation) Law, 1973, § 9, 27 LSI 178 (1973) (Isr.).

17. Inheritance Law, 1965, ch. 8, § 155, S.H. 446, 63; Adoption of Children Law, 1981, §§ 26-27, 35 LSI 365 (1980-81) (Isr.).

18. Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953, § 1, 7 LSI 139 (1953) (Isr.).

19. In fact, the rabbinical courts' jurisdiction over matters related to divorce is more restricted than that of the family courts since the rabbinical courts are allowed to rule in these matters only if they have been "connected" to a divorce petition. *Id.* at § 3. While matters such as child custody are considered to be fundamentally connected to a divorce petition, other matters, such as child support, are deemed connected only under certain conditions, such as that the request for divorce is sincere. *See* CA 118/80, Givoli v. Givoli, [1980] 34(1) IsrSC 155; HCJ 8497/00, Felman v. Felman, [2003] 57(2) IsrSC 118.

20. ARIEL ROSEN-ZVI, ISRAELI FAMILY LAW: THE SACRED AND THE SECULAR 69-92 (Tel Aviv Univ. 1990) (Hebrew).

21. HCJ 1000/92, Bavli v. Great Rabbinical Court, [1994] 48(2) IsrSC 221. In this case, Mrs. Bavli claimed that she was entitled to an equal share of the couple's property following the divorce, in accordance with civil court rulings in similar cases. The regional rabbinical court denied her claim since such division of property is in contradiction to Jewish religious law. The Great Rabbinical Court upheld the regional court's ruling, but the Israeli Supreme Court overturned this decision, ruling that the rabbinical courts are obligated to implement the principle of equal property rights in cases of divorce.

22. HCJ 6650/04, Doe v. District Rabbinical Court of Natanya [2006] 61(1) IsrSC 581. In this case, the Supreme Court ruled that photographs showing the wife having sexual relations with another man cannot be submitted by the husband as evidence to the rabbinical court. The photographs were taken by the husband without the wife's knowledge, in her residence, which she did not share with him and which he had entered, together with two of his friends, without permission. The Supreme Court ruled that accepting these photographs as evidence would infringe on the wife's right to privacy and that the rabbinical courts must protect this right as civil courts do.

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ultra-conservative judgments, for which Israeli family law expert Ruth Halperin-Kaddari recently coined the term the "Judgment Day weapon."[23]

Clearly, therefore, in certain family matters, Israel has taken an uncompromising liberal stance that excludes religious jurisdiction. In other family matters, a radically multicultural approach has been adopted, with religious tribunals accorded sole jurisdiction over even non-observant Jews; and in yet a third group of family matters, a complicated system of overlapping jurisdiction has been created. This legal reality reinforces Seyla Benhabib's objection to cultural essentialism, with its assumption that group identity and boundaries must be rigid and static.[24] Indeed, the Israeli case presents an excellent opportunity to study the ongoing dynamics of the relations between *nomoi* groups, individual actors, and the state.

II. METHODOLOGY

Seeking to understand the variables impacting the dynamic relations among the rabbinical courts, the individual actors who enter the legal field, and the state, I conducted two studies on family matters heard by the regional Tel Aviv Rabbinical Court. This tribunal is located in Israel's second largest and most cosmopolitan city, Tel Aviv, and serves many of the surrounding towns in the central region of Israel, which includes approximately two million people out of Israel's total population of 7.5 million.[25] In 2009, the Tel Aviv Rabbinical Court dealt with 21,066 of the 82,233 files in family matters that had been opened across the country in rabbinical courts.[26]

The first study, which I refer to as the "Divorce Study," analyzed 360 divorce files opened at the Tel Aviv Rabbinical court between 1997-99. In the second study, the "Inheritance Study," 303 files of intestate and probate orders opened at the Tel Aviv Rabbinical Court in 2000, 2002, and 2004 were analyzed. The studies also included comparative samples from the relevant civil authorities: divorce files in the Divorce Study included 189 files that were also handled by a secular family

23. Ruth Halperin-Kaddari, *The Missing Women's Enigma: The Scope of the Get Refusals Predicament in Israel*, *in* 5 BEING A JEWISH WOMAN 83, 90 n.14 (Tovah Cohen ed., 2009) (Hebrew).

24. *See* BENHABIB, *supra* note 5, at 137.

25. Central Bureau of Statistics, Statistical Abstract of Israel No. 60, tbl.2.6 (2009), *available at* http://www.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_06x&CYear=2009.

26. *See* data provided by the Rabbinical Courts Management, at http://www.rbc.gov.il/statistics/index.asp (last visited Mar. 2011) (Hebrew).

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court.[27] In addition to the 303 rabbinical court files, the Inheritance Study analyzed 296 files of intestate and probate orders opened at the Tel Aviv Inheritance Registrar[28] and 144 inheritance disputes deliberated in the secular family court in the same region. In the Divorce Study, I also conducted more than forty interviews, including with the Director of the Rabbinical Courts, three rabbinical court judges, and other professionals, as well as with divorcees. For the Inheritance Study, I interviewed the Legal Advisor of the Rabbinical Courts, eight lawyers and one family court judge specializing in inheritance law, and fourteen individuals who had been involved in inheritance disputes.

These two studies offered a unique chance to compare the institutional praxis of the rabbinical courts in divorce matters with their praxis in inheritance matters. Moreover, they provided important insights into the similarities and differences in how these particular family matters are handled by the rabbinical courts, compared to the praxis of the civil authorities and courts.[29] These comparisons illuminate the significance of the religious, cultural, and institutional variables that impact on how a religious tribunal operates in a democratic state and its responsiveness to the liberal values surrounding it.

III. FINDINGS

A. Attracting Clients

The two studies revealed that in both divorce and inheritance proceedings, the rabbinical courts constitute a relatively cheap and convenient alternative to the civil system. The rabbinical court system uses different institutional mechanisms to signal to potential clients that it is cost-effective and accessible and, in fact, succeeds in attracting many clients, especially the relatively poor and the unrepresented.

27. There are 14 regional family courts in Israel, http://elyon1.court.gov.il/heb/cv/fe_html_out/courts/details/mishpacha.htm (last visited Aug. 2011) (Hebrew). For the jurisdictions of these courts, *see* Family Court Law, 1995, S.H. 1537, 393.

28. There 5 five inheritance registrar branches in Israel, http://www.justice.gov.il/MOJHeb/ApotroposKlali/RashamYerusha/ (last visited Mar. 2011) (Hebrew).

29. For more findings on the Israeli legal field governing divorce, *see* Daphna Hacker, *A Legal Field in Action: The Case of Divorce Arrangements in Israel*, 4 INT'L J.L. CONTEXT 1, 5-6 (2008). For more findings from the inheritance study presented in this article, *see* Daphna Hacker, *The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, 7 J. EMPIRICAL LEGAL STUD. 322 (2010); Daphna Hacker, *Soulless Wills*, 35 L. & SOC. INQ. 957.

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1. Fees

In divorce matters, the rabbinical court fees are lower than those charged by the family courts. For example, the fee for filing a divorce petition in the rabbinical courts is NIS 327 ($91.00),[30] as opposed to NIS 455 ($127.00) in the family court.[31] Moreover, a woman does not have to pay a fee in order to file an alimony suit in a rabbinical court,[32] but must pay NIS 224 ($63.00) for the same procedure in a family court.[33] In general, the rabbinical courts and inheritance registrars charge the same fees for inheritance procedures; however, a fee of NIS 913 ($255.00) is charged to submit an objection to a probate order with a registrar,[34] whereas the fee in the rabbinical courts is only NIS 472 ($132.00).[35]

2. Forms and Lawyers

Forms are another institutional mechanism that makes the rabbinical courts a more accessible alternative than the civil system. In all kinds of divorce proceedings, the rabbinical courts provide parties with forms that are easy to understand and complete and that are free of charge. A woman can thus simply enter a rabbinical court, request a "Divorce Suit" form, fill in the basic details by hand (such as the names of her spouse and children and her address), state her grounds for petitioning for a divorce (such as "I can no longer stand my husband"), and the divorce proceeding is initiated. In the family courts, no corresponding forms exist; indeed, in the Divorce Study, all the petitions in the family court files were typed and formulated in legal language.

With its convenient divorce forms, the rabbinical court thus enables those who cannot afford legal representation or wish to save legal fees to initiate a legal procedure by themselves. Indeed, the statistical analysis of the findings from the Divorce Study revealed that a person with no legal representation is thirty times more likely to apply to the rabbinical court than to a family court.

In inheritance proceedings, the rabbinical courts seem to lose their advantage in this regard, as both the Rabbinical Courts Management and the Chief Inheritance Registrar Office provide forms that can be

30. *See* http://www.rbc.gov.il/tolls/index.asp (last visited Mar. 2011) (Hebrew).
31. *See* http://elyon1.court.gov.il/heb/agrot/mishpaha.htm (last visited Aug. 2011) (Hebrew).
32. *See supra* note 30.
33. *See supra* note 31.
34. *See* http://ecom.gov.il/counter/general/homepage.aspx?counter=9&catalog=1&category=inheritanceRegistar&language=he (last visited Mar. 2011) (Hebrew).
35. *See supra* note 30.

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downloaded from the Internet,[36] as well as hard-copy forms that are available free of charge at the regional courts and registrar offices. However, there is one significant difference between the forms distributed by the rabbinical courts and the inheritance registrar forms. While both require the applicant for the intestate or probate order to declare that all the information provided is accurate, the affidavit on the inheritance registrar form must be verified by a judge, lawyer, or head of a municipality,[37] whereas the rabbinical courts allow verification by the court secretary or his deputy.[38] The study found that, in practice, almost everyone who applied to an inheritance registrar chose verification by a lawyer, the most accessible option of the three, which is not free of charge. Almost all of those who applied to a rabbinical court, by contrast, saved the lawyer's fee and had the affidavit verified by the court secretary, his deputy, or another rabbinical court clerk whom the secretary has authorized for this purpose. As in the divorce context, the data from the samples are dramatic regarding the involvement of lawyers in inheritance proceedings: in 91% of the applications for an intestate order and 95% of the applications for a probate order submitted to the Tel Aviv Inheritance Registrar a lawyer was involved, but only 2.5% of the intestate applications and three percent of the probate applications submitted to the Tel Aviv Rabbinical Court involved a lawyer.

The rabbinical courts' willingness not to insist on legal representation for their clients is the product not only of the institutional variable, which forces them to try to maximize their appeal relative to the civil alternatives, but also of the religious variable. Unlike the civil courts and authorities, which tend to favor legal arguments shaped by lawyers, the religious Jewish perception is that the voice of the litigant is more important than the lawyer's. As a rule with only limited exceptions, litigants and applicants should always be heard during legal proceedings at the rabbinical court, and before their lawyers are heard.[39]

3. Time

In both divorce and inheritance proceedings, time is a third factor

36. For the rabbinical court forms, *see* http://www.rbc.gov.il/forms/index.asp (last visited Mar. 2011) (Hebrew). For the inheritance registrar forms, *see* http://www.justice.gov.il/MOJHeb/ApotroposKlali/TfasimNew.htm (last visited Aug. 2011) (Hebrew).

37. Inheritance Regulations, 1998, Forms 1 & 2, KT 1256, 1268.

38. *See supra* note 36 for rabbinical court forms for inheritance orders and probate orders.

39. Rabbinical Courts Hearing Regulations, YP no. 4102 (1993), p. 2299, § 60.

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that works in favor of the rabbinical courts, at least when no serious conflict is involved. Since there is no "civil divorce" in Israel,[40] even if the parties initially file in a family court for matters such as custody and alimony, they must petition the rabbinical court for a divorce decree. By contrast, those who from the outset file only in the rabbinical court, for all matters related to the divorce, can complete all stages of the divorce process in one forum. The data clearly show the ramifications of this difference: although divorce proceedings are concluded more quickly in the family court than in the rabbinical court (2.9 months on average compared to 3.7 months, respectively), on average, the whole legal process, including the divorce decree, takes 7.3 months for those who also filed their petition in a family court, compared with only 5.5 months on average for those who filed only in a rabbinical court. Thus, the state-granted monopoly held by the religious courts over issuing divorce decrees gives them an institutional advantage that allows speedier service to those who turn to them exclusively.

As far as inheritance proceedings are concerned, one would expect matters to be handled more quickly by an inheritance registrar than by a rabbinical court, since, unlike the rabbinical court, the registrar does not require all relevant family members to be present at the proceedings.[41] Surprisingly, however, the Inheritance Study findings revealed that inheritance procedures are concluded more quickly in the rabbinical court than at the inheritance registrar: an intestate procedure took on average of 2.85 months to be completed at the Tel Aviv Inheritance Registrar, compared to 2.53 months in the Tel Aviv Rabbinical Court. Probate orders were granted within 3.4 months on average from the Tel Aviv Inheritance Registrar, but they only took 1.93 months in the Tel Aviv Rabbinical Court. Here, the rabbinical court succeeds in being more efficient, which increases that court's appeal in legal matters over which it has no state-granted monopoly and in which, according to religious practice, all parties must be present.

40. The rabbinical courts wield sole jurisdiction over marriage dissolution even in cases in which the divorcing couple was married in a civil procedure abroad. HCJ 2232/03, Roe v. Tel Aviv Rabbinical Court [2006] 61(3) IsrSC 496.

41. The rabbinical courts require that all family members be present so as to ensure the possibility of relinquishment of an heir's share in favor of another family member, should this be called for (*see infra* discussion at pp. 115-16 regarding relinquishment of shares in favor of another family member). This information was provided by Rabbi Shimon Yaacobi, the Legal Advisor to the Rabbinical Courts Management in an interview conducted in April 2008.

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4. Public Relations

At the time the study was conducted, the Rabbinical Courts Management was marketing the courts with a glossy brochure explaining the advantages of the rabbinical courts in welcoming language with colorful illustrations. The brochure describes the courts as responsive to all applicants and litigators and as providing a professional, efficient, and expedient service. The brochure also includes a "Statement on the Commitment for Improvement in Service to Those Who Apply to the Rabbinical Courts," noting that the Rabbinical Courts Manager guarantees quality, reliable, and courteous service and speedy handling of applications and suits.[42] It appears that the rabbinical courts system is fully aware of potential clients' ability to forum shop in matters related to divorce and inheritance and thus tries to emphasize its relative advantages over the civil courts and registrars.

The study reveals that the attempts by the rabbinical courts to attract clients with low fees, simple forms requiring no legal counsel, fast procedures, and public relations efforts that emphasize these advantages are effective. The Divorce Study showed that many couples opt from the outset to file in a rabbinical court for all divorce matters. In the sample, forty-seven percent of the divorcing couples chose not to apply to a family court at all, with their divorce handled exclusively by the Tel Aviv Rabbinical Court. These couples included most of the poor and unrepresented parties in the sample, for whom the low fees and uncomplicated forms offered by the rabbinical courts are most significant.[43] In the Inheritance Study during the sampled years, approximately forty percent of the intestate order applications and eleven percent of the probate order applications initiated by the Jewish population in Israel were submitted to rabbinical courts.[44] This is

42. RABBINICAL COURTS MANAGEMENT, THE RABBINICAL COURTS (n.d.) (on file with author).

43. For updated data on the rates of divorce petitions and suits submitted to the rabbinical courts, *see* RUTH & EMANUEL RACKMAN CENTER, WOMEN AND FAMILY IN ISRAEL: STATISTICAL BI-ANNUAL REPORT 73-74 (Ruth Halperin-Kaddari & Inbal Karo eds., 2009).

44. In the relevant years (2000, 2002 and 2004), a total of 100,422 Israeli Jews died. During these years, 16,441 applications for inheritance orders and 14,853 applications for probate orders were submitted to the Tel Aviv Inheritance Registrar, which handles approximately 56% of all applications filed with inheritance registrars across Israel (information provided by the Chief Inheritance Registrar, on file with author). During the same period, 4,212 applications for inheritance orders and 1,044 applications for probate orders were submitted to the Tel Aviv Rabbinical Court, which accounted for about one-third of all inheritance procedures conducted in the Israeli rabbinical courts during that period. http://www.rbc.gov.il/statistics/index.asp (Hebrew). These differences in the rates of intestate and probate applications might stem from the fact that Jewish law does not recognize wills that are not formulated as gift deeds. *See infra* discussion at p. 73. Hence, heirs in a regular will might not petition a rabbinical court for fear that

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particularly impressive given the fact that the eight percent of the Israeli Jewish population that defines itself as ultra-orthodox[45] is a relatively poor group that is less likely to leave estates worth probating.[46]

To conclude, the rabbinical court system's jurisdictional competition with the civil authorities through a deliberate institutional effort, combined with the relatively unimportant role accorded to lawyers in its proceedings and its general mission to encourage all Jews to bring their matters to religious tribunals and submit to their laws, have all led to the rabbinical courts' success in attracting clients. The two studies show this effort to be successful, especially in attracting the relatively poor and the unrepresented. Thus, to return to the tension between the multiculturalist accommodation of cultural minorities and liberal norms of anti-discrimination and equality, any attempt to restrict the rabbinical courts' authority in the name of human rights should clearly factor in their accessibility to the poor and the unrepresented and propose ways for the civil courts to enhance their own accessibility and better serve the underprivileged.

Finally, the two studies show that the rabbinical courts attempt to attract clients only in consensual procedures, in both divorce and inheritance matters. As will be elaborated next, in the context of disputes and conflicts, the similarities between the two legal matters disappear and the religious, cultural, and institutional variables lead to very different praxis.

B. Contradicting Praxis

In divorce disputes, the rabbinical courts notoriously fight to assert their jurisdiction and strive for autonomous jurisprudence, even at the cost of clashing with the Israeli Supreme Court and arousing harsh public criticism.[47] A most recent example relates to the rabbinical courts' exclusive authority in the context of divorce decrees. Under

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it will not validate the will.

45. Central Bureau of Statistics, Statistical Abstract of Israel No. 60, tbl. 7.4 (2009).

46. Eli Berman, *Sect, Subsidy, and Sacrifice: An Economist's View of Ultra-Orthodox Jews*, 115 Q.J. ECON. 905, 913-16 (2000); DANIEL GOTTLIEB, POVERTY AND LABOR MARKET BEHAVIOR IN THE ULTRA-ORTHODOX POPULATION IN ISRAEL (2007) (Hebrew), *available at* www.vanleer.org.il/econsoc/pdf/1_research_mdiniut4.pdf.

47. *See* Ran Hirschl, *Constitutional Courts in the Field of Power Politics: Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1841 (2004); Frances Raday, *A Symposium on Constitutional Rights and International Human Rights Honoring Professor David Kretzmer: Traditionalist Religious and Cultural Challengers—International and Constitutional Human Rights Responses*, 41 ISR. L. REV. 596, 611 (2008); Rabbi Shlomo Deichovsky, *Rabbinical and Civil Courts: Insights on the Friction Between Them in Family Law Matters*, 4 NATANIA ACAD. C.L. SCH. L. REV. 261 (2005) (Hebrew).

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Jewish law, the religious court does not have the authority to grant a divorce decree, known as a *get*, but, rather, can only declare that the parties must divorce and rule whether a divorce is valid or not. The divorce act must be voluntary and consensual, that is, the husband must willingly give the wife a divorce decree and she must willingly accept it.[48] Despite this seemingly egalitarian rule, other Jewish law rules lead to a reality in which women, far more than men, face the risk of being denied a divorce by their spouse, a situation called *get*-refusal.[49] One such rule is that a married man can get rabbinical permission to marry an additional woman without divorcing the first wife, whereas a married woman will not be allowed to remarry until she is divorced. Another rule empowering men in divorce is that a married man can have children from a woman other than his wife with no adverse legal consequences, whereas a married woman who has a child with a man other than her husband under Jewish law dooms that child and all his or her future generations of offspring to being *mamzerim* ("bastards").[50] The ramifications of the woman's decision are severe: *mamzerim* are allowed to marry only other *mamzerim*, and are subject to other harsh exclusionary practices.[51]

Over the years, Israeli rabbinical court judges have drawn much criticism for their ultra-orthodox interpretation of the Jewish divorce rules that invalidates a *get* not granted with the full consent of both husband and wife.[52] This interpretation of a "false divorce decree" (a *get meusseh*) leads rabbinical court judges to refrain from pressuring husbands into giving a *get*. Many Jewish women are thus denied a divorce and become what is known as *agunot*: in reality they have no husband, but they also have no divorce decree or legal ability to remarry and start a new family.[53] In a recent attempt to circumvent this interpretation, feminist lawyers started to file tort suits on behalf of *agunot* in family courts against husbands who have refused to grant a divorce for extended periods of time, causing the wives considerable economic and emotional damage.[54] Many family court judges are

48. Avishalom Westreich, *The Rights to Divorce in Jewish Law: Between Politics and Ideology*, 1 INT. J. JURISPRUDENCE FAMILY 177 (2010).

49. Shohatman, *supra* note 2; SHACHAR, *supra* note 1, at 57-60.

50. Rambam, Mishneh Torah, Hilchot Isurei Biah 15:1.

51. Sylvia Fogiel-Bijaoui, *Why Won't There Be Civil Marriage Any Time Soon in Israel?*, 6 NASHIM: J. JEWISH WOMEN'S STUD. & GENDER ISSUES 28, 31 (2003).

52. For example, *see* Shohatman, *supra* note 2; Westreich, *supra* note 48.

53. Pinhas Shifman, *The New Agunah: Religious Divorce in Israel*, 6 ALEI MISHPAT 27, 30-31 (2007) (Hebrew).

54. Yehiel Kaplan & Ronen Perry, *Tort Liability of Recalcitrant Husbands*, 28 TEL AVIV U. L. REV. 773 (2005) (Hebrew).

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sympathetic to these tort claims[55] and have awarded substantial compensatory damages to the wives.[56] However, the women and their lawyers soon discover that this financial victory is only partial: the rabbinical court judges respond by threatening to refuse to order a *get* or even invalidating a *get* already given. They argue that the civil suit creates a risk of a false divorce decree, since the husband "agrees" to give the *get* only to avoid the tort damages set by the family court.[57] This is a striking example of the rabbinical courts' persistent resistance to relinquishing their exclusive authority to the civil courts through civil legal mechanisms that might overcome the often discriminatory consequences of their jurisprudence.[58] This policy has generated stringent public criticism,[59] with mounting calls to establish alternative religious tribunals that will abandon the rabbinical courts' ultra-orthodox approach in favor of a more humane interpretation of religious law.[60]

In contrast to the rabbinical courts' campaign to attract clients in consensual divorce and inheritance cases and its assertion of its jurisdiction and jurisprudence in divorce disputes, the Inheritance Study shows that, surprisingly, in inheritance disputes, the rabbinical courts make an institutional endeavor not to make rulings, and even encourage litigants to apply to the family court. In other words, in the context of inheritance conflicts, the rabbinical courts tend to refrain from asserting their jurisdiction and jurisprudence.

55. *See, e.g.*, F.C. (Jm.) 3950/00, Roe v. Doe, [Jan. 23, 2001] 2001(1) P.M. 29 (the refusal to give a *get* constitutes a tortious cause of action, since it violates a woman's personal autonomy guaranteed under Basic Law: Human Dignity and Freedom); F.C. (Jm.) 6743/02, C. v. C. [July 21, 2008] (unpublished) (a husband's refusal to obey a rabbinical court injunction that he divorce his wife is a breach of the statutory duty to obey court decisions under § 287(a) of the 1997 Israeli Criminal Law Ordinance); F.C. (Jm.) 19270/03, C.Sh. v. C.F. [Dec. 21, 2004] (unpublished) (*get*-refusal is a tort because it constitutes unreasonable behavior falling under the rubric of negligence).

56. For example, in F.C. (Kfar Saba) 19480/05, Roe v. Roe's Estate [Apr. 30, 2006] (unpublished), the family court ordered the deceased husband's estate to pay NIS 711,000 ($198,937) to the wife of the deceased for the19 years that he had refused her a *get*. In F.C. (Jm.) 6743/02, C. v. C. [July 21, 2008] (unpublished), the family court awarded damages in the amount of NIS 550,000 ($153,889) for 9 years of *get*-refusal. In F.C. (T.A.) 24780/98, N.Sh. v. N.I. [Dec. 12, 2008] (unpublished), the family court ordered the husband to pay NIS 700,000 ($195,859) in damages for 10 years of *get*-refusal.

57. Kaplan & Perry, *supra* note 54.

58. Such discriminatory consequences also include the loss of spousal support in cases of the wife's so-called "sexual misconduct" or when she leaves the marital home without "justified cause," and the wife's loss of child custody when the husband leads a religious lifestyle and the wife does not. *See* HALPERIN-KADDARI, *supra* note 1, at 250-52.

59. *See, e.g.*, Yifat Bitton, *Feminine Matters, Feminist Analysis, and the Dangerous Gap Between Them*, 28 TEL AVIV U. L. REV. 871 (2005) (Hebrew).

60. Shifman, *supra* note 53.

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This conclusion can be implied from the lack of files documenting inheritance disputes in the archives of the Tel Aviv Rabbinical Court. As opposed to the many thick and heavy inheritance files in the Tel Aviv Family Court, unfolding bitter struggles over estates, all the inheritance files in the Tel Aviv Rabbinical Court archives were meager, indicating minimal court action. The rabbinical court files contained only consensual applications for either intestate or probate orders, with no evidence of disputes. Moreover, the clerk in charge of inheritance procedures at the Tel Aviv Rabbinical Court confirmed that the Court adjudicates only a handful of inheritance disputes each year. She acknowledged that she explains to potential applicants that Jewish inheritance law discriminates against women, favors firstborn sons, and can cause other "problems," even though this information might encourage them to apply instead to an inheritance registrar or a family court.[61]

As in the case of divorce, strict interpretation of Jewish religious inheritance law can have discriminatory effects. Women suffer from three forms of unequal treatment in estate allocation. First, while Jewish law deems a husband to be his wife's heir, she is excluded as an heir to her husband's estate. Second, daughters are not recognized as their father's heirs if there are surviving sons or male descendants of sons. Third, a mother and her family are not recognized as heirs of the mother's deceased child.[62] In addition, Jewish inheritance law prescribes that the firstborn male should receive double the share that his siblings receive.[63] These discriminatory rules are particularly problematic since Jewish law does not recognize freedom of testation, and thus the right to override these rules with a will.[64] Over time, however, a substitute for wills has come to be recognized, as Jewish religious leaders allowed the validity of written documents granting *inter vivos* gifts that come into effect immediately before the giver's death,[65] so that, among other reasons, daughters and mothers can "inherit."[66]

Indeed, the Inheritance Study revealed that the Tel Aviv Rabbinical Court does recognize such wills formulated as *inter vivos* gifts.

61. Informal interview with an unnamed clerk conducted in March 2007.

62. *See* Mary F. Radford, *The Inheritance Rights of Women under Jewish and Islamic Law*, 23 B.C. INT'L & COMP. L. REV. 135, 162-63 (2000).

63. *See* JOSEPH RIVLIN, INHERITANCE AND WILLS IN JEWISH LAW ch. 2 (1999) (Hebrew).

64. Arye Edrei, *A Gift "From Today and After Death" in the Talmudic Law*, 20 SHENATON HA-MISHPAT HA-IVRI 1 (1997) (Hebrew).

65. *Id.*

66. *See* Radford, *supra* note 62.

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Moreover, if the deceased dies intestate or leaves a will that violates Jewish laws of inheritance, the Rabbinical Court tends to recognize and even push for male heirs' relinquishment of part of their own shares so that the deceased's wife, daughters, or granddaughters can receive a share equal to that of the male heir from the same family line or, alternatively, the share that the testator had wished to bequeath to them. The Court effectuates the testator's intent by applying a religious law construction that recognizes a fictitious obligation (an *odita*)[67] on the part of the male heirs towards the female family members.

Rabbi Shimon Yaacobi, the Legal Advisor to the Rabbinical Courts Management, stated in an interview for the Inheritance Study that the application of religious egalitarian mechanisms to overcome the discriminatory effects of religious inheritance law is not unique to the Tel Aviv Rabbinical Court; rather, it is part of the general egalitarian inheritance policy implemented by the entire rabbinical courts system.[68] Rabbi Yaacobi noted that in the infrequent cases in which the male heirs do not agree to an egalitarian division of the estate, rabbinical court judges will actively push for an egalitarian compromise. Furthermore, if the judges realize that the conflict is irresolvable, they will try to find grounds for dismissing the case so that the heirs will have to bring their case before a family court, which does not apply the discriminatory religious rules. In the very few instances in which there is no legal ground for dismissal,[69] the rabbinical court will be forced to render a decision based on religious laws, despite the possibly discriminatory outcome. The rarity of such cases corresponds with the infrequency of Supreme Court interference in rabbinical court rulings on inheritance matters, about which Rabbi Yaacobi expressed considerable satisfaction.[70]

67. *See* RIVLIN, *supra* note 63, at 157.

68. *See supra* note 41. *See also* Shlomo Deichovsky, *"The Communal Property Presumption": The Law of the Land?*, 18 THOMIN 30-31 (1998) (Hebrew). Rabbi Deichovsky, who was a judge at the Great Rabbinical Court and now is the Manager of the Rabbinical Courts, argues that he never saw a rabbinical court judge who disinherited a daughter or a wife. Rather than ruling according to the Jewish inheritance laws, the judges make sure that the male family members relinquish an equal share in favor of the female family members.

69. The rabbinical court can dismiss the case using the construction that not all parties involved have given their free consent to its jurisdiction. It is more difficult to make use of this mechanism when all the parties are religious.

70. The one issue Rabbi Yaacobi mentioned where the Supreme Court and rabbinical courts dissent involves inheritance rights is common-law marriage. While Israeli inheritance law has equalized the rights of formally married spouses and spouses in common-law marriage (Inheritance Law, 1965, § 55, S.H. 446), Jewish religious law does not recognize the latter as a union yielding legal rights and obligations, *see* HCJ 673/89, Mesholam v. Great Rabbinical Court, [1991] 45(5) IsrSC 594 (intervening in the Rabbinical Court's attempt to disregard a common-law

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It clearly emerges, then, that in dramatic contrast to their praxis in divorce matters, in the inheritance context the rabbinical courts do not seek to bolster their authority and impose their rulings but, rather, deliberately try to redirect parties to the civil system if there are potential complications, and they make a conscious effort to avoid ruling in disputes. Moreover, whereas in divorce proceedings rabbinical court judges consistently assert their judicial autonomy even when it results in severe gender discrimination, in inheritance proceedings their concern with gender equality undergirds their attempts to mediate between rival family members or refer conflicts to secular family courts rather than to make rulings unfavorable to women. Thus, while the jurisdictional and jurisprudential praxis of the rabbinical courts system in divorce generates harsh feminist criticism and heavy intervention from the Supreme Court, it is quite the opposite with the rabbinical courts' praxis in inheritance matters.

In conclusion, the rabbinical courts system's aversion to asserting its jurisdiction and jurisprudence in inheritance conflicts diverges dramatically from its drive to attract clients and its struggle for authority in divorce disputes. Below, I consider three possible explanations for this divergence: the religious, cultural, and institutional variables.

1. The Religious Variable

The religious explanation for the rabbinical courts' fight for jurisdictional and jurisprudential authority in divorce, which is absent in non-consensual inheritance contexts, rests on the distinction between Jewish prohibition laws (*dinei isurim*) and monetary laws (*dinei mamonot*). Although there is a debate among Jewish law scholars as to whether or not inheritance law falls under the rubric of monetary laws,[71] the Jewish religious legal approach towards a person's property is indisputably far different and far more flexible than its approach to divorce matters.[72] As described above, Jewish law dictates the manner in which a person's property is distributed upon his or her death and does not recognize the option of bequeathal by will. However, as noted, several mechanisms, such as gift deeding, have been developed by Jewish religious leaders that enable people to de facto choose their heirs.

spouse's inheritance rights).

71. RIVLIN, *supra* note 63, at 9.

72. MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 109 (Bernard Auerbach & Melvin J. Sykes eds., Jewish Publication Soc'y Am. 1994).

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Yet in the case of divorce, such adaptive and creative mechanisms have not evolved for fear that a false divorce decree would be issued. At the root of this fear is the fact that divorce law is a prohibition law and that there are harsh consequences if a married woman gives birth to the child of a man other than her husband, even if she believes, erroneously, that she has been properly divorced. In such cases, the woman will never be allowed to marry the father of her children,[73] and as described above, the child and his or her future generations of offspring will bear the discriminatory status of *mamzer*. It is clear, therefore, why the rabbinical courts fight for jurisdiction and implementation of their jurisprudence in divorce disputes that affect personal status.

But this religious explanation does not account for the rabbinical courts' disregard for the position taken by certain Jewish religious leaders prohibiting the application of any mechanism for overcoming Jewish inheritance law,[74] which could lead to jurisdictional and jurisprudential wars in the field of inheritance as well. Nor does it explain rabbinical court judges' inflexibility on monetary issues related to divorce that do not fall within the scope of the prohibition laws[75] and their disregard for solutions developed by religious leaders for preventing *get*-refusal and pressuring husbands into releasing their wives from marriage.[76] This is where the cultural explanation gains relevance.

73. Shohatman, *supra* note 2, at 427.

74. For examples, *see* RIVLIN, *supra* note 63, at 40.

75. A clear manifestation of this insistence emerged in an interview I conducted with a rabbinical judge who claimed that although the Supreme Court has ruled that the rabbinical courts must rule in accordance with the civil conception of communal property and divide it equally between the divorcing spouses (*see supra* note 21), religious judges still follow the religious laws that divide the property according to the notion of individual property. *See* DAPHNA HACKER, PARENTHOOD IN THE LAW: CUSTODY AND VISITATION CONSTRUCTION UPON DIVORCE 169 (2008) (Hebrew); *see also* the debate between Rabbi Sherman, currently a judge at the Great Rabbinical Court, and Rabbi Deichovsky, about the ability of rabbinical court judges to rule according to the communal property presumption: Avraham Sherman, *"The Communal Property Division"—Is Not Grounded in Jewish Law*, 19 THOMIN 295 (Hebrew) (arguing that the judges should not rule according to the communal property presumption, even if the parties agree that they would, since it stands in contradiction to religious law); Deichovsky, *supra* note 68, and at his response published as an index to Rabbi Sherman's article (Hebrew) (arguing that the there is no religious obstacle to ruling according to the communal property presumption if the parties agree). *See also* Adam Hofri-Winogradow, *The Acceleration of Israeli Legal Pluralism: The Rise of the New Religious-Zionist Halachic Private Law Courts*, 34 TEL AVIV L. REV. 47 (2011) (Hebrew) (arguing that the rabbinical courts do not adhere to the recent Supreme Court decision that prohibits them from acting as arbitrators in monetary affairs).

76. Shohatman, *supra* note 2, at 427-34.

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2. The Cultural Variable

The ultra-orthodox judges of the rabbinical courts[77] seem to share the general public opinion that women should not be discriminated against in inheritance. According to Rabbi Yaacobi, the ultra-orthodox sector these judges belong to holds similar perceptions to those held by the general population, namely, that discriminating among offspring or disinheriting a wife are wrong.[78] Thus, rabbinical court judges search for ways to enable them to make religious law conform to these values and perceptions. Like the Israeli secular population, they want their wives and daughters to be treated equally and to be protected from disinheritance, and they act accordingly within their community. They therefore have no cultural motivation to instill values that diverge from those expressed in the egalitarian civil inheritance law.

In the divorce context, in contrast, it seems that the low divorce rate within the ultra-orthodox Jewish community[79] and the considerable power of rabbis within this community to convince husbands to grant wives a divorce converge to minimize the extent to which rabbinical court judges are socially exposed to the misery suffered by a woman refused a divorce. They do not fear that their daughters will suffer the consequences of their divorce policy. Hence, these judges lack both cultural and personal motivation to adopt legal mechanisms that can overcome the gendered discriminatory effects of Jewish divorce law.

However, when they preside over divorce proceedings, rabbinical court judges are most certainly exposed to the distress of women refused a divorce by their husbands. Moreover, those who suffer the most from the conservative application of divorce law in the rabbinical courts are orthodox and ultra-orthodox women, who, unlike some secular women, would not dare to live with another man before getting a divorce. Hence, the cultural factor cannot fully explain why rabbinical court judges refuse to depart from their divorce policy and its harsh gendered

77. Although, as noted above, rabbinical court judges need only be orthodox and not ultra-orthodox rabbis, the current political constellation leads to the nomination of judges mainly from the latter stream. *See* K.M. NISAN SOLOMINSKI, RELIGIOUS JUDGES' APPOINTMENT: A ZIONIST STATE OR AN ULTRA-ORTHODOX STATE?, http://toravoda.org.il/he/node/584 (last visited Mar. 2011) (Hebrew) (in 2003, 83% of the 93 rabbinical courts judges were ultra-orthodox); Kobi Nachsoni & Aviram Zino, *12 Ultra-Orthodox Judges Nominated; "Agunots Sacrificed,"* YNET, Mar. 19, 2007, http://www.ynet.co.il/articles/0,7340,L-3378409,00.html (last visited Mar. 2011) (Hebrew) (of 15 new rabbinical court judges nominated, 12 were ultra-orthodox).

78. *See supra* note 41.

79. For a description of the harsh outcomes of divorce in this community, which contribute to the low divorce rate, *see* Shiri Lerner, *Ultraorthodox Divorce: Not to Become "Defective Goods,"* YNET, Mar. 9, 2006, http://www.ynet.co.il/articles/0,7340,L-3225714,00.html (Hebrew).

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consequences while actively striving for gender equality in inheritance. Rather, an institutional explanation is necessary to complete the religious and cultural aspects of the differences in rabbinical court praxis.

3. The Institutional Variable

As noted, Israeli law grants the rabbinical courts sole authority to issue and validate divorce decrees and parallel authority in all matters related to divorce. In inheritance, however, the law makes rabbinical court authority contingent on the consent of all parties involved. Only one party need object for the case to be referred to an inheritance registrar or family court. Consequently, the rabbinical courts enjoy far greater institutional freedom in divorce matters than in inheritance. The ability of potential clients to go forum shopping in inheritance matters on the one hand, and the rabbinical courts' exclusive jurisdiction over divorce decrees on the other, contribute to the adoption of an egalitarian inheritance policy that corresponds with the civil law, even as the rabbinical court judges are applying a conservative discriminatory interpretation of divorce law.[80] Hence, we see here a clear example of how different kinds of jurisdiction allocations[81] affect religious tribunal praxis. The grant of sole jurisdiction over a particular subset of legal matters to the rabbinical courts is easily followed by resistance to liberal values, whereas the grant of parallel jurisdiction that conditions the religious tribunal's authority on the consent of all parties involved leads to a counterintuitive praxis of jurisdiction avoidance and jurisprudential flexibility.[82]

This comparison between how the rabbinical courts handle divorce and inheritance matters enriches the theoretical debate between the liberal and multicultural advocates over the right that should be granted to religious communities to establish autonomous tribunals, as well as offers an opportunity to assess the outcomes of attempts to mitigate between the two normative positions. On the basis of the empirical findings, we can formulate a three-variable model, where each variable affects the law as enacted by religious tribunals operating in a liberal

80. *See also* Westreich, *supra* note 48.

81. *See* the Shachar model in the text following *supra* note 1.

82. *See also* Ido Shahar, Practicing Islamic Law in a Legal Pluralistic Environment: The Changing Face of a Muslim Court in Present-Day Jerusalem 28 (2006) (unpublished Ph.D. dissertation, Ben Gurion University of the Negev) (on file with the Ben Gurion University Library) (an ethnography on the consequences of forum shopping in the legal field governing Muslims' personal status in Jerusalem).

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environment. These variables are likely to be predictive of a religious tribunal system's willingness to respond positively to liberal values and practices:

> *The religious variable—the content of the religious law governing the subject matter*: The more the religious law itself allows for flexibility and creativity, the more willing the religious judges will be to adapt their praxis to liberal legal perceptions.
>
> *The cultural variable—the cultural background of the religious judges*: The closer the religious judges' culture is to the liberal culture of the majority, the more receptive they will be to the needs of clients who suffer from the discriminatory effects of formal religious law.
>
> *The institutional variable—the degree of authority the religious tribunal has over the given subject matter*: The greater the competition from the civil courts, the more willing the religious tribunal will be to accommodate liberal values and practices.

This is, of course, only a partial, preliminary, and tentative model. There are only a few existing studies on religious tribunals operating within a liberal environment that can serve as test cases for it.[83] Further studies are thus required to verify and possibly refine the model.

CONCLUSION

In most countries, there is either a civil family law system or a religious family law system.[84] In this respect, the Israeli dual family law regime is unique.[85] However, more and more liberal states are facing the need to define policies regarding the work of religious tribunals that deal with family matters outside the official state legal system.[86] These states must choose between setting up potential conflicts between the secular and religious tribunals, integrating religious tribunals into the state legal

83. Shahar's study, for example, points to the possible effect of nationalism on the institutional praxis of religious tribunals when they serve a national minority, as in the case of the Shari'a courts in Israel. *Id.*

84. *See, e.g.*, DAVID BRADLEY, FAMILY LAW AND POLITICAL CULTURE: SCANDINAVIAN LAWS IN COMPARATIVE PERSPECTIVE (Sweet & Maxwell 1996) (providing an outline of the civil family law system in Scandinavian countries); MARY A. GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (N. Holland Pub. Co. 1977) (discussing the civil family law systems in the United States, England, Germany and France). For an example of a country with a religious family law system, *see* Hossein Esmaeili, *On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System*, 26 ARIZ. J. INT'L & COMP. L. 1 (2009).

85. *See* Mark Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101 (2000); Goodman, *supra* note 6 (for the similarities between Israel and India in their family law systems).

86. *See* SHACHAR, *supra* note 1; Goodman, *supra* note 6.

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system, or allowing them to have separate and parallel operations.[87]

My modest objective in this paper has been to demonstrate that empirical studies that examine how religious tribunal systems actually operate can be very valuable to the theoretical debates over legal multiculturalism and policy-making dilemmas over religious tribunals in liberal states. My studies show that religious tribunals are not static entities but rather institutions that dynamically respond to religious, cultural, and institutional constraints and opportunities. The understanding of these dynamics is crucial for those seeking to formulate legal frameworks in which religious groups are able to preserve their *nomos* while the most powerless members of these groups are protected from discrimination.

The institutional variable of the three-variable model suggested here underscores the importance of the element of choice of jurisdiction in Ayelet Shachar's model. This choice is vital not only in securing the individual's freedom to forum shop; it also encourages both the religious and civil tribunals to increase their accessibility in the struggle for clients, a competition that also might lead religious tribunals to accommodate the liberal values of the secular majority. However, the studies' findings also show that even when the element of jurisdictional choice is ensured, the religious tribunal's interest in attracting clients is mitigated by the religious and cultural variables, which might lead to discriminatory rulings. Understanding these variables could call for a jurisdictional allocation that relegates legal matters that would be governed by less discriminatory religious rules and more liberal cultural backgrounds of religious judges to parallel jurisdiction with religious bodies, while matters in which more discriminatory religious rules apply or those matters influenced by the more anti-liberal cultural background of the religious judges would be subject to the sole jurisdiction of the civil courts.

The study has also demonstrated how a detailed analysis of a specific religious court can assist in evaluating the potential of multicultural polity ideas, such as Shachar's *transformative accommodation*, in a relevant socio-legal context. Clearly, it is necessary to examine the current religious and cultural characteristics of the minority group's legal body to determine which, if any, institutional structures will motivate it to respect all citizens' basic rights. Or, the study of such religious legal authorities may allow a secular state to

87. *See* Gordon R. Woodman, *The Idea of Legal Pluralism*, *in* LEGAL PLURALISM IN THE ARAB WORLD 3-19 (Baudouin Dupret, Maurits Berger & Laila al-Zwaini eds., Kluwer L. Int'l 1999).

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conclude that, at least under present circumstances, the gap between worldviews is too wide, so there will be no easy resolution between advocates of a liberal stance (such as Okin's) and advocates of a multiculturalist stance (such as Barzilai's).

Finally, I hope that this paper will contribute to the ongoing debate over the role of the rabbinical courts within the Israeli legal field governing family matters. The paper highlights the advantages of these religious tribunals in serving the poor and the unrepresented. Any attempt to undermine their authority in the name of human rights will be problematic until the civil court system better serves this underprivileged population. In addition, it is clear that in the current social and political environment, rabbinical court judges have very little motivation to abandon their conservative and discriminatory divorce policy. The inheritance context and certain religious interpretations of divorce law highlight that an intrinsic or deterministic clash between religious law in action and gender equality can possibly be avoided. However, the cultural background of the ultra-orthodox judges and their institutional monopoly over divorce decrees guarantee their continued interest in maintaining the current status quo. It is eminently clear that the rabbinical courts' gender-friendly policy in inheritance will not permeate into divorce in the near future. Hence, those who strive for gender equality in Israel or for an Israeli legal system that upholds its constituents' right of jurisdictional choice should unrelentingly struggle for a regime of civil marriage and divorce and for a plurality of state-recognized religious tribunals that include such streams as the Progressive Movement[88] and the Conservative Movement.[89] Hopefully, these less orthodox tribunals would seek to preserve religious values without the high costs in group discrimination and individual misery.

88. *See* Israel Movement for Progressive Judaism, Progressive Judaism in Israel, http://www.reform.org.il/Eng/Index.asp (last visited July 20, 2011).

89. *See* The Masorti Foundation, Welcome to Masorti, http://www.masorti.org/ (last visited July 29, 2011).

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