The Role of Religious Law in the Legal System of the State of Israel:

Divorce in Israeli Law

Dominika Sedlakova, Paideia Fellow 2011-2012

My project is about Jewish law, and more precisely Israeli law. It focuses on the issue of divorce in Israeli law system. This topic is also the theme of my master thesis in Hebrew studies. I have chosen this topic because it is interdisciplinary and because there have been written almost nothing on this topic in the Czech Republic. I will write my paper in both English and Czech and my primary target group is Czech people. I would also have a chance to publish a part of my project in a Czech magazine (it is called „Novy Orient“) which specializes in the Near East issues. There are not many people in my country who are interested in Jewish law or Israeli law and, in my opinion, it is important to offer an opportunity to Czech people to get to know Jewish law because Jews have been a part of the Czech society for many centuries but Czech people know almost nothing about Jewish law. Unlike other religious law, for example canon law, Jewish law is not taught nowadays at Czech law faculties and, in my opinion, it is necessary to change this situation.

Introduction

Every legal system has its own history, development and it is somehow specific exactly because its unique development. The legal system is usually influenced by all cultures which were changing off in the area of the state. The more rules and powers were changing off in the area of the state the more interesting but also complicated is its legal system. Legal systems are usually divided into two groups or families – the Continental legal system (Continental European law) and the Anglo-Saxon legal system. In the Continental European law, the central source of law that is recognized as authoritative are codifications in a constitution or statute while in the Anglo-saxon legal system the basic source of the law is a decision in case by judge. The legal system of some countries can be considered as more or less pure form of the Continental or Anglo-Saxon. For example the legal system of my country is based basically on the civil law (continental law) and precedents (court’s decisions) are not the basic source of the Czech law.
Israeli law is different. We are not able to include it to first or second group. We cannot speak in this case about pure form of the Continental or Anglo-Saxon law. It is in virtue of specific history of people of Israel and also of a history of the area of the State of Israel. Jews have been living in diaspora in many countries in Europe, North Africa and Asia and although their traditional law, halakhah, was used by all of them, they were living in different conditions and their law was influenced by local legal system.

Halakhah used to be a legal system which was observing by all Jews, all Jewish communities. However, except of halakhah, a status of Jews, their rights and obligations were determined also by rulers of every specific country. There were usually some special laws which were supposed to protect Jews and which guaranteed them some rights and usually also judicial autonomy and allowed them to use their own law (halakha) for their inner matters.

The first document of this type which was published in the area of today’s Czech Republic, was so called Statuta Judaeorum from 1262. This law guaranteed to Jews some rights, they became servi camerae and they were over the jurisdiction of a king. This decree concerns also to disputes between Jews and Christians, tolls, damages of synagogues and Jewish cemeteries and bodily harms caused to Jews. These rights and obligations as judicial autonomy began to be abolished in the 18th century in connection with the emancipation and with plans of rulers to integrate Jews into society.

One of the first document of this kind in our lands was the Edict of Tolerance which was promulgated in 1782 by emperor Joseph II. We cannot confuse this document with another document, which is probably more known, so called the Patent of Toleration, which concerned to non-catholic Christians.

This document, as we can read in promulgation, was supposed to give to Jews the possibility “..to participate in common in public welfare”. The state and public welfare were very important for Joseph II and he wanted all inhabitants to participate in it. As we can read in the Edict of Tolerance : “ As our goal to make Jewish nation useful and serviceable to the State, mainly through better education and enlightenment of its youth as well as by directing them to the sciences, the art and the crafts.”
For our purpose it is important to mention that it was exactly this document which abolished the judicial autonomy for Jews in our lands. As it is written in paragraph 23: “Besides, We hereby completely remove the double court system.” In 1784 a jurisdiction over Jews began to be performed by the same courts as over Christians. The jurisdiction of the rabbinical courts ( beyit din) was restricted on matrimonial or religious proceedings.

Similar statutes were published all over Europe. The emancipation caused that the Jewish law lost its force as an active social institution. Jewish law was not anymore functional, actively used legal system at least in Europe. The only area, in which Jewish law was still applied, was family law, matters of marriage, divorce.

I am concentrated in my paper on Europe, but in my opinion it is important to mention that for instance in the North Africa there existed a judicial autonomy until the end of 19th century, and in Morocco the judicial autonomy in matters of family law was abolished even in 1956 where Morocco became independent.

**Israeli judicial system**

In Israel there are two types of courts – general courts and special courts. The system of special courts includes also religious courts. In our country we have also general (civil) courts and religious courts. But there is very important difference.

In the Czech Republic civil courts have general jurisdiction over all persons who dwell in the area of state. These courts have jurisdiction in all areas. Religious courts exist and they have jurisdiction in some areas, but unlike a situation in Israel, their decisions have no influence on personal status of a person. These Christian courts adjudicate mainly matters of marriage and divorce. For instance, if I want to divorce I bring a case before the civil court which is competent to adjudicate my case. The religious court is competent to consider the validity or invalidity of marriage, but it does so just in the case that marriage was divorced by civil court. If ex-spouses wish to wed in accordance with canon law they are required to have two decisions which proclaim their previous marriage invalid. However for the state and personal status of those persons these decisions of religious court are not important.

In Israel, by contrast, religious courts are competent to adjudicate in relevant restricted areas. Religious, rabbinical courts (there are also the Sharia courts and religious courts for Christians
and Druze, but these courts are not a topic of my work) have jurisdiction in matters of marriage and divorce over Jewish Israeli citizens and Jewish residents in Israel. This jurisdiction is exclusive. However in the matters of personal status there is also concurrent jurisdiction of rabbinical courts and general courts. This concurrent jurisdiction is in matters of legal capacity, inheriting and minors maintenance. The religious court system was established by The Palestine Order – in- Council, 1922-1947.

As I said there is concurrent jurisdiction in some matters in Israel. That means also that in some cases the civil court is obliged to apply Jewish law. There is also question if in some case adjudged already the rabbinical court, is this decision binding for the civil court? There are different opinions on this issue. For instance the decision of the rabbinic court should be binding because everyone is obliged to respect a decision of a halakhical authority of his generation, another opinion says that only takkanah of the Chief Rabbinate has this authority. However on the other hand halakhah does not set one definitive decision and it means that also the civil court has right to decide in the specific case in accordance to its own legal opinion.

Before promulgation of The Palestine Order there were some attempts how to provide an application of Jewish law in practical everyday life. The Jewish Court of Arbitration (Mishpat HaShalom Ha-Ivri) was established in 1909-1910. This court coexisted with a court system of Ottoman empire and later with a court system of British mandate. The Jewish Court of Arbitration had no power to enforce its judgements and it decided according to principles of equity, morality, social welfare etc.

The Rabbinical Court of Appeals was established in 1921 and twenty years later the Council of the Chief Rabbinate adopted procedural enactements for the rabbinical courts which were based partly on Jewish law and partly on the practice in general court system.

As I said above there are general and special courts in Israel. The general court system is consisted of magistrates´ courts, district courts and the Supreme court. The special courts are the military courts, the labor courts, the traffic courts and the religious courts. There are rabbinic courts and the Supreme Rabbinic Court which acts as the court of last resort in cases which were brought before the rabbinic courts. It is also important to mention that rabbinic courts in most cases apply just Jewish law unless specific law prescribes its application also to rabbinic courts.
**History and Sources of Israeli Law**

I do not want to describe in this paper very rich history of Jewish law. I would like to concentrate on the history of Israeli law and its basic sources.

As I said above, the Israeli law was influenced by many other legal systems. We may find different sources, different principles which stand behind laws of the State of Israel. For instance the Law of sales was influenced by Moslem religion law, law of damages for breach of contract was partly based on the Ottoman Code of Civil Procedure from 1879 and this Code was obviously based on French law. An influence of English law maybe found in a tort law, which was based on a Mandatory ordinance of 1944-47 (this Ordinance is based on English law). It is also interesting to realize that these laws were written in different languages.

Since Israeli law was influenced by so many legal systems and principles, it is important to determine which is the basic principle, the basic system, which creates a cultural-legislative basis of the Israeli law. Predictably it is Jewish law. The Israeli legal system is inspired by Swiss, German, British law, but if the law itself is not sufficient to solve a case and it is needy to find general principles, general and common basis of the Israeli legal system, we have to catch our notice to the Jewish law. The Jewish law has priority to other legal systems which influenced the legal system of Israel.

The State of Israel was established in May 1948. Usually, when a new state is established there is some law which is valid in that area to the day of the establishment. When a new sovereign is going to kontrol this area it is necessary to determine what legal system, what law will be valid after a declaration of independence of a new state. We can easily find law like this in the Czech legal history, it is the law from 28th October 1918, which keeps in validity austrian-hungarian law system until the enactment of new czechoslovakian legal system.

In the history of the area of present Israel during the 20th century we may also find documents of this kind. I would like to mention The Palestine Order in Council from the year 1922. According to this document the Ottoman law in the area of the British Mandate was recognized as binding, „subject to the ordinances and regulations thereafter promulgated by
the Mandatory Government. If there appeared an issue which was not included into the legal system it would solve according to principles of the common law and equity.

In 1948 when the new state was established, current law was recognized binding and it was being gradually replaced by laws of the new state. There was a discussion if or to what extent should have been Jewish law incorporated to the legal system of the new state. Jewish law, except of the law of personal status, was not officially incorporated to the legal system of the state, however a primary source, principle for a legislation issued by Knesset, is Jewish law.

We may see in many laws or their explanatory notes, how they were influenced by principles of Jewish law although from time to time there were arguments that the incorporation of principles of the Jewish law decrease its value, because they are nomore principles of Divine law. If we accepted this argument it would exclude the incorporation of the Jewish law at all. We may say that the criminal law and the public law in general were based on principles of Jewish law.

For instance a law which is concerned to a monetary compensation for released employee, was influenced by Jewish law, in the basis there are parts about a law of slaves in Deuteronomy and their manumit. Other examples are The Bailees Law which was Publisher in 1967 and The Rules of Evidence Amendment Law from the year 1980. The first mentioned one accepts a terminology of Mishnah concerned bailees, four types of bailees and also some parts about their responsibility. The Rule sof Evidence Amendment Law regulates a status of witness and it is based on Exodus 20:16 and Deuteronomy 5:17.

The Israeli Law achieved its independence from others legal systems by promulgation of The Foundation of Law Act in 1980. This law released the Israeli legal system from dependence on English common law and equity and Jewish law became part of Israeli law. This law says in its paragraph 2 that: „Article 46 of the Palestine Order in Council, 1922-1947“, is hereby repealed.

However in the same paragraph we may find the saving cause: „The provision of subsection (a) shall not derogate from the law which was accepted in Israel before the coming into force

---

2 Ex 20:16 : "You shall not give false testimony against your neighbor.
3 Dt 5:17 : "You shall not murder.
of this Law. This part speaks about those parts of English common law which were incorporated to the Israeli legal system until the date of efficacy of this law.

In my opinion it is also important to note that this law did not derogate the Ottoman law which was valid to the day of establishment of the new state. The Ottoman law was derogated in 1984.

**The Law of Personal Status, the Family Law and the Heirship**

The Law of Personal Status, the Family Law and the Heirship are parts of the Israeli legal system which the Jewish law has been incorporated to. The Jewish law, as Menachem Elon writes, was incorporated to these branches of law by two ways. The first possibility is a blanket incorporation. It means that in the law there is just reference to Jewish law, but it is not specified how that certain branch will be influenced by the Jewish law. As an example of this way of incorporation we can mention The Marriage and Divorce Law from 1953. Another way is an incorporation of specific provisions.

I would like to shortly mention some important Israeli law from this area, which were influenced by the Jewish law. In my opinion first of all it is important to mention The Capacity and Guardianship Law. This law is concerned with one of the most important legal concept and that is a legal capacity. If a person has legal capacity it means that he is able to make binding amendments to his rights, duties and obligations. Usually, in the most legal systems, the legal capacity is assumed successively and a person assumes the full legal capacity in the age of maturity, which is set differently in different countries. The full legal capacity is assumed in the Czech Republic as well as in Israel in the age of 18.

There was a problem in the Israeli law with this law concerned the legal capacity, because, as we know, according to halakhah, man is mature in the age of 13 and woman in the age of 12. However it is important to mention that this age became throughout the history flexible and required age depended on the specific legal transaction. I must add that the legal capacity is looked on individually and it is necessary to have a respect to a mental maturity of a concrete person.

---

4 ibid
Another important law in this area which was influenced by principles of the Jewish law is The Family Law Amendment (Maintenance) Law, 1959. This law is concerned to a maintenance of other family members than minors and spouse. The principle of the Jewish law “charity must be compelled” was incorporate to this law. The similar principle we may find in the Shulkhan Arukh which says that supporting relatives or neighbors who are in need has priority to supporting persons from another city who are in need etc.

**The Marriage and Divorce Law in Israel**

The marriage and divorce law in Israel is governed by religious law. Unlike in the Czech Republic in Israel there is not a separation between church and state. If you wish to wed in the Czech Republic, you may choose civil or religious marriage and both are equal. In Israel, by contrast, a Jew can be married only in accordance with halakhic principles and the civil marriage is nonexistent. If secular Jews want to be married in a different than orthodox way they have to be married abroad.

There are also some restrictions relating to marriage which are based on traditional religious law, but in modern society it is necessary to attempt a solution for those people who want to be married but traditionally it is not allowed. This is an example of the marriage of kohen and divorced woman. This marriage is not halakhically permitted. All marriages which are not permitted according to halakhah are forbidden ex ante, but valid ex post. The reason for this solution is that a public interest is validity of this marriage and its registration to a register of the Ministry of Interior. On the other hand if a couple preferred privately performed marriage to marriage according to halakhah there was opinion that this marriage should not be register because a public interest is in this case law - abidingness.

Privately performed marriage is wedding which is not performed by a member of the local Rabbinate. Traditionally during this wedding ceremony a future husband gives a ring to his future wife in the presence of two witnesses and declares that she is betrothed to him in accordance to law of Moses and Israel or that she is his wife. However on the present when somebody wants to wed and his wedding is not halachically permitted or he or she prefers civil marriage, he may wed abroad.

---

5 see Zákon o rodině (Family law) 94/1963, § 3
Marriage which is performed abroad and which is valid in that country is retroactively recognized in Israel as valid and registered. Today the most popular destination for Israeli citizens who wish a civil wedding, is Cyprus.

As I said above, in Israel the matters of marriage and divorce are under the jurisdiction of religious courts, in our case Jewish rabbinic courts (batei din). In the case of the Jewish divorce court just returns a verdict that the divorce is tangible or, in most cases, that the divorce is advisable. The rabbinic courts can resort to coercive policies by the means of state police and are capable of enforcing their decisions. The Israeli rabbinic courts thus have vehicles to arrest a recalcitrant husband until he agrees to provide the get. However, this means can be apply just in the case when the court declared that a divorce is enforceable.

As it is well-known, according to the halakhah, the husband must deliver the divorce-list without any duress or compulsion. That represents a crucial problem for any “enforcement”. What enforcement can be used not to invalidate the get right away? There is a danger of get meuseh. And what reasons are sufficient for enforcement of the get? This is still not clear enough. For instance Maimonides claims that if a woman declares that she loathes her husband, it is the reason for enforcement of the get.

What are the main reasons why husband refuses to deliver a bill of divorcement? The motive behind withholding a get is economic or other benefit for instance child custody. A husband can keep his wife at his mercy. It seems to me as an extortion and abuse of the power to withhold a get. But how we can solve this problem? Ruth Halperin Kaddari alerts to unwillingness of leading orthodox rabbis to participate in conferences concerned to the problem of agunot.

That is a fact that there is in Israel a law, so called the “Sanction Law” (The Rabbinical Courts (Enforcement of Divorce Decrees) Law, 1995) which enables to courts to apply various restraining orders against recalcitrant husbands. However this law is not very effective because these orders lead to the divorce just in the half of all cases.

There are several proposed solutions for agunot such as a premarital contract or self-imposed penalties which divides specialists into two groups. The matter is that a husband agrees to divorce his wife and deliver a get within a certain date. If he doesn’t deliver it he stipulates to pay some penalty. The husband then declares his unwillingness to execute the get but he does
it to avoid the payment. There is a question whether the get is valid or invalid. It could be valid because the creation of the penalty was consensual. However, usually this get is judged as invalid because the authorities afraid of the get meusah.

Another suggested solution is a concept of qiddushei taut – rescission of the marriage because of error. The Qiddushei taut is de facto an annulment of marriage. In this case it means that a process of the wedding itself was invalid because there were errors in law such as fraud. If the marriage is annulled it is annulled ab initio it means as if a marriage was never performed.

There are some opinions expressed in responsas according to them the reason for the annulment of the marriage can be also impotency of a husband. Ruth Halperin - Kaddari quotes in her article about agunot R. Spector’s responsum relating to the nullity of the marriage. R. Spector based his responsum on Rashba’s famous declaration that “everyone knows why the bride enters the chupa and she marries on that basis.” This is connected to the so – called tav lemeitav presumption.6

This presumption says that a woman prefers in any case living with somebody to being alone. Why tav le-meitav presumption? Ruth Halperin- Kaddari writes: “…” gemara and response seem to ascribe exclusive significance to the sexual element and see this presumption as expressing women’s irrepressible sexual urges.”7 However this tav lemeitav presumption more likely expresses a general opinion that woman more desires to live in partnership, to have support, to be sure that her children will be legitimate.

**Damages for psychological distress**

Naturally, the agunah status causes severe psychological distress to women. It also establishes a violation of woman’s internationally recognized human rights. The concept of equality of both genders and the right to human dignity implies also right to respect and ethical treatment. Hardly is a woman accorded right to human dignity if her husband can keep her at his mercy.

The courts in Israel also sometimes deal with actions which are connected with the question of agunot. Women sue their (ex-) husbands for damage which they suffered because their husbands rejected to deliver them a get. Until recently courts usually did not award damages to these women.

---

6 Tav lemeitav tan du mi- lemeitav armalu. Better to dwell as two that to dwell alone.
For instance the Jerusalem family court had to solve the case where plaintiff, Jane Doe, sued his ex-husband John Doe for damage which she suffered because of his recalcitrance to give her a get. The refusal to give her a get caused her emotional distress and it is obvious that she couldn’t freely decide about her life because she was dependant of his decision, she was chained. Justice Greeberger said that “The aspiration of a woman who wants a divorce to fashion her personal condition as free person determining her own fate merits every defense as an inseparable part of her dignity as a person.” However the action was dismissed because in Israel a woman can’t sue for damage that was caused by refusal to give her a get.

The threat of damages can serve as motivation to a recalcitrant husband. So why do the religious courts fight against damages? Abraham Weiss, Attorney and a rabbinical pleader explains:”Contrary to the thesis of the women's organizations - and I represent more women than men - it's not true that the court perpetuates agunot and tries to help men only. The divorce has to be proper and in accordance with halakhic rulings… We believe that Jewish law does not change. You can say, 'Let's just shut down the beit din,' but you can't change the halakha." He suggests the social solution: „… To educate in favor of family life, and at the same time encourage prenuptial agreements that are halakhically valid. It's a pity people don't know enough about this. You see it especially in second marriages, and it greatly reduces the number of women who are denied divorces. Today we have 10 people sitting in jail for refusing to grant divorces, and one of them has been there for 10 years already, just so that his wife remains an agunah. He hates her so much that he just wants to make her life miserable.”

A breakthrough decisions in this matter were the decision of The Jerusalem Family Court from 2004 and the decision of the Tel Aviv District Court from 2011. In the former case the Jerusalem Family Court ordered damages 425 000 NIS to be paid to an ultra-Orthodox woman. She had been denied a divorce for 8 years.

The decision of the Tel Aviv District Court from 2011 was the first case when a judgement for damages was confirmed by an appellate court. A woman was 24 years old when she got married, their partnership has not been working but her husband has refused to give her a get for 16 years. Now he is obliged to pay her damages 700 000 NIS for the suffered mental and physical harm. The judge wrote: “The woman standing before us has been held hostage by the

8 http://www.haaretz.com/weekend/magazine/suing-for-their-freedom-1.357876
9 ibid
10 http://www.haaretz.com/weekend/magazine/suing-for-their-freedom-1.357876
[husband] who has no valid reason for the prison that he made for her simply because she once agreed to marry him… The respondent had the right to a get from the moment she wanted one, and all the more so when she married the appellant at the age of 24, was with him for all of three months, and knew no comfort from him. Today, almost 40 years old, she continues to suffer from his cruelty towards her, ….he prevents, and prevented her, from experiencing life’s joys, establishing a family, and especially from having children. We are talking about immeasurable damage that increases by the day. These actions are immoral and go against the Basic Law – Human Dignity and Freedom.”

**Conclusion**

It is very difficult to find a solution for agunot. As I said above a husband must deliver a get voluntarily, there is a danger of a get meusah and its invalidity. The problem has a long history and is not an issue just in Israel. For instance in United States, where the second largest Jewish community lives, they attempted to solve this matter with special laws, so called the New York Get Laws.  

There are also several international organizations that concern aguna rights.  

In my opinion it is important to understand that this problem is not the problem of Jewish women, but the problem of whole Jewish community, of whole society. And I must agree with Ruth Halperin – Kaddari that it is hard to find the solution and to help to these women if for instance leading orthodox rabbis are not willing to participate in conferences which try to find the solution.

---


12 The first so called New York Get Law is from 1983 and it states that a person who doesn’t give a get is unable to receive the benefits of a civil divorce. This law was supported by orthodox rabbis, women organizations, but it was refused by the Reform movement because in their opinion it isn’t possible to impose religious obligations on American citizens and the problem should be solved by the orthodox movement itself.

13 At first it is The International Coalition for Agunah Rights. This NGO seeks freedom for agunot within the boundaries of Jewish law. ICAR will direct agunot to individuals who can help to induce both parties in a broken marriage to appear before beit din and go through the get process. Through its effort many agunot have obtained a get. ICAR uses various means of pressure on husband in order to give a get. It could be for example encouraging his synagogue or friends from associating with him until he gives his wife get or publish his name and the facts about his behaviour in a local newspaper.
Sources:


Halperin – Kaddari, Rut, Women in Israel, A State of Their Own, University of Pennsylvania Press, 2004


Rabbinical Courts Jurisdiction Law (Marriage and Divorce Law 5713 – 1953)

Broyde, Michael J., Marriage, Divorce And the Abandoned Wife in Jewish Law, Ktav Publishing House; 1 edition, 2001

Higer, Mosheh, Husband and Wife in Israeli Law, Harry Fischel Institute for Research in Talmud and Jurisprudence, 1985


http://www.haaretz.com/weekend/magazine/suing-for-their-freedom-1.357876
http://shaananlaw.wordpress.com/2011/05/01/suing-for-freedom/
http://bible.cc
http://www.llrx.com/features/israel3.htm
http://www.nyulawglobal.org/globalex/Israel.htm
www.family-laws.co.il