Women in Israel

A State of Their Own

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Chapter 11
The Halachic Trap: Marriage and Family Life

Feminist legal writing has exposed the institution of the patriarchal family as a prime locus of domination and control of women by men, and revealed its legal regulation as a system that enables and reinforces male supremacy (Fineman 1992; Okin 1989; Olsen 1984). The patriarchal family is seen as the epitome of the social-legal construction of the public/private split. This ideology considers the world to be naturally divided into two spheres: a public sphere, usually taken to include work and politics, inhabited by men, and a personal sphere, encompassing home and the family life, deemed to be the realm of women (Polan 1993, 422). In constructing the family as the ultimate private sphere, laws granted men considerable power over their wives. Women could not count on legal protection in the home, since as the private realm, it was perceived to be outside the law's or society's authority to regulate (Olsen 1985). Moreover, by structuring the functions and the operation of the family along clear and immutable gender lines, the law braced women's confinement into the home, and sanctioned their roles as childbearers and childrearers.

Family law in Israel is governed by the principle of religious personal law in family matters.[1] This means that matters concerning personal status (marriage, divorce, support) are determined according to the religious affiliation of the parties involved (Halperin-Kaddari 1994). Religious laws are generally traditional and patriarchal in nature, and a common feature to most of these systems is their prejudiced perceptions of women's nature and role, which leads to discriminatory treatment of women in these matters (Okin 1999, 12–13).

While the principle of personal law is presently intertwined with the debate over religion and state relations in Israel and has come to represent the focal point of Israel's identity as a state for the Jewish people, it

originates from the four hundred years of Ottoman rule in Palestine. The Ottoman regime, which regarded family matters as internal private affairs to be governed by religious law, and simultaneously held that only Muslims have the right to be governed by the Shari'a (Muslim religious law), had allowed those the Ottoman regime regarded as "nations" to be governed by their own religious laws. The succeeding rulers, the British, left the situation as it was. This remained the State of Israel's legal approach toward family and personal status in its formative period and in the present legal system (Rubinstein 1991, 204–8). Socially and politically, the rule of religious law over marriage and divorce has come to symbolize religious coercion in Israel, and it is generating growing resistance by those opposed to any religious practice, by those who oppose the official monopoly of Orthodox Judaism over religious practice, by those whom religious law precludes from marrying each other (Rosen-Zvi 1990; Shifman 1995b), and by feminists (Shalev 1995a; Yishai 1997). Nevertheless, a change in the near future seems inconceivable. The maintenance of religious law in matters of marriage and divorce is still considered a basic tenet in the Israeli polity in general and in the delicate construction of Jewish identity in particular. It has been taken for granted by many as a natural expression of the Jewish identity of the state and as an acceptable political price for the maintenance of internal peace and unity by many others (Levi, Levinson, and Katz, 1993).[2] Although practical and legal subterfuges of the principle of religious law are recently gaining more weight and legitimacy, Israeli law is still a long way from overriding the status quo and introducing civil marriage and divorce (Shifman 1999, 278). Moreover, it is these very subterfuge mechanisms, in the mitigating effect they have on the coercion, that may very well postpone the overall introduction of civil marriage in Israel.

Due to this principle of personal law, the legal situation in Israel in the area of marriage and divorce can be described as violating the precept of gender equality in family life in all three stages of marriage (in entry to marriage, during marriage, on dissolution of marriage) (Shalev 1995a). In a nutshell, it conceives marriage as a one-sided transaction in which the man betroths the woman and not the opposite, which sanctions inequality and discrimination regarding spousal obligations and rights toward each other during the course of marriage, and sanctions harsh limitations over the process of divorce and inequalities with respect to it, to the detriment of women. Furthermore, it also violates the principle of freedom in marriage contained in other international human-rights instruments, in putting broad religious restrictions on eligibility to marry.

Unlike previous chapters, where my custom was to open with the nor-

mative description and analysis and then to proceed to the sociological discussion, here I have chosen the opposite course. This is primarily because this subject is the most heavily regulated and has therefore generated the richest legal materials of the subjects covered in this book. Part of the reason for that is the complexity of the legal arrangements due to the complicated relationships of civil and religious laws in this area. For some reason, which could also be related to the previous observation, very few sociological and empiric studies have been conducted on families in Israel in general. In addition, my own specialization in family law has no doubt attributed to this decision. Consequently, this chapter begins by supplying brief sociological background on families in Israel, including some demographic data, and continues with a legal discussion. The legal discussion first addresses the conventional Jewish marriage and divorce laws, including limitations on marriage such as bigamy and minimum marital age, and proceeds to address alternatives to religious marriage, including the uniquely broad Israeli legal institute of nonmarital cohabitation, and the subject of same-sex couples. The discussion continues along the lines of monetary consequences of marriage (mainly property distribution), and moves on to briefly address parents and children. Specific topics such as names, single-parent families, and new reproductive technologies conclude the discussion.[3] Domestic violence is extensively covered in the second part of Chapter 9, within the general discussion of gender-based violence against women. In terms of reference to religious law, the discussion and analysis focus on Jewish law. Specifically narrow descriptions are made to Shari'a and Druze family laws.

The Family in Israel: Social Observations and Demographic Data

Israel is a family-oriented society. Familism, the normative family's centrality in the lives of the individual and the collective (Fogiel-Bijaoui 1999, 113), is one of the central characteristics of Israeli society (Shamgar-Hendelman and Bar-Yosef 1991; Peres and Katz 1991). Using various sets of demographic data that sociologists take to reflect familism, sociologist Sylvia Fogiel-Bijaoui concludes in a comprehensive study of familism and family perceptions in Israeli society that Israel ranks first among twenty-one post-industrial states in which, like Israel, women's educational level and workforce participation have significantly increased in the past twenty years. Relative to the other states in the study, marriage rates in Israel remain high, divorce rates are low, and birth rates are significantly higher (Fogiel-Bijaoui 1999, 130–34). In further analyzing specific religious and ethnic population groups,

Fogiel-Bijaoui claims that familism in Israel is not limited to groups who "have not yet Westernized," but is the common normative framework of the institute of family in Israel.

The familial characteristic of Israeli society is indeed reflected in data such as the high marital status percentages and low percentages of unmarried and never-married men and women in different age groups.[4] Even the phenomenon of cohabitation among young adults, which is growing in Israel as elsewhere in the Western world, is generally found to be just a transition stage before formal marriage takes place (Belosh-Kleinman and Sharlin 1999). Overall, throughout the different population groups, as Israelis get older, those who never marry are an increasing minority. Quite significantly, more women over 40 (both Jewish and Muslim) relative to men over 40 never got married (e.g., 3.2 percent of Jewish women aged fifty-five to sixty-four compared to 2.8 percent of Jewish men that age). Even more significant for the general state of women is the fact that more women who were married are presently not married (either divorced or widowed): almost 30 percent of the Jewish women aged fifty-five to sixty-four) and more than 60 percent of Jewish women over sixty-five are unmarried, compared to only 12 percent and 22.3 percent of Jewish men of those ages. The translation of this into actual numbers is particularly telling: in 1997 there were exactly twice as many divorced women as divorced men (116,600 and 58,400 respectively). In other words, divorced men are clearly much more likely to remarry than are divorced women.[5]

Another indication of the centrality of family life in Israeli society is the relatively low marriage age, especially that of women, compared to other Western societies. While median marriage age for Jewish women and men between 1970 and 1997 has gone up from 21.6 to 24.4 and 24.4 to 27 respectively,[6] it is still lower than in other postindustrial countries (Fogiel-Bijaoui 1999, 137). Median marriage ages are lower among Muslim and Druze Israelis (25.1 and 25 for Muslim and Druze men, respectively, and 20.3 for both Muslim and Druze women) and highest among Christian men (28.2), though, interestingly, Christian women's median marriage age is much lower: 23. The overall trend in all population groups is the rising of marriage ages for both women and men.

Birth rates (discussed in detail in Chapter 4) are also an important factor in determining society's familism (Peres and Katz 1980). While fertility rates in all population groups in Israel have dramatically decreased,[7] they remain significantly higher than in other postindustrial countries, and have even risen since the mid-1990s. In 1997, Israel ranked third within the 45 countries with high human development according to the United Nations Development Program, with a total fertility rate of 2.93, the same as Kuwait and Bahrain and less than Qatar

(3.7) and the United Arab Emirates (3.4). Having children in Israel is a constructed part of the Jewish-Arab conflict and is expressed in terms of "the demographic balance," reflecting the national requirement to have more children (Berkovitch 1997; Izraeli 1997; Yishai 1997) and assigning women the role of "bearers of the collective" (Yuval-Davis 1980).

Increasing divorce rates send a somewhat different message from the previous indicators regarding Israel's familism. Between 1975 and 1998, while the total Jewish population in Israel grew by 62 percent, the number of divorces almost tripled (from 2,857 divorces to 8,186).[8] Figure 3 clearly shows the significant growth in the rates of divorcing persons per 1,000 married men and women. However, the total divorce rate per 1,000 people (1.7) still remains low relative to other post-industrial countries (Fogiel-Bijaoui 1999, 130–34). This explains the somewhat surprisingly low percentage of divorced persons in the population: in 1997, of all men and women over fifteen only 3.5 percent of the men and 6.6 percent of the women were divorced.[9]

Official and published marriage and divorce rates in Israel do not present the full picture, especially with regard to marriage. The Central Bureau of Statistics (CBS) reports only cases of marriage recounted by the official marriage and divorce registrars in Israel, namely the formally recognized religious authorities (which is, for Jewish people, the Orthodox Rabbinate), since there are no civil marriages and divorces in Israel.[10] These obviously exclude the alternative forms of marriage men-

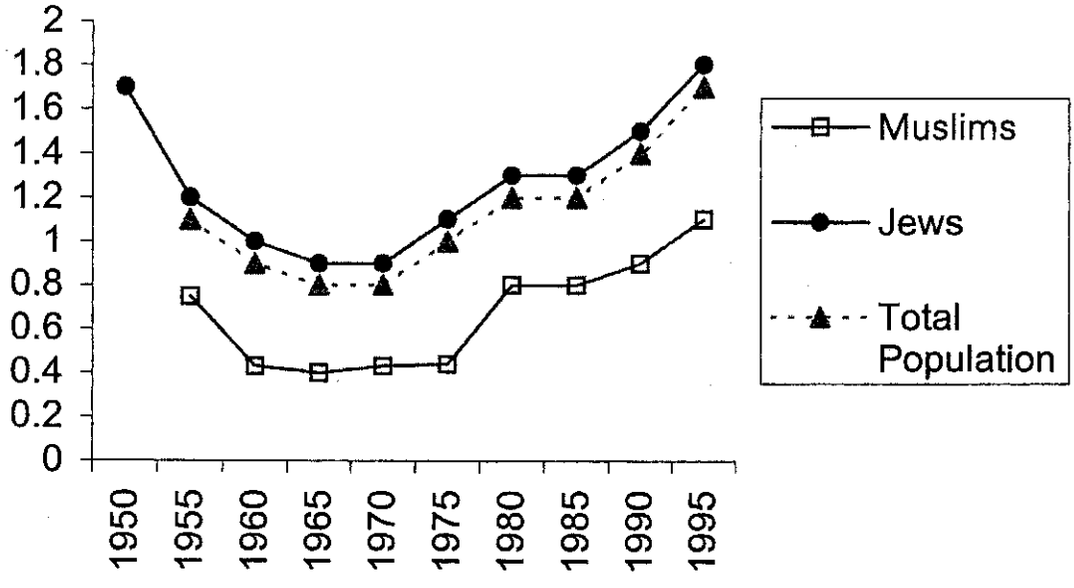

Figure 3. Divorce rates by religion, 1950–1995. Source: Central Bureau of Statistics, *Statistical Abstract of Israel*, 2000.

tioned below, some of which, such as conducting civil marriage out of Israel, are actually recognized as valid for purposes of registration by the Ministry of Interior. In other words, CBS published data do not correlate with Ministry of Interior data, which are unpublished. Moreover, none of these statistics cover nonmarital cohabitation.

Divorce rates are more reflective of the full picture. Since obtaining a foreign divorce that will be recognized for purposes of registration is a legally complex procedure, even couples who were married under civil law outside Israel generally go through a religious divorce in Israel to change their status from married to unmarried and be able to remarry. However, the growing phenomenon of nonmarital cohabitation is not reflected here either. Unmarried couples who separate after years of living together are not included in these data, even though the process they go through is certainly akin to formal divorce, both emotionally and even legally to some extent (in terms of child custody or property distribution) but lacks the officially recognized form of divorce.

In order to get a fuller scope of marriage for Israelis, I obtained some unpublished data from the Ministry of Interior.[11] These data relate to marriages of Israeli citizens conducted out of Israel and registered by the Ministry of Interior (the reason for this double registration is explained later). In order for such a marriage to be registered, an official document of marriage has to be presented to the registrar, thus precluding any form of "private marriage" such as through a lawyer's administered contract or a private religious ceremony. One such set of data reveals that in 1997–98, 13,447 Israeli men and women were civilly married outside Israel, compared with 155,496 men and women who were officially married in Israel. This means that CBS data on marriages miss the real number of marriages of Israelis by at least 8 percent.[12]

About half of all marriages conducted outside Israel take place in Cyprus and Paraguay. Half were marriages between two Jews, and the rest were mostly mixed marriages between Jew and non-Jew.[13] This brings in the political debate behind the whole question of civil marriages in Israel. As much as it relates to social and political struggles against religious coercion in general, it is also strongly related to the struggle against the monopoly of Orthodox Judaism over the practice of religion in particular. One such demonstration of that struggle is conducting a civil marriage out of Israel, after having conducted a religious but non-Orthodox (and therefore unrecognized by the state) marriage ceremony in Israel. Thus, one good example of the growing resistance to the Orthodox monopoly is a comprehensive practical guide issued by the Center for Jewish Pluralism of the Reform Movement in Israel, listing all possibilities for civil marriages out of Israel, including a detailed

description of all formal requirements for obtaining marriage license in each state (Center for Jewish Pluralism 1999).

Family Law in Israel: Jurisdictional and Legal Split

Family law in Israel is a uniquely complex system in the Western legal world, in that it combines civil and religious legal systems simultaneously governing the same geographical and demographic unit (Shifman 1995c; Rosen-Zvi 1990). In a sense, it is a special case of legal pluralism (Halperin-Kaddari 1997a) derived from the rule of personal religious law in family matters, which is embedded in the Palestine Order-in-Council (1922–47),[14] still in force today. It is this rule that is responsible for the singular attribute of family law in Israel, namely the jurisdictional and legal split. The split is characterized by the following two features: the parties to the cases are governed by personal (religious) law, and both legal rules and jurisdiction in this area are divided between the civil and religious systems. These features have created a problematic phenomenon known as the "race for jurisdiction" (Shava 1972; Rosen-Zvi 1989). This race develops when each side in a divorce proceeding seeks to gain advantage by petitioning the forum that is perceived to be more favorable in matters under concurrent jurisdiction. In general, the relief offered by religious courts tends to favor the husband, while that by civil courts tends to favor the wife (Shifman 1995c; Rosen-Zvi 1990). Filing a suit in one forum stops the jurisdictional race and prevents the matter from being addressed in the competing arena.[15] Thus, there is a built-in incentive to initiate legal proceedings immediately upon the first sign of marital crisis (Halperin-Kaddari 1994).

Seizing jurisdiction is indeed crucial, since the differences between the two tribunals are substantial, even though both theoretically apply the same laws (Rosen-Zvi 1989).[16] According to the 1953 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law,[17] rabbinical courts have exclusive jurisdiction in matters of marriage and divorce, which are completely governed by religious law. However, all other matters that are related to divorce disputes, from child custody and support through property claims, are under the jurisdiction of the civil court, unless they are properly "attached" to a divorce suit filed in the rabbinical court. Thus, the jurisdiction of the civil court may be obstructed by filing for divorce in the rabbinical court, and "attaching" all other disputed issues to it, according to Section 3 of the Rabbinical Courts Law. The outcomes of disputes depend on the forum in which they are heard, both because rabbinical tribunals apply religious rules of procedure and evidence, and, mostly, because these tribunals generally ignore substantive civil law, even when it specifically includes religious courts in its application

(Maoz 1985; Halperin-Kaddari 1997a). The consequences of this are much harsher on women than on men. For example, rabbinical courts refuse to apply the egalitarian community property rule, and rule according to the principle of separate property, which distributes property according to the formal title.[18] In addition, support awards for both wife and children are overall much lower in rabbinical than in civil courts, as demonstrated in Chapter 6.

Realizing the problematic enforcement of religious law and jurisdiction over nonreligious people, and the injustices caused mainly to women in rabbinical courts, civil courts—mainly through the High Court of Justice—have engaged in a gradual and consistent process of narrowing the scope of religious law and jurisdiction, starting as early as in the late 1950s. In the early 1990s, parallel to the overall "constitutional revolution" that Israel has allegedly been undergoing, the High Court of Justice began to subject religious courts to the basic norms and principles that govern the civil legal system (Halperin-Kaddari 2001). Thus, for example, while property claims were originally deemed to be under the exclusive jurisdiction of rabbinical courts and governed by religious law, they were gradually drawn into civil courts and were subject to civil (contract and property) law,[19] until the whole process culminated in a 1994 ruling that subjected the rabbinical court to the civil principles of equality and mandated that it rule according to the civil rule of community property, which gives the husband and the wife equal shares in the marital property.[20] In addition, the civil system has also been developing civil courses of alternative forms of intimate relationships that would be accorded various degrees of recognition by the state.

Until 1995, jurisdiction was also divided within the civil system itself. The 1995 Family Court Law[21] established a new family law division within the magistrate courts. The family courts became responsible for all family matters under the jurisdiction of the civil system. While the establishment of the family court system has not formally affected the jurisdictional split between the religious and the civil judiciaries, it does carry significant informal consequences for the power struggle between them. Officials in the rabbinical courts have been reported to warn against losing ground to the family courts.[22] In addition to simplifying the proceedings by the consolidation of all the civil suits under one roof, the Family Court Law also sought to introduce less formal proceedings that are more amenable to family disputes. The Family Court Law specifically permits the court to disregard the regular civil rules of procedure and to employ whatever procedure promotes justice.[23] In addition, the Family Court Law provided for the establishment of new Family Court Service Units in every Family Court, to supply auxiliary services as needed on referral by the court.[24] One service provided by family court

services is the possibility of resolving family disputes through mediation. Ranging from the management of emergency cases in small-scale mediation sessions to handling the full range of disputed issues, these units provide a hybrid physically out-of-court mediation service under the auspices and supervision of the court (Ben-Rabi and Shmaia-Yadgar 2000). In the three years following their establishment, family court service units have handled approximately 7,600 cases.[25] By the end of 2000 they were staffed with 30 specially trained social workers, vis-à-vis 33 family court judges, in nine of the ten family courts in the country.[26]

Marriage and Divorce

Marriage According to Jewish Law

Any discussion that mentions Jewish law without actually going into and analyzing the law itself is problematic, since Jewish law, perhaps more than any other religious legal system, is pluralistic (Berkowitz 1983; Roth 1986; Sagi 1996). It is therefore misleading to present Jewish law as a monolithic normative system a claim a certain representation of Jewish law on a particular issue as an ultimate portrayal of the Jewish law on that issue. Since Jewish law is not a central theme of this book, the discussion here pertains to a description of the law as it is understood and applied by contemporary rabbinical courts in Israel, narrowed to a specific reading of Jewish law, which in my understanding is sadly the conventional interpretation of Jewish law, as it is understood and practiced under Orthodox Judaism today.[27] Applicable Jewish law in Israel is in fact the Orthodox interpretation of Jewish law, and rabbinical courts are exclusively Orthodox. Therefore, the conclusions I draw below are certainly relevant to Jewish women in Israel. This discussion by no means exhausts the possibilities within Jewish law at large, nor the potential for progressive interpretation that does exist within Orthodox Judaism itself.

Under Jewish law, men and women are in general equally free to choose their spouses. The limitations on marriage, drawn from religious laws and sanctioned by the Israeli civil system, apply almost equally to men and women. Under Jewish law, neither a Jewish man nor a Jewish woman can marry a non-Jew. One of the broadest limitations on eligibility to marry under Jewish law applies to men of the "priestly" class (*kohanim*), who cannot marry a divorced woman or a convert to Judaism. Regarding consent to marriage, Jewish law may sometimes presume marriage for women to be preferable to nonmarriage (Halperin-Kaddari, forthcoming), and accordingly there have been cases where women's unexpressed or unclear choice regarding the marriage was taken as con-

sent (Shershevsky 1993). No parallel cases can take place regarding men's consent, since marriage is in fact a unilateral act on the part of the man who betrothes the woman, in a legal transaction that corresponds to acquisition (Wegner 1988).

The status of men and women during marriage is far from equal. As a traditional patriarchal system, Jewish law strongly adheres to strict gender roles in the family. The differential treatment in the religious laws carries legal implications under the Israeli legal systems, most of it in the areas of spousal support and grounds for divorce. However, Jewish law adopts a double standard with respect to sexual behavior of men and women in general, and of married men and married women in particular. While a married man's sexual relationships with a woman other than his wife hardly carries any legal consequence, except for the very rare possibility of considering this to be a ground for divorce (Halperin 1989), a married woman's sexual relations with a man other than her husband carry extremely harsh consequences: she is to be immediately divorced while losing all her monetary rights otherwise acquired according to the Jewish law. She is prohibited from later marrying either her former husband or the man with whom she had "committed adultery," and any child that results from the adulterous relationships is considered a "bastard" (*mamzer*) who is precluded from marrying within the Jewish community, except for a convert or a *mamzer* like him/herself (Haut 1983; Shershevsky 1993). These grave and unequal consequences of women's extramarital relations profoundly implicate women's position within the divorce process, which is the main form of discrimination against women under Jewish law.

Divorce and the Agunah Problem

What distinguishes Jewish marriage and divorce rules from other legal and religious systems is that both marriage and divorce are autonomous, voluntary acts of two individuals, not legal actions constructed by the external judicial or religious organ. Neither marriage nor divorce can be constituted for the couple. Divorce is promulgated by the spouses' own act either through the mutual consent of both parties or after proof of "faults" (grounds for divorce). The judicial acts, however, are only declaratory, not constitutive, and the rabbinical courts' involvement in divorce cases amounts to determining whether the husband or wife is under any degree of obligation to grant or accept the divorce. The rabbinical courts' incompetence in processing divorce is clearly reflected in unpublished data detailing the number of annual petitions of divorce (both contested and uncontested) compared with the number of actual divorces: in 1998, the number of divorces promulgated amounted to

only 48 percent of the total petitions (8,435 and 17,564 respectively), while 47 percent of the petitions were in fact petitions to ratify a divorce agreement, thus reflecting mutual consent to divorce![28] Another set of data confirms this: of 1,630 contested divorce cases decided in the Jerusalem Rabbinical Court in 1998, in only 234 (14.4 percent) was the petition accepted.[29] Where there is no consent, no divorce can be processed, since contemporary rabbinical courts perceive themselves incompetent to annul marriages, although Jewish law does provide for this mechanism under certain circumstances (Freiman 1945; Berkovits 1966; Elon 1978, 686–712).

Although in principle both parties' free will is needed for the bill of divorce (*get*) to be valid, the wife's consent can be circumvented with no consequences on the get's validity, while the husband's voluntary provision of the get is an absolute prerequisite without which the divorce is invalid (Haut 1983; Rosen-Zvi 1990; Halperin-Kaddari 2000a). Invalidity of the *get* means that the wife is still a married woman, so that any sexual relations she may later conduct would still be considered adulterous, with the harsh consequences explained above. Thus, as a rule, the husband has almost absolute control over the *get*, which the wife categorically requires in order to divorce.

The preceding survey also explains the rabbinical courts' hesitation and reluctance in issuing decisions obligating or even compelling men to grant divorce. Rabbinical courts may use several terms of ordering divorce, from the very lenient recommendation to divorce, to the harshest term permitting coercion under very rare circumstances. Each term permits varying degree of sanctions against the recalcitrant party, and the highest category of coercion permits the incarceration of the recalcitrant husband.[30] However, divorce claims against women are easily accepted by rabbinical courts, and women are ordered to accept the *get*. Similar claims against men, under similar circumstances, rarely produce an order to grant the *get*.[31] Contemporary rabbinical courts tend to refrain from compelling a man to divorce (Zilberg 1957, 108–10; Falk 1973). A man's violence toward his wife can theoretically constitute a halachically valid ground for divorce; however, some authorities have indicated the need for special aggravating circumstances or prior warnings and witnesses to the violence, so that contemporary rabbinical courts feel that this does not constitute a legitimate ground for coercing divorce, but only for recommending that the husband give the *get* (Frishtik 1991). According to Rabbi Ben-Dahan, the Rabbinical Courts Administrator, each year there are about ten orders to compel divorce upon husbands.[32] In light of the number of annual petitions for divorce, this number is minuscule.

The rabbinical courts, then, are apprehensive about the validity of the

get, which is dependent on the man's "free will," and usually prefer to deal with a recommendation for divorce and send the parties to negotiate its terms. This leads the way for a common course of negotiation, which generally results in the woman buying her way out of the marriage by paying whatever the husband demands in terms of property rights, child support, and so on. Women who refuse to pay for their freedom to remarry have no recourse in the Israeli legal system. They are *agunot*, women who are "chained" or "anchored" to their husbands, with no relief available in the religious or civil system.[33] Thus, divorces are almost always based on prior agreements between the parties.[34] These agreements, which commonly cover all aspects of the divorce, are usually negotiated outside the rabbinical or civil courts, although they require ratification by either court. The ratifying court, however, does not engage in substantive scrutiny of the terms of the agreement (Rosen-Zvi 1990; Shifman 1995c).[35] Thus, the power imbalance is not remedied by the judicial system. More often than not it is the husband who translates this advantage into monetary concessions from his wife. In many cases, the civil legal system is the one that conditions property distribution upon prior arrangement of the *get*, so that the wife cannot even execute the right to her share of the property, even if she decides to put off the *get*.[36]

There is another category of women who are restrained from remarriage due to the laws of levirate marriages: under Jewish law, if a man dies childless, his widow is allowed to marry another man only after she is "freed" by her deceased husband's brother from her obligation to marry him (Haut 1983; Shershevsky 1993). Contemporary Jewish law in fact prohibits actual levirate marriage but still necessitates the process of "freeing" the widow (*halitza*) from her "bond" to her deceased husband's brother. In these circumstances, the widow's freedom to remarry depends on the deceased's brother cooperation, and there are cases of money being demanded in exchange for *halitza*. In cases where the brother is under thirteen, the minimum age of marriage under Jewish law, the widow must wait until he reaches thirteen to go through the process of *halitza*. According to data supplied by the Administrator of the Rabbinical Courts, there were twenty such cases of women in need of *halitza* on average a year during the 1990s.[37]

A major step forward with regard to the *aguna* problem did occur in Israel in 1995, when the 1995 Rabbinical Courts (Enforcement of Divorce Decrees) (Temporary Measures) Law was passed.[38] This law uses a mechanism in Jewish law to indirectly compel recalcitrant husbands to grant divorces. In past times this was done by denying them social status, through ostracizing and excommunication. The contemporary "translation" of this mechanism is suspension of one or more of the following

unrelated rights and benefits: the right to leave the country, hold a driver's license, hold a passport, hold a bank account, practice as a professional where a license is needed, be nominated to public office, or be eligible for parole in case the husband is a convict. The harshest form of restraining order available through this law is the incarceration of the recalcitrant husband.[39] Problematic as this may seem from a secular liberal perspective, it may be the only mode of solution that can combine Jewish legal principles in a nontraditional framework.

It is still somewhat too early to evaluate the actual effect of this law. The Administrator of the Rabbinical Courts, however, claims that in many cases there is no need for actual sanctions, since the mere threat of using them is enough to propel the husbands to grant the required bills of divorce. If so, this may indicate a breakthrough in the problem of *agunot* and the deadlock of divorces in Israel. However, actual data supplied by the Administrator of the Rabbinical Courts show a definitely less encouraging picture. Through the first four years of its usage, from May 1995 to May 1999, only 163 restraining orders were issued, a small number in light of the number of yearly petitions for divorce. Moreover, one rabbinical court of the twelve operating in the country has consistently issued half of all restraining orders: 76 of a total 163.[40] In other words, making use of this mechanism is dependent upon the personal conviction of the religious judge as to its halachic legitimacy. Furthermore, on the practical level, still fewer than half the cases where restraining orders are issued actually result in a divorce: 71 of 163. This is not to say that the rest have been futile, as proceedings may still be taking place. According to the Administrator of the Rabbinical Courts, it usually takes a period of up to nine months for the sanctions to have an effect on the husband and make him grant the get.

The Ripple Effect of Formal Application of the Halachic Code of Marriage and Divorce

The plight of the *aguna* is indeed the most extreme expression of women's inferiority under Jewish family law. However, a deeper reflection of the law reveals that this is but one reflection of the structural inferiority into the system (Halperin-Kaddari, 2000a). The discriminatory process of divorce often leads women to give up their legal property and monetary rights, so as not to get into the intolerable position of *aguna.* The consequences of this on divorced women's economic vulnerability are clearly seen in Chapter 6.

Nonetheless, discrimination at the end of marriage is only part of the picture. Jewish law perceives marriage as a system of mutual rights and responsibilities, clearly based on traditional separate spheres gender ide-

ologies (Levinson 1990; Lazarus-Yafeh 1988). The husband works outside the home and is responsible for the wife's sustenance, while the wife works inside the home and is responsible for all the housework and childcare, and is also obligated to personally serve the husband. In addition, any property the wife may have had upon marriage becomes subject to her husband's management and her earnings are put against her right to support (Meiselman 1978).[41] Similarly, the code of double standard Jewish law posits for moral and sexual behavior on married men and women also carries grave economic consequences for women. According to this code, as a direct result of the wife's unilateral consecration to her husband as part of her betrothal to him, total sexual fidelity is demanded only of the wife, not of the husband, who can in fact engage in extramarital relationships without fear of legal repercussions (Greenberg 1991).[42] In this sense, the economic relationship of the couple is intimately related to their intimate relationship. All this may have reflected gender balancing and mutuality appropriate to the social and economic conditions of the time when it was designed (Berman 1976; Biale 1984; Hauptman 1998), however its application to present social norms can have devastating effects on women.

Women's awareness of their inferiority projects onto their self-perception and perception of their marital relationship. As the family is the basic unit of socialization, these perceptions structure the socialization process of children within the family (Okin 1989). The summary of the law presented above demonstrates that in a sense, the vices of the patriarchal family, which, at present, are generally a reflection of strong social norms, are in fact normatively sanctioned under Jewish religious law, and are consequently part of the Israeli legal system itself. Thus, for example, the well-known circular interaction between the women's economic dependency within the "private" family and their secondary position within the "public" market is clearly endorsed under the law itself. The difference in wage patterns presented in Chapter 7 can thus be seen not just as a reflection of social norms but as an expression of the legal order.

Restrictions on the Right to Marry: Minimum Marital Age

The 1950 Marriage Age Law[43] states that the minimum marital age for women is seventeen except in rare cases. A 1998 amendment set a minimum marriage age for men(not been set before) at seventeen.[44] The minimal age requirement is accompanied by provisions that make the arrangement of underage marriages a criminal offense punishable by up to two years imprisonment for the person who arranges the marriage and the person who performs the ceremony. The law provides that the

mere fact that a marriage was conducted in violation of this law is a ground for divorce, but does not state that such marriages are invalid. The simple reason for this omission is, once again, the hold of religious laws over marriages. Jewish law regards marriages of minors beyond a certain age—which usually coincides with puberty (12.5 for girls and 13 for boys)—as valid. Under the peculiar Israeli arrangement of jurisdiction and law in family matters, it is obvious that the secular legislature cannot interfere with actual marital validity, determinations that are under exclusive jurisdiction and rule of religious laws.[45] The provision that supposedly adds violation of this law as a ground for divorce is of no real effect for the same reason.

Article 5 of the law provides for two alternative grounds for judicial permission of underage marriage. The first relates to circumstances under which the underage woman is pregnant from or has given birth to the child of the man whom she asks permission to marry. No age limit is attached to this ground for exception. The 1998 amendment added a parallel case in the form of circumstances under which the woman the underage man wishes to marry is pregnant or has given birth to his child. The second ground for permission relates to unspecified "special circumstances" that would justify immediate marriage, provided the woman or man is over sixteen years old. In one leading case, then Justice Barak firmly stated that a community's custom and tradition do not justify marital exception, since it is those very traditions and customs that the Marriage Age Law has set to abolish.[46]

The lack of a minimum age regarding the first ground for exception was vividly demonstrated in a 1994 case, in which a fourteen-and-a-half-year-old girl, seven months into her pregnancy, petitioned for permission to marry the father of her future child, a twenty-four-year-old man, her former teacher. The petition was denied by the district court, and her appeal to the Supreme Court was reluctantly accepted by Chief Justice Shamgar.[47] Justice Shamgar's main reason for accepting the appeal was the lack of a better alternative, since it was too late for abortion at that point, and the girl was firm in her desire to keep the child and not give it up to adoption. Chief Justice Shamgar also pointed out, somewhat oddly, that unless the couple officially marry, the man could be accused of statutory rape (according to section 346(a) of the 1977 Penal Law[48]). Statutory rape, which applies to intercourse with girls aged fourteen to sixteen, is hence vindicated by marriage, even though the minimum age for marriage is seventeen. Even the Penal Law, however, had not foreseen the possibility of marriage of a girl under age fourteen, and consequently section 345(a)(3) states that intercourse with a girl under that age is considered rape under any circumstances. Justice Shamgar ignored the dangerous implications of such a rationale, according to

which a man who statutorily rapes a young girl can exonerate his criminal act by marrying her.

Despite the criminal sanctions, the phenomenon of minors' marriages has not been eliminated altogether, as the CBS data clearly show: in 1998, out of 40,137 brides, 1,883 were under seventeen (close to 5 percent, an improvement from the 6 percent in 1994). Of these, 412 were Jewish, 16 were Christian, 131 were Druze, and the overwhelming majority—1,323—were Muslim; 125 were under sixteen, more than double the number from 1997.[49] Information as to the number of judicial permits issued each year for minor marriages according to Section 5 of the law has been very difficult to obtain, since this legal procedure is not coded separately from all other family legal procedures. Once again, we are faced with the familiar information problem: child marriage is a social problem that gravely affects girls and is widespread among certain population groups. Strong correlation exists between the practice of child marriage and women's low social status. If the authorities are indeed committed to finding out the extent of the phenomenon in order to combat it, there should be nothing easier than comparing the number of judicial permits for underage marriage with the number of married women under seventeen every year. A separate coding for the procedure of judicial permits to underage marriage requires only awareness of the problem and commitment to eradicate it. Since these conditions, unfortunately, do not seem to exist, special efforts had to made to manually sort out the relevant judicial records.[50] When comparing the data eventually supplied by the Department of Judicial Statistics in the Courts Administration with the CBS data for married women under seventeen in various years,[51] a predictable discrepancy between the numbers of judicial permits actually obtained and the number of minor marriages actually performed clearly exists: in Israel in 1994, 2,140 women under seventeen were married, but only 65 petitions for judicial permits for underage marriages were brought to courts.[52] During almost three years, January 1997 to November 2000, only 122 petitions for judicial permits were brought and 89 permissions were granted (an approval rate of 73 percent), while about 1,800 women under seventeen were married in each of these years alone!

This fact obviously confirms the long-held impression that many of the minors' marriages take place without a judicial permit. Furthermore, when judicial permits are sought, they are apparently given quite liberally: the rate of approvals during the first half of the 1990s stood at 80 percent, and decreased slightly in the late 1990s to 73 percent.[53] Undoubtedly, the various legislative interventions into the religious laws and into the practice of religious laws and norms within various population groups, particularly the Arab and the Bedouin populations, are not

being enforced. While this area would seem to invite debates over multiculturalism and over the feminist-multicultural dichotomy (Okin 1999; Halperin-Kaddari 2000b), no such discourse seems to have been developed here, and the grave data presented here are reflective not of a conscious multicultural stance, but rather of neglect and apathy.

Restrictions on the Right to Marry: Bigamy

Bigamy is a particular form of discrimination against women. Under Jewish law, a man may be married to more than one wife, but a woman can never be married to more than one man. While Jewish law was amended about a thousand years ago to include a prohibition against taking a second wife or divorcing a wife against her free will, such practices still carry legally valid consequences after the fact (Shershevsky 1993; Haut 1983). Since questions of marriage and divorce are determined by religious law alone, the secular legislature could not have decreed bigamous marriages to be invalid, but could instead only operate against them through criminal law. Section 176 of the 1977 Penal Law makes bigamy a criminal offense punishable by five years imprisonment. Sections 181–82 prohibit forcing divorce upon one's wife with no judicial decree of divorce and make the arrangement of such prohibited marriages or divorces a criminal offense as well.

Sections 179–80, however, provide exceptions for the rule against bigamy. Section 180 applies to all individuals whose religious affiliation is other than Jewish, citing incapacitation of one's spouse or seven years of absence thereof as permitting marriage to another person. Section 179 applies only to Jewish people, providing impunity to a person whose second bigamous marriage was permitted by a rabbinical court's judgment that was later approved by one hundred rabbis and by the chief of the Grand Rabbinical Court. Criminal law, therefore, yields to religious law on this issue. Needless to say, the said impunity can only apply to second marriages of men. According to Jewish law, a permit to take a second wife is issued under various circumstances, similar to those that serve as grounds for divorce. According to the administrator of the rabbinical courts, throughout the first half of the 1990s, an average of 11 permits to marry a second wife were issued each year.[54]

There is no way to describe this normative framework but as a comprised approval by the secular legal system of the discriminatory treatment toward women under Jewish family law, which enhances women's inferior status in family law in Israel. In the 1971 Boronovsky case,[55] Justice Haim Cohen, who argued that section 179 of the Penal Code sanctions discrimination against Jewish women and should therefore be

narrowly interpreted, was rejected and remained in the minority. This legal regulation has not been challenged in courts.

Alternatives to Religious Marriage

Civil Marriage Outside Israel

The various restrictions on the right to marry and the exclusivity of religious forms of marriages in Israel have led many to search for and develop alternative forms of marriage. Most common among them is the civil marriage either outside of Israel, or by proxy, where that method is recognized by the marrying state. These marriages are generally registered by the Ministry of Interior.[56] However, the actual legal validity of such marriages between two individuals who are Israeli citizens and reside in Israel according to private international law rules is doubtful (Shava 1991). The Israeli Supreme Court has repeatedly managed to avoid the issue, in light of its political sensitivity. Recently, Judge Porat of the Tel Aviv District Court has declared such a proxy marriage of an Israeli couple to be invalid under the rules of private international law in Israel. Consequently, the wife was found to have no right to support from her husband.[57] Israeli constitutional law has developed a well-established distinction between two levels. The first is administrative-formal aspects of personal status without an examination of the validity of that status; the second is the substantive legal validity of the status. Formal registration by the Ministry of Interior belongs to the first level, while Judge Porat's decision belongs to the second, and mainly affects the couple's internal relationships. These can easily be taken care of through an expressed, or even an implied, contract. Paradoxically, it is the former level that interests most alternative-seekers, since that is the level that includes the registration of marital status in the Population Registrar in the Ministry of Interior, which carries immeasurable significance.

Pragmatically, registration as a married couple is more important for most people than is according substantial validity to their union. The registration guarantees, for example, social benefits to officially married couples. As early as the beginning of the 1960s, the High Court of Justice instructed the Ministry of Interior to register civil marriages in the Population Registrar, making their status equal to that of marriages officially conducted in Israel for all purposes.[58] Thus, civilly married couples are just as eligible for all economic benefits from the state as are as those who were formally married in religious marriage in Israel, their inheritance rights are the same, and in principle the same marital property laws apply to both groups. Even the question of spousal support that was mentioned in the Brochovitch case, which theoretically requires the

determination of the marriage's validity, could be managed without actually going into that. In 1994, the Supreme Court decided the Cahana case,[59] in which it suggested the possibility of reading into the relationships an implied contract that applies all the ordinary obligations and rights that arise under formal valid marriages. For some reason, this venue was not pursued by the claimant or the court in the Brochovitch case.

Nonmarital Cohabitation

Israel is probably one of the most progressive countries with respect to the recognition given to forms of family life without formal marital ties (henceforth referred to as nonmarital cohabitation or partnership) (Lifshitz 2002). The existence of an elaborate liberal system of nonmarital cohabitation side by side with a strict and traditional system of formal marriage and divorce may seem paradoxical at first, but upon reflection this proves to be inevitable (Rosen-Zvi 1990). The two systems in fact supplement each other: the progressive system of nonmarital cohabitation is both an inevitable consequence of the conservative and inflexible system of religious formal marriage and divorce, and a remedy that enables the endurance of that system. While the progressive and liberal characteristic of this system has recently been questioned (Lifshitz 2002), it is nonetheless quite fair to say that, had it not been for the system of nonmarital cohabitation, the sustenance of the principle of personal law would have been politically much more difficult, if not impossible.

The Israeli legal system recognizes the state of nonmarital cohabitation or partnership, and attaches to it a bundle of rights with some obligations that taken together amount to the creation of a virtually parallel institute to that of formal marriage: economic rights of nonmarital partners have been equated to those of married couples for purposes of pensions, social security benefits, residents' protection against eviction, damage awards under torts law,[60] and more. In terms of law of inheritance, a qualification was added to the recognition of nonmarital partnership, namely, that neither one of the two is "married to another person." This requirement that "no prior marriage exists" applies only to inheritance.

Another reflection of the more substantive level of recognition is found in some pieces of legislation that impose the same obligations and duties upon nonmarital partners as those that are imposed upon married couples. These include obligations and duties in the area of family violence and duty of care toward minors in the family. In those areas, which mainly apply to relations with other family members in which the

State has a legitimate interest, the relationship between the nonmarital partners is constructed as equal to those of married couples. The legislature, however, has not gone as far as imposing mutual positive obligations upon the partners toward each other. Therefore, there is no statutory obligation of support. Nevertheless, case law has held that such an obligation could be construed as an implied commitment under the circumstances.[61] Similarly, case law has also held that the rule of community property that was developed by the Supreme Court to regulate the area of marital property prior to the enactment of the 1973 Spouses (Property Relations) Law equally applies to nonmarital partners.[62]

Notwithstanding the broad scope of recognition, there are still some areas in which such relationships are not equated to those of formal marriage. There is no consistent ideology behind these distinctions, and they are mostly the result of traditional formalistic judicial interpretation, which can be expected to change. Such areas include, among other things, the provision of impunity from spousal testimony in criminal proceedings, the right of spousal entry to Israel according to the 1952 Entry Into Israel Law,[63] and the right to adopt a child together in Israel, as distinguished from out-of-state adoptions. The prospect of change was substantiated in a precedent-setting case in which Chief Justice Barak recognized nonmarital couples to be eligible for tort damages, notwithstanding the language of the law that was previously interpreted to exclude such forms of relationships.[64]

Same-Sex Couples

The broad approval of nonmarital cohabitation has had an undeniable effect on the possibility of legal recognition of same-sex couples. This was clearly seen in the most significant step thus far in that direction, namely the precedent-setting Danilovitch case,[65] in which El-Al, the Israeli national airline, was ordered to award an air steward's homosexual partner the same benefit, in the form of a free ticket, awarded for a heterosexual partner, married or not. The Danilovitch holding was made possible as a result of two developments in the Israeli legal system: first, a 1992 amendment to the 1988 Equal Employment Opportunities Law that added sexual orientation as a prohibited ground for employment discrimination;[66] and second, the widespread recognition of nonmarital partnerships (Shifman 1995b; Harel 1996; Yonay 1998). These two developments allowed (then) Justice Barak to hold the homosexual steward eligible for the same work benefits as his colleagues, while expressly maintaining that this does not amount to recognition of the homosexual partners as "spouses" and rejecting the claim that this move constructs them as a family. A narrow reading of Justice Barak's

holding indeed confines it to the realm of employment rights, where a clear prohibition on discrimination on the basis of sexual orientation exists. However, the whole rhetoric of the decision and its underlying rationale clearly put same-sex couples on the same level as heterosexual couples as intimate unions deserving recognition and support.

Since the Danilovitch case, no court proceeding has produced final outcomes that could test that holding's applicability to the realm of family relations.[67] A highly publicized suit by a homosexual partner of a high-ranking Israel Defense Forces (IDF) officer against the army to accord him the same benefits as a female widow produced conflicting outcomes on the first level of proceedings, and their appeals from both sides had ended in a compromise with no judicial decision.[68]

The most pertinent cases on this question, in Israel as elsewhere in the world, are cases involving children of same-sex couples, usually lesbian couples. This subject arose in the late 1990s, and several developments have taken place since then. The first one relates to equal access of lesbian women to new reproductive technologies for purposes of constructing a family. As explained later, the procedures of artificial insemination and in vitro fertilization in Israel are regulated in the 1987 Public Health (In Vitro Fertilization) Regulation and in an administrative directive issues by the director general of the Ministry of Health.[69] Both directives limited single women's access to the reproductive technologies and required that they undergo psychological or social worker evaluation before treatment. These regulations were challenged in 1997 by several women and by a lesbian couple, claiming they were discriminatory. The High Court of Justice accepted the appeal, declared the regulations to be void, and ordered the Ministry of Justice to publish an administrative directive mandating equal access to reproductive treatments.[70] The decision was celebrated by the lesbian feminist community as legitimizing lesbian motherhood.[71]

The most recent legal victory in that direction has been the High Court of Justice's decision to register a lesbian partner of a biological mother as the child's second mother, based on a prior adoption order issued in California.[72] While the majority holding, from two women justices (of the three presently sitting in the Supreme Court), was careful to emphasize the narrow and almost technical basis of the decision, namely, the lack of the registrar's discretion to refuse the registration according to a foreign adoption order, the social policy implications of the decision cannot be ignored. It is true that the registration is only administrative and has no substantive validity,[73] and legally the court's decision has nothing to do with substantive recognition of lesbian nonbiological motherhood; nonetheless, in granting the second mother registration, the court does declare that at least officially, if not legally,

"this child does have two mothers" (Polikoff 1990). Once again, as with the Danilovitch case, the narrow legal holding carries much broader social ramifications. And similar to the reactions following the Danilovitch decision, this case was met with much criticism and public outcry, mainly from religious political circles, and the state attorney requested a rehearing of the case. The rehearing was granted in April 2001, but the Ministry of Interior's motion to uphold the registration until the final decision in the rehearing was dismissed.[74]

In a substantive challenge to the traditional concept of family and motherhood, a lesbian couple who have together been raising three children born to them through artificial insemination have been pursuing legal recognition of their mutual parenthood over the children through a second-mother adoption order. During the course of their legal battle, Judge Yehudit Schtofman, then deputy president of Tel Aviv and Center Family Court, issued a guardian order for each woman over the biological children of her partner.[75] On the other hand, their petition for joint second-parent adoptions was rejected by the family court.[76] Their appeal to the district court was denied in a 2 : 1 decision, with the majority (two male judges, Deputy President Porat and Judge Mishali) holding that the remedy the couple seeks is beyond the courts' prerogative, and the minority (female Judge Saviona Rotlevi) holding that "the best interest of the children" in this case demands the approval of the second mother adoption.[77] Confrontation of lesbian motherhood is present in another pending case, coming from an altogether different angle. That case concerns a lesbian woman's petition for visitation rights over a child born to her ex-partner prior to their breaking up, claiming to be a nonbiological mother. The biological mother's motion to the family court to dismiss the claim was rejected, as was her appeal on that decision; both the family court and the district appellate court saw the family court as the appropriate forum to decide the case since it involves custodian and visitation issues pertaining to the child and to the child's welfare.[78]

Legal developments regarding same-sex couples have taken place in the administrative arena as well. Thus, for example, in response to the a 1998 petition by the association for Civil Rights in Israel (ACRI), the Civil Service Commission adopted a new policy regarding beneficiaries' rights, providing cohabitants of deceased civil servants with beneficiaries' rights regardless of their sex.[79] Likewise, in early 2000 the Ministry of Interior awarded homosexual foreign partners of Israeli citizens resident status.[80]

It seems that the overall trend in Israeli society and in the legal system is toward growing recognition of gay and lesbian couples. Alon Harel has suggested that, ironically, it is Israeli society's conservative nature

that has enabled these far-reaching developments, since "homosexuality was not perceived as a major threat to family values" (Harel 2000, 445). Following this line of thinking, the recent legal challenges on the family front do seem to pose such a threat. However, as one of the women who had gained the approval of the High Court of Justice to be registered as the child's second mother put it, when lesbian couples have children, they are welcomed to the Israeli society almost on an equal basis. Through reproducing, their union is being legitimized, and they are perceived as joining in with the national familial ethos.[81]

Parents and Children

Child Custody

The 1962 Legal Capacity and Guardianship Law,[82] which regulates issues of child custody, among other things, is a territorial law, meaning that it applies to all individuals notwithstanding their religious affiliation, and binds all judicial tribunals, religious or not. The law provides for equal responsibility of both parents toward their children and directs them to act in any matter "in the best interest of the child." Recognition of both parents as equal natural guardians of their children was already expressed in the 1951 Women's Equal Rights Law,[83] in an attempt to end the discriminatory treatment of Muslim women's rights toward their children upon termination of marriage, whether by divorce or by the husband's death.

Confirming the equality of both parents' guardianship over their children, the law, however, sets a "tender years presumption," imposing a rule of maternal preference whenever children under six are involved. Loss of maternal preference can occur under very rare and extreme circumstances of maternal unfitness. In general, most courts tend to favor maternal custody, even when older children are involved (Shifman 1995c). It is important to emphasize, however, that the rule of the best interest of the child is formally the governing norm in all cases, and the maternal preference is perceived to be just an implementation of this rule. Significantly, the evolution in the legal norms that eliminated maternal preference and replaced it by gender-neutral rules of custody that has taken place in most Western countries over the past few decades has skipped Israel, and the topic has never become subject to intensive public debate.[84] This remains the case despite the gradual increase in cases of divorce with children: from 45 percent of all divorces during the 1960s to over 66 percent during the 1990s (Katz and Peres 1996, 494). During 1999, the parents of close to 10,000 children in Israel (0.5 per-

cent of all children in Israel) were divorced, making the average number of children per divorcing couple 2.0.[85]

Rabbinical courts may obtain jurisdiction in child custody cases through the "rule of attachment,"[86] which comes into play when either spouse sues for divorce, provided there is no prior motion for child custody in the civil court. Although rabbinical courts are equally bound by the law and by the best-interests-of-the-child principle embedded in it, child custody cases are in reality often among those that are the most difficult to resolve in terms of jurisdictional conflict. Rabbinical courts do not abide by the law's directives if these conflict with the courts' religious convictions. This may take place under circumstances in which one of the parents, usually the mother, is religiously defiant while the other maintains a religious lifestyle. Rabbinical courts have denied mothers under such circumstances custody over their children, phrasing their decisions in the "best-interests-of-the-child" terminology. The women's petitions to the High Court of Justice have usually been accepted.[87] Nonetheless, the potential for abuse of the rule of attachment is very high, and the incentive to present false indications as to a supposedly religious lifestyle is great.

Child Support

The 1995 Family Laws Amendment (Maintenance) Law[88] refers to an individual's religious law as the law governing child and spousal support. According to Jewish law, the major legally binding obligation for child support is over the father, while the mother only owes a residual duty of "charity," which is less binding. The scope of the father's primary obligation, however, is narrow and refers only to the very necessities of life. Once the child reaches age fifteen, the father's obligation also becomes one of charity and not law (Shershevsky 1993). Furthermore, a 1981 amendment to the law provides that the child support obligation on both parents be relative to each parent's income. In practice, civil courts usually hold the father responsible for a considerably larger portion of the child's estimated needs, unless the mother's economic situation enables her to contribute more, bearing in mind that it is ordinarily the mother, as the custodial parent, who tends to the child's everyday needs.[89] Several Supreme Court cases in recent years have raised the age of obligatory child support until the child finishes military or national service. The scope of the obligation, though, is to be about a third af the scope of the obligation toward children age eighteen.[90]

The problem of "deadbeat dads" is not unfamiliar in Israel. What is unique to Israel is the welfare system developed to ease the plight of women with children whose fathers default on their support payments,

by assuring their minimum payment through the National Insurance Institute (NII). However, in 1998 the NII managed to receive only 43 percent of the total alimony payments from the debtors. While this welfare mechanism indeed alleviates some of the economic consequences of marital breakdown for women and children, the situation of divorced women with children in Israel is still poor, as detailed in Chapter 6. Some explanation for this may be found in the spousal support rules, to which we now turn.

Monetary Consequences of Marriage and Divorce

Spousal Support

Spousal support according to Jewish law, which controls this area according to the 1959 Family Laws Amendment (Maintenance) Law, strongly reflects the traditional patriarchal perceptions of gender roles. In principle, the husband is obligated to support his wife, while she, in return, is obligated to give him such services as housework and care of his children, in addition to such personal services as "making his bed and pouring his cup."[91] She must also give him monetary returns she may earn for doing work that is customary among women of her position to do. It is only under very rare circumstances, such as extreme gaps in economic status, that a woman would be obligated to support her husband, and even then her obligation would be considered "charity," with very weak powers of enforcement. The scope of the husband's obligation, on the other hand, is determined according to the standard of living the wife had enjoyed prior to the crisis, and according to the husband's economic potential. However, the evolving social norms regarding married women's work for wages were construed in such a way that any money the wife earns is to deducted from the amount of support. Consequently, in many cases where the wife's salary is not minimal she is advised not to sue for support, since the difference between her own earnings and the amount her husband would be obligated to pay her would not be worth the litigation involved.

There are several circumstances under which a woman may lose her right to be supported according to Jewish law, most of which arise out of "misconduct" on her part: refusal to engage in sexual relations with her husband, evidence of her "misbehavior" with other men, and any other deviation from the sexual code of conduct required of wives under Jewish law (Halperin-Kaddari 2000a). Another ground for losing her right to support is if she leaves the marital home with no justified reason. Determination of what counts as a "justified reason" is obviously value-laden and depends on the forum that hears the case. Thus, for example,

a husband's violence toward his wife should unequivocally be perceived as a justified reason, and it is indeed so perceived by the family civil court. Rabbinical courts, however, may evaluate the circumstances differently, and accordingly arrive at different conclusions (Rosen-Zvi 1990). Under Jewish law, as well as under the supplementing provisions of the Family Laws Amendment (Maintenance) Law, spousal support is limited to the period of formal marriage alone, and there is no continuous support obligation whatsoever after divorce. There is no doubt that this lack of alimony after divorce greatly contributes to the grave economic consequences of divorce for women. This could have been redressed by adapting the division of property award to reflect husbands' usually greater earning capacity, which wives would no longer benefit from after divorce. Unfortunately, earning potential is not yet recognized by Israeli law as part of the marital assets in which both spouses have an equal share.

Distribution of Marital Property upon Divorce

Property distribution is the ultimate example of the civil system's attempts to narrow down the rabbinical system's law and jurisdiction, in order to improve women's position and oppose their discriminatory treatment under religious law. Rooted in social norms that are totally alien to contemporary times, Jewish law provides for most of the woman's property to be transferred to her husband, either to his ownership or to his management. Upon marital breakdown, the wife is only entitled to the property which she had brought into the marriage, in form or in value, but not to any assets that may have been accumulated in the husband's name during the marriage. She is also entitled to a specific sum of money to which the husband contracted upon her betrothal, known as the *ketubah* (Shershevsky 1993; Haut 1983). These rules carry devastating consequences in times where more and more women are left economically independent after divorce, when that independence is based on the intolerably small part of the formally joint property. Realizing this, and following the 1951 Women's Equal Rights Law, which (as interpreted by the court) practically annulled the husband's rule over the wife's property, the Supreme Court gradually drew the subject of marital property out of rabbinical and into civil law and jurisdiction.[92]

Distribution of marital property under Israeli law is governed by a shared as opposed to a separate property regime. There are, however, two parallel legal arrangements of that regime, due to delayed legislation that compelled the courts to provide solutions during the legislative vacuum. The first arrangement is the community property rule, developed in the Supreme Court's rulings since the early 1960s, which con-

structs a general presumption that both spouses have an equal share in the marital property. The trend in recent years has been to broaden the scope of shared property to include even "private assets" that belonged to either spouse prior to the marriage or that either spouse has inherited.[93] The second arrangement is the one included in the 1973 Spouses (Property Relations).[94] This arrangement applies to all couples married after 1974, and provides that the marital property (excluding "private assets") be equally divided on divorce or death, unless the couple expressly contracted otherwise and had their contract ratified by a family court, rabbinical court, marriage registrar, or notary. The judicial "community property rule" applies to all couples married before 1974 and to nonmarital cohabitants as well.

In principle, the rule of community property dictates equal sharing not only in property assets and rights, but also in debts and obligations, when these have accrued in relation to the communal property and are not personal in nature. So far the trend in case law has been to make it rather difficult for creditors to prove the communal nature of the debts. Under both arrangements the exact scope of the community property is not entirely settled. More specifically, the inclusion of assets that come under the definition of "the new property" (Glendon 1981) is still undecided (Mendelson 1995). Regarding such assets as pension rights, case law has made significant strides in the direction of their inclusion in shared property,[95] and they are routinely being distributed between divorcing couples just like traditional property as part of divorce agreements, on the basis of which most couples are divorced.[96] Regarding such assets as earning potential and goodwill, however, there is much more hesitation and even resistance from the courts. Nonconsideration of these factors has long been signaled as a prime cause for the disastrous economic consequences of divorce for women and children (Weitzman and MacLean 1991; McLindon 1987). Unfortunately, no empirical research has ever been conducted in Israel to ascertain the economic consequences of divorce, and it can only be assumed, in light of international research, that Israeli women fare worse. This is due to their weaker power regarding divorce, which is inherent in the Israeli legal system of divorce, and the lack of post-divorce alimony.

The Property Relations Law conditions property distribution on the end of the marriage, through either death or divorce, while the judicial rule of community property is not limited by any prior condition and could theoretically take place at any point during the marriage on either party's request. The law's conditioning of the property distribution upon prior divorce opens up the way for withholding the divorce in order to extract a better property settlement or draw other concessions from the opposing party. In light of the rules of divorce under Jewish

law, the husband controls the divorce, and can therefore control and delay the property distribution by withholding the divorce (Rosen-Zvi 1990; Halperin-Kaddari 2000a). These observations obviously relate to the previous discussion of the *aguna* problem,[97] and add another distressing dimension to the structured possibility of extortion that is built into the rules of divorce under Jewish law and, apparently, is unfortunately fortified rather than rectified, under the civil legal system.[98]

Numerous bills to amend the distorted outcome of the law have been suggested through the years, proposing to separate the procedure of property distribution and the divorce. None passed as a law, mainly due to religious objection,[99] based on the fear that allowing for property division prior to divorce would encourage couples to be practically separated without arranging for the formal get. This, of course, could lead women who are still formally married, to engage in intimate relations with other men, and could result in creating a greater problem of *mamzerim*.[100] All these concerns were brought into the open by Chief Justice Shamgar in the 1995 Ya'acobi case,[101] which was supposed to end the disparity between the two legal arrangements of property distribution but only added to the confusion. Nonetheless, it seems that civil courts now tend to enable the distribution of property even prior to the divorce, despite the express wording of the law (Shifman 1996). This move will eventually result in subjecting all couples to the judicial rule of community property, bypassing the problematic arrangements of the Property Relations Law.

Property distribution could still come under the jurisdiction of the rabbinical courts if properly "attached" to a divorce suit.[102] Thus, women who were entitled to half the marital property according to the civil law were often left with nothing if their case reached the rabbinical court and all the family property was registered on their husbands' names. This, however, was changed in the 1994 precedent-setting Bavli case,[103] which not only applied the judicial rule of community property to religious courts but also subjected them to any and all principles of civil law beyond the specific matters of personal status, where religious law continues to govern (Halperin-Kaddari 1994, 1997a). While this decision has intensified the tension between the religious and civil system, it is doubtful whether rabbinical courts can abide by this ruling, and the race for jurisdiction will probably continue until the next intervention by the High Court of Justice (Shifman 1995b, 80; Halperin-Kaddari 2001, 146–53).

Names Law

Until 1996, Section 6 of the 1956 Names Law[104] stated that as a rule a married woman takes her husband's surname upon marriage, although

she may keep her own name or add it to her husband's. In practice, however, women's names were automatically changed upon registration of marriage. In February 1996 the law was amended, and Section 6 now neutrally refers to both men and women. Upon marriage, a person may now retain his or her former name; choose the spouse's surname; add the spouse's surname to the person's former name, select a new surname identical to one chosen by his or her spouse, or add it to the former name. In addition, a provision that had previously mandated that a change in the surname of married couples be made by the husband and wife together, adopting only one new name, has been removed.

However, even when no budgetary concerns are involved, progressive laws are difficult to implement, and more than four years after the law was amended, regulations for implementing this reform had still not been promulgated. It is probably not irrelevant to mention that the Ministry of Interior is traditionally run by one of the religious parties, and regulations, obviously, are promulgated by the minister. It seems that once again, the High Court of Justice's intervention will be sought in order to enforce the legislation.

The law's 1996 amendment confirmed a 1993 case, *Efrat v. The Population Registrar*,[105] in which the Ministry of Interior was instructed to register the change of name of a woman to the surname of her nonmarital spouse. Justice Barak, who delivered the case, went into a long discussion about the legal and social attitudes toward nonmarital partnerships and concluded that it is in the public interest to encourage such forms of family life as equally important as "formal," legally married families.

As to children's surnames, Section 3 states that a child acquires his or her parents' surname. If married parents have different surnames, then, as a rule, the child acquires the father's, unless both parents agree that the child would acquire the mother's name or both names. This provision was not changed in the 1996 reform. Furthermore, a child born to unmarried parents acquires the mother's name, unless both parents agree that the child would acquire the father's name, or if the parents were living together as nonmarital cohabitants. This last point is strongly related to the next topic, that of single mothers.

Single Mothers

Economic aspects of single-headed families are discussed in Chapter 6, concentrating on their poor situation and on the welfare system's means to redress it. The Israeli legal system has indeed recognized the growing phenomenon of single-parent families, 95.6 percent of whom are headed by women (Eliav 2000), and accords them a variety of social benefits and aid. The proportion of single-parent families among all families

is indeed growing fast, from comprising 8.9 percent of all families in 1993 to 11 percent in 1999. Moreover, the rate of their annual growth is four times larger than that of families in general (8 percent versus 2 percent respectively in 1998). The phenomenon of single-parent families headed by women is mostly the result of divorce (68 percent of all single mothers in 1999), then of widowhood (16 percent), and only marginally the result of choosing motherhood without marriage (16 percent of all single mothers in 1999). Nevertheless, single motherhood by choice may be slowly, but consistently growing: while in the late 1970s, births to Jewish single women comprised only 1 percent of the overall births, this rate was doubled in 1995, and by 1998 births to single women made up 2.5 percent of all births to Jewish women.[106]

The 1992 Single-Parent Family Law[107] expresses society's recognition of the special needs of these family units and tends to their economic and social welfare. It is doubtful, nonetheless, whether this expression can be said to reflect a complete recognition of single mothers and their children as normative families within the Israeli legal system and Israeli society. The most far-reaching precedent in terms of the concept of family as including single-headed families is a 1996 decision of the Haifa District Court regarding an internal dispute in a northern kibbutz over the question of eligibility to new housing units.[108] The district court voided a decision taken by the kibbutz members not to include a single mother with her minor child among the eligible member families, notwithstanding her seniority, since she and her child were not considered a "family." The court asserted that the single-parent family unit is as much a "family" as a two-parent family. Other expressions of the inclusion of single mothers and their children in the conception of the normative family are found in the context of access to new reproductive technologies: this can be interpreted as symbolizing the legitimization of single motherhood by choice.

New Reproductive Technology and Surrogacy

Along with Israel's familism comes Israel's pro-natalist ethos, which is reflected, for instance, in Israel's boasting a world record number of fertility clinics per capita and in generously subsidizing fertility treatments.[109] This "fertility ethos" has been critically observed by many scholars, pointing out the great pressure on women with fertility problems to endlessly try all the technology available, and to the media's role in celebrating women who strive to attain maternity (Solomon 1993). Recent legal developments have complemented this ethos, and along the way, have unexpectedly added to Israel's family law's patriarchal attribute.

The 1996 Surrogate Motherhood Agreements (Approval of Agreements and Status of Newborn) Law[110] made Israel only the third jurisdiction in the world, after the U.S. states of New Hampshire and Virginia, not only to positively sanction, but also to heavily regulate, surrogacy. Israel, though, is the only jurisdiction that regulates surrogacy through an administrative (and not judicial) organ (Halperin-Kaddari 1999). Following a 1992 petition to the High Court of Justice on restrictions posed by the Public Health In Vitro Fertilization Regulations (IVF Regulations),[111] a public multiprofessional commission headed by Justice Aloni was formed to consider all aspects of reproductive technologies in Israel and make recommendations for their regulation.[112] The only principle adopted from the commission's recommendations was the establishment of a statutory committee that would serve as a supervisory and approving medium for altruistic surrogacy. The basic principle enunciated by the law is that full surrogacy[113] is permitted only under very specific conditions. Furthermore, the whole procedure is legal only if a surrogacy agreement is approved by a statutory committee composed of seven members of relevant professions (physicians, social workers, and the like) and a religious official of the contracting couple's religion. The imperative substantive conditions, which are primarily based on halachic considerations, are that the surrogate be an unmarried woman (with provision for exceptions in rare circumstances); that there be no family relationship between her and the designated parents; that the surrogate's religion be the same as the designated mother's religion; and that the sperm be the designated father's sperm.[114] Apart from these religiously based restrictions, all parties to the surrogacy agreement must be of full age and residents of Israel, and the designated parents probably must be married, excluding nonmarital cohabitants.[115] The surrogacy agreement is approved only on a medical evaluation as to the inability of the designated mother to become pregnant or carry a pregnancy. The committee may approve monthly payments to the carrying mother to cover actual costs in addition to compensation for suffering, loss of time, income, or earning capacity, or any other reasonable compensation. No payment beyond this compensation is allowed.

The law, in principle, views the designated parents as the legal parents of the resulting child. To formalize this principle, the designated parents must apply for a "parenthood order" within a week of the child's birth (for circumstances and restrictions, see Halperin-Kaddari 1999). By October 2000, 26 babies had been born to 19 women who served as surrogates (including several pairs of twins), and two pregnancies were in progress.[116]

Incorporating halachic considerations into the social-legal arrangements of the new reproductive technologies has had some unintended

patriarchal consequences to the detriment of women (Halperin-Kaddari 1999). This is particularly evident in the Surrogacy Law's mandating that the sperm used in surrogacy must always be the contracting husband's sperm, while no such requirement applies to the egg, which may originate from the contracting designated mother or may come from a donor, so long as it is not the surrogate's egg. In other words, surrogacy is not an option for those couples where the wife ovulates but is unable to carry the pregnancy and the husband is totally infertile. This distorted outcome conveys the message that genetic relation to the woman is not as important as genetic relation to the man. Even though this is certainly not the reason behind this specific arrangement—rather, it was prompted by a specifically stringent halachic opinion regarding the problem of *mamzerut*—I do maintain that preferring the stringent halachic opinion while disregarding its implication is in itself troublesome and is a reflection of the deeply engrained unconscious patriarchal values of Israel's society. The resulting arrangement is clearly geared toward facilitating reproduction, while safeguarding religious considerations but overlooking women's possible interests and concerns. This particularly difficult upshot comes on top of the significant fact that throughout the public debate that preceded the passage of this law, at no point was the option of prohibiting surrogacy altogether seriously contemplated. The Israel Women's Network (IWN) was the only voice heard backing this position, but it was virtually silenced within the official forums of the public debate, such as the Aloni Commission or the Knesset Welfare Committee who was in charge of preparing the law.

Non-Jewish Religious Systems of Family Law

References to social practices involving family structure and customs are also found under Chapter 12, as part of the general discussion of non-Jewish women.

Muslim Family Law

The position of Muslim women in Israel in matters of personal status is precarious on two main levels. Muslim courts, which held broad exclusive jurisdiction at all levels under Ottoman rule, maintained exclusive jurisdiction over all issues of personal status, including paternity claims spousal and child support, until late 2001.[117] Consequently, Muslim women have had fewer options than women of other religious groups for turning to the civil system. More substantially, in the Muslim courts themselves the status of women is undermined by the applicable law, the substantive Shari'a (Islamic) law, which is highly discriminating toward

women (Layish 1995; Churi 1996; Abdo 1997). Application of the substantive law is heavily influenced by the patriarchal social structure and cultural norms of Arab society in Israel (Abdo 1997).

A trend similar to the one demonstrated above regarding the civil system's encroachment on the religious system's law and jurisdiction is also traced here.[118] While theoretically respecting the essential principle of exclusive jurisdiction, the civil system has worked—with mixed success—to influence and limit the bounds of Shari'a as it applies to Muslim Israelis. The process in this context, though, takes on a more complex angle, on top of the religious-secular confrontation: many have denounced the intervention of civil law into the exclusive realm of the Muslim courts as an example of national religious coercion, arguing that the Muslim system of law is dynamic and very efficient and must be left to its own creative devices. A typical opinion is that of Qadi Ahmad H. Natour, president of the High Shari'a Court of Appeal, who argued that both through judicial activism and through the guidelines and proclamations of the Shari'a Court of Appeals to the Shari'a courts, the Muslim court system in Israel has managed to "shake off the dust from the Shari'a rules and show to the extent to which the Shari'a religious laws are perceptive, far-reaching, and also substantive."[119]

Muslim law discriminates against women in marriage itself. While in effect the marriage of a Muslim man to a non-Muslim women is valid under Muslim law, a Muslim woman cannot marry a non-Muslim man. Moreover, the option of polygamy is available only to men, who may marry up to four wives (Layish 1995). But it is especially Muslim divorce law that is discriminatory toward women. While a man may divorce his wife of his mere volition simply by saying "talaq" (you are divorced), with no judicial intervention or supervision at all, this option is not available to women. Indeed, a Muslim woman may obtain divorce only through judicial decree, provided this option has been guaranteed to her in her marriage contract, and only on limited grounds such as the husband's marriage to another woman or his ceasing to provide for her. Israeli law has attempted to remedy these inequalities in marriage and divorce by criminalizing both polygamy and the talaq unilateral and unsupervised divorce. Although the secular legislature's intervention has indeed reduced the frequency of their occurrence, these practices are still common among Muslims, and the law that prohibits them is not enforced.

Discrimination in the area of marriage and divorce is complemented by discrimination in the area of parents and children law. Shari'a law, for instance, grants guardianship of children to the mother only until a certain age, after which the guardianship is transferred to the father. The 1951 Women's Equal Rights Law[120] had attempted to end this dis-

crimination by designating both parents as equal guardians of their children. Concerning issues of paternity and unwed mothers, Muslim law traditionally recognizes no paternal ties between a child born out of wedlock and his or her father and thus denies the child of such an "illegitimate union" any rights deriving from this biological tie. While paternity has always been under the exclusive jurisdiction of Shari'a courts (and thus governed by Muslim law), a 1995 case[121] brought about a major change regarding the position of Muslim unwed mothers and their children. By introducing into Israeli jurisprudence the concept of "civil paternity"—namely paternity established upon biological-factual grounds and not determined by the marital status of the child's parents—the Supreme Court has opened the door to ordering a father to pay child support to children born out of wedlock. In a forceful opinion, Justice Heshin recounted the intolerable position of an "illegitimate" Muslim and based his disregard of the religious courts' exclusive jurisdiction on these matters on their refusal to grant the legal consequences of paternity to the child-father relationship as a refusal to exercise jurisdiction in that matter, thus allowing the secular courts to take the case.

In 1996 a coalition for Equality in Arab Women's Personal Status Laws, consisting of several Arab women's associations together with the IWN and ACRI, joined efforts to confer jurisdiction to civil courts, to parallel the jurisdictional choice Muslim women have in divorce disputes to that of Jewish women. These attempts have generated much opposition, mainly from Muslim religious leaders—all men. A typical reaction is that of Qadi Natour, calling it a "big mistake of almost historical proportions" and explaining that "the personal law is structured on the Qur'an and not on the personal opinion of one jurist or another from any particular historical period. Shari'a for Muslims is a part of their identity."[122] These last words reflect the crux of the matter. Struggling to advance the position of Muslim women in the area of family law is not just a struggle between the familiar progressive civil system and the patriarchal religious system, but also within the national political conflict in Israel. And that makes it a much more complex struggle. By the end of the 14th Knesset's term, the proposed reform passed first reading, and the 15th Knesset eventually passed it as a law in November 2001.[123] While this dramatic reform in Shari'a jurisdiction opens the way for Muslim women to turn to civil courts, it also opens a new "race for jurisdiction" similar to the notorious rabbinical-civil race. It also remains to be seen whether Muslim women are socially and politically able to use this new option.

Druze Family Law

Druze religious courts were established by the 1962 Druze Courts Act,[124] granting them exclusive jurisdiction over Druze marriage and divorce.

Other family matters are in principle under the jurisdiction of the civil courts, but Druze courts can in fact obtain jurisdiction over them by means of consent of all the parties involved. Besides setting up the court system and determining its jurisdiction, the 1962 law is also instrumental in making the Personal Status Law Relating to Druze, which originates in Lebanon, compatible to the guidelines of Israeli law. With respect to insuring the status of women, there have been far fewer clashes between Druze courts and Israeli secular legislature in comparison with those encountered by other religious communities in Israel. Druze religious family law is indeed far more progressive in terms of women's status. However, critics claim that Druze religious courts in Israel do not always adhere to the "pure" law, and that in practice they often apply prevailing custom, which is influenced by patriarchal social norms (Layish 1998; Sa'b 1998).

Contrary to both Jewish and Muslim laws, Druze law forbids polygamy. Furthermore, Druze law on divorce can be said to be "one of the most progressive in the Middle East."[125] It indeed confers women equal rights to divorce their husbands. Moreover, a woman has the right to distribute her property under a will, with complete testimonial freedom guaranteed. However, the Druze religious courts tend to reconcile the parties of a divorce procedure in order to give them the opportunity to reconsider, with the divorce being granted only when all attempts fail. This, in effect, almost always functions in favor of the husband. Indeed, it is the wife who mostly endures court pressure to give up on her dowry or other material benefits so that the divorce may be granted. Thus, despite the clear direction of Druze law in trying to promote the interests and status of women, the reality more often than not contradicts this theoretical egalitarian approach (Layish 1998; Sa'b 1998). Furthermore, with respect to children, the position of Druze women is far from progressive. The mother is regarded as the appropriate custodian only until her son reaches age seven, and her daughter age nine. After that, the father is obligated to take them. Moreover, the mother's custody over her children is conditioned upon her characteristics and behavior, and in reality she may lose her children upon remarrying, even if the remarriage is not religiously prohibited (Dana, forthcoming).

A new empirical study of Druze court files sheds more light on the reality of Druze family law (Dana, forthcoming). An examination of all divorce cases in one Druze court during 1983, 1988, and 1998 revealed that 81 percent of the divorces were uncontested. Of the contested cases, women initiated 12 percent of the proceedings, while men brought only 7 percent of the cases. In a different area, that of wills and inheritance, the study confirms the contentions of the gap between the

progressive legal norm and its noncompliance. Of 60 inheritance cases in 1998, concessions on the part of the female heirs were made in 44. Thus, while the law grants equal inheritance rights, the social norms impel the women (daughters and widows of the deceased) to forgo their rights in favor of male heirs.