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Gender, Colonialism and Rabbinical Courts in Mandate Palestine

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Abstract

The distribution of powers between the state and religious groups plays an important role in shaping how controversies over multicultural toleration and women's rights under religious law can be resolved. Some structures encourage dialogue while others make it difficult. In Israel, the presence of multiple systems of personal religious law limits the possibilities for the transformation of discriminatory religious laws. There is no civil marriage or divorce in Israel. When the modern State of Israel was created, exclusive power over family law disputes involving Jewish citizens was placed in the hands of rabbinical courts. This arrangement has been called one to retain the 'status quo'. However, it was not a continuation of Jewish tradition or of the arrangements in place during the long period of Ottoman rule in Palestine. It reflected strengthened powers that had been given to rabbinical courts during the period of the British Mandate for Palestine. This article will trace the ways in which British policies for colonial rule and the interests of Jewish religious leaders coalesced to create a regime of religious family law that is resistant to feminist demands for change.

Keywords

Gender and multiculturalism, women's rights and religious law, Jewish law, Israeli law, Mandate Palestine, family law

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Introduction

Contemporary legal theorists of gender and multiculturalism have focused on the role institutional form can play in shaping conflicts over women's rights. Institutional arrangements which distribute the power to regulate areas of social life and to review actions of courts and government can be designed to enable, encourage or impede a dialogue between state institutions and religious or cultural minorities over how discriminatory practices can be brought in line with human rights norms.[1] These practices are often embodied in codes of personal religious law, regulating marriage, divorce, sexual propriety, child welfare and inheritance. Religious citizens may be subject to regulation not only by the laws of the state, but also by the laws of the religious tradition to which they adhere.

The co-existence of multiple, overlapping and possibly conflicting regimes of legal regulation within a single state is described as legal pluralism. Under conditions of legal pluralism, a situation which pertains in every complex modern state,

> law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.[2]

[1] See, for example, A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights,* Cambridge: Cambridge University Press 2001; M. Deveaux, *Gender and Justice in Multicultural Liberal States*, Oxford: Oxford University Press 2006.

[2] J. Griffiths, 'What is Legal Pluralism?' in *Journal of Legal Pluralism* 24 (1986), 1-55: 39.

By the end of the Ottoman empire during the first World War, the diverse inhabitants of Palestine were governed by a number of intersecting and overlapping legal regimes. While matters of civil, criminal, corporate and public law were dealt with by state courts applying European style legal codes, for most citizens, family law matters lay in the hands of *shariah* (Islamic law) courts.[3] Special dispensation was made to allow the family disputes of religious minorities, such as Jews and Christians, to be dealt with by their own religious courts.[4] A similar policy of split jurisdiction based on religious affiliation was adopted during the period of the British Mandate for Palestine from 1920 to 1947.

When the modern state of Israel was created in 1948, a compact was struck between Zionist leaders and representatives of the ultra-Orthodox community.[5] In exchange for public expressions of support from the Orthodox organization, *Agudath Israel* (Union of Israel), for creation of the Jewish state in testimony before the United Nations body considering the bid for statehood, the Jewish Agency for Israel made four key promises: to accept the Jewish Sabbath as a national day of rest; to provide for the observance of kosher dietary laws in public institutions; to provide public funding for Jewish religious education; and to confer exclusive jurisdiction over family law cases involving Jews upon state-supported rabbinical courts.[6]

This arrangement has been called the ‘status quo’ agreement, because it retained in place the power distribution over family law enforced by the British authorities during the Mandate period. The decision has had a dramatic and long-lasting impact on the content of Jewish family law and the rights of women in Palestine and the modern State of Israel. However, contemporary Israeli legal historians argue that rather than being an uncontroversial continuation of Jewish legal practices from time immemorial, Orthodox religious authorities used legal reforms instituted under British Mandate rule as an occasion to ‘fix and impose – by statist

[3] I. Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine,* Syracuse: Syracuse University Press 2006, 6.

[4] W. Kymlicka, *Multicultural Citizenship*, Oxford: Oxford University Press 1995, 156.

[5] M. Edelman, ‘A Portion of Animosity: The Politics of the Disestablishment of Religion in Israel’, *Israel Studies* 5: 1 (2000), 204-227: 224.

[6] The letter confirming this agreement, signed by David Ben-Gurion, Rabbi Y. L. Fishman and Y. Greenbaum on behalf of the Jewish Agency Executive, is reproduced in M. Friedman, ‘The Structural Foundation for Religio-Political Accommodation in Israel: Fallacy and Reality’ in S. I. Troen and N. Lucas (eds.) *Israel: The First Decade Of Independence*, Albany: SUNY University Press 1995, 51, 52.

means – their version of tradition, their version of Jewish law and their ideas concerning the desired composition of Jewish tribunals.'[7]

There is no option to enter into a civil marriage in the state of Israel. Every citizen, however irreligious or disaffected with their religious tradition, must take family law disputes to religious courts. By putting a monopoly over performing marriages and granting divorces into the hands of religious courts, this agreement has created an institutional form that makes egalitarian transformation of religious law very difficult. Because couples seeking divorce have no choice but to subject themselves to the jurisdiction of religious courts, they cannot refuse to appear before them even where they object to the discriminatory legal provisions being applied. Because the state is committed to supporting the jurisdiction of rabbinical courts, demands made upon the rabbinate to make its law and procedure more fair to women are met with obdurate refusal.[8]

This essay will consider the role played by the creation of state-sanctioned Rabbinical Courts during the British Mandate period in creating this status quo. As part of a broader project exploring the role legal arrangements can play in fostering inter-communal and intra-communal dialogue about reforming laws that discriminate against women, I seek to unpack the competing political forces that coalesced to consolidate the power of religious authorities during this period. Much political theory regarding the reconciliation of women's claims to gender equality and practices justified in terms of cultural and religious norms explores the nature of an appropriate remedy when these claims come into conflict. Some theorists argue that gender equality must clearly take priority and that practices which deny this right should be abolished.[9] Others argue that because the liberal state should not entangle itself in religious questions or because the bonds of a cultural community are so important and fragile, the state should not interfere with such discriminatory practices.[10] A third approach has sought to identify ways in which cultural communities can be encouraged to engage in a process of re-evaluating their discriminatory practices themselves. A key strategy for initiating such reflection has been

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[7] R. Shamir, *Colonies Of Law: Colonialism, Zionism And Law In Early Mandate Palestine,* Cambridge: Cambridge University Press 2000, 66.

[8] R. Halperin-Kaddari, *Women in Israel: A State of Their Own,* Philadelphia: University of Pennsylvania Press 2004, 40-65.

[9] S. M. Okin,'Is Multiculturalism Bad for Women?' in S. M. Okin (ed.), *Is Multiculturalism Bad for Women?*, Princeton: Princeton University Press 1999, 7-36: 15.

[10] C. Kukathas, 'Cultural Toleration' in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights,* NOMOS 39, New York: New York University Press 1997; W. Kymlicka, *Liberalism, Community and Culture*, Oxford: Oxford University Press 1989.

to find ways of encouraging dialogue between stakeholders in the community and between community and instrumentalities of the state over how traditional values and civil rights values might conflict, overlap and integrate.[11] The way powers are distributed between levels of government and between courts, lawmakers and community can foster such dialogue or render it difficult and ineffectual.

I argue for reading the history of the distribution of jurisdiction over family law in Mandate Palestine in light not only of the political tensions being negotiated between Orthodox and secular factions in the period leading up to the founding of the state of Israel, but also in light of the British colonial policy of indirect rule as a method of governance for multicultural states. The policy was designed to quiet anxieties over the expression and integration of indigenous and British values by confining the expression of cultural and religious identity to distinct private law spheres. This had the effect of making colonial governance run more smoothly, but impeded the possibilities for open reflection on reforming discriminatory aspects of indigenous law. Because family law took on the burden of being a repository for cultural values, attempts to transform it became fraught with greater import and difficulty.

The role of British legal policy in the constitution of the legal institutions of the state is a neglected area in Israeli legal history.[12] This essay draws on new historical work that explores the negotiations over power, law and legitimacy between colonizer and colonized during the Mandate period. I read this work as a family lawyer seeking remedies for women's current inequality under Israeli family law, looking for ways of understanding how past decisions about jurisdiction resonate in the present. While incremental improvements to women's status under some specific religious laws were made under British rule during the Mandate period, I argue that the main legacy of this period is the consolidation of a structure of split jurisdiction over family law that continues to render the achievement of pervasive gender equality a difficult and complex task.

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[11] See, for example, S. J. Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity*, Cambridge: Cambridge University Press, 1995; I. M. Young, 'Communication and the Other: Beyond Deliberative Democracy' in S. Behanahbi (eds.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton: Princeton University Press 1995; M. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge: Cambridge University Press 2000; Shachar, *Multicultural Jurisdictions.*

[12] R. Harris, A. Kedar, P. Lahav and A. Likhovski, 'Israeli Legal History: Past and Present', in R. Harris (ed.), *A History of Law in a Multicultural Society*, London: Ashgate 2002, 7.

In the next section, the lessons learned by the British about governing ethnically, religiously and legally plural dominions through policies of indirect rule will be described. The negative impact of indirect rule policies for the development of family law and the rights of women subject to it will be detailed. The section concludes with showing the ways in which an atypical form of indirect rule was applied in Mandate Palestine.

The third section will describe the Mandate government's role in perpetuating and enhancing Ottoman policies which gave power over family law to indigenous religious leaders. In particular, it shows how rabbinical authorities' interests in consolidating a role for themselves as central to the public life of the new national home were served by the Mandate program to recognize and streamline the operation of religious courts.

Finally, the fourth section analyses the impact of this patriarchal compromise over family law in the development of religious family law in Palestine during the Mandate period. On key issues such as the right of women to inherit and the abolition of child marriage, British policies of deference to indigenous authorities on family law matters undermined the effectiveness of egalitarian law reform efforts in Palestine.

Indirect Rule as a Strategy for Colonial Governance

In order to understand how the British approached the challenge of governing an ethnically and religiously diverse Palestine, it is useful to consider the strategies for efficient colonial administration they had developed in other jurisdictions. The British mapped the lessons learned elsewhere on to the interpretation and elaboration of the Ottoman plural regime they found in Mandate Palestine. Unlike the conquest of North America, where small indigenous populations spread over a wide territory were neutralized by treaty and subdued by force, the question faced by British colonists during the scramble for Africa in the mid 19th century was how a small group of colonists could govern a colonized population that vastly outnumbered them.[13] They addressed this challenge with the development of a policy of 'indirect rule' whereby local government should, wherever possible, be carried out through the co-optation of

[13] The British Mandate authority was staffed by colonial officers who had developed their expertise serving in other colonial outposts. Shamir, *Colonies of Law,* 9. Colonial authorities had extensive experience applying Ottoman civil law in Cyprus. N. Bentwich, 'The Legal Administration of Palestine under the British Military Occupation', *British Yearbook of International Law* 1 (1920-21), 139-14: 140.

indigenous political institutions.[14] With regard to African law, British law altered aspects of customary culture which were viewed as repugnant to British morality, but the bulk of customary law, dealing with petty crimes and the civil law matters of family, inheritance and land tenure were to be left intact to evolve naturally along with the world view of its adherents.

Indirect rule had three key features: the distribution of jurisdiction between colonial and indigenous law along subject matter lines, negotiation about this distribution between colonial authorities and patriarchal elites in the indigenous community, and the subjection of indigenous norms to extinguishment if they were deemed repugnant to British moral norms.

Indirect Rule in Africa

Under indirect rule in Africa, the parameters of the indigenous legal realm were established in a way that disadvantaged women.[15] By the early 20th century, official customary law throughout southern Africa had taken on a particularly authoritative and patriarchal cast. In part, this was because the legal codes were the product of negotiation between colonial and customary elites at a time of dramatic social and political change. Official accounts of customary law were produced through consultation with men in positions of patriarchal authority and through observation of the workings of traditional courts. Where they acted as informants, it was in the interest of senior men to put forth a version of customary law which was relatively stable and which privileged their interests.[16]

Women were also disadvantaged by the translation of African customary norms into rules enforceable in British courts. The imposition of colonial adjudication entailed the creation and application of clear rules in areas that had previously been regulated through the application of

[14] The innovation was the work of Theophilus Shepstone, the first Secretary of Native Affairs for Natal, but is often attributed to Sir Frederick Lugard, first governor of British Nigeria. S. F. Moore, *Anthropology And Africa: Changing Perspectives On A Changing Scene*, Charlottesville: University of Virginia Press 1994, 18.

[15] C. Walker, *Women And Resistance In South Africa*, London: Onyx Press 1982, 7.

[16] 'It is not simply that customary law has changed in both content and form during the colonial period. It is that the circumstances of its development made it a part of an idealization of the past developed as an attempt to cope with social dislocation. It was defensive in spirit, defense not only against British rules but against those Africans whose growing involvement in wage labour and market agriculture was leading them towards different interpretations of obligations and priorities.' M. Chanock, *Law, Custom And Social Order*, Cambridge: Cambridge University Press 1985, 4.

flexible, non-technical standards.[17] This rendered invisible the complex negotiated quality of African adjudication.[18] In particular, it gave prominence to the claims of certain dominant groups, primarily older married men, by characterizing these claims as enforceable legal rights. Conversely, the claims of other members of society, such as women and young men, were framed as purely moral ones, enforced through communal pressure alone, if at all.[19] Having reduced these complex and fluid legal relations to rules subject to the doctrine of precedent, colonial adjudication also impaired the capacity of African law to grow and change in response to changing social conditions and internal political demands, including those for greater gender equality.

Colonial and apartheid governments may have had their own reasons for co-operating in the re-invigoration of indigenous law. The most significant threat to White rule in the 20th century came from educated, organized and urban Africans rather than from traditional leaders and their constituencies. The British came to regret the erosion of what they saw as tribal discipline and the decay of customs that formerly kept young people in check.[20] The reification of traditions of gender inequality in the African family legitimized and naturalized notions of obedience to one's natural superiors that also served to legitimate White supremacy.

The exercise of power by indigenous authorities in many areas of Africa was subject to a 'repugnancy proviso' whereby the colonial authorities could invalidate legal norms viewed as repugnant to morality. These clauses were often used to deter those practices viewed as simply intolerable, such as the infanticide of twins, trial by ordeal, and slavery.[21] Sometimes it was used to achieve advances for women, for example in banning child betrothal, forced marriage, levirate marriages (of a widow to

[17] See D. Kennedy, 'Form and Substance in Private Law Adjudication', *Harvard Law Review* 89 (1986), 1685-1778.

[18] M. Chanock, 'Making Customary Law: Men, Women and Court in Colonial Northern Rhodesia', in M. J. Hay and M. Wright (eds.), *African Women and the Law: Historical Perspectives,* Boston: Boston University African Studies Center 1982, 53-67: 59.

[19] G. Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria', in B. Morse and G. Woodman (eds.), *Indigenous Law and the State,* Dordrecht: Foris Publications 1988, 181-220: 181 and 190-91.

[20] H. J. Simons, *African Women: Their Legal Status In South Africa*, Evanston: Northwestern University Press 1968, 43.

[21] T. W. Bennett, 'Conflict of Laws – The Application of Customary Law and the Common Law in Zimbabwe' *International And Comparative Law Quarterly* 30:1 (1981), 59-1-3: 83; F. Kaganas and C. Murray, 'Law, Women and the Family: the Question of Polygyny in a New South Africa', in *Acta Juridica* (1991), 116, 120.

her husband's kinsman) and seed-raiser unions (in which a women is compelled to marry the widower of another woman in her family as her replacement).[22] These advances reinforced an understanding of African traditional norms as intrinsically backward and patriarchal. While many of these practices could have been abolished through the progressive interpretation of customary law[23], the agency for achieving gender equality was routinely credited to the civilizing intervention of British colonial judges bearing British colonial morality.

Indirect Rule in Mandate Palestine

The British colonial enterprise in Palestine differed from that in Africa. It was based on a mandate from the League of Nations to facilitate transition to an independent state which provided a Jewish national home which was limited in both scope and time.[24] Imperial policy was committed from an early stage to facilitating Jewish settlement and supporting the creation of an effective sovereign government.[25] The terms of the Mandate for Palestine also required that the authorities safeguard the religious rights of all inhabitants, Jewish and Muslim alike.[26] This entailed respecting their personal status and religious interests,[27] providing for freedom of conscience and free exercise of worship[28] and being responsible for such supervision of religious bodies as might be required for public order and good government.[29]

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[22] N. S. Peart, 'Section 11(1) of the Black Administration Act No 38 of 1927: The Application of the Repugnancy Clause', in *Acta Juridica* (1982), 99, 111.

[23] Woodman 'How State Courts Create Customary Law in Ghana and Nigeria', 195, 197.

[24] Until 1920, the British held power as military occupier. Under the usages of war, the occupier is prohibited from changing the laws of the occupied territory until peace is made and sovereignty determined. Bentwich, 'The Legal Administration of Palestine under the British Military Occupation', 139. From July 1920, with the appointment of the High Commissioner for Palestine, they enjoyed the powers of a civil government and were able to introduce legal innovations. N. Bentwich, 'The Legislation of Palestine, 1918-1925', in *Journal Of Comparative Legislation And International Law*, 8:1 (1926), 9-20-: 9.

[25] G. Forman and A. Kadar, 'Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective', Theoretical Inquiries in Law, 4:2 (2003), 491-540: 497.

[26] *Mandate for Palestine*, article 2, reproduced at Annals of The American Academy of PolitIcal Science. 164 Palestine. A Decade of Development (1932), 198-203: 198.

[27] Ibid., article 9.

[28] Ibid., article 15.

[29] Ibid., article 16.

In Palestine, the British did not create a system for distributing power between local elites and the central colonial authorities. The existing Ottoman imperial legal system already divided power between the imperial authority and indigenous groups along subject matter lines, placing family law under the jurisdiction of minority religious communities.[30] As in indirect rule, the Ottoman state coped with the challenge of governing a diverse population through retaining direct control over matters of national importance such as security and taxation, and by granting jurisdiction over other legal issues to religious *millets* (self-organizing religious communities).[31] Initially, this dispensation extended only to Christians and, to a lesser extent, to Jews, as fellow 'people of the book', but this tolerance was eventually extended to other groups as well.[32] The extent of the powers delegated also did not remain static. Over time, many of these were transferred to the Ottoman state, leaving religious groups only with power over family law and charitable trusts.[33] British Mandate authorities mapped their governance strategy in Palestine on to this existing legal form.

The repugnancy proviso played a very limited role in the administration of family law in Mandate Palestine. As the discussion of levirate marriage under Jewish law in the following section will show, this had the perverse result that practices that had been outlawed as repugnant in southern Africa were allowed to stand in Palestine. Courts created for the Bedouin in the Beersheba district in 1918[34] were formally empowered to apply tribal custom, insofar as it was not 'repugnant to natural justice or morality'.[35] However, British authorities preferred to attempt to negotiate with Bedouin leaders to bring an end to practices

[30] L. Welchman, *Beyond The Code: Muslim Family Law And The Shar'i Judiciary In The Palestinian West Bank*, Boston: Kluwer Law International 2000, 44.

[31] Ibid., 43.

[32] See B. Braude, 'Foundation Myths of the Millet System' in B. Braude and B. Lewis (eds.) *Christians And Jews in The Ottoman Empire: The Functioning of a Plural Society*, New York and London: Holmes and Meier 1992, 69-88:72.

[33] U. Kupferschmidt, *The Supreme Muslim Council: Islam under the British Mandate for Palestine*, Leiden: Brill 1987, 14. Kupferschmidt provides an interesting discussion of the ways in which British policy in Palestine reflects lessons learned from governing other Islamic colonies.

[34] A. Likhovski, *Law and Identity in Mandate Palestine*, Chapel Hill: University of North Carolina Press 2006, 33.

[35] The Palestine Order In Council, 10 August 1922 (League of Nations), article 45.

such as trial by ordeal or child slavery rather than to extinguish these practices through application of the repugnancy clause.[36]

The repugnancy proviso did not apply even nominally to the laws of the Jewish, Muslim and Christian communities of Mandate Palestine. Palestine's *shariah*-based family law regime, codified in the Ottoman Law of Family Rights passed in 1917[37] was admired as 'a form of modern scientific legislation'.[38] Similarly, Jewish law was seen by the British as a complex and highly developed legal code, the emanation of a complex and highly developed culture. Like Roman-Dutch law in Southern Africa, Jewish law in Palestine was seen as derived from canonical sources similar to those that underpin English law. In the standard telling of this legal story, English law merely operated to refine procedures and fill the lacunae in an otherwise developed set of civilized indigenous legal arrangements.[39]

Consolidation of Rabbinical Court Hegemony in the Mandate Period

In the turmoil of the British Mandate period, rabbinical courts seized the opportunity to have their powers enhanced and altered. The history of Israeli family law since that time has been a struggle to wrest authority over various aspects of family law from the rabbinical courts. The scope of their exclusive jurisdiction has been narrowed from the full range of family law matters to the solemnization of marriage and divorce. The rabbinical courts and civil courts now enjoy parallel jurisdiction over most matters ancillary to divorce. The question of which court will be seized of the case is often determined by a race to the courthouse. Wives usually find it advantageous to initiate proceedings in civil courts, while husbands may seek to have the case dealt with under Jewish law alone in rabbinical courts. Rabbinical courts do not, for example, award alimony payments after divorce, do a poor job at evaluating the best interests of children in custody cases and may turn a blind eye to attempts by men to use their power to withhold divorce as a bargaining chip in settlement negotiations.[40]

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[36] Likhovski, *Law and Identity in Mandate Palestine,* 92-93.

[37] It contained provisions dealing with other communities, but only the Muslim sections were continued by the British through the *Muslim Family Law (Application) Ordinance* of 1919. Welchman, *Beyond The Code*, 38-43.

[38] Bentwich, 'The Legislation of Palestine', 11.

[39] U. Yadin, 'Reception and Rejection of English Law in Israel', in *International and Comparative Law Quarterly* 11:1 (1962), 59-72: 60 .

[40] See L. Fishbayn, 'Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce', in *Canadian Journal of Law and Jurisprudence* 21 (2008), 71-96.

Jews in Gentile Courts

In addition to the parties, the judiciary in both systems has an interest in acquiring and holding jurisdiction. Jewish law has long been concerned about the possibility that parties living in legally plural multicultural states will take their dispute to Gentile courts. Jewish law requires that, where possible, Jews take disputes with other Jews to Jewish courts.[41] The elaboration of these rules reflects the context of their development. For centuries, Jewish law was the subject of fragile toleration by dominant legal authorities who might persecute Jewish leaders or prohibit Jewish practices. Jewish legal sources thus developed extensive and detailed rules regarding the relationship between Jewish courts and civil courts which were aimed at preserving Jewish legal autonomy.[42]

The prohibition against using Gentile courts was first pronounced soon after the destruction of the Second Temple in 70 CE, when Jews had the option of using the courts of the Roman Empire.[43] Where both parties are Jewish, it is forbidden to litigate before non-Jewish judges or in their courts. This prohibition applies even if both litigants have agreed to the court's jurisdiction and even if these courts rule in accordance with Jewish law.[44]

The reasons given for supporting the maintenance of this prohibition are both principled and pragmatic. On principle, the prohibition is understood to derive from a divine command contained in the Torah (the five books of Moses given by G-d to the Jewish people at Mount Sinai). Compliance with it is, therefore, compulsory. It is a *chillul hashem* (a scandal which brings the community into disrepute) to reject courts applying the laws handed down from G-d. The *schechina* (the presence of G-d) is said to dwell on earth when a *beit din* (Jewish court) rules justly.[45] Use of Gentile courts thus constitutes a lost opportunity to find holiness and to fulfill the commandment to study and follow the word of G-d. Ottoman Jews were also advised against using non-Jewish courts for

[41] Y. Feit, 'The Prohibition on Litigating in Secular Courts', Beit Din of America (on file with author).

[42] I. Englard, 'Law and Religion in Israel', *American Journal of Comparative Law*, 35:1 (1987) 185, 187. Conversely, Jewish law offered little guidance on how to respond to conflicts between Jewish religious norms and the civil enactments of a Jewish-dominated secular state.

[43] M. Elon, 'Mishpat Ivri', in *Encyclopaedia Judaica*, 14, 2d Ed. 2007, 331-363: 342.

[44] M. Elon, *Jewish Law: History, Sources, Principles*, Philadelphia: Jewish Publication Society 1988, 15.

[45] S. Kraus, 'Litigation in Secular Courts', in *Journal of Halacha and Contemporary Society* 2:1 (1982), 35-62: 48.

prudential reasons. Gentile courts may not be fair to Jews because they may be staffed by anti-Semites. Even well-meaning judges may apply the laws of a community permeated by anti-Semitism.[46] Failure to understand the nuances of Jewish society may lead non-Jewish courts to be too harsh or too easy on a Jewish party.[47] Use of Gentile courts was said to engender enmity both within and towards the Jewish community.[48] Finally, the interests of the rabbinical courts and the Jewish law they championed were clearly threatened by routine resort to Gentile courts. Even where these courts decided in ways consistent with the principles of Jewish law, reliance upon them would undermine the authority of Jewish courts and render them irrelevant.[49]

Jews in the Courts of the State of Israel

This challenge was particularly pressing during the period before and after the creation of the State of Israel. Faced with the creation of a state in which courts would be staffed by Jewish judges and the law might be assumed to reflect Jewish legal norms and cultural values, the rabbinate had to consider whether resort to these courts would also be prohibited by Jewish law. The Talmud recognizes the legitimacy of a category of inferior courts described as 'the courts of Syria', which had been chosen in ancient times by local communities to resolve disputes in the absence of qualified judges with expertise in Jewish law. These judges relied on common sense notions of justice, fairness and equity rather than *halacha* (Jewish law). The prevailing opinion in Jewish law is that such courts are only acceptable in the absence of qualified rabbinical judges. Moreover, Israeli civil courts would not merely rely on common sense, but would create an elaborate and alternate system of legal norms and precedents. Resort to such courts would therefore also amount to a rejection of the supremacy of Torah law:

> The essence of … the prohibition of resorting to a secular judicial system, is the deinstitutionalization of Torah law and its subsequent nullification by atrophy and neglect, through the conscious choice of criteria other than Torah law. That this 'other law' is made by Jews in the Knesset and

[46] J. Hacker, 'Jewish Courts from the Sixteenth to the Eighteenth Centuries' in A. Levy, *The Jews of the Ottoman Empire*, Princeton: Darwin Press 1994, 153, 156.
[47] Ibid.
[48] Ibid.
[49] Kraus, 'Litigation in Secular Courts', 1.

> interpreted by Jews in the Israeli judicial system does not alter the fact that a conscious choice was made to forego Torah law for other law.[50]

Despite stern cautions from rabbinical authorities, many Palestinian Jews, in fact, used Ottoman *shariah* courts to deal with family law issues when it suited them.[51] Jews might take their cases to Ottoman courts in order to make use of their more extensive enforcement powers or to shop for a forum whose doctrines might offer a more advantageous result.[52] Indeed, Jewish widows in Ottoman Palestine preferred to have their spouses' estates administered by Ottoman courts because they awarded women a greater share of the estate than did rabbinical courts.[53] The emphatic exhortations against use of Gentile courts in some of the Jewish law literature, in the pre-state period and in the present, may thus reflect a reactionary struggle by rabbinic authorities against the clear willingness of Jewish plaintiffs to use them.

Jewish Women Seeking a Fair Legal Forum

Family law has been a key site for this struggle over jurisdiction. Under Jewish law, a divorce is effected through the delivery of a bill of divorcement (*get*) from the husband to the wife before a *beit din*. The wife does not have the power to issue a divorce herself but can request that her husband divorce her and ask a *beit din* to consider whether there are grounds under Jewish law for a *beit din* to request or instruct her husband to grant her a divorce. A woman who lacks such grounds or whose husband chooses not to comply with rabbinical advice that he ought to grant a divorce may become an *agunah*, a woman chained to a dead marriage. A woman who refused sexual relations and sought to divorce her husband simply because she disliked him did not have grounds for divorce and was characterized as a rebellious wife. In order to pressure her to return to her husband, she was denied both a divorce and financial support from her husband for one year. Some desperate women turned to Gentile courts seeking their help in ordering their husbands to divorce them, even though such coerced divorces are not considered valid under Jewish law.[54]

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[50] Ibid.

[51] Hacker, 'Jewish Courts from the Sixteenth to the Eighteenth Centuries'.

[52] Ibid.

[53] E. Westreich, 'Levirate Marriage in the State of Israel: Ethnic Encounter and the Challenge of a Jewish State', in *Israel Law Review* 37 (2003-4), 427-500: 437.

[54] S. Riskin, *Women And Jewish Divorce,* Hoboken: Ktav Publishing House 1989.

The Talmud itself deals with a propensity of women to turn to non-Jewish courts to protest the discriminatory practices of Jewish law courts.[55] The Talmud includes statements by rabbis of the Amoraic period (200-500 CE), explaining that they declare divorces resulting from orders of Gentile courts invalid in order: 'To stop each and every Jewish woman from seeking the assistance of a non-Jewish court to [compel a *get*] and thus release herself from the control of her husband.'[56]

Conversely, Talmudic commentators of the Gaonic period (700-1000 CE) dealt with the women's use of Gentile courts by making the law more accommodating to women.[57] The Geonim instituted wide-ranging reforms to stop the practice of withholding divorce by calling upon the husband to release the wife and empowering the *beit din* to coerce him into doing so when necessary. Unfortunately, this sympathetic approach to the captive wife has since fallen into disuse.[58] By the mid 20th century, demands for women's rights under Jewish family law were once again conceived as a challenge to rabbinical authority.

Rabbinical Courts During the Mandate Period

While Mandate authorities initiated some improvements to women's rights under religious law, the grant of jurisdiction over family law to religious courts made the path to gender equality under Jewish family law a more arduous one. By the end of the Ottoman era, the Jewish millet in Palestine had lost much of its legal authority. It retained the right to resolve disputes between members regarding matters of personal status. However, it could not, for the most part, rely on the courts of the realm to enforce rabbinical court judgments.

> [Ottoman] courts accepted the ruling of the Jewish courts if they matched Muslim rulings and in such cases served as a punitive instrument for the Jews. The Jewish courts had no power of coercion in other cases, but were dependent upon the willingness of those who turned to them to accept their rulings.[59]

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[55] J. Hauptman, *Rereading The Rabbis: A Woman's Voice*, Boulder: Westview Press 1998, 118.

[56] Babylonian Talmud, Gittin 88b., as translated by Hauptman. The tractate goes on to state that the latter statement 'was fabricated', but Hauptman argues that it is the disclaimer itself that is fabricated at 111-18.

[57] Riskin, *Women And Jewish Divorce,* 135.

[58] Tzvi Gartner, 'The Problem of a Forced Get' in *The Journal of Halacha,* 9 (1985), 118 - 142: 136-37.

[59] J. Hacker, 'Jewish Courts from the Sixteenth to the Eighteenth Centuries', 166.

In the new Jewish state under creation, the rabbinical courts faced a risk of losing what little enforcement powers they had if Jews had the option to turn to civil courts to resolve their family law disputes. Orthodox nationalists were strategic in urging the creation of state-sponsored rabbinic courts during the Mandate period because they suspected, correctly, that they would have de facto control over them. Secular Jews would lack the expertise in Jewish law and desire to run these courts, while the ultra-Orthodox would continue to maintain their own courts independent of the state.[60] The insertion of rabbinical courts into the civil justice regime created under the Mandate meant that rabbinical authorities could avoid competition for legitimacy and deploy the force of the new state to enforce their judgments. The entrenchment and administrative re-organization of rabbinical courts enhanced their power to enforce rigid and conservative conceptions of Jewish law by removing the option for adherents to adopt alternative interpretations of Jewish law or to exit from the jurisdiction of Jewish law altogether to a civil marriage regime.

Under the Palestine Order in Council of 1922, jurisdiction over matters of personal status was vested in the existing courts of the religious communities.[61] Rabbinical courts were conferred exclusive jurisdiction over cases involving marriage or divorce, alimony and confirmation of wills,[62] and could acquire jurisdiction over other aspects of personal status with the consent of the parties.

The Mandate authorities put great effort into reforming the procedure and administration of these religious courts. After all, indirect rule was predicated on the existence of organized, effective and cooperative indigenous collaborators. If these did not exist, or where their authority was in doubt, the British would often create or support them. In the Jewish community, the British re-organized institutional forms that had been fragmented by ethnic and political dissension. The Ottomans had first

[60] Shamir, *Colonies Of Law,* 65.

[61] Palestine Order in Council 1922, articles 47 and 51.

[62] Ibid., article 51. Since the creation of the State of Israel, some of these powers have been removed by legislation. Succession and wills are now regulated by the *Succession Law of 1965* and finance and property issues ancillary to divorce now fall under the *Spouses (Property Relations) Law of 1973*. R. Halperin-Kaddari, 'Family Law And Jurisdiction In Israel And The Bavli Case', in *Justice Quarterly* (1994), 37-40: 37-38.

created the office of a chief rabbi, the *Haham Bashi*, in Istanbul in 1835.[63] The indigenous Palestinian Jewish community had also accepted a chief rabbinate appointed by Ottoman authorities. Through the office of the *Haham Bashi*, the Jewish community was subject to corporate regulation and taxation. However, by the early 20th century, the Palestinian Jewish community lacked a unified comprehensive organization. There was dissension among the Sephardic community subject to the authority of the *Haham Bashi*, while many Ashkenazim chose to remain outside the authority of the chief rabbinate altogether.[64] In the eyes of the British, this arrangement was read as an absence of 'recognized ecclesiastical organization' to which they could effectively delegate power.[65] The Jewish community was, therefore, 'invited' to redress this lack by adopting the model of an elected Rabbinical Council under the control of a joint Chief Rabbinate in 1921.[66]

British authorities were aware that there were conflicting views in the Jewish community about both the source and content of the Jewish law norms that would govern their new society. They had conducted two inquiries into how to structure authority over religious law. One looked at all communities and one focused on the Jewish community specifically. Members of the Jewish community proposed various options, including civil courts, a Jewish secular court, plural Jewish religious courts or a centralized religious system of law.[67] Most favoured a centralized rabbinical authority, but urged that its jurisdiction be confined to religious matters alone.[68] The British chose the latter model as the path of least resistance.

This option enjoyed support from the right and the left within the Jewish community. While the Ultra-Orthodox favoured recognition of multiple Jewish courts without a supreme authority, they were in

[63] This role was largely ceremonial until 1860, when the incumbents of the office began to be leading rabbis, *dayanim* and *rosh yeshivot*. A. Levy, 'Millet Politics: The Appointment of a Chief Rabbi in 1835' in *The Jews of the Ottoman Empire*, 432.

[64] I. Kolatt, 'Religion, Society and State during the Period of the National Home', in S. Almog, J. Reinharz and A. Shapira (eds.), *Zionism and Religion,* Waltham: Brandeis University Press 1998, 273- 301: 279.

[65] H. Samuel, High Commissioner and Commander-in-Chief, An Interim Report On The Civil Administration Of Palestine During The Period 1st July 1920 to 30th June 1921. London: His Majesty's Stationery Office 1921.

[66] Kolatt, 'Religion, Society and State during the Period of the National Home', 283.

[67] Ibid. Such a plural personal law system was also supported by authorities in the Muslim and Christian communities.

[68] Ibid.

agreement that family law matters should be governed by religious law alone.[69] While secular lawyers attempted to articulate a modern conception of Jewish law to be enforced by civil courts in other areas of law, they put forth no objection to allowing religious courts to maintain sole jurisdiction over family law.[70]

The Abandonment of Family Law

While it is not surprising that ultra Orthodox authorities supported rabbinical control of family law, the reasons for the abandonment of the family law realm by advocates for a progressive 'Hebrew law' (*mishpat ivri)* are less clear. The latter supported a new model of jurisprudence, legitimated by its relationship to the Jewish legal tradition developed during centuries of exile but also superseding the sacred texts in which they were elaborated. Proponents argued that while Jews lived in exile in other nations, it had been appropriate that Jewish legal norms were developed through the rubric of religion. However, now that Jews were to hold the instrumentalities of the state in their hands, Jewish values could also be expressed through secular law-making.[71] The religious aspect of Jewish law was viewed as 'a matter of form, an outer layer enclosing a cultural core' which could be stripped away to reveal essential values to be translated into new forms.[72] However, in spite of the fact that in many jurisdictions, including Mandate Palestine, the primary jurisdiction of rabbinical courts was in the resolution of family law disputes, this grand project of reformation did not include family law and the rights of women and children subjected to it. The symbolic confinement of religious law to the field of family law while modernizing other areas of law was, apparently, acceptable to most secular Palestinian Jews during this period.

This was all the more curious, given that debate over the future of Jewish personal law, and the position of women in it, was rife elsewhere in the Jewish world at this time. The Conservative/*Masorti* movement, in particular, sought to implement a dynamic conception of *halacha.*[73] Indeed, one of the central issues through which the Conservative movement in North America defined itself against Orthodoxy was the development of remedies for *agunot*, women unable to remarry because

[69] Ibid.
[70] Likhovski, *Law And Identity In Mandate Palestine*, 36.
[71] Shamir, *Colonies of Law,* 34-35.
[72] Englard, 'Law and Religion in Israel', 204.
[73] L. Jacobs, 'Conservative Judaism: How the Middle Became a Movement' in *Jewish Religion: A Companion,* Oxford: Oxford University Press 1995, 75-95.

their husbands refuse to grant them a divorce.[74] Indeed, some looked to the creation of a Jewish state as a development that would create conditions under which the vestiges of gender inequality under Jewish law would be stripped away. Justifications for this legal innovation invoked a familiar trope, ascribing inequality under minority law to the deforming effects of colonialism. The current state of Jewish law, some argued, was not an accurate reflection of Jewish legal sources and moral norms, because it had failed to properly develop during centuries of exile and colonization:

> The social conscience of the modern world insists on the recognition of the equal spiritual status of men and women. There is ground to believe that, had the autonomy of Jewish communal life and the continuity of Jewish legal development been undisturbed, such equalization would by now be an accomplished fact well on its way to accomplishment. But with the arrest in the development of Jewish law, not only has progress in this direction been arrested, but the impotence of Jewish communal agencies to enforce Jewish law has deprived women in many instances even of such protection of their legal rights as they could claim in past ages.[75]

This rosy view was apparently shared by Norman Bentwich, a British Jewish civil servant who served as attorney-general of Mandate Palestine from 1920 to 1931 and later became professor of international law at the newly founded Hebrew University in Jerusalem. In defending the granting of exclusive authority to make and enforce personal status law in Palestine to the rabbinate which has proved so damaging to the prospects for women's rights, he argued that this decision would actually inspire the development of more progressive rules.

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[74] M. Routenberg, 'The Rabbinical Assembly of America: An Evaluation (1960)' in *Proceedings Of The Committee On Jewish Law And Standards Of The Conservative Movement 1927-1970, Vol. Two: The Agunah Problem*, D. Golinkin (ed.), 1997, 898.

[75] E. Kohn, 'President's Message' (1936) in D. Golinkin, *The Agunah Problem.* The movement's leaders were inspired by an optimistic reading of developments in Mandate Palestine: 'Another remote hope lies in the development of Jewish life in Palestine. Already progressive measures in the law have been forced upon the Rabbinate in Palestine by the action and agitation of the Women's Organization for Equal Rights. This organization is now engaged in the Agunah problem and is steadily gaining sympathizers among influential laymen.' L. Epstein, Chair of the Committee on Jewish Law, 'Rabbinic Attitude to the Agunah Problem', (BRA 2/3, March 1939). Ibid, 694.

> There is reason to expect that in the free atmosphere of Palestine, Jewish law will be systematically developed to accord with the liberal views of our time as to the relations of men and women. The development has been impaired by the abnormal conditions of the Jewish communities in Eastern Europe since the Middle Ages. As soon as a Jewish religious centre is established in the national home, the authority of the rabbinical body to change the law would be recognized throughout the diaspora and Jewish law on matters of family right could be modified, as it was modified in the happier days of the great jurists of Babylon, Persia, Egypt and Spain during what are known as the Dark Ages of Europe.[76]

The Legacy of Patriarchal Compromise in Mandate Family Law

British colonial policies regarding the effective management of religiously and culturally diverse colonies laid the groundwork for the reconfiguration of legal authority over family law during the Mandate for Palestine. The final years of Ottoman rule saw the loosening of the strict division of personal law regimes. Jewish women took advantage of opportunities for mobility between regimes to both seek the most advantageous result and to pressure Jewish courts to compete for their allegiance by being more sympathetic to their plight. During the Mandate period, this useful flexibility in the distribution of jurisdiction was diminished in the name of efficient governance. British interests in efficient administration of indigenous affairs led to the strengthening of rabbinical courts. The impact of this ambivalence can be seen in how the Mandate authorities dealt with demands for succession law reform and the establishment of a minimum age of marriage.

Levirate Marriage and Succession Law Reform

British interests in pacification of ethnic strife may have led them to take a deferential approach to intervention in practices that discriminated against women under the family laws of Palestine. While Mandate authorities initiated some positive innovations in family law, these attitudes of deference made successful enforcement of these advances difficult. Jewish women's inheritance rights improved during the Ottoman period, but the invigoration of rabbinical authorities undermined the effectiveness of succession law reform during the Mandate period. According to *halacha*, in

[76] N. Bentwich, 'The Application of Jewish Law in Palestine', in *Journal of Comparative Legislation and International Law* 19:1 (1927), 59-67: 65.

the absence of a will to the contrary, a man's property descends to his male heir. The wife is entitled to return of her marriage portion as set out in the *ketubah* (marriage contract). Often, the value of the *ketubah* was negligible and could not be a source of ongoing support to the widow.[77] In practice, this right might prove difficult to enforce. A widow could be left with little more than a fraction of her *ketubah* money upon the death of her husband. The rights of creditors, which might have included the institutions of the Jewish community itself, sometimes took precedence over the rights and needs of the widow to be maintained out of the estate.[78]

Under the Ottoman system, members of minority communities such as the Jewish community had had the option of using Ottoman courts to deal with succession issues. When they abolished this supervisory role of Islamic courts under the Mandate, the British did not want to leave members of the Jewish community without alternate recourse. Attorney General Bentwich commented:

> It would have been regarded as a grave hardship to many Jews if they had been placed under the exclusive jurisdiction of the rabbinical Court and of the Jewish law in matters of succession and guardianship. The Jewish law has remained in those subjects unprogressive since the Middle Ages, with the result that women have inferior rights as compared with men. The Moslem law, paradoxically, approximated more closely to modern ideas with regard to equality of treatment of men and women in these family rights. There was not, indeed, complete equality, but there was less rightlessness of women than in the Jewish system.[79]

A Succession Ordinance was brought in by Mandate authorities in 1923 to ensure that Jewish women had access to a more advantageous inheritance regime. However, parties could still consent to have their inheritance disputes dealt with under *halacha* before a rabbinical court.[80] Most women would simply refuse this unappealing alternative. However, it posed a particular problem for widows who needed to perform *haliza*, the ceremony which dissolves the obligation to engage in levirate marriage, with their deceased husband's brother.

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[77] Westreich, 'Levirate Marriage in the State of Israel', 439.

[78] M. Shilo, *Princess Or Prisoner? Jewish Women In Jerusalem, 1840-1914*, Waltham: Brandeis University Press 2005, 189.

[79] Bentwich, 'The Application of Jewish Law in Palestine', 62-63.

[80] Westreich, 'Levirate Marriage in the State of Israel', 439.

While the African customary law duty to enter into a levirate marriage with the brother of one's deceased husband was extinguished as repugnant in South Africa, it remains valid in Jewish law. A childless widow must either marry her brother-in-law or go through a ritual where he renounces his claim over her. Unless and until he frees her, she is unable to remarry. As in the case of Jewish divorce law, placing this veto power over a woman's marital future in the hands of another sometimes results in refusal to free the widow, out of spite or until she hands over payments or property demanded by the brother-in-law. Rabbinical legislation in Israel passed in 1944 imposed a disincentive on such delays by placing the husband's brother under an obligation to provide financial support for the widow until he had freed her to remarry. However, Mandate authorities extinguished neither the underlying requirement to enter into a levirate marriage, nor the duty to participate in a ritual to be released from the obligation, thus placing no barriers before this form of extortion.[81]

In Mandate Palestine, the award a widow received under secular inheritance law often exceeded what she would be entitled to under Jewish law. Where the widow required release from the levirate bond, the brother-in-law could insist on making release conditional on her agreement to accept division of the estate in accordance with halachic norms. Indeed, in 1945, the Great Rabbinical Court became complicit in such extortion, when it affirmed a widow's obligation to surrender her rights under civil law before the court would obligate her brother-in-law to perform *halizah*.[82] Where the brother-in-law was willing to go through with the levirate marriage, but the widow refused, she might be also subject to further financial loss. If a rabbinical court declared her a 'rebellious woman' for refusing to go through with the marriage, she could lose her right to *ketubah* money and support out of the estate as well.[83] While the creation of a civil inheritance statute offered relief to many widows, maintenance of

[81] The requirement to actually marry the brother-in-law was abolished by rabbinical courts in 1950. This amounted to a 'most modest change in the existing rules of *halacha*' that did not express a preference for *haliza* (renunciation) over levirate marriage. It had the effect of offering greater protection for women who were rendered *agunot* by their brother-in-laws refusal to release them. However, rabbinical courts still require the widow to go through the ritual of release in order to be eligible to remarry. Israeli rabbinical courts now have the power to order a man to release his brother's widow on pain of imprisonment or loss of civil privileges, but are loathe to use it. M. Elon, M. Dron and L. Rabinowitz, 'Levirate Marriage and Halizah', in *Encyclopaedia Judaica*, Vol 12, 2d Ed. 2007, 725-729: 728-29.

[82] Westreich, 'Levirate Marriage in the State of Israel', 440-441.

[83] Ibid., 433. See also Riskin, *Women and Jewish Divorce,* 27-28.

parallel jurisdiction over succession by rabbinical courts allowed this form of gender inequality to be perpetuated. Extortion based on *halizah* continues to be a problem among ultra Orthodox communities in Israel.[84]

Child Marriage

Collusion between Mandate authorities and religious elites also diminished the effectiveness of attempts to bring the international struggle to prohibit the practice of child marriage to Palestine.[85] While a minimum age of marriage for girls was eventually imposed, it was drafted in such a way that it contained loopholes that permitted child marriage to continue largely unimpeded.[86] Indeed, one commentator suggests that British intervention in this area may have been more effective at confirming notions of the backwardness of Middle Eastern cultures relative to progressive British norms than at achieving change on behalf of women.[87]

In 1917, child marriage was permissible in Palestine. Under Islamic law, the minimum age of marriage for girls was nine years. With parental consent, a girl who had undergone puberty could be married even earlier.[88] Between the onset of puberty and reaching full majority at 17 for girls and 18 for boys, children could be married with authorization from a *qadi*, an Islamic judge.[89] Under classical Jewish law, a girl was considered marriageable from the notional onset of puberty at the age of 12. Early marriage was thought to maximize the period of potential procreation, and increased the likelihood that the bride would be a virgin at the time of marriage.[90] As the Mandate proceeded, the Chief Rabbinate raised the halachic minimum age to 16 'for reasons of health' but exceptions could still be made in appropriate cases.[91] Child marriage was also permissible under Christian law.[92]

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[84] See, for example, E. Westreich, 'Family Law and the Challenge of Modernity: Debate about Levirate Marriage among Moroccan Sages', Tel Aviv University Law Faculty Papers, 2010.

[85] Likhovski, *Law And Identity In Mandate Palestine,* 96-97.

[86] Ibid.

[87] Z. Ghandour, 'Review of Likhovksi', in *Modern Law Review*, 70:2 (2007), 345-348: 347.

[88] Likhovski, *Law and Identity In Mandate Palestine,* 93.

[89] Welchman, *Beyond The Code* 1, 10.

[90] T. Meacham (leBeit Yoreh), 'Marriage of Minor Girls in Jewish Law: A Legal and Historical Overview' in M. D. Halpern and C. Safrai (eds.), *Jewish Legal Writings by Women*, Jerusalem: Urim Publishers 1998, 23-37: 24-25.

[91] Likhovski, *Law and Identity in Mandate Palestine,* 93-94.

[92] In 1931, the Palestinian census showed 12 Christian girls had married while under the age of 15. There were ten Jewish girls in this category and 200 Muslim girls. Likhovski,

Attempts by the Palestine Jewish Women's Equal Rights Association to have the League of Nations intervene to support raising the minimum age in Mandate Palestine in the early 1920s were unsuccessful. Herbert Samuel, the Commissioner for Palestine, urged restraint, 'in deference to Muslim opinion'.[93] Indeed, a British organization defended child marriages, warning that opposition to it was part of a Zionist conspiracy to impose Jewish moral norms on Muslim Palestinians.[94]

However, Palestine had soon fallen behind the United Kingdom, other British colonies and other nations in the Middle East on this issue.[95] Prior to 1929, the common law age of consent to marriage in the United Kingdom was 14 for boys and 12 for girls. In 1929, it was raised to 16 for both.[96] The House of Lords Select Committee stated expressly that raising the minimum age within mainland Britain was meant to support efforts by the League of Nations to stop child marriage in other countries where it remained a common practice:

> It may be difficult to prove that, in Great Britain, the disparity between the legal age of marriage and the facts of national life impede the progress of morality. But there is evidence that it does impair the influence of Great Britain in co-operating in the work of the League of Nations for the protection and welfare of children and young people and

94. The minimum age for women was raised to 17 by the *Marriage Age Law 1950* S. H. 286. The minimum age was extended to men by the *Marriage Age Law (Amendment) Act* n. 4, 1998, S. H. 318.

[93] Likhovski, *Law and Identity in Mandate Palestine*, 94.

[94] T. Segev, *One Palestine, Complete: Jews And Arabs Under The Mandate* (trans. Haim Watzman), London: Abacus 2000, 168.

[95] Transjordan raised the minimum age to 16 in 1927 while India raised the age to 14 in 1929. Likhovski, *Law and Identity in Mandate Palestine,* 237, note 62. Egypt imposed a minimum age of 16 for girls and 18 for boys in 1923. J. Esposito with N. Delong-Bas, *Women In Muslim Family Law* 2d Ed., Syracuse, Syracuse University Press 2001, 50.

[96] *Age of Marriage Act* 1929, s. 1 (Now re-enacted in the *Marriage Act*, 1949, s.2). See C. Hamilton, *Family, Law and Religion*, London: Sweet and Maxwell 1995, 46. The United Kingdom will recognize marriages contracted by minors domiciled in jurisdictions that permit this. Until 2003, such children were not viewed as victims of child abuse simply by virtue of the fact that they were 'performing their wifely duties' in having intercourse with their spouse. *Ahaji Mohamed v. Knott* [1969] 1 Q.B. 1968, 2 All E R. 563. This defence to prosecutions for child abuse was repealed by the *Sexual Offences Act of 2003.* Section 23 provides that a husband will not commit an offence if he can prove that, at the time of the sexual activity, the wife was aged 16 or over. The minimum age was not in the original draft of the bill but was added during Parliamentary debate. See *Sexual Offences Bill,* [HL] s. 31(2).

> does prejudice the nation's effort to grapple with the social problems arising from the early age at which marriages are contracted in India.[97]

With the support of both Jewish and Islamic feminists, but in the face of resistance from religious authorities in both communities, the Mandate government introduced draft legislation in 1933. Unfortunately, it would only have raised the minimum age of marriage for girls to 13, with exemptions permitted if the girl had reached puberty, her guardian had consented and 'no physical ill effects would follow from consummation' of the marriage.[98] This inadequate proposal was met with protests from women's rights activists in Palestine and critical and embarrassing questions of the Colonial Office in the British Parliament.[99] The Colonial Office, arguing that the terms of the Mandate guaranteed freedom of conscience, stressed that any amendments to religious family law required the consent of the groups in question.[100] The final legislation, passed in 1936, raised the age to 15 but retained the proviso that allowed religious courts to approve marriages of under-age girls under specified circumstances.[101] However, little attempt was made to ensure enforcement of these rules[102] and the persistence of child marriage in the Bedouin community in contemporary Israel suggests that there is a legacy of apathy and neglect with regard to this issue.[103]

Conclusion: The Legacy of British Governance

The Mandate government balanced a desire to offer the women of Palestine the benefits of legal equality against administrative needs to pacify religious authorities. As a result, efforts to reform religious family law remained relatively stagnant. While some incremental advances were achieved, they pale when compared to the impact of the structural reforms to jurisdiction which were implemented during this period. By enhancing the role of the Chief Rabbinate and turning over exclusive jurisdiction on family law matters to religious courts, British policy set the stage of a similar grant of powers to the rabbinate in the nascent State of Israel. It

[97] H.L. Official Report 74 (5th Series) Col. 259.
[98] Likhovski, *Law And Identity In Mandate Palestine,* 95.
[99] Ibid., 96.
[100] Ibid.
[101] Ibid.
[102] Welchman, *Beyond the Code,* 44.
[103] Halperin-Kaddari, *Women in Israel,* 243-44.

was this new 'status quo' that shaped the distribution of power in the state and limited the possibilities for debate and reform.

Jewish women, who had once had the option of resorting to state run family law courts when they treated women more fairly, were now coerced into accepting the authority of rabbinical courts. This allowed the realm of family law to become a practical and symbolic outlet for the exercise of power by religious Orthodoxy. The grant of exclusive authority over family law to rabbinical courts has served to immunize them from review, critique and progressive transformation. The opportunity to reject the jurisdiction of religious family courts that fail to give justice to women has effected the development of Jewish law in the past and it continues to do so in jurisdictions outside of Israel.[104] The removal of this option in Mandate Palestine continues to impede the path to gender equality for Israeli women.

Contemporary Israel is a nation riven by conflicts over the place of Jewish law in the life of its citizens. Recent years have seen a dramatic rise in demands for the reform of Jewish family law to make it more hospitable to women seeking divorce. Successful efforts to use civil law to help these women met with threats from the rabbinical courts to retroactively invalidate divorces and encourage sanctions against activist lawyers. While incremental reforms have been made, the role of state-sponsored rabbinical court judges as the sole arbiters of divorce is a bottleneck on the road to gender equality. The conflict between women's claims and the power of the rabbinical courts is often characterized as an insoluble one.

However, review of the historical development of the distribution of jurisdiction over family law in Palestine and Israel tells a more complex tale. Prior to the Mandate period, Jewish family law was a site of persistent struggle and negotiation between men and women, state and religious authorities. During the Mandate period, rabbinical courts were given a more central and official role in the country's legal life. The rabbinical courts themselves used their authoritative power to demand and receive exclusive jurisdiction over Jewish family law in the new State of Israel.

An understanding of this history can both explain how the current impasse over family law reforms came about and offer hints at a way forward. Reducing the power of rabbinical courts, by giving couples access to civil courts to resolve their disputes, would not be a rejection of Jewish or Israeli tradition, but would mark a return to the status quo of an earlier

[104] See Shachar, *Multicultural Jurisdictions*; Fishbayn, *Gender, Multiculturalism and Dialogue.*

time. It would restore conditions under which religious courts would have to compete with civil courts for the loyalties of women and defend their place to other constituencies in the state. This form of legal pluralism would also restore conditions that would encourage rabbinical court authorities to engage in a dialogue with women and the state over how Jewish family law could be made more amenable to women.