From Religious “Right” to Civil “Wrong”: Using Israeli Tort Law to Unravel the Knots of Gender, Equality and Jewish Divorce

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“Legal discourse… is the divine word… [it] creates what it states.”

Pierre Bourdieu

The purpose of this paper is to describe how Israeli cause lawyers are using tort law to untie the knots between gender, equality, and Jewish divorce law. To that end, I will give a brief overview of Israel’s family law regime and its gender quagmire; explain how the tort of “get-refusal” is being constructed in response; present some preliminary statistics from the trenches; and outline some of the practical and theoretical implications of these new tort cases.

I will posit that using tort law is a creative way to reframe the gender problems posed by Jewish law and to “bring the state back in” to help resolve them. Tort law turns a Jewish husband’s religious “right” to give a divorce at his "uncoerced behest" into a civil “wrong” that harms his wife and entitles her to damages. This reframing delineates and distinguishes the harm being done to women; raises consciousness; demystifies the power relations that undergird Jewish divorce law; strips away the religious aura of a cruel act; and forces a dialogue of change.

Background: The Millet System

On or about its founding, the State of Israel incorporated the millet system (millet means "religious community") of the Ottoman Empire into its laws of personal status. In the spirit of religious pluralism, this system, categorizes citizens in accordance with their religious affiliations, ceding jurisdiction over matters of marriage and divorce to religious courts. The millet system effectively subjects citizens of the same state to different rules of divorce, depending on their particular religious affiliation and irrespective of their religious beliefs. Secular, religious, traditional, ultra-Orthodox, atheist, agnostic, and fundamentalist Catholics, Muslims, and Jews of the State of Israel who get married or

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2 Stuart Scheingold and Austin Sarat, “Something to Believe In: Politics, Professionalism and Cause Lawyering (“For cause lawyers,…][lawyering…is a deeply moral or political activity, a kind of work that encourages pursuit of their vision of the right, the good, or the just” at p. 2).

3 J. David Bleich, "Modern-Day Agunot: A Proposed Remedy": 4 Jewish L. Ann.167,171 (1981) ("Halakhah requires that the get be drafted at the uncoerced behest of the husband. Free will on the part of the husband is a necessary condition of validity.")
Marriage and divorce is the only area of law in which Israel defers exclusively to religious law and the religious courts. In all other matters, civil law and civil courts, inspired by Western notions of liberalism and democracy, determine the outcome of disputes between Israeli citizens. In all other areas except family law, Israel empowers its women. While the rabbinic courts might have risen to the challenge of interpreting the long and venerable tradition of Jewish law so that it responded to the needs of a modern democratic state and to the idea of gender equality, the rabbinic courts have fallen far short of such expectations.

Rabbinic courts apply Jewish law (halakha) to determine whether or not a person is married or divorced. According to the halakha, a divorce occurs only when a man delivers a bill of divorce (a get) to his wife (Deuteronomy 24:1) of his own free will (Talmud Bavli Yevamot 112b). A bill of divorce delivered by a man against his will is invalid (a get meuseh or “a forced divorce”) (Talmud Bavli Gitten 88b). If a man is missing, incapacitated, or simply refuses to give his wife a get, she remains married to him forever (an agunah, literally an anchored woman). The halakha penalizes women who conduct extra-marital relationship with men who are not their husbands, stigmatizing children born of such relationships as mamzerim. A mamzer, and all the progeny of the mamzer for generations, are banned from marrying other Jews (Shulhan Arukh, Even Ha’Ezer 4:1, 13, 22).

Only Orthodox Jewish men preside as Israeli rabbinic court judges. No Jewish woman of any religious affiliation, and no Jewish man who is not of Orthodox persuasion can, by law, sit on a rabbinic tribunal. Israeli rabbinic judges do not run a divorce court in any way similar to what a reader living outside of Israel may imagine. In determining whether a husband should divorce his wife, the rabbis are not informed by notions of fault or no-fault. Instead, the rule against the “forced divorce” (the get meuseh) holds sway, with the rabbis favoring tactics of delay and extortion. If the rabbis refrain from making decisions, wives may remain trapped in failed marriages, but the sacred rule against the force divorce is not compromised. Similarly, if wives yield to extortion and pay for their freedom, the rabbis do not have to apply any pressure on husbands to give the divorce. The tactics of delay and extortion insure that no invalid force is brought to bear upon

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5 Under certain circumstances, and with respect to certain matters that are ancillary to the divorce process like child support, custody, and marital property, the family courts of Israel have parallel jurisdiction with the rabbinic courts. However, only the rabbinic courts can decide if an Israeli Jew is married or divorced. In matters of personal status, Israel is a theocracy (defers to the laws of God), not a democracy (defers to the laws of men).
6 Valerie Moghadam, From Patriarchy to Empowerment (2007) appendix, pp 353-364 (Janet Gieles’ Of the 6 variable by which the sociologist assesses a states’ empowerment of women, family law is the only one in which Israel fails its women.
7 CEDAW reservation, the status quo.
husbands. Only when delay and extortion prove ineffective do the rabbis exercise the limited authority that Jewish law gives them to influence husbands to divorce their wives.  

Remedy of Desperation: The Tort of Get-Refusal

In 1999, Hanna, was 36 years old. An ultra-Orthodox woman, Hanna was the mother of 6 children and had lived apart from her husband for the last 10 years when she came to my office for advice. Though she desperately wanted a get, Hanna had had not set foot in a rabbinic courts since 1994. At her last hearing, the tribunal tried to persuade her to surrender her half of the family home and to waive her entire child support award, past and future, in exchange for the get. These were her husband’s conditions for the get and they were, to say the least, not acceptable to Hanna. When she rejected those terms, the tribunal blamed Hanna for her state of marital limbo. She absolutely refused to go back to the rabbis for help. And meanwhile, she had used up the conventional and not-very-effective arsenal available to Israeli divorce attorneys to try and convince her husband to give her a get, of his own free will of course.

I suggested to Hanna that she sue her husband in tort. Academics had for some time raised the possibility of recovery in tort for get-refusal.  But in 1999, there had been no successful attempt to do so, whether inside of Israel or outside of the country. Hanna, however, had nothing left to lose; and I, as a cause-lawyer for an NGO, had been waiting for her case

A “tort” is a wrongful act that causes injury for which the law awards monetary damages (“tort” comes from the Latin word for twisted, dubious). The Tort Ordinance of the State of Israel defines what acts are torts for purposes of the Israeli civil courts. This list includes traditional, as well as more modern conceptions of what is a “wrongful act” worthy of compensation, including: threatening violence or intentionally inflicting physical harm (assault and battery); imprisoning someone against her will (false imprisonment); doing something that is expressly prohibited by law and causes harm. It does not include “get-refusal.”

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9 Israeli couples can divorce by agreement with no waiting period. In cases of contested divorces, most divorce attorneys who represent wives "race" to the family courthouse to sue for matters ancillary to the divorce. They hope to obtain financial advantage in the family court with which they can leverage their clients' freedom. Hanna, an Orthodox woman, had sued in the rabbinic court. Moreover, she had offset her husband's child support debt against his half of the marital home. He still refused to give her a get.


11 Jews who feel bound by Jewish law, irrespective of where they live, will not feel free to remarry until their marriage is terminated with a get.
In 2000 Hanna filed a claim for damages against her husband for get-refusal. She argued that her husband's refusal to divorce her caused emotional harm and infringed on her basic rights to marry and have children. In December 2001, on the same day that Hanna’s husband agreed to give her a get in exchange for the dismissal of her petition, the Hon. Judge Ben-Zion Greenberger of the Jerusalem Family Court denied a motion to dismiss the complaint (File 3950/00). He held that get-refusal is a tort since it violates a woman's personal autonomy protected under the Basic Law: Human Dignity and Freedom. Similar law suits followed. A few months later, Judge Philip Marcus ruled that get-refusal is a tort because it breaches the statutory duty to obey court decisions under section 287 (a) of the Criminal Law Ordinance (File 9101/00). Like Greenberger, Marcus did not need to quantify the amount of damages that the husband owed his wife. Here too the husband gave his wife a get in exchange for the dismissal of her damage claim.

In December 2004, Judge Menachem HaCohen ruled on the merits of a case, awarding a wife 325,000 NIS in damages, and another 100,000 NIS in aggravated damages (about $100,000 in total) (File 19270/03). HaCohen held that get-refusal was a “tort” because it was unreasonable behavior that fell under the rubric of negligence, section 35 of the Tort Ordinance. And in 2006, Judge Tzvi Weitzman, following the logic of Judge HaCohen, ordered the estate of a man to pay his estranged wife 711,000 NIS in damages (about $180,000) (File 19480/05).

The cases

I know of 25+ tort cases that have been filed against recalcitrant husbands since 2000. 63% of the plaintiffs are religious women (ultra-Orthodox or religious-Zionists); 33% of the plaintiffs are not religious (secular or traditional); 4% are unknown. These women waited, or are waiting, an average of 10 years for their get.

![Pie chart showing distribution of plaintiff religious affiliations.](image-url)
Of the 25 women in the sample who sued for get-refusal, the longest amount of time a woman waited for a get was 29 years (her husband died).

Of the 25 women in the sample who sued for get-refusal, 17 (the vast majority) of women waited, or have been waiting, between 7 and 11 years. 12 women “closed” their tort cases before the family courts could render a decision in them.

10 women agreed to dismiss their cases with prejudice (they can’t reopen the cases) in exchange for the get. 9 of the 10 husbands gave the get. 1 husband reneged on his promise. The 9 women who received their get had lived an average of 8 years apart from her husbands; but they waited an average of only 12 months for the get from the time that they filed for damages.

2 women agreed to dismiss their cases without prejudice (they can reopen their cases). In these cases, the wives closed their files in response to pressure from the rabbinic judges. It has been 2 years since these (religious) women have withdrawn their tort cases and they still have not received their get. In 1 case, the rabbinic court put the husband into solitary confinement for refusing to give a get. In the other case, the rabbinic court has not yet ordered the husband to give a get. Both these women are living apart from their husbands for 8 years. They are both in their mid 30’s.

3 cases were decided by the family courts. As mentioned, in 2004, J. HaCohen awarded 425,000 NIS to a haredi woman. The wife collected on the judgment but her husband has still not given her get. They have been living apart for 15 years. In 2006, J. Weizman awarded 711,000 NIS to a secular woman. She had been living apart from her husband for 29 years when he died without having given her a get, or leaving her any money. She sued her husband's estate and collected damages. In 2008, J. Maimon denied a secular woman’s petition for damages, holding that the woman had abandoned her quest for a divorce over the years, and so had not proven her case. The woman is deciding whether or not to appeal. Even in this case, the husband gave the wife a get 2 years after she sued for damages. They had been living apart for 26 years.

The rest of the cases are pending. New cases are being brought on a regular basis.

Some preliminary observations regarding the above rudimentary statistics:

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12 [http://www.ynetnews.com/articles/0,7340,L-3523781,00.html](http://www.ynetnews.com/articles/0,7340,L-3523781,00.html).

13 This case is more complicated than the others, and involves a number of lawsuits and a number of claims.
1. Most of the men who are sued for damages for get-refusal give their wives a get in exchange for the waiver of the damage claims.

2. All the men who gave their wives a get after having been sued for damages for get-refusal did so within 2 years.

3. Not all the men who were sued for damages for get-refusal agreed to give a get. One man refused to give the get even after the court ordered him to pay substantial damages, and even after the wife transferred his rights in the marital home onto her name. Tort is not a complete, systemic solution to the problem of Jewish women and divorce.

4. Religious women are more likely to sue for damages for get-refusal than secular women.

   It seems reasonable to speculate that religious women are more likely to sue for damages than secular women because their freedom is more drastically affected by their husband’s refusal to give them a get. The 2 most extreme cases in this study are those of secular women who waited more than 20 years for a divorce.\(^\text{14}\) It cannot be determined from this study that religious Israeli men are more likely than secular men to withhold a get, though it indeed might be the case.

**Why Tort? Reframing**

Tort law is an important tool in the hands of innovative cause-lawyers who want to reform Israeli divorce law, and whose vision of a good Israeli society is one that is both Jewish and democratic. Tort law allows these cause lawyers to articulate and reframe the problem of Jewish women and divorce in a manner that make room for such vision. Such reframing is far reaching in its goals, and theoretical underpinnings.

Reframing is an act of translation in which an interpretive code ("schema") is transposed from one setting to another. This act of translation and re-naming allows the legitimacy of the familiar (harms should be redressed) to be attached to the strange (a Jewish husband gives a divorce of his free will).\(^\text{15}\) Translation is a creative but difficult balancing act in which the translator-cause-lawyer must maneuver adroitly between tradition and change, politics and justice, words and visions. The translator must try to resonate with existing laws and customs, and at the same challenge them. At any given moment, she must decide to what extent she can openly challenge existing ways of

\(^\text{14}\) In both those cases, an outside event triggered their tort claims. Another secular woman who withdrew her tort case (she is exploring other avenues) is also waiting more than 20 years for a divorce.

thinking; and to what extent she must conceal her radical ideas.\textsuperscript{16} Cause lawyers who reframe a Jewish husbands "right" to deliver a \textit{get} at will into a civil "wrong" translate simultaneously in more than one directions. They reframe tort law to include \textit{get}-refusal; and they reframe religious law to recognize the forced divorce as an actionable injurious act. They translate transnational human rights principles (women have the right to divorce\textsuperscript{17}) \textit{down} into civil tort claims; and they translate local religious customs (only the husband can give the \textit{get}) \textit{up} into tort violations.

I will posit that these delicate acts of translation and reframing allow the cause lawyer to improvise, invent and create. Dubbing \textit{get}-refusal a "tort" allows cause lawyers to define and delineate the problem of Jewish women and divorce; rally consciousness and unite women; demystify an act of power; defrock a religious act; and bring the state back in to redress the harms inflicted on its citizens. Moreover, by constructing the tort of \textit{get}-refusal, cause lawyers draws attention to the conflict of values that are in issue and force a dialogue that the rabbinic courts would otherwise avoid.

\textbf{Defines, delineates, and quantifies:}

For Jewish women whose husbands refuse to give them a divorce, the tort of \textit{get}-refusal gives them a voice. It breaks what MacKinnon would refer to as the “silence of a deep kind”—the silence of being prevented from having anything to say.\textsuperscript{18} Though rabbis have for years bemoaned the plight of the \textit{agunah}, Orthodox rabbis—the only ones that count in Israel—have not articulated a satisfying response, or a systemic solution, to the problem of Jewish women and divorce. Nor have these Orthodox rabbis listened to women. They have consistently held that women cannot act as judges and cannot write responsa. They have even refused to allow women to attend conferences scheduled to discuss the problems of Jewish women and divorce. In short, they have prevented women from having anything to say. By suing husbands (and the rabbis\textsuperscript{19}) for damages, women are forcing the rabbis to listen. Women, not the rabbis, are defining and delineating what is happening to them: It’s a tort, a twisted and distorted act that causes harm. What’s more it is a harm that Judge HaCohen has quantified in the amount of $150 a day. Cause lawyers use his evaluation as a bench mark when suing.

In my mind, \textit{get}-refusal is a tort that requires still further clarification. The term “\textit{get}-refusal” is one that I have adopted for purposes of this article but it hardly does justice to the injustice. The judges in the Israeli family courts are still jostling for the privilege of naming the tort. One judge claims that \textit{get}-refusal is an infringement on personal

\textsuperscript{16} Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle,” 108 (1) American Anthropologist (2006) (explaining how social movement activists and nongovernmental organization participants translate ideas from the global arena down and from the local arena up).

\textsuperscript{17} CEDAW

\textsuperscript{18} Catherine MacKinnon, Feminism Unmodified 39 (1987) (“When you are powerless., you don’t just speak differently. A lot, you don’t speak. Your speech is not just differently articulated, it is silenced, eliminated, gone… Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that; it is also silence of the deep kind, the silence of being prevented from having anything to say. Sometimes it is permanent.”)

\textsuperscript{19} Rachel Avraham
autonomy: Another posits that it is an act of negligence. I would like the judges to declare that get-refusal is a violation of the Law Against Family Violence (1991), thus emphasizing the torts’ intentional and harsh effects. Instead of get-refusal, perhaps the act of causing harm to one's wife by refusing to give her a religious divorce should be referred to as the tort of “marital bondage,” or “marital imprisonment.”

Rallies consciousness and unites:

By articulating get refusal as a tort, women’s groups and responsive family court judges have raised the consciousness of Jewish women. Leslie Bender, a feminist tort expert, explains: “Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared telling of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression.”

The publicity given to damage cases for get-refusal by the press, women's groups, and the family courts has allowed individual Jewish women to understand that their individual experience of get-refusal is not unique and isolated, but a collective injustice.

Demystifies relations of power:

To this very day the rabbis are more concerned with protecting the “right” of husbands to divorce their wives at their "uncoerced behest”, and in monitoring the rule against the "forced divorce" (get-meuseh), than they are in redressing the harms done to women who remain anchored to their recalcitrant husbands. Calling get-refusal a "religious-right-to-divorce- your wife-of-your-own-free-will," is like calling a terrorist a freedom fighter. The “forced divorce” is a euphemism that conceals the relations of domination that underlie get-refusal.

Get-refusal is an act of raw patriarchal power. Calling it a privilege of free will, or a problem of the “forced divorce,” masks its relations of domination. Tort law demystifies the language that dissimulates the relations of domination and reveals them.

Defrocks

Similarly, calling get-refusal a tort avoids any attempt to sanctify it and place it under the protective aegis of religion. Using the civil tort laws of the state, Israeli women reframe a husband’s exercise of a religious “right” to refuse to give his wife a get into a civil “wrong” that entitles her to damages. Instead of an act of religious conscience, get-refusal becomes a secular tort that the liberal state – in particular a state like Israel where there is no separation of church and state-- is more willing to remedy under routine civil law. By calling it a tort, the law can more easily "bring the state back in" to redress what

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20 Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort 38 J. Legal Edu. 3,9 (1988)/
is happening.\textsuperscript{22} Calling \textit{get}-refusal a tort eliminates confusing “religious” language that places the husband’s behavior beyond the reach of the civil law.

What’s more, it is clear from the cases described that awarding damages for \textit{get}-refusal does not in fact interfere with a religious act at all. Husbands can, and do, continue to exercise their “right” to refuse to give their wives a \textit{get} just as they always have before the introduction of tort law. If women had the choice, they would probably choose both the \textit{get}, as well as the damages for their lost years. In my opinion, the fact that most defendant-husbands manage to convince their wives to give up their tort claims in return for the \textit{get} just proves that the power to give or take the \textit{get} still remains strongly lodged in the hands of Jewish men.

\textbf{Dialogues:}

Calling \textit{get}-refusal a tort provokes a direct confrontation between religious values and modern ones. \textit{Get}-refusal is about male dominion over women. Equal power to sue for divorce is about liberty, autonomy, and equality for women. It is a modern notion. The tort of \textit{get}-refusal forces the rabbinical court to confront modernity and to conduct a dialogue, whether they want to or not, with women.

It was, and remains, the hope of Israeli cause lawyers that this dialogue and confrontation would yield a transformative response from the rabbinic court and religious communities that will untie the knots between gender, equality, and Jewish divorce law. Various transformative response are imaginable, some more radical than other, all of which are possible: (1) The rabbinic courts could embrace the tort of \textit{get}-refusal as a way to help them resolve difficult cases. Theoretically at least, the rabbis could encourage women to sue for damages in the civil court as a way of warning husbands against recalcitrance. (2) Rabbinic leaders might be encouraged to find internal systemic \textit{halakhic} solutions to the problem of religious divorce; (3) Alternative Israeli Orthodox rabbis could break with existing rabbinic judges to form more modern rabbinic courts; and (4) An increasing rift may develop between the secular and religious courts that would pave the way for the legislation of secular marriage and divorce in Israel.

\textbf{Rabbinic Supreme Court Responds to Tort Claims: March 11, 2008:}

Despite the effectiveness of the tort law in solving long-standing cases in the rabbinic court (not to mention doing justice), the Israeli rabbinic courts have not embraced tort as a solution, or as a way of ameliorating, the problem of \textit{get}-refusal. On the contrary. As more and more women have been suing for damages for \textit{get}-refusal, the rabbinic court has been expressing more and more opposition to those cases on religious grounds, arguing that these case violate the rule against the forced divorce (\textit{get meuseh}). The rabbis claim that husbands who give the \textit{get} after they’ve been sued in tort, are not giving the divorce freely, but in response to the tort cases.

On March 11, 2008, the Supreme Rabbinic Court (file 7041-21-1) issued a 26 page decision (all *obiter dictum*) in which it held as follows:

All petitions filed outside the rabbinic court – like petitions to civil courts for damages — that relate to *get* refusal, whose practical consequence is to accelerate the delivery of the *get*, are an interference with the laws of the Torah regarding divorce, and effectively preclude the possibility of the execution of a [kosher] *get*…

Attorneys who deal in family law should be advised to weigh carefully their recommendations to clients to file damage claims in the family court for *get*-refusal. Such recommendations are tantamount to malpractice, and I doubt that attorneys could avoid such claims [of malpractice], even if they were to sign their clients on waivers to that affect. It can be assumed that clients are not aware, and cannot possibly foresee, what serious consequences and delays can occur in the delivery of the *get*, even after the husband has agreed to give the *get*, if the husband's agreement [to give the *get*] was given subsequent to a petition for damages for *get*-refusal (J. Algrabli).

In short, the rabbinic court declared in no uncertain terms that it would not yield to outside attempts to reform its failings and wielded, once again, the immutable rule against the "forced divorce"(*get meuseh*), thus re-winding the knot of religion that had for a moment loosened.

**In Conclusion**

The tort of *get*-refusal is delineating, distinguishing, demystifying; and defrocking the knots that bind gender, equality, and Jewish divorce law. The tort has prompted an important dialogue in the Israeli courts between modernity and tradition, between liberal principles and religious values. It remains to be seen how that dialogue will play itself out and if the knots that bind Israeli Jewish women unremittently to their husbands will somehow be undone. It could be that women will lose patience in their attempt to unravel these knots and will simply cut them in order to escape entanglement.