The Jewish Family – Between Family Law and Contract Law

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BETWEEN FAMILY LAW AND CONTRACT LAW

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Preface

This book deals with the nexus of Jewish contract law and Jewish family law and their potential mutual influence. The essence of the research explores whether and to what extent there is considerable halakhic room for the usage of ancient and modern contractual devices and doctrines to privately regulate the Jewish family. Whereas Jewish law regulates comprehensively and thoroughly both the spousal and parental relations, it is necessary to discuss whether and to what extent there is freedom of contract to privately regulate the various angles of those relations. The subject of the research is mainly the horizontal relationship between spouses, but it also discusses the vertical relationship between parent and child. The research draws upon material from the biblical period and concludes with current analysis and materials. It focuses mainly on the Mishnah and the Talmud periods onward. This book discusses mainly Jewish law, which I prefer for several reasons to call halakhah and which stands at the crossroads of theology and law, but it also engages with modern civil law.

This is especially true in the last chapter of the book, Chapter 5, where one can find discussions of the most cutting-edge legal-ethical dilemmas in the field of advanced biomedical innovations regarding who should be determined as the legal parent of a child conceived through artificial means. The methodology of the research is taken mainly from the halakhic dogmatic method but often also applies the historical method; it is thus an example of Professor Menahem Elon’s combined historical-dogmatic standpoint. This book concludes the results of my writings over the last decade in both Jewish and civil law. The research commenced with my MA thesis, “Public Regulation and Private Agreement of Spousal Conjugal Privileges in Jewish Law,” which was published in 2006. This was followed in 2011 with the publication of my PhD dissertation, “Determining Legal Parentage by Agreement.” Following these two major research projects, I developed my thinking in over twenty publications in various law reviews in the United States as well as in Israel, drawing it together in this book.

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This book explored the potential influence of halakhic contract law on halakhic family law in both spousal and parent–child relationships. I opened the discussion with the subject of privately regulating conjugal relations, treating these as an absolute legal “debt” that must be “paid” at clear, rigid, and fixed times. As a consequence, there is no way to circumvent it, since it is a biblical obligation, and therefore any attempt to circumvent it contractually is restricted, as it is “the stipulation of anybody who stipulates against what is written in the Torah.” Nevertheless, an in-depth and thorough rereading of the halakhic literature throughout the generations, including both the Tannaitic and Amoraic literature, and particularly the Palestinian Talmud and the medieval literature, yielded a far more complex picture—there is enough halakhic room for such private regulation.

This was the essence of Chapter 1, “Regulating Marital Relations between Spouses by Consent,” in which I explored, first and foremost, the public regulation of conjugal relations, as it is comprehensively regulated in halakhah. I enumerated the various binding aspects of the onah obligation, which suggests that the halakhic obligation is inflexible, deriving from the status of marriage as a religious institution. This approach would prima facie block any possibility of private contractual arrangements. Thus, I built the legal infrastructure for exploring the halakhic possibility to practically use one of the available contractual devices as a possible solution for the heart-wrenching case of the agunah. Therefore, I discussed the halakhic sources that endorse the usage of some contractual tools. These various contractual devices are available for a couple married according to the law of Moses and Israel (kedat Mosheh veYisrael) who ask to waive this intimate obligation/right. Such deviation from public regulation of conjugal relations may be achieved by the wife’s renouncing of her onah rights or receiving permission to violate her onah right.
Following this explanation, I explored in Chapter 2, “‘Freedom of Contract’ in Jewish Family Law – The Differences between the Babylonian and Palestinian Talmuds,” how that the Palestinian Talmud not only occasionally endorses more freedom of contract regarding privately regulated conjugal relations, but also has a more comprehensive and systematic perspective. Consequently, the husband may impose stipulations on or nullify not only his onah obligation, but also various spousal monetary obligations such as his obligation to pay the basic ketubah sum and his right to inherit his deceased wife’s estate. The main goal of this chapter was to address from a dogmatic as well as a historic perspective that the Palestinian Talmud’s “hate clause” – “if he grows to hate her or she grows to hate him” – is not merely a monetary stipulation, but also a condition that seeks to enable the wife to demand a divorce if she so desires.

In Chapter 3, “Is There Really No Conditional Marriage?,” I sought to overcome the two main halakhic obstacles to using contractual mechanisms as a possible viable solution to the problem of the agunah. Many halakhic authorities have claimed throughout the generations that any such contractual devices, such as conditional marriage, should be rejected from the outset, since this would be “one who stipulates about what is written in the Torah” and due to the well-known Talmudic dictum “there is no conditional marriage.” I argued that any halakhic marriage was actually a conditional marriage; therefore, if the sages are not satisfied with any given marriage, they can retroactively nullify it, as was extensively argued by several rishonim (early halakhic authorities) and Talmudic scholars.

Similarly, in Chapter 4, “Temporary Marriage – A Possible Solution to the Problem of the Agunah?,” I reexamined the possibility of imposing a stipulation in the marriage contract that it would only be a temporary marriage, as is reflected, in my opinion, in the Babylonian Talmud. I explored the deep and precise meaning of the cry by important Babylonian amoraim “Who will be mine for a day?” that appears twice in the Babylonian Talmud. I claimed that there are possible common roots for temporary marriage and Shi’ite temporary marriage in ancient Persian law.

Finally, in Chapter 5, “Toward Establishing Halakhic Parenthood by Agreement?,” I examined the public regulation of determining halakhic parenthood – both fatherhood and motherhood. The most challenging aspect of this proposal was the necessity of deviating from rigid public regulation that adheres in almost every instance to natural lineage, by private agreement. I explored some halakhic exceptions to the natural order, recognized by halakhah for several reasons. I claimed that those exceptions serve as the legal infrastructure for moving more generally from the traditional and “natural” order of establishing legal parenthood toward a more nuanced, sensitive, and delicate order that involves some aspect of intentional parenthood.

Following over a decade of research in this field, from both the halakhic and the civil perspectives, I would suggest that contract law is becoming more and more prevalent and important for family law. Thus, contractual devices and doctrines are
slowly but surely penetrating, influencing, and shaping familial arrangements, both in the spousal relationship and in the parent–child relationship. Obviously, today’s greater social openness, rocketing divorce rates, and rapid biomedical developments in the field of reproduction enable the increased reproduction of children in “nontraditional” families. Accordingly, the acute need for private regulation of those familial relations is accelerating. I am confident that the increasingly intensive discussions in the field of civil law regarding private regulation of spousal and parental arrangements, both in the breakdown of the traditional family and in nontraditional families, will step by step penetrate the halakhic realm. Likewise, the intensive spread of academic discourse concerning the acute necessity of increased private regulation of Jewish family and calls to use the various available contractual devices, inter alia, to promote the status of the wife will increasingly render those agreements as acceptable among Jewish communities across the globe.

This book has explored how the discourse in this regard is more of a political issue than a purely halakhic issue, as ideological concerns prevent the practical application of important contractual devices for the modern Jewish family. Thus, I argued that this is the reason why the Israeli rabbinical authorities and courts are slow to accept potential contractual solutions, the first and foremost of these being prenuptial agreements. These agreements are primarily intended to reduce the number of cases of a husband who refuses to give his wife a get. That can be achieved by imposing monetary fines on a recalcitrant husband (or wife) to prevent the partner opposing the divorce from hindering the other partner from going through with the divorce. Nonetheless, the strong resistance to such agreements arises on grounds that they are halakhically problematic, but I argued that they are based on meta-halakhic considerations rather than on hardcore halakhah concerns. In stark contrast to the Israeli official Rabbinate Authority, in the United States, the usage of prenuptial agreements is increasing. Moreover, the Rabbinical Council of America and the halakhic authorities in the Yeshiva University strongly support the validity of these agreements and advise couples not to get married without signing one.

There is evidence that the problem of agunah does not arise among couples who have signed prenuptial agreements before they married. Globalization and the ease with which people can move from one residence to another means that we are witness to an increase in the number of couples where at least one of them either lived or lives in the present out of Israel. Moreover, in recent years there has been an increase in couples who immigrate from the diaspora to Israel – but who nevertheless have married prior to their arrival outside Israel – who ask to get divorced in front of one of the Israeli rabbinical courts. It is likely that slowly but surely, similarly to any other Jewish custom (minhag), the more prevalent these agreements become, the more halakhic discussion will arise and the more they are likely to be accepted. The intensity and recurrence with which these agreements are being encountered will eventually force the modern halakhic authorities, first
in the diaspora and later in Israel, to recognize and validate them even if just *post factum* (*bediavad*) rather than in advance (*lechatchila*).

It is hoped that one day the acute necessity of using contractual devices and doctrines suggested in this book will increasingly penetrate the circles of halakhic authorities, *poskim*, and *dayyanim*. Then, it is hoped that the theoretical conclusions of this book and its proposed practical initial outlines of the limits of the “freedom of contract” available to spouses who marry according to the law of Moses and Israel will be very useful for them.