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ABSTRACT

What role does suspension tactics have in resolving highly contested social and political issues concerning hu(wo)man rights? When applied in the law and religion context, this question carries a special resonance in societies where religious law forms part of the civil legal system, as is the case in Israel. The following article explores the Israeli judicial involvement in alleviating the suffering women experience on account of religious rules and practices, as my argument pertains to the application of suspension tactics and tort claims with a view to protecting hu(wo)man rights. The article considers the intersection of tort law and religious practices as critically encouraging such tactics. While it recognizes the importance of the newly acknowledged potential of tort law to diminish discrimination against women, the article also cautions against the reality in which courts use these very same claims as a means for suspending women's right to

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equality. The article further seeks to identify the mechanisms, which seem to evolve this opposite effect, whereby courts suspend women's right to equality in contexts involving tort claims alleging religiously-grounded harms. This pursuit is applied in the analysis of several recent cases in which the Supreme Court of Israel and the Grand (national) Rabbinical Court have both addressed the issue. These cases regarded women's entitlement to pursue their right to equality through tortious claims, to which the courts responded by instructing the women how to exercise their tortious rights. In what might seem to be conflicting decisions, both courts used the association between the law of torts and women's equality to suspend the latter and thus excluded women from equal protection of the law. The courts' recent penchant for instructing women embodies a dangerous legal position, which suggests that tortious claims must be used *instead* of other viable claims for equality, resulting in a de facto suspension of women's rights.

The present article seeks to challenge the elusive disposition which places tort law at the forefront of women's fight for equality, but ultimately serves to marginalize it. To this end, the author uses a novel feminist application of Giorgio Agamben's theoretical work, introducing the terms "state of exception" and "suspension" to conceptualize and illustrate a current evolutional legal stage, which renders illegal the suspension of rights that women endure under such "state of exception." Finally, the article seeks to re-advocate tort law's central role in the betterment of women's underprivileged status in society by calling for a reorientation of tortious rights as *independent* of and *complementary* to other legal apparatuses designed to protect women's right to equality.

Key words anti-discrimination torts, sex-based discrimination, women's rights, Giorgio Agamben.

I. INTRODUCTION

Discriminatory religious rules and practices affect women worldwide.[1] Their influence goes far beyond their intended community of religious women and "religious" legal systems.[2] When woven into the legal system, religious rules affect non-religious women, and legal systems do not necessarily need to be grounded in religion to implement religious rules.[3] Liberal legal systems that espouse the separation of religion and state may also be involved in discriminatory religious practices, albeit indirectly.[4] Throughout the world, a Jewish woman who marries a Jewish man is subject to her country's secular legal system, as well as to the Jewish law in matters concerning divorce and marriage.[5] This duality may work concurrently,[6] independently,[7] or in a consolidated fashion.[8] Providing

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[1] *See* Noya Rimalt, *Separation between Males and Females as Gender Based Discrimination*, 3 ALEI MISHPAT 99, 131 (2003). I prefer the use of the term "practice" rather than "rule" to emphasize the idea that many alleged religious rules are actually extremely patriarchal interpretations of Halakhic rules, and are therefore practices of these rules. Halakhic rules are the collective body of ancient Jewish religious laws.

[2] Gila Stopler, Note, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 164 (2003).

[3] *Id.* at 170.

[4] *Id.*

[5] *See* RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 227-62 (2003).

[6] Esther Tager, *The Chained Wife,* 17 NETH. Q. HUM. RTS. 425, 437 (1999). In the U.S., divorce is generally a state matter, and requiring a Jewish husband to grant a divorce (*get*) in particular is considered a religious matter to be settled by a Jewish religious court regardless of civil divorce procedures. *Id*. In spite of this, the majority of pertinent jurisprudence in the state of New York operates under the provisions of the *Removal of Barriers to Remarriage* statute enacted on August 8, 1983 (also known as the New York *get* Law). *See* N.Y. DOM. REL. § 243 (1984). This law requires both parties to state or affirm that they have removed all barriers to the other party's ability to remarry, and thus allowing New York courts to prevent a civil divorce until all religious barriers have been removed. *See* Tager*, supra*, at 445 (for further analysis).

[7] *See Cour de Cassation* [Cass.] [Supreme Court for Judicial Matters] Dareinté 1877 S. Jur. I 27 (Fr.) (where a Jewish husband was first compelled to grant his wife a religious divorce (*get*), stating that she had suffered an inexcusable deprivation of her liberty to marry, and thus accruing harm to her freedom of conscience. The court further ruled that

women with a medium for addressing the consequential harm of discriminatory religious rules is therefore highly significant in advancing the global quest for gender equality, and in alleviating the costs that this harm imposes on women.

Despite this crucial need, history suggests that traditional endeavors in both the legal and political spheres have failed to provide sufficient protection to women affected by religious rules.[9] As a result, a group of Israeli feminist legal scholars and human rights lawyers recently developed a method of protecting women against gender-based suffering by applying a cutting-edge interpretation of tort law theory and practice.[10] More specifically, these scholars and practitioners have formulated theoretical and doctrinal venues for the pursuit of this empowering process.[11] Feminist legal scholars maintain that tort law may potentially redress, and ultimately abolish, the "public" harm imposed by public state law and suffered by women as a result of discriminatory religious rules, despite tort law's "private" nature as a branch of law.[12]

Religious law and tort law have, in the past, intersected in three main types of cases: (1) tort claims arising from the misuse of normally acceptable religious rules; (2) cases where religious settings serve as venues

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the granting of a divorce is of *a civil character meant to protect a woman's liberties*). *See generally* H. Patrick Glenn, *Where Heavens Meet: The Compelling of Religious Divorces,* 28 AM. J. COMP. L. 1, 15 (1980) (for further analysis).

[8] Stopler, *supra* note 2, at 171.

[9] *See* Frances Raday, *Women's Human Rights: Dichotomy between Religion and Secularism in Israel,* 11 ISR. AFF. 78, 87 (2005).

[10] *See* Yifat Bitton*, Transformative Feminist Approach to Tort Law: Exposing, Changing, Expanding—The Israeli Case*, 25 HASTINGS WOMEN'S L. J. 221, 225 (2014) (for details regarding these activists' individuals and groups).

[11] *See* David Bleich, *Modern Day Agunot, A Personal Remedy,* 4 JEWISH L. ANN. 167, 167–87 (1981); *see also* Susan Weiss, *Israeli Divorce Law: The Maldistribution of Power, Its Abuses, and the 'Status' of Jewish Women*, *in* MEN AND WOMEN: GENDER, JUDAISM AND DEMOCRACY 53 (Rachel Elior ed., 2004).

[12] Yifat Bitton, *Public Hierarchy – Private Harm: Negotiating Divorce within Judaism*, *in* (RE)INTERPRETATIONS: THE SHAPES OF JUSTICE IN WOMEN'S EXPERIENCE 61 (Laurel S. Peterson & Lisa Dresdner eds., 2008).

for inflicting harms on believers;[13] and (3) religious practices that become injurious and actionable *per se*. This article will introduce a fourth and much less known intersection of these laws.[14]

Sharing the sentiment that tort law can, and should, serve as a tool for combatting discrimination, I will argue that tortious entitlements should be used to promote and further protect hu(wo)man rights undermined by religion. Tortious entitlements must not be suspended or be used for suspension of wo(hu)man rights. In activating the novel feminist mechanism of reading torts anew for the betterment of women, the notion of tort law as an independent and complementary means for securing women's right to equality and autonomy alongside its function as an *alternative* to other problematic legal settings should bind the courts. Such perception of tort law will provide women the discretion to make strategic decisions with regard to whether they should utilize tort law. Conversely, if this use of tort law is misunderstood, tort claims for the betterment of women might turn into a double-edged sword and work against women and the struggle for securing their human rights.

Tort law also intersects with religion in ways that are more tenuous. For example, religious practice can be a yardstick for reasonableness in the determination of negligence.[15]

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[13] *See generally* Thomas F. Taylor, *Clergy Malpractice: Avoiding Earthly Judgment*, 5 BYU J. PUB. L. 119, 119–40 (1991); *see generally* Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809, 809–895 (2007); *see generally* Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish - Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 183 (2004) (for the important role torts have played in the fight against this phenomenon).

[14] An example of such a practice is "disciplinary actions" taken by the church and its congregation against one of its members in the course of an alleged Christian indoctrination that can be highly harmful to this member. *See, e.g.*, *Church Liability for Torts*, LAW & CHURCH 1 (1989) (for an example of such a practice).

[15] However, no systematic gender based characteristics were identified in the latter cases. *See, e.g.*, Muhlenberg Hosp. v. Patterson, 320 A.2d 518, 519 ([N.J. Super.] 1974) (where a minor plaintiff's mother refused the administration of a blood transfusion due to her beliefs as a member of Jehovah's Witnesses).

The identification of tort law's suitability to the gender-equality battle has led to an increasing interest in crafting a newly established and thoughtfully structured practical use of tort law.[16] This perception of tort law has, however, changed gradually in the past two decades in common law systems that embraced the usage of tort law for the betterment of women—to a point where this utilization no longer faces questioning and is even considered natural.[17] This strategic feminist move, as envisioned by feminist scholars[18] and practiced by torts lawyers, was meant to achieve three goals.

First, to compensate women for the harm inflicted upon them through discriminatory religious practices with a potential for the imposition of tort liability (as in the practices of Jewish men maliciously refusing a bill of divorcement (hereinafter: *get*) or the coercive confinement of Jewish women to segregated spaces in the public sphere, See *infra*).[19]

Second, after tortious liability becomes a real possibility, the inherent deterrent effect tort law has on tortfeasors is expected to create large-scale social change where the entities facilitating such harmful practices, rather than the particular defendants, become economically motivated to avoid the harmful practice and the system as a whole is "remedied."

Third, in cases where religious authorities specifically are involved in facilitating the harm, the imposition of tortious liability has the potential of spurring these (exclusively male) authorities (i.e., rabbis) to reinterpret discriminatory religious rules in a manner that would be less harmful to women. In other words, the use of tortious claims to compensate women for

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[16] *See* Bitton, *supra* note 10, at 230.
[17] *See id.* at 241 (for a description of the process); *see also* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 1–2 (2010) (for the legitimacy and justification of this view of tort law).
[18] *See* Weiss, *supra* note 11, at 53; *see generally* Yifat Bitton, *Reclaiming Power? Tort Claims of Women Victims of Sexual Violence*, *in* TRENDS AND ISSUES IN VICTIMOLOGY 130-50 (Natti Ronel et al. eds., 2008) (explores the envisioning of tort law as a means to combat sexual violence against women).
[19] *Infra*, on pp. 678-90 (segregation and *Get* oppression).

the harmfulness of discriminatory religious rules has the potential to encourage the revisiting of these rules from within the religious system, and thus ensure relief to as many groups of women as possible.[20] This legal paradigm suggests a path whereby feminist activism can establish a dialogue with religion rather than its overall rejection, as is often characteristic of the intersection of these cultural institutions.[21] The cases discussed in this article promulgate claims that alter fundamental conservative accounts in current tort law that is rooted in a masculine epistemological framework, whereby the suffering of women still mostly remains unchallenged.[22]

Israel saw a period in which a growing number of tort cases have been decided in favor of women who brought their grievances before Israeli civil courts for sustained harms inflicted by religious practices.[23] Civil court decisions from across the nation have only recently awarded compensation to women plaintiffs seeking damages for discrimination by sex segregation tactics used during burial ceremonies, on flights, and in buses.[24] In light of the success in these tort cases, the feminist mission of harnessing tort suits to combat women's discrimination has seemingly been accomplished. Or has it?

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[20] As mentioned above, many women's religious compliance do not necessarily emanate from religious beliefs.

[21] *See* Bitton, *supra* note 12, at 62.

[22] *See* Leslie Bender, *An Overview of Feminist Tort Scholarship*, 78 CORNELL L. REV. 575, 575-76 (1993) (for early writings on the topic); *see* FEMINIST PERSPECTIVES ON TORT LAW 1-13 (Janice Richardson & Erika Rackley eds., 2012) (for the second generation of feminist critique of torts).

[23] *See* Raday, *supra* note 9.

[24] File No. 3342-03-12 Small Claims (Netanya), Rosit Davidian v. Chevra Kdisah Kadisha (2012) (Isr.); File No. 19480/05 Kfar Sava Family Court, Jane Doe v. the Estate of John Doe, (Isr.); File No. 30560/70 Rishon LeTzion Family Court, H.Sh v. H.A, (Isr.); File No. 6743/02 Kfar Sava Family Court, K. v. K., (Isr.).

Following a few prosperous years for Israeli women seeking redress for their religious-based discrimination injuries,[25] recent years have seen the emergence of alarming signs of retreat manifesting in the suspension of women's human rights entitlements. This retreat is particularly evident in two legal contexts: family law and constitutional law. In the family law context, prevalent are cases—to the extent they could be considered a reformative trend—in which women sued their husbands for refusing to grant a *get*, and the harm this refusal caused.[26] After years of trying the divorce cases of women who simultaneously pursued tort suits and divorce suits against their husbands, rabbinical courts have recently compelled women employing both family and torts routes to relinquish their civil tort suits.[27] If the women refuse, they risk having their family law-based case against their recalcitrant husbands suspended by the rabbinical court.[28] These women are thus in the impossible position of having to choose which of their rights should be suspended: their human right to be freed from their captive marriage or their legal right to exhaust a tort claim emanating from their suffering as marriage-prisoner.

In the constitutional context, a covert version of either the suspension of a human right in favor of a legal right to tort claim, or conversely, the suspension of a right to tort claim in favor a human right is identifiable. In a series of recent decisions, the Israel Supreme Court suspended the women's right to equality when infringed by religion.[29] In the first decision, *Regan v.*

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[25] File No. 9101/00 Jerusalem Family Court, K.S. v. K.P, (Isr.) (for the most seminal among a mounting number of such cases).

[26] *See* John C. Kleefeld & Amanda Kennedy, *'A Delicate Necessity': Burker v. Marcovitz and the Problem of Jewish Divorce,* 24 CAN. J. FAM. L. 205, 208 (2008) (for the overview).

[27] Rabbinical courts perceive any involvement in marriage and divorce issues as wrongfully interfering with their exclusive jurisdiction over these matters, as provided to them in Rabbinical Court Jurisdiction (Marriage and Divorce) Law. Marriage and Divorce Law, 1953- [1953] 7 LSI 139 (Isr.); *see infra* note 32 and accompanying text.

[28] *See infra* note 47 and accompanying text (describing the way in which rabbinical courts halt divorce cases of women who pursue tort claims against their husbands).

[29] *See infra*, pp. 684-97 (segregation and *Get* oppression).

Ministry of Transport, the court refrained from banning the usage of sex-segregated buses in Israel.[30] Rather than order the abolition of this practice altogether, as constitutional law mandates,[31] the court advised women who find this discriminatory practice offensive to use their tortious right to sue.[32] While such "court counseling" is well intentioned, and to some extent encouraging, it fails to protect women's right to equality. Furthermore, it is legally offensive because instead of the law protecting women, it excludes women and suspends women's constitutional rights.[33] Instead, the courts required women to exhaust all private means for receiving ex-post compensation for discriminatory acts inflicted upon them.[34] In *Bizchutan v. Yom L'Yom*, it was a religious women's legal right to be elected to Parliament that the court failed to protect.[35] In that case, the court refused to order a religious newspaper to publish the political advertisements of a newly established women-inclusive religious party. The newspaper had refused to publish the advertisement due to alleged "religious constraints" prohibiting women from participating in political life.[36]

This article proceeds in three parts: Part II introduces the two intersections of tort law in which Israel's highest courts have evidently affected the suspension of hu(wo)man rights. Part III uses Giorgio Agamben's philosophical work, drawing mainly on two of his eminent

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[30] HCJ 746/07 Regan v. Ministry of Transport, PD 64, 530, 566, 568 (2008) (Isr.).

[31] This statement is relevant despite raging criticism of constitutional law's failure to satisfactorily protect women's rights. *See* Jill Hasday, *Women's Exclusion from the Constitutional Canon*, 2013 U. OF ILL. L. REV. 1715, 1716–22 (2013) (for the U.S. legacy); *see also* Raday, *supra* note 9 (for Israeli legacy).

[32] HCJ 746/07 Regan v. Ministry of Transport, PD 64, 530, 562-63 (2008) (Isr.).

[33] *See infra* Part III (suspension identified using feminist analysis of Giorgio Agamben's philosophy).

[34] HCJ 746/07 Regan v. Ministry of Transport PD 64, 530, 562-63 (2008) (Isr.).

[35] *See generally* TBC 17/20 Bizchutan v. Yom L'Yom (2015) (Isr.); *see generally* TA 25435-03-15 Bizchutan v. Yom L'Yom (2015) (Isr.); *see generally* HCJ 1868/15 Yom L'Yom v. Bizchutan (2015) (Isr.) (The Israeli Supreme Court's reversal of the district court's decision).

[36] TBC 17/20 Bizchutan v. Yom L'Yom, *1, *2-3 (2015) (Isr.); TA 25435-03-15 Bizchutan v. Yom L'Yom, *1, *3 (2015) (Isr.).

notions of "state of exclusion" and "suspension," to illustrate three evolutional stages of feminist-legal development: exclusion, lawlessness, and suspension. By engaging with Agamben's work, I criticize the stage of suspension, and focus on establishing the much-needed distinction between illegal suspension and legitimate referral of plaintiffs by courts to utilize legal tools other than the ones brought before them. Finally, Part IV reinforces the account of tort law as a tool for enhancing hu(wo)man rights by engaging with theories of tort law that advocate using it to complement, rather than to exclude, other legal tools already serving to shield hu(wo)man rights.

II. RELIGIOUS EXCLUSION, SECULAR SUSPENSION

A. Torts and/vs. Family Law

Judaism exposes women to the risk of having a "recalcitrant husband"—a husband who refuses to grant a *get* to his wife. This seemingly "religious" problem is particularly acute and distinctively "legal" in Israel since the state has incorporated Jewish tradition into its secular law.[37] In order to better understand the pragmatic (political) motivations of both the rabbinical courts and the Supreme Court in the case of referrals[38] as a method of suppression, a brief overview of the consolidated Jewish and secular civil law system employed in Israel is required. This context concerns religiously grounded discriminatory practices that inflict harms upon women, by allowing husbands to hold their wives captive and by allowing their forced segregation in public spaces.

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[37] Marriage and Divorce Law, 1953-1953, 7 LSI 139 (Isr.) (The Israeli secular legal system has embraced Jewish law for regulating the marriage and divorce of Israeli Jews, granting sole jurisdiction over these matters to the state rabbinical courts who apply religious Jewish rulings).

[38] The term "referral" is used here to describe an adjudicative method whereby a court receives a case and decides to refer it to another court due to lack of jurisdiction.

In the Israeli system, rabbinical courts hold exclusive jurisdiction on divorce issues.[39] However, civil family courts hold exclusive jurisdiction over tort claims between family members.[40] State law has embraced the unequal structure of the Jewish divorce where the completion of the divorce proceedings is uniquely conditional upon the husband's agreement to a *get.*[41] Husbands often use this unequal gender disposition to exploit their power by extorting financial and custodial concessions from their wives or by simply preventing their wives from remarrying.[42] A tortious perspective on this circumstance offers a theoretical platform for compelling the husband to pay for not granting the *get*.[43] The husband's refusal to grant a *get*, and specifically the unreasonable manner of his refusal, violates a duty of care towards his wife under the negligence doctrine. Negligence law indeed may impose liability on a husband who negligently abuses his relative superiority over his wife.[44] Moreover, the husband's refusal to grant a *get* with the full knowledge that doing so impinges upon a woman's right to marriage autonomy goes beyond recklessness and may be construed as the intentional infliction of harm, an element of moral guilt.[45] The imposition of liability on the husband, therefore, does not amount to unwanted interference with his right to freedom of religion, which will

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[39] Court for Family Affairs Law, 5755-1995, SH No. 1537 p.393 (Isr.) (The definition of "divorce issues," however, was strictly interpreted by the Israel Supreme Court as granting exclusivity to rabbinical courts only in matters concerning the validity and procedure of the divorce).

[40] *Id.*; *see also*, HCJ 6103/93 Levi v. Grand Rabbinical Court, 48(4) PD 591 (1994) (Isr.).

[41] Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israel Case,* 26 ARIZ. J. INT'L & COMP. L. 279, 281 (2009).

[42] *See id.* at 282.

[43] *See id.* at 284.

[44] Yifat Bitton, *Protecting Equality through Torts and Imposing Negligence Liability within Power Relations*, 37 MISHPATIM 145, 179-82 (2008).

[45] *See generally* Daniel Givelberg, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 45–49 (1982) (explicates the focus of intentional infliction of emotional distress tort on "outrageousness").

stand uninterrupted as long as he exercises it reasonably. Particularly, the husband's rights are not infringed since paying for the harmfulness embedded in a person's privilege does not amount to prohibiting its execution by the payer.[46] Such an intent, driven by the desire to either gain advantageous alimony arrangements or simply inflict suffering as a form of cruelty, justifies a claim for damages by the woman.[47]

Tort suits against recalcitrant husbands carry the risk of being seen as a threat to the legitimacy of the eventual *get* from a religious standpoint. In a nutshell, this perception of threat refers to the assertion that imposing tortious liability on a husband might pressure him towards granting the divorce under duress, which might invalidate the divorce as lacking the religious mandatory consent component.[48] Coercing the husband to grant the divorce is only allowable under special circumstances in Jewish law, and a tort suit is not among them.[49] Granting a coercive divorce poses a significant religious difficulty, which bears legal implications. This difficulty is primarily because a divorce granted under duress endangers the status of the wife's future offspring. In a case where a divorce is considered or suspected to be given under duress, the wife is still deemed to be married to her recalcitrant husband, meaning that any children that she would have with another man would be considered *mamzers*, who may only marry another *Mamzer* or a convert to Judaism.[50] Moreover, this derogatory status is hereditary, and the children of *mamzers* retain the *mamzers* status for seven generations.[51] Mortified by the potential realization of this scenario,

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[46] *See* Blecher-Prigat & Shmueli, *supra* note 41, at 297.
[47] *See* Steven F. Friedell, *The First Amendment and Jewish Divorce: A Comment on Stern v. Stern,* 18 J. OF FAM. L. 525, 532 (1980); *see also* Barbara J. Redman, *Jewish Divorce: What Can be Done in Secular Courts to Aid The Jewish Woman?,* 19 GA L. REV. 389, 417 (1985).
[48] Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment,* 51 MD. L. REV. 312, 331 (1992).
[49] *See* Blecher-Prigat & Shmueli, *supra* note 41, at 289.
[50] *Id.*
[51] *Id.*

some feminists have suggested that Rabbis could be reasonably expected to endorse deviation from the conservative and stringent interpretation of Jewish divorce rules of granting a *get*.[52]

The feminist hope is to witness an adherence to particular sources within Jewish law—traditionally neglected and overlooked—that could support such a deviation and release Jewish women from the unfair burden of the rabbinical divorce system.[53] Nevertheless, rabbinical courts' increasingly retaliatory tendencies towards tort claims for bettering women's position in relation to their recalcitrant husbands have shattered the feminist hope embedded in them.[54] A series of cases were recently brought before the rabbinical court where the women litigants were also engaged or intending to engage in tort claims against their recalcitrant husbands in the civil family court. The rabbinical judges ordered a suspension of the rabbinical case before them until the women declared that they would surrender the civil suit.[55] The rabbinical court excused its decisions as bound by the concern that such a claim would endanger the divorce's legitimacy due to the coercive nature of tortious compensation.[56] The rabbinical courts ordered the suspension of the women's right to a religious ruling concerning their personal status until they either withdrew their tort claim or otherwise committed themselves to not pursuing such claims in the future.[57] Using their power over women litigants, the rabbinical courts forced women to

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[52] I myself had hoped for such a positive development. *See* Yifat Bitton, *Feminine Matters, Feminist Analysis and the Dangerous Gap between Them*, 28 TEL AVIV L. REV. 871, 896–97 (2005).

[53] *See id.* at 885–86.

[54] Yehiel S. Kaplan, *Tort Liability of Recalcitrant Husbands in Light of Jewish Law: from Controversy between Rabbinical and Secular Courts to Peaceful Compromise*, 6 FAM. UNDER L. REV. 263, 268 (2013–2014).

[55] Such cases are becoming more and more prevalent in the last five years, as the numerous examples in Kaplan's article indicate. *See* Kaplan, *supra* note 54, at 284–93.

[56] Blecher-Prigat & Shmueli, *supra* note 41, at 297.

[57] By carefully reviewing rabbinical courts' rhetoric, it is possible to identify the abridgement of their jurisdiction by civil family courts as the real basis for their decisions in these matters.

"choose" between the two (non-)options of giving up the right to get a divorce and pursuing the right to compensation in civil family court system. Women have no adequate legal protection and are deserted in the legal limbo of "lawlessness."[58]

This practice of rabbinical courts to force women into choosing between receiving a *get*, or pursuing the right for compensation can be illustrated in the *Cohen v. Cohen* decision granted by the Grand Rabbinical Court.[59] In that case, the court ordered that the plaintiff—who had already suspended her tort claim in the civil family court in accordance with a lower rabbinical court's order—had to make sure that the case be dismissed entirely by the family court.[60] Specifically, the court ordered the plaintiff to reactivate her suspended tort suit in order to have the civil court decide it on its merits and dismiss it explicitly and irreversibly.[61] The rabbinical court also announced, upon the plaintiff's refusal to comply with this unprecedented order, that the recalcitrant husband who had refused to grant his wife a *get* for 10 years, even after the rabbinical court itself incarcerated him, would be released from jail at once.[62] At the request of the plaintiff's lawyer and feminist petitioners—present author included—acting in the capacity of *amici curiae*, the rabbinical court agreed to suspend the husband's release for a few more days in order to allow the wife plaintiff to file an injunction with the Supreme Court in its capacity as the High Court of Justice.[63] Unfortunately, the rare opportunity given to the Supreme Court to hold this decision illegal was missed.[64] Once the woman plaintiff filed her appeal, the Grand Rabbinical Court issued an affidavit to the Supreme Court stating

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[58] The notion of "lawlessness" was developed within feminist theory. *See* Marjorie Maguire Schultz, *The Voices of Women: A Symposium on Women in Legal Education: The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 58 (1991).
[59] SRC 87002/01 Rabbinical Court (PT), Cohen v. Cohen, *1, *1 (Isr.).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

that it withdrew its recent decision and that the recalcitrant husband's release was no longer dependent upon the woman's claim for tort remedy.[65] Upon the Grand Rabbinical court's assurance that the plaintiff's *get* case would reactivate regardless of the status of her tortious claim, the Supreme Court eventually ordered the injunction's dismissal.[66]

In its decision, the Grand Rabbinical court subjected the plaintiff, and thus all other Jewish women in Israel seeking divorce and filing for compensation for their years of distress, to a multilayered suspension of their legal rights, taking place in several ways. First, the decision resulted in the suspension of women's rights to freedom of marriage based on their constitutional right to autonomy.[67] The unequal legal setting endowing the husbands with the ultimate power to free women from their marriage takes the right away from women. When the state adopted Jewish divorce doctrines, which are primarily contingent upon a husband's free will, husbands indirectly received the authority to suspend women's right to autonomy. As such, husbands can hold women hostage. Second, the Grand Rabbinical court's decision resulted in the suspension of women's right to exhaust their tortious claims vis-à-vis their husbands and receive compensation for their suffering.[68] Third is the suspension of women's divorce suits—if those women refuse to withdraw their tort suits—by the rabbinical court, which will not take any steps towards advancing the *get's* issuance.[69]

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[65] *Id.*

[66] *See* HCJ 568/12 Mavoi Satum v. John Doe, *1, *3 (2013). This was ordered despite the petitioner's claim that her case could still revert at the rabbinical court's order to what it was and despite the feminist amicus' claim that this case exemplifies the crisis women undergo in rabbinical courts in trying to realize their tortious rights. *Id.*

[67] *See* HCJ 7052/03 Adallah v. Minister of Interior 61 PD 202 (2006) (Isr.), http://elyon1.court.gov.il/Files_ENG%5C03%5C520%5C070%5Ca47/03070520.a47.htm (for the constitutional right to autonomy in Israeli law).

[68] *See* Kaplan, *supra* note 54.

[69] Blecher-Prigat & Shmueli, *supra* note 41, at 290.

B. Torts and/vs. Constitutional Law

The second legal context that has forced women to suspend their tortious right is the religious practice of sex segregation in the public sphere. Unlike the clearly negative repercussions arising from the divorce setting, the constitutional context may, at first glance, seem to do the opposite. More to the point, when it comes to sex-segregated religious practices, where a separation of men and women occurs based on religious justifications in public areas or on public transportation, women are in a stronger legal position. Specifically, Jewish law has a narrow foothold when it comes to its use as justification for an allegedly legally protected rule of tolerance towards religiously grounded sex-segregation. Sex-segregation practices are markedly different from the consolidation of Jewish and secular law dominating the case of marriage and divorce.[70] Indeed, when faced with arguments concerning the freedom of religion and religious practices as justification for the imposition of religious prohibitions in the public sphere, Israeli courts tread very carefully.[71] The courts in Israel typically prefer focusing on interpretations and distinctions grounded in secular justifications and emphasize cultural autonomy when allowing such impositions to persist.[72] Therefore, Israeli women seeking protection from

[70] REPORT OF THE MINISTERIAL TEAM OF INQUIRY ON THE PHENOMENON OF THE SEGREGATION OF WOMEN IN THE PUBLIC SPHERE 60–67 (2013), http://index.justice.gov.il/Pubilcations/Articles/Documents/DochHadaratNasim.pdf.

[71] HCJ 98/54 Lazarovitz v. Food Controller, 1956 PD 10, 40, 55–56 (1954) (Isr.); HCJ 122/54 Axel v. The Mayor, Councilors and Residents of Netanyah, 1954 PD 8, 1524, 1535-37 (1954) (Isr.) (In both cases the Israel Supreme Court has restricted the executive branch from employing religious justifications as primary considerations in an administrative context).

[72] HCJ 531/77 Baruch v. Tel Aviv Dist. Traffic Controller 1977 PD 32(B) 160, 163 (1977) (In *Baruch*, the Supreme Court, following riots by ultra-orthodox Jews demanding the closure of certain roads to vehicular traffic on the Sabbath, allowed this closure arguing it was meant to prevent harm to the *sentiments* of religious communities); HCJ 166/71 Halon v. The Mayor of the Local Council of Ussafiyah 1971 PD 25(B) (1971) (In *Halon*, a café was restricted from playing "western" music or serving alcohol by the local council of the Druze village of Isfiya. Despite these restrictions with clearly religious origins, the Supreme Court insisted on treating the issue as cultural rather than religious,

forced sex-segregation are allegedly more naturally and easily entitled to legal relief.

C. Religiously Grounded Sex-Segregation in Israel – An Overview

Sex-segregation is not unknown to Israeli society, which employs the practice extensively, and mainly in educational, army, health care, and recreational settings.[73] Under the religious sex-segregation practice in question, women were required to board the bus from the back door and sit in the back of the bus, while men were to board from the front door and sit in the front seats.[74] Sex-segregation is basic and primordial;[75] it is as conclusive and brutal as it is "natural" and unquestionable, as long as men are generally and visibly "different" from women.[76] Its "naturalness" notwithstanding, sex-segregation is generally perceived as unconstitutional based on its breach of a person's right to equality.[77] In Israel, the notion of sex-segregation has been employed by feminist legal scholars and lawyers in two conceptual paths. One claims that sex-segregation constitutes a breach of women's right to equality, which under Israeli constitutional law derives from the women's constitutional right to dignity.[78] While the other

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justifying the restrictions as acts intended to preserve the *characteristics* of the village, and protect its residents' *culture*).

[73] Michal L. Allon, *Gender Segregation, Effacement, and Suppression: Trends in the Status of Women in Israel*, 22 DIG. MIDDLE E. STUD. 276, 284 (2013); Yael Tamir, *Siding with the Underdogs, in* IS MULTICULTURALISM BAD FOR WOMEN? 48 (Joshua Cohen et al. eds., 1999).

[74] HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 540 (2008) (Isr.).

[75] The term "sex," and not "gender," segregation is used here to denote the bluntness of referring to a person's biological sexual characteristics as the object of this tactic.

[76] David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-essentialism, and Masculinity*, 33 HARV. J. L. & GENDER 509, 517 (2010).

[77] *Id.* at 553.

[78] HCJ 4541/94 Miller v. Minister of Def., PD 43, 49 (1995) (Isr.), http://www.dindayan.com/rulings/94045410.z01.pdf. The right to equality, since the enactment of the Basic Law: Human Dignity and Liberty, has become elevated to be a principle of constitutional status as the right to equality is interpreted to be derived from the Right to Dignity. *See id.* at 43; *see also* Basic Law: Human Dignity and Liberty (5752-1992) (Isr.). Both accounts render religiously grounded segregation as an offense

claims that sex-segregation breaches the women's right to autonomy.[79] Be that as it may, both rights are protected under Israeli constitutional law and warrant the intervention of the court. Besides being unconstitutional, sex-segregation contributes substantially to strengthening the dominance of men over women, as well as the dominance of masculinity over femininity.[80] These dominances, in return, reinforce hegemonic masculinity as the preferred masculinity, and derogate non-hegemonic masculinity, which is in itself more egalitarian to women and more respectful of their humanistic, rather than sexist, being.[81]

Regardless of their prevalence in liberal states, such as Israel, which declaratively espouse sex equality,[82] when stemming from religiously grounded rules, sex-segregation has a much farther goal in mind than its "secular" counterpart, which "merely" aims to separate the sexes.[83] Religious sex-segregation is meant to result in the disappearance of the female body from the public space altogether,[84] and is therefore far more dangerous to women's equality and illegal by nature.[85] To illustrate this

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that some consider tantamount to sexual harassment. *See* HCJ 4541/94 Miller v. Minister of Def., *supra.; see also* Basic Law: Human Dignity and Liberty, *supra*.

[79] HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 579 (2008) (Isr.) (Joubran, J., concurring); Rimalt, *supra* note 1, at 104.

[80] *See* Cohen, *supra* note 76, at 522–24.

[81] *See generally* Zvi Trigger, *Segregation between Men and Women as Sexual Harassment*, 35 IYUNEY MISHPAT 703, 740 (2013) (shows the correlation between a woman's autonomy and her human, as opposed to sexual, being).

[82] *See infra* p. 715 and accompanying notes 231–32.

[83] *See* Cohen, *supra* note 76, at 516. These types of secular segregation include athletics, restrooms, etc. Though less harmful to women's human rights than religion-based segregation, many of the secular segregations warrant revision and reconsideration, given our gender-changing world.

[84] Allon, *supra* note 73, at 282.

[85] *See generally* HCJ 9460/08 Hitorerut Yerushalmim v. Eged, *1 (2008) (In this case, the petition was brought against Eged, a public transport company, who decided not to allow bus billboards to showcase posters presenting female candidates to Jerusalem municipality. Upon petition, Eged was quick to retract its decision. The HCJ therefore dismissed the injunction, yet stated clearly that the petition was "based on a solid claim" of unconstitutionality.); *see generally* ROSALYN DIPROSE, THE BODIES OF WOMEN

point, consider the fact that while the Israel Defense Forces (IDF) keeps its elite combat units open almost exclusively to men, the IDF still employs female soldiers massively in all combat support apparatuses and shared public spaces.[86] With the increased enlistment of ultra-orthodox men, the IDF is now creating declaredly male-only units, operating under the premise that ultra-orthodox men cannot serve in the presence of women, or, as described by Sasson-Levy, "the IDF is willing to create 'sterile' environments for them."[87] Thus, female soldiers in ultraorthodox units are banned from even being in the general vicinity of male soldiers, and male soldiers now assume female soldiers' traditional roles at the units' peripheries.[88]

While this typology of sex-segregation bears malicious and dangerous implications, religiously grounded sex-segregation seems to enjoy the leveraging protection of the liberal right to freedom of religion and multiculturalism.[89] Thus, religious sex-segregation should be interpreted in light of the broader patriarchal sex-segregation context. This context implies that the "difference" between the sexes, whether real or imagined, has long served as a divisive element in several respects, with the most prominent being the division between the private and the public, the political and the non-political, and the physical separation in such spaces such as amenities, schools, etc.[90] Therefore, religiously grounded sex-segregation should not be examined solely from a religious authenticity and

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ETHICS, EMBODIMENT, AND SEXUAL DIFFERENCE 53 (1994) (for the theoretical and philosophical analysis of the exclusion of the female body from public life phenomenon).

[86] Orna Sasson-Levy & Sarit Amram-Katz, *Gender Integration in Israeli Officer Training: Degenerating and Regendering the Military,* 33 SIGNS: J. WOMEN CULT. & SOC'Y 105, 114 (2007).

[87] Orna Sasson-Levy, *Gender Segregation or Women's Exclusion? The Military as a Case Study*, *in* CIV.-MIL. RELATIONS IN ISRAEL: ESSAYS IN HONOR OF STUART A. COHEN 161 (2014).

[88] *Id.*

[89] Yaacov Ben-Shemesh, *Law and Internal Cultural Conflicts*, L. ETHICS HUM. RTS. 271, 274 (2007).

[90] Trigger, *supra* note 81, at 713-14.

multiculturalist perspective, but rather should be seen as a practice that complies with patriarchy as a whole—one that also places men and women in separate hierarchical spaces where men are superior.[91] As Martha Nussbaum puts it, "when religion and politics intertwine, it is not only religion that affects politics to the detriment of women," but also vice versa.[92] Reflecting her insight in the Israeli example is the fact that the religiously grounded practice of sex-segregation—which has long-standing opposition within the realm of religious interpretation of the Jewish tradition[93]—has gradually become one of primary importance and genuine virtue at the hands of the governmental institutions that have allowed it to flourish.[94]

Despite its clear democratic foundations, Israel has witnessed growing practices of religiously grounded coercive-sex-segregations in its public spaces. The state has denounced some of these practices, while ignoring others.[95] The increasingly worrying numbers of encounters such as sex-segregation practices in the private sphere in funeral homes, in lines to receive care in HMO's, and in the public state sponsored sphere in public transportation and public memorial services,[96] led Israeli government to act upon the issue. Israel's Attorney General assembled a "Ministry of Justice Committee of Inquiry on the Phenomenon of the Segregation of Women in

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[91] Stopler, *supra* note 2, at 160.

[92] MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 262 (2000).

[93] Avinoam Rosenak, *"Dignity of The Congregation" as a Defense Mechanism: A Halakchic Ruling by Rabbi Joseph Messas*, 13 NASHIM: J. JEWISH WOMENS STUD. & GENDER ISSUES 183 (2007) (In this study of Jewish law, Rosenak casts doubt on the idea of the segregation between the sexes in a much more private sphere, within the Jewish synagogue itself).

[94] Trigger, *supra* note 81, at 716 (Though known in ancient Jewish history, sex-segregation has never been as extremely and as aggressively present or enforced as it has been in the last decade of Jewish/Israeli life).

[95] REPORT OF THE MINISTERIAL TEAM OF INQUIRY ON THE PHENOMENON OF THE SEGREGATION OF WOMEN IN THE PUBLIC SPHERE 9 (2013), http://index.justice.gov.il/Pubilcations/Articles/Documents/DochHadaratNasim.pdf.

[96] *Id.* at 5.

the Public Sphere" in order to review the phenomenon, outline the causes for the segregation in each particular case, and suggest recommendations.[97] The committee's harsh report unequivocally considered sex-segregation practices illegal.[98] Ironically, the government not only avoided the adoption of the report's recommendations but also launched a Ministry of Education program for subsidizing gender exclusive ultra-orthodox campuses in public universities and colleges throughout the country.[99]

This evolving trend of state-supported religious sex-segregation ultimately reached the Supreme Court of Israel with women petitioning that their right to equality was being brutally infringed by these segregational practices, and imploring the Court to restore the protection of their right to equality.

1. The Case for Sex-Segregation in Israeli Buses – Background

Israel's public transportation companies provided their services to the local ultra-orthodox community up until the late 1990s, as an integral part of their routine service. Then, a Ministry of Transportation committee decided to provide services tailored to the specific needs of this community.[100] The ultra-orthodox male hegemony negotiating the issue with the state required, among other demands, a total separation between men and women in bus services.[101] The obvious financial interest of the public transportation companies in expanding their activities to this large

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[97] *Id.* at 6.
[98] *Id.* at 60-67.
[99] *See generally* HCJ 6667/14 Dr. Yofi Tirosh v. The Council For Higher Educ., *1 (2015) (In *Tirosh*, the Supreme Court acknowledged the potential damage to women's right of equality by providing public funding (through the Council of Higher Education) to male only Ultra-Orthodox campuses. However, the court was satisfied with the council taking it upon itself to publish guidelines addressing the issue of equality in the funding budget associated with these campuses. Effectively, this Supreme Court decision meant that the substantive claim of discrimination concerning women's right to equality would not be addressed in the current budget.).
[100] Trigger, *supra* note 81, at 706.
[101] Rimalt, *supra* note 1, at 118.

segment of the population matched the ministry's interests in encouraging public transport and generally earning political credit in the ultra-orthodox community.[102] This position in support of segregation also gained some traction among legal scholars who argued the necessity of viewing through the intercommunal perspective of the ultra-orthodox community itself.[103] These scholars suggested that no actual contradiction necessarily exists between the ultraorthodox women's right to equality, and the ultra-orthodox community's right to freedom of religion.[104] After lengthy deliberations and alleged commitments to serving all passengers equally, the Minister of Transportation issued a permit allowing the bussing companies to operate sex-segregated bus lines.[105]

Soon after the permit's issuance, violent acts were perpetrated against women who did not comply; the rides were usually "supervised" by a man who ensured that women moved to the back.[106] Women who did not comply faced verbal and even physical assaults;[107] in most cases, the bus drivers were indifferent to the women being terrorized on their bus,[108] and in some cases actively participated in the oppressive acts by ordering the protesting women off the bus.[109] As a result of these abusive incidents, a group of social-change organizations and women—some of whom self identified as ultra-orthodox—petitioned the Israeli Supreme Court in 2007, asking the court to order the abolition of the practice of segregated bus lines.[110] The

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[102] *Id.*
[103] Alon Harel, *Benign Segregation? A Case Study of the Practice of Gender Separation in Buses in the Ultra-Orthodox Community in Israel*, 20 S. AFR. J. ON HUM. RTS. 64, 66 (2004); A. Yehuda Warburg, *The Practice of Gender Separation on Buses in the Ultra-Orthodox Community in Israel: A View from the Liberal Cathedral*, 44 TRADITION: A J. ORTHODOX JEWISH THOUGHT 19, 22-24 (2011).
[104] *Id.*
[105] Rimalt, *supra* note 1, at 118.
[106] *Id*. at 117.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 540-41 (2008) (Isr.).

petitioners claimed that this "separate but equal" reasoning was unconstitutional,[111] and therefore required the court's intervention in the form of an invalidation of the license permit issued by the state to these publicly funded route operators.[112] When the case reached the Supreme Court, a public committee appointed to review the legality of the segregated routes declared the operation illegal and recommended the abolition of its practice of formally segregated doors and seats.[113] Interestingly, the Minister of Transportation refused to adopt the special committee's recommendation and notified the court of his reluctance to abolish the permit in question as long as the route "recommended" and did not "coerce" passengers to act in accordance with the segregated boarding and seating policy.[114] The petitioners, on the other hand, called for the complete invalidation of both the practice and the government permit.[115] The Supreme Court decided not to abolish the segregated bus lines or invalidate the route operators' permits, but it did emphasize the prohibition of any coercive practices.[116] The court ruled that as long as passengers voluntarily boarded the bus from different doors and willingly sat in different parts of the bus, there was nothing legally prohibited in the route operators' activation of the bus lines.[117]

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[111] *Id.* at 540. As Justice Danziger explains in *Regan*, by referring to both Brown v. Board of Education as well as to the Israeli *Miller* case, the sex-segregation of men and women in and of itself makes it a violation of the right to equality, positioning the women forced to sit at the back of the bus in a state of inferiority. *Id.* at 577–80.

[112] HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 540 (2008) (Isr.). It took almost four years until the petition was finally decided (The petition was submitted on Jan. 24 2007, and the ruling was given on Jan. 5, 2011). One of the reasons for this delay was an attempt by the government to have the case settled out of court. *Id*. at 541–47.

[113] *Id.* at 546-47.

[114] *Id.* at 550.

[115] *Id.* at 549.

[116] *Id.* at 567-68.

[117] *See id.* at 555-70. Given the scope of the present study, I have not fully detailed the court's full (and more sophisticated) decision.

When coupled with patriarchy and its inherent disadvantage to women, this invocation of individual consent can hardly be considered valid or genuine.[118] The Supreme Court also failed to ban the "rear boarding" practice, regardless of the petitioner's claim that it has a humiliating effect for women.[119]

While the Supreme Court applied unequivocal rhetoric in condemning the sex-segregation practice, describing it as denigrating to women and shameful to Israeli democracy, in reality, the court did nothing more than warn the bus companies against any coercion women might be subjected to as a result of religious extremists' behavior on the bus.[120] Seeking to bolster its dedication to equality, the court briefly counseled women to make use of tort claims to sue, in particular cases, perpetrators whose abusive behavior coerced women to sit in "women only" seats.[121]

Taken alone, this court dictum can be viewed as encouraging for women by virtue of the court's fostering of the tools required to submit antidiscriminatory tort claims. However, the dictum can also be read as calling for the use of tort claims to alleviate, *ex post facto*, the *ex ante* suspension of women's constitutional rights. To that end, the court used tort law to suspend, whether temporarily or perpetually, women's constitutional right to protection against the discrimination inherent in sex-segregation practices.[122] More importantly, and as opposed to the case of the rabbinical

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[118] Frances Raday, *Culture Religion and Gender*, 1 INT'L J. CONST. L. 663, 702 (2003).
[119] Trigger, *supra* note 81, at 734. Trigger asserts that "sneaking" onto the bus from behind is humiliating in its symbolic linguistic significance. The court treated this practice as having a "technical" nature, mainly designed to facilitate the segregation. *See* HCJ 746/07 Regan v. Ministry of Transport, PD 64, 530, 557 (2008) (Isr.).
[120] *Id.* at 567–69 (Danizger, J., concurring).
[121] The court referred, inter alia, to one of my own articles, which developed the theoretical framework for facilitating such antidiscriminatory tort claims. *Id.* at 563; *see* Yifat Bitton, *Bringing Power Relations within the Scope of Negligence Liability*, 38 MISHPATIM 145, 199–214 (2008).
[122] Sex-segregation is generally unconstitutional based on its breach of a person's right to equality. HCJ 4541/94 Miller v. Minister of Def., PD 43, 49 (1995) (Isr.). In addition to being contrary to the constitutional right to equality in Israel, in the U.S., this practice

courts' suspension of women's right for either divorce or a tort claim,[123] where it might be possible to allege a religious motivation, this kind of suspension is applied by the highest instance of the civil court system against the system's own democratic values. Furthermore, the suspension of women's rights under the family law regime has been notoriously well-established from the State of Israel's founding,[124] while the suspension of rights in the constitutional domain was not introduced to the legal system before this case was handed down.[125]

2. Elections and Religiously Grounded Segregation

The *Bizchutan* case represents another Supreme Court ruling indicating a trend of ignoring women's rights.[126] Here, a group of young, vigorous, and brave ultra-orthodox women decided to rebel against their exclusion from participation in their community's representation in the Israeli parliament, the Knesset.[127] Strongly adhering to the notion of the public sphere as being reserved to men alone, ultra-orthodox religious male authorities dictate the systematic suppression of women from participating in any kind of partisan political activity, especially in its purest incarnation, the parliament.[128] The women in *Bizchutan*, however, decided to challenge this ban and founded a women-led party to run for Parliament in the 2015 national elections.[129] Striving to utilize their community's public media, the women's party sought to purchase advertisements in their community's most widely

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also counters the right to equality protected under federal and state antidiscrimination laws. *See* Cohen, *supra* note 76, at 553.

[123] *See supra*, main text at p. 680-82 (introducing the rabbinical courts' method of suspending the rights of women seeking divorce writ).

[124] HALPERIN-KADDARI, *supra* note 5, at 227-29.

[125] This is not to suggest that all the justified claims of women for equality were admitted, but rather to stress the fact that a suspension methodology of that kind is new to this legal regime.

[126] *See* TBC 17/20 Bizchutan v. Yom L'Yom, *1 (2015) (Isr.).

[127] *Id.* at 1–2.

[128] *Id.* at 3; Rimalt, *supra* note 1, at 99.

[129] TBC 17/20 Bizchutan v. Yom L'Yom, *1, *1 (2015) (Isr.).

circulated newspaper to launch their election campaign.[130] Unsurprisingly, the newspaper's management denied the women's request, leaving the women with no other relevant media outlet within the relevant ultra-orthodox community for voicing their campaign advertisements.[131] The newspaper had thus brutally abridged the women's right to freedom of speech based on its discriminatory opposition to the women's demand for free political expression.

Armed with evidence of this abridgement, the women sought protection from the election committee for the blatant discrimination by the newspapers and expected a writ ordering the newspapers to allocate some of their advertisement space for the women's use.[132] The committee, headed by a Supreme Court justice, dismissed the case even though the justice implied the newspapers' refusal was conceivably illegal; the justice stated, "This petition is not lacking in merit; rather, it seems to have strong footing."[133] He further referred to the women's right to equality during an election as a "superior principle,"[134] allegedly "comporting with the petitioners' claims."[135] Yet, rather than abolish the human rights violation presented before him, the justice decided to deny the petition.[136] In doing so, he counseled the petitioners to instead seek redress through one of Israel's tort ordinances, explaining it was the correct forum to advocate the women's grievances.[137] Unfortunately, this decision was given only one

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[130] *Id.*
[131] The Lithuanian Ultra-Orthodox community is highly isolated in Israel, and it is the main constituency that the women in Bizchutan come from, and were aiming for, in their campaign. This community has very few sanctioned media sources that community members are allowed to read, the newspaper in question being one of them. *Id.* at *3.
[132] *Id.* at *2.
[133] *Id.* at *4.
[134] TBC 17/20 Bizchutan v. Yom L'Yom, *1, *4–5 (2015) (Isr.).
[135] *Id.*
[136] *Id.* at *5.
[137] *Id.* at *4. The justice justified the decision by stating the petitioners had a more appropriate remedy of exercising their right under civil law to seek redress through another statute—the Law against Discrimination in Products and Services and in

month before the election itself, allowing no reasonable timetable for exhausting any tortious right that the party may or may not have possessed.[138] Undeterred by the election committee's denial of their petition, the women appealed to the district court, which granted them an executive order,[139] only to have the Supreme Court annul the order two days later on the ground that there was not enough time left to conduct a thorough consideration of the issues involved in the case due to the fact that the actual election was due in four days.[140]

Under these circumstances, the petitioners not only saw the denial of protection against the bigotry of patriarchal subordination, but were also prevented from using effective media exposure they desperately needed in order to facilitate their constitutional right as women to be elected.[141] At the same time, this decision affected the ultra-orthodox community's constitutional right to enjoy informed elections.[142]

In this case, as well as in the case of the segregated bus lines, women's right to equality, generally well entrenched in the Israeli legal system and recently granted constitutional status, has effectively been denied. How was such regressive development made possible? What tools can be used to conceptualize it? The next section addresses these puzzling queries.

Admission to Amusements Facilities and Public Places. 5761-2000, SH, No. 1765, 58 (Isr.).

[138] HCJ 1868/15 Yom L'Yom v. Bizchutan, *1, *1 (2015) (Isr.).

[139] TA 25435-03-15 Bizchutan v. Yom L'Yom, *1, *10 (2015) (Isr.).

[140] HCJ 1868/15 YomL'Yom v. Bizchutan, *1, *5-7 (2015) (Isr.). Although Justice Hendel used the formal excuse of "delayed pleading" to invalidate the mandatory injunction, he actually used terms implying the lack of reasonable time for deciding the case underlaid the ruling: "The picture arising from this description is that this delay has given rise to a situation under which questions of grave importance have not been able to receive adequate consideration . . . we are dealing here with complicated and highly important questions, that warrant careful and structured deliberation, unlimited by pressure or time constraints." *Id.* at *6.

[141] HCJ 8238/96 Abu-Arar v. Minister of Interior 18 PD 36, 26, 38-39 (1998) (Isr.) (discussing the constitutional importance of the right to elect and be elected).

[142] HCJ 142/89 Le'Or Movement v. Speaker of the Knesset, PD 44(3) 529, 554 (1985) (Isr.).

III. WOMEN'S RIGHT TO EQUALITY UNDER "STATE OF EXCEPTION"

In Part III, I turn to Giorgio Agamben's theoretical work. Drawing on two of his constitutive notions of "state of exclusion" and "suspension," I illustrate three evolutional stages of feminist-legal development: exclusion, lawlessness, and suspension. By engaging with Agamben's work, I criticize what I refer to as the third stage of women exclusion from the law's protection, where suspension tactics of hu(wo)man rights are used against women, who are being put under "state of exception." Later in this part, I focus on establishing the much-needed distinction between illegal suspension and legitimate referral of plaintiffs by courts to exhaust the former's legal rights elsewhere in the legal system. To this end, I define the scope of "suspension" based on a three-pronged test designed to identify its illegality.

A. From Lawlessness to Suspension

The legal system has yet to abolish women's outsider position.[143] The modern western legal system's disregard for women contaminates the system's missions and doctrines.[144] This failure to identify women's needs and redress their hurts was identified as a state of Lawlessness, where the lack of legal intervention accounted for lack of proper protection of women, who needed it.[145] The most prominent embodiment of Lawlessness was the legal perception of the home. Bound by the underpinnings of liberal thought, the legal system, feminists claimed, considered the home, which was, and to a substantial extent still is, an effectively feminine domain, a private haven, protected from the law's invasion, leaving the women at the mercy of Lawlessness.[146] The public-private dichotomy delineated the

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[143] CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 17, 23–24 (2005).
[144] Nadin Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW – A PROGRESSIVE CRITIQUE 151 (David Kairys ed., 1990).
[145] MACKINNON, *supra* note 146, at 17, 106–09.
[146] *Id.*

state's legitimate regulatory function with regard to the public, while ordering the state's refrainment from interfering with private matters. This dichotomy was used throughout the patriarchal tradition as a tool for preserving the inferior status of women in society.[147] This liberal proposition led legislatures and courts to promulgate statutes and doctrines that were blind to women's needs and suffering.[148] One such statute identified "rape" as only occurring if the woman was not the rapist's lawfully married wife.[149] The court's refusal to apply rules of fairness or to enforce intermarriage contractual relations embodied such desertion.[150] Similar phenomena is identifiable in Israeli law, albeit in a more subtle form.[151]

The law has progressed in including women. The law still forms and facilitates the inferiority of women to men, but liberal law continues to foster more rights designed to elevate women's status.[152] Within this new functionality, while the law is present in many aspects of women's lives and protects them against discrimination, the suspension of this protection is a new means for preserving women's vulnerable and inferior position as illustrated in the cases introduced above.[153]

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[147] *See* JOAN B. LANDES, FEMINISM: THE PUBLIC & THE PRIVATE 3–20 (1998).
[148] *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 11–29 (1992) (introducing the many ways in which the private/public distinction has been used to marginalize women).
[149] SUSAN ESTRICH, REAL RAPE 36-38 (1987).
[150] Thus, the First Restatement of the Law of Contracts (1932), § 587 states, "[B]argain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal." RESTATEMENT (FIRST) OF CONTRACTS § 587 (AM. LAW INST. 1932); *see generally* Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103, 1114–21 (1989) (suggests treating marriage as an investment partnership for divorce financial settlements).
[151] *See generally* READINGS IN LAW, GENDER AND FEMINISM (Daphne Barak-Erez et al. eds., 2007) (providing an analysis of how Israeli written law and case law are used to preserve the inferior status of women, and in particular under the private/public dichotomy discussed above).
[152] MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 37 (1992).
[153] *See* the cases introduced *supra* Part II (demonstrating women's rights suspension within liberal and modern law).

B. Suspension as Exception

In order to conceptualize the Israeli court decisions in this article as having employed an illegal suspension of women's rights, I wish to draw on Giorgio Agamben's political and legal theory of the State of Exception (Exception). Although a thorough discussion that would do justice to the depth of Agamben's body of scholarly work would exceed the limits of this article, shedding light on the prominent notion of Exception would be sufficiently effective in suggesting that suspending women's rights constitutes an Exception under his theory and that this Exception is the new Lawlessness.

Agamben critically conceptualizes the rise of power structures that governments employ in times of the supposed crises labeled as 'emergencies.' [154] Declared by the sovereign under his normal legal authority, which is the "Legal Norm," "emergency" is perceived to be the epitome of the preservation of the law, enjoying socio-legal legitimacy.[155] Temporal in nature, and therefore contrary to the persistence of a state of "Legal Norms," in reality, "emergency" often ends up becoming permanent and unremitting.[156] As Agamben described,

> Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law externally and

[154] GIORGIO AGAMBEN, STATE OF EXCEPTION 26 (2005). An example of such emergency is the declaration of "war on terrorism," as employed by the Bush administration pursuant to the 9/11 terror events. *See infra* notes 165-66 and accompanying text.

[155] This idea is encapsulated in the opening statement of Carl Schmitt's Political Theology: Four Chapters on the Concept of Sovereignty: "*Sovereign is he who decides on the exception. Only this definition can do justice to a borderline concept.*" CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (1985).

[156] Agamben argues that today there is no clear distinction between the Norm and the Exception, and the modern states tend to include the necessity and the exception within the juridical order itself. *See* AGAMBEN, *supra* note 157, at 26.

> producing a permanent state of exception internally—nevertheless still claims to be applying the law.[157]

Agamben further maintains that the state of Exception is in fact the desertion of law to an emerging "zone of anomie, in which violence without any juridical form acts."[158] And yet, the state of exception is not a state of pure violence outside the sphere of the law. Instead, it introduces a kind of sovereign violence that "neither makes nor preserves law, but suspends it."[159] In other words, in the modern liberal state, Norm and Exception are bound to one another, and the important task is not to delineate the two. Rather, it is to understand the way in which the Exception organizes and articulates itself through the very notion of the Law itself.[160] Consider, for instance, how this process played out in America's legal reactions to the 9/11 terror attacks. After 9/11, the Bush administration declared an ever-expanding state of Exception, in which more and more suspensions of law occurred in the name of the war against terrorism.[161] These constitutionally approved suspensions were gradually expanded with the active acquiescence of both the American Congress and the courts, to the point whereby ultimately and unavoidably, an exceptional rule of

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[157] *Id.* at 87.
[158] *Id.* at 59; *see* Stephen Humphreys, *Nomarchy: On the Rule of Law and Authority in Giorgio Agamben and Aristotle*, 19 CAMBRIDGE REV. INT'L AFF. 331–51 (2006).
[159] AGAMBEN, *supra* note 157, at 54. This distinction between violence and "pure violence" comes from Agamben's reading of the dialectical correspondence in Carl Schmitt's response to Walter Benjamin's definition of violence as being antithetical to a state of lawfulness. *See* WALTER BENJAMIN, *Critique of Violence*, *in* WALTER BENJAMIN: SELECTED WRITINGS, VOL 1: 1913–1926, at 239 (5th ed. 2002).
[160] According to Agamben, "the essential task of a theory of the state of exception is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place and modes of its relation to the law." AGAMBEN, *supra* note 157, at 51.
[161] Kim Lane Scheppele, *Law in Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1023 (2004); Rens van Munster, *The War on Terrorism: When the Exception Becomes the Rule*, 17 INT'L J. FOR SEMIOTICS OF L. 141, 142 (2004).

suspension became prevalent and normalized.[162] In Israel too, an official state of emergency has prevailed since the state's establishment in 1948, and has lasted ever since.[163] This state of emergency originally occurred at a time of extreme-war reality, which was perpetrated against the new Israeli state by adjacent Arab states.[164] Ever since though, it is extended from time to time, mostly in order to maintain the validity of the many administrative orders used by the IDF establishments as part of the fight against terror and illegal invasions by Palestinians.[165] The pervasiveness of the declaration, hence, goes beyond these "political" affairs to substantially affecting clearly "civilian" matters.[166]

Agamben's nonbinary perception aligns with Paul Khan's idea that the Legal Norm and the Exception swirl and attempt to control each other. Khan, a prominent legal-culture philosopher of constitutional law, maintains that the Legal Norm will always seek to extend toward the exceptional decisions and to normalize them.[167] At the same time, the Exception will also attempt to penetrate the legal order during both ordinary and exceptional moments.[168]

The cases discussed above illustrate how exceptions to the norm that is the women's legal right are introduced by the court, and in doing so the court creates suspension to the human rights of women. Namely, the women's right to both constitutional and family law recourses, as well as

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[162] Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 33 (2012).
[163] Yoav Mehozay, *The Fluid Jurisprudence of Israel's Emergency Powers: Legal Patchwork as a Governing Norm,* 46 L. SOC. REV. 137 (2012).
[164] *Id.* at 143.
[165] ZE'EV SEGAL, DEMOKRATIA ISRAELIT, 152, 158 (1990).
[166] Yuval Shany & Ido Rosenzwieg, *High Court of Justice Rejects Petition to End Israel's State of Emergency [HCJ 3091/99]*, 41 TERROR & DEMOCRACY (2012), http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-41/hcj-rejects-petition-to-end-israels-state-of-emergency/.
[167] PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 34 (2011).
[168] *See id.* at 54.

tort remedy, are reclassified by the court as mutually exclusive. Thus, this creates an exception, and in so doing suspends the human rights of the women. The realization of human rights requires that all possible remedies secure these rights and be available to the women. In the cases analyzed in this article, the suspension is far less overt in its declaration and far more focused in its application. As shown earlier, this suspension applies only to particular legal rights and is carried out within a framework that is formally governed by the law; it applies to tort-based rights, in realms where the legal system acts normally: constitutional petitions and family-related cases.[169] Such a suspension blurs the distinction between the Exception and the Norms greatly by manifesting no acute or distinctive signs of the crisis or emergency that typically give rise to a "state of exception" that suspends the relevance of the rule of law.[170] In other words, it mandates the identification of "Lawlessness" even in situations where the law prevails, as long as the court orders the suspension of one set of legal rights in deference to another: tort law versus family law (in the case of the rabbinical court), and tort law versus constitutional law (in the cases of the Supreme Court). This triviality and banality of exclusion is well echoed in Agamben's theory, where he states, "[I]n our age all citizens can be said, in a specific but extremely real sense, to appear virtually as *homines sacri.*"[171] Using this Latin phrase, Agamben pertains to yet another anchor concept he developed, the *Homo Sacer,* a person whose life is bare and unprotected by the law.[172] In the very same way, this realization resonates in Kahn's view

[169] *See* HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 534 (2008) (Isr.) (for suspension in constitutional realm); *see* HCJ 568/12 Mavoi Satum v. John Doe, *1, *3 (2013) (for suspension in family-related realm).
[170] *See* Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, 17 EUR. J. INT'L L. 677 (2006) (for a more comprehensive account).
[171] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 111 (1998).
[172] *Id.* at 8, 71.

that exceptional moments are perceptible as less radical and catastrophic and more ordinary and banal.[173]

In contrast to the common usage of Agamben's notion in subsequent critical theory as being primarily relevant in times of declared emergencies, my account of the state of exception is gendered: the exception represents an existential normality for women. This realization warrants introducing—this time, from a feminist perspective—two more key concepts of Agamben's pivotal political structures of Rule and Exception, namely Bare Life and Political Existence.

Agamben's work, though insightful and humanistic in nature, has been criticized by feminists for its gender blindness.[174] Feminist critics say Agamben failed to identify the unique modes of exclusion within inclusion that characterize women's experience; meaning that though they are "included" as citizens, women are nevertheless subjugated to unequal treatment under the law, and therefore, still "excluded." At its core, Agamben's work concentrates on the ways in which the distinction between citizens and noncitizens is a primary mechanism allowing a separate, yet legally justified, treatment of humans by the liberal state.[175] According to this distinction, the sovereign cherishes and protects the lives of citizens and their inherent rights, thereby rendering the citizens' existence political. These citizens enjoy Political Existence. In contrast, the lives of the noncitizen *homo sacers* and the rights they entail are constantly abridged by

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[173] KAHN, *supra* note 170, at 126. In this way, Kahn explains how exceptional moments "outside" the legal norm can be perceived not only on massive scale such as in revolutions or similar tremendous phenomena but also as Equity: a phenomenon of a political decision making exception in the norm on a much smaller scale. *Id.*

[174] E. P. Ziarek, *Feminist Aesthetics: Transformative Practice, Neoliberalism, and the Violence of Formalism*, 25 DIFFERENCES 101, 115 (2014); P. Deutscher, *The Inversion of Exceptionality: Foucault, Agamben, and "Reproductive Rights"*, 107 S. ATLANTIC Q. 55, 70 (2008). Deutscher, nevertheless, considers this genderless theory as having the potential to embrace the feminist standpoint. *Id*.

[175] *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989) (for the way the liberal state (dis)functions within an Exception).

the sovereign, rendering these second-class human beings exposed to Bare Life.[176]

The masculine inclination of Agamben's terms is primarily a result of the modern political order's masculine foundation, a fact Agamben failed to identify.[177] Women's social status does not align itself squarely with this border-identifying analysis that Agamben identifies in practices of differentiation and categorization of people as entertained by Western states.[178] While the sovereign formally identifies women as citizens and therefore normally set to enjoy its protections, this enjoyment only goes as far as men's rights allow them.[179] Consider, for example, a woman's right to exercise her sexual liberty and enjoy her sexual autonomy, which was confined to a man's property-based right to control his wife's sexuality as part of his rightful possession of her within the family.[180] This legal constellation challenges Agamben's paradigm and proves that acknowledgement as citizens can still expose an entire group of people to desertion and exclusion from the protection of the law as if they were *de facto* noncitizens.

The female experience of suppression under the law illustrates how the modern territories of liberal state "camps" that Agamben envisions as spaces of exclusion are not limited to identifiable camps designed to hold

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[176] *See, e.g.*, Joan Copjec, IMAGINE THERE IS NO WOMAN 27 (2002) (Copjec claims that Agamben failed to identify that masculine lives has become the foundation for the modern political order).
[177] DEUTSCHER, *supra* note 177, at 59.
[178] *See* Michalinos Zembylas, *Agamben's Theory of Biopower*, 26 J. CURRICULUM THEORIZING 31, 38 (2010) (describes the typical person Agamben envisions as universalist).
[179] *See generally* Susan Buck-Morss, *Hegel and Haiti*, 26 CRITICAL INQUIRY 821 (separating politics from the economy as establishing the gendered supremacy of men over women); *see also* JOAN WALLACH SCOTT, ONLY PARADOXES TO OFFER: FRENCH FEMINISTS AND THE RIGHTS OF MAN 2–3 (1996) (during the greatest democratization process in French history, women were excluded from participating in promulgating the process's underlying premises).
[180] Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 73 (1988).

(or sterilize) women in order to "draw the line" between them and men.[181] Instead, women are put in symbolic, rather than physical or noticeable, camps whenever the sovereign systematically neglects to protect the women's rights.[182] Women, therefore, encompass realms of Bare Life alongside their Political Existence within their individual bodies. However, Agamben's analysis and observations are still relevant to women. His fascination with the conceptual field of the "in-between" and the "indistinction zone,"[183] where it is impossible to identify social exclusion without identifying inclusion at the same time, resonates with women's rights. In this space, an inclusion into a political community only seems possible through simultaneous exclusion of others who are unable to become full legal subjects.[184] The feminist voice does, however, call for a more nuanced application of this notion; one that will take the peculiarities characterizing the gendered experience of women and the hierarchies of the *Homo Sacer* that gender reveals within Agamben's theory into account.[185]

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[181] PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL 238 (2008). Moreover, the experience of a "bare life" of women's desertion by their own sovereign government and judiciary is rarely as extreme and abhorrent as in the ruling of Justice O.W. Holmes Jr. in Buck v. Bell. *See generally* Buck v. Bell, 274 U.S. 200 (1927) (allowing compulsory sterilization of mentally disabled woman).

[182] AGAMBEN, HOMO SACER, *supra* note 174, at 174. Agamben describes concentration camps in Nazi Germany, as the embodiment of such territory, but widens it to current liberal states where, for example, there are areas in airports that are designated for refugees seeking shelter where the refugees are put outside the protection of law and under the violent sovereignty of police forces. *Id.*

[183] This characteristic of Agamben's work is a common thread that goes beyond his *Homo Sacer* project. *See* PHILIPPE MESNARD, *The Political Philosophy of Giorgio Agamben: A Critical Evaluation*, 5 TOTALITARIAN MOVEMENTS & POL. RELIGIONS 139, 140 (2004).

[184] AGAMBEN, HOMO SACER, *supra* note 174, at 181. It is therefore assumed that this borderline "zone of indistinction" is where law and its absence render only some communities legal subjects.

[185] Agamben's work, in this respect, can be seen as too dichotomous, as it seeks to identify the moment in which the *Homo Sacer* is constituted, rather than recognizing the continuum upon which he/she operates. *See* Thomas Lemke, *"A Zone of Indistinction" – A Critique of Giorgio Agamben's Concept of Biopolitics*, 7 OUTLINES 8, 8-9 (2005).

Returning to the case of Israel, two more notions are useful for conceptualizing the suspension's damaging effect to women. Agamben identifies two elements as accompanying the process of "exclusion" by the sovereign: desertion and sacredness.[186] The desertion element relates to a lack of effective legal protection where it should have applied, while the sacredness element requires the excluded subject to make a sacrifice that strips him or her of sacred rights.[187] Further, Agamben criticizes the notion of sacredness involved in the process, arguing it reduces living to its minimal experience: that of simply being alive and not being endowed with human rights.[188] These elements manifest when Jewish women attempt to exert their tortious rights. First, courts' decisions in the *get* and bus segregation embody the notion of desertion, but in a manner somewhat different from the one portrayed by Agamben. Here, the desertion is not total or formal. Moreover, it is the kind of desertion done with sympathy and aimed at pursuing *other* legal remedies available to the women petitioning the court.[189] Second, the sacredness in these situations is applied through the court's implied supposition that the women petitioners enjoy some rights while deprived of others, thus securing the sacredness of their being. Identifying the Israeli cases as demonstrating Agamben's critical theory is possible by treating them as a more nuanced, gendered, and individualized manner of exclusion.

In sum, sketching the feminist evolution from an Agambenian perspective may be described as follows: at the early stages of modern citizenship women fought to harmonize their formal recognition as citizens

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[186] RASMUS UGILT, GIORGIO AGAMBEN: POLITICAL PHILOSOPHY 44-46 (2014).
[187] AGAMBEN, HOMO SACER, *supra* note 174, at 8; *see also* A. S. Purakayastha & S. S. Das, *Absolutist Democracy, Homo Sacer and the Resistance of Bare Life*, 6 HISTORY & SOC. S. ASIA 111, 118–119 (2012) (additional elaboration on this status).
[188] *Id. at 45; see also* UGILT, *supra* note 189, at 44-46. (elaborative discussion of this element in Agamben's work).
[189] *See* HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 563 (2008) (Isr.).

with their substantive basic citizenship rights.[190] Foremost among these rights is the right to vote.[191] Upon achieving these primary rights in most liberal states, women turned their focus to "secondary" rights that made their lives political rather than merely natural, as Agamben would put it.[192] In other words, they moved on to the next battle proving women were entitled to the law protecting their rights, even at times when these conflicted with men's liberties. Examples of battles waged at this stage are ample, such as abolishing the law that protected a (male) citizen's house from outer invasion, but left the (female) citizen in it to be physically invaded against her will;[193] laws that enabled men to be excused of murder charges when claiming an "honor killing" of their wives;[194] and laws that rendered a man eligible for compensation when a woman under his auspice had a sexual encounter with another man.[195]

To support this evolutional development, I propose a third stage where women ask that their rights not only be included, but that once included their rights would not be re-suspended for any reason. This plea for sustainable inclusion is aimed at the adjudicative sovereign tacitly declaring a state of exception for women in response to identifying emergencies allegedly emanating from a threat to the state. In our case, it is the threat generated by women's challenge to conservative and restrictive religious practices. At this stage, the ability of women to name the suspension of rights they underwent as a "state of exclusion" weakens, and therefore requires the kind of reconceptualization and theoretical contextualization offered by the present article. The cases described here work within a

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[190] ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 9 (1999).
[191] *Id.* at 15.
[192] AGAMBEN, HOMO SACER, *supra* note 174, at 188.
[193] Estrich, *supra* note 152 (the law allowing men to coerce his wife into sexual intercourse without being perceived as raping her is one outrageous example).
[194] Orit Kamir, *Honor and Dignity in the Film Unforgiven: Implications for Sociolegal Theory*, 40 L. & SOC. REV. 193, 199 (2006).
[195] Sarah Swan, *Triangulated Rape,* 37 N.Y.U. REV. L. & SOC. CHANGE 403, 410 (2013).

women-only exception, with these women suffering a very sophisticated and subtle suspension of their rights. With this in mind, I will now turn to exploring these peculiarities.

C. Women's State of Exception: Referral as Suspension

The state of exception Israel faces in the form of its proclaimed state of emergency allows for a subtle undeclared and normalized suspension of women's rights.[196] The exception is expressed and exercised through suspension tactics as demonstrated in the Israeli *get*, bus, and voting cases, even though the courts claimed that women's rights were not being denied.[197] Rather, the plaintiff women had asked to choose one of two recourses available to them or were referred to alternative reliefs within the legal system.[198]

While the *get* case is the epitome of suspension, since the woman was literally asked to withdraw her tort claim or suffer the suspension of her divorce claim, the segregation cases, where the women were referred to an alternative legal route, warrant a more careful analysis. Could such a referral not be considered legitimate? Arguably, referring a party to utilize an alternative legal route would be considered fair in some contexts, including lack of jurisdiction, efficiency, or aptitude in a chosen legal field.[199] How then should the line be drawn between legitimate and illegitimate referral? I suggest that an illegitimate Agembenian suspension is created in circumstances where the referral is done by virtue of the court's political reluctance to grant the petitioner her basic legal right. Suspension occurs where the court has jurisdiction over the case, but refuses to adjudicate it and in so doing limits the scope of protection

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[196] *See* Part IIIB (conceptualizing "suspension" of rights in liberal states).
[197] *See* Part II (analysis indicating that though the women's rights were acknowledged by courts, they were nevertheless suspended).
[198] *Id.*
[199] Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy,* 102 NW. U. L. REV. 1547, 1553 (2008).

guaranteed to the petitioner but for the referral. All of the following circumstances apply in the cases above: (1) the court's decisions were given in religious contexts, where political-pragmatism tactics often nurture the Israeli courts' reluctance to assist women; (2) the court had clear jurisdiction over the cases; and (3) the scope of protection of these women's rights was indeed limited due to the vertical referral from the constitutional route to the torts route.

1. Political Reluctance to Protect the Petitioners

The reluctance of Israeli courts to protect a woman's right to equality is deeply entrenched and based in political pragmatism regarding discriminatory religious practices. This is especially the case in family and religious matters. With regard to marriage, Israeli law provides that a woman in Israel cannot marry outside of the patriarchal domination of her religion,[200] and there is no civil-marriage institution.[201] There is also the matter of reproductive rights. While an encompassing discussion of this issue is beyond the scope of this article, it is worth mentioning that Israeli law prohibits a married couple from conceiving with the help of a surrogate mother outside their religion.[202] This prohibition stems from the Israeli Supreme Court's recognition of Jewishness as being defined by a matriarchal lineage rule established in Halakhic law (or more specifically, its rabbinical orthodox interpretation).[203] Furthermore, an Israeli woman

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[200] To be clear, this effective ban on inter-religious marriage has been shown to affect women more than men in Israel. *See* Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, "Our" Women, and the Law,* 30 WOMEN'S RT. L. REP. 479, 503 (2009) (for an elaboration of this point).

[201] Marriage and Divorce Law, 5713-1953 §2, S.H. 134, 186 (Isr.); *see* SUSAN M. WEISS & NETTY C. GROSS-HOROWITZ, MARRIAGE AND DIVORCE IN THE JEWISH STATE: ISRAEL'S CIVIL WAR 2 (2013) (for the implications of having no secular marriage institution on women).

[202] Certification of the Agreement and Status of the Newborn Law, 5756-1996 §2, S.H. 1577, 176 (Isr.).

[203] Ayelet Shachar, *Citizenship and Membership in Israeli Polity*, *in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 188 (Alexis Aleinikoff & Douglas

who wishes to be a single-parent mother through surrogacy may not do so—as ruled by the Israeli Supreme Court in *New Family v. The Committee on the Authorization of Agreements Concerning the Carriage of Embryos*, because of the religious issues stemming from having a child from the seed of a man a woman is not married to.[204]

The civil courts in general, and the Israeli Supreme Court in particular, are not ignorant or declaratively indifferent to the difficulties of women facing their recalcitrant husbands, and at times note their discontent quite bluntly. In the case of *Rephaeli v. Rephaeli*, for example, the Grand Rabbinical Court overturned an order for punitive maintenance on a recalcitrant husband who was physically abusing his wife as well as being unfaithful.[205] Consequently, the wife left the house, and the husband, separated from his wife for over six years, refused to give her a *get.*[206] The lower rabbinical court based its decision on the violence and infidelity rules in order to grant the wife punitive damages.[207] The Grand Rabbinical Court later overturned this decision, stating that even assuming violence and infidelity were proven, there could be no punitive maintenance absent forewarning.[208] It is important to note that in this case the Israel Supreme

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Klusmeyer eds., 2000). The implications for non-Jewish women in Israel are even more absurd, while the imposition of Jewish Law on Jewish women wishing to have a child is infuriating. The imposition of Jewish rationales to constrain Christian, Muslim, or nondenominational women wishing to be mothers through surrogacy in Israel borders on Kafkaesque absurdity.

[204] HCJ 2458/01 New Family v. The Comm. on the Authorization of Agreements Concerning the Carriage of Embryos, PD 57, 419, 468–79 (2001) (Isr.). For the *mamzer* status, see *supra* note 49-50. In his ruling addressing the question of discrimination, Justice Englard went so far as to say that "[T]he Process of Surrogacy involves the usage of a stranger's uterus, and in the case of the unmarried women also the usage of the donor sperm of a stranger. This state of affairs, we have seen, raises grave moral and Halackhic problems. . .this is not a matter of equality among equals, this a matter of unsameness among those who are not the same." *Id.* at 479.

[205] HCJ 1371/96 Rephaeli v. Rephaeli, PD 51, 198 (1998) (Isr.).

[206] *Id.* at 201.

[207] *Id*.

[208] *Id.* at 202.

Court, after accepting certiorari, had to decide between two decisions stemming from Jewish Law—the first from the lower rabbinical court and the second from the Grand Rabbinical Court. Thus, the Supreme Court was not even required in its decision to go beyond religious arguments and address matters concerning the freedom of conscience or the freedom to remarry in order to grant the woman her relief by reinstating the decision of the lower rabbinical court.[209] The woman was clearly going through a quintessential Bare Life experience. Justice Cheshin's ruling articulated this when he held that the plaintiff was being treated worse than the biblical slave looking forward to his sixth year of enslavement, when he would finally be set free.[210] Yet Justice Cheshin, along with his fellow justices, refused to intervene in the Grand Rabbinical Court's decision. Claiming deference to the Grand Rabbinical Court, the Supreme Court as the High Court of Justice refused to grant a remedy. The court stated that it did not sit as an appeals instance for factual and Jewish halahkhaic disagreements among the rabbinical courts, and dismissed the woman's injunction, thus deserting her to fend for herself.[211] In doing so, the Supreme Court disregarded both the plaintiff's right to equality by upholding her recalcitrant and abusive husband's power over her, and her right to autonomy to be able to bring an end to the marriage and move on with her life.[212] Moreover, based on the politically motivated reluctance to rule over matters of religious Jewish law and come into conflict with the Grand Rabbinical Court, the Israeli Supreme Court had jurisdiction over the case to give a remedy in the interests of justice.[213] The Supreme Court also

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[209] *Id.*
[210] *Id.* (Chechin, J., concurring).
[211] *Id.* at 203.
[212] *Id.*
[213] *Infra* note 228 (indicating that the Israeli High Court of Justice had clear jurisdiction to adjudicate the cases).

committed here an illegitimate referral when upon dismissing the case suggesting that the plaintiff could petition the rabbinical court once again.[214]

Israeli courts' political pragmatism with regard to discriminatory religious practices is hardly limited to the private sphere and matters of family life, but also extends into the public sphere and issues of free practice of religion and worship in the public sphere. In the *Prime Minister Office Director General v. Hoffman* case, the Supreme Court rejected the petition of the women who demanded permission to pray at the sacred Wailing Wall of Jerusalem.[215] In its rhetoric, the court affirmed the women's right to religious worship including their right to pray and read the Torah out loud in a manner that was contrary to ultra-orthodox conventions.[216] Ultimately, however, the court refused the women's demand to allow them use of the Wailing Wall's public space designated to women and went on to order the government to merely designate a separate and segregated remote worship area so as to not offend the sensitivities of the other worshippers not accustomed to women praying and reading the Torah simultaneously.[217]

2. Jurisdiction

The Israel Supreme Court serves in the capacity of the High Court of Justice on the grounds of Article 15(c) as well as 15(d)(2) of the Basic Law: The Judiciary. This law establishes that the Supreme Court presides as the High Court of Justice, which may grant injunctions and writs to state authorities, municipal authorities, and other persons that fulfill public

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[214] HCJ 1371/96 Rephaeli v. Rephaeli, PD 51, 198 (1998) (Isr.) (¶ 18 in Justice Or's ruling).
[215] AHCJ 4120/00, Prime Minister Office Dir. Gen. v. Anat Hoffman et al., PD 47, 289 (2003) (Isr.).
[216] *Id.* at 298.
[217] *Id.* at 319; *see also* Raday, *supra* note 9, at 86–87 (reviews the Women of the Wall group's legal battles).

functions in matters where it sees a necessity to grant a remedy in the interests of Justice.[218]

In 1985, even before what is sometimes referred to as the Israeli *Constitutional Revolution,* the Israeli Supreme Court made it clear that it had jurisdiction over the executive and legislative branches in applying judicial review.[219] Moreover, the Supreme Court in its role as the High Court of Justice also referred to the concept of applying judicial review to laws in cases where those laws conflicted with the "the fundamental principles of Israel's democratic regime."[220] Following this, in 1992, during the *Constitutional Revolution* itself, the Knesset passed the Basic Law: Human Dignity and Liberty,[221] and the Supreme Court announced the advent of the *Constitutional Revolution*, stating that this Basic Law was nothing short of Israel's "Bill of Rights."[222] This reasoning enabled judicial review and imbued the Supreme Court with the authority to invalidate laws, regardless of their secular or religious nature, that infringe upon the rights enshrined in the Basic Law.[223]

Armed with these developments, the Israeli Supreme Court began what is often referred to as its era of judicial activism.[224] The Israeli Supreme Court issued a string of important decisions to both the executive and legislative branches, which included ordering municipalities to build facilities with full

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[218] The Judiciary § 15, 5744-1984, S.H. 1110, 78 (Isr.).
[219] HCJ 620/85 Miari v. Speaker of the Knesset, PD 39(3) 122, 127 (1985) (Isr.).
[220] HCJ 142/89 Le'Or Movement v. Speaker of the Knesset, PD 44(3) 529, 554 (1985) (Isr.).
[221] Human Dignity and Liberty, 5752-1992, S.H. 1391, 150 (Isr.).
[222] Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of a Bill of Rights in Canada and Israel*, 53 AM. J. COM. L. 293, 312 (2005).
[223] *See* CA 6821/93 Bank Ha'mizrachi Hameuchad v. Migdal, PD 49(4) 221, 419-27 (1994).
[224] To clarify, this term was often used by the HCJ's critics arguing against this kind of robust application of substantive justice. *See* Yoav Dotan, *Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism*, 8 ISR. AFF. 87, 87-106 (2002); *see* Gad Barzilai, *Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics, and the Israeli Arab-Palestinian Community*, 34 ISRAEL L. REV. 425 (2000).

access to disabled people.[225] It also ordered the IDF to open Israel Air-Force recruitment to women.[226] It affirmed the rights of homosexuals employed by a national public transportation company to equal treatment;[227] and even went as far as ordering the government to build a road connecting a Bedouin village constructed without permits with a school pupils from that village had trouble getting to.[228] All of these interventions were done in the name of the right to equality and in order to safeguard this right's constitutional cogency.[229]

First, with regard to the *Bizchutan* case and the issue of protecting women's right to political inclusion, the Israeli Supreme Court failed to fulfill its commitment to ensure Israeli citizens' political expression. Long before the *Constitutional Revolution,* in the monumental *Kol-Ha'am v. The Minister of the Interior PD* decision, the Israeli Supreme Court ruled that political free speech is part of an "inner-circle."[230] That is, that political free speech is the most sacred level of protected speech, so important and vital to a democratic society's functioning that it must not be infringed upon.[231] Second, in the *Bavli v. Grand Rabbinical Court* case the High Court of Justice (HCJ) ruled that religious tribunals were bound by general legal and constitutional principles as elucidated by either legislation or through case law bound religious tribunals.[232] This allowed the HCJ to strike down decisions made by the Grand Rabbinical Court in case these decisions

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[225] HCJ 7081/93 Botzer v. The Local Council of Maccabim-Re'ut, PD 50, 19, 27 (1996) (Isr.).
[226] HCJ 4541/94 Miller v. Minister of Defence, PD 43, 49 (1995) (Isr.).
[227] HCJ 721/94 El-Al v. Danilovitch, PD 48(5) 749, 773 (1994) (Isr.).
[228] HCJ 3511/02 The Ass'n "The Forum for Cohabitation in the Negev" v. The Ministry of Infrastructure, PD 27(2) 102, 107 (2003) (Isr.).
[229] HCJ 721/94 El-Al v. Danilovitch, PD 48(5) 749, 760 (1994) (Isr.).
[230] HCJ 73/53 Kol Ha'am v. The Minister of the Interior PD 7(2), 871, 878 (1953) (Isr.).
[231] *Id*.; *see also* Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L. Q. 21, 66 (1982) (for elaboration on the freedom of political speech).
[232] HCJ 1000/92 Bavli v. Grand Rabbinical Court*,* PD 48(2) 221, 240 (1994) (Isr.).

infringed upon the constitutional rights of petitioning women.[233] In the *Regan* case, the illegality of segregating women from men was professed through some of Israel's constitutive laws.[234] First, this illegality is present within Israel's Declaration of Establishment, which states, "The state of Israel. . .will ensure complete equality. . .irrespective of. . .sex."[235] Second, the Women's Equality Act of 1951 provides that "Women and men shall be equal for purposes of every legal act."[236]

Indeed, examples exist where these principles guided the Supreme Court in its capacity as the HCJ to substantively, as opposed to only declaratively, prefer these principles over religious values in the public sphere. In the *Shakdiel v. Minister for Religious Affairs* case, the Ministry for Religious Affairs refused to appoint a woman to a local religious services council.[237] In the *Poraz v. Mayer of Tel Aviv* case, the municipal council of Tel Aviv refused to appoint a woman to the nominating board for the Tel Aviv municipal rabbi.[238] In both cases, the defendants argued that under Jewish Law women may not sit on electoral committees or hold public office.[239] The Israeli Supreme Court rejected this argument and ruled that these were statutory public institutions, and that the women plaintiffs had a *fundamental right to equality*, thus obligating the institutions to accept female members.[240]

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[233] *Id.*
[234] *See* HCJ 746/07 Regan v. Ministry of Transp., PD 48(2) 221, 240 (1994) (Isr.).
[235] Jewish People's Council, Declaration of the Establishment of State of Israel of 14 May 1948, http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx.
[236] Equal Rights For Women Law, 5711-1951, 1A(a), *translated at* http://financeisrael.mof.gov.il/FinanceIsrael/Docs/En/legislation/LaborSocialPolicy/5711-1951_Equal_Rights_for_Women_Law.pdf.
[237] HCJ 153/87 Shakdiel v. Minister for Religious Affairs 42(2) PD 221, 228 (1987) (Isr.).
[238] HCJ 953/87 Poraz v. Mayor of Tel Aviv 42(2) PD 309, 318 (1987) (Isr.).
[239] HCJ 153/87, Shakdiel v. Minister for Religious Affairs 42(2) PD 221, 234 (1987) (Isr.); HCJ 953/87 Poraz v. Mayor of Tel Aviv 42(2) PD 309, 322 (1987) (Isr.).
[240] HCJ 153/87, Shakdiel v. Minister for Religious Affairs 42(2) PD 221, 274 (1987) (Isr.); HCJ 953/87 Poraz v. Mayor of Tel Aviv 42(2) PD 309, 329 (1987) (Isr.).

3. Limiting Vertical Referral

Referring a petition based on violation of constitutional rights claim to the tort route is vertical referral; this section introduces the vertical nature of the referral by delineating the hierarchy between the constitutional route and the tort route, and it then moves to present three arguments against vertical referral.

The tort and constitutional routes differ so much from each other that it seems almost unnecessary, and to some extent impossible, to compare the scopes of protection they offer to women's right to equality. Our intuitive recognition that constitutional protection is far more preferable to women needs only little explanation. The distinctive, rudimentary, and quintessential elements of each of these legal fields places these fields in a clear hierarchical structure in which constitutional protection is dominant.[241] It is certainly possible to argue that the referral of a matter of significant public hu(wo)man interest from the constitutional to the tort route is a downgrading referral, since it causes the claims in question to become depoliticized and weakened in several important ways.

First, the claims undergo a definitional transformation. When a matter becomes the subject of a tort claim, it transforms from a matter of public importance to one of a private nature.[242] In other words, this is a situation where the court essentially privatizes a public problem. The idea behind using torts to affect public change is promulgated by the concept of the plaintiff operating as a kind of private attorney general who exacts a monetary cost on the undesirable behavior and thus deters potential defendants from carrying out this behavior in the future.[243] While this approach of transforming a public matter into a private claim in tort may

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[241] CA 6821/93 Bank Ha'mizrachi Hameuchad v. Migdal, PD 49(4) 221, 292-319, 353 (1994).
[242] ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 70–71, 74 (1995).
[243] *See* John Goldberg & Benjamin Zipursky, *Torts as Wrongs*, 88 TEX. L. REV., 917, 946–47 (2010) (for the similarity between a prosecutor and a tort claimant); *see* John C.P. Goldberg, *Twentieth-Century Tort Theory,* 91 GEO. L.J. 513, 548 (2003) (for deterrence).

seem benign and morally neutral, it is important to stress that this model of deterrence, by using private plaintiffs, exists alongside a theory of economic efficiency. In this theory, the plaintiff, rather than the state, is trying to create deterrence through a civil claim that is actually rather conservative.[244] For example, by referring the case to the tort route, the Supreme Court is actually telling the segregated-bus plaintiffs that under economic efficiency theory, the cheapest agents to prevent[245] the harm caused by discriminatory segregation are the women themselves.[246] Rather, the Israeli Supreme Court should have identified itself as the cheapest cost avoider, one that can prohibit the segregating policy altogether and prevent it *ex ante*.[247] This is only true, of course, under the artificial premise that the court is just a neutral arbiter in private law, not a guardian of the disenfranchised as it rhetorically sees itself in the public constitutional context.[248] This kind of neutrality, typical to tort disputes,[249] tends to preserve existing interests that are vested in the preservation of the status quo of power disparity between the plaintiff women and the particular tortfeasor.[250]

Second, the referral is not only detrimental to the plaintiffs, but also puts judges of lower instances (i.e., magistrates and district court judges) deciding the tort cases in a complicated position. On the one hand, the

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[244] James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory,* 15 L. & HIST. REV. 275, 314–15 (1997).
[245] GUIDO CALABRESI, THE COST OF ACCIDENTS 67 (1970).
[246] Yoav Dotan*, Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 L. & SOC'Y REV., 319, 320 (1999) (argues that courts use either rhetoric or settlement tactics to protect human rights).
[247] *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (for the cheapest cost avoider of the harm principle).
[248] *See* HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 552-554 (2008) (Isr.).
[249] Leslie Bender, *Feminist (Re)Torts: Thoughts on The Liability Crisis, Mass Torts, Power, and Responsibilities,* 1990 DUKE L.J. 848, 853 (1990) (criticizing the alleged neutrality of courts to tort dispute parties, since tort law actually benefits hegemonic parties to a tort dispute).
[250] Russel Korobkin, *The Status Quo Bias and Contract Default Rules,* 83 CORNELL L. REV. 608, 625 (1998).

Supreme Court has referred the plaintiffs to these courts to seek a remedy on torts; on the other hand, by dismissing the petitions the Supreme Court is seen as giving these practices a constitutional seal of approval, which makes it difficult for the plaintiffs to prove the harm element that is necessary for their tort suit to be successful. Therefore, the judges of the lower instances deciding these tort cases face the need to decide upon a tort claim for discrimination regarding an act that the Supreme Court just deemed constitutional and compatible with equality. For example, consider the public segregation ordeal where the Supreme Court's decision created a dichotomy in which the practice is either consensual—and thus legal, as far as the bus company is concerned—or coerced, and hence presumed to be the act of a private overzealous individual who should in turn be sued for damages.[251] Indeed, this problem manifested in a suit where the plaintiff included the transportation company in her plea, and the latter asked for immunity due to the Supreme Court's decision in *Regan* and based on "national aspects."[252] This contention of the transportation company, that their allegedly wrongful actions were rendered illegitimate in public legal venues, illustrates how constitutional issues of public relevance are more suitable to resolving the case. The civil district judge who reviewed the *Bizchutan* case overtly raised this concern and the uneasiness it causes to low-instance civil court judges. That judge opined that the case touched upon fundamental basic rights such as the right to equality, the right to be

[251] Essentially, under *Regan*, as long as the public transportation companies refrain from coercing segregation directly through their employees, or through instructions ordering passengers to sit in segregated areas, they would be virtually immune to any tort claim by a woman, even one who was coerced to comply with the segregated practice.

[252] CA 2356/08 Yasur Ruth Ray v. Egged, *1, *7–*13 (2014) (Isr.) (This case featured a class action suit against a public transportation company operating an inter-city segregated bus line. Although the claim for immunity was eventually rejected by the court, the judge still invoked a rationale for it that would go beyond identifying the discriminatory practice as being illegal in and of itself.).

elected, which he deemed of crucial weight, and the rights that go beyond his jurisdiction.[253]

Thirdly, such referrals to the lower courts via the tort route are not without practical, and sometimes significant, financial consequences for the plaintiffs, since pursuing tort claims demands the investment of considerable resources by the women plaintiffs.[254] Finally, the referral creates a mechanism that only becomes relevant after the fact, but creates no direct *ex ante* protections against the harm inflicted in the first place.[255]

Thus, we see that much like the veritable power Agamben identified in his work, the power embedded in the decision to refer by way of suspension can render "power" to women, while at the same time render these women "powerless."[256]

IV. TORT LAW SHOULD COMPLEMENT OTHER HU(WO)MAN RIGHTS LAWS

The notion of tort law as a tool for enhancing human rights has recently emerged by theorists advocating its role in pursuing equalities, even within its traditional corrective-justice paradigm.[257] However, these theories do not engage with the type of challenge presented in this article. This challenge relates to a constellation whereby tort law is measured against another legal tool as potential and alternative protector of human rights. This constellation constitutes a more direct challenge to the disposition of tort

[253] TBC 17/20 Bizchutan v. Yom L'Yom, *1, *16-17 (2015) (Isr.).
[254] Normally in Israel, court fees for a civil suit amount to 2.5 percent of the total sum sought by the plaintiff for compensation, as stipulated in Article 6 of the Court Regulations. Court Regulations (Fees), 2007, KT 6579 p. 720 (Isr.). Attorney fees are also paid in advance. *Id.*
[255] Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 L. & HUMAN BEHAV. 89, 89-92 (1995).
[256] Geraldine Pratt, *Abandoned Women and Spaces of the Exception,* 37 ANTIPODE 1052, 1062 (2005).
[257] Michael E. Schrader, *Competition and Convenience: The Emerging Role of Community Reinvestment*, 67 IND. L.J. 347, 359 (1992).

law in relation to other legal branches of law available to wage the struggle to secure the hu(wo)man right to equality.[258]

To this end, a theory regarding the relations between tort law and constitutional law in contexts of overlapping relevance is what is at stake. The tort route and the constitutional route can operate in either a complementary, that is, in addition to the use of tort claims, or a mutually exclusive way, that is, one employing suspension of the constitutional right. Under the notion of complementarity, constitutional law acts as the metaphoric shield by protecting women's rights, while tort law acts as the metaphoric sword by allowing women to receive compensation for violations of those rights. The plaintiff can then make a strategic choice with regard to how both routes may be deployable at the same time. If she is being suppressed, excluded, and placed at a great power disadvantage, then the plaintiff may want to use the "shield," that is, the constitutional route to nullify or diminish the harm done to her. If, on the other hand, she has more time and wishes to be more precise against the particular actor causing her the harm, she may choose to use the sword, that is, the torts route. These actions might seem sequential, but they are not. In keeping with the metaphor, they are means in combat to be used in the order and frequency of the plaintiff's choosing, always available to her and always complementary. The complementarity of tort law encapsulated in its synchronic usability, along with other available legal redresses, puts the injured plaintiff at the forefront, allowing her the legal choice she deserves, as the person whose rights were abridged.[259] This empowerment is specifically essential to women because in the third stage of the evolutionary development articulated in this article, women plaintiffs find

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[258] Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation,* 24 HASTINGS INT'L & COMP. L. REV. 401, 408 (2001).

[259] In this respect, the complementary way lies at the heart of what can be referred to as Social Justice Theory of Tort Law. This theory, in a nutshell, advocates the importance of using tort law as a means to promote a women's own sentiments as to social matters. Goldberg, *supra* note 246, at 561.

themselves mid-battle, suddenly told that the normal rules have been suspended, and they must now choose between sword and shield to sustain their human rights.

Vulnerability theory to torts, developed and advocated elsewhere, would support the complementarity solution. Moreover, this theory would advocate its application to an extent that goes beyond even the constitutional-tort interplay towards diverse fields of law that may overlap with tort law regarding to women's basic rights.[260] Torts vulnerability theory is premised on the idea that tort law should serve to eliminate abusive social power relations and compensate victims for these relations' inferred harms. The theory advocates the compensation of those parties who sustained their harms through their tortfeasors' abuse of the power relations within which the parties interact.[261] Untraditional as it is, this theory draws on the notion of "reciprocity" introduced in George Fletcher's well-known and accepted theory of tort law. Reciprocity focuses tort liability on the degree of risk that the parties in a lawsuit impose on each other, advocating the imposition of liability only when the risk taken by the tortfeasor against the victim exceeds the degree of risk normally inflicted by people in society, that is, non-reciprocal risk.[262] Fletcher submits that this perception of unwanted risk-taking offers better protection of individual interests than the paradigm of reasonableness, which assigns liability based on a utilitarian calculus.[263] This social understanding is what justifies the imposition of tort liability in cases where the tortfeasor inflicts harm on the victim through the exercise of a risk that is not reciprocal in nature, or risk

[260] ASHER FLYNN, NICOLA HENRY & ANASTASIA POWELL, RAPE JUSTICE: BEYOND THE CRIMINAL LAW 112 (2015).
[261] Bitton, *supra* note 10, at 246.
[262] *Id.* at 541.
[263] George P. Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537, 541-548 (1972).

that despite being "reciprocal" was not reasonably executed, and therefore constitutes negligent behavior.[264]

Pursuant to Fletcher's ideas, vulnerability theory identifies discrimination with nonreciprocal risks and maintains that negligence law should serve to impose liability on tortfeasors vis-à-vis victims of their discriminatory acts.[265] The power relations existing between the rival parties are rendered nonreciprocal, and whenever the abuse of these relations triggers dispute, vulnerability theory calls for the imposition of liability on the victim's abuser.[266] This theory's main concern, in accordance with the liberal stance on basic liberties, lies with power relations characterized as "suspect," that is, as reflecting "old and bad" discriminatory relationships based on race, sex, religion, and disability.[267] Such power relations lie at the heart of heinous social structures that endanger the wholesomeness of democracy, and therefore justify the harnessing of the tort-law mechanism for protecting society against the harm inflicted upon it.[268]

Although vulnerability theory brings into account the general social structure within which power relations might render a discriminatory behavior "non-reciprocal," vulnerability theory still remains within the bounds of the bilateral dispute splitting the parties.[269] In light of this fact, this theory is especially suitable for accommodating the challenge that suspension poses to women's rights. Due to its focus on power relations, it would point to the harms inflicted upon the women in the cases presented

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[264] *Id.*
[265] Bitton, *supra* note 44, at 162–72.
[266] Bitton, *supra* note 10, at 246.
[267] Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 963 (1984).
[268] Note that power relations as a catalyst for an activist-strategic use of tort law is known in much less stressing contexts, such as in doctor-patient relations, producer-consumer relations, employer-employee relations, etc. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1749–1752 (1981).
[269] *See* Weinrib, *supra* note 245 (for the need to restrict tort law to bilateral setting).

above as representing exactly the kind of abuse imposed on women within the social context of the systemic inferiority they bear in relation to men.[270] The imposition of tort liability in such circumstances, as the cases presented above indicate, is not only allowed but also imperative. Thus, vulnerability theory dictates a transformative opposite reaction in the way tort law functions in these situations, where women are deprived of their constitutional right to equality. The basic idea of tort liability here—securing equality in a reality of power relations[271]—would be frustrated by suspending rather than complementing other means for protecting hu(wo)men's rights.

The *Nilly Philip v. Municipality of Beit-Shemesh* case provides a great example of the complementary nature of tort law when a tort suit is being used to compensate women for deprivation of equality as an alternative to the administrative branch's failure to protect them. In *Nilly Philip*, the women plaintiffs filed a tort action against their municipality claiming damages for the harm they sustained as a result of public advertisements ordering women in the city to be modest while walking the city's streets.[272] The signage, addressing women alone, stipulated that "[w]omen visiting/working/shopping in our neighborhood are required to respect the sentiments of our residents, who are faithful to God and his Torah and ARRIVE in MODEST DRESS, which includes: buttoned up, long sleeved blouse , long skirt – no pants allowed – not wearing tight or see-through garments" (bold caps in the original).[273] Another sign was more bluntly phrased and aimed, as I have claimed before, to abolish any female presence in the city streets: "Women are requested to REFRAIN FROM PASSING/PAUSING BY THIS SIDE WALK" (bold caps in the

[270] Bitton, *supra* note 44, at 131.
[271] *Id.* at 159–72.
[272] CA 41269-02-13 Nilly Philip v. Municipality of Beit-Shemesh (Isr.) (case has not been published as of 2015).
[273] *Id.* ¶ 13.

original).[274] The women-plaintiffs brought their claim under the negligence tort,[275] and the court's elegant and clear analysis showcases tort law's potential as yet another tool in fighting sex discrimination given the colossal failure of the public entities, such as the police and the municipality, to protect women's right to equality and human dignity.[276] The court used its decision to enumerate the public entities' failure as well as to establish their negligent behavior, that is, their failure to act reasonably, as expected from a public entity committed to equality. A reasonable response to the abridgement of the plaintiffs' right to equality, the court submitted, would have been to act swiftly to ensure the removal of the signage as well as assure that the women are not accosted and are not required to follow the instructions the signage contained.[277]

The court suggested a public-private disposition, which accords with a complementary rather than suspension approach. It offers to use tort law as a means of protecting women's rights where the public system has not done so itself.[278] According to the court, the women repeatedly sought the protection of the municipality and the police against the atmosphere of

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[274] Both signs were depicted in the court's decision, and were brought as examples of many other such signs placed across the city. *Id.* ¶ 11, 17.
[275] Tort Ordinance §35 [New Version], 1968, 10 LSI 266 [New Version].
[276] CA, 41269-02-13, Nilly Philip v. Municipality of Beit-Shemesh (Isr.), ¶ 69 (case has not been published as of 2015).
[277] *Id.* ¶ . As dictated by the "reasonable person" standard. Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993). As stated by Justice O'Connor, "This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, mere utterance of an. . .epithet which engenders offensive feelings in an employee. . .does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.* at 21 (internal quotation marks omitted); *see generally* Barbara A. Gutek et al., *The Utility of The Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases A Multimethod, Multistudy Examination*, 5 PSYCH., PUBLIC POL'Y, & L. 596 (1999) (discussing the need to deploy the reasonability test from a feminine standpoint).
[278] HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 563 (2008) (Isr.).

discrimination, intimidation, and humiliation suffered as a result of that misogynic signage.[279] The plaintiff's complaints about incidents of bigotry and assault were not treated properly,[280] and their sense of being constantly under threat in the public sphere grew stronger.[281] Ultimately, the signs were kept mostly intact, and in the few cases where they were actually removed, ultra-orthodox men quickly reinstated them without any proper reaction by the authorities.[282]

Interestingly, the police and the municipality declared that they were taking measures to resolve the situation by trying to negotiate with the ultra-orthodox community, and the court did not use these facts to stall tort proceedings.[283] Rather, the court pointed to the authorities themselves as those who violated the women's right to protection, thereby rejecting the authorities' submission that trying to resolve the issue through negotiation had justified the violation of the women's rights and the authorities' own unreasonable behavior as tortfeasors.[284] This critical judgment granted against the police and the municipality further underlined the court's assessment of the harm sustained by the women.

> [T]he defendants' behavior. . .suffices to contribute to the plaintiffs' emotional distress and to add another layer to it. Beyond the insult and harm, it brings about. . .a heavy realization that the authorized public entities had deserted the plaintiffs and women as a whole in allowing the ongoing violation of their rights, and were prepared to allow a reality in which parts of the city were not subjected to the rule of law in a manner that may be interpreted as an acceptance of this state of affairs. . .this behavior and disregard

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[279] CA 41269-02-13 Nilly Philip v. Municipality of Beit-Shemesh, *1, *17 (Isr.).
[280] *Id.*
[281] *Id.*
[282] *Id.* at *14.
[283] *Id.*
[284] *Id.* at *10–16 (establishing the duty of care as well as recognizing the negligent behavior in the way the authorities dragged their feet in reaction to the plaintiffs' complaints).

> [for women's rights] aggravated their sense of insult and vulnerability.[285]

These court's harsh words, originally aimed at the executive entities, are also applicable to the judiciary itself as was presented in the cases discussed in this paper. The judges who decided the *Regan* and *Bizchutan* cases, and used tort claims for suspending women's rights, acted with striking similarity to the court in the above description.[286] Regardless of the court's good intentions in availing women the tortious route and using it in a revolutionary fashion to protect their human rights, the court brought about a destructive result where tortious claims were used for suspending women's rights. Women's claims under tort law should thus function as an addition to protecting their rights, and not as a mere substitute for their rights. Tortious rights should complement and deepen the protection provided to human rights by constitutional law and public entities, rather than rendering these remedies mutually exclusive. Complementarity facilitates a comprehensive and holistic legal system committed to the protection and advancement of human rights.

V. CONCLUSION

Despite the tremendous role tort law is gradually assuming in waging the fight to protect human rights by using as many legal tools as possible, this positive trend also bears some dangerous implications. After a decade of women using tort claims in creative manners that clearly benefitted women and bettered their inferior social as well as legal status, these same claims are now turning into a mutually exclusive alternative, a substitute, rather than an independent and additional tool for bolstering women's rights.

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[285] *Id.* at *18.

[286] *See* HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 568-70 (2008) (Isr.) (deciding not to grant the women their requested legal relief); *see also* TBC 17/20 Bizchutan v. Yom L'Yom, *1, *4–5 (2015) (Isr.) (stating that the women need to use another venue, though they hold a meritorious claim).

The destructive turn that created the suspension, and thus made tort and constitutional remedies mutually exclusive, was at times an explicit effort to block women from reclaiming equality where it was taken away from them, as in the *get* cases brought before the rabbinical courts.[287] At other times, like in the *Regan* and *Bizchutan* cases, referral to tort law was made as an effort aimed at equipping women with another tool to assist them in gaining redress through the private legal sphere.[288] In both methodologies, a worrying similar effect emerged, one that suspends women's basic rights and privatizes their right to redress in the public sphere too. As Agamben's political philosophy suggests, this trend places women in a state of exception where their rights are violated by the liberal state in which the rule of law should allegedly prevail.[289] Women's experience in the added third stage adds a more nuanced perspective to Agamben's theory, contextualizing it and pointing to the peculiar and more harmful manner in which the theory applies to women.[290] Taking away their right to choose between a civil lawsuit and a constitutional claim, by suspending their right to pursue one of these paths and the forced privatization of their public struggle, burdens women with the role of being the private general attorneys and executors of the basic rights that the state should have secured for them.

Although this trend is identified as taking place in the Israeli legal system, it also bears implications for many other common law systems. The suspension of women's rights and their privatization by the liberal state as a pragmatic political response is expected to prosper. This article should serve as a warning sign to this trend worldwide.

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[287] *See supra* notes 54-70 and accompanying text (reviewing the suspension of women's rights within the *get* ordeal in Rabbinical courts).
[288] *See* HCJ 746/07 Regan v. Ministry of Transp., PD 64, 530, 562-63 (2008) (Isr.); *see also* TBC 17/20 Bizchutan v. Yom L'Yom, *1, *4 (2015) (Isr.).
[289] *See supra* Part III (utilizing Agamben's philosophy to conceptualize modern suspension of hu(wo)man rights).
[290] *Id.*