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Religious Alternative Dispute Resolution in Israel and Other Nations With State-Sponsored Religious Courts: Crafting a More Efficient and Better Relationship Between Rabbinical Courts and Arbitration Law in Israel

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RELIGIOUS ALTERNATIVE DISPUTE RESOLUTION IN ISRAEL AND OTHER NATIONS WITH STATE-SPONSORED RELIGIOUS COURTS: CRAFTING A MORE EFFICIENT AND BETTER RELATIONSHIP BETWEEN RABBINICAL COURTS AND ARBITRATION LAW IN ISRAEL

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I. EXECUTIVE SUMMARY

This paper proposes the expansion of both private and public options regarding religious arbitration in Israel, broadening both the choice of law and the choice of forum[1] available to Israeli citizens in cases of either commercial law or issues of status (such as divorce, marriage, and conversion). The current law in Israel prohibits citizens from adjudicating their monetary disputes in state religious courts and treats private religious courts as no different from any other arbitration tribunal, precluding these private religious courts from marriage, divorce and conversion matters.[2] We propose that both of these restrictions be lifted, while the role of Jewish Law in the state is not changed.

Our proposal is neither an attempt to introduce alternative models of Jewish Law, nor to forsake or expand Jewish Law in regard to status issues, nor an attempt to completely solve either the *agunah*[3] or conversion problems. Rather, we propose that by expanding the private religious courts options available and expanding the ability of the state rabbinical courts to hear monetary disputes, every citizen of Israel would be more likely to have a better experience than under the current legal regime, while not changing the substantive balance between secular law and Jewish Law in Israel. Furthermore, this proposal aims to reduce the race to the courthouse issue present in Israeli family law.

It is important to note that while we focus on Jewish Law and the state of Israel, neither the variable "Jewish Law" nor "Israel" is the theoretical focus of this paper. The proposals we advance here are

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[1] Choice of law refers to the ability of the plaintiff and defendant to agree to the system of law under which they will be regulated. Choice of forum refers to the specific court or arbitration panel where the issue is to be adjudicated.

[2] HCJ 8638/03 Amir v. The Great Rabbinical Court in Jerusalem (Apr. 6, 2006) (Isr.), https://versa.cardozo.yu.edu/opinions/amir-v-great-rabbinical-court-jerusalem.

[3] An *agunah* is a wife (or more rarely a husband) left without a Jewish divorce.

applicable to any country that has both religious family law and secular commercial law.[4] Of course, this proposal is also applicable to Muslim citizens of Israel and the Islamic courts of the state of Israel. More generally, it is applicable to all citizens of Israel regardless of their faith because family law in Israel is millet system based,[5] and all cases are adjudicated in religious courts. At a greater level of abstraction, this systemic balance between arbitration tribunals and state religious courts could be implemented in other nations with a partial millet system such as India, Pakistan, or South Africa.

The chart below explains our basic approach to commercial disputes, status issues (conversion, marriage, and divorce), and those areas of commercial law that touch on status issues.

Topic Area→→ Subject Area↓↓	**Commercial Disputes**	**Status Issues**	**Commercial Family Law[6]**
Forum Choices	Full forum choices	Full forum choices	Full forum choices
Law Choices	Full law choices	Jewish Law (as defined by the Rabbinate)	Full law choices (limited by its impact on status)
Supervision by Rabbinate	No	Yes	Limited to issues of status that might arise
Appellate Review	As agreed to by the parties	Yes (by the Chief Rabbi/designee)	As agreed to by the parties for commercial matters and fully for status matters

[4] Included on this list are nations that include at least a quarter of the world's population: India, Pakistan, and Turkey.

[5] The millet system is characterized by separate legal systems for some commercial and all family law matters, based on religion. The term is Arabic in origin and the millet system was widely practiced in areas controlled by the Ottoman empire, including Israel. The British frequently adopted the millet system in their colonies as well and in every instance in which they took control of Ottoman territory, they continued it.

[6] This term refers to the financial arrangements that must take place in the course of status adjudication, such as asset distribution in cases of divorce and similar matters.

II. INTRODUCTION

The paper proposes that the state of Israel increase access to arbitration in the rabbinical courts and expand access to both private rabbinical court arbitration and arbitration of commercial matters by the state rabbinical courts. Furthermore, this paper proposes that the basic deadlock that has prevented such reform— whether to expand or restrict the role of Jewish Law in status determinations—needs to be bypassed by distinguishing between the forum and the law. Even when the Knesset has decided that "Jewish Law as determined by the Chief Rabbinate" ought to be the law governing any situation—such as marriage, divorce, and conversion[7]—the Israeli legal system ought to permit forum selection. This allows litigants and society to accrue the benefits of robust arbitration, including efficient dispute resolution, reduced cost, increased access to justice, and greater consumer happiness. Other than the employees of the various governmental agencies, if proposals such as this one were adopted, everyone would better be served while leaving the relationship between Jewish Law and the state unchanged.

III. A BRIEF POLITICAL BACKGROUND

We are aware that we are not the first ones to address this complex situation. Over many years, different stakeholders -- both from the world of academia and the political arena -- have proposed approaches to expanding arbitration in Israel with the goal of increasing both the choice of law and the choice of forum in family law.

Furthermore, arbitration is not new to Israel, and proposals to use arbitration law to solve various complexities in Israeli family law abound. Six significant proposals have been made. None of these proposals were adopted, we think, because each sought to use arbitration law in some way to substantially modify the role of Jewish Law in the

[7] The relevant laws (Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, and other laws regarding the Chief Rabbinate) give rabbinical courts and the Rabbinate the authority to decide what falls within the boundaries of Jewish Law. For issues that fall out of the jurisdiction the law sets out, each rabbinical court has the authority to decide what Jewish Law is on its own.

area of family law in ways that create Jewish Law "winners and losers," a political process that the Knesset seems unwilling, in fact, to do. Our proposal is crafted in a way that remains within the boundaries of the Jewish Law status quo while substantially increasing choices—both of forum and law—available Israeli citizens in the area of family law.

We summarize below the six proposals which seem to primarily solve the "race to the courthouse" problem while along the way addressing other issues related to the role and place of Jewish Law and arbitration. [8]

1. **Rosen-Tzvi and Mavui Satum** proposed establishing one system that is authorized to adjudicate status issues that also has parallel authority with the agreement of the parties. There are three different ways of constructing this system: (1) granting the initial jurisdiction to the rabbinical court and then (with the parties' agreement) giving jurisdiction to the secular court; (2) giving initial jurisdiction to the secular court and then, with the parties' agreement, giving jurisdiction to the rabbinical court; and (3) giving initial jurisdiction to the rabbinical court for a defined period of time (a year or two), and if that time elapses without the matter being resolved, transferring the case to secular court. Of course, each one of these suggestions creates a Jewish Law winner and loser.
2. **The Rackman Center of Bar Ilan** proposed that if one of the sides files in family court, the other side should have the ability to file in the rabbinical court within a period of 30 days. However, this proposal desensitized racing to the courthouse. In fact, this proposal rewards the party who is willing to wait the longest. Racing to the courthouse to achieve choice of law is a bad policy, but so is rewarding waddling to the courtroom slowly. Hence, we see no reason to favor this proposal over the status quo.

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[8] *See* Aryeh Ulman and Ariel Finkelstein, *Forum Shopping*, INST. ZIONIST STRATEGIES (2014), http://izs.org.il/papers/mhs.pdf (summarizing each of the five proposals before making its own proposal).

3. **The Gavizon-Medan Proposal** leaves the forum choice to the couple, but if they cannot agree, jurisdiction is given to a special tribunal made up of one secular judge, one *dayan* and a secular judge who sees himself as obligated to Jewish Law also. Although there are no obvious winners and losers here, this system naturally favors a religious claimant since it mandates that two members of the three-judge panel must be obligated to Jewish Law.
4. **The Shanhav Commission Proposal** directs that family law matters start with a mandatory "request for dispute resolution" whose jurisdiction is limited to matters the parties choose and does not deal with any other matter. After the request, the parties are invited to a meeting after which they need to decide whether they want to continue with dispute resolution or legal adjudication. This proposal does not truly seek to solve the problem of the race to the courthouse but merely proposes a process that it hopes will induce the parties to settle their claims amicably. So, although there are no winners and losers, there is no real solution.
5. **The Dickovsky Commission Proposal**, similar to the Shanhav proposal, mandates that the parties come to an agreement in which forum they wish to adjudicate. Like our proposal, it recognizes not only rabbinical courts adjudicating using Jewish Law and secular courts adjudicating using civil law but has a third category in which rabbinical courts adjudicate using secular law. Because family court is the default option if there is no compromise, the Dickovsky proposal has a clear winner and loser. Although adjudication in rabbinical courts using secular law might seem appealing (notwithstanding the procedural questions surrounding it), here too, we see winners and losers. Because family court is the default option, the side that prefers religious judgment is naturally going to lose most of the time.
6. **The Institute for Zionist Strategies** (IZS) proposed a three-step process. *Step one:* when the couple registers their marriage, the couple chooses the forum in which divorce proceedings will be held. The emphasis here is

> on the division of property, alimony and visitation, though the divorce itself (including the *get*) would still fall under the jurisdiction of the rabbinate. *Step two:* any familial issue will be adjudicated only after a "request for dispute resolution" has been filed. This request would address only the areas the plaintiff is interested in addressing in a suit. After submission of the request, the sides would negotiate whether they are interested in continuing the dispute resolution process or switching to legal adjudication. *Step three:* depending on which forum the couple had chosen in step one, there are competing paths. If they had chosen a rabbinic court, they would decide between: (a) a rabbinic court that judges according to Jewish Law but is obligated to follow the secular laws and precedent of the country; or (b) a rabbinic court that judges based solely on Jewish Law, acting as an arbitrator. If the couple feels so inclined, they, with the agreement of both sides, may change the forum. The IZS proposal is the closest to our proposal, and we share its commitment to eliminating the race to the courthouse with its concomitant problems, choice of law and choice of forum. However, their proposal does not address what to do if the parties do not agree to a forum in the first place.

Our proposal is not a pure innovation; it is a way of reworking the many prior proposals to increase the likelihood that a proposal will be adopted by enough stakeholders that it can be introduced into Israeli law. We do this by assuming that changes in the balance between secular-Israeli and Jewish-Israeli law will not be accepted. We recognize that given the political reality in Israel, attempts to substantially increase or decrease the role of Jewish Law in the family area are unlikely to attract enough political support to be viable in the current environment. We want to emphasize both choice by litigants and efficiency of resolution as our core values rather than ideological claims about the place of religion in the state of Israel.

A. What Are We Doing

We are examining the spectrum of choice of law and choice of forum available in Israel in the area of religious arbitration. Our focus is the ability of rabbinical courts, both state and private, to adjudicate different cases. The primary focus is on two matters: (1) state rabbinical courts and their ability and authority to judge commercial cases (including the commercial aspects of marriage) when the parties so choose and (2) private rabbinical courts and their authority to adjudicate cases of personal status (marriage, divorce and conversion).[9] Our proposal suggests that permitting greater choice of forum by enabling state rabbinical courts to adjudicate monetary matters, when the parties so direct, and by enabling private rabbinical courts to adjudicate status matters consistent with Jewish Law, as understood by the Chief Rabbinate, would be beneficial to Israeli society as a whole. All this can be done without forcing a change in Jewish Law's relationship to the state.[10]

Religious arbitration has gained popularity as a form of Alternative Dispute Resolution (ADR) in many other countries, particularly the United States.[11] The reasons for this are multi-faceted; however, on a basic level, religious ADR offers parties the procedural flexibility of arbitration and the ability to appoint religious experts familiar with specific issues to resolve disputes, consistent with the parties'

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[9] It must be noted that state rabbinical courts will refer cases to private rabbinical courts under certain conditions, *see* Amihai Radzyner, *Get Under the Supervision of Badatz: Divorce Matters in Israeli Unofficial Rabbinical Courts*, LAW SOC'Y CULTURE 69-105 (2019). Radzyner makes note of this phenomenon by explaining that although state rabbinical courts are obviously aware of the exclusive jurisdiction the government has given them, they are likewise aware that for many parties they are not the best forum for adjudication of specific cases. Because of this, state rabbinical courts will circumvent (or directly violate) the law and refer certain parties to private rabbinical courts.

[10] The Chief Rabbinate would determine the exact definition of Jewish Law on status matters in our proposal. We are building on the groundbreaking work of the Kohelet Forum on increasing access on Kashrut matters. *See* Amichai Philbur, הסדרת הכשרות בישראל [Arranging the Kosher Laws in Israel], KOHELET (Aug. 15, 2018), https://tinyurl.com/y69em3r8 (for the full paper, see https://tinyurl.com/yxthjp9m). Kohelet's kashrut proposal suggests that breaking the government monopoly over kosher certification will increase the efficiency in the kashrut "market" thereby making the lives of consumers easier (and cheaper). Our proposal presents the same argument within in the area of religious adjudication.

[11] MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST, at xix (2017).

wishes.[12] Religious arbitration gives parties an opportunity to decide matters through a lens that considers both the secular and the religious laws to which they are subject.[13]

B. What We Are Not Doing

This proposal does not seek to change the role of Jewish Law in the laws of the state of Israel. We are not advocating for the expansion of choice of law and forum as a way of advancing substantive change in the relationship between religious and secular law without proper public conversation and legislative debate and decision. Nor are we advocating for the abandonment of Jewish Law as understood by the Chief Rabbinate on status issues. While we recognize that many people favor abandoning, modifying, or restricting the application of Jewish Law in Israel, and a smaller group proposes expanding the role of Jewish Law in Israel, our proposal presupposes the status quo as currently enshrined in Israeli law: Jewish Law applies in marriage, divorce, and conversion and is not part of the public law in commercial matters.[14] We do not address whether it is a wise idea to expand or restrict Jewish Law outside the framework of our proposal.

We wish to contrast our approach with the recent proposal by former Justice Minister Moshe Nissim (and others), which advocates that all conversions performed abroad in "recognized Jewish communities" be valid for the purposes of the Law of Return in Israel, with an organization in the Prime Minister's office having central authority to perform conversions in Israel.[15] This organization would have the final say on all conversions done in Israel, no matter the denomination in question. While this proposal was worded just as another "choice of forum," all recognized that depending on the definition of "recognized Jewish community" and the Prime Minister's discretion, this proposal attempts to change the substantive laws of conversion by selecting a forum and law with more liberal rules. Other such proposals abound as well.

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[12] *Id.* at 652.
[13] *Id.* at 653.
[14] *See* § 64, Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, LSI 7 139 (1952-53), as amended (Isr.).
[15] *Proposal would strip Chief Rabbinate of control over conversion,* ARUTZ SHEVA ISR. NAT'L NEWS (Jun. 3, 2018), https://tinyurl.com/bkfpbmtc.

Our proposal's agenda is neither hidden nor covert, and we embrace the status quo as the starting point since it is the law as endorsed by the Knesset. We take no stand on the virtues or vices associated with increasing or decreasing Jewish Law in Israel, for we leave that for others to discuss and the Knesset to enact. Our proposal makes the current system—a mixture of Jewish and secular law as mandated by the Knesset and interpreted by the Chief Rabbinate of Israel and the Israeli Supreme Court— the given law. Our proposal focuses on efficiency as opposed to ideology and works to improve the system. We seek to make it more efficient, more user-friendly, cheaper, and to provide greater access for the poor in Israeli society—in short, to create greater consumer happiness by increasing choices. Implementation of our proposal leaves Israeli citizens with a more responsive legal system; as the metaphor goes, "faster, better, cheaper."[16]

IV. CHOICE OF LAW AND CHOICE OF FORUM UNDERSTOOD AND DEFINED

"Choice of law" refers to the ability of the parties to agree to the system of law which will apply in the event of a dispute. Choice of law agreements can apply either before there is a dispute or during the dispute itself. A common example used in the world of commercial arbitration is the preference for the laws of the State of New York, as it is well understood and widely practiced. Countless contracts contain the following statement:

> This agreement shall be governed by, construed and enforced in accordance with laws of the State of New York.[17]

Indeed, it is common that parties choose the laws of the State of New York for a variety of reasons, even when the parties have no connection to New York.[18]

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[16] *See* HOWARD E. MCCURDY, FASTER, BETTER, CHEAPER: LOW-COST INNOVATION IN THE U.S. SPACE PROGRAM, (Johns Hopkins Univ. Press, 2001) (explaining the saying and its applications).

[17] *See, e.g.,* William J. Hine and Sevan Ogulluk, *Standard New York Choice of Law Provisions May Apply Foreign Laws to Bar Claims*, 20 N.Y. BUS. L.J. 26 (2016); *see generally id.* at 26-30, 26 nn. 1-2.

[18] *See* Dmytro Biryuk, *17 Reasons to Choose New York Law as Your Contract Governing Law*, BIRYUK LAW FIRM (Oct. 23, 2019), https://www.biryuklaw.com/choose-new-york-law-governing-law/.

"Choice of forum," on the other hand, refers to the specific court or arbitration panel where the issue is to be adjudicated, rather than the law applied. For example, the standard agreement used by the Beth Din of America states:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof (including, without limitation, any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement, including any claims that all or any part of this Agreement is void or voidable, and the arbitrability of any disputes arising hereunder), shall be settled by arbitration by the Beth Din of America (www.bethdin.org), in accordance with its Rules and Procedures. Judgment upon the award rendered by the Beth Din of America may be entered in any court having jurisdiction thereof.
>
> The parties expressly acknowledge that they understand and agree that arbitration before the Beth Din of America shall be the exclusive forum for the adjudication of the aforementioned disputes and that by agreeing to arbitration they are waiving their rights to other resolution processes, such as court action or other arbitration, and that the parties shall be precluded from bringing suit in court with respect to the aforementioned disputes.[19]

The choice of law provision does not provide where the dispute shall be adjudicated, and the choice of forum provision does not specify what law should apply. Sometimes the two mix. For example, two parties can agree that the London Mercantile Exchange will resolve their dispute under the laws of the State of New York. Closer to home, the Beth Din of America hears many cases in which the choice of law is the law of the State of New York, even as the forum is a private

[19] *Sample Arbitration Provision*, BETH DIN AM. (2018), https://bethdin.org/wp-content/uploads/2018/07/Contractual-Arbitration-Provision.pdf (last visited Jun 2, 2019).

rabbinical court. Rabbi Shlomo Weissmann, Director of the Beth Din of America, writes:

> The Rules and Procedures of the Beth Din of America state that, "in situations where the parties to a dispute explicitly adopt a 'choice of law' clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law." So if your expectation is that a particular set of laws will govern your transaction, you may want to make that clear in a governing law provision in your contract that says something like, "any disputes arising under this agreement shall be decided in accordance with the laws of the State of New York."[20]

It is worth understanding that the Beth Din of America will hear a dispute for which the choice of law is New York State (or any other state). The rabbinical courts of the state of Israel share this view as well. No one argues that choice of law is not possible in rabbinical courts.

Although choice of law and choice of forum seem similar at first glance to non-lawyers, they are quite different. "Law" refers to the body of rules applicable to the dispute. "Forum" refers to the court or arbitration tribunal authorized to resolve the dispute. To illustrate this point further: claimants could request judgement under New York state commercial law as understood by the Jerusalem State Rabbinical Court or the reverse. In both of these cases, courts will adjudicate disputes using the rules of a legal system other than their own.[21]

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[20] *See* Shlomo Weissmann, *Four Things You Need to Know If You Do Business in the Jewish Community*, TIMES ISRAEL: BLOGS (May 6, 2019, 5:39 PM), https://blogs.timesofisrael.com/four-things-you-need-to-know-if-you-do-business-in-the-jewish-community/.

[21] Indeed, courts in the United States frequently hear cases in accordance with Jewish Law when the parties so direct in their choice of law selection. *See, e.g.*, Silver v. Mount Hebron Cemetery, 64 N.Y.S.2d 274 (N.Y. Sup. Ct. 1946) (questioning whether a widower was permitted to move deceased wife's body from a Jewish cemetery to family plot over objections of membership corporation that disinterment would contravene Orthodox Jewish Law whose rules bound the cemetery association through their corporate bylaws); *cf.* Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999) (questioning whether moving headstones would violate Jewish Law).

Of course, we recognize that matters of public policy or unconscionability can limit choice of law. We will not discuss this at great length in this proposal since we see little likelihood that parties will make reference to the law of North Korea (for example), but we acknowledge that neither rabbinical courts nor private arbitration tribunals will enforce choice of law selections that are repugnant to public policy.[22]

V. WHAT ARE THE ADVANTAGES OF OUR PROPOSAL?

There are a number of advantages to our proposal which are outlined briefly here, but which are, on the whole, self-explanatory:

1. **Greater Efficiency**: Arbitration panels in a religious legal system, when they are selected by the parties, have a deeper command of the factual nuances and complexities as well as cultural norms that are present in any community, whether it be Hasidic, Haredi, Zionist, Traditional or fully secular (*hiloni*). Arbitration allows the selection of arbitrators much more deeply familiar with commercial norms, allowing for speedier adjudication, more accurate results and more convenient resolution.[23]
2. **Greater Consumer Happiness:** The consumer stands to gain by the expansion of choice of law and choice of forum because they have greater freedom to decide where and how their issues are settled. While we recognize that some consumers want more or less Jewish Law than current Israeli law dictates, even those consumers will be happier with the implementation of our proposal than they are under the current system. We recognize that consumers who do not wish to have any Jewish Law present will not be "happy" with our

[22] For example, attempting to take a pound of flesh à la Shylock would be interpreted as repugnant to public policy and therefore forbidden. For an example more closely aligned with our circumstances, see *In re* Marriage of Dajani, 251 Cal. Rptr. 3d 871, 872-73 (Cal. Ct. App. 1988) (explaining that the appellant court overturned the original ruling on the grounds that it would encourage "profiteering by divorce" and was therefore detrimental to public policy).

[23] BROYDE, *supra* note 11, at 139.

proposal, but they will be happier than they are under the current framework.

3. **Reduced Bureaucracy**: The relationship between the rabbinical courts and the secular court system has resulted in a bureaucratic system of robust dual jurisdictions. Claimants spend much effort racing to courthouses to file first for procedural advantages and litigating to preserve that advantage. Increased private adjudication governed by contract will reduce the bureaucracy associated with dispute resolution. Reducing the legal difficulties associated with private adjudication leads to the same result.
4. **Pareto Efficiency**: The expansion of choice of law and choice of forum will increase everyone's efficiency and does not construct winners and losers within this proposal. Everyone will be better off in this system.[24]
5. **Expanding the Jurisdiction of State Rabbinical Courts:** For the first thirty years of Israel's existence as a sovereign state, the state rabbinical courts could also function as private rabbinical tribunals (as they could before the state was established). The Supreme Court, functioning as the High Court of Justice, eliminated that option in 2003.[25] This proposal argues that in the course of expanding the many options available to the parties for private rabbinical adjudication, the state rabbinical courts ought to be able to function as

[24] This is in contrast to many other proposals which are driven by a desire to fundamentally change the underlying law adjudicating matters and are not candid about that goal. This was the heart of the Nissim proposal as explained above. *See Proposal would strip Chief Rabbinate of control over conversion, supra* note 15. Though never overtly stated, it was fairly obvious that Nissim's goal was to fundamentally change what the State considered Jewish Law for matters of conversion. He did this by removing the very definition of what constituted Jewish Law from a Jewish Law authority (the Chief Rabbinate) and giving the Prime Minister (by way of his office) the power to determine what Jewish Law actually is. While some Prime Ministers would undoubtedly affirm the current definition, it is equally obvious that others would change that definition as a matter of policy.

[25] *See generally* HCJ 8638/03 Amir v. The Great Rabbinical Court in Jerusalem (Apr. 6, 2006) (Isr.); HCJ 3269/95 Katz v. The Jerusalem Regional Rabbinical Court, 50(4) P.D. 590 (1996) (Isr.).

private tribunals like they had been able to for the first fifty years of the state and for many years before that.

VI. A BRIEF HISTORY OF ARBITRATION IN ISRAEL

Arbitration in Israel is not a new concept. From the Ottoman Empire onwards (and even previously, though that is beyond the scope of this piece), private arbitration as a means of resolving legal disputes has served an important role in the state of Israel and pre-state Israel.[26] Religious arbitration, in one form or another, is no exception and has been officially recognized for many years and has ample pre-state precedent.[27]

Israel passed its Arbitration Law in 1968 to recognize private dispute-resolution forums (i.e., non-state) whose adjudicative powers stem from the litigants' contractual consent.[28] The law protects jurisdiction over arbitration agreements in the same way it protects the enforcement of contracts in general. As part of the parties' general freedom of contract, they, by and large, may choose the law which governs

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[26] *See generally* Elimelech Westreich, *Jewish Judicial Autonomy in Nineteenth Century Jerusalem: Background, Jurisdiction, Structure*, JEWISH LAW ASS'N STUD. XXII 310 (2012). Westreich makes note that these courts did not perceive themselves as arbitrators, but this only strengthens the point. *Id.* at 310. These courts, who see themselves as arbitrators, are acknowledging the fact that they are not necessarily an official court. If an adjudication body perceives itself to be an official court, it is stating its understanding that it has a certain degree of autonomy, and that is the true point: Jews have had judicial autonomy in Israel for hundreds, if not thousands of years. Incidentally, this was precisely what the minority opinion in *Katz* was emphasizing, in an attempt to rationalize granting a greater degree of judicial autonomy to state rabbinical courts in the current day. *See* HCJ 3269/95 Katz v. The Jerusalem Regional Rabbinical Court, 50(4) P.D. 509 (1996) (Isr.).

[27] *See Mandate for Palestine: The Palestine Order in League of Nations Council*, League of Nations Doc. C.639.M.378.1922.VI (1922). From this Mandate order it is reasonably shown that the establishment of *Badatz* is presupposed under the League of Nations mandate. Section V of the Palestine Order in Council deals with the Judiciary aspect of Mandatory Palestine. Article 53 deals specifically with Jewish rabbinical courts. Section I grants exclusive jurisdiction to religious courts already established in matters of marriage, divorce, alimony and confirmation of wills. Section II grants Jewish rabbinical courts the authority to deal in all other matters of personal status provided the parties agree to this (arbitration). Because *Badatz* already existed when the Palestine Order in Council was issued (it was founded around a year earlier), it was grandfathered into the rules the British laid out.

[28] Arbitration Law, 5728-1968 (Isr.).

their transaction ("choice of law"). The right of individuals to contract freely with one another bolsters the justification for allowing parties to choose different forums and sets of law. Additionally, choice of law leans on the well-established principle that the courts rarely intervene in the relations between voluntary organizations and their members, in general, nor in the decisions of internal judicial institutions, in particular, as an additional justification. Section N of the addendum of the Arbitration Law states that the arbitrator is exempt from the substantive law of the land:

> The arbitrator will act in such manner as appears to him most conducive to a just and speedy settlement of the dispute, and he will make the award to the best of his judgment in accordance with the material before him. The arbitrator will not be bound by the substantive law, the rules of evidence or the rules of procedure that is obtained in Courts.[29]

The Supreme Court of Israel has expressed the idea, also found in the United States Supreme Court,[30] that judicial review over arbitration must adhere to the purpose of the arbitration law and therefore shall be executed narrowly.[31] This review should not ask if the same outcome would have been reached by a secular court. Rather, it merely focuses on compliance with the Arbitration Law and absence of fraud. Additionally, a court is permitted to set aside an arbitration award which is contrary to public policy.[32] This authority shall be executed mainly where the content of the award is "to harm the interests, the principles and the values that our society is asking to keep and protect."[33]

Since the passing of the Arbitration Law in Israel, the judicial system has encouraged arbitration as an efficient method of resolving disputes when the parties agree by contract. The primary reason is because arbitration has the status of a judicial order and is not subject to review for adherence to Israeli Law, although there is an appellate

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[29] Arbitration Law, 5728-1968, add. 1, sec. N (Isr.).
[30] *See* Jones v. Wolf, 443 U.S. 595 (1979); *see also In re* Scholl, 621 A.2d 808, 810 (Del. Fam. Ct. 1992).
[31] CivA 5991/02 Groitzman v. Fried (2004) (Isr.).
[32] § 24(9), Arbitration Law, 5728-1968 (Isr.).
[33] PCA 3971/04 Modan v. Maccabi Healthcare Services (2005) (Isr.).

mechanism built into the law, Section 29B(a).[34] Additionally, Israeli law accepts choice of law and forum as fundamental tenets of arbitration.

VII. A BRIEF HISTORY OF JEWISH RELIGIOUS ARBITRATION IN ISRAEL

Religious arbitration amongst Jews is generally done in a *Beit Din*, a religious court.[35] A typical rabbinical court consists of three rabbis, though, when acting as an arbitrator, a single rabbi can preside over the case. Historically, *Batei Din* (the plural of *Beit Din*) have served in both capacities as arbitrators and judicial judges.[36] Where Jews had autonomy or had governmental permission to do so, *Batei Din* have been the official forum for settling legal disputes within the Jewish community, usually dealing with commercial and family matters. *Batei Din* also occasionally dealt with criminal cases in a small number of places but not in any Western nation in modern times. Where Jews did not have autonomy but still had the power to adjudicate commercial disputes as an arbitration tribunal, *Batei Din* have served as an arbitration panel, deciding cases only at the agreement of the two sides to bring their dispute before the *Beit Din*. This is the model employed by rabbinical courts in the United States.[37]

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[34] § 29B(a), Arbitration Law, 5728-1968 (Isr.); *see* CivA 5991/02 Groitzman v. Fried (2004) (Isr.):

> The judicial intervention in the arbitration award must be narrow and limited to the grounds defined in the law which should be applied cautiously and through a strict interpretation in order to validate the arbitration award and not to set it aside. From such a view of judicial review, the court examining the arbitration award does not examine it as an appellate court examining a judgment, and it is not supposed to examine whether the arbitrator arbitrarily rules or errs in its rulings, since the grounds for canceling an error over the award are no longer considered grounds of [contract] cancellation, is all the more so since the court does not examine these questions where the arbitrator has been released from the substantive shackles of the law and the rules of evidence.

[35] Our proposal is just as applicable to Islamic Law courts or any other religious community in Israel, as will be discussed further.

[36] Shulchan Aruch Choshen, Mishpat 12:2 for a notation that judges in rabbinical courts can either apply Jewish Law or principles of compromise.

[37] *See About Us*, BETH DIN AM., https://bethdin.org/about/ (last visited Nov. 1, 2020).

In the present day, resolving commercial disputes in rabbinical court is the ideal way as a matter of Jewish Law to adjudicate a dispute,[38] and there are no rabbinical courts that have the authority to address criminal matters. Jurisdiction to arbitration is provided by an arbitration clause in a contract that stipulates that any disputes will be resolved in a specific rabbinical court. This represents a choice of forum as well as a potential choice of law. Israel has a large number of private rabbinical courts operating today.[39] Some serve specific Jewish sects (usually with a focus on family law) while others are experts in commercial dispute resolution.

A. The Rabbinical Courts of the State of Israel

Israeli law authorizes the Chief Rabbinate to maintain a system of state rabbinical courts responsible for adjudicating status issues.[40] Furthermore, in 2003, the High Court of Justice (HCJ) prohibited state rabbinical courts from adjudicating monetary cases unrelated to divorce or family matters.[41]

The Rabbinical Court Jurisdiction (Marriage and Divorce) Law of 1953 gave the Chief Rabbinate direct and exclusive jurisdiction over the marriages of Jewish citizens of the state of Israel.[42] This law explicitly states that the Rabbinate would have exclusive domain over marriage and divorce and deals with international family law cases (including conversions). For the next forty-five years, the state rabbinical courts acted as arbitrators in monetary cases as well, and the legislature made no comment on this activity, despite existing prior to the establishment of the state and being authorized by the British Mandate and Turkish practice even earlier.

The HCJ abolished this dual jurisdiction over the course of two different cases. In *Katz v. Jerusalem Regional Rabbinical Court*,[43] the majority opinion, authored by Justice Zamir, adopted the view that the

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[38] Shulchan Aruch*, Choshen Mishpat* 26:2.

[39] *Badatz*, *Bada'k*, *Eretz Chemda* and the various different *Batei Din* of different *Hasidic* sects are but a few examples. Each *Beit Din* either caters to a specific community, has a particular area of expertise or both.

[40] §1, Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (Isr.).

[41] HCJ 8638/03 Amir v. The Great Rabbinical Court in Jerusalem (Apr. 6, 2006) (Isr.).

[42] §1, Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (Isr.).

[43] HCJ 3269/95 Katz v. The Jerusalem Regional Rabbinical Court, 50(4) P.D. 590 (1996) (Isr.).

rabbinical court system is an institution with its roots in British Mandatory Palestine and is not connected, historically or otherwise, to any tradition preceding it and does not have the natural jurisdiction that all rabbinical courts have.[44] Most critically, Zamir characterizes state rabbinical courts as a single tier institution defined and bound by the laws of the state of Israel that gave birth to them (like any other court of the state of Israel).[45] This means that the state rabbinical courts have a jurisdiction determined by the Knesset and no one else, which limits state rabbinical courts to the authority that the Knesset grants them. Since the Knesset restricted the jurisdiction of state rabbinical courts to marriage, divorce and conversion, Justice Zamir claims that jurisdiction is exclusive to those areas.

Justice Tal's dissent takes a more historical and holistic view: rabbinical courts are two-tiered institutions. The first tier is more important, both in terms of time and importance, and is the Jewish Law tier which has existed for hundreds (if not thousands) of years.[46] The second tier is the status conferred on state rabbinical courts by the law of Israel and Israel's reliance on these state rabbinical courts for official acts—distinguished from other private rabbinical courts.[47] According to Tal, this second tier of authority cannot reduce the authority conferred by Jewish Law from the first tier. It then stands to reason that the Knesset has the authority to expand the state rabbinical courts' jurisdiction, but it cannot restrict their jurisdiction, explicitly or implicitly.[48] Thus, at most, Tal concedes that the Knesset can explicitly forbid state rabbinical courts from adjudicating monetary cases if it wishes to do so. Since the Knesset did not, such adjudications are proper.

In *Amir v. The Great Rabbinical Court in Jerusalem*,[49] the majority opinion adopted Justice Zamir's opinion in *Katz* and held that the State Rabbinical Courts' authority was limited to that which the Knesset explicitly granted to it. This effectively limited the state rabbinical courts' authority to issues of personal status such as marriage,

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[44] *Id.*
[45] *Id.*
[46] *Id.* (Tal, J., dissenting).
[47] *Id.*
[48] *Id.*
[49] HCJ 8638/03 Amir v. The Great Rabbinical Court in Jerusalem (Apr. 6, 2006) (Isr.).

divorce and conversion.[50] Not only can state rabbinical courts not judge monetary cases, but they also cannot act as arbitrators of these cases even if the two sides agree that the state rabbinical court is their preferred forum for settling their dispute.[51]

We believe that the *Katz* decision should be legislatively reversed with the context of generally expanding the options available for arbitration in Israel; the parties should be allowed to choose the law and forum of their choice in commercial matters and the law and forum (as understood by the Chief Rabbinate) in status matters. We see no reason that the state rabbinical courts should not be one of many options possible for litigants.

B. Private Rabbinical Courts in Israel

Even though there are state rabbinical courts, Israel has a long tradition, predating its establishment, of private rabbinical courts as well.[52] Certain communities have consistently preferred to set up their own court systems to deal with internal issues including marriage, divorce, and conversion. The most prominent institution in this mold was, and still is, the *Beit Din Tzedek Eidah Ha'Chariedis,* founded by Rabbi Yosef Chaim Sonnenfeld and Rabbi Yitzchok Yerucham Diskin in 1921, slightly prior to the founding of what would become the State Rabbinate in 1921.[53] The British authorized *Badatz Ediah Ha'Chariedis*, even though they did not recognize it as a state rabbinical court of the British Mandate.[54] One of the other notable private rabbinical

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[50] *Id.*

[51] The state rabbinical courts understandably took umbrage with this ruling and fiercely criticized it. Their chief argument was based on Justice Tal's opinion in *Katz*: no one, not even the Knesset, has the authority to limit the state rabbinical courts' jurisdiction. In addition to that argument, there are a number of justifications for why limiting the state rabbinical courts' jurisdiction is complex, particularly when the starting point is the consent of the litigants. Most importantly, is it counter-intuitive to remove jurisdiction that was historically granted even pre-state? Second, this removal did not accomplish anything substantive, since it was "consent" driven; PRC simply took in the cases with even less judicial oversight.

[52] *Badatz* is the most obvious example, though the Rishon Lezion's office from Ottoman times is another possible one.

[53] The office of the Rishon Lezion had existed for centuries up until this point; the British simply formalized its status and added an Ashkenazi element.

[54] *See* Mandate for Palestine, *supra* note 27. Though the British did not explicitly authorize *Badatz*, the language used in the Palestine Order in Council makes it clear

courts in Israel is the *Beit Din Rabbi Karlitz*, otherwise known as *Bada'k,*[55] founded by R' Nisim Karlitz in 1968. It is one of the larger private rabbinical courts in Israel, and it addresses all areas of the law, including issues of personal status. There are a host of other private rabbinical courts operating in Israel which adjudicate commercial matters,[56] but no other private rabbinical courts address divorce matters. This anomaly relating to British Mandate recognition of *Badatz* (and its extension to *Badatz's* Bnei Brak cousin, *Bada'k)* is simply an accident of history and not a policy. Although it is clear that the expansion of the community served by the *Badatz* has led to the expansion of its rabbinical courts to involve thousands of status matters over the last decades, there is no policy reason to treat it uniquely.[57]

Examining these institutions from the prism of choice of law and choice of forum is critical. Private rabbinical courts in Israel nominally adjudicate all commercial matters under Jewish Law; however, Jewish Law in commercial matters dynamically and robustly allows for choice of law between the parties.[58] Functionally, private rabbinical courts adjudicate commercial disputes using whatever commercial norms the parties agree to. Jewish Law is merely a default rule that, absent an agreement to the contrary, provides the choice of law to adjudicate disputes. However, private rabbinical courts, no different

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that *Badatz* was considered a legitimate establishment (at least as long as both sides were interested in having their case adjudicated there) and saw no reason to limit their power. (*Badatz's* activity before the establishment of the State is a key factor in several issues addressed later).

[55] Bada'k is an acronym **B**et **D**in shel haRav Nissan **K**arlitz. *See* Radzyner, *supra* note 9.

[56] *See Jones*, 443 U.S. at 595; *see also In re Scholl*, 621 A.2d. at 808.

[57] The Charedi community in Israel, which now constitutes 12% of Israel's population, used to be as little as 2%. *See* Dr. Gilad Malach & Dr. Lee Cahaner*, Statistical Report on Ultra-Orthodox Society in Israel*, ISRAEL DEMOCRACY. INST. (2019), https://en.idi.org.il/haredi/2018/?chapter=26180. Needless to say, as the community grows, so do its rabbinical courts.

[58] Robust choice of law is a part of the halachic tradition, particularly in contract matters, for a variety of reasons: first*,* Jewish Law's broad and deep acceptance of conditions in almost all agreements, including marital ones; second, Jewish Law's general enforcement of agreements which even violate Jewish Law adds to this; third, Jewish Law's emphasis on formalism as an important type of legal reasoning crafts rigid contract doctrines; fourth, Jewish Law's flexible consideration (*kinyan)* doctrines allow for agreements without common law doctrines of consideration limiting them; and finally, and most directly, Jewish Law's recognition of *kim le* ("I accept") models of choice allow parties to clearly accept more than one legal rule as valid.

from private arbitration tribunals generally, are unquestionably open to choice of law selection on commercial disputes. Furthermore, common commercial custom, the law of the land, and many other factors go into determining where the rules of decision reside in commercial disputes. Private rabbinical courts provide a wealth of forum driven choices to the participants from the choice of language, to the format, and to the time and location of adjudication. Put more succinctly, private rabbinical courts cater to the needs of consumers to resolve their disputes subject to an agreement between the parties.

On the other hand, in status matters (marriage, divorce and conversion), private rabbinical courts and the laws of the state of Israel mandate that all adjudications take place consistent with Jewish Law as understood by the Chief Rabbinate.[59] Simply put, Jewish Law directly governs three matters: (1) one cannot convert to Judaism other than consistent with Jewish Law for marriage purposes; (2) one cannot get divorced in Israel without consistency with Jewish Law; and (3) one cannot marry as a Jew except when consistent with Jewish Law. Furthermore, the term "Jewish Law" means "Jewish Law as determined by the Chief Rabbinate" and not anything else. Private rabbinical courts that adjudicate status matters only do so consistent with Jewish Law, with explicit or implicit permission of the Chief Rabbinate, because choice of law here plays a much more vital role than choice of forum.

That private rabbinical courts use a standard of Jewish Law that satisfies the Chief Rabbinate in these three areas seems obvious by their very nature, but this is an important point. As far as the Rabbinate is concerned, private rabbinical courts can adjudicate commercial matters consistent with a variety of norms and understandings of Jewish Law or even secular law. However, private rabbinical courts are not supposed to deal with status issues in the first place, and when these courts have the permission of the Chief Rabbinate, they do so with a clear choice of law provision pointing to Jewish Law. If the Chief Rabbinate ruled that a private rabbinical court's judgments fell outside of what they consider proper as a matter of Jewish Law, they would act to prevent those judgments from being implemented.[60] In fact, this

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[59] For an English translation of the letter, see David Ben-Gurion, *Status Quo Compromise*, in ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS, PRE-1948 TO THE PRESENT 58, 58-59 (Itamar Rabinovich & Jehuda Reinharz eds., Brandeis Univ. Press 2d ed. 2008) (1984).

[60] Radzyner, *supra* note 9.

exact situation has already occurred.[61] This is a logical corollary to the decision of the Knesset to compel adjudication consistent with Jewish Law in areas of marriage, divorce and conversion. "Jewish Law" has to be determined by a "decisor" and that decisor is, as the Knesset has determined, the office of the Chief Rabbi.[62]

These same reforms are also broadly applicable to Islamic courts in Israel, and we see no reason not to expand our basic proposal to them. Processes that the state mandates must be performed in a religious manner, such as divorce, apply regardless of the religion,[63] and Islamic citizens are then adjudicated consistent with Israeli law in the Islamic courts of Israel. Because of this system (originally introduced under the Ottoman Empire),[64] the state Islamic courts have the same basic sets of restrictions placed on them as do state rabbinical courts. It stands to reason that expanding choice of law and forum amongst the Islamic courts in Israel would lead to a similar result as it would in the state rabbinical courts.

The status quo agreement requires that marriage, divorce and conversion be adjudicated according to Jewish Law (for Jews); neither choice of law nor arbitration ought to be used as a "venue" to undermine decisions by the Knesset which mandates Jewish Law. Yet, the state rabbinical courts have always permitted private rabbinical courts to function as long as they follow Jewish Law as understood by the Chief Rabbinate. For example, conversions performed by recognized rabbinical courts outside the state of Israel are recognized by the Chief

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[61] *Id.* After R' Levin's announcement that his Beit Din would also be issuing divorces, the State Rabbinate issued a statement saying that: (1) the Ministry of Interior would refuse to change the personal status of someone who presented them with a divorce from his rabbinical court and (2) going to get a divorce from R' Levin constitutes a sin (they use the term "*aveirah"* although the context does not make clear whether this is a spiritual transgression or a legal one, as the word is used for both in modern Hebrew. What is clear is that this PRC is certainly engaging in actions which are against the law in Israel (which could then lead to an argument that there is also a spiritual transgression)).

[62] Though this has not been codified in any law, it is the standard way in which "Jewish Law" is interpreted in Israel and is implied in countless rules and laws.

[63] The Palestine Order in Council codified the millet system into law, and that has been the basis for Islamic Courts in Israel.

[64] *See generally* Maurus Reinkowski, *Late Ottoman Rule over Palestine: Its Evaluation in Arab, Turkish and Israeli Histories, 1970-90*, 35 MIDDLE E. STUD. 66 (1999).

Rabbinate, as are divorces.[65] Arbitration cannot be a vehicle for the selection of a different legal system (a choice of law provision) but can function as a mechanism in terms of choice of forum.

We thus believe that the *Amir* decision is incorrect as a matter of arbitration theory and harms consumers by reducing choice and competition. We see no reason why parties cannot consent to having the state rabbinical courts resolve matters beyond their mandatory jurisdiction with the consent of the parties,[66] just as we see no reason not to permit private rabbinical courts to adjudicate matters consistent with Knesset decisions in regard to choice of law.

Consistent with the arbitration theory we have previously laid out which focuses on consumer happiness in addition to choices of law and forum, when the parties of a case wish to have the issue adjudicated by the state rabbinical courts, we see no reason why they should be forbidden this right. Granting this choice maximizes consumer happiness, optimizes efficient dispute resolution, and creates no violation of the public policy preferring adjudication consistent with Jewish Law. Expanding choice of forum as well as choice of law negatively impacts no party which has not consented. We do want to be clear here: reversing *Amir*, we think, is an excellent idea as part of the package of reforms that liberalize access to ADR in Israel in the rabbinical court, both private and public. We do not support reversing *Amir* other than in the context of broad reform.

VIII. OUR PROPOSAL

Our proposal's goal is an expansion of choice of law and choice of forum in monetary cases, and an expansion of choice of forum (and law, in limited circumstances) in status (marriage, divorce, and conversion) matters. To accomplish this, we propose the following three basic changes to Israeli law, and we do not support the implementation of any one of these changes without the other two:

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[65] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (Isr.).

[66] At a most basic level, our argument is fairly obvious: we believe that two consenting parties should have the ability to freely contract so long as the agreements in question cause no harm. An interesting response the Israeli government could give would be to claim that our expanding choice of law and forum would cause harm because of the *halachic* issues that have the potential to arise as a result of our proposal. Obviously, we have solutions and mechanisms that will be implemented in order to make sure those issues never manifest.

1. State rabbinical courts should be authorized to adjudicate monetary cases with the consent of both parties.

We support the repeal of both the *Amir* and the *Katz* decisions. Repealing these cases removes the major roadblock to both choice of law and choice of forum in regard to monetary issues and levels the playing field in terms of status issues. The Israeli Arbitration Law already permits private rabbinical courts to adjudicate commercial matters (and in the strictest legal sense, they are the only method to monetary claims consistent with Jewish Law at this point). This is also acceptable from a Jewish Law perspective, as Jewish Law recognizes both choice of law and choice of forum in commercial matters.[67] The

[67] *See Rules of Procedure*, BETH DIN AM., https://bethdin.org/wp-content/uploads/2018/04/BDA118-RulesProcedures_Bro_BW_02.pdf, which states in sec. 3:

> Choice of Law
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> A. In the absence of an agreement by the party's arbitration by the Beth Din shall take the form of compromise or settlement related to Jewish law (p'shara krova l'din), in each case as determined by a majority of the panel designated by the Beth Din, unless the parties in writing select an alternative Jewish law process of resolution.
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> B. The Beth Din will strive to encourage the parties to resolve disputes according to the compromise or settlement related to Jewish law principles (p'shara krova l'din); however, the Beth Din will hear cases either according to Jewish law as it is understood by the arbitrators or compromise (p'shara) alone, if that is the mandate of the parties.
>
> C. The Beth Din of America accepts that Jewish law as understood by the Beth Din will provide the rules of decision and rules of procedure that govern the functioning of the Beth Din or any of its panels.
>
> D**. In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish law.**
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> E. In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community — whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common

only reason status issues cannot be settled in state rabbinical courts is because of HCJ's decision in *Amir*. We see no reason to distinguish between state and private rabbinical courts within this rubric.

2. Private rabbinical courts should be encouraged to hear and resolve many more commercial disputes, and they should do so with no significant choice of law restrictions.

While the Knesset had determined that status issues are to be adjudicated consistent with Jewish Law, the parties ought to be free to choose a court or arbitration tribunal that best suits their needs for all general commercial matters. Commercial norms are complex, oftentimes being further complicated by the specific religious group the parties are members of (Ashkenazi, Sephardic, Hassidic, etc.). This is why choice of law and choice of forum jointly have such utility in these cases.

Efficiency and fair resolution are enhanced when the parties are free to choose any rabbinical court that best understands their needs. For example, a case involving a couple from a specific Hassidic sect who are divorcing would be free to have their financial case adjudicated in that particular sect's rabbinical court. We encourage the establishment of similar courts in all segments of Israeli society. The state rabbinical courts will serve as the default (and free) option when parties cannot agree on the forum. Because private rabbinical courts are more familiar with particular cultural norms and customs, this ensures a smoother experience for everyone involved since all parties are procedurally and culturally in agreement. It is worth noting that the state rabbinical courts regularly refer couples to private rabbinical courts when they consider that the private route would be better suited for the parties at hand, reflecting the basic model this paper endorses (even as the technical law as written seems to not allow this type of adjudication).

3. Private rabbinical courts must be allowed to adjudicate status issues consistent with Jewish Law as determined by the Chief Rabbinate.

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commercial practices in this transaction — the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish law.

The Chief Rabbinate must ultimately review all status determinations per Jewish Law as per the status quo agreement,[68] but this choice of law determination should not be confused with the choice of forum we are advocating. The Chief Rabbinate must be encouraged to authorize a variety of forums across a variety of social, cultural, and religious spectrums which adjudicate Jewish Law consistent with the directions of the Chief Rabbinate.

4. The right of forum selection handed exclusively to Badatz and Bada'k cannot reasonably be limited to these two forums alone and should be the general rule for all private rabbinical courts that wish to engage in status determination.

The Chief Rabbinate must give approval for all status decisions made in private rabbinical courts consistent with Jewish Law, since the status quo agreement mandates that these issues be judged under Jewish Law and the Chief Rabbinate is the state's authority on Jewish Law. In status issues, the parties ought to be free to choose a court or arbitration tribunal that best suits their needs consistent with the Knesset's decision that Jewish Law, as understood by the Chief Rabbinate, must govern these matters.[69] Status issues in Judaism are inherently complex and are oftentimes further complicated by the specific religious group the parties are a part of (Ashkenazi, Sephardic, Hassidic, etc.). This is why choice of forum has such utility in these cases: parties are free to choose a rabbinical court that best understands their needs while still adopting the law mandated by the Chief Rabbinate. For example, a case involving a couple from a specific Hassidic sect should be free to have their divorce ritual performed by their particular sect's rabbinical court, so long as the *get* is validated by the Chief Rabbinate, as is proper and consistent with Jewish Law. We encourage the establishment of similar courts in all segments of Israeli society.

In sum: the state rabbinical courts will serve as the default (and free) option where parties cannot agree on the forum. Because private rabbinical courts are more familiar with particular cultural norms and customs, this ensures a smoother experience for everyone involved

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[68] The status quo compromise makes it clear that Jewish Law is to be used in matters of status; later laws designate the Chief Rabbinate as the authority who will be making decisions on what Jewish Law is.

[69] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (Isr.).

since all parties are procedurally and culturally in agreement from the beginning.

There are a few shifts that will occur as a result of the adoption of our proposals; however, fundamental decisions made by the Knesset remain the same. The role of Jewish Law as the determiner of status undergoes no significant shift as the Knesset mandates.[70] As explained above, it is beyond the scope of our proposal to change the law governing this issue. However, economic efficiency, both in the court and arbitration systems, will increase because consumers will finally have the ability to choose the forum that best suits their needs. As a result of the increase in efficiency, consumer happiness will rise in tandem. The government's rabbinical court system and general family court system as well as commercial courts will have fewer cases overall as a result of people leaving to use the private rabbinical courts. This effect may be compensated for by people whose preference would be for state rabbinical courts to judge monetary cases, as the state rabbinical courts will remain the free option for consumers.

Adoption of our proposal results in the alignment of Israeli policy with the way rabbinical courts outside of Israel are treated. Rabbinical courts in the Diaspora are all based on the arbitration-law model,[71] and Israel recognizes this as valid.[72] This proposal creates, in essence, private rabbinical courts in Israel that follow the same paradigm as the Rabbinate-recognized rabbinical courts in the Diaspora.[73]

A. The Role of the Chief Rabbinate and the Incentives They Have to Cooperate in Good Faith

It is important to understand the crucial role that the Chief Rabbinate plays in this proposal. This proposal only works if the Chief Rabbinate recognizes three ideas and applies them fairly. First, on status issues (marriage, divorce and conversion) the Chief Rabbinate has to certify some private rabbinical courts and their judges as eligible to

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[70] *See id.*

[71] *See id*.

[72] *See id.*

[73] Furthermore, adoption of this proposal aligns well with Kohelet's proposed Kashrut reform. *See supra* note 10. That proposal advocated a similar position in the realm of kashrut but encouraging private competition to Rabbinate Kosher Certification. This parallels our proposal, which encourages private competition with the Rabbinate in the legal realm.

judge according to Jewish Law.[74] Of course, the Chief Rabbinate need not certify all those who apply as meeting the standards they set. They can disqualify those who do not meet the standards mandated by Jewish Law to sit as judges. In fact, the Chief Rabbinate already has an extensive list of rabbis who are allowed to perform marriages outside of the members of the Chief Rabbinate—but not everyone who applies is permitted to conduct marriages under its auspices. Our proposal presupposes that such a list will be prepared for all status issues.[75] This should be neither difficult nor overly complex for the Chief Rabbinate to do, and it is consistent with work that is done in many other areas, including kosher supervision and various other ritual areas.

Second, the Chief Rabbinate will have to prepare a list of substantive standards that it expects these private rabbinical courts will employ in the area of divorce and conversion (just like it does now in marriage). Unlike the first list, which is about which judges are eligible, this list concerns the minimal substantive standards of Jewish Law that these rabbinical courts need to employ in status matters to remain certified. These standards, of course, must also be adhered to by the state rabbinical courts.[76] State rabbinical courts can adhere to higher standards (as can private rabbinical courts), but these are minimum standards adhered to by all.

Third, the Chief Rabbinate will have to recognize the broad application of "choice of law" provisions in commercial law matters (other than status issues) and allow the private rabbinical courts to substantially deviate from the understanding of Jewish Law found in the state rabbinical courts on commercial law matters. This is consistent with both the law of Israel and Jewish Law but is not currently the practice of the state rabbinical courts. We do not propose that the state rabbinical courts change their practice; rather they should recognize as

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[74] By this, we mean they are eligible to be rabbinical court judges (*dayanim*) according to Jewish Law as found in Shulchan Aruch, *Choshen Mishpat* 1-14.

[75] Thus, we recognize that the Chief Rabbinate will refuse to allow on this list non-Orthodox rabbis as they will be deemed ineligible to sit as a matter of Jewish Law.

[76] This is not the place to discuss what those standards ought to be. We recognize that the issue of formal standards and substantive standards is important here. Our point is that whatever the actual standards employed by the rabbinate really are, those are the standards the private rabbinical courts need to employ also. The courts will monitor this to ensure that if the Rabbinate employs internally pro-forma standards, they need not hold the private rabbinical courts to a higher standard. *See* MICHAL KRAVEL-TOVI, WHEN THE STATE WINKS: THE PERFORMANCE OF JEWISH CONVERSION IN ISRAEL (Colum. U. Press 2017).

valid the practice (already in place and already proper under Israeli law) of accepting choice of law provisions on commercial matter (as the Beth Din of America does explicitly note is their practice).[77]

In order to ensure that the Rabbinate does not seek to undermine the policy compromises found in this proposal by, for example, refusing to certify private rabbinical courts as required above, this proposal suggests that granting the state rabbinical courts consent jurisdiction over commercial arbitration be made contingent—year in and year out—on the Rabbinate certifying at least 100 private rabbinical court judges and ten private rabbinical courts, and that these private rabbinical courts hear at least half the commercial law case load and half the status matters. If that stops being the case, the state rabbinical courts lose their jurisdiction over consent-granted commercial matters. This approach properly incentivizes the state rabbinical courts to recognize private rabbinical courts and provides the state rabbinical courts with a standard that is consistent with Jewish Law.

In sum, this proposal can be implemented in Israel without dramatic changes in the nature of Jewish Law or its applications. Private rabbinical courts will still be limited to judges who obey Jewish Law as certified by the Chief Rabbinate, and private rabbinical courts will continue to have jurisdiction over commercial arbitration matters as they see fit. Status matters—marriage, divorce, and conversion—will now also be adjudicated by private rabbinical courts when the parties consent, and commercial matters can now be adjudicated by state rabbinical courts when the parties consent.

IX. UNIVERSALIZING OUR PROPOSAL, BOTH IN AND OUT OF ISRAEL

A. In Israel

The Israeli legal system utilizes various personal status laws in the area of family law as applied by religious courts.[78] This

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[77] *Rules and Procedures*, BETH DIN AM. 5 (2019), https://bethdin.org/wp-content/uploads/2019/08/RulesandProcedures.pdf (last visited Sept. 28, 2020):

> In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.

[78] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, (Isr.).

phenomenon has historical and political roots: it existed under Ottoman rule (the millet system)[79] and was retained by the British after they were assigned the Mandate to govern by the League of Nations after World War I.[80] The basic source for the application of personal status law and the jurisdiction of the various religious courts is found in the Palestine Order in Council in 1922. This order provides that "[j]urisdiction in [m]atters [o]f [p]ersonal [s]tatus [s]hall [b]e [e]xercised . . . [b]y [t]he [c]ourts [o]f [t]he [r]eligious [c]ommunities."[81] The order also grants jurisdiction to the Palestinian (and now Israeli) district courts in matters of personal status for foreigners who are non-Muslims and not Jewish, stating that they "shall apply the personal law of the parties concerned."[82] Regarding foreigners, this was defined as "the law of [his] nationality."[83] Case law determined when regarding non-foreigners, "the court[s] . . . have . . . to apply the religious or communal law of the parties."[84] The Palestine Order in Council recognized eleven religious communities: Jewish, Muslim, and nine Christian denominations. The Knesset also enacted a law vesting jurisdiction in the Druze religious courts, creating a total of fourteen recognized religious communities with the authority to create state authorized religious tribunals. [85]

Indeed, this is the model in many nations outside of Israel. Under the British millet system model, religious courts have jurisdiction over family law while commercial law is subject to universal rules independent of one's faith. This is true not only in Israel, but in other places where the British influenced the legal system. Countries that still use the millet system include Iraq, Syria, Jordan, Lebanon, Israel, the Palestinian Authority, Egypt, and Greece (for religious minorities). States like India, Iran, Pakistan, and Bangladesh, which observe the principle of separate personal courts and/or laws for every recognized

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[79] *See supra* note 5.
[80] *See Mandate for Palestine*, *supra* notes 27, 54, 63 and accompanying text. The British simply codified what had already been practiced before.
[81] Palestine Order in Council 1992, art. 51, https://unispal.un.org/DPA/DPR/unispal.nsf/0/C7AAE196F41AA055052565F50054E656.
[82] *Id.* art. 64.
[83] *Id.* art. 59.
[84] *Id.* art. 64.
[85] *The Judiciary: The Court System*, ISRAEL MINISTRY FOREIGN AFFAIRS, https://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the judiciary-the court system.aspx (last visited Jun. 2, 2019).

religious community, use a similar model. The distinction between choice of law and choice of forum can be introduced in each of these jurisdictions as a way of expanding access to both religious law and commercial law norms.

Ultimately, our proposal is limited neither to Jewish Law nor Israeli law. The application of our proposal is a result of the system under which Jewish Law in Israel is applied and not the substantive law itself. Thus, our proposal is equally valid in Muslim courts, Christian courts, and Druze courts in Israel.

Consider, for example, a problem of Israeli law discussed by Karin Carmit Yefet of the University of Haifa: many Christian sects in Israel—including Maronite Christianity—have no divorce rite at all because divorce is religiously prohibited to them. What should the state of Israel do when such women or men file for divorce? The common practice in these communities is for the parties to undergo a temporary and nominal conversion to an alternative Christian sect that permits such divorce and is recognized by Israel as well. Consider now the case of a Maronite Christian woman who refused to participate in a temporary and formal conversion to Orthodox Christianity for the sake of being granted a writ of divorce.[86] Israeli law here encourages the temporary conversion to a Christian denomination that permits divorce in order to allow divorce, which is essentially a human right in Israel and most nations, under Israeli law. What should be done when a party refuses this temporary conversion? To no one's surprise, the state of Israel Maronite Religious Court mandated a temporary conversion to address a lacuna in religious divorce law.

Hypothetically speaking, broadening the choice of law and the choice of forum available to all is a much better solution to this problem than coercive temporary conversions as these choices resolve the situation without judicial coercion. Indeed, Dr. Yefet goes on to describe the ill effects of a certain type of forum competition amongst Palestinian-Arab women engaged in divorce proceedings.[87] On a holistic level, the wife's claim is that the choice between religious and secular courts encourages radicalization in the religious arena.

[86] Karin Carmit Yefet, *Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction*, 2016 U. ILL. L. REV. 1505, 1515-16 (2016). The procedure in cases like this is as follows: because this specific sect has no formal divorce mechanism, a purely formal conversion is held with the plaintiff then getting divorced in a different Christian sect's court. The other courts are usually more than happy to take them as there is a financial incentive to provide this service.

[87] *Id.* at 1529.

Because religious courts only can produce religious results and private religious tribunals are not authorized, the parties and the state are caught between values that cannot be resolved. Broadening the choice of law and the choice of forum to allow private religious tribunals can solve this problem. Furthermore, this might serve as a mechanism to encourage better religious integration with Israeli law and better divorce adjudication in the following two ways: (1) Encourage couples to amicably settle disputes in a court of their choosing instead of years of procedural battles to determine where to adjudicate cases, and (2) Market forces dictate that a bevy of options that appeal to women and men would eventually result in a less radicalized market friendlier to parties (and in the Islamic world, friendlier to women in particular). This is true in the rabbinical courts of Israel as well.

The scholarship has pointed out that forum shopping under current Israeli law—where the race to the courthouse serves as a substitute for mutually agreed choice of law—is expensive for divorcing couples and encourages disputes regarding which legal system shall govern the divorce.[88] This is driven by the Frankenstein-ish nature of the current model, in which secular law and religious Jewish Law (and Islamic Law) both can adjudicate identical disputes while selection is determined by the winner of the race to the courthouse. Israeli law and Jewish Law are certainly not identical in their treatment of asset distribution in divorce, with Jewish Law being fault based and Israeli law being no-fault based in its asset distribution. The common claim is that Israeli secular courts have the reputation for being the better forum for women in divorce cases,[89] whereas the state rabbinical courts generally favor men.[90] Because of this, in the event of a divorce, there is often a long procedural battle over where exactly the case will be heard. This, in turn, creates an enormous level of inefficiency found neither in purely religious nor purely secular systems. The race to the courthouse as a phenomenon is not unique to Jews in Israel as the same issues exist in other religions and other nations. The religious

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[88] *Id.* at 1528-30.

[89] *See generally id.* The basic claim here is that because state rabbinic courts judge cases based on Jewish Law, they favor men, whereas secular courts (secular courts that judge based on secular law) favor women.

[90] Andrew Tobin, *How Israeli Women Are Gaining in the Fight for Jewish Divorce*, TIMES ISRAEL (Aug. 23, 2016, 3:47 AM), www.timesofisrael.com/how-israeli-women-are-gaining-in-the-fight-for-jewish-divorce/.

monopoly on divorce ensures that forum shopping is not an issue limited to Jews and is a viable strategy elsewhere.

The vigorous expansion of private religious arbitration, particularly when combined with prenuptial agreements which agree on forum choice, provide a ready solution to the current inefficient set up. Under our proposal, any communal subgroup will use these same tools to select marriage and divorce models as they desire, and our proposal has no test for the authenticity of the religious tribunal to adjudicate the commercial disputes between couples ending their marriage. It is only for the ritualistic giving of the *get* that choice of law is important. But the parties can choose the laws of the State of New York or a reform rabbinical court to adjudicate the economics of their divorce. The expanse of private arbitration increases efficiency.

Arbitration is more efficient everywhere but particularly in Israel. The race to the courthouse makes litigation even more inefficient, and because Israel has a unique system of dual jurisdiction between the religious and secular courts, this inefficiency is exacerbated. We have a distinctive remedy to solve this problem in Israel: the expansion of choice of law and choice of forum in certain circumstances.[91]

B. International Applications of Our Proposal

The model we propose is applicable outside of Israel as well. Though the particulars of each model will depend on the specific country in question, the basic premise is detail-agnostic. The expansion of choice of law and choice of forum leads to the same results because the millet system puts status and family law into the religious realm (legally speaking). Our proposal simply broadens the range of choices available within the religious realm, so long as the parties agree to private adjudication and the state supervises conformity to religious principles. The ensuing results include greater efficiency and greater forum selection which produce greater consumer happiness with no reduction in legal effectiveness.

The relationship between family law and commercial law worldwide can be divided into three categories. Many nations, including most Western democracies, have secular family law and secular

[91] The root issue is the fact that the existence of a hybrid (religious-civil) system that also allows forum shopping almost guarantees that the parties will invest resources (time and money) into a long drawn out procedural battle. This behavior is also wholly justified as the forum can significantly impact the outcome of a case.

commercial law, with religious family law negotiated privately with no governmental sanction. Countries in the model include the United States, Canada, England, France and many other Western democracies. A second group of countries imposes religious law on all transactions, both family and commercial, in their country and have no space for secular commercial law (Iran and Saudi Arabia immediately come to mind). The third category of nations is the one that Israel and many other nations fit into. These are countries that have a millet system for family law. These governments regulate family law consistent with religious principles and create state authorized religious courts to adjudicate such disputes. Simultaneously, these countries have fully secular commercial law that sometimes include commercial aspects of family law. Countries in this list include India, Pakistan, Turkey, Israel, and many others.

Our proposal addresses all of these nations and their laws. Nothing in our proposal is either unique to Jewish Law or unique to Israeli law. Key aspects of what we propose can be incorporated into the law of any nation that fits into this model, producing greater efficiency and greater consumer happiness, as we note it would do in Israel. Furthermore, this can be done in Israel itself to govern the relationship between Israel and its Muslim citizens, who are not governed by the rabbinical courts but the Islamic courts of the state of Israel. The same advantages that would accrue in Israel with the adoption of this proposal would accrue elsewhere as well, with, of course, some local modification for unique idiosyncrasies of specific nation states.

X. A BRIEF RESPONSE TO THREE POSSIBLE CRITICISMS

There are three possible criticisms of our proposal, one concerning Jewish Law in Israel, one concerning arbitration law and one concerning the rabbinical court. None are persuasive.

One criticism may ensue from those who want more or less Jewish Law in Israel. We see merit in both of these criticisms. Our proposal is not focused on the proper place of Jewish Law in Israeli society, as that is a matter for the Knesset to determine. Our focus is on the expansion of forum options available and allowing choice of law selections when permitted by Jewish Law. Expanding or contracting Jewish Law is beyond the scope of this paper.

Another criticism may rise from the consideration that private arbitration tribunals are users' pay systems and reduce the poor's access to justice. This criticism, while true, is inapplicable to our proposal. We intend to expand the jurisdiction of the state rabbinical courts, which is the free court system, to include all monetary matters. The net effect of expanding the (paid) private rabbinical courts' jurisdiction and the expansion of the (free) state rabbinical courts to include monetary matters will make the free state rabbinical courts faster and more available, because private rabbinical courts will start robustly hearing cases and reducing the case load of the state rabbinical courts. In the current model, no free, private arbitration is available in the rabbinical court, and providing such free service, under our model, will increase reasonably priced (or free) options for the poor. We assume that some cases in the state rabbinical court system will move to the private system. If the budget allocation to state rabbinical courts remains constant, the net effect will be to increase the availability of state rabbinical courts to resolve disputes to those who choose to use them. This makes state rabbinical courts more accessible to the poor.

A third criticism may be that by allowing state rabbinical courts to function as private arbitration tribunals in monetary matters, we have diminished the line between governmental and non-governmental functioning. As the Israeli Supreme Court has noted,[92] privatizing governmental functions can be fraught with difficulty. Our response focuses on the unique role of the rabbinical courts in Jewish history. Unlike every other aspect of contemporary Israeli government, the rabbinical courts pre-date the establishment of the state.[93] They were adjudicating monetary disputes before the establishment of Israel, before the British Mandate, and before the Ottomans assumed control of Palestine.[94] The idea that Israel will allow rabbinical courts of the State to function as rabbinical courts has existed for the last millennia with

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[92] *See* HCJ 2605/05 The Academic Ctr. of Law & Bus. v. Minister of Fin. (2009) (Isr.) (though it does not necessarily impact the thought process in this case, it must be noted that this case dealt with the administration of a private prison and that the court might see things differently when discussing options for dispute resolution).

[93] The Chief Rabbi of Jerusalem was an official office in the 17th Century, and in 1842 the Ottoman Empire combined this office with that of the Chief Rabbi of Constantinople under the title "*Rishon Lezion*." The Chief Rabbi of Turkey and the Chief Rabbi of Israel both now use that title.

[94] *See generally* Alick Isaacs, *Lecture 9: Islam and the Jews: Jerusalem in the Middle Ages – 2*, JEWISH AGENCY (Aug. 23, 2005), archive.jewishagency.org/jerusalem/content/23686.

the consent of parties. This does not represent a profound breach of normative rules of justice at all analogous to private prisons or other governmental delegations to private parties, since the parties have consented, and this is their historical role. Furthermore, authorized rabbinical courts throughout the globe serve this function already, giving Israelis with access to resources the ability to find exactly such "State Authorized" rabbinical courts.

XI. A SOLUTION TO THE PROBLEM OF FORUM SHOPPING IN ISRAELI DIVORCE LAW

As has been documented, current Israeli family law allows for or even encourages a race to the courthouse in which parties jostle for procedural and substantive advantage in terms of Jewish Law or secular law at the time of their divorce.[95] The underlying reason for this is simple to understand: the Knesset has chosen to allow the parties to have the finances of their divorce adjudicated either by state rabbinical courts or (secular) family law courts and recognizes that the choice of forum here is also a choice of law between Jewish Law and secular law. Thus, the parties race to the courthouse of their choice when they believe their spouse might file for divorce in the forum they would not select. Furthermore, solutions to this problem have all failed because they have been predicated on the desire to increase or decrease the place of Jewish Law in end of marriage determinations. As we noted in the introduction, we are not advocating for an increase or decrease of the presence of Jewish Law in these scenarios. The decision by the Knesset to allow the parties to decide whether Jewish Law shall govern the finances of their divorce is sacrosanct to this proposal.

Our proposal, however, allows an elegant solution to this deeply problematic race to the courthouse at the time of the divorce by front-loading this decision onto the parties at the time of marriage. Our view is that at the time of marriage, parties should be handed a mandatory form[96] which must be filled out in order to obtain a marriage

[95] *See* Daphna Hacker, *Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts,* 27 J. L.J & RELIGION 59, 69 (2012); *see generally* Ariel Rosen-Zvi, *Forum Shopping between Religious and Secular Courts (And Its Impact on the Legal System)*, 9 TEL AVIV U. STUD. L. 347 (1989).

[96] The form would be something like this:

license, in which the couple is given a variety of choices as to the forum in which their divorce will be adjudicated and the law which will govern the finances of that adjudication. Of course, no option will be presented to the parties that does not effectuate a valid Jewish divorce as a matter of Jewish Law as determined by the Chief Rabbinate.

As our paper has amply demonstrated, a diversity of choices from at one end of the spectrum (of deeply traditional Jewish life with Jewish Law as determined by *Badatz,* and a *get,* issued by *Badatz)* to the other end of the spectrum (with a Rabbinate issued *get*, and all finances adjudicated consistent with the rules set out by the family law courts of Israel) are possible in our proposal. Furthermore, a wealth of choices is provided in-between if the couple so wish. A final option acknowledging the acceptance of the race to the courthouse under Israeli law would also be presented to the couple.

The virtues of our solution to a pressing problem in Israeli law are obvious. First, we neither increase nor decrease the role of Jewish Law, yet we solve the problem of the race to the courthouse. Second, by front-loading this race prior to marriage, it increases the likelihood that the parties address this issue between them while aware of the

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> Husband to be [Named] and Wife to be [named] agree that should there be any disputes in our marriage or in its dissolution the law governing all matters (other than the giving and receiving of a Jewish divorce) shall be: [Israeli Law/Jewish Law/other legal system as selected by the parties] and our choice of forum is [selected from a list of private rabbinical courts authorized by the office of the Chief Rabbi, or the state rabbinical courts or the state family court], and in the event we do not have an agreement in advance, we recognize that this will be governed by the law in place at the time of our divorce.

All recognize that public policy should not encourage divorce, and having an arbitration agreement in advance helps in this regard. Of course, for this approach to work, the Chief Rabbinate must provide a list of non-Rabbinate organizations authorized to perform divorces in accordance to Jewish Law as they understand it. To ensure that they do so, the law that authorizes this could say that the state rabbinical courts only have the consent jurisdiction that we propose so long as there are at least ten authorized private rabbinical courts.

The form will also have a decline option: "I/we decline to sign this form"; people who do this can be told that they have acknowledged that they are liable to face a race to the courthouse. Having addressed the breadth of choice of law and choice of forum, we see this as an opportunity to solve the race to the courthouse. We recognize that the reason this issue has not been fixed is that each side sees an advantage in having the ability to choose between Jewish or secular law. We are not trying to increase the role of Jewish or secular law, and we think addressing the issue before the marriage is a much better idea.

choices provided by the Knesset and remaining consistent with their matrimonial union. As we have shown elsewhere, mutually agreed upon choices of law and forum increases effectiveness, happiness and efficiency, which is true here as well.

XII. CONCLUSIONS AND SUMMARY

The expansion of the options available in Israel for religious arbitration can be done in a way that does not change the underlying substantive relationship between the three cases: (1) where Jewish Law is the binding law for Jewish citizens; (2) where Jewish Law is not binding; and (3) where the parties choose what law binds. This expansion—if done well and with thought—increases efficiency, reduces costs, expedites dispute resolution, and reduces the social tensions present in the current situation. The key is recognizing that "choice of law" decisions are not the same as "choice of forum" decisions, and Israeli law ought to encourage vibrant choice of forum, even when the Knesset has made a clear "choice of law" decision to mandate Jewish Law. Arbitration law is robust enough to allow for that policy all the while allowing Israeli society to acquire the benefits of litigant selected forums. Our final chart outlines our proposal concisely.

XIII. CHART WHICH SUMMARIZES THE PROPOSAL

Below, we reproduce a chart with miscellaneous notes that highlights our proposal. This expanded chart shows exactly what we think an ideal system would look like: full choice of law and forum for all monetary matters, as well as full forum choice for all status matters, where choice of law is limited to Jewish Law as understood by the Chief Rabbinate.

In summary, we are proposing a liberalization of choice of law and choice of forum in regard to religious adjudication and arbitration. We are not advocating a revolution in how the Israeli courts approach Jewish Law, rather advocating a procedural change in order to expand consumer options. The final result is an efficient system where

consumers have enough choice to ensure that the court system remains efficient and relevant.

Topic Area→→ *Subject Area↓↓*	**Commercial Disputes**	**Status Issues (marriage, divorce & conversion)**	**Commercial Family Law**	**Miscellaneous**
Forum Choices	Full forum choices	Full forum choices	Full forum choices	Notice that we generally advocate for robust and complete forum choices.
Law Choices	Full law choices	Jewish Law as defined by the Chief Rabbinate	Full law choices (limited by its impact on status)	Here we distinguish between family law (and Jewish identity) and other areas. Non-Jewish status issues will be treated like Jewish status issues in their ecclesiastical courts.
Supervision by Chief Rabbinate	No	Yes	Limited to issues of status that might arise	It is not enough to say Jewish Law, we mean Jewish Law (*halacha*) as defined by the Chief Rabbinate.
Appellate Review	As agreed to by the parties	Yes (by the Chief Rabbinate)	As agreed to by the parties for commercial matters and fully for status matters.	This is how they enforce the law as applied to the facts.
Miscellaneous	We think that there needs to be private rabbinical courts very robustly on commercial matters.	We do not want to use this to create a status revolution. Areas that are now governed by Jewish Law will continue to be so governed.	There are a few commercial law matters in family law that have status impact. They are legally like all status issues.	This chart summarized the paper entitled *Religious Alternative Dispute Resolution in Israel and Other Nations with State-Sponsored Religious Courts: Crafting a More Efficient and Better Relationship Between Rabbinical Court and Arbitration Law in Israel.*