

Same-sex marriage and divorce in Israel: Approaches of Civil and Rabbinical Courts

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Matters of marriage and divorce in Israel are within the concurrent jurisdiction of the civil courts and the religious courts. The religious courts were established according to pre-state legislation under the British Mandate and exist until this day. While each recognised religious community has its own courts, this article will focus on the religious approach of the rabbinical courts, which have jurisdiction over 80% of Israel's population.

Israeli law grants the religious courts the exclusive authority to perform and recognise marriages between members of the same religious affiliation. It should be noted that a person's individual religious beliefs have no impact on their being categorised as being a member of a certain religion. An atheist who was born to a Jewish mother is categorised as Jewish for all matters related to marriage and divorce.

As none of the religious courts will perform a marriage between parties of the same gender, there is no possibility of a legal same-sex marriage in Israel. Civil and religious courts have concurrent jurisdiction in matters that are ancillary to divorce, mainly issues related to child custody and division of assets. The party who files first, subject to certain restrictions, determines the court of jurisdiction.

Common law marriages are recognised in Israel by both the rabbinical and family courts. Partners that share a common household as defined by the courts are considered to be subject to the same obligations and maintain the same rights as partners that are formally married. However, the civil courts of Israel are not entirely bound by the strictures of religious law. They have therefore developed case law that has given practical solutions to those who cannot legally marry according to

religious law. The recognition of same-sex couples as common law spouses is one of the great divides that exist between the approach of the rabbinical and civil courts.

Rabbinical courts, which rule according to Jewish law (Din Torah), do not recognise a same-sex marital union, nor will they recognise a same-sex relationship as a common law marriage. Civil courts in Israel do recognise same-sex relationships as having the same substantive rights and obligations as a married couple. The precedent-setting 1994 case of *Danilevitch v El Al* recognised the right of the same-sex partner of an El Al airline employee to receive to the same benefits as a legally married spouse of an El Al employee, including reduced airline tickets.

The civil courts have continually expanded the rights of same-sex couples; the right to make binding prenuptial agreements, the parental rights of the non-biological partner, the right to receive spousal support and the right to equitable distribution of the 'marital' assets. Substantively, there is no practical difference between the rights of married couples and same-sex partners. The difference exists in the formal recognition of same-sex partners as being married. In a 2005 petition filed by five male couples who married in Canada, the Supreme Court of Israel ruled that although same-sex couples married abroad are not recognised as married in the rabbinical courts, the state must register the couple as married in the Population Registry. Thus was created an anomalous situation whereby the same-sex couple was registered by the civil agencies of the state, yet under the applicable religious law, they were both considered single.

The Supreme Court ruling was seen as a victory for same-sex couples, yet created a new issue. How could same-sex couples of

the same religion who were registered as married in Israel change their status to single if they separated? Since religious courts have exclusive jurisdiction over divorce between couples of the same religion, a same-sex Jewish couple married outside Israel and registered as a married couple are unable to file for divorce in the rabbinical courts.

On the other hand, countries that recognise same-sex marriage, such as Canada or the United States, have residency requirements for couples that wish to file for divorce. A married couple living in Israel would need to uproot their lives for extended periods in order to obtain jurisdiction to divorce in a foreign country.

Faced with this dilemma, a same-sex Israeli couple, registered as married in Israel due to their marriage in Canada, asked the family court to declare them to be divorced. Under a 1969 law, Jurisdiction in Matters of Dissolution of Marriage (Special Instances and International Jurisdiction), the family court was granted jurisdiction to divorce couples of different religions who had married abroad and were unable to divorce in Israel. The law, however, did not grant divorce authority to family courts in cases where the parties were of the same religion. The Canadian couple were both Jewish and therefore there was no statutory authority to grant them a divorce.

The couple had signed a separation agreement, which was ratified by the family court. They presented the court ratification to the Population Registry, an authority under the auspices of the Interior Ministry, and requested that their status be changed to 'divorced'. The Population Registry was not impressed by the court-ratified agreement and refused to register the couple as divorced. The Population Registry contended that only the rabbinical court was authorised to grant a divorce to a Jewish couple. The couple attempted to file a divorce petition in the rabbinical court but the court would not comply, claiming that it needed time to review the situation.

Not to be deterred, the couple filed a petition for divorce with the family court.

The family court ordered that the Interior Ministry be added as a respondent to the action.

The argument that the separated couple presented regarding jurisdiction of the court was twofold. First, it stated that in view of the fact that the rabbinical court did not recognise the marriage, it could not grant a divorce. Second, they contended that the state must provide an avenue for a married couple to exercise the fundamental right to divorce. Failure to permit a couple to legally divorce is contrary to the rights of equality and justice as guaranteed by the laws which define fundamental rights in Israel. The Interior Ministry continued to claim that the couple must file their divorce petition in the rabbinical court, despite that court's delay tactics and their known position regarding same-sex marriage.

The family court held that it had jurisdiction based on principles of international law and forum non conveniens. Although both courts are part of the Israeli legal system, they acted according to two different legal precedents and legal sources. It therefore found that the principles of international law were applicable in this matter. Based on the fact that the rabbinical courts do not recognise same-sex marriage and therefore would not be able to issue a divorce decree, the court held that the couple's predominant connection was to the family court, which is the appropriate forum to rule on the divorce petition. Furthermore, the law defining rabbinical court jurisdiction provides that in cases where the rabbinical court determines that it does not have jurisdiction, then the family court is seized with jurisdiction.

The family court agreed with the arguments of the plaintiffs and held that it would exercise its inherent authority to provide relief in matters not specifically regulated by statute. The court held that given the family law precedents regarding same-sex couples, it was the natural forum to determine the divorce of same-sex couples. The court also referred to the couple's prior family court matters. The same court had previously issued an adoption order for the couple's child and then ratified their separation

agreement. The judge even cited his swearing-in oath in which he committed to upholding fundamental principles of justice in his decision to issue a divorce decree.

The case set an important jurisdictional precedent. However, it only applied to the circumstances of the case, namely where a same-sex couple who married abroad subsequently registered as married in the Population Registry. Several months after the ruling in the Canadian case, a divorce petition was filed by a woman who had married her partner in the state of Connecticut. Both parties lived in Israel. In this case, the couple had never registered their marriage in the Population Registry. They were therefore not recognised as married in Israel. The court was thus confronted with the legal dilemma of issuing a divorce for a couple not married in its jurisdiction.

Not wanting to register their marriage after already separating for fear that they might only further complicate their situation, the couple filed a petition for divorce in the family court. However, following the suggestion of the court, the petitioner agreed to register her marriage in the Population Registry. However, the respondent refused to cooperate. The respondent's refusal to register their marriage forced the court to

rule on whether it had jurisdiction to issue a divorce decree to a couple not recognised as married.

The petitioner argued that international law required the court to recognise their marital status, without necessarily changing their formal status in Israel. Given that the situs of the marriage is the principle followed to determine its legitimacy under US jurisdictions, the court must recognise the marriage of the parties.

The court rejected the recognition argument. It held that under Israeli law, religious laws apply to acts of marriage and therefore the court cannot declare that a marriage not recognised in Israel is in fact valid.

However, the court did accept an alternative practical solution. The court recognised the reality that the couple were married under the laws of Connecticut and no longer were living together as a couple. Instead of issuing a divorce decree, the court issued a declaratory judgment, which stated that the parties were not married to each other and therefore free to remarry. While not resolving the legal issues, the judgment resolved the personal status issue of the parties. Given the successful resolution of their status, no appeal was filed. It remains to be seen whether the legislature will provide the necessary relief to couples in similar situations.