How to Make a Tort of Marital Captivity, the Israeli Experience

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# Introduction, Tirzah's story

In 1999, Tirzah (not her real name) came to my office for advice. She had been in marital captivity for ten years. She was thirty-six years old, although she could easily have been mistaken for much older. At nineteen, Tirzah, an ultra-Orthodox Jew, had been married through a match-maker to a man who, she would later discover, suffered from serious psychological problems. In 1989, six kids and seven years after her wedding, Tirzah had left her husband and sued for divorce in a Jerusalem rabbinic court.

Though she desperately wanted a divorce, Tirzah had not set foot in a rabbinic court since 1994. At the last hearing, the tribunal had tried to persuade her to surrender all her rights in the family home and to waive child support, past and future, in exchange for a Jewish bill of divorce, a *get*. These were her husband’s conditions for divorce and the court thought that Tirzah should meet them.However, these conditions were not, to say the least, acceptable to Tirzah. When she rejected them, the tribunal blamed Tirzah for her state of marital limbo, claiming that she was “anchoring” herself. After all, the keys to her freedom were now in her hands. All she needed to do was to submit.

Tirzah left the rabbinic courtroom and refused to go back for help. Having exhausted all other conventional paths available to her, I advised Tirzah to sue in secular, family court for compensatory damages for the harm done to her as a result of being denied a get. This was the first time such suit was brought in Israel. In December 2001, the family court denied her husband's motion to dismiss the claim; and, on the same day, he released her from marital captivity in exchange for waiver of the lawsuit.[[1]](#footnote-2)

Since 2000, in my capacity as head of two NGO’s, I have overseen the filing of scores of damage claims in Israeli secular, family courts on behalf of Jewish women like Tirzah who were being held in marital captivity.[[2]](#footnote-3) Judges have accepted these claims and awarded women hundreds of thousands of dollars. Family courts all over Israel have thus turned a state-enforced religious “right” --to hold a woman in marital captivity-- into a civil “wrong,” establishing that persons cannot abuse religious privileges to infringe on the liberty and autonomy of their spouse.

This is the sociological and legal story of those claims. Using Israel as a case study, I will describe “How to Make a Tort of Marital Captivity”; what pitfalls an attorney may face; what challenges might be confronted; and the impact, as well as the limits, of this tort as a means of resolution to the problem of marital captivity.

# Background, Jewish Divorce in Israel

In Israel, religious laws determine when a marriage ends.[[3]](#footnote-4) Since religious communities have different rules regarding marriage and divorce, Israeli residents of different religious communities[[4]](#footnote-5) (“millets") are subjected to different levels of marital captivity.[[5]](#footnote-6) Women are particularly vulnerable. Israeli Jewish woman can be held in marital captivity forever.

Jews in Israel are governed by the Rabbinic Court Jurisdiction (Marriage and Divorce) Law of 1953. This law gives rabbinic courts sole jurisdiction to arrange divorces for Jews in accordance with Torah law (*din torah*). *Din torah* binds a Jewish woman to her marriage until her husband agrees to deliver a bill of divorce (*get*) to her of his own free will (T. Bavli Yev. 112b). Coercion or leverage wielded against a recalcitrant husband can invalidate a get as “forced” (*meuseh*) (T. Bavli Git.88b).[[6]](#footnote-7)

This means that a Jewish woman married to a Jewish man in Israel -- whether she is religious, unaffiliated, or agnostic -- will be divorced only when her husband physically places into her hands a bill of divorce, written by a scribe with pen and ink on parchment paper, in a ceremony witnessed by three men. If her husband agrees, a woman can be divorced as quickly as she can arrange for the requisite scribal activity; there is no waiting period or trial separation for divorce. But if her husband is missing, incapacitated, or simply refuses to deliver a *get*, a wife will remain tied to her defunct marriage forever, figuratively “anchored” (an *agunah*[[7]](#footnote-8)) into marital captivity.

Proof of fault will not release an Israeli Jewish woman from marital captivity. It does not matter if her husband abandoned her, committed adultery, converted, is in prison for murder, is in a coma, took vows of celibacy, or if she simply cannot stand him. It does not matter if the rabbinic court has even put her husband in jail for refusing to divorce her.[[8]](#footnote-9) If a husband refuses to deliver a get to his wife, a rabbinic court will not declare the marriage over; and Israeli family courts have no jurisdiction to do so. If she dares to ignore the need for the *get* and live with another man and have his child, she will be branded by the state as an adulterous (a *noefet*)[[9]](#footnote-10) and her child will be ostracized as a bastard (a *mamzer*)[[10]](#footnote-11) who is barred from marrying another Jew except a fellow mamzer.[[11]](#footnote-12)

Because of an edict attributed to Rabbenu Gershom in the Middle Ages, Jewish men can also be held in a diminished form of marital captivity. That edict barred Ashkenazik Jewish men from marrying a second wife and divorcing a wife against her will.[[12]](#footnote-13) However, if valid "fault" grounds exist, a man can be given a dispensation to take a second wife and to be free of any obligations to his first one. If he does receive such dispensation it is a recognized exception to the crime of bigamy in the State of Israel.[[13]](#footnote-14) Even if he does not receive such dispensation, he is not censured by Jewish law if he leaves his wife and has a child with another, unmarried woman. He will not be branded an adulterer and his children with that woman will not be ostracized.

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The Tort of Marital Captivity discussed here is a response of (secular) Israeli family courts to the problem of marital captivity for Israeli Jews—both for women in its expanded form, and for men in its diminished form. Family courts in Israel have parallel jurisdiction with Israeli rabbinic court over matters ancillary to divorce; but they have no jurisdiction over the actual divorce and cannot declare a Jewish marriage over. There is no secular, civil divorce in Israel. [[14]](#footnote-15) The tort claims described here have provided a way for family courts judges to respond to what had been the taken-for-granted reality that Jewish husbands in Israel could both keep their wives in marital captivity forever without any justice or relief available, as well as demand, often with rabbinic support, extortionist conditions for their freedom.

Though the tort of marital captivity is relatively new in Israel, it is not an isolated response of secular courts to martial captivity, nor is it a new idea. Outside of Israel, civil courts and legislatures worldwide have been increasingly willing to respond to the injustices that result when a husband or wife refuses to "remover religious barriers to remarriage" of their spouse—i.e., keep them in marital captivity. [[15]](#footnote-16) Since the 1950’s, French courts have held that withholding a Jewish divorce is a tortious act under the Civil Code of France, Art. 1382.[[16]](#footnote-17) A Dutch court made a similar ruling in 2010.[[17]](#footnote-18) Academics have been contemplating tort as a response to marital captivity for Jews for decades.[[18]](#footnote-19)

# How to Make a Tort of Marital Captivity

In this section, I describe how feminist cause lawyers, [[19]](#footnote-20) their agunah clients, and family court judges, joined forces to construct-- and are continuing to construct--the tort of marital captivity in Israel, slowly changing the common sense that marital captivity is just how things are and always have been. Israeli lawyers and their clients have "named" the new tort while at the same time they have shifted the "blame" for the harm done to include holding rabbinic courts and religious rules responsible. Family court judges have "reified" the tort, making it seem part of a long, historical tradition and distancing it from its agents. And, at the same time, judges have categorized the new tort as a totally secular cause of action, separating it from religious rules and universalizing it as a human rights violation that the state cannot ignore.

That said, the naming, blaming, reifying, categorizing, and universalizing of the tort of marital captivity in Israel has been somewhat incomplete and inexact. The tort has not been fully institutionalized and "internalized" in Israel as the new common sense, [[20]](#footnote-21) certainly not by rabbinic judges who claim the tort is invalid "force." [[21]](#footnote-22) Here I explore the imprecisions, deficiencies, and challenges that remain before we cause lawyers can rest assured that our work is done and that the tort gains further traction-- both inside and outside of Israel.

## Name

As the Israeli cause lawyer who brought the first cases for damages on behalf of Jewish women held in marital captivity I, together with colleagues from my organizations,[[22]](#footnote-23) took the first steps in "naming" a new reality—the fact that the injurious act of refusing a get will no longer go without relief.[[23]](#footnote-24) Naming get refusal as a civil wrong not only empowers powerless women, but it also breaks what Catherine Mackinnon would refer to as the “silence of a deep kind” -- the silence of being prevented from having anything to say.[[24]](#footnote-25) Felstinger, Abel and Sarat, note that naming may well be the critical point in the transformation of an injurious act into a legal dispute and claim. They state that: "the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision." It should be done carefully and precisely.[[25]](#footnote-26)

In the initial pleadings filed, the injurious act targeted and so named was that of "get refusal." It was not called "marital captivity" or "get abuse." The terms captivity and abuse underscore the harm being done much more than the term "refusal." Simply labelling the act of get refusal as harmful and deserving of compensatory damages does not explain what is amiss, what injury is occurring. To some extent, the term refusal dissimulates that anything injurious is actually happening. This is particularly poignant when the State of Israel has, for all intents and purposes, embraced religious laws that facilitate, if not condone, such refusal and injury.

When I drafted the first claims for damages for get refusal, I looked towards the Israeli Tort Ordinance and contract law to help frame what exactly was wrong. I drew on all possible legal arguments and argued that get refusal was: a form of wrongful imprisonment; encouraged extortionist behavior; a breach of the Jewish marriage contract; an injury to the right to marry, to bear children, and to sexual enjoyment. In response to this collection of allegations, J. Greenberger of the Jerusalem family court noted that all this boils down to an infringement on a woman's "autonomy." He wrote:

… [I]n my opinion these various infringements [assembled by Attorney for the Plaintiff] combine to form one central cause of action in tort, to wit, infringement of a woman's personal autonomy caused by depriving her of her ability to determine the continuing course of her life with respect to those issues that are central to the life of any.[[26]](#footnote-27)

Later, Judge HaCohen would refuse to base the new tort on the "false imprisonment statute" but he nonetheless made the comparison:

Granted, there is no room for imputing to the Defendant the *commission* of the tort of “false imprisonment” – one of the alternatives suggested by the Plaintiff. However, there is no doubt that in actuality the Plaintiff is *imprisoned* and *confined* by the Plaintiff, without the ability to break out and extricate herself from a matrimonial *bond* which she no longer desires. Before us is a clear case of social and psychological *imprisonment* (emphasis mine- s.w).[[27]](#footnote-28)

Judge Sivan, quoting Supreme Court Justice Arbel, noted that *get* refusal "chains" a woman to the "bonds" of unwanted matrimony:

The phenomenon of *get* refusal …involves severe and painful injury to the woman who remains *chained* to a marriage in which she is no longer interested: her freedom is compromised, her dignity and feelings are harmed and her right to family life is also affected ...[*Get* refusal infringes] in this way on a woman’s right to *autonomy*, her right to realize herself as a *free* person, her right to *choose* her destiny, to write her life story - to decide, by herself and only by herself, whether and when the *bond* of marriage that she no longer wants will be ended and whether and when she will decide to enter into such a bond again (emphasis mine- s.w).[[28]](#footnote-29)

As early as 2004, we lawyers started referring to get refusal as a form of domestic violence, pointing to the Prevention of Family Violence Law of 1991 as the source for the construction of a new cause of action based on a breach of a statutory duty."[[29]](#footnote-30)

Yet, while some judges will speak about the loss of autonomy, marital bondage, or the infringement on dignity intrinsic to get refusal, and while some have started to call get refusal a form of domestic violence, the new tort is still largely referred to as "the tort of get refusal."[[30]](#footnote-31)

I posit that it is not enough to "name" the tortious act of refusing to deliver a Jewish bill of divorce as "get refusal." The tort of "marital captivity" for example is much better. As described below ("Reify"), the failure to highlight the injury done when first naming the new tort has to some extent been compounded by inexact efforts to "reify" it and place it within the history of tort and contract law.

## Blame

In addition to "naming" the new tort of get refusal in a way that stresses the act of abuse or imprisonment involved, those constructing the new tort would do well to unabashedly and unapologetically acknowledge that millets are designed in such ways as to facilitate marital captivity. In other words, millets are as much to "blame" for marital captivity as recalcitrant husbands. [[31]](#footnote-32) Understanding the nature of such "blame" will enable state secular courts to unhesitatingly take responsibility for the social construction of the tort of marital captivity and not to delegate such responsibilities to those millets,[[32]](#footnote-33) or to rely on millets to correct themselves through reinterpretation of ancient texts.[[33]](#footnote-34)

Since Israel is a country that has specifically embraced the rules of millets-- religious-theocratic laws —despite being a democracy in every other way, criticism has not been an easy thing for Israeli judges to do.[[34]](#footnote-35) Essentially, one arm of the state has to "blame" the other. Some family court judges lay such blame better and more forcefully than others. J. HaCohen (2004) referred to the problem of get refusal as “fundamental,” suggesting that there was a systemic problem with Jewish Law (also: "halakha"). He wrote:

The problem of get recalcitrance is one of the fundamental problems of halakhic Judaism and in Israeli family law (emphasis mine, s.w.)[[35]](#footnote-36).

When confronted with the (awful) case in of a man who refused to deliver a get to his wife for 27 years and then left nothing to her or his children in his will, J. Weitzman, an Orthodox Jew, noted that halakha does not treat men and women equally; that rabbis hesitate to apply even moderate pressure on (awful) recalcitrant husbands; and, that even when rabbis agree to imprison husbands, woman can be stuck in failed marriages forever. He warned:

…[E]ven if [rabbinic judges] do take measures to enforce the get, if the withholder withstands those sanctions applied against him, or simply wants to annoy and take revenge on his wife—she can find herself chained to him forever and ever till death part them—as was the case here.[[36]](#footnote-37)

J. Sivan noted that values embraced by the family court and rabbinic court are not the same:

The rabbinic court is obligated to the particular system of laws and values for which they exist, as well as to an array of considerations and guiding principles that are sometimes different from those which obligate the civil court. [[37]](#footnote-38)

Sometimes Israeli judges in secular courts have also ruminated that things could be different. They will argue that halakha has the tools to heal itself, but that, unfortunately, it is not within their authority to do so.[[38]](#footnote-39) While sympathetic to such sentiments, I posit that such judicial ruminations of halakhic possibilities are of no help at all and do not serve the needs of justice. When faced with harm done in the name of religion, Judges cannot wait till the religion corrects itself through reinterpretation. They would do well to heed the words of Valentine Moghadam who, after surveying the responses of Muslim feminists to sharia law, proclaims unapologetically that states must protect its citizens from religious injustices, subjecting them to critiquing (or "blame"):

Family law should not derive from religious texts, whether in Iran or in Israel. Blasphemy laws should be removed, and religion should be the subject of historical and critical inquiry. All citizens should be equal before the law, with equal rights and obligations. Civil, political, and social rights of citizens should be protected by the state and by the institutions of civil society.[[39]](#footnote-40)

In other words, marital captivity cannot be justified as another, multicultural way of doing things.[[40]](#footnote-41) Nor as simply the halakha—the Jewish law way.

## Reify

In addition to "naming" the new tort clearly, and along with placing "blame" on the institutions and apparatuses that facilitate the promulgation of the tortious activity, those interested in constructing the new tort must (ironically) deny that such new construction is taking place. They must "reify" the new tort and make it seem like it is not their doing -- that it is a product distinct and separate from its producers. [[41]](#footnote-42)

In an article entitled “How to Make a New Tort: Three Paradoxes,” Anita Bernstein describes how strategies of reification (not her term) have been essential to the successful “formation-and-birth” process of new torts.[[42]](#footnote-43) Taking an empirical look at new torts that have succeeded, Bernstein suggests that those who want to construct a new tort should make sure the new tort seems like it is old and not new. And they should try and ground the new tort in contract and property law since those are older and more respectable legal disciplines than tort. She also argues that the creators of new tort should try and make things look as if it were completely independent of individual human creation, particularly of any feminist agents. Regarding the latter, Bernstein explains that while activists face the future, common law faces the past. Law reform efforts and new torts are fundamentally different and incompatible. One defeats the other, forcing tort reformers to choose whether to prefer the new tort and to submerge their own agency, or to prefer activism and submerge the tort. (Bernstein admits a bias in favor of the new tort).

Or, re-conceptualizing Bernstein's theory, there are two strategies of reification that the creators of a new tort should undertake: One is the strategy of "eternalization"—making the tort seems as if it were not new but is part of an eternal tradition--whether in tort or contract law. The other is the strategy of "nominalization"—making it seem as if there were no agent responsible for the construction of the new tort. [[43]](#footnote-44)

Intuitively, those of us who took part in the construction of the new tort in Israel—judges, academics, and activists-- drew on these strategies.

### Eternalize (as tort)

The need to ground the new tort in the *terra firma* of tradition is most obviously underscored by the fact that all judges who rendered decisions after Greenberger’s initial one in 2001, including Greenberger himself, searched for foundations in the Israeli Tort Ordinance—as did I when I filed the original damage claims. The academics Kaplan and Perry rallied strongly for this redirection. They wrote:

The Tort Ordinance, as *everyone knows*, is the “picture image” of English tort law at the time of their legislation…The torts that were conceived and constructed by the English in their case law were *fixed* by us in the form of statutory law; and while the English courts may expand the list of torts as they have for hundreds of years, the legislative picture in Israel is that of a *closed list* of tort, of which there are no others (emphasis mine-s.w.) [[44]](#footnote-45)

Kaplan and Perry also posited that within the Tort Ordinance, it was best to ground the new tort under the "negligence rubric." And indeed, all judges who granted awards for *get* refusal after 2001 have taken up the academics’ gauntlet to ground the tort in the old and familiar (albeit vague) language of the negligence statute (§36 of the Israeli Tort Ordinance). All the judges, including Greenberger himself in 2008, have now agreed that *get* refusal is "unreasonable" behavior that violates the "duties of care" that a husband and wife have to each other.[[45]](#footnote-46)

HaCohen was the first judge to rise to the academics' challenge and lay the historical and precedential grounds for using negligence to formulate the new tort. Quoting cases that go as far back as 1951, HaCohen explained that, “as it has been delineated over the years in case law and in the legal literature,” negligence includes intentional acts. He added, however, that contrary to Kaplan and Perry’s notion of torts as fixed, "the categories of negligence are never closed, never rigid and never immutable, but are rather determined based on the sense of morality and societal and social justice and society’s changing needs." Negligence, he thus argued, has always, traditionally, and historically been normatively creative and never set in its ways.[[46]](#footnote-47)

I argue that it is here, at this point of "reification" and "eternalization" of the new tort, in search of re-invented roots, that an imperfect "tort of marital captivity" has been produced. The negligence statue with its open language of “reasonableness” and “duty” is the perfect textual spot to cover almost any “wrong,"[[47]](#footnote-48) However, with the benefit of hindsight, it has become clear that the negligence statute was not the ideal way to reify the new tort. Placing get-refusal under the rubric of negligence has obfuscated the power relations that were meant to be redressed by the new tort. Get refusal becomes about reasonableness and foreseeability, not about the abuse of power, violence, or captivity. By rooting the new tort under the rubric of “negligence,” judges have inadvertently encouraged the idea that get refusal might sometimes be "reasonable,” or justifiable, or mitigated by contributory negligence, and thus not an act of abuse. [[48]](#footnote-49)

The reification of the new tort of get refusal within the tradition of tort law could have more accurately reflected the harm being done. This could have been done had the judges declared that marital captivity was a form of false imprisonment (§26 of the Tort Ordinance), or a violation of a statutory duty (§63 of the Tort Ordinance) that prohibits duress and extortion (§§ 427, 428, and 431 of Penal Code); or emotional abuse (§3 of the Prevention of Family Violence Statute)[[49]](#footnote-50); or which ensures a woman's dignity and freedom (§§ 2 and 5 of the Basic laws of Human Dignity and Freedom).[[50]](#footnote-51)

Perhaps, had the new tort been clearly "named" at the outset as a form of domestic violence --the "tort of marital captivity" for example-- Israeli judges would not have attempted tried to ground it in the tradition of negligence. Nor would they have even considered that a rabbinic court decision might be a prerequisite to finding that harm was done.[[51]](#footnote-52) Placing someone in marital captivity is an intentional act that causes harm. It is not fair. It cannot be "excused" or "justified" by lack of rabbinic ruling. And it should never be considered "reasonable." [[52]](#footnote-53)

### Eternalize (as contract)

Almost as if they were reading Bernstein’s recommendation, Israeli civil judges have also slowly embraced "contract" as yet another way to eternalize the award of damages for *get* refusal. In 2006, J. Weitzman rendered a judgement in favor of a woman against her husband’s estate on the basis of negligence, but he added that a Jewish husband’s duty of care to his wife derived from his obligation to her under the Jewish marriage contract, the *ketubah*. He wrote:

As far as Jewish couples are concerned, a man who enters into the responsibilities of marriage obligates himself to respect his wife, and not to harm her, and to take care of her needs, and he is obligated to do so long as their marriage lasts and until it ends. The grounds for this obligation lies in the Jewish marriage contract (*ketubah*)—which is in and of itself a source for the duty of care that a man owes his wife.[[53]](#footnote-54)

In 2008, Judge Tova Sivan, quoting Weitzman, similarly referred to the *ketubah* as the source of the duty of care that a man owes his wife. So did HaCohen in 2010. In 2011, Judge Nimord Felix declared that the marital relationship is a contractual one which requires parties to act toward one another in good faith, and fairness, in particular where there is an imbalance of power between the parties which is liable to give one person an advantage over the other .[[54]](#footnote-55)

In 2012, Judge Erez Shani similarly turned to contract in support a judgment of damages awarded in favor of a man whose wife, the court held, maliciously refused to accept the *get* out of vengeance and personal financial gain. Turning to contract, Shani stated that it is contract, more than tort, that justified awards made in response to *get* refusal. Elaborating at length as to what he feels is the implied “family contract” that the parties who appeared before him had undertaken by virtue of their relationship, Shani noted that the source of the terms of this contract are many and included, among others: those obligations set forth in writing between the spouses, in the laws of the state, as well as in the laws of personal status, for example, in the *ketubah*. Such obligations, Shani continued, must be carried out both in “good faith” and in “fairness” (at 48).[[55]](#footnote-56)

### Nominalize

Bernstein also suggests that activists intent on promoting a new tort should keep a low profile. A new tort can succeed, she maintains, even if it is ideologically charged and challenges power, so long as its agency is veiled. The scope can be broad but the agency must be modest. Modesty is even more important than a conservative agenda. And it’s also best, she adds, if the F word – feminism-- is downplayed. Bernstein blames the failure of MacKinnon and Dworkin’s feminist, anti-pornography efforts on what she calls “an uncommonly strong presence of agency.”[[56]](#footnote-57)

Interestingly enough, there is no mention in any of the family court decisions of the cause-lawyers origins of the new tort. Similarly, academics Kaplan and Perry make no mention of those origins, a fact which Yifat Biton notes in a footnote forty-eight of her article.[[57]](#footnote-58) Perhaps it is this very illusion of the absence of agency, in particular of feminist agency, which has contributed to the success of these torts.

In keeping with the spirit of this analysis is the fact that the new torts have been taken over by independent attorneys, male and female, who have for the most part an economic agenda with no particular cause in mind, let alone a feminist one. These attorneys have brought damage claims successfully on behalf of men, distancing the new torts even further from their feminist origins and at the same time ironically allowing for the expansion of their novel conceptual scope—that get refusal is an abuse of power and an infringement on dignity and autonomy.

In a 2010 decision in which he awarded damages to an 82 year old man, Judge HaCohen summed up the courts’ sentiments as follows:

The phenomenon of get refusal is an underhanded, power-laden event that delivers a mortal blow to the freedom, dignity and autonomy of the individual, without regard to whether the recalcitrant is a man or a woman.[[58]](#footnote-59)

## Categorize

In addition to "naming" the new tort carefully, "blaming" millets for systemic subordination of women, and "reifying" the new tort to make it seem part of a long tradition with no feminist origins, anyone constructing a tort of marital captivity would do well to "categorize" it as a secular response to harm done. Such categorization allows the new tort to separate itself conceptually from the religious act of divorce and from any religious response to the new tort, including the problem of the "forced divorce." Such categorization is essential to the successful social construction of the new tort both in Israel where rabbinic courts have sole jurisdiction over marriage and divorce, as well as in the diaspora where church and state are separated.

Indeed, many Israeli family court judges have specifically categorized the new tort as a secular response to get refusal that in no way interferes with a religious act. In 2001, Judge Greenberger explained that a tort claim in which a petitioner demands money for past harm done is a demand for (secular) relief and not for a (religious) declaration that the marriage is over:

This Court is not intervening at all in the act of giving the *get*, and the wife is not asking the Court to intervene in this act; the claim is for monetary compensation only and this on the basis of a cause of action in tort and tort alone.[[59]](#footnote-60)

In 2008, J. Greenberger also distanced himself from any possible response by a rabbinic court. He noted that it was not his job to decide whether or not the divorce will later be invalidated by a rabbinic court for any reason—including the problem of the "forced divorce"-- and that the agunah must decide for herself whether to continue with the case. Moreover, he emphasized that the court had an obligation to determine the case on the basis of tort theory and its objectives—and on that basis alone.[[60]](#footnote-61)

J. Sivan responded similarly:

I am of the opinion, and I share this opinion with my fellow judges, that these claims are for monetary compensation alone in accordance with tort law. They do not amount to any obligation to give a *get…* Moreover, by filing suit and following it through to completion, the plaintiff is making clear her desire to have her claim heard. It can be presumed, especially since she is represented by counsel, that the plaintiff understands [any] risks involved if this claim is accepted or denied…..[[61]](#footnote-62)

J. HaCohen explained that the new tort was not dealing with sanctions meant to encourage a *get*. It is compensation for past harm done, irrespective of when and if the husband might eventually give a *get*.[[62]](#footnote-63) He noted:

... The relief, should it be granted, will not be conditioned, determined or reduced if the *get* is given afterwards. And should the *get* be given during the proceedings and deliberations of this petition—it would in no way influence my decision on the matters before me…[w]e are not dealing with additional sanctions on the recalcitrant husband targeted at encouraging him to give the get. Nor is this Court involved in the means by which the get will be given in the future. Rather only with the direct consequences that result from the failure to issue the get and the right of the woman to compensation for damages. [[63]](#footnote-64)

In 2013, a Connecticut court made similar arguments when asked to enforce a husband's agreement to support his wife until she received a religious divorce:

Determining whether the defendant owes the plaintiff the specific sum of money does not require the court to evaluate the proprieties of religious teachings. Rather, the relief sought by the plaintiffs is simply to compel the defendant to perform a secular obligation, i.e., spousal support payments, to which he contractually bound himself.[[64]](#footnote-65)

In addition to noting that a tort claim is a secular one for damages and not a religious one in search of the get, J. Greenberger noted that it would be "bad faith" on the part of rabbis to claim jurisdiction over these monetary claims. [[65]](#footnote-66) Quoting Rabbi Uriel Lavi for such bad faith, Greenberger points out that under halakha there is no such thing as damages for intangible, non-pecuniary injuries--emotional harm not incidental to physical harm:

In these instances, when it is known from the outset that a claim brought before the rabbinic court for damages for *get* refusal is doomed for certain failure because the type of injury addressed does not fit into any category of obligation of a “tortfeaser” (*adam hamzik*) according to Jewish law … then, in essence, the raising of such claim is tainted by lack of good faith.[[66]](#footnote-67)

## Universalize

In addition to "naming" the new tort carefully, "blaming" millets for systemic subordination of women, "reifying" the new tort to make it seem like part of a long tradition with no feminist origins, "categorizing" the new tort as a secular response to harm done, anyone constructing the tort of marital captivity should also try to rationalize the new tort as part of the "universal" response in defense of human rights, and hence "institutionalize" the new tort as the way things should be done, without question.

Admittedly, suing husbands for damages for marital captivity is not a very direct, comprehensive way of protecting human rights. Such suits do not directly challenge Israeli government policies that impose religious laws on Israeli citizens, infringing on individual rights (of both men and women) to religious freedom, privacy, equality, marriage and divorce.[[67]](#footnote-68) Tort claims do not require the state to repeal the religious rules that made marital captivity the law of land in the first instance. And it can be argued that reframing marital captivity as a wrongful act of the husband obscures the state's direct contribution to martial captivity and impact on women as a collective. To a large extent, suing husbands for damages for unreasonable behavior is a poor translation of the larger human rights violations contained in the act of get refusal and marital captivity.

And yet, Israeli lawyers do indeed inter human rights allegations and proclamations within their pleadings and rulings. Standard pleadings filed by the Center for Women's Justice will allege that get refusal is a violation of the “right to autonomy, to have children and to marry.” Similarly, almost all the judges who have ruled on the these cases have held that the new tort is at the very least inspired by, if not directly grounded in, the Basic Law of Human Dignity and Liberty of 1992, one of the eleven Basic Laws that are said to make up Israel’s constitutional charter. [[68]](#footnote-69) In support of including get refusal within the broad framework of the Basic Law, Judge Greenberger writes:

In our case, I am convinced that the right of a woman to determine for herself when she wishes to sever marital ties and when she wishes to remarry, her wish "to write the story of her life as she wishes and in accordance with her choice," is a basic right that will certainly find its place by virtue of the aforesaid framework [right]. The aspiration of a woman who wants a divorce to fashion her personal condition as a free person determining her own fate merits every defense as an inseparable part of her dignity as a person.[[69]](#footnote-70)

Academics have argued that translation and condensation of human rights violations may be all that is possible in certain contexts. In an article describing the translation of transnational ideas such as human rights into local social settings, Sally Engle Merry explains how local activists translate human rights into the vernacular and in so doing lose much in the translation, compromising the rights of women for the sake of acceptance by the indigenous population.[[70]](#footnote-71) She quotes Snow and Benford to explain that such expedient framing is often necessary in the context of social activism and cause lawyers:

They frame, or assign meaning to and interpret relevant events and conditions in ways that are intended to mobilize potential adherents and constituents, to garner bystander support and to demobilize antagonists.[[71]](#footnote-72)

In Israel, such translation and condensation would appear to be inevitable. First, inevitable because the very same Basic Law that is invoked to help construct the new tort of marital captivity expressly prohibits any judicial review of longstanding, state divorce laws. Second, because there is no Basic Law in Israel that protects the rights to religious freedom and equality.[[72]](#footnote-73) And third, because many Israeli family court judges have dual loyalties. They are committed both to the democratic state and to religious rules. It is hard, if not impossible, for them to look the human rights violations of religious rules squarely in the eye. So by translating human rights into tort, Israeli lawyers and family court judges are probably doing the best they can to garner general support for their response to the harms being done as a result of marital captivity.

That said, judges outside of Israel might do well to consider underscoring how the tort of marital captivity is consistent with the state's obligation to protect the civil rights of women and to adhere to the universal principles of International human rights law.[[73]](#footnote-74)

# Caveat

The tort of marital captivity does not eliminate the possibility of marital captivity in the first instance.

To eliminate marital captivity completely--in and out of Israel—religious communities will indeed have to correct themselves and reinterpret their rules and traditions. To a large extent, Reform[[74]](#footnote-75) and Conservative[[75]](#footnote-76) rabbinic thinkers in the Diaspora have already done this. But until this happens, states have the obligation to respond to the harms done. I posit that the introduction of the tort of marital captivity will encourage such reinterpretation.

# Conclusion

Until Tirzah brought her lawsuit for damages, a husband's refusal to deliver a religious divorce was a taken for granted privilege, enforced of husband, backed by Israeli law. Before get refusal became a tort, family court judges may have had no recourse but to shrug their shoulders in angry frustration at a husband’s recalcitrance; attorneys may have cynically used (and continue to use) the possibility of recalcitrance as extrajudicial leverage to gain an upper hand for their male client against his a powerless wife; and husbands may have assumed that get refusal was his state endorsed religious right. But since the new tort of marital captivity, judges, attorneys, husbands, and wives cannot understand recalcitrance in their old, taken for granted ways. Now marital captivity is not a husband's privilege but a civil wrong that entitles his wife to redress through monetary compensation.

Learning from the Israeli experience, here's how to best make a tort of marital captivity:

* **Name**. Be careful how you name it. Be sure to underscore the abuse and loss of autonomy that is the result of marital captivity.
* **Blame**. Blame unabashedly. Multiculturalism *is* bad for women.
* **Reify**. Reify it strategically and with the consciousness of a sociologist--invent the tradition of the tort and distance it from its feminist agents.
* **Categorize**. Categorize the tort as a civil response to injury done, and not as a way to encourage a religious act. Disentangle religion and state. Don’t try and correct or reinterpret the religion.
* **Universalize**. Universalize the tort by translating it as an act that protects the human rights of women.

Family Court Cases cited:

FamC 3950/00 S. v. S. (Jerusalem 2001, J. Greenberger) ([English trans](http://www.cwj.org.il/sites/default/files/The%20Tort%20of%20Get%20Refusal%202012%202.pdf).)

FamC 9101/00, Motion 054233/01 M. v. M. (Jerusalem 2002, J. Marcus) (unpublished decision, abailable from author)

FamC 19270/03 K. v. K. (Jerusalem 2004, J. HaCohen) ([English trans](http://www.cwj.org.il/sites/default/files/The%20Tort%20of%20Get%20Refusal%202012%202.pdf).).

FamC 19480/05 Plonit v. Estate (Kfar Sava 2006, J. Weitzman) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/sm05019480.htm)).

FamC 22061/07 B-A. v. B-A. et.al (Jerusalem 2008, J. Maimon) (Hebrew) (unpublsihed, availble from author).

FamC 6743/02 K. v. K. (Jerusalem 2008, J. Greenberger) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/sm02006743.htm)).

FamC 24782/98 N. v. N. , (Tel Aviv 2008, J. Sivan) (Hebrew,[published in nevo](https://www.nevo.co.il/psika_html/mishpaha/sm98024782.htm)).

FamC 30560/07 H. v. H. (Rison Letzion 2008, J. Kistis) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/sm07030560-hk.htm)).

FamC 21162/07 Ploni v. Plonit (Jerusalem 2010, J. HaCohen) (Hebrew[, published in nevo](https://www.nevo.co.il/psika_html/mishpaha/sm07021162.htm)).

FamC 18561/07 D. v. D. (Jerusalem 2010, J. Katz) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-07-18561.htm)).

FamC 22158/97 T. v T. (Jerusalem 2011, J. HaCohen) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-97-22158-5.htm)).

FamC 44248-05-10 S. v. S. (Jerusalem 2011, J. Flax) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-10-05-44248-5.htm)).

FamC 23849-08-10 K. v. K. (Tel Aviv 2011, J. Shani) (Hebrew[, published in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-10-08-23849-5.htm)). .

FamC 9877/02 P. v. P. (Rishon Letzion 2011, J. Stein) (Hebrew, [publsihed in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-02-9877-1.htm)).

FamC 14177-03-09 A. v. A (Haifa 2013, J. Meraz) (Hebrew, published in nevo) (case of Catholic marital captivity).

FamC 50202-10-13 (Tiberias 2015, J. Shadafna) (Hebrew, [publsihed in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-13-10-50202-55.htm)).

FamC 22970-11-11 S. v. S (Jerusalem 2013, J. Maimon) (Hebrew, [published in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-11-11-22970-11.htm))

FamA 46631-05-11 ( Tel Aviv 2014, J. Shneller ) (Hebrew, [publsihed in nevo](https://www.nevo.co.il/psika_html/mechozi/ME-11-05-46631-11.htm)).

CivA 7557/15 Plonit v.Ploni (Jerusalem 2015, J. Rubenstein) (Hebrew, [publsihed in nevo](https://www.nevo.co.il/psika_html/elyon/15075570-t01.htm)).

FamC 56366-12-12 Plonit v. Almonit (Jerusalem 2016, J Elbaz) (Hebrew, [publsihed in nevo](https://www.nevo.co.il/psika_html/mishpaha/SM-12-12-56366-33.htm)).

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1. \* This article draws on work that I did for my PhD dissertation in Sociology and Anthropology at Tel Aviv University: "Not Just Words: The Tort of Get Refusal."

 FamC 3950/00 (Jerusalem 2001, J. Greenberger). [↑](#footnote-ref-2)
2. See Susan Weiss, *From Religious 'Right' to Civil 'Wrong': Using Israeli Tort Law to Unravel the Knots of Gender, Equality, and Jewish Divorce*, *in* Gender, Religion, and Family Law: Theorizing Conflicts Between Women's Rights and Cultural Traditions (Fisbayn- Joffe and Neil, eds., 2013). [↑](#footnote-ref-3)
3. Law and Administration Ordinance (1948). *See* Aharon Layish, *The Heritage of Ottoman Rule in the Israeli Legal System: The Concept of Umma and Millet*, *in* The Law Applied: Contextualizing the Islamic Shari'a 128 (Peri Bearman et al. eds., 2008) (describing how Israel incorporated the "millet system" (millet means religious community) set up originally under Ottoman rule to allow religious groups to govern themselves in matters of "personal status" in accordance with religious laws). See *also* Yüksel Sezgin, *The Israeli Millet System: Examining Legal Pluralism Through Lenses Of Nation-Building And Human Rights*,43 ISRAEL L. REV.631 (2010) (explaining that incorporating the millet system allowed the new state to preserve and homogenize Israeli-Jewish identity, and, at the same time to differentiate Jews from non-Jews). [↑](#footnote-ref-4)
4. Some religious communities are not recognized at all in Israel (e.g. Protestants) and members of those communities can divorce in Israeli family courts. Matter of Dissolution of Marriage (Special Cases & International Jurisdiction) Act of 1969. [↑](#footnote-ref-5)
5. *See* *e.g.,* Shirin Batshon, A Gendered Look at Ecclesiastical Courts in Israel (Position Paper, Kayan-Feminist Organization) (2012) (describing how Catholic women and men can obtain a ruling of a canonical court that their marriage has been annulled or voided; or how they can agree to temporarily convert to Orthodox Christianity so that they can divorce on proof of fault or by agreement; and how Orthodox Christians men and women are subject to different fault grounds). *See also* FamC 14177-03-09 A. v. A (Haifa 2013, J. Meraz) (quoting cases described in this paper to award damages to Catholic man whose wife refused to convert temporarily in order, thus leaving him in marital captivity). Hashem Suad, The Marital Bond in Islam and How to Dissolve It (2014) (Hebrew) (describing how Muslim women in Israel can obtain a *sharia* court order declaring them divorced if a team of arbitrators determines that their marriage has irretrievably broken down, or if they can prove that their husband has an illness that puts them at risk or has been absent for a prolonged time; and how Muslim women can, like their husbands, unilaterally divorce them or if they signed a prenuptial agreement giving them such parallel power); Druz Personal Status Law of 1962 (outlining how Druz men and women both have equal capacity to unilaterally capacity to end a failed marriage). [↑](#footnote-ref-6)
6. *See generally* Irving A. Breitowitz, Between Civil and Religious Law, the Plight of the Agunah in American Society (1993), Ch.1 and Appendix E (describing in detail the din torah rules that dictate Jewish divorce, including the problem of the "forced divorce," from the perspective of an Orthodox rabbi and law professor). The problem of the forced divorce is often raised to challenge the validity of remedies suggested to ameliorate the plight of Jewish women stuck in marital captivity., *See e.g*., Breitowitz pp. 145-150 (suggesting that the 1983 Prenuptial Agreement promoted by the Rabbinic Council of America was withdrawn for this reason). [↑](#footnote-ref-7)
7. I do not distinguish here between the *agunah* who is anchored to her failed marriage because her husband is missing --a "classic" *agunah*-- and the *agunah* who is anchored because her husband denies her a get --the "modern" *agunah* often referred to as a *mesurevet get*, a woman denied divorce . [↑](#footnote-ref-8)
8. Rabbinic Courts (Enforcement of Divorce Judgments) Law of 1995 (permitting rabbinic courts to incarcerate recalcitrant husbands). The story of Shai Cohen is illustrative. Imprisoned in 2008 for refusing to divorce his wife, Shai escaped by jumping out of a bathroom window of a rabbinic court in 2013. His wife is still an agunah. She first sued for divorce in 2000. <http://www.jpost.com/National-News/Prisoner-escapes-Rabbinical-Court-through-window>. [↑](#footnote-ref-9)
9. *See e.g.,* HCJ 5676-12, Plonit, et.al v. Jerusalem District Court (2015) (published in nevo).. [↑](#footnote-ref-10)
10. *See generally* Susan Weiss, *Woman, Divorce and Mamzer Status in the State of Israel*, in Love, Marriage and Jewish Families: Paradoxes of social revolutions 256 (Sylvia Barack Fishman, ed.,2015) (reviewing the history of the mamzer rule and describing how it is applied in Israel today); M. Yev. 4:13; Shulkhan Aruch 4:13; Rambam, Mishna Torah, Laws of Prohibited Unions 15:1. [↑](#footnote-ref-11)
11. *See generally* Susan Weiss & Netty Gross Horowitz, Marriage and divorce in the Jewish State: Israel's Civil War (2013) (describing six *agunah* cases tried in Israeli rabbinic courts). [↑](#footnote-ref-12)
12. See generally. Breitowitz, supra n. 6. pp. 286-291 (1993). See also, Judith Romney Wegner*, The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. Women’s L. Rev. 1, 26 (1982) (referring to this edict as a “jurisprudential anomaly, forced on the Ashkenazi Jews of Europe by Christianity's rejection of polygamy.”). [↑](#footnote-ref-13)
13. §179 Israel Penal Code (1977). [↑](#footnote-ref-14)
14. Except in cases of intermarriage or the marriage of persons who have no religious or belong to a religious group that is not recognized. Matter of Dissolution of Marriage (Special Cases & International Jurisdiction) Act of 1969. [↑](#footnote-ref-15)
15. *See e.g*., NY DRL 253 (1984 NY Get Law); : §5a THE DIVORCE AMENDMENT Act 95 (1996) (1985 Canadian Get Law). *See* Susan Weiss and Susannah Dainow, *Four Methods of Civil Response to Get Recalcitrance* (unpublished article on file with author categorizing these secular approaches under the rubrics of “clean hands,” “tort,” "support," and “contract”). [↑](#footnote-ref-16)
16. Jean Claude Nidam, *How French Civil Courts Respond to Claims Against Jewish Husbands to Deliver a Get* (Hebrew). Dinei Yisrael, 10/11, 385 (1981-3). . [↑](#footnote-ref-17)
17. Dutch case (citation missing) [↑](#footnote-ref-18)
18. Breitowitz, *supra* n. 6, at Ch.8: David M. Cobin, *Jewish Divorce and the Recalcitrant Husband—Refusal to Give a Get as Intentional Infliction of Emotional Distress*, 4 J. of L. and Religion 405 (1986); Barbara J. Redman, *Jewish Divorce: What Can What Can Be Done in Secular Courts to Aid the Jewish Woman?* 19 Georgia L. Rev.389(1984-1985). [↑](#footnote-ref-19)
19. *See* Thomas M. Hilbink, *You Know the Type... :Categories of Cause Lawyering*,29 L. and Soc. Inquiry 657 (2004). [↑](#footnote-ref-20)
20. *See generally* Peter Berger, The Sacred Canopy: Elements of A Sociological Theory of Religion (1967) (explaining how social phenomena are constructed through the “ongoing dialectical process composed of the three moments of externalization, objectivation, and internalization”). Also, Austin Sarat, *Exploring the Hidden Domains Of Civil Justice: "Naming, Blaming, And Claiming" In Popular Culture*' DePaul L. Rev. 425 (2000-2001)(examining the "emergence and transformation" of disputes). [↑](#footnote-ref-21)
21. *See e.g.,* HRabC 7041-21-1 Plonit v. Ploni (R. Izerer, Hashai, Elgrabli) (2008). [↑](#footnote-ref-22)
22. The first few petitions were filed under the auspices of Yad L'isha, a legal aid service that represents women held in marital captivity. The rest were brought by attorneys from the Center for Women's Justice (CWJ), an NGO set up with the express purpose of bringing as many of these tort claims as possible. The author founded and directed both Yad L'isha (1997-2004) and CWJ (2004 until present time). [↑](#footnote-ref-23)
23. *See also* Pierre Bourdieu, Language and Symbolic Power (1991 [1982]) (legal discourse ”is a creative speech which brings into existence that which it utters….[I]t is the divine word…which…creates what it states."); Gerda Lerner, The Creation of Patriarchy (1986), Ch. VII and IX) (describing how naming is an "act of sovereignty" traditionally reserved for men). [↑](#footnote-ref-24)
24. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *In* Feminism Unmodified: Discourses on Life and Law, 32, 39 (1987), [↑](#footnote-ref-25)
25. William L. F. Felstiner, et.al, *The Emergence And Transformation Of Disputes: Naming, Blaming, Claiming...* 15:3,4 L. and Soc. Rev. 631, (1980/1981) [↑](#footnote-ref-26)
26. FamC 3950/00 S. v. S. (Jerusalem 2001, J. Greenberger) at 8. [↑](#footnote-ref-27)
27. FamC 19270/03 K. v. K. (Jerusalem 2004, J. HaCohen) at 85. [↑](#footnote-ref-28)
28. . FamC 24782/98 N v. N (Tel Aviv 2008, J. Sivan). [↑](#footnote-ref-29)
29. § 63(a) of Israel Torts Ordinance [New Version]; *e.g.,* FamC 19270/03 K. v. K. (Jerusalem 2004, J. Hacohen). [↑](#footnote-ref-30)
30. *See e.g.*, Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay between Tort Law and Religious Family Law: The Israeli Case,*  26:2 Ariz. J.of Int'l & Comp. L. 279, 289 (2009). [↑](#footnote-ref-31)
31. *See generally* Susan M. Okin, Is Multiculturalism Bad for Women? (1999). [↑](#footnote-ref-32)
32. *Compare* Will Kymlicka, Multicultural Odysseys: Navigating the New International Politics of Diversity (2007). [↑](#footnote-ref-33)
33. *See* *e.g.,* Yuksel Sezgin, Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India (2013) (encouraging the support of "hermeneutic communities" to harness "alternative interpretations of religious norms and narratives to best protect and advance individual rights and liberties"). [↑](#footnote-ref-34)
34. Two attempts to sue the state for its responsibility in supporting marital captivity were aborted when plaintiffs could not bear the cost of filing fees. See CivA 5027/09 A v. C (2010, J. Rubinstein) (published in nevo) (rejecting request to waive filing fee for damages for marital captivity); FamC 55050/09 S. v. S., et. al. (Tel Aviv 2010, J. Shani) (unpublished hearing available from author) (yielding to pressure of state to transfer petition against state to district court). [↑](#footnote-ref-35)
35. FamC 19270/03 K. v. K. (Jerusalem 2004, J. HaCohen) at 3. [↑](#footnote-ref-36)
36. FamC 19480/05 (Kfar Saba 2006, J, Weitzman) at 13. [↑](#footnote-ref-37)
37. FamC 24782/98 N v. N (Tel Aviv 2008, J. Sivan) at 6. [↑](#footnote-ref-38)
38. *See e.g.,* HCJ 164/67 Attorney General v Yehiya, et. al. PD 22 (1) 29, (1968) (outlining various *halakhic* ways to bypass recalcitrant husbands--- dissolution, agency, and conditional marriage – but then noting that it is not the Court's problem to solve) See also, HCJ 6751/04 Sabag v. High Rabbinic Court PD 59 (4) 817 (2004) (citing Yehiya); FamC 19480/05 Plonit v., Estate (KfarSaba 2006, J. Weitzman) (citing Sabag); FamC 22970-11-11 S. v. S. (Jerusalem 2013, J. Maimon) (quoting Rabbi Hayim Palagi (1788– 1869) for proposition that separation of eighteen months is grounds for divorce). [↑](#footnote-ref-39)
39. Valentine M. Moghadam*, Islamic Feminism and Its Discontents: Toward a Resolution of the Debate* 27:4 Signs 1135, 1163,4 (2002). [↑](#footnote-ref-40)
40. *See e.g.,* Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights, Part of Contemporary Political Theory (2001) (arguing for enhancing minorities' autonomy). *Compare*, Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12:1 Colum. J. Gender and L. 154 (2003); Karin Carmit Yefet, *Israeli Family Law As A Civil Religious Hybrid: A Cautionary Tale Of Fatal Attraction*, Univ. of Ill. L. Rev. 1505 (2016) (arguing against [↑](#footnote-ref-41)
41. The sociologist Peter Berger would refers to this stage in the "social construction of reality" as "reification" or " objectivation." See Berger, 1967, *supra* n. 20 at p. 8,9).and Peter L. Berger & Thomas Luckmann, The Social Construction of Reality 89 (1966) ("…[R]eification is the apprehension of the products of human activity as if they were something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will."). [↑](#footnote-ref-42)
42. Anita Bernstein*, How to Make a New Tort: Three Paradoxes*, 75 Tex. L. Rev. 1539 (1996-1997). [↑](#footnote-ref-43)
43. *See generally* John B.Thompson, Ideology and Modern Culture (1990) (placing the strategies of eternalization and nominalization as subcategories of reification). *See also*, Peter Gabel, *Reification in Legal Reasoning*, 3 Res. in L.& Soc'y 25 (1980). [↑](#footnote-ref-44)
44. Yechiel Kaplan & Ronen Perry, *Tort Liability of Recalcitrant Husband,* 28:3 Iyunai Mishpat 773 (2005). [↑](#footnote-ref-45)
45. *E.g.,* FamC 19270/03 K. v. K. (Jerusalem 2004, J. HaCohen) ; FamC 19480/05 Plonit v. Estate (Kfar Sava 2006, J. Weitzman); FamC 6743/02 K. v. K. (Jerusalem 2008, J. Greenberger). [↑](#footnote-ref-46)
46. FamC 19270/03 K. v. K. (Jerusalem 2004, J. HaCohen) at 58. [↑](#footnote-ref-47)
47. *See generally* Pierre Bourdieu,*The Force of Law: Towards a Sociology of the Juridical Field* 38 Hastings L. J. 805, 827 (1986/1987) (reflecting on the great “elasticity of texts, which can go as far as complete indeterminacy or ambiguity, [allowing for]… considerable freedom"). [↑](#footnote-ref-48)
48. *See e.g.,* CivA 7557/15 Plonit v.Ploni (2015, J. Rubenstein)(denying request for special permission to hear appeal of decisions rejecting claim for damages; and suggesting that a husband was justified in refusing a *get* until after a rabbinic court had determined whether he owed amount promised in marital contract-- *ketubah* ): FamA 46631-05-11 (Tel Aviv 2014, J. Shneller )(reversing family court decision denying damages to wife, but stating that, under certain circumstances, economic considerations might "justify" delaying delivery of *get*); FamC 50202-10-13 (Tiberias 2015, J. Shadafna) (awarding damages and determining when a husbands actions had "exceeded the bounds of reasonableness"); FamC 56366-12-12 Plonit v. Almonit (Jerusalem 2016, J Elbaz)(denying damages, stating that there may be "justifiable" reasons to deny a *get*; and that husband was not using *get* as a "bargaining chip" when he refused divorce until all financial matters were heard by a rabbinic court). [↑](#footnote-ref-49)
49. *See e.g.,*FamC 3950/00 S. v. S.(Jerusalem 2001, J. Geenberger); FamC 19270/03 K. v. K.(Jerusalem 2004, J. Hacohen) (rejecting the Family Violence statute as a basis for the new tort, stating that the statute is meant to provide only temporary relief). This is still my preferred theoretical framework for the new tort. I argue that, by definition, no statute that is called upon to construct a new tort originally provided for civil damages. [↑](#footnote-ref-50)
50. *See* FamC 19270/03 K. v. K. (Jerusalem 2004, J. Hacohen); FamC 030560/07 H. v. H. (Rison Letzion 2008, J. Kistis); FamC 6743/02 K. v. K. (Jerusalem 2008, Judge Greenberger); FamC 9877/02 P. v. P. (Rishon Letzion 2011, J. Stein) (referring to the values of the Basic Law to support the new tort but still adhering to the notion of "negligence" as the appropriate basis for the cause of action). *Cf.*  FamC 3950/00 S. v. S.(Jerusalem 2001, J. Geenberger) (stating that the basis for a cause of action for get refusal lies in the values of dignity and freedom reflected in both Basic Laws and laws of the Torah). [↑](#footnote-ref-51)
51. *See e.g.,* FamC 9101/00, M. v. M. (Jerusalem 2002, J. Marcus); FamC 19270/03 K. V. K (Jerusalem 2004, J. HaCohen); Kaplan and Perry, *supra*, n. 44. *Contra e.g.,* FamC 22158/97, Motion 056986/07 T. v T. (Jerusalem 2011, J. HaCohen) (declaring that claims for damages for get refusal are independent of rabbinic court order). [↑](#footnote-ref-52)
52. *See generally* George P. Fletcher, *Fairness and Utility in Tort Theory,* 85 Harv, L, RevNo. 3 537-573 (1972)( describing the different paradigms for tort liability--fairness and utility; distinguishing between "excuses" and "justifications"; and arguing that the paradigm of fairness that allows for limited "excuses" for damages to better protects individual interests than the paradigm of utility that allows defendants to "justify" damages on the basis of "reasonableness"). [↑](#footnote-ref-53)
53. FamC 19480/05 (Kfar Saba 2006, J, Weitzman) at 18. *See also* Kaplan & Perry,  *supra* n. 44, at p. 797. [↑](#footnote-ref-54)
54. FamC 24782/98 N. v. N. (Tel Aviv 2008, J. Sivan) at 8; FamC 21162/07 Ploni v. Plonit (Jerusalem 2010, J. HaCohen) at 52; FamC 44248-05-10 S. v. S. (Jerusalem 2011, J. Felix) at 31-35. [↑](#footnote-ref-55)
55. FamC 23849-08-10 K. v. K (Tel Aviv 2011, J. Shani) at 47, 48. [↑](#footnote-ref-56)
56. Bernstein, supra, n. 42 at 1557. [↑](#footnote-ref-57)
57. Yifat Biton*, Women’s Issues, Feminist Analysis and the Dangerous Gap Between Them,* *Response to Kaplan and Peri* 28:3Iyunai Mispat 871, 885 (2005). [↑](#footnote-ref-58)
58. FamC 21162/07 Ploni v. Plonit (Jerusalem 2010, J. HaCohen) at 67. [↑](#footnote-ref-59)
59. FamC 3950/00 S. v. S. (Jerusalem 2001, J. Greenberger) at 17. [↑](#footnote-ref-60)
60. FamC 6743/02 K. v. K. (Jerusalem 2008, J. Greenberger). *See also* Amihai Radzyner, *It''s not What's Said but What is Done that Counts: Arranging for Divorce After Suing of Damages and Rabbinic Court Publication Policy*, 45 Mishpatim 5 (2015) (in Hebrew) (showing how rabbinic courts arranged for delivery of *get* in all cases in which women had sued for damages despite claims of invalid pressure on the recalcitrant husband). [↑](#footnote-ref-61)
61. FamC 24782/98 N. v. N. (Tel Aviv 2008, J. Sivan) at 5. Also in 2008, Judge Maimon denied a motion to dismiss a claim for get refusal on the basis that it would result in a, (invalid) "forced divorce", saying simply: “It is inappropriate to deny a Plaintiff… relief from the outset … just out of concern for the impact that a potential ruling might have on the get should damages actually be awarded. FamC 22061/07 B-A. v. B-A. et.al (Jerusalem 2008, J. Maimon). [↑](#footnote-ref-62)
62. *But see* FamC 18561/07 D. v. D. (Jerusalem 2010, J. Katz) (awarding prospective damages). Note that with the exception of this case, all family court judges have refused to award prospective damages, underscoring that their judgment should not be interpreted as an incentive to give a get but as damages for past harm done. [↑](#footnote-ref-63)
63. FamC 19270/03 K. v. K. (Jerusalem 2004, J. Hacohen) at 4. [↑](#footnote-ref-64)
64. Light v. Light, 2012 WL 6743605 (Conn.Super.). [↑](#footnote-ref-65)
65. *See e.g.,* R. Shlomo Dichovsky, *Monetary Enforcement Measures against Recalcitrant Husbands* 26 Tehumin (Hebrew) 173 (2006) (Hebrew). [↑](#footnote-ref-66)
66. FamC 6743/02 K. v. K. (Jerusalem 2008, J. Greenberger) at 9. [↑](#footnote-ref-67)
67. See also Weiss & Gross-Horowitz, supra n. 10, Ch.8 (enumerating the human rights violations that occur as a result of the imposition of the millet system on Israeli citizens). [↑](#footnote-ref-68)
68. Supra, n. 51 and case cited therein. [↑](#footnote-ref-69)
69. FamC 3950/00 S. v. S. (Jerusalem 2001, J. Greenberger) at 10. [↑](#footnote-ref-70)
70. Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle* 108:1 Am. Anthropologist 38 (2006) [↑](#footnote-ref-71)
71. David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, 1 Int'l Social Movement Res. 197 (1988). [↑](#footnote-ref-72)
72. See also Dafna Barak-Erez*, From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective,* 26 COLUM. HUM. RTS. L. REV. 309, 325 n. 82 (1995) (describing how religious parties blocked all effort in the Knesset to pass a Basic Law that would have specifically protected such freedoms). [↑](#footnote-ref-73)
73. *See* Convention for the Elimination of Discrimination Against Women (1979). *Accord* Universal Declaration of Human Rights (1948). [↑](#footnote-ref-74)
74. *See* Solomon Bennett Freehof, Reform Jewish Practice (1963); Walter Jacob,

Reform Judaism And Divorce, American Reform Response 511-514 (1983)(stating that civil divorce is sufficient to dissolve a Jewish marriage). [↑](#footnote-ref-75)
75. *See*. R. Mayer E. Rabinowitz, *Agunot - Abandoned Wives,* <https://www.jewishvirtuallibrary.org/jsource/Judaism/agunot.html> (authorizing the annulment of marriages in extreme cases of desertion, abuse, blackmail, or spiteful recalcitrance, and encouraging couples to agree to "conditional betrothals" that would allow a rabbinic tribunal to declare the marriage void subsequent to civil divorce, stating: "Out of concern for both the agunah and the Jewish Community, we refuse to accept the approach that "there is nothing we can do. We have found halakhic solutions and we have implemented them…"). [↑](#footnote-ref-76)