

THE JEWISH FAMILY

Traditional Jewish family law has persevered for hundreds of years, and rules covering marriage, the raising of children, and divorce are well established; yet pressures from modern society are causing long-held views to be re-examined. *The Jewish Family: Between Family Law and Contract Law* examines the tenets of Jewish family law in light of new attitudes concerning the role of women, assisted reproduction technologies, and prenuptial agreements. It explores, through interdisciplinary research combining the legal aspects of family law and contract law, how the Jewish family can cope with both old and modern obstacles and challenges. It focuses on the nexus of Jewish family law and contract law to propose how “freedom of contract” can be part of how family law can be interpreted. *The Jewish Family* will appeal to practitioners, activists, academic researchers, and laymen, readers who are interested in the fields of law, theology, and social science.

YEHEZKEL MARGALIT is a senior lecturer at Netanya Academic College in Israel.

CAMBRIDGE STUDIES IN LAW AND JUDAISM

Series Editor – Mark Goldfeder

Editorial Board

- Ira Bedzow (NY Medical College),
 Noa Ben-Asher (Pace)
 Saul Berman (Columbia)
 David Blumenthal (Emory)
 Erwin Chemerinsky (UC Irvine)
 Adam Chodorow (Arizona State)
 Dena Davis (Lehigh)
 Elliot Dorff (American Jewish University)
 Lenn E. Goodman (Vanderbilt)
 David Flatto (Hebrew University)
 Steven Friedell (Rutgers)
 Moshe Halbertal (NYU/Hebrew U)
 Michael Helfand (Pepperdine)
 Samuel J. Levine (Touro)
 Brigit Klein (Hochschule für Jüdische Studien Heidelberg)
 Suzanne Last Stone (Cardozo)
 Fred Lawrence (Brandeis)
 Sanford Levinson (University of Texas)
 Phil Lieberman (Vanderbilt),
 Timothy Lytton (Albany)
 Benny Porat (Hebrew University)
 Ronen Reichman (Hochschule für Jüdische Studien Heidelberg)
 Mark Rosen (Chicago-Kent)
 Jeffrey Roth (Fordham)
 Chaim Saiman (Villanova)
 Lena Salaymeh (Tel Aviv)
 Eliezer Segal (Calgary)
 Keith Sharfman (St. John's)
 Stephan Wendehorst (Geissen)
 George Wilkes (Edinburgh)
 John Witte, Jr. (Emory)

The law and religion movement is a growing field dedicated to studying the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas, institutions, norms and practices. *Cambridge Studies in Law and Judaism* cultivates scholarship on Jewish topics in law and religion including translations, historical accounts of the foundations of the Jewish legal system, and innovative comparative studies. Its mission is to break new ground in studying what Jewish law has, can, and should offer to public, private, penal, and procedural law and legal theory.

The Jewish Family

BETWEEN FAMILY LAW AND CONTRACT LAW

YEHEZKEL MARGALIT

Netanya Academic College



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
 978-1-316-61518-8 — The Jewish Family
 Yehezkel Margalit
 Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
 79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107163409

DOI: 10.1017/9781316681350

© Yehezkel Margalit 2017

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2017

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Margalit, Yehezkel, author.

TITLE: The Jewish family : between family law and contract law / Yehezkel Margalit, Netanya Academic College.

DESCRIPTION: Cambridge [UK] ; New York : Cambridge University Press, 2017. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2017031854 | ISBN 9781107163409 (Hardback)

SUBJECTS: LCSH: Domestic relations (Jewish law) | Marriage (Jewish law) | Prenuptial agreements (Jewish law) | Agunahs. | Parent and child (Jewish law)

CLASSIFICATION: LCC KBM531 .M37 2017 | DDC 296.7/4-dc23

LC record available at <https://lcn.loc.gov/2017031854>

ISBN 978-1-107-16340-9 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>Preface</i>	<i>page</i> ix
<i>Acknowledgments</i>	xi
Introduction	1
1 Regulating Marital Relations between Spouses by Consent	10
2 “Freedom of Contract” in Jewish Family Law – The Differences between the Babylonian and Palestinian Talmuds	40
3 Is There Really No Conditional Marriage?	68
4 Temporary Marriage – A Possible Solution to the Problem of the <i>Agunah</i>?	106
5 Toward Establishing Halakhic Parenthood by Agreement?	135
Epilogue	174
<i>Bibliography</i>	179
<i>Index</i>	209

Preface

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

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

Acknowledgments

First and foremost, I am grateful to my MA thesis and PhD dissertation supervisors: Professor Berachyahu Lifshitz, former dean of the Hebrew University Faculty of Law, and Professor Shahar Lifshitz, current Faculty of Law dean at Bar-Ilan University. Both of them are world-renowned experts in family and contract law, respectively in the halakhic and civil aspects. I warmly thank them for opening the gate for me to the scholarly research of these developing and challenging fields. Professor Shahar Lifshitz has been my mentor throughout.

The first chapters of this book were written during the years I served as a research associate at the Agunah Research Unit at the Centre for Jewish Studies, University of Manchester, U.K. I am grateful to Professor Bernard S. Jackson, the director of this challenging project, for his encouragement and financial support while writing these chapters. I wrote this book as faculty and Senior Lecturer at Netanya Academic College. I am sincerely thankful to the college and to Professor Sinai Deutch, currently Senior Vice President, Director, and Dean of the Law School, for the generous grant to publish it. The preparation and publication of the work was supported also by the Memorial Foundation for Jewish Culture. There is no doubt that without these meaningful grants, this book would not have been published.

Thanks also to dayyan Ronnie Warburg for carefully reading the entire manuscript and giving me knowledgeable and thorough comments. Special thanks are due to my colleagues Professor Israel Z. Gilat, and Professor Pamela Laufer-Ukeles who provided me with helpful comments while I was writing this book. Thanks are also due to Mr. Uri Yamin, who helped me identify and read various Islamic sources in the original while writing the fourth chapter. I am grateful also to Mrs. Chava Cassel for her enormous assistance in the linguistic editing of the book. Mrs. Cassel thoroughly and critically edited the manuscript and made many essential and important comments regarding substantial concerns. Finally, I want to thank Rabbi Avishai Elboim, Director of the Rambam Library in Tel Aviv, Israel, for his efficient and prompt assistance in finding any missing rare bibliographical information.

During the last decade, while writing this book, I spent huge amounts of time at both the Judaica Library and the Law Library at Bar-Ilan University. I am grateful for the help of the library staff. I would like to thank my dear parents, Shlomo and Chana Margalit, and my in-laws, Shmuel and Chana Burkash, who have served me as second parents, and my children – Shira, Hallel, Yehonatan-Zvi, and Eitan-Reuven – who taught me throughout the years how deep and meaningful the parent–child bond can be. Finally, I want to thank from the depths of the heart my beloved wife, Hagit, who over the last few decades has proven to me how enormous and experiential true spousal love can be.