WHOSE LAW IS IT ANYWAY? THE CASE OF MATRIMONIAL PROPERTY IN ISRAEL

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It is often argued that courts avoid foreign laws because they prefer local law. It would make sense if they did—after all, foreign law can be hard to understand and complicated to employ, and it is also . . . foreign. Aiming to investigate this assumption through a qualitative analysis of all available cases on one question and comparing the findings with the approach towards local matrimonial property cases in Israel, this Article finds something rather different. At least as regards Israeli judges discussing matrimonial property, it appears that sometimes judges do not prefer the lex fori but something else. The Article discusses one case that reveals what could be described as a judicial mutiny, where judges chose to apply neither foreign law nor local law per se. In the case of matrimonial property, a particular legal norm seems particularly close to the judges' hearts. So much so that despite legislative intervention designed to change the judicially-shaped law, the courts continue to apply their own, judicially created law.

Introduction

Upon identifying a case where courts refrain from employing a choice of law rule, one might assume the reason to be an aversion to choice of law rules or foreign law. However, the curious case of the Israeli approach towards matrimonial property demonstrates how the truth is sometimes different. By analyzing the available case law, this Article shows that Israeli judges are not particularly opposed to foreign law. The cases in which they refrain from applying it seem to have less to do with the law, the parties' choice, or other features of the case, and more to do with its outcome. In fact, Israeli judges appear to be suspicious of foreign and local law alike. Instead of an affinity to the legislative *lex fori*, the judges seem to prefer a particular substantive solution, and will do whatever is needed to arrive at it. That solution, the Article argues, is a community property regime. The courts' preference for this regime seems so ingrained and visceral that they are unable to resist it. The courts' choice to apply this solution in substantive cases means breaking away from the clear wording of the law. It should therefore come as no surprise that the courts break away from a choice of law rule that would lead them to an outcome

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of separation, in circumstances where they believe sharing is the right way to go. If that is indeed the case, the judges are not opposed to foreign law. Rather, they are opposed to foreign and domestic law (or at least its legislative scheme) alike. Their preference has nothing to do with conflict of laws and everything to do with a general substantive preference. Data analysis of cases involving foreign elements reveals an interesting picture: sometimes what is foreign to the court is not the foreign law, but the confines of legislative law in general. To examine this argument, the Article proceeds as follows. Part I presents the Israeli choice of law rule(s) for matrimonial property, and how the courts broke away from the legislator and went their own way. Part II presents the corpus of cases available for qualitative analysis, and the choice of law tendencies it presents. Part III offers an in-depth analysis of the courts' choice of law in the corpus, in an attempt to offer a systematic explanation for the application of the different choice of law rules. Finally, Part IV offers a new way to look at the data. This part examines the courts' approach towards matrimonial property in Israeli domestic cases and demonstrates the striking similarities between the two. By doing so, this part suggests that there is a common motivation for both—which is not *lex fori*, but rather a fundamentally different, court-made law, which is the judges' *lex nostra*.

I. The Choice of Law Rule

Currently, the choice of law rule for matrimonial property is set in Section 15 of the Property Relations between Spouses Act, 1973.[1] This law drove a paradigm shift in the regulation of matrimonial property in Israel. The law replaced the existing court-created Presumption of Community Property according to which spouses own their property jointly as of the time of the marriage. Instead of this, the law introduced a rule according to which parties own their property separately during the marriage, and only some property is eligible for division upon the breakdown of the marriage.

The Act also deals with cross-border cases. Unbelievable as it may sound, until the legislation of the Act, nobody knew for certain what the rule governing cross-border matrimonial property was. Four theoretical options existed:[2] one, stemming from the legislation created by the British Mandate, where the applicable law is that of the parties' nationality.[3] Another option was based on the connection between

1 §15, Spouses (Property Relations) Law, 5733-1954, LSI 27 313 (1972-73) [hereinafter the Act].

2 Menashe Shava, *Choice of Law in Matrimonial Property*, 6 Iyunëi Mishpat 247 (1979) [Hebrew].

3 This option is based on §§ 51, 64 (ii), the Palestine Order in Council, 1922, HEI C 2738. Indeed, some scholars suggested as much; *see* Frederic M. Goadby, International and Inter-religious Private Law in Palestine 159 (1926). Goadby does not refer to § 64 (ii), *id*. Instead he notes that, with regards to matrimonial property in Palestine, "we may conclude that rights to dowry and the determination of the national system under which the parties married will be governed by the Personal Law (national or religious)." While he mentions various sources including the Hague Convention and an Egyptian case, he does not explain the grounds for his conclusion.

both mandatory and early Israeli law and the English Common Law.[4] According to this option, the Common Law rule was adopted into local law, so that the applicable law was that of the parties' matrimonial domicile, unless they had agreed otherwise.[5] A third option was the application of the *lex fori*. The fourth option was that there was no rule at all, meaning that there was no legislative rule and the issue never arose in courts. This option seems unlikely in an immigrant-filled territory, even when considering that at the time of the British Mandate and the young State of Israel, most of the population had very little, if any, property to speak of.[6]

This question of the rule governing cross-border matrimonial property was first addressed by the Supreme Court in the *Azugi* case, which arose immediately after the introduction of the legislative rule of the Act.[7] This somewhat unclear decision dealt with the question whether the recent legislative choice of law rule could apply to a Moroccan couple who had gotten married, acquired their property, immigrated to Israel and separated before its entry into force. An additional problem discussed was which law applies when a couple moves from one state to another in the course of their marriage (a change in the connecting factor). The decision can be explained in a number of ways "and it is consequently not clear on what principles it rests."[8] However, what can be learnt from it is that, of the four possible choice of law rules that existed before the Act, the first option, according to which the choice of law rule points to the law of the parties' nationality, as well as the fourth option, according to which no rule exists at all, were not even considered. The other two options were proposed, each being accepted by one judge (with the third judge not clarifying his position on the question). On the one hand, Justice Barak assumed the Common Law rule, which he interpreted as subjecting each asset to the law of the parties' domicile at the time of acquisition.[9] However, Justice Barak only deferred to this rule due to the complex circumstances of the case. Justice Elon, on the other hand, suggested that a local norm exists that makes the choice of law rule redundant.

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4 Up until 1980, Israeli law used Common Law to fill lacunae, in accordance with Article 46 of the Order on Palestine. This Article was repealed in 1980 by the legislation of the Foundations of Law Act, 5740-1980, LSI 34 181 (1979-1980). The Act fills lacunae through case-law, analogy, and in the absence thereof, in light of the principles of freedom, justice, equity, and peace of Israel's heritage, *see id.* § 1.

5 *See, e.g.*, Albert V. Dicey & John H.C. Morris, The Conflict of Laws 638 (9th ed. 1971); Peter M. North, Cheshire's Private International Law 587-89 (9th ed. 1974). These versions reflect the rule as it stood at the time of the hearing. The rule is similarly stated in the current versions of these sources. *See* Dicey, Morris And Collins on The Conflict of Laws ch. 28 (Collins et al. eds., 15th ed. 2012); *but see* Cheshire, North & Fawcett Private International Law 1078 (Paul Torremans ed., 15th ed. 2017).

6 There is no way to tell for certain, since there was never a systematic publication of family decisions in Israel.

7 CivA 2/77 Azugi v. Azugi, 33(3) PD 1 (1979). The issue was never discussed by the Supreme Court prior to this case, as noted in CivC (DC BS) 10/74 Azugi v. Azugi, PM 1978(1) 201, 205 (1976).

8 Celia Wasserstein Fassberg, *The Intertemporal Problem in Choice of Law Reconsidered: Israeli Matrimonial Property—the Intertemporal Problem*, 39 Int'l & Comp. L.Q. 861 (1990). Fassberg explains the complexity of this decision, which mainly centers around the inter-temporal problem, i.e., not what the choice of law is, but to which cases (and items of property) does the new rule of Section 15 applies, and which are subject to the previous rule, whatever it was. *See also* Shava, *supra* note 2; 1 Menashe Shava, The Personal Law in Israel 399-405 (4th ed. 2001) [Hebrew].

9 *Azugi*, PD 33(3) at 28-9.

That is to say, there *is* a rule, which is the direct application of *lex fori* to all cases involving matrimonial property, regardless of foreign elements.[10] Though Justice Elon's is clearly a minority opinion, it appears to best describe the reality before 1973.[11]

Alongside the paradigm shift proposed in the Property Relations between Spouses Act regarding local matrimonial property, the Act also proposed a new, clear rule for cross-border cases. Section 15 of the Act states:

> The financial relationship between spouses will be governed by the law of their domicile at the time of the marriage, but they may, through an agreement, determine and change this relationship in accordance with the law of their domicile at the time when the agreement is made.

Presumably, this Section offers a clear-cut answer to the question. The basic rule is similar to the Common Law one, applying the law of the matrimonial domicile in the absence of an agreement determining otherwise.[12] By applying the matrimonial domicile *at the time of the marriage* to all of the matrimonial property (immutability), the rule further addresses the intertemporal problem (of change in the connecting factor) and favors certainty and vested rights over reflection of the changing realities of the parties and the laws governing them throughout the marriage. This is tempered, however, by the option given to the parties to change the applicable legal regime by way of an agreement. While this rule obviously leaves various open questions,[13] it still solves at least some fundamental questions and creates a clear and relatively easy rule to apply. One might have expected that following the enactment of this rule, adjudication of cases would be swift and simple.

This, however, was not the case. In the summer of 1996, the Supreme Court gave the final decision in the *Nafisi* case.[14] The case involved a couple who had married in what was then Persia and lived there for 39 years before immigrating to Israel. Four years after their immigration, the wife sued for a declaratory judgement applying the Israeli Presumption of Community Property to two items of property that were registered to her husband's name. Unlike the Azugi couple, the Nafisis had never lived in Israel under the Presumption, since the Property Relations between Spouses Act was enacted ten years before their immigration. Therefore, Mrs. Nafisi's claim (insofar as she made one) for the application of that regime was weaker. And indeed, when the case was appealed in the Supreme Court, the Court applied Section 15 of the new law. According to this provision, Mrs. Nafisi's claim depended on her having rights under Persian law. However, Mrs. Nafisi failed to prove the Persian law and demonstrate that she would have any right under it (and in fact Persian law would

10 *Id.* at 9.

11 *See* Shava, *supra* note 2, at 267-68.

12 However, unlike the rule in Common Law, this rule does not distinguish between movables and immovables.

13 For instance, what should be done when someone has not set domicile at the time of the marriage? Or when the parties have different domiciles at the time of the marriage?

14 CFH 1558/94 Nafisi v. Nafisi, 50(3) PD 573 (1996) [Hereinafter *Nafisi*]. An unofficial English translation of this decision is available at https://versa.cardozo.yu.edu/opinions/nafisi-v-nafisi (last visited Sep. 4, 2021).

have probably applied Jewish law to Jewish spouses, thus keeping the property with the husband who was its registered owner). Mrs. Nafisi further failed to show that there was any agreement between the spouses that would grant her rights in the disputed property. Hence she lost.

But that was not the end of the case. The court agreed to entertain a further hearing of the case before an extended panel of nine justices. Here the wife won by a majority of seven to two. The dissenting judges, Matza and Tal, repeated their position from the previous round of the case: Section 15 applies the law of the original matrimonial domicile, unless the parties made an agreement valid under their domiciliary law at the time of contracting. Israeli law requires a formal agreement, which was not proven (or even argued) to have existed in this case. Persian law was not argued. Therefore, there was no agreement. The wife should have proven her rights under Persian law, which she did not. Thus she must lose. This minority opinion is clear and simple.

Unlike it, the opinions of the majority are far more complicated. Within the majority of seven, three justices joined Justice Barak's opinion,[15] maintaining that Section 15 does not apply to the case. The reasoning of Justice Barak and those joining him differed from the previous panel in two key points. On the one hand, they thought that Section 15 can be contracted out of in its entirety. On the other hand, they interpreted the fact that the couple lived together, in Israel, in the light of the requirements of good faith and equality, as an agreement to live under a community of property regime. In essence, it could be said that this opinion erases Section 15 from the books, since it not only minimizes the section itself, but also lowers the bar for agreements beyond the bare minimum. It is enough that a couple lived a reasonable life together following their immigration to Israel, with no duration or quality requirements (since the Nafisis' life as a couple following immigration demonstrated neither quality nor longevity that would substantiate the Presumption of Community Property). This, despite the fact that the legislator was clearly aiming for changes in the applicable law that would only take effect following an intentional and conscious action by the parties.[16]

Other members of the majority thought differently. Justices Goldberg and Dorner applied Section 15 and held that the wife should win because the parties had an agreement that overcame the reference to the law of the original matrimonial domicile.[17] What was that agreement? Justices Goldberg and Dorner ruled that the couple's clear and set intention to immigrate to Israel, and later their actual immigration, created such an agreement.[18] Justice Cheshin ruled that the Presumption of Community Property applies to the matrimonial property of Israeli residents unless proven otherwise.[19] The Nafisis were now citizens and residents of Israel

15 Justices S. Levin, Or, Strasberg-Cohen.

16 As stated in the Draft Bill for the Individual and the Family, 5716-1955, HH (Gov.) 216-17 (Isr.), https://www.nli.org.il/he/books/NNL_ALEPH001956100/NLI [Hebrew].

17 *Nafisi*, 582-86, 588-94 (1996).

18 *Id.* at 599-600.

19 *Id.* at 626.

(connecting factors which the Act does not suggest), and therefore subject to the Presumption of Community Property. The husband could have proven his rights under Persian law, and had he done so, his previously vested rights would have triggered the application of Section 15 and the wife would have lost.[20]

Seeing that the extended panel, which was composed to clarify the range and effect of Section 15, arrived at such a unclear ruling, it is not surprising that this decision was fiercely criticized.[21] As Fassberg notes, this decision actually cancels out Section 15 because it established the possibility that the mere change of domicile would count as an agreement, when the law seems to explicitly rule this out (and after all, even most of those who thought it applied did not reflect it in their rulings). Section 15 exhibits an unreserved preference for certainty by opting for immutability and applying the parties' matrimonial domicile (or, in cases of a nuptial agreement, their domicile at the time of contracting) while ignoring any subsequent life changes. However, the majority chose to focus on the parties' circumstances at the time of separation, thus de facto opting for mutability and applying their domicile at the time of the separation and proceedings.[22] By doing so, they created the new, *Nafisi* (and *Nafisi* style) choice-of-law rule,[23] according to which circumstances might create a sharing agreement that overrules any other rule regarding the parties' matrimonial property. Therefore, in order to achieve the stability which Section 15 intended to afford, a couple must now sign an agreement in order to apply the law of their matrimonial domicile to their matrimonial property. In the absence of such an agreement, the situation is uncertain. By so doing, the *Nafisi* decision not only changed the substantive legal rule but also created a reversal of the burden of proof, so that the defendant, rather than the claimant, would have to prove a right to the property in order to supersede the application of the *lex fori*.

II. What did the Courts Make of the Situation?

As a rule, family decisions are not published in Israel in order to protect the parties' privacy. Further, since the early 2000s researchers are no longer allowed access to cases for research purposes. A High Court of Justice petition against this situation

20 *Id.* at 628.

21 *See, e.g.*, Celia Wasserstein Fassberg, *Law and Justice in Choice-of-Law: Matrimonial Property after Nafisi v. Nafisi*, 31 Mishpatim 97 (2000) [Hebrew, hereinafter Fassberg, *Matrimonial Property after Nafisi*]; Celia Wasserstein Fassberg, Private International Law ch. 16 (2013) [Hebrew, hereinafter Fassberg, Private International Law]; Menashe Shava, *Property Relations Between Spouses who Married Abroad when their Domicile was in a Foreign Country*, 22 Iyunëi Mishpat 571 (1999) [Hebrew]; Rhona Schuz, *Choice of Law in Relation to Matrimonial Property: The Existing Law and Proposals for Reform*, 16 Mehkarei Mishpat 425 (2001) [Hebrew]; Rhona Schuz, *Private International Law at the End of the Twentieth Century: Progress or Regress?*, *in* Israeli Reports to the XV International Congress of Comparative Law 145, 171-73 (A.M. Rabello ed., 1999); Talia Einhorn, Private International Law in Israel 244-46 (2d ed. 2012).

22 Fassberg, Private International Law, *supra* note 21, at 1224.

23 The *Nafisi* decision did not offer a clear and comprehensive rule for consequent cases that are not composed of the exact fact-set of this case. Hence following decisions mostly employ *Nafisi* style reasonings, which are muddied versions of the *Nafisi* rule.

was recently dismissed, although a compromise reached may enable some future research, depending on the cooperation of judges.[24] Only a fraction of the cases are published. They are either cases that the Judiciary Authority deems to be of special importance or public interest (usually Supreme Court decisions), or cases submitted for publication by lower-court judges who presided over them and consider them to be particularly important. Consequently, any study involving family law cases is limited because of limited access as well as the possibility of skewed representation of the law in practice by the cases that are available.

Indeed, the number of published decisions dealing with cross-border matrimonial property is extremely small. Consequently, no definitive argument can be made as to the courts' practice in the aftermath of *Azugi* and *Nafisi*. Studying the published case law may help to decipher a tendency of the courts regarding the applicable choice of law rule regarding matrimonial property in Israel. But while this Article discusses the data and draws potential qualitative conclusions from it, by no means is it intended to argue for their statistical significance or their accuracy with regard to the general (unpublished) reality. Authentication of these findings is planned to be done in future work, by interviewing practitioners who might shed light on their accuracy based on their experiences and unpublished cases in which they were involved. Hopefully, if the compromise reached following the previously mentioned petition on the matter comes to fruition, the findings will be re-examined in light of a statistically representative sample from all cases, published and unpublished alike.

A. The Corpus

In order to examine the legal reality of choice of law in matrimonial property cases, all decisions pertaining to this question were extracted from the Nevo database, which is the most widely used legal database in Israel.[25] The search included all citations of Section 15 or the *Nafisi* case (since it was later and broader than *Azugi*, and despite the fact that both cases together composed the ruling on the subject). This search yielded 103 decisions citing Section 15 and 205 decisions citing *Nafisi*.[26] Of those, some cases appeared in both lists as they cited both. Further, while the database's "search by citation" tool is generally reliable, it did retrieve one case where Section 15 was not in fact cited.[27] Lastly, two of the retrieved judgements were of the *Azugi* case (the original judgment of the District Court, and the judgment in the appeal before the Supreme Court). Those cases were disregarded.

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24 HCJ 8001/19 Triger et al. v. The Director of the Courts, Nevo Legal Database (Nov. 30, 2020).

25 For instance, according to data published in the Nevo website, 90% of the public-sector employees (judges, clerks, prosecutors etc.) chose Nevo as their legal database, and only 10% chose from the other databases.

26 These are all the available decisions as of February 2020.

27 FamC (DC Nz) 28098-10-13 AS v. AS, Nevo Legal Database (Nov. 20, 2014). The search also retrieved CivC (DC TA) 19677-04-10 Kishon v. Company for the Development of Residential Neighborhoods in Judea and Samaria Ltd, Nevo Legal Database (Apr. 8, 2014); where Section 15 was cited only in the claim, not the decision, but the database did note as much.

Further sifting was done based on contents. Many decisions cited *Nafisi* as part of discussions regarding public policy, the presumption of foreign law,[28] or the Israeli regime regarding matrimonial property in purely local cases—all matters also discussed in that judgement. Other cases cite Section 15 for general reference and other external uses; they too were disregarded. After accounting for those, the final pool was composed of 30 decisions (in 29 cases, since one decision[29] is an appeal on a first-instance decision also in the group[30]). While not all of them focused on the question of the choice of law rule, all had some constructive discussion or ruling on this matter. All cases were such that Section 15 could have applied to, following the inter-temporal reasoning of the *Azugi* case.

The corpus discussed below includes all those decisions (all-inclusive corpus). However bear in mind that the corpus cannot be considered a representative selection due to the above-mentioned publication policy of family decisions in Israel. While the corpus may be a small-scale reflection of reality, more likely it is not, since publication of decisions requires an active effort. Perhaps judges chose to publish particularly articulate decisions that reaffirm the norm, but it is just as likely that judges chose to publish unusual and innovative decisions.

The first thing to note about this group is its surprisingly small size. Even for unpublished matters, only 30 decisions discussing a piece of legislation that is almost 50 years old or a precedent that is over 15 years old seem an extremely low number. Nothing can be said with any certainty, and this number may indicate that cases involving choice of law are notably less prevalent for any number of reasons. However, while choice of law cases are likely to be less frequent than local ones, such a difference in numbers in a country composed largely of immigrants is surprising.[31]

This surprise might be mitigated when considering the spread of the cases over time: the corpus includes no case that was initiated in the 1970s,[32] one case from the 1980s, three cases from the 1990s, ten cases from the 2000s, and 14 cases from the 2010s.[33] Though the numbers may reflect change in the publication policy of the databases (all-inclusive databases are a phenomenon of the internet era), they might also reflect judges' growing interest in publishing their decisions since, as previously mentioned, the presiding judge often initiates the publication of family decisions. This is supported by the fact that two judges are single-handedly each responsible for 10% of the decisions (three decisions were given by Justice Shohat of the Tel Aviv District Court and three by Judge Felx of the Jerusalem Family Court). Three other judges are each responsible for 6.6% of the decisions (Justice Schneller's Appeals

28 As to the different understandings of this presumption, see Albert Martin Kales, *Presumption of the Foreign Law*, 19 Harv. L. Rev. 401 (1906).

29 FamA (DC TA) 1971-12-16 John Doe v. Jane Doe, Nevo Legal Database (Jan. 6, 2019).

30 FamC (TA) 10521-03-15 Jane Doe v. John Doe, Nevo Legal Database (Oct. 10, 2016).

31 This finding might indicate, for example, a tendency to overlook or avoid choice of law. However, at this point nothing can be stated with any persuasion.

32 The *Azugi* case was initiated in the 1970s, but it is naturally not part of the corpus.

33 These 15 cases include two rabbinical court cases. Those do not cite the year of initiation, but since the decisions were given towards the middle of the decade it was assumed that the cases were initiated within that decade.

Panel of the Tel Aviv District Court, Justice Shaked of the Tel Aviv Family Court, and Justice Katz of the Jerusalem Family Court are responsible for two decisions each). This, despite the fact that there are several family law appeals panels in each of the six district courts, and over 60 family judges in the 16 family courts in Israel.[34] However the majority (60%) of the decisions were given by judges who were one-time participants in the corpus. Therefore it seems that the interest in publication cannot, at this time, fully explain the dates of the corpus.

Alternatively, it is possible that following the *Nafisi* case, which was decided late in 1996 and was of a more general and principled nature than *Azugi*, the question of the law applicable to cross-border matrimonial property cases became more contentious, therefore more publication-worthy. It could also be that following the *Nafisi* case, which created a new choice of law rule, litigants found they had prospects for winning despite Section 15, and thus more cases came to court.

Finally, the numbers might also indicate a demographic change: choice of law arguments are only relevant when there is a difference between the competing applicable laws and when there is enough money to make the case worthwhile. It is possible that at a later time more immigrants arrived in Israel from countries where the property regime is separation (e.g., France), or were better-off. However, this seems a less likely explanation in view of the cases. Three cases involved people who were residents of the West Bank at the time of their marriage (hence their domiciliary law at the time of the marriage was Jordanian, thus applying the separation regime of Sharia law).[35] Nothing prevented such cases from reaching Israeli courts in the 1970s, 1980s and 1990s.[36] As for wealth, while some cases seem to reflect significant assets,[37] others do not.[38]

While it is not claimed that the corpus is statistically representative, it does involve courts of various instances, suggesting that it does not reflect a local norm of a particular court or instance, but rather a norm that can be traced throughout

34 71 as of April 2021, according to the Judiciary website: https://judgescv.court.gov.il, (last visited Apr. 17, 2021).

35 Case (DC Jer) 322/92 Dweik v. Dweik PD 5753(2) 423 (1993) (the parties married in East Jerusalem in 1947); Case (DC Jer) 355/95 Kord v. Kord PD 5756(2) 464 (1996) (the parties married in East Jerusalem in 1940); FamC (Nz) 18572-11-10 BA v. HA, Nevo Legal Database (Aug. 28, 2012) (the parties married in Jenin in 1982).

36 Though it is possible that social changes, such as increased litigiousness, an increase in the number of lawyers looking for business, or an improvement in women's rights or heightened awareness of them, might have made a difference here.

37 *E.g.*, CivA 291/85 Awalid v. Awalid PD 52(1) 215 (1988); CivA 7687/04 Sasson v. Sasson, PD 59(5) 596 (2005); FamA (DC Hi) 2290-04-10 ML v. YL, Nevo Legal Database (Dec. 27, 2010); FamA (DC TA) 51311-12-11 John Doe v. Jane Doe, Nevo Legal Database (Nov. 12, 2013); John Doe, *supra* note 29; Kord, *supra* note 35.

38 FamA (DC Hi) 37676-05-18 LP v. MP, Nevo Legal Database (Mar. 14, 2019); Dweik, *supra* note 35; FamC (TA) 23990/01 AH v. LB, Nevo Legal Database (May 20, 2002); FamC (TA) 44900/00 PL v. DV, Nevo Legal Database (Apr. 14, 2003); FamC (Jer) 10621/05 MY v. MA, Nevo Legal Database (July 30, 2007); FamC (Tiberius) 860-09-09 SA v. MA, Nevo Legal Database (May 8, 2012); BA, *supra* note 35 and possibly also FamC (Jer) 63862-09-14 NC v. AC, Nevo Legal Database (June 13, 2016). The couples in those cases usually had a bank account and an apartment or a small plot of land (at most). Ownership of an apartment (or for Arab couples, a small plot of land) does not reflect significant wealth, since ownership (with mortgage), as opposed to rent, is the norm in Israel.

the Israeli judiciary. The decisions were mostly given by courts of first instance (70%, 21 cases) of three types; 80.95% (17) of the first-instance cases were given by family courts; 9.52% (2 cases) were given by district courts, which are mid-tier and appellate courts, but were first-instance courts for some family matters until 1995; and 9.52% (2 cases) were given by regional rabbinical courts. Of the 9 decisions given by appellate courts, 22.2% (2 cases) were given by the Supreme Court, 66.6% (9 cases) by the district courts, and 11.1% (1 case) was given by the Grand Rabbinical Court, the highest court of that instance. Since the corpus includes three decisions given by the rabbinical courts, it is important to note that it includes no decisions given by other official religious tribunals. Those decisions are usually written in Arabic (rather than Hebrew) and therefore not published by the Israeli legal databases. However, the corpus does include four cases that involve Muslims but were entertained by civil courts.[39] Members of other religious groups do not appear in the corpus.[40]

B. The Choice of Law Rule Used

More than anything, the decisions demonstrate confusion. It is apparent that the courts—in all instances—are aware of Section 15 and its applicability, as 93% (28) of the decisions mention it directly, and one of the outstanding two refers to it indirectly.[41] Since, as mentioned above, Section 15 is only one of two different search terms that were used in order to identify the relevant decisions, this finding cannot be explained solely by the design of the search. But while the courts are aware of the Section, they do not see it as a ubiquitous rule. Far from it—only 30% of the decisions (9) applied the rule as is, either applying the parties' matrimonial domicile at the time of the marriage or upholding an agreement made by them legally, without adding any further considerations or discounting factors.[42] Another 26.7% (8) of the cases used a different rule, based on the *Nafisi* case, according to which factual life changes such as immigration can be read as implicit choice of law agreements, without the parties ever having made such an agreement or even discussed it.[43] Importantly, despite reaching its ultimate expression in the final

39 Dweik, *supra* note 35; Kord, *supra* note 35; SA, *supra* note 38; BA, *supra* note 35.

40 The husband in FamC (Jer) 4460/05 John Doe v. Jane Doe, Nevo Legal Database (May 5, 2008) is said to have originally been Christian, but to have converted prior to the marriage that resulted in the case.

41 AH, *supra* note 38 does not mention Section 15, since the decision regarding the applicable law was apparently made in a previous decision (as mentioned in para 5); NC, *supra* note 38 neither mentions nor applies the Section.

42 Awalid, *supra* note 37; ML, *supra* note 37; AH, *supra* note 38; MY, *supra* note 38; John Doe, *supra* note 40; FamC (TA) 8291-03-13 YA v. AFA, Nevo Legal Database (Aug. 17, 2014); FamC (Ashdod) 37846-04-13 MB v. PB, Nevo Legal Database (Apr. 26, 2015); Case (Grand Rabbinical Court) 1132751 John Doe v. Jane Doe, Nevo Legal Database (May 18, 2018) [hereinafter *1132751 John Doe*]; Case (Rabbinical Court Netanya) 844861 John Doe v. Jane Doe, Nevo Legal Database (Oct. 31, 2011) [hereinafter *844861 John Doe*].

43 LP, *supra* note 38; Dweik, *supra* note 35; Kord, *supra* note 35; PL, *supra* note 38; FamC (TA) 47300/96 SS v. The Estate of the Late SS, Nevo Legal Database (July 6, 2003); SA, *supra* note 38; FamC (Jer) 13270/06 TL v. TZ, Nevo Legal Database (Oct. 30, 2008); NC, *supra* note 38.

decision of the *Nafisi* case, this rule actually preceded it, and was hinted at in the *Azugi* case. Since all decisions in the corpus were rendered after the decision in the *Azugi* case, they were presumably aware of this rule. Three decisions were given in the interim between the legislation of Section 15 and the *Nafisi* decision: *Awalid*,[44] *Dweik*,[45] and *Kord*.[46] While the first applied Section 15 directly, the other two used a "*Nafisi* style" rule, ruling that spouses who stayed put following a regime-change are seen as accepting the law of the new regime. These final two decisions, both given by the Jerusalem District Court in the 1990s, went even further than *Azugi* and *Nafisi*, ruling that not only is active immigration an agreement, but also merely staying in a territory after it was occupied by Israel (East Jerusalem, following the 1967 war) implies an agreement to apply Israeli law.[47] This, despite the parties having no obvious choice on the matter.

Alongside 56.6% (17) of the cases that used one of two 'pure' rules, the remaining 43.3% (13) of the cases used muddied variations of the rules. Three cases used a variation of Section 15,[48] bringing the total number of cases basing the decision on it to 12 (40%), while 10 cases used a variation of the *Nafisi* style rule,[49] bringing the total number of cases using it to 18 (60%), thus demonstrating a preference for the latter rule.

C. Was it all just a ploy aimed at applying lex fori*?*

One might assume that the reason for the courts' resorting to the *Nafisi* style rule is their wish to apply *lex fori*. But although the *Nafisi* style rule is indeed a good way to do so, the corpus may suggest this is not the case. First, Israeli law was applied in only 50% (15) of the cases, including cases where any rule would have led to its application.[50] If the courts have an abject aversion to foreign law, or even just a strong preference for *lex fori*, they would not have applied it in 43.3% (13) of the

44 Awalid, *supra* note 37.

45 Dweik, *supra* note 35.

46 Kord, *supra* note 35.

47 Dweik, *supra* note 35; Kord, *supra* note 35.

48 FamC (Jer) 10982/05 MA v. AKB, Nevo Legal Database (Jan. 6, 2013) (ruling according to an actual agreement, however one that was not done according to the parties' matrimonial domicile at the time of the agreement, as per Sec. 15); FamC (TA) 2990/07 Jane Doe v. John Doe, Nevo Legal Database (Apr. 30, 2015) (using Sec. 15 and Israeli law as alternative reasonings); Jane Doe *supra* note 30 (interpreting the French code as deeming that behavior which implies co-ownership regarding particular items of property supersedes an agreement deeming otherwise).

49 Sasson, *supra* note 37; John Doe, *supra* note 37; LFamA (DC BS) 43199-10-17 YGP v. AAP, Nevo Legal Database (Nov. 27, 2017); John Doe, *supra* note 29; LFamA (DC TA) 12248-04-19 AG v. YG, Nevo Legal Database (July 11, 2019); FamC (TA) 1210/07 John Doe v. Jane Doe, Nevo Legal Database (Nov. 2, 2011) [hereinafter *1210/07 John Doe*]; BA, *supra* note 35; Case (Jer) 32295-11-15 LB v. BB, Nevo Legal Database (Sept. 6, 2016); Case (Jer) 20944-12-16 TS v. AS, Nevo Legal Database (July 4, 2018); Case (Rabbinical Court Netanya) 9199 John Doe v. Jane Doe, Nevo Legal Database (Dec. 18, 2007) [hereinafter *9199 John Doe*].

50 John Doe, *supra* note 37; *1210/07 John Doe*, *supra* note 49; MA, *supra* note 48; (and possibly Sasson, *supra* note 35).

cases.[51] Second, and more importantly, while in most cases the *Nafisi* style rule resulted in the application of *lex fori*, in some cases it did not. Of the 10 cases using a variation of the *Nafisi* style rule, 6 (60%) resulted in the application of foreign law.[52] This means that of the group of 18 cases that use some version of the *Nafisi* rule, 70% defer, as expected, to *lex fori*, and 30%, a rather significant percentage, apply foreign law.

Interestingly, in two cases, the *Nafisi* style rule was used not to apply *lex fori*, but foreign law. In one of them, the couple married when the wife was domiciled in the West Bank, and the husband was domiciled in a foreign country (whose name was redacted from the published decision). After the marriage, the couple moved to the husband's country, and ten years later the couple moved to Israel. Usually, the court's use of the *Nafisi* style rule in such circumstances would lead to the application of Israeli law, which is both *lex fori* and the law of the parties' last common domicile. Surprisingly, the court used the rule to apply the law of the foreign country, since it found that it was the spouses' intended matrimonial home and the law to which they implicitly agreed.[53] In another case,[54] the parties were domiciliaries of Israel at the time of the marriage, and later moved to South Africa where they lived for the remainder of their marriage. One would expect the court to have used Section 15 here, and to have applied Israeli law. However, the court used the *Nafisi* style rule and deemed that the relocation created an implied agreement to apply South African law to the parties' matrimonial property, therefore that law, rather than Israeli law, must apply.

But if the application of *lex fori* was not the aim of the judges in breaking away from Section 15, what was?

III. Alternative Motivations?

Judges might have any number of reasons to dislike the solution of Section 15 and to prefer a different rule. For example, they might reject a rule which they feel disfavors women or men, plaintiffs or defendants, rich or poor parties. They might reject a rule that allows or bans the application of the law of friendly or hostile nations. They might be more or less respectful towards agreements, or they might simply demonstrate their own personal preference. As the data show, while these are all viable options, they are probably not the motivations of the judges rendering the decisions in the corpus, as this Part will suggest.

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51 Awalid, *supra* note 37; ML, *supra* note 37; John Doe, *supra* note 29; AH, *supra* note 38; MY, *supra* note 38; *1210/07 John Doe*, *supra* note 49; MA, *supra* note 48; YA, *supra* note 42; MB, *supra* note 42; Jane Doe, *supra* note 48; Jane Doe, *supra* note 30; *1132751 John Doe*, *supra* note 42; *844861 John Doe*, *supra* note 42. In another case, BA, *supra* note 35, there was no decision as to the applicable law, though the court mentioned that Israeli law might apply.

52 John Doe, *supra* note 29; *1210/07 John Doe*, *supra* note 49; BA, *supra* note 35; LB, *supra* note 49; TS, *supra* note 49; *9199 John Doe*, *supra* note 49.

53 BA, *supra* note 35.

54 *1210/07 John Doe*, *supra* note 49.

A. Gender Preference

All of the cases in the corpus discussed the matters of heterosexual couples. It is therefore conceivable that the decisions were influenced by gender-related considerations, so that judges ruled in a way that supported or favored one gender over the other. It is particularly likely that judges wanted to protect women who would otherwise, at least in certain cases, be left penniless.

At first glance, it appears that women may have enjoyed preferential treatment, as they won 60% (18) of the cases.[55] However, in some of the cases the woman won only partially, usually meaning she won half of the marital home but lost her claim to other assets.[56] Further two cases reflected a procedural rather than a substantive win. In those cases the decision was focused on the court's jurisdiction and not the actual division of property, and the applicable law was only discussed as a preliminary matter or as an indication of the forum's convenience.[57] Therefore women fully won only 50% (15) of the cases and substantively won only 43.3% (13) of the cases, and it thus seems there was no apparent bias towards either men or women.

At the same time, the choice of law used in the cases does demonstrate a tendency that may reflect a gender preference. Of the 18 cases which women won, 72.2% (13) used the *Nafisi* rule (or a variation thereof), while only 27.7% (5) used Section 15 (or a variation thereof). Therefore it might seem that the former rule is preferable for women. Alternatively, it might be that this rule is preferable to applicants, regardless of their gender, and women are overrepresented in this group, since they initiated 60% (18) of the cases in the first instance.[58] This speculation is somewhat supported by the fact that 54.5% (6) of the cases that men won also employed this choice of law rule.[59] While this is of course a very narrow majority, it does support the possibility of a different explanation.

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55 Sasson, *supra* note 37; ML, *supra* note 37; YPG, *supra* note 49; John Doe, *supra* note 29; Dweik, *supra* note 35; Kord, *supra* note 35; AH, *supra* note 38; PL, *supra* note 38; SS, *supra* note 43; SA, *supra* note 38; BA, *supra* note 35; MA, *supra* note 48; Jane Doe, *supra* note 48; TL, *supra* note 43; NC, *supra* note 38; LB, *supra* note 49; Jane Doe, *supra* note 30; *844861 John Doe*, *supra* note 42.

56 Cases: SS, *supra* note 43; SA, *supra* note 38; Jane Doe, *supra* note 30 reflect partial wins. In cases: SS, *supra* note 43; Jane Doe, *supra* note 30, the distinction between "family" assets and other assets is clearly made. In SA, *supra* note 38, the partial win was effected by the wife's insufficient arguments and proof regarding some of the assets, and the fact that much of the claimed property was registered to the names of the husband's family members.

57 BA, *supra* note 35; *844861 John Doe*, *supra* note 42.

58 Awalid, *supra* note 37; ML, *supra* note 37; John Doe, *supra* note 29; LP, *supra* note 38; Dweik, *supra* note 35; Kord, *supra* note 35; PL, *supra* note 38; SS, *supra* note 43; MY, *supra* note 38; SA, *supra* note 38; BA, *supra* note 35; YA, *supra* note 42; MB, *supra* note 42; Jane Doe, *supra* note 48; TL, *supra* note 43; NC, *supra* note 38; LB, *supra* note 49; Jane Doe, *supra* note 30 (this final case was composed of counter-suits, so although the woman sued it is unclear who actually initiated the procedure).

59 Sasson, *supra* note 37; John Doe, *supra* note 37; YPG, *supra* note 49; AG, *supra* note 49; MA, *supra* note 48; *9199 John Doe*, *supra* note 49.

B. Claimant/Respondent Preference

Courts may have a tendency to prefer the status quo and thus avoid intervention and reject claims. If that were the case, we would expect the court to use a choice of law rule that causes the court to intervene only when it is compulsory. Indeed the *Nafisi* decision itself demonstrates a different approach: the wife there would have lost if not for the new rule suggested by the court, both because she did not prove the Persian law, and because had she proven it, it would probably not have created a community property regime but rather deemed the husband as the sole owner.

Therefore the existence of the new rule created in the *Nafisi* case supports a different assumption, namely that courts do see the literal rule of Section 15, which is the law in the books, as the guiding norm, but choose to break away from it when applying it would lead to a an undesirable loss in the eyes of the court. The corpus seems to support this conclusion. First, because only in 36.6% (11) of the cases did the initial claimant (in the first instance) lose completely.[60] Second, while the *Nafisi* style rule was generally more prevalent in the corpus (60%, as mentioned above), it was rarely used in cases that resulted in a loss for the claimant: only 27.2% (3) of those cases used the *Nafisi* style rule in one way or another, while in the lion's share, 72.7% (8) of the cases, the claimant lost used Section 15. Since in 90% (27) of the cases the claimant was the party that wanted to receive a share of the property (rather than the one wishing to exclude the other spouse),[61] it is plausible that the *Nafisi* style rule serves as an escape clause preventing what the courts consider to be undue losses.

C. Class Preference

Do courts play with the applicable choice of law rule for the benefit of poorer parties, or to the detriment of richer ones? The data on this point are far from clear or conclusive, but if the assets mentioned in the cases are taken into consideration, neither seems to be the case. Admittedly, most of the cases—both of winners and losers—discuss considerable assets. In two cases, though, the parties clearly come from lower economic classes,[62] and in at least five others they seem to belong to the mid-level economic class.[63] Of those seven cases, all but one[64] were initiated by wives who wanted a share in the property held by their husbands. One would think that these would be the cases where the courts feel most strongly for the claimants and want them to win. And indeed in the two poorest cases, the claimant won, even if

60 Awalid, *supra* note 37; Sasson, *supra* note 37; ML, *supra* note 37; YPG, *supra* note 49; LP, *supra* note 38; AH, *supra* note 38; MY, *supra* note 38; MA, *supra* note 48; MB, *supra* note 42; *1132751 John Doe*, *supra* note 42; *844861 John Doe*, *supra* note 42 (in this last case the loss touched only upon the question of jurisdiction).

61 The suit was aimed at avoiding the sharing of assets only in cases: Sasson, *supra* note 37; YPG, *supra* note 49; AH, *supra* note 38. In all those cases, the initiator lost.

62 PL, *supra* note 38; SA, *supra* note 38.

63 LP, *supra* note 38; Dweik, *supra* note 35; AH, *supra* note 38; MY, *supra* note 38; BA, *supra* note 35 (and possibly also NC, *supra* note 38, though less likely).

64 AH, *supra* note 38.

only a partial win. However, in three of the other five the claimant lost (including the one where a husband sued).[65]

How did the choice of law rule play out in these cases? Here a possible correlation emerges. Of the seven cases, only two employed Section 15 (28.5%), and in both of those cases the applicant lost. Overall, the percentage of cases using Section 15 was 40%; though far from being conclusive, this may show that there is a correlation between wishing to help weaker parties and applying the *Nafisi* style rule.

D. Friendly (Western) Nations

The cases in the corpus involved many different countries, but over half of the cases came from only three countries.[66] The largest group of cases in the corpus involved French law (26.6%, 8 cases). Of these, in 75% (6) of the cases foreign law was applied. The second largest group involved the USA (20%, 6 cases. The courts mostly did not distinguish between states). The third group involved South Africa (13%, 4 cases). These are all Western countries which are also considered to be friendly to Israel, so Israeli judges are likely to trust their legal rules. Of these 15 cases, foreign law was applied in 66.6% (10 cases).

The corpus also includes cases from several jurisdictions that could be defined as non-Western, and unfriendly, countries, whose rules Israeli courts consider more suspicious: Jordan (and East Jerusalem, where Jordanian law applied at the relevant times), which at the time the cases were litigated was considered an enemy state; Iran, which is still an enemy state; and the Palestinian Authority, with which Israel has a complicated relationship. Together, these jurisdictions are responsible for 5 cases (20%). Foreign law was not applied to any of the cases in this group. In all of them, the *Nafisi* style choice of law rule was used, and the outcome was the application of Israeli law instead of the foreign law, despite there being nothing in Section 15 to mandate (or possibly even allow) avoiding the application of such laws.

The distinction between cases involving the laws of Western (in the broad sense) or friendly states and those of Eastern or hostile ones, might indicate that the *Nafisi* style rule is used as means to avoid applying (and thereby respecting) laws that the judges are prejudiced against or averse to. The judges might be more suspicious of legal arrangements made by countries they have less affinity with. After all, the *Nafisi* rule originated in a case that avoided upholding Iranian law, a country which, at the time of the hearing was no longer friendly with Israel, hence its law was not that of a friendly nation. The unfriendliness or suspicion seems to be a driving force here, considering that all of the non-Western or unfriendly countries in the sample would have applied the parties' religious laws—the same laws applicable, at least to some family matters, in Israel. Note, however, that it is also possible that the courts are suspicious of non-Western laws whatever they might actually be,

65 LP, *supra* note 38; AH, *supra* note 38; MY, *supra* note 38.

66 The rest of the cases involved ten other jurisdictions: East Jerusalem (2 cases), Canada, Ethiopia, Iran, Jordan, Mexico, Netherlands, Palestinian Authority, Ukraine, and the United Kingdom (1 case each). One of the U.S. cases—LP, *supra* note 38—also involved the law of the Dominican Republic.

and choose to shy away from them regardless of friendliness considerations. Since the two categories merge (so that Western countries are also the ones considered friendly and non-Western countries are those considered unfriendly), it is hard to determine which of the considerations guides the decision.

E. Respect for Agreements

In 36.6% (11) of the cases in the corpus the parties had an agreement regarding their matrimonial property.[67] Even if the judges are opposed to particular laws or outcomes, they might be more inclined to respect arrangements were actively and intentionally created by the parties. This assumption might be further supported by the fact that the *Nafisi* style rule is based on contractual reasoning. Hence it stands to reason that it, like Section 15, will respect agreements. And indeed, in 72.2% (8) of the cases, the outcome reached by the court aligned with the agreement. For example, in the *Awalid* case,[68] given before *Nafisi*, the agreement was respected despite creating a separation regime to the detriment of the claimant wife. This decision might not prove much, since it preceded the *Nafisi* case. However, a similar outcome was reached in two other cases in the corpus, which succeeded *Nafisi*.[69] In all three cases, the choice of law used was Section 15.

On the other hand, in two cases[70] the agreement did not serve as a barrier, and the courts intervened and applied a law or reached an outcome that did not comply with the parties' agreement.[71] In both these cases, the choice of law used was the *Nafisi* style rule. In the clearer of the two cases,[72] the reason for rejecting the agreement and applying Israeli law was the parties' behavior after signing the agreement, which in the eyes of the judges implied an intention to share property despite the agreement (i.e., the Presumption of Community Property which itself is part of the internal Israeli law on matrimonial property). This outcome might seem more reasonable in light of the facts: the disputed house and the mortgage that enabled its purchase were registered in the names of both spouses, and the court found it hard to ignore the registration and give the entire house to the husband. In the other case, which is harder to decipher, there is some evidence to suggest that the ruling was even broader and applied Israeli law to the entire pool of assets despite a separation agreement. In any event, the outcome might indicate that the contractual

67 Awalid, *supra* note 37; Sasson, *supra* note 37; YPG, *supra* note 49; John Doe, *supra* note 29; AH, *supra* note 38; MY, *supra* note 38; MA, *supra* note 48; MB, *supra* note 42; LB, *supra* note 49; Jane Doe, *supra* note 30; *9199 John Doe*, *supra* note 49. In two more cases agreements may have existed: in John Doe, *supra* note 40, where the court finds an inferred agreement, and in *1210/07 John Doe*, *supra* note 49, where there is a debate over the existence of an agreement. Since these agreements are less certain, they were not taken into account here.

68 Awalid, *supra* note 37.

69 MY, *supra* note 38; MB *supra* note 42.

70 In the last two cases—John Doe, *supra* note 29; BA, *supra* note 35—it is unclear from the decisions whether the outcome complied with the agreement.

71 Sasson, *supra* note 37; YPG, *supra* note 49.

72 Sasson, *supra* note 37.

rationale that allowed the court to apply local law in *Nafisi* and subsequent cases might have been a façade covering other motivations.

F. Personal Preference

It is possible that some judges are aware of only one of the two possible rules, or have a preference for the rule itself, rather than its outcome. If such is the case, then the judges' use of one rule or the other does not reflect an informed decision based on substance, but rather mere coincidence. The corpus gives some indication regarding the veracity of this assumption. Of the 30 decisions, 12 decisions (40%) were given by judges who have at least one more decision in the corpus. Two judges (Shohat[73] and Felx[74]) gave three decisions each and three others gave two decisions each (Katz,[75] Shaked,[76] and Justice Schneller's panel[77]). With the exception of one judge (Shaked) who only applied Section 15, all judges used both rules,[78] without offering a clear distinction to explain the difference between the cases. So much so that Justice Felx gave two decisions within the space of three months using two different choice of law rules, without offering a rule (as opposed to a value judgement regarding the outcome) to explain the difference between the cases. This outcome, together with some of the previous indications identified, might suggest a different preference altogether—for what the judges perceive to be substantive justice.

IV. That Which is Truly Ours

A. Understanding the Numbers

While the corpus does not clearly demonstrate a preference for the *lex fori*, nonetheless the courts appear not to use the choice of law rules neutrally but to choose between them. Further, they do not award preference to Section 15 despite the fact that it is the official choice of law rule, and the *Nafisi* style rule is a secondary rule, or a sub-rule of Section 15, at best. As discussed above, there are several tendencies that can be identified in the corpus. While judges do not appear to prefer one of the rules as a matter of principle, their selective use of the rules demonstrates a preference for particular outcomes.

The use of the *Nafisi* style rule seems to represent a certain preference for women claimants and poorer parties. Since in most of the cases surveyed a woman was both the claimant and the poorer party, these three findings merge. Further, there might be some correlation between the employment of that rule and avoiding the

73 AG, *supra* note 49; AH, *supra* note 38; PL, *supra* note 38.
74 NC, *supra* note 38; LB, *supra* note 49; TS, *supra* note 49.
75 MY, *supra* note 38; TL, *supra* note 43.
76 Jane Doe, *supra* note 48; Jane Doe, *supra* note 30.
77 John Doe, *supra* note 37; John Doe, *supra* note 29.
78 Justice Schneller did rule in accordance with Section 15 in all cases, but mentioned the "*Nafisi* style" rule as further support for the outcome in one of the cases (John Doe, *supra* note 37).

application of the laws of unfriendly or non-Western nations. At the same time, there seems to be a negative correlation between the existence of an agreement, the court's upholding it, and the use of the *Nafisi* style rule. Finally, no correlation was found between the application of any of the rules and the personal preferences of judges. These specific findings might also be part of a bigger picture that could better explain the courts' rulings. This bigger picture is that of sharing, i.e., a community property regime.

Of the 30 cases in the corpus, 27 had practical outcomes (the other three were preliminary decisions), and in 63.3% of them (19 decisions) the final outcome mandated sharing.[79] Of these 19 decisions, 14 (73.6%) used the *Nafisi* style rule. While in some of these cases the application of the *Nafisi* style rule changed the outcome, in at least four of the cases (28.5%) it clearly did so and created sharing in a situation where Section 15 would not have.

On the other hand, of the 8 non-sharing decisions, only one (12.5%)[80] used the *Nafisi* style rule, and that was an exceptional case where a woman sued for half of the estate of a man from whom she had been separated for decades, arguing that their divorce, concluded some 29 years earlier, was invalid. The court found that the parties had parted ways at the time of the divorce if not earlier, and hence found no sharing intention of the parties, or grounds to infer such an intention. Further, the woman failed to prove that she was deserving of the sums sued for under any of the relevant laws.

The aggregation of these findings raises another, broader and more interesting goal that seems to guide the courts' decisions. Possibly there is a connection between the application of the *Nafisi* style rule and an outcome where the parties must share their property. This might also shed some light on the category of friendly nations. All the hostile nations were countries where there is reason to assume that the personal (i.e., religious) law of the parties would have applied to their matrimonial property, and thus would have created separation.[81] Therefore, while the rejection of these laws might be a result of who their legislators are, it may also be a result of what they dictate. Indeed, this proposition can be contested, since other separating laws, particularly the French, were upheld. However, French law does not mandate separation, but offers separation as one of several options from which the parties may choose. Further, the courts made a concerted effort to interpret the law as mandating sharing, even in cases where the parties chose separation: out of 8 cases involving French law, in 6 (75%) the outcome was the sharing of property rather than separation. Therefore, the judges' motivation may not be connected specifically

79 Sasson, *supra* note 37; John Doe, *supra* note 37; YGP, *supra* note 49; John Doe, *supra* note 29; AG, *supra* note 49; Dweik, *supra* note 35; Kord, *supra* note 35; AH, *supra* note 38; PL, *supra* note 38; SS, *supra* note 43; John Doe, *supra* note 40; *1210/07 John Doe*, *supra* note 49; SA, *supra* note 38; Jane Doe, *supra* note 48; TL, *supra* note 43; NC, *supra* note 38; LB, *supra* note 49; Jane Doe, *supra* note 30; TS, *supra* note 49.

80 LP, *supra* note 38.

81 See, for example, regarding Jewish parties, the District Courts' decision in the *Azugi* case, CC (Be'er-Sheba) 10/74 Azugi v. Azugi, PM 1978(1) 201, 207 (1976). *See also* Fassberg, *Matrimonial Property after Nafisi*, *supra* note 21, at 132 n.111. Regarding Muslim parties see BA, *supra* note 35.

to any of the factors considered above, but to an overarching principle, which is the community of property.

B. Matrimonial Property in Israel

Article 51 of the King's Order in Council on Palestine states:

> Subject to the provisions of Articles 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised . . . by the courts of the religious communities . . . . For the purpose of these provisions, Matters of Personal Status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

The Article does not directly mention matrimonial property. Early on, however, the Israeli Supreme Court ruled that "suits regarding marriage" should be interpreted to include rights derived from the marital status.[82] The Court further stated that "Laws which give the husband rights in his wife's property upon marriage are part of the matrimonial law . . . ."[83] The subjection of matrimonial property to the jurisdiction of religious courts meant that it was also subject to religious laws, which generally divided property between husbands and wives in an unequal manner.[84] Therefore, the Israeli law was rather quick to sever the tie between property and religious law. It did so, first, through Section 2 of the Women's Equal Rights Law, 1951, which states: "A married woman shall be fully competent to own and deal with property as if she were unmarried; her rights in property acquired before marriage shall not be affected by her marriage."

Following this legislative change, the Supreme Court found that matrimonial property was no longer a matter of marriage, which is subject to the jurisdiction of religious courts and law.[85] Later, the regulation of matrimonial property was further removed from religious law through a string of rulings by the courts, which ended up creating a secular matrimonial regime that considers the spouses' property as joint and equally dividable upon breakup.[86] This regime is the Presumption of Community Property, which creates an immediate community of property rights between the parties, so that the spouses are joint owners of their property during the marriage, and may share it accordingly at any time during the marriage or following

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82 SC 1/50 Sidis v. Head of Execution and Enforcement Office, PD 8 1020, 1025-1026, 1031-1032 (1954) [Hebrew]. *See also* CivA 100/49 Miller v. Miller, PD 5 1301, 1321 (1951) [Hebrew]; CivA 514/76 Hashash and Damari v. Damari, PD 31(2) 505 (1977) [Hebrew].

83 In the *Sidis* case, *supra* note 82, at 1032 [the translation is mine—SS].

84 Since Jewish law separates property between spouses. For a detailed account, see Alina S. Kofsky, *A Comparative Analysis of Women's Property Rights in Jewish Law and Anglo-American Law*, 6 J. L. & Religion 317 (1988).

85 Pinhas Shifman, Family Law in Israel 34-35 (2d ed. 1995) [Hebrew].

86 *See, e.g.*, HCJ 185/72 Gur v. The Regional Rabbinical Court, PD 20(1) 589 (1966); Ariel Rosen-Zvi, Family Law in Israel—Between the Sacred and the Ordinary 89-92 (1990) [Hebrew]; Shahar Lifshitz, Spousal Property 113-14 (2016) [Hebrew].

its breakdown. In its earlier stages, the Presumption was based on the assumption that certain behavior on the part of specific spouses during their marriage, which reflects co-ownership, creates an implied agreement to share familial assets such as the marital home. Later on, the Presumption was generalized and broadened to mean that any spouses who invested joint efforts in supporting the family (financially or otherwise) are presumed to have agreed and be obligated to divide their property equally, unless there is a nuptial agreement clearly stating otherwise.[87] Consequently, under the Presumption of Community Property, the spouses share all their property throughout their marriage, unless clearly held otherwise.

After years of this judicially-created regime of community property, the legislator intervened through the Property Relations between Spouses Act. The Israeli legislator concluded that joint ownership of property during the marriage is clumsy and inconvenient,[88] and imposed in its place a separation regime, under which "[n] either the contracting of a marriage nor its existence affects the property rights of either of the spouses, nor does it grant one rights in the property of the other or impose on one liability for the obligations of the other."[89]

Consequently, the Act created the Resource Balance Arrangement, which is a regime of postponed contractual community, according to which each spouse has separate ownership over his or her property during the marriage. Upon the expiration of the marriage (due to divorce or death), the contractual community comes into play, and the parties balance their matrimonial assets so that they equally share the value gained through dividable assets (i.e., excluding external assets) during the marriage. It further established the entitlements of spouses to include only a share of the assets gained during the marriage, and not each other's entire property,[90] thus excluding assets preceding the marriage, inheritances, gifts and so forth, commonly referred to as "external assets." [91]

The Act further created clear and strict rules for the creation of nuptial agreements. While the judicial Presumption of Community Property was originally based on implied agreements created through telling behavior, the Act strove to stabilize and clarify the property relations by requiring that all nuptial agreements, and any changes therein, be in writing[92] and approved by the courts.[93]

The matrimonial property rule created by the Act was designed to govern all couples married on or after January 1st, 1974. However, Israeli courts pushed back

87 For the details of this development and a discussion of the assets included in the Presumption, see Lifshitz, *supra* note 86, at 113-43.

88 Draft Bill for the Individual and the Family, 5716-1955, HH (Gov.) 102 (Isr.), https://www.nli.org.il/he/books/NNL_ALEPH001956100/NLI [Hebrew], which was the document that later evolved into the Act.

89 § 4 of the Act.

90 Individual and the Family Bill, *supra* note 88. at 100.

91 § 5(a) of the Act.

92 § 1 of the Act.

93 § 2(a). If the agreement was created before the marriage, it may be approved by the marriage registrar (§ 2(c)) or a notary (§ 2(c1)).

against this rule. In the famous *Yaacobi-Knobler* case,[94] an extended panel of Supreme Court justices debated the relationship between the Act and the Presumption. While two justices referred to the clear language of the Act and found that the Presumption cannot apply to couples who are subject to the Act,[95] two other justices thought the two co-exist,[96] and another judge thought that while the Presumption of Community Property itself cannot apply to such couples, the spouses may create a sharing arrangement rereading specific items of property through property law (as opposed to family law).[97]

Despite the clear language of the Act, Israeli courts, in all instances including the Supreme Court, were only too happy to read this development as reintroducing the Presumption of Community Property, or at least some version of it. Some of the judges went as far as to apply the Presumption to couples that should have been subject to the Act, and whose lifestyle did not reflect a community of joint efforts.[98] The courts also broadened the Presumption to apply to assets which both the Act and the judicial Presumption kept separate, such as external assets that were kept separate throughout the relationship.[99]

The language of the Act, in its Section 3(a), should have prevented the application of the Presumption, in any version, to couples governed by the Act. The Section states: "Spouses who have not made a nuptial agreement . . . shall be seen as agreeing to the Resource Balancing Arrangement under this chapter . . . ."

Arguably, this Section means that the Resource Balancing Arrangement can only be overridden by a nuptial agreement. This, as well as the clear language of the Act regarding how nuptial agreements should be created—in writing and approved by an official authority—should have made the implied agreements on which judges based their reasoning in some of the cases impossible. It should have further prevented the judges from using the judicial Presumption of Community Property in cases where an agreement could not even have been inferred. Yet the judges remained undeterred by this clear language and did—still do—allow all sorts of unofficial, even presumed, agreements. The most the Supreme Court did about this situation was to suggest that a spouse should offer some reason for assuming that his or her partner intended to share an item of property which the Act does not deem joint,[100] but this did not go as far as to demand anything in writing or even any unambiguous proof.

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94 CivA 1915/91 Yaacobi v. Yaacobi, Knobler v. Knobler, PD 49(3) 529 (1995).

95 Justices Matza and Tal.

96 Justices Shamgar and Dorner.

97 Justice Strasberg-Cohen, in LCivA 8672/00 Abu-Romi v. Abu-Romi PD 56(6) 175 (2002) case, where she elaborated and explained the position she presented in the *Yaacobi-Knobler* case.

98 *See, e.g.*, LFamA 5939/04 John Doe v. Jane Doe PD 59(1) 665, 672 (2004).

99 See, as an extreme example of this tendency, LCivA 818/05 Jane Doe v. John Doe (7.5.2006), affirmed in appeal in LFamA 4951/06 John Doe v. Jane Doe (14.6.2006). *See also* Lifshitz, *supra* note 86, at 177-79.

100 LFamA 1398/11 Jane Doe v. John Doe Nevo Legal Database, (26.12.2012).

C. Not lex fori*, rather* lex nostra

When juxtaposing the court-created matrimonial norm for matrimonial property in Israel with the decisions dealing with the same issue in cross-border cases, the resemblance is striking: the same trend is clearly apparent in both. The Israeli legislator rejected the Presumption of Community Property in no uncertain terms and replaced it with the Resource Balance Arrangement, and it has never since relented or opened the door for the reemergence of the Presumption. Yet the courts brought it back nonetheless. Similarly, the Israeli legislator created only one choice of law rule, Section 15, and at no point did it formally accept the *Nafisi* style rule as an alternative. Further, the Supreme Court in *Nafisi* did not so much create an outright new choice of law rule, but rather offered a way out for that case through an expansive interpretation of Section 15, which the courts later broadened and generalized. Still, the courts insisted on using the *Nafisi* style rule, particularly in cases where using Section 15 would have led to a separating outcome, and making it the new norm. Both trends fit together nicely.

Israeli judges did not accept the transition from the Presumption of Community Property to the Resource Balance Arrangement. They maintained—almost unanimously, starting with Supreme Court justices and ending with Family Court judges—that marriage should create a more wholesome property community than proposed by the Act and ruled accordingly, to the dismay of the legislator. They did so in local cases, hence it is not surprising that they seem to have done so in cross-border ones as well. In a sense, these judges, working in a traditional conflicts of laws environment, have opted for a version of Leflar's Better Law approach, choosing a law that makes more sense for the case and the parties.[101]

True enough, the actual content of the *Nafisi* style rule bears a striking resemblance to the Presumption of Community Property. In both cases, the judges look at the life of the parties to see if they had a good enough relationship, and in both cases they assume that if the parties lived well enough together, they acquired rights in each other's property. Further, in both cases, they will see any agreement—even a clear and direct one—as a point at which to start the discussion, but not the be-all and end-all of the property regime between spouses.

In the eyes of Israeli judges, the Presumption of Community Property seems to reflect a strong public policy, maybe even a mandatory rule, that must supersede any law which offers a different regime, including Israeli law itself.[102] It is a notion so ingrained in the judicial culture and innate to the judges' understanding of marriage and just outcomes that they are unable to resist it in local and foreign

101 "A judge's natural feeling that his own state's law is better than that of other states to some extent explains forum preference. Of course the local law is sometimes not better, and most judges are perfectly capable of realizing this. The inclination of any reasonable court will be to prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules." Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 295-304 (1966); Robert A. Leflar, *More on Choice-Influencing Considerations*, 54 Cal. L. Rev. 1584, 1588 (1966). I thank Dan Klerman for suggesting this point.

102 This was clearly stated in Dweik, *supra* note 35.

cases alike. In a sense, the judges do not strive to apply the *lex fori*. It can be said that they do not apply it even when they say they do, and even in purely local cases. Because the law they endeavor to apply is not the law that the forum has legislated and ordained, but a social norm in which the judges believe wholeheartedly and which they treat as law.

Conclusion

Undoubtedly, something has gone awry in the Israeli choice of law rule for matrimonial property. Despite the small size of the corpus examined here, which precludes any quantitative findings, it still rather clearly demonstrates that the judges seem to be choosing when to apply the literal statutory rule and when to use another, judicially-created rule. One might think that they do so with the aim of applying *lex fori*, as is often assumed in private international law. But the limited published cases indicate otherwise. Though various trends can be identified in the cases, when attempting to generalize the findings and comparing them to the tendencies apparent in local decisions of those judges on the matter, a different story emerges. It appears that Israeli courts are not striving to apply the statutory *lex fori*. Instead, they tend to ignore it, both locally and internationally. They are rather drawn towards a norm which they themselves created and hold imperative, according to which spouses must share their property.

The findings of this Article are centered on the choice of law in matrimonial property cases heard by Israeli courts. However, this finding might be an indication of a broader issue. It might reflect the general tendency of Israeli judges towards activism. But it might also suggest a broader phenomenon within private international law. A phenomenon in which judges do not revert to *lex fori* due to their disliking foreign laws. Instead, they might be actively choosing preferable substantive outcomes, while disregarding choice of law methodology and constraints. The example of matrimonial property in Israel, in which there is a distinction between the legislated *lex fori* and the law the judges choose to apply (*lex nostra*), might help sharpen our understanding of the argument regarding judges' tendency towards the application of *lex fori* and the motivations and goals guiding judicial decisions when choosing an applicable law. Further research into other choice of law questions and other jurisdictions is required in order to substantiate this hypothesis and map its extent.

Appendix I – Corpus of Cases

Supreme Court (appeal)

1. CivA 291/85 Awalid v. Awalid PD 52(1) 215 (1988)
2. CivA 7687/04 Sasson v. Sasson, PD 59(5) 596 (2005)

District Court (appeal)

3. FamA (DC Hi) 2290-04-10 ML v. YL (27.12.10)
4. FamA (DC TA) 51311-12-11 John Doe v. Jane Doe (12.11.2013)
5. LFamA (DC BS) 43199-10-17 YGP v. AAP (27.11.2017)
6. FamA (DC TA) 1971-12-16 John Doe v. Jane Doe (6.1.2019)
7. FamA (DC Hi) 37676-05-18 LP v. MP (14.3.19)
8. LFamA (DC TA) 12248-04-19 AG v. YG (11.7.2019)

District Court (first instance)

9. Case (DC Jer) 322/92 Dweik v. Dweik PSM 1993(2) 423 (1993)
10. Case (DC Jer) 355/95 Kord v. Kord PSM 1996(2) 464 (1996)

Family Court (first instance)

11. FamC (TA) 23990/01 AH v. LB, Nevo Legal Database (May 20, 2002)
12. FamC (TA) 44900/00 PL v. DV, Nevo Legal Database (Apr. 14, 2003)
13. FamC (TA) 47300/96 SS v. The Estate of the Late SS, Nevo Legal Database (July 6, 2003);
14. FamC (Jer) 10621/05 MY v. MA (30.7.2007)
15. FamC (Jer) 4460/05 John Doe v. Jane Doe (5.5.2008)
16. FamC (TA) 1210/07 John Doe v. Jane Doe (2.11.2011)
17. FamC (Tiberius) 860-09-09 SA v. MA (8.5.2012)
18. FamC (Nz) 18572-11-10 BA v. HA (28.8.2012)
19. FamC (Jer) 10982/05 MA v. AKB (6.1.2013)
20. FamC (TA) 8291-03-13 YA v. AFA (17.8.2014)
21. FamC (Ashdod) 37846-04-13 MB v. PB (26.4.15)
22. FamC (TA) 2990/07 Jane Doe v. John Doe (30.4.2015)
23. FamC (Jer) 13270/06 TL v. TZ (30.10.2008)
24. FamC (Jer) 63862-09-14 NC v. AC (13.6.2016)
25. Case (Jer) 32295-11-15 LB v. BB (6.9.16)
26. FamC (TA) 10521-03-15 Jane Doe v. John Doe (10.10.2016)
27. Case (Jer) 20944-12-16 TS v. AS (4.7.2018)

Grand Rabbinical Court (appeal)

28. Case (Grand Rabbinical Court) 1132751 John Doe v. Jane Doe (18.5.2018)

Rabbinical Courts (first instance)

29. Case (Netanya) 9199 John Doe v. Jane Doe (18.12.2007)
30. Case (Netanya) 844861 John Doe v. Jane Doe (31.10.2011)

CivA – Civil Appeal
FamA – Family Appeal
FamC – Family Case
LFamA – Family Leave to Appeal

Appendix II – Analysis of Cases

Case #	Initiator	Choice of Law Rule Used	Outcome for Initiator	Foreign Law Applied?	Agreement?	Outcome Upholds Agreement?	Sharing?	Competing Foreign Law	Content of Competing Regime (foreign law or agreement) According to the Court
1	W	Sec. 15	L	Y	Y	Y	N	France	Separation
2	H	Nafisi	L	N	Y	N	Y	Netherlands	Separation
3	W	Sec. 15	L	Y	N	-	N	Canada	Separation
4	H	Nafisi	W	N	N	-	Y	South Africa	Community
5	H	Nafisi	L	N	Y	N	Y	France	Separation
6	W(&H)	Sec. 15	W	Y	Y	?	Y	France?	Separation
7	W	Nafisi (Sec. 15 also considered)	L	N	N	-	N	USA/ Dominican Republic	Separation
8	H	~Nafisi	W	N	N	-	Y	South Africa	Separation
9	W	Nafisi	W	N	N	-	Y	Jordan	Separation
10	W	Nafisi	W	N	N	-	Y	East Jerusalem - Jordan	Separation
11	H	Sec. 15	L	Y	Y	Y	Y	France	Separation
12	W	Nafisi	W (partly)	N	N	-	Y	Ukraine	?
13	W	Nafisi	W (partly)	N	N	-	Y	Iran	Separation
14	W(&H)	Sec. 15	L	Y	Y	Y	N	USA (California)	Separation
15	H	Sec. 15	W	N	N (debated)	-(N)	Y	France	Separation
16	H	Nafisi	H (partly)	~Y	N (inferred)	- (Y)	Y	South Africa	Community
17	W	Nafisi	W (partly)	N	N	-	Y	Palestinian Authority	Separation
18	W	Nafisi	?	?**	?	?	?*	?	Separation
19	H	Sec. 15	L	N	Y	Y	N	Mexico	Separation
20	W	Sec. 15	?	-*	N	-	?	USA	?
21	W	Sec. 15	L	Y	Y	Y	N	France	Separation
22	W	Sec. 15	W	Y	N	-	Y	France	Community
23	W	Nafisi	W	N	N	-	Y	UK	?

Case #	Initiator	Choice of Law Rule Used	Outcome for Initiator	Foreign Law Applied?	Agreement?	Outcome Upholds Agreement?	Sharing?	Competing Foreign Law	Content of Competing Regime (foreign law or agreement) According to the Court
24	W	Nafisi	W	N	N	-	Y	East Jerusalem - Jordan	Separation
25	W	Sec. 15	W	~Y	Y	Y	Y	USA	Community
26	W(&H)	Sec. 15	W (partly)	Y	Y	~Y	Y	France	Separation
27	H	Nafisi	W (partly)	N	N	-	Y	Ethiopia	?
28	W	Sec. 15	L	Y*	N	-	N	USA	?
29	H	Nafisi	W (partly)	~Y	Y	~Y	N	South Africa	Separation
30	H	Sec. 15	L	Y*	N	-	?*	USA	?

* Preliminary decision, no law was actually applied/property actually divided.
** Preliminary decision, no law was actually applied but the court mentioned that the applicable law might be Israeli.
H = Husband
W = Wife
Y = Yes
N = No