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One Size Doesn't Fit All: Collaborative Law in Israel[1]

I. Introduction

In a recent conversation, Idith Schaham, a pioneer in the Israeli Collaborative Law movement compared Collaborative Law in Israel with Eurodisney. At first this seemed like a strange connection to make, but as Idith explained, there is actually quite a few similarities. Both were failed attempts to impose an American cultural ideal on a population which did not share the culture. And, Idith hopes, much as Eurodisney started to prosper when they made slight changes to take the French culture into consideration, so too will Israeli Collaborative Law once the system has been in place for long enough to modify the paradigm to Israeli culture. Collaborative Law is still in its infancy in Israel. The first training occurred only in 2010. Idith is the most prominent collaborative lawyer, she has handled over 50 cases. Most other collaborative lawyers have maybe one or two a year. Collaborative Law has the possibility of equalizing the inherent gender inequality in Israeli divorce, making the process more equitable.

There are, added cultural norms in Israel which lead to people to not choose collaborative divorce. The first and foremost is that Israel is a highly adversarial country.[2] Many people see

[1] I would like to thank Idith Schaham, without whom this paper would have been impossible to write! I refer to her as Idith throughout this paper by her own request. Unfortunately, there are no well written articles on this process which are available in English. Multiple practitioners have warned me against using too much from the IACP journal article on Israeli Collaborative Law, so my sources for this paper have been limited to a website outlining the religious aspects of Israeli Divorce, and Idith herself, who is a much better source of information than an article could ever have been.

[2] A point I made to some consternation in my presentation, but a point that Idith brought up without prompting

mediation of any kind as a weakness, and therefore avoid collaborative law. Adding to this issue is the fact that the Civil Court Judges, who have jurisdiction over portions of the settlement not relating to the actual divorce, are highly skeptical of any new ideas. Describing Israeli jusges as "conservative", Idith lamented that they do not promote collaborative divorce, and at times will strike entire portions of the filed agreement. The lawyers themselves, because Collaborative Divorce is uncommon, are almost uniformly trained in the adversarial system. Idith stated that one of the major issues is that lawyers who agree to the collaborative process "negotiate nicely, but do not truly undergo the paradigm shift necessary to be collaborative lawyers." Along those lines, there have been a number of cases where the couple themselves

Finally, because of the complex legal system in place in Israel, Collaborative Law faces special challenges not extant in America, including a dual court system. Divorce is handled solely by the religious courts, while other related matters such as spousal support and child custody are subject to concurrent jurisdiction. This leads to a race to the courts. Whoever files first gets to forum select.

This is not to say that Collaborative Law is doomed to failure in Israel, quite the opposite. The Israeli system of divorce actually lends itself to Collaborative Divorce more than the American system in many ways. Because of a provision in religious law, divorce cannot be compelled. Despite their near-uniform conservatism, it is the religious court, rather than the civil, who support the collaborative process. The Rabbis are aware that any settlement coming out of the collaborative process contains no coercion. Because of this, they have almost always upheld collaborative divorce settlements.

Finally, despite its status as a neophyte, Israeli Collaborative Law has already taken steps that the United States can learn from. The Israeli collaborative lawyers have modified the process to

fit a society which is as, if not more, multicultural than America. They form teams specially trained to deal with specific ethnic groups, run public collaborative law centers for low-income citizens, and have the possibility of a hybrid collaborative-mediation process in which the divorce is collaborative in every aspect other than there is a mediator. This hybrid system, while not fully within the spirit of the Collaborative method in America, allows a neutral fact finder to help guide the couple through certain issues which might cause the process to fail in America.

In short, the history of Collaborative Law in Israel is short, but it is promising. If Israel can train a group of lawyers with the same passion as Idith has for the Collaborative Process, can gain support from the civil judges, and continue to tailor the method to the specific cultural needs of Israeli culture, the success rate of the Collaborative Process in Israel is likely to skyrocket.

II. Israeli Divorce Law

There are two separate court systems in Israel. The Civil Court system is similar to that in America. There is, however a separate Rabbinical Court, in which the "Judges" are Rabbis, the "law" is Talmudic, and the decisions are binding per the Israeli government. These two systems hold concurrent jurisdiction over most civil matters, and because of this, there is often a "race to the courts" between two opposing parties. If a case is filed in Civil Court, civil law applies. If it is filed in Rabbinical Court, Talmudic law applies. This has many ramifications which will be discussed later in this paper. There is one area of law, however, which the courts do not share concurrent jurisdiction, marriage and divorce.

There is no concept of civil marriage in Israel. All marriage is religious, and has been made so by legislation. If a couple wants to obtain a civil marriage, they must go out of the country to a land such as Cyprus, and get civilly married there, and return to Israel. At this point, Marriage

Certificate in hand, they appeal to the Minister of the Interior. The Minister can change documentation to show a couple as married, but they are not technically so. If the civilly married couple wishes to obtain a divorce, if any Israeli couple wants to get divorced, they must do so through the Rabbinical Court, and obtain a document called a Get, a religious document, or else they are not divorced. Other issues, such as child support, can be handled either by the Civil or Rabbinical Court, but divorce jurisdiction is exclusively Rabinnical.

This religious divorce system has a number of inherent problems. It is based on Halakha, or Talmudic Law. Deuteronomy 24:1 is the sole basis for divorce in Israel, stating: "A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her and sends her away from his house." (Deut. 24:1) The first problem with basing a civil divorce system on this quote is that the Chief Rabbi takes it quite literally. A husband must grant the wife a divorce. He can banish her from the home. Basically the Israeli divorce system provides few, if any, rights to the wife. In other words: "His wife had no capacity, voice or power to protest. It did not matter whether she was at fault for the breakdown of the marriage, having refused conjugal relations with her husband, committed adultery, or merely burnt his dinner" (Falk, found at http://jwa.org/encyclopedia/article/divorce-halakhic-perspective). If the woman wants to end the marriage, she "often pays for her freedom in order to persuade her husband to "exercise" his free will to give her a get. She may give up her right to child support, marital property and even the custody of her children to release herself from the bonds of a recalcitrant spouse and a failed marriage." (Id) This male-centered divorce regime is carried out through the ideas of property distribution. Talmudic law makes no provision for a woman to have a career, expecting her to be

a housewife and mother. Therefore, even if it is the husband who wants to end the marriage, often no provision is made for childcare costs, or other costs inherent in a two-career family.

This is not to say that the wife is entirely without rights. She can petition the rabbis to "compel" her husband to give her a divorce if he touches manure, is a tanner, copper miner, has bad breath, or beats her outside the prescribed wife-beating practices found in the Tanakh. (Mishnah Ketubbot 77a). This might seem like a joke, but with one exception, all the reasons the wife has for petitioning the Rabbis are quite comical. The singular exception relevant to modern life, under which a wife to petition the Rabbis to compel the Get is if her husband is sterile. About the only right more fundamental than marriage in the Bible is that a woman should have children. If her husband is sterile, the court is likely to compel a Get so that the wife can marry again and procreate.

One final difference between the Israeli and American systems of divorce is the issue of spousal support. Post-divorce alimony simply does not exist in Israel. Spousal support can be mandated during the course of the marriage, but once the Get is got, it terminates. This can give rise to issues of equitable distribution, and making each party whole. These issues will be discussed in further detail.

III. How The Israeli Divorce System and Israeli Culture Helps the Collaborative Process

Because divorce is handled by a religious, not civil court, it is an easy to assume that the Israeli system does not lend itself to the collaborative process. The narrow American world-view is that secular courts are much more likely to allow a process which gives a woman greater equality than a religious court is. One would assume wrong. The major reason for this is that the

husband must willingly give the divorce to his wife. In the Mishnah (commentary) it is written: "A man who wishes to divorce his wife is not like a woman who seeks divorce from her husband. A woman is divorced in accordance with her will or against her will. A man cannot divorce his wife except of his own free will." (Mishnah 77a). This is undoubtedly another example, at first reading, of the woman having less rights than her husband. However, because the divorce must be granted willingly, the Rabbinical Court accepts the collaborative process of proof of willingness when deciding whether to grant the divorce or not. Conversely, the civil judges in Israel are highly conservative and fight anything which can reduce their power.

Because the Religious court's exclusive jurisdiction is solely in relation to the termination of the marriage itself, all other aspects of the divorce (child custody, spousal support) is subject to concurrent jurisdiction, a divorcing couple may find themselves in a "race to the court." There are particular benefits for the husband to have all aspects handled by the religious courts, while the wife has motivation to keep the religious jurisdiction over the termination of the marriage itself. Whoever files first, where they file is where the case is handled. By implementing the collaborative process, this race to the court is eliminated. Some Israeli husbands have asked why they should allow the collaborative process, when they may face continued spousal support, Idith answers "Family, family, family!" Because the collaborative process places such emphasis on the family remaining a unit even after the breakdown of the marriage, those family minded husbands are willing to subject themselves to a long term financial commitment.

Finally, there is the constant fear of mortal peril that comes with living in Israel. Things Americans take for granted, such as riding public transportation, can be deadly in Israel. Because of this, there is a sense of a lack of control over even the basic aspects of life existing within Israeli citizens. A collaborative divorce allows Israeli couples a sense of control over the ending

of their marriage which typical litigation does not afford. This aspect of Israeli culture cannot be overstated as a reason why the collaborative process should be promoted in Israel.

IV. Issues Faced by Israeli Collaborative Lawyers

There are cultural views within Israeli citizens which have stunted the growth of the process in that country. Idith stated that Israelis are "fighters, and mediation of any kind, especially collaborative divorce is seen by many as weakness." Cultural norms in Israel show that any sign of weakness, especially in men, is to be avoided. To this issue, Idith reiterated that she explains that the process is about the family. It is not weakness to submit to the process, because the end result is a stronger family unit.

The Israeli lawyer also has issues to overcome. Collaborative law is not lucrative in Israel at this time. In four years, Idith has had 50 cases, but most collaborative lawyers may handle one or two a year. They still make a majority of their salary from litigation. Because they do not spend as much time immersed in the process as many American collaborative lawyers do, they do not always stick to the process as closely as they could. Idith characterizes this as lawyers "negotiating nicely, not collaborating." This issue is simply a matter of demand. As the demand for collaborative divorce rises in Israel, there will be more training, and lawyers will spend more time in the process. The more time they spend, the stronger their paradigm shift towards the process will be.

Finally, there is a religious aspect involved in Israeli collaborative practice which does not exist in America. Because the divorce itself is under the religious courts, the Israeli collaborative lawyer must negotiate the civil aspects of divorce along with getting the husband to agree to the Get. Without this fundamental agreement, no divorce can occur. Once this

fundamental hurdle is passed, the rest of the process proceeds like the American process, with equal give and take among the parties.

Finally, there is both a lack of support from the Civil Courts in Israel. Judges don't like having their powers taken away from them, and have been willing to void specific portions of the Israeli Collaborative Agreement. Idith spoke of how the original Collaborative Agreement contained a provision that if the process broke down, the parties agreed to wait 30 days before taking further action. At that time, they could decide to try the process again, or file in the courts. This is no longer a part of the Collaborative Agreement because judges were not upholding it. Idith had cases where one party would use the collaborative process as a front, while simultaneously filing in civil courts. After opening a case, they would come back to the practice and say that they were abandoning the process. While attempts were made to hold the parties to this part of the agreement, it received no recognition in the courts, and was therefore moot.

V. What American can Learn from Israeli Collaborative Practice

Although Collaborative Law in Israel is still in its infancy, and is experiencing many growing pains, there are two specific areas where American Collaborative practitioners can learn from the Israeli Process. The first is the idea of collaborative mediation. This process blends two common ADR practices taking practices from each and setting up a system which is laudable. Similarly to American collaborative law, all meetings are together, the parties share a mental neutral, a financial neutral, and a child neutral if needed. From mediation, this practice has a neutral fact finding party, who acts as a guide to help the parties traverse specific issues which might otherwise lead to a breakdown in the process. While the mediator can, if fully necessary, act as a decider of fact in this process, it rarely happens. The mediator is simply there to guide in a neutral manner. This has helped overcome some of the reticence felt by Israeli clients and

lawyers who, Idith says, are inherently argumentative. There have been cases where the breakdown in the process occurred solely because the two sides were not working with each other. Idith compares these cases to Tai Chi. You must work with the movements of your "opponent" before making your move. If you move against them, you both stall. In this metaphor, the mediator is like a guiding hand over the two sides, helping them move together, and stopping them from moving against each other.

Probably the biggest lesson that American Collaborative Law can learn from Israel is the role of Non-Profit centers geared towards low-income and multicultural residents who would otherwise not have access to the process. Municipalities, such as Ramat Gan, will provide funding for Collaborative Law Centers geared towards low-income residents. This allows access to the process, not only to the poor, but also to women who are victims of domestic violence and might not be able to otherwise access the system.

Such centers are staffed with teams specifically trained in the cultural sensitivities of what is a truly multi-cultural society. For example, there was a recent collaborative divorce in which the couple was Ethiopian-Israeli. One of the reasons for the success of this case was that the entire team was made up of those who were either of the same culture, or had special training in the specific cultural morays of this sub-set of Israelis. While Israel faces more issues than America does in this area, as Israel is more heterogeneous than America, there are still lessons to be learned. If you are serving a specific subset of Americans, than specific training in this area should be provided to help the process be successful.

VI. Conclusion

Israeli Collaborative Law is still in its infancy, and faces issues outside those faced by American practitioners. Although it is definitely going through some growing pains, the future of Collaborative Law in Israel is bright. The practitioners have managed to traverse a complex legal arena including areas of concurrent jurisdiction that America just does not have. Furthermore, they have paid special attention to cultural sensitivities in a way that could be educational for American practitioners. Finally, by merging different forms of ADR and allowing a collaborative mediation process on a case-by-case basis, Idith and her fellow trailblazers have found a solution to overcoming some of the thornier cultural issues which can lead to the breakdown of the process. It will be interesting to watch the process in Israel over the next few years to see how they deal with the growing pains, and build on their successes.