THE POWER OF INTERPRETATION: RELIGIOUS SCHOLARS ELEVATE THE STATUS OF FEMALE GUARDIANS IN JEWISH LAW

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I. INTRODUCTION

Many countries in the world are mixed societies. Individuals from different ethnic origins and religions attempt to cooperate and cobble together a special culture and heritage for their country. Their goal is based upon the assumption that they can agree upon a common ideology. The original intention is positive and optimistic: each individual would like to live in peace with others and accept the unique social contract of the population in a common territory. However, different people with many outlooks do not always share a common goal. These individuals sometimes do not agree upon values and ideology and a clash between their desires and agendas is not a rare phenomenon. It is not easy for the majority in certain cultures to accept all patterns of behavior in their country. Consensus is sometimes impossible when the dominant culture does not share the attitudes and values of the minority culture. In certain societies, the values of the mainstream population, including gender equality, are not accepted by the minority. In some countries, the attitudes of the minority contradict the ideology of the liberal democratic society, and consequently, the majority is opposed to the implementation of the patriarchal norms of the minority group in society. As a result, many inhabitants of these countries may be ambivalent about the controversial practices and approaches of certain cultures and individuals within their society. A prime example of such social tensions can be found in the issue of gender equality and the unequal treatment of woman. The minority and majority cannot always cooperate and find pragmatic solutions to this problem due to the conservative standpoint of the minority. Equality of the sexes will not always be accepted by a minority culture, especially one that adheres to a hierarchical society and separation of roles between the sexes. Often, it will reject the new approach of the majority and feels threatened by attitudes that do not coincide with its traditional norms and outlook.

In many liberal democratic countries, there are minority groups that adhere to traditional religious values. The state wishes to treat these groups with due respect, but finds that it is sometimes not easy to properly balance between the values of a

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liberal democratic society and the ideology of these groups. Should the dominant culture in these societies silence the voice of the minority culture?

We encounter a similar dilemma in the international arena. International norms should be applicable in all countries. Some countries promote the religious values of the state or the dominant group, while others stress that the state is a secular body or believe that separation between religion and religious values and the state is desirable. The more traditional and conservative societies sometimes do not adhere to all international norms, since they view these norms as an attempt to impose a foreign secular outlook or the practices of other cultures, such as equality between men and women. How can we bridge the gap between the current ideology of the majority in Western liberal societies, which have become the contemporary international norms, and their rejection in some minority groups, cultures or societies?

This article argues that the maximal promotion of adherence to feminist values can be achieved in traditional societies through an internal approach, within religious law. An attempt to introduce reform is legitimate and religious law can accept it when it is an outcome of the application of appropriate methods within religious law, such as a new interpretation of ancient religious texts.

The attempt to enhance feminist ideology in religious-traditional societies and countries will be most effective and successful when religious scholars strive to interpret religious law in light of modern gender equality. Religion is not static; religious groups and countries are influenced by changes in modern law and society, although they often do not state explicitly that external influence has led them to the adoption of a new religious approach. They respect traditional ideology and the outlook in their ancient sacred texts and have to take into consideration the limits of evolution in their legal system

The focus of this essay will be upon the implicit promotion of a feminist agenda in the legal system of one religious system: Judaism. Especially in the twentieth century, the rules of guardianship in Jewish law have been interpreted in a manner that has enhanced equality between the sexes.

It is evident that changes in the role and status of woman in society influenced the interpretation of the rules of guardianship in Jewish law. The attempt to elevate the status of the women in this sphere was necessary because at the earliest stage of the development of Jewish law, the status of the woman was inferior in the field of guardianship. Gradually, her status improved, step by step, as the result of an interpretation by Jewish law scholars in light of a new societal outlook. However, the medieval approach did not bridge the gap between the male and female Jewish guardian in all spheres and the status of the women in this domain remained inferior. In the twentieth century there has been an attempt, in the writings of some Jewish law scholars, to work toward a more significant equality between the male and female in guardianship. The religious legal norms

have changed in response to changes in society's attitudes and behaviors. New practices concerning the role of the woman at home and in her family or her status in society has led to the formation of new legal rules.

This development of law regarding the guardianship of Jewish women is not an isolated phenomenon. It demonstrates that when the interpreters of religious law wish to elevate the status of women, they can respond in an appropriate manner to meet the demands of societal norms. Women in traditional societies can benefit from more subtle, internal approaches such as the reinterpretation of religious law.

II. FEMINISM AND MULTICULTURALISM

Multiculturalism is common in many democratic liberal societies today. Presently residing in these societies, side by side, are individuals from different ethnic, racial, and religious groups. The ideology, outlook, values, and religion of members of different groups are not identical. Sometimes the state or the courts must balance between different, and at times contrasting, interests and values of these groups in society. Those who grant due respect to multiculturalism wish to secure recognition and representation for the variety of interests and values of all ethnic, racial, and religious groups in society.[1]

Society should protect minority groups, especially when they have special cultural or religious values. The majority should not silence the voice of the minority. However, should controversial values be safeguarded? If we take multiculturalism seriously, then they should be safeguarded because accepting multiculturalism is fundamental for societies that attempt to accomplish the basic goal of the liberal democratic society: equal recognition and representation for all members of society. Presently, this mission has not been fully accomplished, since, in many liberal democratic societies there are some groups with special values. They are not the mainstream in these societies, and suffer from lack of representation or misrepresentation. The goal of democratic liberal societies should be to eliminate all forms of inequality. We can achieve this goal by recognizing the unique values and ideology of all groups.[2] The liberal point of view requires that

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[1] *See* Amy Gutman, *Introduction*, *in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 3 (Amy Gutman ed., 1992). *See also* Isaak Dore & Michael T. Carper, *Multiculturalism, Pluralism, and Pragmatism: Political Gridlock or Philosophical Impasse?* 10 WILLAMETTE J. INT'L L. DISP. RESOL. 71, 73 (2002). Regarding the value of preserving the culture of different groups, *see also* Martha Minow & Elisabeth V. Spelman, *In Context*, *in* PRAGMATISM IN LAW AND SOCIETY 247 (M. Brint & W. Weaver eds., 1991); Rosemary F. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, *in* AFTER IDENTITY: A READER IN LAW AND CULTURE 266 (D. Danielsen & K. Engle eds., 1994).

[2] *See* Dore & Carper, *supra* note 1, at 78. Some scholars reject the opinion discussed earlier regarding tolerance and respect for the values of different cultures. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 313 (Harper Collins 1996). Bork questions the status granted to multiculturalism in society and law in the United States. In his opinion, the emphasis on multiculturalism might cause a split within American society. In addition, it could result in the devaluation of the central cultural values of the society in the United States. He also expressed concern that another outcome could be the evolution of American culture toward undesirable

all cultural groups in society be granted equal legitimacy and treated with due respect and tolerance.[3] We should grant each cultural group in society an equal opportunity to determine its own aspirations, customs, and values, which are the basic outcomes of its ideology. It should be able to express itself without unnecessary constraints or deprivation.[4]

The difficulty of implementing multiculturalism arises whenever the cultural claims and values of different groups contradict one another. Sometimes, as the result of its liberal humanistic outlook, the liberal democratic society wishes to protect the values and ideology of a conservative group or society. However, these values and ideologies may contradict those of a liberal western society.[5] There may be significant tension between the desire to uphold the equal treatment of women and multiculturalism, which respects and tolerates the practices and ideology of all groups in society, including more traditional and religious groups that may adhere to traditional patterns of control and authority over women.[6]

What is the optimal approach for those who strive to promote feminist values in a multicultural society? What should be the policy of a liberal democratic society when ethnic or religious groups, or some other segments of society, preserve or promote patriarchal power structures? Proponents of multiculturalism have suggested several formulas for balancing between multiculturalism and feminism. Some have held that there should be more emphasis on multiculturalism. Their commitment to multiculturalism has led them to conclude that some aspirations of the feminist movement are simply impossible in a situation where feminism clashes with multiculturalism.[7]

"barbarian" characteristics.

[3] STANLEY FISH, THE TROUBLE WITH PRINCIPLE 60-63 (Harvard Univ. Press 1999). The author makes a distinction between two forms of multiculturalism: boutique multiculturalism and strong multiculturalism. The first form is characterized by a sympathetic yet superficial approach towards the culture of others. This is the multiculturalism of "boutiques," which welcomes the ethnic foods of different groups in the population. On a superficial level, it declares that it accepts the culture of others. However, when the values or conduct of others contradict the values of the individual that claims he adheres to this form of multiculturalism, he rejects them. Boutique multiculturalism is based upon the assumption that the values of others cultures should not be accepted when such acceptance conflicts with the values of the cultural group adhering to this form of multiculturalism. Fundamentally, the adherents of boutique multiculturalism believe their values and convictions to be superior. The other form of multiculturalism is based upon a commitment to promote the special characteristics of the cultural values and customs of others, in an attempt to prevent discrimination between cultures. However, Fish stresses that this form of multiculturalism is also not absolute. Respect and tolerance towards the values of an intolerant culture, such as fundamentalist Islam, are problematic. Adherents to this form of multiculturalism would probably choose intolerance over the outlook of the fundamentalists in Islam based on a universal perception of desirable cultural values. However, when he desires to act in this manner, his policy is actually not strong multiculturalism but boutique multiculturalism.

[4] *See* Dore & Carper, *supra* note 1, at 78.

[5] *See* Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel,* 5 UCLA J. INT'L. L. & FOREIGN AFF. 339, 340-41 (2000-2001).

[6] *See* MICHAEL WALZER, ON TOLERATION 65 (Yale Univ. Press 1997). *See also* Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism? Civil Marriage in Lebanon,* 14 YALE J. L. & FEMINISM 177, 199 (2002).

[7] *See, e.g.,* Chandran Kukathas, *Is Feminism Bad for Multiculturalism?,* 15 PUB. AFF'S Q. 83-98

A second solution to this dilemma is based upon the assumption that protection should at times be granted to cultures that treat men and women unequally, including those who preserve biased legal arrangements regarding the relationships between men and women. However, this protection should only be granted to these cultures when they are at risk of extinction.[8]

A third approach suggests that it is possible and appropriate to promote both the aforementioned approaches at the same time. The desired outcome is to strike a reasonable balance between multiculturalism and feminism on a case-by-case basis.[9]

The past solutions of scholars to the dilemma of finding a desirable balance between multiculturalism and feminism were a sincere attempt to grant due weight to both philosophies. However, this goal can be reached today by taking an alternate approach that could enhance and promote a desirable balance between multiculturalism and feminism. Scholars and policymakers can focus on a dynamic internal solution within the evolutionary framework of the relevant religion. The adherents of feminism should initiate dialogues with the spiritual leaders of cultural groups that preserve patriarchal rules and traditional practices regarding women and attempt to convince them that they could and should interpret their religious laws in a manner that will enhance the best interests of women.

The feminist political philosopher Susan M. Okin did not adopt the solutions to the dilemma presented above because she believed that they granted too much weight to multiculturalism. She believed that the ideology of the feminist movement was more important and should dominant in cases of conflict between multiculturalism and feminism. Feminism is one of the paramount outlooks that coincides with the universal values of modern society, which seek to promote respect and equality for all individuals including women. Multiculturalism is

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(2001); Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 127 (1992); Chandran Kukathas, *Cultural Toleration, in* ETHNICITY AND GROUP RIGHTS 69-104 (Ian Shapiro & Will Kymlicka eds., 1997). Kukathas held that the state should demonstrate tolerance towards a variety of cultures, despite the fact that an outcome of this policy could be tolerance towards patriarchal patterns of behavior.

[8] *See* Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES 491 (1994). The authors oppose the idea of replacing traditional patriarchal cultures with equal societies. However, they point out that some of the scholars supporting replacement were more realistic and softened their position to supported a more moderate approach of acting from the inside—which would achieve the desired change of promoting equality between men and women without the replacement of the ancient society. *See* Susan Moller Okin, *Is Multiculturalism Bad for Women? in* IS MULTICULTURALISM BAD FOR WOMEN? 1, 9 (Joshua Cohen et al. eds. 1999).

[9] *See* Will Kymlicka, *Comments on Shachar and Spinner-Halev: An Update on the Multiculturalism Wars, in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 8, at 31-34. Kymlicka adheres to a proper balance between different, colliding values and rights, including a possible conflict between multiculturalism and human rights. In his opinion, there are limitations imposed upon the cultural rights of those who belong to minority groups, due to the relevance of principles such as freedom, democracy, and social justice. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 76 (1995).

inferior in this respect, since it preserves patriarchal principles and conducts.[10] Nevertheless, Professor Okin holds that we can justify the protection of certain aspects of minority cultures, such as its language, and should attempt to be empathetic when cultural groups implement legitimate cultural practices and rules that are different from those of the majority culture.[11]

The approach of Professor Ruth Halperin-Kaddari is similar to that of Okin. She argues that the fact that women choose to belong to a group that implements unequal and oppressive norms towards them does not justify their oppression and discrimination. Yet, she shares Okin's opinion that an effort should be made to promote the status of women in their group through a creative use of the group norms, including the interpretation of its rules.[12] Okin and Halperin-Kaddari granted more weight to feminism but did not choose the approach of direct confrontation with the traditional and religious groups and their norms. They were realistic and did not want to endanger the positive results of the nascent feminist movements of women in these groups. While holding feminism to be paramount, they avoided the external path—a total attack on traditional groups and their patriarchal rules and practices. Their goal was to find an optimal solution for women who choose to belong to these groups.[13]

The tension between multiculturalism and feminism, as discussed above, was presented in a manner relevant to the reality of many liberal democratic countries. However, there is a significant distinction between the analysis of the relationship between multiculturalism and feminism in Israel and the analysis of this issue in other countries, such as the United States and Canada. In the latter countries, the main problem consists of the patriarchal practices of minority populations. Taking multiculturalism seriously, the state should grant protection to the minority culture. The culture of the majority should not suppress or extinguish that of the minority. The legal situation is different in the state of Israel.[14] Recognized religious sects and their religious courts hold sole or parallel jurisdiction in the law of the state of

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[10] *See* Okin, *supra* note 8, at 9.

[11] *See id.* at 18, 23. In the author's opinion the liberal approach leading to the justification of multiculturalism should be balanced with the fear that support of multiculturalism means support of patriarchy and damage to women. Okin's basic position is shared by Leti Volpp, a feminist scholar, who believes that when we cannot resolve the conflict between feminism and the cultural principles of certain immigrant groups in the United States, feminism should be the paramount consideration and is more important than multiculturalism as a matter of principle. In these groups, customs such as the marriage of young girls are commonly the outcome of unequal power relations between men and women. *See* Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE L.J. & HUMAN. 89, 105 (2000); Leti Volpp, *Talking Culture: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996).

[12] *See* Halperin-Kaddari, *supra* note 5, at 342.

[13] Such "external" direct attacks could result in the adoption of strict uncompromising policies by the religious community in order to resists what it conceives as "coercion" from the outside. The result of these policies might be stronger opposition in the religious community to new interpretations of religious law in light of contemporary ideologies regarding gender equality.

[14] *See* Halperin-Kaddari, *supra* note 5, at 342.

Israel in matters concerning personal status. In certain matters, such as the marriage and divorce of Jews, an exclusive jurisdiction had been granted to Jewish religious courts—the Rabbinical courts. The relevant principles of Jewish law are applied in these courts and interpreted by a traditional group—the religious judges, *Dayanim*—who are trained in religious orthodox institutions and share a conservative approach to the legitimate boundaries of the interpretation of Jewish law. Consequently, the process of balancing between multiculturalism and feminism in Israel should be different from that in nations such as the United States and Canada. Indeed, the religious customs and practices of Orthodox Jews in Israel are those of a minority culture, but it is not a minority at risk of extinction. On the contrary, this culture is granted enforceable legal power in Rabbinical courts. It can coerce individuals from both the minority and the majority to adhere to principles of Jewish law that are sometimes patriarchal. The state of Israel granted a conservative minority group the power to implement its ideology in one of the more significant areas of family law, the marriage and divorce of Jews—and sometimes in other matters of personal status, such as custody and guardianship of children. In this regard, the majority population in Israel could be subjected to the ideology and legal practices of the minority. According to liberal ideology, this policy is controversial. It could potentially violate human rights, which are granted to all individuals living in the country. Some claim that this is unacceptable for the majority of liberal Jews in Israel that do not belong to the conservative religious group. Their ideology cannot justify the price that many Israeli Jews must pay in human rights and liberal values in many spheres, including equality between the sexes.[15]

There are some religious Jews in Israel who are also feminists and argue that the implementation of Jewish legal principles, which are not always egalitarian,[16] in Israeli Rabbinical courts is problematic from a feminist perspective because it results in application of unequal rules regulating the relationship between men and women.[17]

The Israeli legislature however has chosen to grant the status of binding rules to the principles of these religious conservatives and has reaffirmed this legal practice by renewing its validity. In 1992, the Israeli House of Representatives—the *Knesset*—enacted two important constitutional laws—Basic Law: Human

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[15] *See* Ruth Halperin-Kaddari, *Legal Pluralism in Israel and the Rabbinical Courts in Israel After the Court Verdicts of Bavli and Lev*, 20 TEL AVIV UNIV. L. REV. 683, 745 (1997); Ruth Halperin-Kaddari, *More About Legal Pluralism in Israel*, 23 TEL AVIV UNIV. L. REV. 559, 567 (2000); Liora Bilski, *Cultural Import: The Case of Feminism in Israel*, 25 TEL AVIV UNIV. L. REV. 523, 561-562 (2002).

[16] *See* Halperin-Kaddari, *supra* note 5, at 352.

[17] *Id.* at 348-352. In the author's opinion, the division of areas of activity and roles between men and women, an outcome of the patriarchal family structure, is reinforced in the Israeli legal system as a result of the legal status granted to the principles of Jewish law regarding marriage and divorce. *See also* Halperin-Kaddari, *supra* note 15, at 567-71 (discussing the "dark side" of legal pluralism, which portrays the inherent confrontation between liberalism and pluralism).

Dignity and Liberty and Basic Law: Freedom of Occupation. These Basic Laws preserved all the laws enacted in the past, including the laws that incorporated, implicitly or explicitly, unequal religious laws that sometimes discriminates against women. In addition, Israel's current political reality makes it unlikely that any attempt in the *Knesset* to enact new rules to change the aforementioned foundations of family law will be successful.

In Israel's unique reality, what is the proper balance between multiculturalism and feminism? An interpretation of Jewish law that takes into consideration the special needs and aspirations of women is the more realistic alternative. Such an interpretation could elevate the legal status of Jewish women in Israel in legal matters that are within the jurisdiction of the Rabbinical courts. It is not surprising that feminist religious scholars in Israel prefer the "internal" mode of action—reform within the religious constraints of Orthodox Judaism. These scholars believe that this mode of action can produce an effective result for those who wish to enhance the power and rights of Jewish women in the Rabbinical courts.[18]

Religious feminists, such as Israel's Jewish Orthodox women, prefer the "internal" solution because it coincides with their religious beliefs. The radical "external" approach attempts to uproot power structures in society, religion, and culture, thereby challenging the foundations, morals, and principles of the religious establishment and religious ideology. Religious women prefer efforts to bridge and compromise, as much as possible, between feminism and religion. These women, including religious Jewish feminists, are aware of the fact that their mission is problematic at present. They must face the difficulty resulting from their double fidelity: the commitment to a life of faith versus their loyalty to humanistic values of liberty and equality.[19] A religious feminist activist in Israel stated that religious Jewish feminists today are faced with the following dilemma: from the feminist viewpoint, is it possible that the *Torah*, Biblical Jewish law, which displays eternal truth according to the Jewish religious perspective, lacks the egalitarian perception and values that feminist women cherish so much today?[20] The religious conviction of these women leads them to conclude that it is unacceptable to regard the *Torah* as old and irrelevant to modern women. These women are believers and are committed to the ideology that the *Torah* is the eternal truth.[21]

Performing an "internal" act within a religious society can lead to a change that will be accepted by both the religious establishment and religious feminists. We can derive this conclusion from the struggle that led to the granting of the status of *Toa'anot rabaniyot* to women in Israel. *Toa'anot rabaniyot* are Orthodox

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[18] *Id.* at 344-345, 365.

[19] *See* Hanna Kehat, *BREAKING THE PATRIARCHAL CIRCLE*, 22 PANIM , 23, 28 (2002).

[20] *See* Rivkah Lubitz, *THE PAIN OF TZLOPHAD'S DAUGHTERS*, 22 PANIM, 129, 133 (2002).

[21] *Id.* at 134.

Jewish women who are capable of implementing their knowledge of the principles of Jewish law when they represent their clients—many times women—in legal proceedings before the Rabbinical courts in Israel. Originally, only men could represent clients in legal proceedings before these courts. When women wished to enter this profession and requested authorization to represent clients in the Rabbinical courts, they encountered strong opposition from sections of the religious Jewish community, including some of the *Dayanim*. As a result, women had to overcome various obstacles and resistance. When women wished to obtain the requisite licenses to represent clients in Rabbinical courts, the scope of the requirements was expanded and the level of difficulty of the exams was heightened. Women who were preparing for the exams were not given proper information regarding the material they were required to study. Many *Toanim Rabaniyim*—men who represent clients in Rabbinical courts—refused to accept women as interns, thereby denying women the necessary experience. Some of the *Dayanim* prohibited women from sitting in court as spectators, so they could not learn practical aspects of litigation procedure and evidence, which they would need to implement when they represented clients in the courtroom.[22] Nevertheless, women were successful in their struggle and eventually received the accreditation to be *Toa'anot rabaniyot*.

This is perceived by some scholars as a feminist achievement within the boundaries set by Jewish law and the Jewish religious establishment. The *Toa'anot rabaniyot*, as women who are dedicated to their religious conviction, did not wish to undermine the religious system of the Rabbinical courts. They had to operate within the limitations set by the religion and the religious establishment. Since this establishment is sometimes hostile to the feminist movement, they sometimes had to publicly claim they were not part of the movement.[23] In addition, they emphasized the fact that they were dedicated to a religious ideology and lifestyle.[24] However, their accreditation and work on behalf of women in the Rabbinical courts is de facto a feminist achievement.

The rest of the world follows a similar pattern. The difficulty encountered by Orthodox Jewish women, who wish to combine their personal belief that women should promote their own status in society together with their religious commitment, is not a phenomenon unique to Judaism.

This aspiration to enhance women's rights in a traditional religious society is also evident in the writings of some Muslim women. Certain Islamic laws and the practices of Islamic society reflect the fact that in several domains Muslim women

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[22] *See* Ronen Shamir, Michal Shtrai, & Nelly Elias, *Mission, Feminism and Professionalism: Toa'anot Rabaniyot in the Religious Orthodox Community*, 38 MEGAMOT, 313, 328-329 (1997). *See also*, Halperin-Kaddari, *supra* note 5, at 356-354; Bilski, *supra* note 15, at 561-562 (concerning the struggle of the *Toa'anot rabaniyot* for recognition of their status as a feminist struggle).

[23] *Id.* at 331.

[24] *Id.*

retain an inferior status. Muslim men are in a superior position in a patriarchal society.[25] Therefore, it is sometimes difficult to implement a policy of compromise between feminism and Islamic ideology. It is not a simple task to convince Muslim spiritual leaders that they can and should interpret Islamic law in an attempt to enhance the status of Muslim women. Fundamentalist Muslims will reject "external" influences, but moderate forces within Islam may welcome an attempt to interpret Islamic law in a manner that will produce a common denominator between Western feminism and the religious perspectives of Muslim law.[26]

Some have claimed that the international standards regarding the status of women in law and society, adopted by the international community at the initiative of Western states, contradict the basic principles of Islam and therefore the efforts to promote these standards should be perceived as an imperialistic attempt to subject Islamic society to foreign attitudes. These scholars hold that the judgment of Islamic society through a Western prism is actually a mechanism utilized by the powerful groups of the world community to control developing countries.[27] These groups suppress the traditional ideology of Islamic countries and use their power in an attempt to silence the voice of the weaker segments of society in the world. Many Islamic countries have opposed the adoption of new trends in Islamic law in light of Western feminist ideology. These Islamic countries feel that such reforms incorporate external worldviews and constitute a revolution from the outside, which uses the enhancement of women's liberty as a justification for the imposition of foreign and problematic ideas. These scholars have likened the modern assumption that feminism should be the dominant ideology to the viewpoint of some Western women during the colonial period, who believed that colonialism was positive since it improved the legal and social status of women amongst the colonized. Those Western women stressed that the necessary mission of the colonial powers was to import the values of Western civilization into "backward" societies.[28] Thus, part of the objection to the importation of Western feminist ideology into Muslim societies is based upon the assumption that the goal of the feminist movement today is the implementation of "external" Western norms onto Muslim women. This opposition to feminist influences is presented as an objection to Western dominance, which is viewed as a threat to the preservation of authentic Islamic

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[25] *See* Adrian Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L. J. 149, 157-161 (1994).

[26] *See* Abdullahi Ahmed A. An-N'aim, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13 (1990); Sajeda Amin & Sara Hossain, *Religious and Cultural Rights: Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319 (1995); Aziza Al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POLY. 1 (1997).

[27] *See* INTRODUCTION TO WOMEN, ISLAM AND THE STATE 7 (Kandiyoti Deniz ed., 1991).

[28] *See* Antoinette Burton, BURDENS OF HISTORY: BRITISH FEMINISTS, INDIAN WOMEN, AND IMPERIAL CULTURE 1865-1915 (1994); Vron Ware, BEYOND THE PALE: WHITE WOMEN, RACISIM, AND HISTORY 156-167 (1992); WESTERN WOMEN AND IMPERIALISM: COMPLICITY AND RESISTANCE (Nupur Chaudhuri & Margaret Strobel eds., 1992).

culture. These opponents claim that their objections stem from their sensitivity and respect for the values of Muslim societies that wish to preserve Muslim women's traditional lifestyle.[29] In addition, in a number of cases in the past, Western pressure, applied in an attempt to improve the status of Muslim women in their societies, was counterproductive. The reaction to Western demands to bring about significant change in the status of women in Muslim societies sometimes caused the toughening of traditional standards and practices. Often, the external pressure resulted in a tendency to reject the basic foundations of the women's equal rights movement altogether.[30]

One of the opponents to the implementation of Western feminist ideology in Islamic society is Professor Aziza Al-Hibri. She investigated women's status in Islamic culture and argued that Okin's balance between traditional religious ideologies, such as Islam, and the conflicting outlook of feminism, was not appropriate. Her criticism was that Okin did not grant due weight to traditional religious ideology. She also argued that the weight of multiculturalism should be more significant when it is balanced against feminism. In Al-Hibri's opinion, Okin gave too much weight to the fact that certain principles in the Islamic world and religion promoted the dominance and authority of men over women.[31] Al-Hibri stressed that a feminist perspective in favor of reform in Muslim countries or within groups of Muslim immigrants in Western countries should always be balanced by the counter-perspective: respect for the religious and cultural principles of Muslims. Professor Al-Hibri felt that Okin's perspective silenced the authentic voices of Muslim women and that the adoption of her policy was an infringement upon their freedom of expression. According to Al-Hibri, Muslim women should be given a fair opportunity to express their original voice. Her criticism was that Okin only allowed this voice to be heard when it coincided with the dominant concepts of Western feminism, which shapes policy in liberal democratic societies regarding the status and rights of women. Al-Hibri claimed that the imposition of Western feminist concepts upon the populations of Muslim countries and members of Western Muslim groups was an attempt to oppress their Islamic culture. She believed that this approach stemmed from a patronizing agenda that is implemented by the world's majority and by multicultural societies upon Muslim minority groups.[32]

Some critics of the feminist analysis of traditional religious societies have claimed that the attempt to impose Western principles on groups that adhere to a

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[29] *See* INTRODUCTION TO WOMEN, ISLAM AND THE STATE, *supra* note 27, at 8.

[30] Regarding Muslim society's attitude toward the new agenda of human rights for women, *see* SHAEEN SARDAR ALI, GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW–EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? 24-49, 220-246 (Springer 2000).

[31] *See* Aziza Al-Hibri, *Is Western Patriarchal Feminism Good for Third World Minority Women?, in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 8, at 42.

[32] *See id.* at 41-46.

conservative agenda regarding the status of women is an act of arrogance. According to these critics, the imposition of outside values stems from a lack of respect and tolerance toward the beliefs and choices of the women belonging to these groups.[33] They held that this strong paternalistic approach is a substantial danger to human freedom since it does not enable these women—who wish to act as they please in the fundamental aspects of their life, such as religion, family, parenting, and education—to live according to their conviction.[34]

The tension between the desire of women to belong to a traditional patriarchal society and the attempt of the feminist movement to "save" them from the hegemony of men in their society is not only felt in the Muslim communities of Western countries, but also experienced by the female members of other conservative communities, such as the ultra-Orthodox Jewish groups in the United States—including two groups, *Chasidey Satmer* and *Lubavitch*.[35] From the feminist perspective, women who maintain a religious patriarchal life style wish to preserve this tradition as a result of "false consciousness."[36] However, men and women who choose this path sometimes claim that this attitude is an insult and that this accusation about their mental awareness lacks empirical proof since they have adopted a religious and conservative ideology with full awareness and consciousness. They perceive their opponents' low evaluation of their choice to adopt a traditional lifestyle as a lack of appreciation and respect for their intelligence. There are millions of women in all regions of the world who adhere to a religious or traditional ideology and feel that it is a very important and meaningful guideline for their lives.[37]

Several scholars claimed that Western society should seriously consider the feelings, convictions, and choices of traditional and religious women. Feminists should not reject the principles and ideological foundations of religions simply because they believe that these religions oppress women. Feminists suggest that women's struggles for equality and the narrowing of power gaps between men and women should be the preferable policy.[38] However, feminism should be implemented in a cautious manner. Feminists should advance their agenda, but

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[33] *See* David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights, Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 171 (1995-1996).

[34] *See id.* at 170.

[35] *See id.* at 158, 163.

[36] *See* Elisabeth Schussler Fiorenza, *Public Discourse, Religion and Women's Struggles for Justice*, 51 DEPAUL L. REV. 1077, 1088 (2002).

[37] *Compare with id.* at 1084. *See also* CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION 151 (1989). *See also* Emily Fowler Hartigan, *Practicing and Professing Spirit in Law*, 27 TEX. TECH L. REV. 1165, 1167-68 (1996). Regarding the criticism of a Catholic woman in the United States who encountered hostility from feminist scholars as a result of her religious beliefs and approach to current society.

[38] *See* Fiorenza, *supra* note 36, at 1084; Farida Shaheed, *The Cultural Articulation of Patriarchy: Legal System, Islam and Woman*, 6 S. ASIA BULL. 43 (1986).

also reflect in their actions a desired understanding and respect for the religious culture that many women wish to follow. The feminist movement should not oppose, exclude, or ignore patriarchal principles of religion if it truly wishes to aid all women, as there are women who choose to maintain a religious lifestyle.[39]

A new approach is evident in the feminist movement as a result of this criticism. Coexistence between feminism and religion is problematic in the Islamic society. Islamic principles are sometimes patriarchal or were interpreted as such in the past, which is evident in issues such as polygamy or the laws of divorce. Scholars like Okin, who held that feminist ideology should be dominant, wrote that the coexistence of a feminist outlook with the principles of Islamic religion is very difficult. However, eventually she preferred a more compromising approach. She held that whenever possible, it is preferable that the change of rules and practices of religions should come from the inside. Women living in a patriarchal religious culture should try to initiate a new interpretation of the principles of their religious law in an attempt to enhance equality between the sexes within the existing structure.[40]

However, Okin was not optimistic about this process. She felt that religious law is often rigid, and consequently viewed the process of changing religious law as problematic. She expressed concern that the outcome of this process will not always be the elevation of women's status in religious societies.[41]

This essay focuses on the power of interpretation of religious law in a specific context: female guardianship in Jewish law. The evolution of the rules of female guardianships in Jewish religious law proves that Okin's concern is not always justified. We should believe in the promise of interpretation of religious law. In one sphere of Jewish law—guardianship—the rules have gradually changed, so that step by step, the status of the Jewish female guardian has been elevated. A significant change is evident, especially in recent generations, as a result of the response of some Rabbis to the new status of women in Western society. This proves that when interpreters of religious law wish to elevate the status of women, they can apply an effective method of interpretation bearing good results.

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[39] Fiorenza, *supra* note 36, at 1084.

[40] *See* Susan Moller Okin, *Reply*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 8, at 117, 122-23.

[41] Although Okin felt that interpretation of religious law can produce effective results, she was not very optimistic about the outcome. Okin mentioned that the problems facing women as a result of patriarchal principles in Islamic law should not be ignored. In this sphere, there are not only difficulties concerning legal principles, but also practical difficulties, which those who wish to abolish patriarchal trends in existing Muslim law will have to cope with. *See id.*

III. GUARDIANSHIP IN JEWISH LAW

A. Ancient Law

1. Biblical Law

Biblical law concerning the legal relationship between parents and children granted the father powerful legal rights over all members of his family, including children, that it did not grant the mother. Thus, the status of the mother and father concerning their authority over their children was not equal.

Few biblical verses mentioned rules that affect the authority of the father and his relationship with his children. Certain rules in these verses led some scholars to conclude that in biblical Jewish law, the leader of the family—the father—was granted authority concerning the physical bodies of family members.[42]

In several biblical precedents the authority of the head of the family could be considered as the authority to determine the "life and death" of members of the family.[43] The power of the family leader is sometimes regarded by practitioners as the power of possession.[44] Biblical law does not present explicit rules that determine the activity of parents in specific spheres, such as guardianship of children.

The scholar Blidstein pointed out that the authority of the father in biblical law should not be considered as identical or similar to the father's authority in the Roman *Patria Potestas* system. He wrote that Ancient Jewish law does not speak of "parental power" as in Roman *patria* since:

> Jewish law is characteristically framed in terms of responsibility rather than right, and this distinction is especially apt here. The ethos of filial responsibility is simply not grasped if it is seen as filial adjustment to

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[42] Abraham was commanded to slaughter his son and was willing to fulfill this commandment of the Creator of the world. *See Genesis* 22: 2-10. He may have felt that his parental authority included the right to put an end to the life of his child. Judah felt that Tamar, the widow of his oldest son, acted in an improper manner. He was head of the family and ruled that a severe punishment be imposed upon her—capital punishment. *See Genesis* 38:24. Scholars claim that this is a typical example of the patriarchal authority of "life and death." *See* TOMUS QUINTUS, *Law, Biblical Law, in* ENCYCLOPEDIA BIBLICA , 614, 617.

[43] *See* QUINTUS, *supra* note 42, at 617. This scholar also based his conclusion on the statement of Reuven, son of Jacob, that if he would not return Benjamin from Egypt, Jacob could kill both of his sons. *See, Genesis* 42:36. When Yiftach wanted to launch a war against the nation of Amon, his vow led him to an unfortunate result: he was obligated to kill his daughter. *See Shoftim* 11:39. *See also*, BABYLONIAN TALMUD, Taanit, 4b. Jonathan, son of King Saul, violated the vow of his father. King Saul consequently held that this son should be executed and had to be persuaded not to kill him. *See I Samuel*, 14: 24-45. When King Saul thought that his son Jonathan was rebellious, he threw the sword at him. *See I Samuel* 20: 30-31. In other biblical stories, the head of the family acted in a manner that, according to one interpretation, could be considered the application of his authority upon the body of his "children," which is less severe than the authority of "life and death." *See Genesis* 9: 7-8.

[44] *See Genesis* 21: 7-12. The father could "sell" his daughter and, as a result, she became a maid-servant. *See Exodus* 21:7.

parental rights or submission to parental authority.[45]

I also share the point of view of the scholar Rabello, who convincingly proved that in the biblical period, in comparison with legal norms of other nations at the same time, the authority of the father to implement the authority of punishment was significantly restricted. These restrictions are certainly true in relation to the power of life and death the father of the family held over its members. When the child needed to be punished, the punishment was implemented by the Jewish court and not by the father.[46]

A comparison between the legal status of Jewish children in the biblical period and their status in the law of the gentiles in the surrounding area reveals that the rules of Jewish law reflect more mercy, love, and obligations of parents towards their children. However, these rules sometimes do not coincide with the modern concept of the best interest of the child.

2. Tanaitic and Amoraic Law

i. General Trend: Authority of the Father

In Jewish law of the *Tanaitic* Period [47] and the subsequent *Amoraic* period,[48] the father was granted authority over his children.[49] This authority was significant, especially concerning his daughter.[50] The mother held inferior status. The father was often the parent granted absolute and final authority concerning the children.

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[45] GERALD BLIDSTEIN, HONOR THY FATHER AND MOTHER – FILIAL RESPONSIBILITY IN JEWISH LAW AND ETHICS, Introduction, XI-XII, 25 (Ktav Pub. 1975) ("The bible assumes throughout that men naturally revere and honor their fathers.").

[46] *See* A.M. Rabello, *Patria Potestas in Roman and Jewish Law*, 5 DINE ISRAEL 85, 145 (1974).

[47] The Hebrew term *Mishnah* is derived from the Hebrew "*shanah*," meaning "repeated." Repetition characterizes the way in which the Jewish law tradition was handed down orally from *Tanna* (which means "teacher" in Hebrew) to students, generation after generation. By the second century, the Jewish scholars of this period, the *Tannaim,* feared that the vast oral Jewish tradition would be lost if it were not committed to writing. Therefore, the authoritative collection of Jewish oral law, the *Mishnah*, was completed by Yehuda *Ha-Nasi*, in early third century. The scholars of this period, the *Tanaitic* period, are *Tannaim.*

[48] The *Amoraic* period is the period between the death of Rabbi Yehuda Ha-Nasi, in the early third century, and the final editing of the BABYLONIAN TALMUD, at about 500 C.E. The scholars of this period are the *Amoraim.* The *Amora* would stand alongside a *Tana* and explain the lesson being expounded by the *Tana* in simpler terms.

[49] *See* Rabello, *supra* note 46, 85-154 (comprehensive description of various aspects of this authority); I.Z. GILAT, THE RELATIONS BETWEEN PARENTS AND CHILDREN IN ISRAELI AND JEWISH LAW – ALIMONY, FINANCIAL RESPONSIBILITIES, CUSTODY AND EDUCATION (Hebrew) 57-154, 249-300 (Hoshen Mishpat Pub., 2000); Adiel Schremer, *Jewish Marriage in Talmudic Babylonia* (Hebrew), 41-91 (1996) (Ph.D. dissertation, Hebrew University of Jerusalem; on file with Hebrew University Library) [hereinafter Schremer, *Jewish Marriage*]; ADIEL SCHREMER, MALE AND FEMALE HE CREATED THEM: JEWISH MARRIAGE IN THE LATE SECOND TEMPLE, MISHNAH AND TALMUD PERIODS (Hebrew) 73-125 (Jerusalem, Zalman Shazar Center 1993)[hereinafter SCHREMER, MALE AND FEMALE].

[50] *See* GILAT, *supra* note 49, at 249.

Scholars pointed out that there were several definitions of "minor" in Jewish law sources from the *Tanaitic* and *Amoraic* eras.[51] According to the most common and accepted definition of "minor" and "adult" in these sources, a minor daughter becomes an adult when two conditions are fulfilled: she reaches the age of twelve years and one day, and proves she has the signs of puberty. The father is granted certain rights concerning his daughter when she is a minor. Some rights are very significant; for example, he is entitled to sell her as a maidservant, [52] a legal act that could result in a drastic change in her life.

In general, a minor child is not considered as an individual that can understand the implications and consequences of his or her actions and therefore the father performs legal acts on behalf of his minor sons and daughters.[53] Since the minor has no independent legal capacity, one of the legal acts he or she cannot perform independently is marriage. The father of a daughter is also entitled to other rights, such as the right of ownership. He is the owner of her labor, any discoveries she makes, and could also abrogate her vows.[54]

ii. Best Interest of the Child

The significant authority of the father and the inferior status of the mother is evident in the sphere of guardianship over their children. In the period during the *Tanaitic* and *Amoraic* era the decisions granted by Jewish law are not always in the best interest of the child. The scholar Gilat pointed out that certain aspects of the

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[51] *See* Yitzhak D. Gilat, *"Thirteen Year-Old: The Age of Commandments," Mehqerei Talmud (Talmudic Studies)* I (Jerusalem 1990); *Studies in the Development of The Halakha*, 19-31 (Ramat Gan 1992), 19-31; Schremer, *Jewish Marriage*, *supra* note 49, at 91-94; SCHREMER, MALE AND FEMALE, *supra* note 49, at 74.

[52] *See* MISHNAH, Ketubot, 3, 8.

[53] *See* GILAT, *supra* note 49, at 62-69. There are legal limitations imposed upon the legal capacity of male and female minors, including daughters and sons who have not yet reached the age of maturity (twelve years for female and thirteen years for male). Those under the age of maturity are not granted the rights to perform certain legal acts. *See id.* at 57-106. *See also Medieval Commentators: Commentary of Rabbi Solomon Yitzhaki*, Kidushin, 3b, s.v. Veeyma Haney Miley; *Terumat Hadeshen,* 223 (Jerusalem 1991). The age of maturity is not the only relevant age concerning the capacity of a minor child to perform legal acts. There are also other stages in the life of the child that are significant from the standpoint of legal capacity, such as the capacity of a *ketana*, who is three years old. *See* TOSEFTA, NASHIM (Liberman ed., 1967); Ketubot, Chapter 3, p. 65; BABYLONIAN TALMUD, Gitin 59a; and *Medieval Commentary: Responsa of Rabbi Solomon Ben Aderet (Rashba)*, 2, 219, 299 (Jerusalem 1997); *Responsa of Rabbi Solomon Ben Aderet (Rashba), Attributed to Nachmanides* 2, 87 (Jerusalem 2001); *Responsa of Rabbi Yaacov Molin – Maharil* 51 (Jerusalem 1979); *Responsa of Rabbi Moses Mitrani (Mabit)* 1, 122 (Lemberg 1862); *Shulchan Arukh, Even Haezer*, 14, 155. The most important age for girls is twelve, and thirteen for boys. There are limitations imposed upon the legal capacity of a minor child in various spheres, such as joining the group of ten required for public prayer. *See* BABYLONIAN TALMUD, Berachot, 48a; Kidushin, 63b; and *Medieval Commentary: Tosafot*, Berachot, s.v. Veleyt Beshem Rabenu Tam; *Mishneh Torah*, Ishut, 2, 22-23; *Responsa of Rabbi Yaacov Molin-Maharil* , 196 (Jerusalem 1979); *Responsa of Rabbi Simon Ben Tzemach (Tashbetz)* 1, 71 (Jerusalem 1998).

[54] *See Tosefta* (Jacob Neusner trans., 2002); Sotah, 2, 7: "A man has control over his daughter and has power to betroth her . . . and he controls what she finds, the produce of her labor, and the abrogation of her vows." *See also Mishnah*, Ketubot 4, 4; *Mishnah*, Sotah, 3, 8; BABYLONIAN TALMUD, Kidushin, 3b.

father's authority—such as the authority to betroth his minor daughter to a person he chooses, including a repulsive person, without her consent, or the father's right to be considered the owner of certain things his young daughter earned or found, or the legal right granted to the father, in certain circumstances, to not maintain his children—are not necessarily in the best interest of the children.[55]

The scholar Schremer,[56] among others,[57] explained that although some scholars in the *Amoraic* period held that marriage of minor daughters is not desirable, many sources from the *Tanaitic* and *Amoraic* period state clearly, or implicitly, that marriage of minor daughters was common in this period.[58] This reality is not in accordance with the current meaning of the best interest of the child.

This reality is somewhat balanced by the fact that disputes regarding the scope of the father's authority are evident in sources from the *Amoraic* period. Some Jewish scholars during the *Amoraic* period claimed that limits were imposed upon this authority. Rabbis stressed that the authority of the father was sometimes limited in the best interest of the daughter.[59] These limits are mentioned in some sources that also concerned the betrothal of the daughter. Although sources from the *Tanaitic* period explicitly stated that the father can betroth his daughter when she is a minor, some doubt was cast upon this idea in the *Amoraic* period. Rabbi Yehudah mentioned the statement of the *Amora* Rav—or according to another tradition, Rabbi Elazar—that the betrothal of the minor daughter is prohibited.[60] The father should not betroth his daughter when she is a minor; he should wait until she matures and is willing to state she desires to wed an individual.

Rabbi Yosé said that the Messiah, son of David, will not appear in the world until all souls in a special chamber in heaven are placed into the appropriate body. The souls that G-d has created, waiting for a suitable placement, are delaying the redemption, since they must be implanted into human beings who will be born. Therefore, a person should not marry a minor daughter who is too young to conceive. By doing so, he delays the Messiah's revelation.[61]

Professor Rabello described the ancient process of the development of rules of Jewish law in this sphere. The major shift was between biblical law and the

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[55] *See* GILAT, *supra* note 49,at 50-51.

[56] *See* SCHREMER, *supra* note 49, at 106-107.

[57] *See id.* at 106, n. 11.

[58] *See id.*

[59] *See* BABYLONIAN TALMUD, Kidushin, 41a, 81b. Rabbi Solomon Ben Aderet stated that the rule in Biblical law that the father can betroth his daughter to an individual afflicted with boils was abolished in the *Amoraic* period in the best interest of the child. *See Responsa of Rabbi Solomon Ben Aderet (Rashba)* 1, 1131 (Jerusalem 1997).

[60] *See* BABYLONIAN TALMUD, Kidushin 41a, 81b.

[61] SEE BABYLONIAN TALMUD, Niddah 13b; in light of medieval interpretation: *Commentary of Rabbi Solomon Yitzhaki*, ibid, s.v. Dinisivey Ketanot; Shebaguf. *See also Responsa of Rabbi Yitzhak Ben Sheshet (Ribash)* 15 (Jerusalem 1993).

Tanaitic and *Amoraic* laws. In the biblical era there were some aspects of property and acquisition that characterized the relationship between parents and children. In the new era, beginning at the time of the *Mishnah* and ending at the sixteenth century—the period of the writing of the Jewish law codification, *Shulchan Arukh*—the rights of the father were limited, i.e. the right of the father to sell his daughter and grant her a status of a Hebrew slave was limited significantly and, at the beginning of the period of the second temple, it was totally abolished. In addition, the right to betroth a daughter was limited, and during the *Amoraic* period some Jewish scholars held that the father should wait until she grows and expresses her own will to marry a certain person.[62]

iii. Guardianship

During the ancient period of Jewish law, a guardian was a person who had responsibility for another's affairs. He attended to the affairs of minors or adults who were not legally capable of managing their own affairs. Ancient Jewish law dealt with a guardian charged with responsibility for the property of a minor or an adult who lacked legal capacity. The guardian managed the assets of the orphans.[63] This guardian acted in the modern-day function of an estate administrator.

Since the guardian protects and manages financial assets and the custodian devotes time and care in an attempt to satisfy the physical and emotional needs of the children, sometimes, in the best interest of the child, the guardian of the child is not his custodian in Jewish law. In the medieval period, the best interest of the child was mentioned explicitly in Jewish verdicts concerning guardianship and custody. As a result, Rabbi Asher Ben Yechiel stressed that sometimes the guardian of the assets of orphans is not their custodian. In one verdict, he ruled that since the father of the deceased mother managed the assets of the orphan in a satisfactory manner, he should remain her guardian. However, since the daughter can benefit from the care and love of her father, he should therefore be her custodian in her best interest.[64]

In *Tanaitic* and *Amoraic* Jewish law, the father was most often granted rights in the sphere of guardianship. The word "guardian" in ancient Jewish law sources—*Apotropos*—is derived from Greek, meaning "the father."[65] The father

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[62] *See* Rabello, *supra* note 46, 146.

[63] *See Mishna*h, Gitin, 5, 4; *Tosefta*, Ketubot, 3, 8; BABYLONIAN TALMUD, Gitin, 52a – 52b. *See also* medieval codifications: *Mishneh Torah*, Nachalot, 10, 6-8; *Tur*, *Choshen Mishpat*, 290; *Shulchan Arukh*, *Choshen Mishpat*, 290, 1-2, and the medieval *Commentary of Rabbi Solomon Ben Aderet*,Shabat, 121a, s.v. Apotropos. For a comprehensive analysis of Jewish law in the field of guardianship, *see also* Ya'akov K. Reinitz, *The Guardian of Orphans in Jewish Law: His Responsibilities, Methods of Supervision and Control Over Him* (1984) (unpublished Ph.D. dissertation, Hebrew University; on file with Hebrew University Library) (a comprehensive analysis of Jewish law in the field of guardianship) [hereinafter Reinitz, *The Guardian*]; C. A. 50/55 *Herskovits V. Greenberger*, 9 P.D. 791, 796.

[64] *See Responsa of Rabbi Asher Ben Yehiel* (*Rosh*) 82,2 (Jerusalem 1994)

[65] *See Apotropos*, *Arukh Completum* (New York 1955); *Mishnah with the Commentary of Rabbi Moses Ben Maimon* (Jerusalem 1964), Bikurim, 1, 5, s.v. Veapotropin; *Commentary of Rabbi Ovadya*

was the natural guardian of his children so long as he was healthy and able to manage their property. Therefore he was expected to appoint a guardian for his children who would manage their financial affairs after his death. The inferior status of the mother is evident in the sphere of guardianship of children.

In this period, the Jewish court could replace the father as guardian because the court was the "father of orphans."[66] The two basic forms of nomination were a guardian nominated by the deceased father of the orphans, and a guardian appointed by the Jewish court.[67] The guardian was usually nominated by the father in order to manage the affairs of his minor children after his death. If the father died without nominating the guardian, the court was obligated to appoint a guardian, acting as "the father of the orphans."[68]

According to the interpretation of many medieval commentators on the ancient sources there was also a third possibility: guardianship without appointment. Ancient sources do not explicitly state that this is a form of guardianship, and thus it was probably not officially recognized during the ancient period. However, according to these medieval commentators guardianship without appointment was created on its own as a result of orphans choosing to "attach" themselves to a guardian. Usually, this meant that the orphans chose to live with the guardian.[69]

In *Tanaitic* and *Amoraic* law, there is an assumption that the guardian will enhance the best interest of the orphan. Talmudic law stated that when the court nominates a guardian, he should be a trustworthy and able person. The guardian should be qualified to protect the orphan's rights and administer his property

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Bartenura, Mishnah, Bikurim; A. Kirschenbaum, *Orphan, Encylopedia Judaica,* 17, 1479 (1971) *Principles of Jewish Law* , 439 (Jerusalem 1975); Reinitz, *supra* note 63, at I.

[66] *See* BABYLONIAN TALMUD, Gitin, 37a; BABYLONIAN TALMUD, Bava Kama, 37a. *See also Responsa of Rabbi Solomon Ben Aderet (Rashba)* 1,974 (Jerusalem 1997); *Responsa of Rabbi Asher Ben Yehiel (Rosh)* 85, 5–6 (Jerusalem 1994) (medieval applications of this rule); *Shulchan Arukh, Choshen Mishpat*, 110, 11; 290, 1-2.

[67] *See Mishnah*, Gitin, 5, 4; BABYLONIAN TALMUD, Gitin 52a; Reinitz, *supra* note 63, at X-XI. *See also* medieval codifications: *Mishneh Torah*, Terumot, 4, 10; Nachalot, 11,9; *Tur, Choshen Mishpat*, 290; *Shulchan Arukh, Choshen Mishpat*, 290, 14.

[68] *See* Reinitz, *supra* note 63, at X. *See also* Medieval Responsa Literature*: Responsa of Rabbi Solomon Ben Aderet (Rashba)* 2, 49 (Jerusalem 1997); *Responsa of Rabbi Solomon Ben Aderet (Rashba), Attributed to Nachmanides* 2, 87 (Jerusalem 2001). Rabbi Asher Ben Yechiel explained, in the medieval period, that the father is the natural guardian. We assume he will enhance the best interest of the orphans, Rabbi Asher Ben Yechiel argues. The natural guardian should nominate a guardian who will manage the affairs of the orphans after his death. The second best option is a nomination by the court. The court could also nominate a guardian for the orphans since we assume that it will also act in a manner that will enhance the welfare of the orphans. *See Responsa of Rabbi Asher Ben Yechiel* 87, 1 (Jerusalem 1994).

[69] *See* Gitin, *Mishnah*, 5,4; BABYLONIAN TALMUD, Gitin, 52a; Reinitz, *The Guardian, supra* note 63, at X-XI; Ya'akov K. Reinitz, *Guardianship by Virtue of 'Orphans Boarding with the Householder*, 1 BAR-ILAN LAW STUDIES , 219-250 (1980). Concerning the rules of Tanaitic and Amoraic law, *See id. at 219-224; See also* Medieval Codifications, *Mishneh Torah*, Terumot, 4, 10; Nachalot, 11, 9; *Tur, Choshen Mishpat*, 290; *Shulchan Arukh, Choshen Mishpat*, 290, 14; Medieval Responsa Literature: *Responsa of Rabbi Solomon Ben Aderet (Rashba)*, 2, 49 (Jerusalem 1997).

profitably.[70] Although guardians were not explicitly instructed to enhance the best interest of the orphans in their care, this rule was an implicit assumption in the sphere of guardianship.

The court could not nominate "women, slaves, or minors" as guardians.[71] However, when the father nominated a guardian, that limitation was no longer relevant as "he is at liberty to do so."[72] The rationale for the inferior status of women, slaves, and minors in the sphere of guardianship is not explicitly presented in ancient Jewish law sources. However, it is implied that the disqualification of women and others as guardians is in the best interest of the orphans.[73]

As discussed earlier, a woman could also act on behalf of the orphans as a result of the manifestation of the minor's will: in other words, when orphans would "attach" themselves to her. Orphans usually expressed this desire to "attach" when they chose to live with a woman, an act which was considered an expression of their will that she should act on their behalf. This authority might be limited. Ancient sources do not use the concept "guardian" when orphans "attach" themselves to a person who was not appointed by the father or by a court.[74] In such cases, an act of appointment may be necessary. The decision of the orphans to "attach" themselves to a man or a woman might not be considered a nomination as de facto guardian. This rule may be in the best interest of the orphans; the orphans do not always board with a trustworthy person. When they "attach" themselves to a person, he or she might mismanage their assets.

Overall, in ancient Jewish law, the father was considered the natural guardian and limitations were imposed upon the nomination of the mother as a guardian. The guardian should be a qualified person who can protect the orphan's rights. From the perspective of the common outlook during the ancient period, the rules in the field of guardianship were in the best interest of the child. However, the principle of a child's best interest is not explicitly mentioned in ancient Jewish law sources concerning guardianship.

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[70] The father is obligated to nominate a guardian who will know how to enhance the best interest of the orphans. *See* BABYLONIAN TALMUD, Ketubot 109b. The guardian should be "like this man, who understands how to turn [the scales] in favor of the orphans." *See also* Medieval Interpretation: *Mishneh Torah*, Nachalot, 10, 6, and the Commentary *Magid Mishneh*,Id.

[71] *See* Tosefta, Terumot, 1, 11; Bava Batra, 8, 17; BABYLONIAN TALMUD, Gitin 52a.

[72] *See also* Reinitz, *Appointment of a Woman as a Guardian*, 4 BAR-ILAN LAW STUDIES, 167, 173-174 (1989).

[73] The rule disqualifying women and others from becoming court-nominated guardians appears in Tosefta, Terumot, Chapter 1, after other rules, which empower the guardian of orphans to act in a manner that will enhance their best interest and prohibit dangerous and risky actions on their behalf. This context suggests that the disqualification of women and others is probably also in the best interest of the orphans. *See* Tosefata, Terumot, 1, 10-11.

[74] *See Mishnah*, Gitin, 5, 4; *Tosefta*, Terumot, 1, 12; BABYLONIAN TALMUD, Gitin, 52a. *See also* Reinitz, *supra* note 63, at 223-239.

B. Medieval Law

1. General Trend

The Jewish post-Talmudic medieval period started at the *Geonic* era, after the redaction of the Babylonian Talmud. The post-Talmudic period began approximately during the fifth century and ended with the end of the period of the *Rishonim*, when Jewish law scholars converged at the two primary centers of Jewish culture in Europe: the center of Franco-German Jewry and Spanish-North African Jewry. The period of the *Rishonim* ended at the sixteenth century, when the Codifications of Jewish law—*Shulchan Arukh* and the *Mapa*, also known as *Hagahot Harema*—were compiled.

During the medieval period, there had been an evident shift of emphasis in various legal systems, including Jewish law. The law imposed more limits on the father's authority. The principle of enhancing the best interest of the child had gradually become more important. Eventually, the gradual decline of the father's status resulted in the gradual rise of the status of the child. In addition, the legal status of the mother in certain spheres, such as guardianship, improved.

2. The Best Interest of the Child

Although the gap between the authority of the father and that of the mother was somewhat bridged during the medieval period, the basic idea that the father is the natural and preferable guardian was maintained. This guardianship was regarded as a fulfillment of his obligation to care for his children.[75]

Rabbi Asher Ben Yechiel wrote that the court should not nominate a guardian for minors children when their father is alive. The father is authorized to act on behalf of his minor children and whatever he does is valid. When the father is trustworthy, he can manage the assets of his minor children and the court should not supervise his acts. The authority of the father, as guardian of his minor children, is the basic model in the guardianship law during this period. It is similar to the authority of the court, the "father of orphans."[76] Rabbi Asher Ben Yechiel clearly stated that the father is the basic and natural guardian. He is the guardian of his son in his best interest and is also authorized to nominate a guardian for his son.[77]

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[75] The rights and obligations of parents towards their children stem from parenthood and not from marriage. These rights and obligations are imposed upon natural, biological, married, or unmarried parents. *See Responsa of Rabbi Yitzhak Ben Sheshet* (*Ribash*) 41 (Jerusalem 1993); *Responsa of Rabbi Asher Ben Yechiel* (*Rosh*) 17, 7 (Jerusalem 1994). *See also Shulchan Arukh*, *Even Haezer*, 71, 4.

[76] *See* BABYLONIAN TALMUD, Bava Kama, 37a.

[77] *See Responsa of Rabbi Asher Ben Yechiel* (*Rosh*) (Jerusalem 1994), 87, 1, in light of the rule in BABYLONIAN TALMUD, Gitin, 36a. Rabbi Asher Ben Yechiel wrote that when the son boards with his father, the father is also a guardian as a result of the fact that his son is boarding with him. The basic rule in this field is mentioned in BABYLONIAN TALMUD, Bava Kama, 102b. *See Responsa of Rabbi*

The widening of the scope of women's guardianship was achieved in the medieval period through an increasing number of women who had been nominated by the father. This was an exception to the rule that disqualified women from being nominated as a guardian by the court. It was also achieved through the de facto widening of the scope of guardianship of women. New interpretations of ancient texts and exceptions to the ancient rules, which limited the nomination of women as guardians, were mentioned for the first time in the medieval period.

Medieval Jewish law scholar, Rabbi Solomon Ben Aderet, stated that there is an exception that enables a court to nominate a woman as a guardian. He held that the origins of the rule are in an ancient Jewish law text, the *Tosefta*, which begins with the statement: "[w]omen, slaves, or minors should not be nominated as guardians by a court."[78] The rule ends, "if, however, the father [of the orphans] chose to nominate them when he was alive, they could be nominated as guardians."

Rabbi Solomon Ben Aderet explained why women could be nominated as guardians by court under these adequate circumstances: "the father chose to nominate them when he was alive." The basis of this guardianship is trust. When the court is convinced that the father trusted a woman, a slave, or a minor, during his lifetime, and consequently nominated him or her as a guardian when he was alive, the court can nominate them as guardians.[79] The father will trust a guardian who is qualified and is likely to enhance the best interest of the child. Rabbi Solomon Ben Aderet's outlook enables the father to nominate a suitable woman as a guardian, particularly the mother.

Some medieval Jewish law scholars wrote that when a gentile court nominates a Jewish woman as guardian, the nomination was also valid according to the principles of Jewish law. Jewish law assumes the gentile court acted in the best interest of orphans, and in these cases, the law of the gentile king is valid in light of the principles of Jewish law.[80]

Asher Ben Yechiel (*Rosh*) 96, 2 (Jerusalem 1994). His son, Rabbi Judah Ben Asher, held that when a minor child has a father, the court is not obligated to nominate a guardian for this child. *See Responsa Zikhron Yehudah* 35 (Jerusalem 1968). However, another Spanish Jewish scholar from the fourteenth century, Rabbi Yomtov Alashbili, said that although a minor child had a father, the court could nominate a guardian for him. Perhaps in this case this nomination was possible since there was tacit consent from the father to this nomination. The father knew about this nomination and remained silent. *See Responsa of Rabbi Yomtov Alashbili* (*Ritba*) 162 (Jerusalem 1959). The idea that the guardian, who enhances the welfare of the children, should act as the "father" of the orphans is mentioned in the writings of Rabbi Moses of Trani, from the period of the *Rishonim*. *See Responsa of Rabbi Moses of Trani*, 2, 29 (Jerusalem 1990).

[78] *See Tosefta*, Terumot, 1, 11; Bava Batra, 8, 17. *See also* BABYLONIAN TALMUD, Gitin, 52a.

[79] *See Commentary of Rabbi Solomon Ben Aderet*, Gitin, 52a. *See also* S. Asaf, *Nomination of Women as Guardians*, 2 *Hamishpat Ha-Ivri* 76 (1947). Another medieval scholar, Rabbi Simon Ben Tzemach Duran (Rashbatz), wrote in the aforementioned circumstances that the court should nominate the wife as guardian: "[s]ince in his life he had trusted her and held that she was skillful in management of property, now after he died without nominating a guardian, only his wife should be nominated." *Responsa of Rabbi Simon Ben Tzemach* (*Tashbetz*) 2, 189 (Jerusalem 1998). *See also* Reinitz, *Appointment of a Woman as a Guardian*, *supra* note 72, 180-182.

[80] *See Responsa of Rabbi Yitzhak Ben Sheshet* (*Ribash*) 495, (Jerusalem 1993).

In the medieval period, the dominant point of view was that when the orphans board with an individual, he or she is considered their guardian, similar to the guardian appointed by the father or by a court. The acts of this individual on behalf of the orphans were not explicitly defined in ancient sources as guardianship. Many medieval scholars mentioned the rule in ancient Jewish sources and used a new term in this context: guardianship. They held that a woman was a guardian as a result of the manifestation of the minor's will. Although she was not appointed by the father or by court, an act of appointment was not necessary.[81] The decision of the orphans to board with the woman was considered a de facto nomination.

This new perspective is usually in the best interest of the child. In most cases, the orphans board with their mother. The mother loves her children and cares for them. She is obligated to act in the orphans' best interest and will probably act on their behalf. The court will terminate this guardianship, and any other guardianship, by a man or a woman, if it has been proven that his or her negligent actions did not enhance the orphans' welfare, and especially when the guardian caused a loss to the assets of the orphans.

In addition, another exception to the ancient rule that a woman should not be nominated by the court as guardian was mentioned in the medieval Responsa literature. In one case, the medieval scholar, Rabbi Yitzhak Ben Sheshet (Ribash), was asked about a minor son of a widow who lived with her and held that she was his guardian. He claimed that when guardianship by the mother began at the first stage without nomination—when the children chose to live with her—it should sometimes continue as guardianship by court appointment.[82] The children trusted

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[81] *See* Reinitz, *supra* note 63, at 224-240. *See also* Reinitz, *supra* note 69, at 172, 184-188; *Responsa of Rabbi Solomon Ben Aderet* (*Rashba*) 2, 49 (Jerusalem 1997); *Responsa of Rabbi Simon Ben Tzemach* (*Tashbetz*), 2, 189-191 (Jerusalem 1998); *Responsa of Rabbi Yitzhak Ben Sheshet (Ribash)* 6; 149, 495 (Jerusalem 1993).

[82] *See Responsa of Rabbi Yitzhak Ben Sheshet* (*Ribash*) 495 (Jerusalem 1993). Rabbi Yitzhak Ben Sheshet held that the law of the kingdom of the gentiles is a factor that is taken into consideration when the standard of the best interest of the child is implemented. However, the law of the gentiles is not adopted as it is. He stated that the nomination of this female as a guardian by the gentiles, who prefer the guardianship of the mother, is not sufficient. Rabbi Solomon Ben Aderet also held that Jewish law does not adopt the laws of the kingdom of the gentiles in these circumstances. *See Responsa of Rabbi Solomon Aderet*, 6, 149 (Jerusalem 1998). In the sixteenth century Rabbi Yedidyah, the son of Rabbi Moses Ben Mordekhay Galanti, wrote and mentioned the precedent of Rabbi Yitzchak Ben Sheshet, that when the court of the gentiles nominated a widow as a guardian the Jewish court should also nominate her as a guardian. He explained that many Jewish scholars share this point of view. *See Responsa of Maharam Galanti* 125 (Jerusalem 1960). Although he stated explicitly that the law of the king of the gentiles is law and the custom of all the inhabitants in the place of residence of the guardian prevails, Rabbi Uziel, in the twentieth century, held the rule in this responsa coincides with the rule in the responsa of Rabbi Yitzchak Ben Sheshet. He stated that the Jewish court will not take the initiative and nominate the mother as a guardian in an attempt to adopt in Jewish law the principle of the gentiles. However, when the court of the gentiles acted first, and nominated her as a guardian, the Jewish court should take this fact into consideration and nominate her as a guardian when her guardianship is in the best interest of the child. *See Shaarey Uziel* (Jerusalem 1991), 1, Gate 8, Chapter 2, 8. Rabbi Simon Ben Tzemach held that usually a Jewish court does not nominate a woman as a guardian. However, when a judge in the court of the gentiles nominated a woman as a guardian the law of the land is law. Although

their mother and therefore the court should also trust her. Since the gentiles would not regard her as a guardian without a nomination by a Jewish court, this reality might have been her way of managing the property of the minor in a satisfactory manner. Therefore, Rabbi Yitzhak Ben Sheshet recommended that the Jewish court nominate her as a guardian in the best interest of the minor.

Rabbi Meir Halevi Abulafia stated, at the thirteenth century, that the scope of guardianship as of a result of "attachment," of children who chose to live with the guardian, is limited. He maintained that a person can become a guardian as a result of having orphans living with him or her only when the orphans are at least nine years old, and only with regard to their movable property.[83] However, Rabbi Asher Ben Yechiel held that these limitations are not be imposed upon that guardianship as a result of "attachment." The orphans can be less than nine years old and the guardian can guard immovable property.[84] Most medieval and modern Jewish law scholars share the point of view of Rabbi Asher Ben Yechiel.[85]

When women are guardians and marry, the Jewish court should rule that their guardianship should end, in the best interest of the orphans. Since there is potential that a woman's new husband might manage the assets of the orphans in an inappropriate manner, the court should nominate a new guardian in these circumstances.[86]

Rabbi Moses Mintz held that when a female is the owner of part of the assets that she guards, then she could be nominated as a guardian by the court. He explained that usually the court should not nominate women as guardians since they might not devote sufficient time and effort when they manage the assets of the orphans. However, when they are owners of part of the assets the court should

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a Jew usually should not approach the court of the gentiles, when the rights of the orphans will be promoted and the guardianship of their assets will be more effective a Jew can request that their court will nominate him as a guardian. Since this guardianship is in the best interest of the orphans, the Jewish court should maintain this guardianship. The Jewish court will terminate this guardianship only when the guardian does not manage the assets in an appropriate manner. *See Responsa of Rabbi Simon Ben Tzemach (Tashbetz)* 2, 188 (Jerusalem 1998). *See also* Asaf, *supra* note 103, at 79-81, *Responsa of Rabbi Moses Mintz,* 41 (Jerusalem 1991). Rabbi Uziel mentioned the point of view of Rabbi Moses Mintz. *See Shaarey Uziel* (Jerusalem 1991), 1, Gate 8, Chapter 2, 3. However, he held that the court should investigate the matter carefully in each case. When there could be a clash between her financial interests and those of the orphans, she should not be nominated as a guardian. In addition, he mentioned his general policy, that when a woman is a guardian, the court should also nominate one or two male guardians.

[83] *See Piskey Harosh*, Chapter 5,6;*Tur,*Even Haezer,290; *See also Responsa of Rabbi Yitzhak Ben Sheshet (Ribash)* 468, 495; Asaf, *supra* note 79, at 76, n.3. The scholar Asaf explained that the prominent Jewish medieval scholar Maimonides—who did not mention the guardianship of orphans that are living with the guardian—likely shared the point of view of Rabbi Meir Halevi abulafia.

[84] *See id.*

[85] *See* the presentation of both outlooks in *Tur* and *Shulchan Arukh,*Choshen Mishpat, 290, and the Commentary of Rabbi Joseph Karo, *Beit Yosf to Tur,id. See also Responsa of Rabbi Simon Ben Tzemach (Tashbetz)* 2,190 (Jerusalem 1998); *Responsa Devar Eliyahu, 82* (Warsaw 1884); Asaf, *supra* note 79, at 76, n.3,

[86] *Responsa of Rabbi Asher Ben Yechiel (Rosh),* New Responsa, 51 (Jerusalem 1994) *See also Tur,* Even Haezer,107.

assume that they will devote more time and effort in an attempt to ensure the proper financial management and maintenance of their own property and the property of others. In these circumstances, the guardianship of a female will be in the best interest of the child. This scholar stated that many times, in his period, the fifteenth century, fathers nominated mothers as guardians of their children and this practice was considered appropriate since it was in the best interest of the orphans.

C. Modern Law

1. General Trend

From the period of the Jewish scholars known as the *Acharonim*, beginning in the sixteenth century, after the publication of the codification of Jewish law, the *Shulchan Arukh*, and ending at present, the medieval trends in Jewish law were strengthened and presented in a more focused manner. The mother's status was elevated. New trends in society were taken into consideration by the interpreters of Jewish law. Especially in the nineteenth and twentieth centuries, some Jewish law scholars have attempted to interpret Jewish law sources in a manner that will enhance equality between men and women in the field of guardianship.

2. Guardianship: Gradual Widening of the Mother's Right

Gradually, the gap between the rights of mother and father concerning guardianship nomination by a Jewish court has been partially bridged. At the last stage of this gradual evolution, several nineteenth and twentieth century Jewish law scholars have held that the mother and father hold almost equal status regarding nomination as a guardian. Nineteenth and twentieth century scholars widened some exceptions of medieval Jewish law, enabling the nomination of women as guardians de facto or by court order under certain circumstances.

i. Children Who Live with the Mother

Rabbi Samuel of Modena, a sixteenth century scholar, suggested that when the children's best interest would be served by having their mother as the custodian, the mother should also be considered the de facto guardian whom they have chosen.[87]

However, parents are custodians or guardians only when their custody or guardianship enhances the best interest of the child. When the mother or father will not devote the necessary time and care to their child, or neglect his or her financial assets, the court should nominate a suitable custodian or guardian.[88]

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[87] *See Responsa of Rabbi Samuel of Modena* (Lemberg 1862), Chosen Mishpat, 39.

[88] *See Responsa of Rabbi David Ben Zimra* (*Radbaz*) 1, 123 (Jerusalem 1971).

In the nineteenth century, Rabbi Eliyahu Lerman, who sought to interpret the rules of guardianship in Jewish law in a manner that would minimize the discrimination against women and enhance the welfare of her children, explained that the limitation of Rabbi Meir Halevi Abulafia, that a person can become a guardian as a result of the orphans living with him or her only when the orphans are at least nine years old, and only with regard to their movable property,[89] is relevant only when the children are not living with their mother. When their mother is a de facto guardian her children are especially attached to her, and this limitation should not be implemented, in their best interest. Her guardianship is desirable since it enhances the special bond and emotional relationship between her and her children.[90]

ii. A Woman the Father Trusted:Financial Expertise of Women

The attempt to elevate the status of the female Jewish guardian in light of the new outlook in society concerning the status of women is evident in another aspect of interpretation of the ancient rules of guardianship in Jewish law. The policy in a verdict of medieval Jewish scholar, Rabbi Eliezer Ben Natan, in one specific case concerning guardianship of a married woman, was presented as general legal policy in modern Jewish law.

In the sixteenth century, Rabbi Solomon Luria wrote that in his period Jewish scholars should implement the legal principle mentioned first in the writings of the twelvth century German Jewish scholar, Rabbi Eliezer Ben Nathan: "[a]ll women are now guardians of their husbands' property."[91] The rule was presented in the writings of Rabbi Eliezer Ben Natan and Rabbi Solomon Luria in the context of the relationship between the husband and wife. The relationship between widows and their children or the guardianship of assets of orphans were not mentioned explicitly in the writings of these Jewish Scholars. They stated that the wife can represent her husband in financial transactions. Rabbi Solomon Luria explained that in different circumstances the scope of this representation could be wide or narrow. Sometimes married women can manage a limited amount of assets, and sometimes they are more active and knowledgeable in financial matters and can manage all the financial assets of the family.[92]

In the nineteenth century, Rabbi Eliyahu Lerman implemented an active-dynamic method of interpretation of Jewish law in an attempt to elevate the status of the female guardian. He added another component to the rule of Rabbi Eliezer Ben Natan and consequently made it applicable to almost all nineteenth century

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See also C.A.50/55 *Hershkovitz v.Greenberger* 9 P.D. 791, 798.

[89] *See supra* note 86.

[90] *See Responsa Devar Eliyahu* 82 (Warsaw 1884).

[91] *See Sefer Ra'avan* (Prague 1610), Responsa, 115.

[92] *See Yam Shel Shlomo*, Bava Kama (Bene Berak 1960), 8, 29.

widows. Rabbi Lerman argued that in the reality of the nineteenth century, husbands trusted their wives in the sphere of financial matters, with the exception of a husband who explicitly stated that he did not trust her. He also implicitly applied the principle of Rabbi Solomon Ben Aderet. This scholar explained that women are nominated as guardians by court under these adequate circumstances. The basis of this guardianship is trust. When the court is convinced that the father trusted a woman during his lifetime, and consequently nominated her as a guardian when he was alive, the court can nominate her as guardian.[93] Therefore, in the new circumstances of the period of Rabbi Lerman, not only the husband, but also the court, can usually nominate a widow as a guardian of her husband's estate, since there is an assumption that her husband trusted her.[94] The primary assumption was that the average woman in the nineteenth century could manage the assets of the orphans in a suitable manner and, therefore, the father of the orphans probably trusted her. Therefore the court could nominate her as a guardian. An explicit nomination by the father was not necessary. Especially when the husband enabled his wife to manage the property of the couple, the court could, and was expected to nominate her as a guardian. This approach was in the best interest of the children. In most cases the widow was the mother, who loved her children and cared for them. When the court nominated her as a guardian, she would probably act in the best interest of her children.

In the twentieth century, the Chief Rabbi Uziel attempted to interpret the Jewish law of guardianship in a manner that would elevate the status of the Jewish female guardian. He held the modern woman of the twentieth century is well-versed in financial matters and therefore can be nominated as a guardian by court.[95] The nomination is not based upon the assumption that the father would probably nominate her. Times have changed and there is no longer a foundation for disqualifying women from the field of guardianship. His point of view was contrary to that of the ancient Jewish law scholars who held that a court should not appoint a woman as a guardian. Rabbi Uziel's point of view was revolutionary. He explained that it is the presumption of Jewish law in modern times that women have financial expertise like men in the field of guardianship.

Yet, Rabbi Uziel had to take into consideration the conservative opposition. He expressed a reservation by saying that the Jewish Court—*Beth Din*—should appoint a "wise and trustworthy" man, in addition to the female guardian, unless the orphans' best interest require the woman to be the sole guardian.[96] He did not give any reason for this reservation. Men and women are both well-versed in financial matters. Women are not inferior and less qualified guardians, who need

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[93] *See Commentary of Rabbi Solomon Ben Aderet,* Gitin, 52a.

[94] *See Responsa Devar Eliyahu,* 82 (Warsaw 1884).

[95] *See Shaarey Uziel* (Jerusalem 1991), 1, Gate 8, Chapter 2, 2.

[96] *Id.*

the assistance of a man to act in the best interest of the child. Rabbi Uziel probably believed that a moderate revolution would be more effective than an extreme one, since the former would not offend the conservative and traditional outlook of many rabbis of his time. He did not want to be isolated in the rabbinic world of his period and desired that other prominent rabbis would join him and accept his new ideology, or at least, would not oppose his new interpretation. Although this reservation is not in the best interest of women, the general principle is important: the rules of guardianship change with each generation. They should be adjusted to the new reality in the best interest of the child and his or her mother.

In the nineteenth and twentieth centuries, Rabbis Lerman and Uziel significantly reduced the applicability of ancient Jewish rules that do not permit the nomination of women as guardians in certain circumstances. They claimed that the reality had changed: every husband trusts his wife in monetary matters and every modern woman is well-versed in financial matters and can manage the property of orphans. As a result, according to these Rabbis, the gap between the rights of the mother and the father concerning guardianship of their children is smaller in the new reality of the twentieth century. Their new outlook contributed to promoting the welfare of the Jewish women.

In addition, a medieval Jewish law scholar, Rabbi Solomon Ben Aderet, explained that women are nominated as guardians by the court under adequate circumstances. The basis of this guardianship is trust. Sometimes the court is convinced that the father trusted a woman, a slave, or a minor, during his lifetime. He believed they had the necessary financial expertise and consequently nominated him or her as a guardian when he was alive. In these circumstances the court can nominate them as guardians.[97]

In the twentieth century, Professor Asaf, aware of the desire in Israel's Jewish society to elevate women's status in Jewish law in light of new trends in society, explained that another medieval Jewish scholar, Rabbi Simon Ben Tzemach Duran, who claimed in the abovementioned circumstances the court could nominate *only* this woman,[98] was more decisive than Rabbi Solomon Ben Aderet, who wrote that in these circumstances the court is *permitted* to nominate her.[99]

Rabbi Simon Ben Tzemach wrote the court could nominate *only* this woman in a specific case. It is possible that in the special circumstances of this case he was convinced this woman was trustworthy. The scholar Asaf, in spirit of the new

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[97] *See Commentary of Rabbi Solomon Ben Aderet,* Gitin, 52a. *See* also Asaf, *supra* note 79, at 76. Another medieval scholar, Rabbi Simon Ben Tzemach Duran (Rashbatz), wrote in the aforementioned circumstances that the court should nominate the wife as guardian: "[s]ince in his life he had trusted her and held that she was skillful in management of property, now after he died without nominating a guardian, only his wife should be nominated." Responsa of Rabbi Simon Ben Tzemach (Tashbetz) 2, 189 (Jerusalem 1998). See also Reinitz, *supra* note 72, 180-182.

[98] *See Responsa of Rabbi Simon Ben Tzemach (Tashbetz)*, 2, 188 (Jerusalem 1998).

[99] *See* Asaf, *supra* note 79, at 80.

status of the female in the twentieth century, held this responsa is not a special case. The rule in the responsa of Rabbi Simon Ben Tzemach is a legal precedent.

IV. CONCLUSION

The Jewish law of guardianship of women has changed, especially in the nineteenth and twentieth centuries, as a result of a new interpretation of Jewish law. Jewish law scholars were aware of new trends in society and responded to the desire of many that the status of the Jewish women be elevated in all spheres, including that of guardianship. The interpretation of religious law can be a useful mechanism. When religious scholars wish to interpret religious law in a manner that will elevate the status of women, their efforts can be an effective way of improving the status of women in religious communities and countries. This process coincides with the belief and ideology of religious women in religious and traditional communities and societies and should be used as much as possible when it could produce positive results and reduce possible conflict between multiculturalism and feminism.