

**In the Supreme Court
Sitting As the High Court of Justice**

H CJ 8638/03

Before: His Honor, Vice President (Ret.) M. Cheshin
Her Honor, Justice A. Procaccia
His Honor, Justice S. Joubran

The Petitioner: **Sima Amir**

v.

The Respondents: **1. The Great Rabbinical Court in Jerusalem
2. The Regional Rabbinical Court in Jerusalem
3. Yoseph Amir**

On Behalf of the Petitioner: **Adv. Michael Korinaldi**

On Behalf of the Third Respondent: **Adv. Nechama Segal**

On Behalf Of the Rabbinical Courts System: **Adv. S. Jacoby**

JUDGEMENT

Justice A. Procaccia

1. This petition puts to the test the question of the Rabbinical Court's authority to adjudicate a property dispute between a couple after the divorce proceeding between them has been completed, and it focuses on an alleged breach of the divorce agreement by one member of the couple. Is the matter within the jurisdiction of the Rabbinical Court or is it within the power of the civil judicial instance; and if the Rabbinical Court does indeed have authority to adjudicate the matter, what is the source of the authority and from where does this authority derive? Is it from the law; is it from the parties' agreement in arbitration or otherwise? And what is the nature of this authority?

2. The petition concerns the petitioner's motion to vacate the decisions of the Great Rabbinical Court in Jerusalem – the first respondent – of May 4 and June 9, 2003, which dismissed the petitioner's appeal against the judgment of the Regional Rabbinical Court of Jerusalem – the second respondent – of May 27, 2002, and its decisions of March 5, 2001 and June 18, 2002.

Background and Proceedings

3. The petitioner and the third respondent (hereinafter: “the respondent”) were married in 1980 and have three children. Their relationship became unstable and they motioned the Regional Rabbinical Court of Jerusalem in 1992 in order to arrange for divorce proceedings. As part of that proceeding, the couple requested the Regional Rabbinical Court to approve a divorce agreement that they had made. In the agreement, the couple agreed on the act of divorce, the custody and support of the children, and various financial and property arrangements, as follows: the three children would be in the custody of the wife until reaching the age of 18 (clause 3); the husband would pay child support in the sum of NIS 1,000 per month for all three of the children until they reach the age of 18; the sum of the child support as set in the agreement would not be increased, and in exchange, the husband would transfer his share of the couple’s apartment to the wife, including his share of the apartment’s contents and the gold objects, ownership of which would all be transferred to the wife (clauses 4(a) and (b)); the husband also undertook to discharge the balance of the mortgage loan each month (clause 6(c)). The agreement also included a condition whereby the wife undertook not to sue the husband in any court for an increase in child support, either directly or indirectly, and if the husband were sued, the wife would compensate him in such a way that he would receive half of the apartment, half of its contents and half of the gold (clauses 4 and 5 the agreement). Taking out a stay of exit order inhibiting the husband's departure from the country would also be deemed a breach of the agreement and lead to the same result (clause 13). In order to secure the wife's obligation in accordance with the agreement, a cautionary note would be registered against the apartment, pursuant whereto one half of the apartment would be transferred into the husband's name if he were sued to increase child support. The relevant provisions of the agreement are as follows:

"4. Child Support

(e) For the avoidance of doubt and without prejudice to the generality of the foregoing, child support under the agreement

shall unequivocally cover all the children's needs without exception... until the children reach the age of 18.

The mother undertakes not to sue the father in any legal instance for an increase in child support or for the satisfaction of any of the children's needs without exception beyond what the father has undertaken in this agreement, either directly (herself) or indirectly (through any institution, entity, authority, person and/or in the name of the minor and/or anyone who now and/or in future has an interest), and if the husband is sued, the wife shall compensate him and he shall receive one half of the apartment, one half of its contents and one half of the gold. The obligation is in perpetuity.

...

5. Indemnification

(a) The mother undertakes and takes it upon herself not to sue the father in any legal instance whatsoever for an increase in child support or for the satisfaction of any of the children's needs without exception beyond what the father has undertaken in this agreement, either directly (herself) or indirectly (through any institution, entity, authority, person and/or in the name of the minor and/or anyone who now and/or in future has an interest).

(b) If, contrary to the abovementioned, the father is sued for an increase in child support and/or satisfaction of any of the children's needs, whether the lawsuit is brought by the mother and/or the mother in the name of the children or by an entity, authority, institution and/or anyone who now and/or in future has an interest, beyond what the father has undertaken in this agreement, then the mother undertakes to transfer one half of the apartment into the father's name and one half of its contents and one half of the gold. The obligation is in perpetuity.

(c) To secure the wife's obligations in this agreement, a cautionary note shall be registered, pursuant whereto one half

of the apartment shall be transferred into the husband's name if the husband is sued to increase child support..."

The agreement also includes a provision with regard to the exclusivity of the Rabbinical Court's jurisdiction in the event of a dispute between them after the divorce, in the following terms:

"9. Cancellation of Mutual Claims And/or Complaints

...

10. ...

11. If after the divorce, differences arise between the couple, they undertake to file the lawsuit solely in the Rabbinical Courts.

12. ...

13. The wife undertakes not to take out a stay of exit order preventing the husband's departure from the country, and taking out such an order shall constitute a breach of this agreement, and the husband shall be entitled to obtain one half of the value of the apartment, of the contents and of the gold.

..."

The divorce agreement was given the effect of judgement by the Rabbinical Court, and on May 26, 1992 the couple was divorced.

4. About five years later, in June 1997, the couple's children (through the petitioner) filed a child support motion against the respondent in the Jerusalem Family Court (FC 10330/97). The motion was mainly intended to increase the child support upon which the couple had agreed in the Rabbinical Court to NIS 6,700. This was, *inter alia*, due to the petitioner's claim that the respondent was not paying the mortgage payments as undertaken by him in the divorce agreement. In the answer of defense, the respondent defended the claim on its merits. According to him, he was living off a general disability pension of NIS 1,200 per month, from which he was paying child support. The Family Court (per Judge N. Mimon) held in its judgement that the children's monthly support should be increased to a total of NIS 2,000 for both minor children together, and the sum of NIS 500 for the other

child until his enlistment to the IDF; with respect to the minors, it was further held that from the time they reached the age of 18 until they completed their service in the IDF, the child support for them would be reduced by NIS 700, and upon completion of their military service the liability for their support will be terminated; if they do not enlist, the liability for them would be terminated when they reach the age of 18. With regard to the other child, upon his enlistment to the IDF and until his discharge, support of NIS 300 would be payable for him.

On September 20, 1997, about three months after the motion to increase child support was filed in the civil court, the respondent filed a motion in the Regional Rabbinical Court of Jerusalem "for a declaratory judgement and specific performance" of the divorce agreement. In the motion, he pleaded that the petitioner had breached the divorce agreement several times and in several different aspects, as follows:

- "8 (a) The defendant (the petitioner – AP) filed a motion to increase child support in the name of the minors before this Honorable Court on February 28, 1993 – a motion that was dismissed by the Court
 - (b) The defendant filed another motion on November 6, 1994 and at the end of that motion the wife again applied for an increase in child support.
 - (c) The defendant motioned for a stay of exit order that was cancelled on July 21, 1997.
9. (a) The defendant went further, and when she saw that her motions were being dismissed by the Honorable Rabbinical Court, she filed a motion to increase the child support in the name of the minors in FC 10330/97 in the Jerusalem Family Court....
 - (b) As part of the motion in Family Court, the wife applied for a stay of exit order that the Court approved.
 - (c) Moreover, at about the time she filed the motion, the defendant filed a motion for a stay of exit order on July 22, 1997, after the previous order inhibiting departure from the

country had been set aside, and the Chief Execution Officer approved it".

He pleaded that the wife had therefore breached clauses 5 and 13 of the divorce agreement. On the basis thereof, the respondent sued the wife for one half of the apartment and its contents and one half of the gold.

5. After filing his motion to the Regional Rabbinical Court, the respondent traveled abroad for more than two years and abandoned his motion. After returning to Israel, he renewed the motion in the Rabbinical Court. The petitioner pleaded in her defense, that the subject of the motion was "breach of a divorce agreement" and according to the law laid down in H CJ 6103/93 *Sima Levy v. The Great Rabbinical Court in Jerusalem*, PD 48(4) 591 (hereinafter: "Sima Levy Case") the Rabbinical Court did not have jurisdiction to adjudicate the motion. As for the merits of the motion, the petitioner argued that the respondent had come to court with unclean hands because he had breached the divorce agreement by not paying the mortgage payments as he had undertaken in the divorce agreement. The Regional Rabbinical Court, in its decision of February 25, 2001, referred the issue of jurisdiction raised by the petitioner to the Rabbinical Courts' then legal counsel on rabbinical jurisdiction, Adv. E. Roth, for his opinion.

During the same month (February 2001) the petitioner filed a lawsuit in the Jerusalem Family Court against the respondent for "declaratory judgement as to the revocation of the indemnity provision in the divorce agreement" (FC 10331/97). This was based, *inter alia*, on the argument that the respondent breached the divorce agreement by not paying the mortgage payments as he had undertaken in the divorce agreement. The petitioner further requested that the Court declare the revocation of clauses 11 and 13 of the divorce agreement, pleading that they were "contrary to public policy and the law". The respondent argued in his defense that the claim should be summarily dismissed due to the proceedings conducted on the same issues in the Rabbinical Court.

On March 4, 2001, and before the Family Court had awarded its decision on the respondent's motion for the summary dismissal of the petitioner's claim, the opinion of the legal counsel on rabbinical jurisdiction, Adv. Roth, was filed in the Rabbinical Court. In his opinion, with reference to clause 5(b) of the divorce agreement, the Rabbinical Court did not have jurisdiction to adjudicate the respondent's motion after the divorce. Nevertheless, he believed that clause 11 of the divorce agreement could be treated as an arbitration clause in accordance with the Arbitration Law, 5728-1968 (hereinafter: "the Arbitration Law"). By virtue of

the rules of arbitration, the Rabbinical Court is empowered to adjudicate the suit as an arbitrator in accordance with the rules and restraints governing an arbitrator. He further added that, in his opinion, it was unnecessary for the couple to sign an arbitration deed, since clause 11 of the divorce agreement constituted an arbitration deed in all respects.

Following the opinion of the legal counsel, Adv. Roth, the Regional Rabbinical Court decided on March 5, 2001 that it was vested with jurisdiction to adjudicate the respondent's suit *"since in the Court's opinion clause 11 constitutes an arbitration deed"*.

On May 14, 2002, and before the Regional Rabbinical Court's judgement had been awarded in the respondent's suit, the Family Court awarded its decision in the respondent's motion for the summary dismissal of the petitioner's suit. It reviewed the question of the Rabbinical Court's jurisdiction to try the respondent's claim, whether as a court empowered by virtue of statute or as an arbitrator, but it decided to stay the award of its decision on jurisdiction on the ground that:

"Mutual respect of legal instances requires that after a decision has been awarded by the Rabbinical Court holding that it has jurisdiction to adjudicate the suit that has been filed with it as an arbitrator, the award of a decision on jurisdiction should be stayed until the proceedings in respect of jurisdiction have been exhausted by the plaintiff, who will perhaps wish to act by applying on appeal to the Great Rabbinical Court or by applying to the High Court of Justice to clarify whether her position with regard to jurisdiction will be allowed, or even by motioning to vacate an arbitral judgment as provided in section 24 of the Arbitration Law..."

On May 27, 2002, the Regional Rabbinical Court awarded its judgement in the respondent's motion. The court was divided in its opinion between the three judges, and the decision was made, in the words of the judgement, in accordance with –

"the third opinion, which was the decisive one of the three, since there are several doubts regarding the interpretation of the agreement, and there is a doubt as to whether it constitutes a breach according to Halachic authorities and the circumstances. Therefore, the case should be decided according to the law, and if the apartment has already been transferred into the wife's name, it is not possible to

take away her ownership of the apartment because of a doubt, and of course the wife is liable to comply with all of the obligations in the divorce agreement.... If the apartment has not yet been transferred, it is not possible to order the plaintiff ... to transfer his share of the apartment into the wife's name

If the plaintiff has already signed a power of attorney and delivered it to the wife, it would appear that the wife cannot be precluded from exercising the power of attorney in order to transfer the plaintiff's share of the apartment into the wife's name.... On the other hand, if the husband still needs to sign transfer documents and the like, he should not be made to help transfer the dwelling into the wife's name in any way whatsoever....

With regards to the gold objects that the wife has received, it would also appear that she cannot be made to return them to the husband because they are in her possession and in this way her possession is valid..."

As mentioned above, according to the Rabbinical Court's decision of March 5, 2001 it decided the respondent's suit as an arbitrator, but on June 18, 2002 it awarded another decision that was headed "Clarification", according to which:

"The Rabbinical Court makes it clear that it was the Rabbinical Court that approved the agreement and that there was an undertaking that all matters involved in the agreement would be tried solely by the Rabbinical Court. Therefore, since both parties undertook in the agreement, and the Rabbinical Court also approved the agreement, the Rabbinical Court consequently has jurisdiction to hear and adjudicate the matter, and the Rabbinical Court awarded the judgement by virtue of its jurisdiction, and there was no need for the Rabbinical Court to adjudicate the same as arbitrator, and although the Rabbinical Court could also adjudicate the matter as an arbitrator, the Rabbinical Court also had jurisdiction to try the matter as an adjudicating court in accordance with the foregoing".

6. The petitioner appealed to the Great Rabbinical Court against the Regional Rabbinical Court's judgement of May 27, 2002. Her main plea in the appeal was that the Regional Rabbinical Court did not have jurisdiction to adjudicate the respondent's suit, either as a competent court by virtue of the law or as an arbitrator, and its judgement is therefore void. As to the actual merits, she argued that the Regional Rabbinical Court had made an error "of judgement" and "disregarded

facts" by not giving proper weight to the fact that it was the respondent who was in breach of the divorce agreement by not making the mortgage payments as he had undertaken in the divorce agreement. Consequently, on that ground too, on the merits of the case, the Regional Rabbinical Court's judgement should be vacated. The respondent also appealed to the Great Rabbinical Court against the said judgement.

The Great Rabbinical Court, in its decision of May 4, 2003, dismissed the petitioner's appeal with respect to jurisdiction and held that the interpretation of the divorce agreement indicated that it concerned the couple's agreement for "property in consideration for child support". That interpretation affects the substance of the complaint that the respondent filed to the Rabbinical Court, and it demonstrates that it is a suit to *revoke* the divorce agreement as opposed to a motion for the enforcement of an indemnity provision. That being the case, the Rabbinical Court had jurisdiction to adjudicate the respondent's motion by virtue of its original (primary) authority because "indemnification was not involved, but property and child support and the connection between them, and those matters of property division and child support are certainly matters of personal status that are governed by section 9 of the Rabbinical Courts Jurisdiction Law". The Rabbinical Court was also vested with original (primary) jurisdiction to adjudicate the suit in view of clause 11 of the divorce agreement, which provides that if differences arise between the petitioner and the respondent after the divorce, the two undertake to file the motion solely to the Rabbinical Courts. The Rabbinical Court mentions that at the hearing, the respondent also pleaded avoidance of the *Get* and the divorce because according to him the *Get* had been given by mistake. Consequently, on that ground too, the Rabbinical Court had original (primary) jurisdiction to adjudicate the claim. According to the Rabbinical Court, it also had jurisdiction by virtue of its "continuing" jurisdiction, because the respondent was "applying expressly for the revocation of the property arrangement as a result of a change in circumstances concerning child support". Finally, the Great Rabbinical Court held that the jurisdiction to adjudicate the respondent's suit was vested in the Regional Rabbinical Court, when "the jurisdiction is the essential jurisdiction vested in the Rabbinical Court, rather than jurisdiction by virtue of the Arbitration Law". The Great Rabbinical Court adjourned the deliberation on the appeal itself to a later date.

On June 9, 2003 the Great Rabbinical Court awarded another decision, this time with regard to the respondent's appeal against the Regional Rabbinical Court's judgement. In its decision, the Great Rabbinical Court ordered the matter to be remitted to the Regional Rabbinical Court for it to try the argument, which had not

been tried in the Regional Rabbinical Court, that the petitioner had breached the divorce agreement by suing for increased child support in the Regional Rabbinical Court in 1993.

The Petition

7. In her petition before us, the petitioner seeks to set aside the decisions of the Great Rabbinical Court and the Regional Rabbinical Court, according to which the Rabbinical Court had jurisdiction to adjudicate the respondent's motion, both as original (primary) jurisdiction and by virtue of an arbitration clause.

This Court issued an *order nisi* in the petition.

The Parties' Arguments

8. The petitioner's essential argument in her petition herein is that the Rabbinical Court lacks jurisdiction to adjudicate the property dispute that has arisen between her and the respondent in respect of the divorce agreement that was made between them. According to her, the Rabbinical Courts are not vested with original (primary) jurisdiction to adjudicate the suit. Moreover, they do not have continuing jurisdiction to hear the respondent's suit. The respondent's motion to obtain one half of the property, which was transferred to the wife, is based on the cause of enforcing an indemnity provision in the divorce agreement. This cause is based on a plea of breach, if one occurred, after the divorce agreement was made and the judgement of the Rabbinical Court giving it force and effect was awarded, and after the couple had been duly divorced. A subsequent breach of the divorce agreement in respect of property after the parties' divorce cannot be bound in retrospect with the divorce agreement and the judgment that materialized in the past. From the divorce and onwards, motions that relate to the breach of the divorce agreement are not a part of matters of personal status. The Rabbinical Court therefore lacks jurisdiction to adjudicate them, and jurisdiction in respect of them is vested in the civil court. Moreover, it was argued that the respondent himself breached the divorce agreement by not paying the mortgage payments as he had undertaken to do in the divorce agreement. His breach of the agreement has civil-financial character, which also demonstrates that his suit after the divorce is subject to the jurisdiction of the civil, rather than religious, court. The petitioner further pleads that clause 11 of the divorce agreement does not amount to an arbitration clause and does not purport to establish an agreement for arbitration. Instead, its wording and contents merely demonstrate its determination, by agreement of the parties, to which court the couple's motions after the divorce should be filed. This agreement,

per se, does not vest jurisdiction in the Rabbinical Court. In view of all of this, and based on other grounds too, upon which we shall not focus, the Rabbinical Courts' decisions on jurisdiction are void.

9. The respondent's position in his petition is that the Rabbinical Court is vested with jurisdiction to adjudicate the suit he filed to it. In this respect, he relies on the provision of the divorce agreement, according to which the parties expressly agreed to vest the Rabbinical Court with jurisdiction to try any future dispute between them concerning the agreement. He pleads that, according to case law, a matter that can be bound from the outset with the divorce suit, such as property matters, and it was agreed in the divorce arrangement to vest jurisdiction in the Rabbinical Court in respect to them, is also within its jurisdiction after the divorce. He further asserted that the meaning of the cause of the action that he filed was the revocation of a conditional undertaking given under the agreement, as opposed to the enforcement of a contractual indemnification arrangement. That is to say that the respondent entered into a conditional undertaking to transfer property to the petitioner in consideration for the child support being set in a binding amount and not being increased, and for motions not to be brought in this matter. Since that condition had not been fulfilled, the property undertaking that he had given is void. A contractual indemnification provision is not to be treated in the same way as a conditional property undertaking, with regard to which the Rabbinical Court has continuing jurisdiction even after the divorce. Alternatively, it is argued, the Rabbinical Court has jurisdiction to entertain the respondent's suit according to the law of arbitration, by virtue of clause 11 of the divorce agreement, which constitutes an arbitration agreement, even if the word "arbitration" is not mentioned in it.

Judgment

10. This Court's intervention in the decisions of religious courts is limited to extreme cases of *ultra vires*, infringement of the principles of natural justice, departure from the provisions of law aimed at the religious court or when equitable relief is necessary where the matter is not within the jurisdiction of another court or tribunal (sections 15(c) and (d)(4) of the Basic Law: the Judiciary; HCJ 323/81 *Vilozni v. The Great Rabbinical Court*, PD 36(2) 733; HCJ 1689/90 *E'asi v. The Sharia Court*, PD 45(5) 148, 154-155; HCJ 1842/92 *Blaugrund v. The Great Rabbinical Court* PD 46(3) 423, 438; HCJ 5182/93 *Levy v. The Rehovot Regional Court* PD 48(3) 1, 6-8).

The subject matter of the petition herein justifies this Court's entertaining the matter on grounds of the Rabbinical Court's exceeding the jurisdiction vested in it for the reasons explained below.

The Question

11. The couple signed a divorce agreement containing property and child support arrangements. In the scope of the property arrangements, they agreed to limit and not increase child support. They added a condition according to which if motions to increase child support were filed by the wife, directly or indirectly, or if she took out stay of exit orders, these actions would have certain property consequences. The parties further agreed that if differences arose between the couple after the divorce, they undertook to conduct the claims solely in the Rabbinical Courts. Indeed, after the divorce, disputes did arise between the parties following motions to increase child support that were brought against the husband, and stay of exit orders were taken out. Further thereto, the husband filed a suit in the Rabbinical Court claiming a breach of the divorce agreement by the wife and requesting to receive one half of the property because of that breach. In those circumstances, after the couple's divorce, is the Rabbinical Court vested with jurisdiction to adjudicate the husband's property suit, which is based on an alleged breach of the divorce agreement by the wife? Or is the exclusive jurisdiction to deliberate and adjudicate that claim vested in the civil court?

The subsidiary questions that are to be decided can be divided into two:

First is whether the Rabbinical Court has jurisdiction *by virtue of the law* to adjudicate a property claim based on a breach of the divorce agreement after the divorce has been completed, by virtue of one of the following:

- (a) *Original-primary jurisdiction* by virtue of statute to hear and adjudicate issues pertaining to the divorce;
- (b) the Court's "*ancillary*" *jurisdiction* to adjudicate matters connected with the divorce after its completion, as interpreted and expanded by case law.

The Second is whether the Rabbinical Court has jurisdiction to decide a property claim based on the breach of a divorce agreement by virtue of the parties' *agreement*, and what legal significance is to be given to this agreement.

We shall consider these questions.

The Starting Point

12. The starting point underlying the analysis of the Rabbinical Court's scope of jurisdiction is based on several fundamental assumptions:

First, the Rabbinical Court is a state judicial instance, which was established by virtue of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (hereinafter: "the Rabbinical Courts Jurisdiction Law"), and it derives its power and jurisdiction therefrom. As such a state judicial instance, the bounds of the Rabbinical Court's powers are defined and fashioned in accordance with the state law.

Second, every state judicial instance, including the religious court, has merely those jurisdictions that the state law has granted it; it is the statute that established it, and it is the one that defined its powers and assigned them to it. In doing so, the statute assumed, as part of the basic concept of democratic government, that in the granting of judicial powers also lay judicial limitations. Anything that has not been granted to the judicial instance is outside and beyond its power, and it must not surpass its acknowledged boundaries and into areas that have not been entrusted to it and go beyond its responsibility. That is the principle of legality that characterises the structure of democratic government, upon which rests the perception of the status of the government authorities, including the courts. It is on the basis of this principle that the realm of jurisdiction that is vested in the state judicial instances, of which the Rabbinical Courts form part, extends.

Third, the definition of the judicial powers of the various different courts, including the Rabbinical Courts, derives from statute, and statute is subject to interpretation by case law. The case law's interpretation of the extent of the powers vested in the judicial instance is intertwined with the provisions of the statute as the primary source of the power vested in the judicial instance, and it is intended to serve its purpose. In reviewing the boundaries of the religious court's power we shall therefore assume that the religious court is vested with the powers that have been granted to it by the statute, as they have been interpreted by case law, and it has only what the law has given it. As the Court stated (per Justice Landau) in H CJ 26/51 *Menashe v. The Chairman and Members of the Rabbinical Court in Jerusalem*, PD 5 714, 719:

"The Rabbinical Courts of our country exist in accordance with the general law, which determines their place in the state courts system, and the questions relating to the spheres of their jurisdiction should generally be resolved in accordance with the same principles as govern other courts".

This is what distinguishes Rabbinical Courts from arbitrators, internal tribunals and voluntary tribunals, which are not established by virtue of statute but mainly by virtue of contract or regulations, and the scope of their jurisdiction is determined pursuant thereto. These entities are essentially governed by the principles of the private law that creates them and they are not part of the country's state judicial system.

As Justice Zamir stated in H CJ 3269/95 *Yosef Katz v. The Jerusalem Regional Rabbinical Court*, PD 50(4) 590, 602:

"The Rabbinical Court is established by virtue of statute and its jurisdiction derives from the statute. Its budget comes from the State Treasury and its judges receive salaries like state employees; it sits in judgement beneath the symbol of the State and it writes its judgements on State paper; the orders that it issues speak in the name of the State and are enforced by the State. The Rabbinical Court is not a private entity but a state institution. It is therefore subject to public law and review by the High Court of Justice. *Amongst other things, the Rabbinical Court is obliged to respect and observe the fundamental principle that governs every government agency, namely the principle of legality. According to that principle, the Rabbinical Court has nothing other than the power granted to it in accordance with the statute*" (emphasis added).

In this respect Justice Cheshin stated in the *Sima Levy Case* (*ibid*, p. 616):

"The legal system takes a grave view of a judicial entity acting beyond the bounds set for it by the law; hence, the case law holds that a lack of subject matter jurisdiction plea stands out and the court will consider it at any stage of the litigation, even where a party first raises it on appeal".

(See also H CJ 816/98 *Eminoff v. Eltalaff*, PD 52(2) 769, 796-7; H CJ 512/81 *The Hebrew University Archaeology Institute v. The Minister of Education*, PD

35(4) 533, 543-4; H CJ 30/76, MF 150/76 *Siho v. The Karaite Jewish Community Religious Court*, PD 31(1) 15, 17-18.)

The state judicial system, and its various different courts, both civil and religious, is built on common norms that govern all its agencies. Thus, for example, it has been held in the past that the fundamental principles that govern civil judges also apply to rabbinical judges. The rabbinical judge, like the civil judge, is part of the judicial authority and in his position he is subject to the same basic rules as obligate any judicial officer:

"He is not an arbitrator between parties who voluntarily apply to him. He operates by virtue of state law and his authority extends over the whole public with all its diversity, opinions and views. Like a civil judge, a rabbinical judge enjoys independence in matters of judgement. The laws concerning conditions of service, immunity, appointment, discipline and the like that govern the rabbinical judge are very similar to those that govern a civil judge. Like the civil judge, so too the rabbinical judge must, by his action, ensure the public's trust in his judgement. The public is not only the religious public. The rabbinical judge deals with the whole people and he must by his conduct ensure the trust of the whole people, both secular and religious". (Per Justice Barak in H CJ 732/84 *MK Tzaban v. The Minister of Religious Affairs*, PD 40(4) 141, para. 16.)

In this context, case law has also drawn a clear distinction between a person's fitness as a rabbinical judge of the Israeli Rabbinical Court and his fitness as a community rabbi. On enactment of the *Dayanim* (rabbinical judges) Law a clear separation was created between judicial and rabbinic functions, and a mix between the two in judicial work is no longer consistent with the concept of state law. In the words of the Minister of Religious Affairs Warhaftig, when he presented the *Dayanim* Law draft on first reading in the Knesset, as cited in the *Tzaban Case*:

"With the establishment of the State of Israel we adopted this course. We distinguished between those functions and separated between rabbis and rabbinical judges" (Knesset Proceedings Session 5457, 1954, p. 2182).

As Justice Goldberg added on this subject in the *Tzaban Case*:

"The main power of the Rabbinate rests in its traditional authority over those who come 'to seek God', whilst the rabbinical judges' authority when sitting in judgement does not depend on the wishes of the litigants but is enforced in the context of the judicial system prescribed for it by the legislature. In this sphere, the rabbinical judges perform the function of 'judging the people', with its varied opinions and views".

The religious function of the rabbinical judge as rabbi is not intertwined with the judicial function that he performs as a rabbinical judge and is separate from it. The Rabbinical Court cannot therefore rely on its religious power in order to assume jurisdiction in a matter that exceeds its powers and authorities in accordance with state law (Schiffman, *Family Law in Israel*, 5755, Vol. I, p. 42).

Against this background there is difficulty with the argument that is sometimes made that the Rabbinical Court might perform a dual function: on the one hand, a state judicial function imposed upon it by virtue of state law, and on the other hand, a religious court in monetary matters by virtue of the parties' agreement. Like any public entity that performs a function in accordance with the law, so the Rabbinical Courts, which operate by virtue of statute must also discharge the responsibility owed by them by virtue of statute and decide the matters entrusted to them. As part of the state judicial system, they possess only the jurisdiction that the statute has placed in their hands. That is the essence of the principle of legality that underlies public administration and the judicial system (*Katz Case, ibid*, p. 607); hence, even if Jewish law and tradition permit a Rabbinical Court to adjudicate and decide disputes in a certain manner, that does not suffice to authorize it to do so because "*the Rabbinical Court, as a state institution, must act within the authority vested in it by state law*" (*Katz Case, ibid*, p. 607). To the same extent, a civil court, which is part of the judicial authority, may not assume an authority or function that does not derive from state law (*Tzaban Case, ibid*, p. 152).

It is against this background that we shall examine the question of the Rabbinical Court's jurisdiction to decide the respondent's property suit against the petitioner based on a breach of the divorce agreement, and the relief deriving therefrom. A comprehensive analysis of the issue of jurisdiction in a similar context

can be found in the judgement of Justice Cheshin in the *Sima Levy Case* and it will guide and direct us.

The Rabbinical Court's Original – Primary Jurisdiction

13. The original primary powers of the Rabbinical Court were set in the Rabbinical Courts Jurisdiction Law and they are built on two tiers: exclusive powers by virtue of the statute; and parallel powers of the civil court and the Rabbinical Court that are vested by virtue of the parties' agreement. The exclusive powers comprise matters of marriage and divorce, as well as matters that are duly bound up in the motion for divorce, including wife and child support. Parallel jurisdiction that is vested by agreement relates to matters of personal status in accordance with article 51 of the Palestine Orders in Council and the Succession Ordinance. The relevant provisions are as follows:

"1. Jurisdiction in matters of marriage and divorce

Matters of marriage and divorce of Jews in Israel, nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts.

...

3. Jurisdiction in matters incidental to divorce

Where a suit for divorce between Jews has been filed in a rabbinical court, whether by the wife or by the husband, a rabbinical court shall have exclusive jurisdiction in any matter connected with such suit, including support for the wife and for the children of the couple.

...

9. Jurisdiction by consent

In matters of personal status of Jews, as specified in article 51 of the Palestine Orders in Council, 1922 to 1947, or in the Succession Ordinance, in which a rabbinical court does not have exclusive jurisdiction under this Law, a rabbinical court shall have jurisdiction after all parties concerned have expressed their consent thereto."

The Rabbinical Court's powers – both the exclusive ones (marriage, divorce and matters bound with divorce) and the jurisdiction in accordance with the parties' agreement in matters of personal status – are original-primary powers by virtue of the statute to hear and rule on the matters that fall within the scope of those powers.

Power Ancillary to Original Jurisdiction

14. The Case law has recognized the existence of a judicial instance's inherent ancillary power that derives from the original power of the Rabbinical Court by virtue of the statute and in special circumstances grants it jurisdiction to again hear a matter upon which it has ruled in the past. Such is, for example, the jurisdiction of the civil and religious courts to vacate a judgement awarded by them that is based on an agreement between the parties, in the making of which there has been a defect. Such a material defect might lead to the revocation of the agreement and therefore also to revocation of the judgment that rests upon it, and the instance empowered to decide its revocation is the one that rendered the judgment (HCJ 124/59 *Glaubhardt v. The Haifa Regional Rabbinical Court*, PD 13 1490; CA 151/87 *Artzi Investment Co. v. Rachmani* PD 43(3) 489, 498-500). Additional expression of such ancillary jurisdiction occurs when there is a material change in the circumstances of the matter, that has occurred after the award of judgement by consent, which makes its continued performance unjust (*Sima Levy Case, ibid*, pp. 605-6; CA 442/83 *Kam v. Kam* PD 38(1) 767, 771; CA 116/82 *Livnat v. Tolidano* PD 39(2) 729, 732; CA 219/87 *Rachmani v. Shemesh Hadar, Building Company Ltd et al.* PD 43(3) 489, 498-500). The recognition of this ancillary jurisdiction is intended to bring about a proper balance between the judgment's finality on the one hand, and the interest not to leave in effect a judgment, the enforcement of which has become extremely unjust due to a change in circumstances. Inherent jurisdiction is also vested in the judicial instance, including the Rabbinical Court, to retain jurisdiction in respect of a matter that is pending before it until the proceedings have been completed. So long as final judgement has not been awarded, jurisdiction continues until the judicial court has completed its work. Once a final, unconditional judgment has been awarded, the work is completed (*Sima Levy Case*, p. 607; CA 420/54 *Ariel v. Leibovitz* PD 9 1337; ALA 2919/01 *Daniel Oshrovitz v. Yael Lipa (Fried)* PD 55(5) 592; J. Zussman, *The Civil Procedure* (seventh edition, 5755) 550).

One of the expressions of ancillary jurisdiction relates to the existence of the Rabbinical Court's "continuing jurisdiction", the essence of which is that, under certain conditions, where the Rabbinical Court has in the past heard a particular matter, its continuing jurisdiction to hear it again will be recognized. The continuing jurisdiction also derives from the inherent power of the judicial instance.

Its basic purpose is to give expression to the duty of mutual respect and the need for harmony between judicial instances where there is parallel jurisdiction between them, and in order to avoid parties running from one judicial instance to another. It has nevertheless already been explained that continuing jurisdiction is not intended to undermine or derogate from the original powers vested in the judicial instances in accordance with statute. Its purpose is essentially "*to vest power to vacate or modify an earlier decision due to a change that has occurred in the circumstances upon which the first decision was based*" (per Justice Cheshin in the *Sima Levy Case*, *ibid*, p. 608, 610). Such are matters of child support and custody, which by their nature are subject to material changes of circumstance, and the original judicial instance therefore has inherent jurisdiction to reconsider them when the appropriate conditions arise.

It should be made clear that no inherent power has been recognized for a civil or religious court to exercise its original authority again in order to *interpret* a judgement awarded by it. Hence, a Rabbinical Court that has granted a divorce does not have inherent jurisdiction to interpret the divorce agreement and the judgement that awarded it force and effect (*Sima Levy Case*, *ibid*, pp. 612-13).

These are the characteristics of the original jurisdiction that is vested in the Rabbinical Court in accordance with the statute, alongside its ancillary powers that are sparingly exercised in special circumstances by virtue of its inherent jurisdiction, in order to complete the judicial act and make it a complete and just deed.

We shall now examine the question of whether the Rabbinical Court has jurisdiction to adjudicate a dispute by virtue of the parties' agreement, where such jurisdiction is not set in the statute empowering the Rabbinical Courts, and is not within the scope of the ancillary jurisdiction vested in it.

The Rabbinical Court's Jurisdiction by Virtue of the Parties' Agreement

15. The parties' agreement to vest jurisdiction in the Rabbinical Court might take on two guises: *one*, simple agreement to grant the Court jurisdiction in a particular case, regardless of the provisions the Rabbinical Courts Jurisdiction Law; *second*, agreement intended to empower the Court to hear and rule on a dispute as an arbitrator. Can such agreement by the parties vest power in the Court that is not granted to it by the empowering statute or embodied in its ancillary powers?

The Israeli state judicial system and the various different judicial instances, derive their powers from statute. It is the statute that establishes them, it is what delineates the bounds of their activity and it is what defines the sphere of their

subject matter and territorial jurisdiction. This is also the case in respect to the civil judicial instances; and so it is with respect to the special judicial systems, including the courts of Israel's different religious communities. These include the Rabbinical Courts in Israel.

By defining the powers of the various different judicial instances in Israel, the statute intended not only to delineate the function and responsibility of the system and its various different arms. It also sought, at the same time, to deny the power of a judicial instance to hear and adjudicate a matter which it was not charged with by the statute and which is not within its inherent jurisdiction. The definition of the judicial instances' powers has a dual dimension, both positive and negative: it constitutes a source of power and responsibility on the one hand, while denying the exercise of authority and power that have not been so conferred; the judicial instance has only what the statute that established it has vested in it, and insofar as it has been made responsible to adjudicate disputes within the scope of the power vested in it, it is under a duty that derives from the statute and the concept of democratic government not to try or adjudicate a matter that is beyond its statutory power.

A preliminary and mandatory condition for the satisfactory activity of any judicial system is a clear and exhaustive definition of the framework of powers and the apportionment of functions that rest with its various different instances. Without an exhaustive and specific definition of powers the systemic structure, built in accordance with the statute, is blurred and the stability of its functioning is not secured. The harmony necessary in the area of operation of the different judicial arms and the relationship between them is impaired; the allocation of professional, administrative and budgetary resources to the different instances is disrupted, and direct harm might occur to the efficacy of the judicial system and the level of judicial performance. The uniqueness of the responsibility owed by the judge, which requires the existence of a clear framework of authority, alongside which is the responsibility and duty to rule, becomes blurry. Thus, recognizing the power of a judicial instance to adjudicate matters, the power and responsibility for which have not been legally transferred to it, might materially disrupt the internal balance required in the structure of the judicial system and severely undermine its standing and performance.

A consequence of the foregoing is that the power of a judicial instance, as such, be it civil or religious, is acquired by law and it has no power to be derived from the parties' agreement, except where the statute itself has seen fit to recognize such agreement in certain circumstances as a source of the power to adjudicate. Thus, for example, with regard to the effect of the parties' agreement, the law has

distinguished between the apportionment of subject matter jurisdiction and territorial jurisdiction between judicial instances. It is willing to acknowledge, in certain conditions, the parties' agreement as a valid source for changing the territorial jurisdiction that has been prescribed. Section 5 of the Civil Procedure Regulations, 5744-1984 provides that when an agreement between parties as to the place of jurisdiction exists, the lawsuit will be filed to the court in that area of jurisdiction. The relative flexibility regarding territorial jurisdiction, and the willingness to recognize the parties' agreement as the source of such jurisdiction, stems solely from the statute and derives its power from its provisions. That is not the case in respect of subject matter jurisdiction. Generally, the law does not recognize that the parties' agreement has power to depart from the rules of subject matter jurisdiction, as crafted by state legislation.

A similar approach is also taken with regard to the judicial instance's power to adjudicate by way of arbitration. Since the state judicial instance merely has the subject matter jurisdiction conferred to it by statute, it is not vested with power to hear and rule a matter as an arbitrator by virtue of the parties' agreement, unless it has been expressly given that power by statute. In general, a judicial instance is not supposed to adjudicate a matter that is referred to it as arbitrator. However, in certain circumstances, the law has expressly recognized the power of a civil instance to adjudicate a dispute in departure from the ordinary rules of procedure. Thus, for example, in the area of small claims, section 65 of the Courts Law (Consolidated Version), 5744-1984 provides that if a lawsuit has been filed in the small claims court, the judge may, with the parties' consent, try the claim as arbitrator, and the provisions of the Arbitration Law will govern the matter, with certain restrictions; in addition, a court hearing a civil matter has been empowered, with the parties' consent, to decide a matter before it by way of settlement (section 79A of the Courts Law) or to refer a matter, with the parties' consent, to arbitration or conciliation (sections 79B and 79C of the Courts Law). The said authorities are all vested in the court by virtue of statute. They assume that the subject of the dispute is within the subject matter jurisdiction of the court hearing the case and they give it special procedural means that are intended to facilitate and expedite the process of deciding the dispute and bringing about a just result. The various judicial instances have not been generally empowered by law to hear and decide matters that are not included in the scope of their subject matter jurisdiction by virtue of the parties' agreement, either as arbitrators or otherwise. Since such authority has not been conferred to them, it is, *ipso facto*, denied and does not exist.

The Rabbinical Courts are an integral part of the Israeli judicial system. They were established by virtue of the Rabbinical Courts Jurisdiction Law and they derive their power and authorities from the state statute. They have nothing other

than what is vested in them by the statute, and they are subject to the set of powers of the statute in their judicial work, as interpreted over the years by case law. Along those lines, this Court has held in the *Katz* Case that the Rabbinical Court is not empowered to issue a Letter of Refusal in monetary matters that is intended to compel a party to submit to the Rabbinical Court's jurisdiction by ostracizing and disgracing the recalcitrant party; and in H CJ 2222/99 *Gabai v The Great Rabbinical Court* PD 54(5) 401, the opinion was expressed that the Rabbinical Court lacks legal authority to issue a forced settlement decision, without the parties' consent, thus forcing a judgment on the parties without determining facts on the basis of evidence, if it is unable to decide in accordance with the law.

It emerges from this that the parties' agreement as such cannot, *per se*, grant jurisdiction to the Rabbinical Court, unless, it has been recognized by the law as a primary source of authority. Thus, the parties' agreement has been recognized as a source of the Rabbinical Court's jurisdiction pursuant to section 9 the Rabbinical Courts Jurisdiction Law, in matters of personal status of Jews pursuant to article 51 of the Palestine Orders in Council or according to the Succession Ordinance, which are within the parallel jurisdiction of the Rabbinical Court and the civil instance. Nevertheless, the Rabbinical Court does not have power to hear and decide a matter that is not of the kind found within its exclusive jurisdiction in accordance with the statute or within its parallel jurisdiction, even if the parties have given their consent to its jurisdiction. Such agreement does not derive from a legally recognized source of authority in the law and it cannot, *per se*, vest jurisdiction in a state judicial instance.

The Rabbinical Court's Jurisdiction by Virtue of an Arbitration Agreement

16. According to the same line of reasoning, the Rabbinical Court has no power and authority to decide a dispute as an arbitrator by virtue of an arbitration agreement between the parties in a matter, which by its nature is not within its legal jurisdiction. The Court has not been vested with jurisdiction by law to decide disputes as an arbitrator and the parties' agreement cannot vest it with such power.

The issue of the Rabbinical Court's jurisdiction to arbitrate financial and other matters that go beyond the powers granted to it in accordance with the Rabbinical Courts Jurisdiction Law has caused consternation and confusion over the years. It appears that, in reality, the Rabbinical Court assumes the role of arbitrating matters that are beyond the scope of its subject matter jurisdiction (*Katz Case, ibid*, pp. 606-8; CA 376/62 *Bachar v. Bachar*, PD 17(2) 881, 882, 885; CA 688/70 *Doar v. Hamami*, PD 25(2) 396, 399; M. Alon, *Jewish Law – History, Sources and Principles*, third edition, vol. III, 5748, 1529). Justice Barak

considered the inherent difficulty of a state judicial instance's need to adjudicate a dispute by arbitration where it was not empowered to do so by law, saying:

"The first possible argument is that the motion to the Rabbinical Court is like that to an arbitrator and embodied in the Arbitration Law, 5728-1968. That possibility – which has been used in practice and can be encoered as a year-long custom - raises serious problems in principle. Thus, for example, it can be asked whether it is proper for a judicial entity, whose powers are prescribed by law, to assume additional judicial powers, by being empowered as an arbitrator. Is it conceivable that parties would motion the magistrate's court to try a pecuniary claim, that is outside its jurisdiction, as an arbitrator? From the state's point of view, is it justifiable to use judicial time and tools (whether of the civil or religious courts) for matters outside the jurisdiction that the law has granted the judicial authorities? Is there no fear that the public be confused as to which decisions the judicial instance has awarded as the government and those that it has awarded as arbitrator?"

(HCJ 3023/90 *Jane Doe (a minor) v. The Rehovot Regional Rabbinical Court* PD 45(3) 808, 813-14; see also S. Ottolenghi, *Arbitration, Law and Procedure* (fourth edition, 5765) 167-8; *Schiffman, ibid*, vol. I, 37.)

In HCJ 2174/24 *Kahati v. The Great Rabbinical Court*, PD 50(2) 214, this Court (per Justice Dorner) once again referred to the practice, adopted from time to time by the Rabbinical Courts, of deciding disputes as arbitrators in matters that are not within their jurisdiction. It expressed skepticism with respect to the validity of the practice. However, as in the previous case, it again left this question open without making any conclusive ruling, since such a ruling was not necessary in that case (cf. *Aminoff, ibid*, pp. 792-3).

17. There is indeed an inherent difficulty in recognizing the Rabbinical Court's power to decide a dispute in a matter on which it has not been given jurisdiction by law (cf. Ottolenghi, *Dispute Resolution by Alternative Means*, Israeli Law Yearbook, 5752-5753, p. 535, 550-1). In the past, the Mandate government empowered the Rabbinical Courts to act as arbitrators by means of section 10(d) of the Israel Knesset Regulations of 1927, but upon the establishment of the State, the "Israel Knesset", within its meaning under the Mandate, ceased to exist and it was held that those Regulations no longer had any force or effect (Crim. App. 427/64 *Yair v. The State of Israel* PD 19(3) 402; HCJ 3269/95, *ibid*, p. 622-3; *Schiffman*,

ibid, p. 39). It cannot therefore be argued that the said section might serve as the source of the Rabbinical Courts' power as arbitrators. Moreover, upon enactment of the Arbitration Law, it was proposed that an arbitration decision made by a religious court when ruling as an arbitrator would in all respects, except with regard to the appeal, be treated as a judgement of the court sitting in accordance with its jurisdiction prescribed by statute, and that the award would not require confirmation under the Arbitration Law. That proposal was not accepted (*Knesset Proceedings* 5728, pp. 2966-7).

It is indeed difficult to settle the governing perception that views the judicial system as an arm of government, which derives its power and authority from statute, while acknowledging the possibility that the selfsame system can acquire other subject matter authorities deriving merely from the parties' agreement that do not originate from the empowering law. The Israeli Rabbinical Courts, that are part of the Israeli judicial system, integrate with the said perception and, like the other judicial instances, operate in accordance with the principle of legality of the arms of government (see the dissenting opinion of Justice Tal in the *Katz Case*, distinguishing between the power of religious courts as a state authority and the power they have, in his opinion, by virtue of Jewish law, which is not connected with state law).

18. Apart from the essential difficulty inherent in the judicial decision of the Rabbinical Court as an arbitrator, which is not consistent with the principle of legality of the government authorities, other difficulties arise from the said procedural practice. The practice blurs the spheres of the Court's own activity in respect of the procedural basis upon which its decision rests: is it a decision within the scope of the Court's state power that is subject to review by the High Court of Justice in accordance with section 15 of the Basic Law: the Judiciary, or is it an extra-statutory power that is built on a different foundation originating from the parties' agreement and subject to review by a different judicial instance, like the District Court, in accordance with the Arbitration Law (cf. *Jane Doe Case*, *ibid*, para. 7)? In more than a few cases the parties might misunderstand the nature of their agreement to vest jurisdiction in the Rabbinical Court as they do not always understand the meaning and implications of their consent. Moreover, usually, in the course of such adjudication, strict attention is not paid to enquiring into the existence of an arbitration agreement or the application of the Arbitration Law and the rules pursuant thereto, such, for example, the mechanism for the confirmation and revocation of an arbitral award and the role of the District Court as the competent instance in accordance with the Arbitration Law (*Ottolenghi*, *ibid*, p. 168; Dichovski, *The Standing of a Rabbinical Court Dealing with Property Law As Arbitrator*, *The Jewish Law Yearbook* 16-17 (5750-5751) 527; MF 268/88

Delrahim v. Delrahim, DCJ 49(3) 428; SC 2329/99 *Kfir v. Kfir*, PD 55(2) 518, para. 5). An arbitral judgment made by the Rabbinical Court frequently does not undergo confirmation or revocation proceedings in the District Court as required by the Arbitration Law for the purpose of its execution, and the Rabbinical Court has no power to confirm an arbitral judgment (*Kahati, ibid*, p. 220; HCJ 5289/00 *Mograbi v. The Great Rabbinical Court*, Takdin Elyon 2000(2) 581; *Kfir Case, ibid*, para. 5). Furthermore, a situation in which the District Court, by virtue of the Arbitration Law, might oversee the Rabbinical Court's decisions as an arbitrator might harm the proper balance between the instances and aggravate the tension between the civil and religious judicial arms (A. Porat, *The Rabbinical Court As Arbitrator*, Kiriat Mishpat II (5762) 503, 521-4; *Dichovski Case, ibid*, p. 529).

The Rabbinical Court, purporting to act as an arbitrator between the parties, still operates under cover, and with the characteristics, of its state role. To that end it makes use of the court's physical and organizational system, which is financed by the state; it adjudicates disputes as an arbitrator in the scope of the court calendar, as part of its ordinary work; the overall services, the organizational and professional arrangement and the government budget are also used by it in that function, which by its nature does not have a state character. The time that it should devote to matters of personal status in its official capacity is partly assigned by it to a different judicial function that is not for the state, despite appearing to carry the state seal in the eyes of the public at large, who finds it difficult to distinguish between the judicial function and the extra-statutory function performed by the Court. This intermingling of functions is inconsistent with the principle of legality and a correct definition of the functions and powers of a state judicial instance (*Katz Case, ibid*, p. 608; *Schiffman, ibid*, pp. 37-8).

19. Mention ought to be made to the approach of Prof. Shochatman in his paper entitled *The Rabbinical Courts' Jurisdiction in Matters Other Than Personal Status* (Bar Ilan University Yearbook on Humanities and Judaism, vols. 28-29 (5761) p. 437, p. 449 et seq.). As he sees it, the Rabbinical Court might acquire jurisdiction by virtue of the parties' agreement in matters outside its jurisdiction in accordance with the Rabbinical Courts Jurisdiction Law by virtue of section 15(d)(4) of the Basic Law: the Judiciary, thereby acquiring jurisdiction as an arbitrator. According to that Law, which defines the High Court of Justice's power to review religious courts, the question of a religious court's jurisdiction can only be referred to this instance when it was raised at the first opportunity. The author infers from this that where there is prior agreement between the parties to vest subject matter jurisdiction in the religious court, a party who has so agreed may not later dispute jurisdiction. By virtue of that preclusion the religious court acquires subject matter jurisdiction, and the High Court of Justice is itself precluded from intervening

therein. According to this approach, such an agreement vests subject matter jurisdiction and is not limited solely to matters of personal status. It might encompass numerous spheres that are beyond the subject matter jurisdiction of the religious court, as defined in the Rabbinical Courts Jurisdiction Law.

I cannot agree with this position. The interpretation expressed by Prof. Shochatman assumes that it is possible to recognize the existence of subject matter jurisdiction of an Israel state judicial instance by means of the parties' consent, combined with the doctrine of preclusion and estoppel that prevents someone who has agreed to jurisdiction from later disputing it. That approach is fundamentally inconsistent with the principle of legality that obligates judicial instances, including the religious courts. It is not consistent with the starting point whereby subject matter jurisdiction is vested in a judicial instance by a positive arrangement, and its existence is not to be inferred by an indirect interpretation of provisions of law concerning estoppel and preclusion. The Rabbinical Court's powers are granted to it by virtue of the Rabbinical Courts Jurisdiction Law and they cannot be added to by an indirect interpretation of statutory provisions, the purpose of which is not the vesting of power. Moreover, it has already been held (in *Sima Levy Case, ibid*, p. 618-19) that the element of preclusion emerging from section 15(d)(4) of the Basic Law: the Judiciary was not intended to vest in the Rabbinical Court subject matter jurisdiction that is not vested in it by virtue of the Rabbinical Courts Jurisdiction Law. The said preclusion is based on the assumption that the matter being adjudicated by the Rabbinical Court is of the type that are within the parallel jurisdiction of the civil court and Rabbinical Court, and regarding the latter, jurisdiction is conclusively consummated if both parties have agreed to it. In those circumstances, and only in them, a party's prior agreement or silence, or subsequent denial of jurisdiction, might lead to preclusion with respect to a lack of jurisdiction argument in the High Court of Justice - that and nothing more. An interpretation that takes the doctrine of preclusion out of context, and assumes the existence of a potentially unlimited Rabbinical Court subject matter jurisdiction, the final consummation of which is dependent only upon the parties' agreement, is directly opposed to the principle of legality, upon which the concept of democratic government is based. It is inconsistent with the subject matter jurisdictions vested by statute in the arms of government, including the judicial system.

Alternative Decision-Making Systems

20. The need of various different circles in the religious world to entertain alternative systems for the resolution of disputes is proper and recognized. Indeed, alternative rabbinical judicial systems that are not associated with the state rabbinical judicial system, which decide disputes between litigants in the

community, are recognized. They can be granted powers to act as arbitrators by agreement of the parties. The need of different communities for alternative dispute resolution systems specific to them can be met by reference to internal arbitration frameworks that are not part of the state judicial system, within which disputes can be settled by virtue of the parties' agreement. This alternative course to litigation in the state judicial instances can be developed and strengthened in accordance with the different needs and preferences of the communities. This was considered by Justice Zamir in the *Katz Case* (*ibid*, p. 606), who stated:

"As is known, there are still observant Jews who prefer to litigate in matters of property according to religious law before a religious court rather than the state court. The state's law does not preclude that, if both parties to the dispute so desire, and it is even willing to give the force of arbitration to such litigation, if the litigants fulfil the provisions of the Arbitration Law. Indeed, in practice, such courts exist in various communities around Israel, not by virtue of state law or as official institutions but as private entities. That is, for example, the case of the rabbinical court of the *Edah Chareidis* [the Haredi Community] in Jerusalem. However... in these cases we are not dealing with a private entity but a state court, and the law applies to it just as any other of the state's courts. Like any court, in fact, like any government agency, the Rabbinical Court is also subject to the principle of legality, meaning that it has nothing other than what was granted to it by the law... In this respect, the Rabbinical Court in Jerusalem is distinguished from the rabbinical court of the *Edah Chareidis* in Jerusalem. The Israeli Rabbinical Court, which has jurisdiction in accordance with the Basic Law: the Judiciary, is not like one of the rabbinical courts of the Jewish communities in the Diaspora. Unlike them, it has the power and authority of a government institution. So too, unlike them, it is also subject to the restrictions that apply to any government institution".

Consensual Resolution – Looking to the Future and to the Past

21. The scope of the Rabbinical Courts' subject matter jurisdiction to decide a dispute by virtue of the parties' agreement outside the framework of the law looks to the past and the future. It calls into question the validity of the Court's rulings based on the parties' agreement outside the scope of the statute, not merely henceforth, looking to the future, but also with respect to the past. The outlook to the future seeks to find a binding definition of the limits of the Rabbinical Court's jurisdiction and to strictly observe those limits hereafter. However, the outlook to

the past calls into question the binding legal validity of the Rabbinical Court's decisions that have been made over the years by virtue of the parties' agreement as aforesaid. That issue is far from simple; there is no need to decide it here, and it will wait until its time comes.

From the General to the Particular

22. Let us return to the respondent's suit against the petitioner in the Rabbinical Court and examine whether it is within the subject matter jurisdiction of the Rabbinical Court; the test of jurisdiction depends on the nature of the cause of action, and whether the cause falls within the jurisdiction of the Rabbinical Court.

The Cause of Action – Enforcement of a Contractual Indemnity Clause

23. The respondent's cause of action in the Rabbinical Court is the *enforcement of a contractual clause* concerning property, which is contained in the divorce agreement that was made between the couple for the purpose of the divorce proceedings. It provided that if the respondent were sued for an increase in child support and the satisfaction of any of the children's needs or if a stay of exit order was granted at the initiative of the wife, then the petitioner would *compensate* him, in the language of clause 4(e) of the agreement, with half the property. That provision is also mentioned in clause 5 of the agreement, which is headed "Indemnification", and according to the substance of the provision, and also its location and wording, it is an indemnity clause. The respondent sues for the enforcement of a property condition for his indemnification due to a breach of contract by the wife, and he gave expression thereto by heading his claim as one for "specific performance". That is to say, we have here a property claim for the enforcement of the contractual indemnity clause in a divorce agreement that received the effect of a judgement of the Rabbinical Court and further to which the parties' divorce was completed.

The Rabbinical Court's Jurisdiction to Adjudicate a Property Claim for the Breach of a Contractual Indemnity Clause in a Divorce Agreement after the Parties' Divorce

Does the respondent's suit, according to its cause, fall within the scope of one of the sources of the Rabbinical Court's jurisdiction? Because of the great similarity between the instant matter and the case of *Sima Levy*, we shall draw guidance and direction from that case.

Original – Primary Jurisdiction

24. The source of the Rabbinical Court's exclusive jurisdiction in matters of marriage and divorce, as provided in section 1 of the Rabbinical Courts Jurisdiction Law, does not apply in the instant case because the subject of the suit is a property matter after the dissolution of the parties' marriage and a matter of "marriage and divorce" is, no longer involved. Nor is it a matter "connected with a divorce suit", including support for the wife and children, within the meaning of section 3 of the Law. *After* divorce, a property claim in respect of the breach of an indemnity clause is not connected with the divorce *suit*, which has ended and no longer exists. The respondent's cause of action is a new one, the subject of which is the enforcement of a divorce agreement or an application for the enforcement of a divorce judgment, based on a divorce agreement. The cause is based on the breach of a divorce agreement after the award of the divorce and completion of the couple's divorce, and such a new cause is naturally not to be bound up with the matters that were in the past connected with the divorce suit.

With regard to the property cause of action, which surrounds the breach of an indemnity clause of a divorce agreement, the Rabbinical Court does not have jurisdiction by virtue of the parties' agreement pursuant to section 9 of the Law, which deals with the Rabbinical Court's parallel jurisdiction that is vested by virtue of the parties' agreement *in matters of personal status* according to article 51 of the Palestine Orders in Council and the Succession Ordinance. Section 9 of the Rabbinical Courts Jurisdiction Law raises the question of whether jurisdiction can be vested in the Rabbinical Court by consent in a matter *included* in its parallel jurisdiction *after* completion of the divorce, or whether its jurisdiction pursuant to that provision is limited solely to matters within its parallel subject matter jurisdiction that arise in connection with, and *until*, the divorce and its completion, but not afterwards. Whatever the answer to this question, it is in any event clear that the subject matter jurisdiction pursuant to section 9 is limited solely to the matters mentioned therein, that is, matters of "personal status" as defined in the Palestine Orders in Council and the Succession Ordinance. In a dispute that is not within the bounds of those matters, even the parties' agreement cannot vest jurisdiction in the Rabbinical Court (*Schiffman, ibid*, vol. I, p. 37; *Jane Doe Case, ibid*, p. 812). The power of the parties' stipulation is restricted solely to the matters defined by the statute (MF 358/89 *Zalotti v. Zalotti* PD 43(4) 41, 42; *Porat, ibid*, p. 510).

Clause 11 of the divorce agreement in this matter looks to the future, and provides that if differences arise between the couple after the divorce, then they undertake to bring their claims solely in the Rabbinical Courts. That agreement is

effective only to vest jurisdiction in the Rabbinical Court pursuant to section 9 of the Law in respect of matters of personal status according to article 51 of the Palestine Orders in Council or the Succession Ordinance. A property claim for the enforcement of a contractual indemnity clause in a divorce agreement is not a matter of personal status within the meaning of the Palestine Orders in Council or the Succession Ordinance, and thus, the parties' contractual agreement in respect of such a dispute cannot vest jurisdiction in the Rabbinical Court pursuant to section 9 of the Law.

The Rabbinical Court therefore does not have original jurisdiction to adjudicate the respondent's claim.

"Ancillary" Inherent Jurisdiction

25. Does the Rabbinical Court have "ancillary" inherent jurisdiction to adjudicate the respondent's claim? The answer is in the negative.

In the instant case, the Rabbinical Court's ancillary jurisdiction is irrelevant insofar as it relates to the revocation of a divorce award because of a defect in the making of the divorce agreement. It is not a defect of fraud, mistake, deceit, duress or similar that occurred in the making of the agreement and that might have given the Rabbinical Court ancillary jurisdiction to consider its revocation.

Similarly, the Rabbinical Court has not acquired ancillary jurisdiction by virtue of a material change in circumstances after granting the divorce judgment that allegedly justifies revoking the divorce agreement and the divorce judgment in order to achieve a just result. On the contrary, the respondent's suit is for the specific performance and enforcement of the divorce agreement, not its revocation. Although, in the Great Rabbinical Court, the respondent pleaded that his suit was *to revoke* the divorce agreement because, according to him, the *Get* had been given by mistake (the Great Rabbinical Court's decision of May 4, 2003). These arguments were made as an "embellishment" at a late stage of the trial and do not reflect the real cause of action; the motion to revoke the divorce agreement and the act of divorce is inconsistent with the respondent's claim in his suit to compensate him with half the property (the apartment, the contents and the gold), which is nothing other than a claim for the enforcement of the divorce agreement (cf. CA 105/83 *Menashe v. Menashe* PD 38(4) 635; Yadin, *The Contracts (Remedies for Breach of Contract) Law 5731-1970*, Second Edition, 5739, p. 44).

Again, the Rabbinical Court's ancillary jurisdiction to retain jurisdiction in a matter pending before it until the proceedings conducted before it are concluded will not vest it with jurisdiction in this case. The Regional Rabbinical Court had

granted a final and unconditional judgment and awarded the effect of judgement to the divorce agreement. Indeed, the divorce agreement does contain an indemnification provision, which by its nature looks to the future, but this fact cannot transform a judgement that gave effect to a divorce agreement into a judgment that is not final, leaving the Rabbinical Court with jurisdiction that has not yet been exhausted to continue adjudicating with respect to the divorce agreement's future performance in this property matter. A financial-property dispute that has arisen between the parties after the award of judgement gives rise to a new cause of action and necessitates the institution of new proceedings in accordance with the jurisdictional framework prescribed by law (see *Sima Levy Case*, pp. 607-608; CA 468/85 *Dondushanski v. Don* PD 40(2) 609; D. Bar Ofir, *Execution - Proceedings and Law* (Sixth Edition, 2005, pp. 164-5)).

Nor has the Rabbinical Court acquired jurisdiction to hear this matter by virtue of the doctrine of "continuing jurisdiction". It should be kept in mind, that continuing jurisdiction is vested where an instance has tried a particular matter in the past and, in special circumstances, a need has arisen to vacate or modify an earlier decision due to a material change that has occurred in the circumstances upon which the original decision was based such, for example, in matters of child support and custody. The instant case is fundamentally different. The motion does not seek to modify or revoke the divorce agreement made between the parties. On the contrary, it seeks to *enforce* the agreement, and such a claim has no place within the continuing jurisdiction vested in the Rabbinical Court. A decision on property matters is a final one and not a matter for continuing jurisdiction, as the Court stated in *Sima Levy* (Justice Cheshin, *ibid*, p. 611):

"As distinct from decisions concerning the payment of support or child custody – which by their nature are not final and the doctrine of continuing jurisdiction applies to them – *a decision on a property matter is in principle a final one*" (emphasis added).

The property aspect of the divorce agreement, including the indemnification clause, and the divorce judgment that gave it effect, are therefore not within the Rabbinical Court's continuing jurisdiction.

And finally, the Rabbinical Court does not have ancillary jurisdiction to adjudicate the new cause that arose following the divorce agreement in order to interpret the agreement. Firstly, the Rabbinical Court, having completed and exhausted its power to rule on the matter of divorce, no longer has ancillary power to interpret the divorce agreement or the divorce judgment (cf. H CJ 897/78 *Yigal v. The National Labour Court*, PD 33(2) 6, 7; CA 5403/90 *The State of Israel v. RAM*

Revhiat Ibrahim PD 46(3) 459). Moreover, in the instant case, the question of the agreement's interpretation hasn't risen as such, but a claim for its enforcement has been brought instead. Hence, the Rabbinical Court does not have ancillary jurisdiction in this respect either.

In conclusion: the Rabbinical Court does not have primary original jurisdiction, or ancillary inherent jurisdiction, to adjudicate a property claim for enforcement of a contractual indemnification clause in a divorce agreement that has given the effect of judgement, once the couple's divorce has been completed.

The Rabbinical Court's Jurisdiction by Virtue of Consent

26. As can be recalled, clause 11 of the divorce agreement provides that differences between the couple after the divorce are to be adjudicated solely in the Rabbinical Courts. The couple's agreement as such cannot vest the Rabbinical Court with jurisdiction where there is no legal source for it. The agreement in this case concerns something that is not a matter of personal status according to section 9 of the Rabbinical Courts Jurisdiction Law, and it was therefore given for this purpose outside the scope of the law, and is ineffective.

Indeed,

"where the subject of the litigation is not within the jurisdiction of a particular judicial entity, no agreement in the world has power to grant the entity jurisdiction that the statute has not given it; it is the statute that gives and it is the statute that takes away" (*Sima Levy*, p. 617).

The Regional Rabbinical Court's decision of June 18, 2002 and the Great Rabbinical Court's decision of May 4, 2003, according to which the Rabbinical Courts have jurisdiction in principle to try the claim by virtue of the law, are inconsistent with its provisions.

The Rabbinical Court's Jurisdiction by Virtue of an Arbitration Arrangement

27. It was further argued that clause 11 of the divorce agreement is an arbitration provision that vests the Rabbinical Court with power as an arbitrator to adjudicate the respondent's claim of a breach of the agreement's indemnification provision. Although not strictly necessary, we have considered the question in principle of whether a Rabbinical Court can be empowered to decide a dispute between litigants in arbitration, in a matter that is not within its subject matter jurisdiction according to the statute. We have answered that question in the negative and the answer is applicable to the case herein.

In the instant case, the conclusion that the Rabbinical Court lacks jurisdiction to try the matter as an arbitrator is also reinforced by another reason. Studying the contents of clause 11 of the divorce agreement shows that it cannot be construed as an arbitration clause, equal to an "arbitration agreement" between the parties. It is well known that the power of an arbitrator to decide a dispute between parties derives from an arbitration agreement. Without an arbitration agreement, no arbitration arises. An "arbitration agreement", according to the Arbitration Law, is "*a written agreement (between parties) to refer to arbitration a dispute that arises between them in the future, whether an arbitrator is named in the agreement or not*" (section 1 of the Arbitration Law). The condition precedent for arbitration is therefore the existence of an *agreement* to refer a dispute to *arbitration*. If parties have agreed to refer disputes between them to the decision of some entity but it is not clear that a decision in *arbitration* is involved, then there is no arbitration agreement (ALA 4928/92 *Aziz Ezra Haj v. Tel Mond Local Council* PD 47(5) 94; *Ottolenghi, ibid*, pp 9-41).

In this case, the parties undertook to refer any disputes arising between them after the divorce solely to the Rabbinical Courts. No intention can be inferred from that agreement to refer such disputes to the Rabbinical Court *qua arbitrator*. In *Jane Doe* (para. 6 of Justice Barak's opinion), as in the case herein, the couple mistakenly believed that their consent to the Rabbinical Court's adjudicating disputes connected with the divorce agreement could vest it with power to decide as *a state judicial instance*, rather than as an arbitrator. Indeed, the wording and contents of clause 11 of the divorce agreement do not demonstrate the parties' intention to treat it as an arbitration clause purporting to empower the Rabbinical Court to act as arbitrator. Consequently, even if we assumed that the Rabbinical Court could be empowered to act as an arbitrator in matters in which it has no original or ancillary jurisdiction by virtue of the law, there is still no effective arbitration agreement, as pleaded.

A Note before Closing

28. The issue of the Rabbinical Court's power to adjudicate by virtue of the parties' agreement, outside the scope of the law, has arisen in earlier contexts in the past, and although different opinions have been expressed in such respect by the courts, no binding decision has been necessary in connection therewith. This absence of a ruling has permitted the continuation of a procedural practice that is inconsistent with the organizational structure of the courts and the division of powers between them in accordance with state law. This custom has enabled a judicial practice that is inconsistent with the principle of the administration's legality and the legality of the judicial system. The time has come to move from the

stage of expressing an opinion to the stage of making a ruling, which is necessary to ensure the proper function of the judicial system within the scope of its powers, and thereby to protect the basic foundation that defines the boundaries of its activity based on the principle of legality and the rule of law. This will not harm, in any way, the need and ability of various social groups to entertain alternative resolution systems outside the state judicial instances, based on the principles of arbitration regulated by law or on the basis of other agreed and recognized rules of procedure. However, at the same time, it is necessary to safeguard, and protect against blurring the boundaries between the state judicial systems and alternative resolution systems that are built on the parties' agreement, in order to protect the proper operation of the different arms of the judicial system and the public's confidence in the way in which its powers are exercised and its judgments.

Conclusion

29. By deciding the respondent's lawsuit against the petitioner for the enforcement of a contractual indemnification clause in the divorce agreement, the Rabbinical Courts exceeded the power vested in them by law. Consequently, the decisions of the Regional Rabbinical Court and the Great Rabbinical Court in the respondent's claim are void. The result is that the *order nisi* that has been awarded should be made absolute. The respondent shall bear the petitioner's professional fees in the sum of NIS 12,000.

Vice President (Ret.) M. Cheshin

I concur.

Justice S. Joubran

I concur.

Therefore, held as stated in the opinion of Justice Procaccia.

Awarded today, this eighth day of Nissan, 5766 (April 6, 2006).

Vice President (Ret.)

Justice

Justice

