

## **Moral Judgment of Sexual Behavior in Marriage: Autonomy, and “Governance” Following HCJ 4602/13**

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This article was written in the wake of HCJ 4602/13, which rejected by majority opinion a petition to overturn a ruling by the Great Rabbinical Court. The ruling in question denied the woman’s right to share in the family residence by virtue of the specific partnership rule, which allows the court to determine that assets, which according to the ordinary rules are considered private, become joint because of the intention of the parties. One of the grounds on which the Great Rabbinical Court rejected the specific partnership claim was the wife’s adultery in the last months of a marriage that lasted some 30 years. The public and legal discourse following the petition gave the impression that this ruling narrowed the judicial review of rabbinical courts when they ruled contrary to civil law, and that the High Court of Justice allowed consideration of sexual fault in determining the economic consequences of divorce. But the analysis in the article reveals that the truth is more complex. Justice Mintz interpreted the ruling of the Great Rabbinical Court, or at least the rationale presented by the majority opinion in that court, as based on the ordinary civil considerations used to determine a specific partnership in an asset, unrelated to the issue of adultery. In the opinion of Justice Stein, the rulings obligating rabbinical courts to comply with civil law, and which prohibit sexual fault considerations from being considered, are valid but limited to prohibiting any of the spouses being deprived of their due rights under the law because of sexual culpability. By contrast, based on his civic doctrine regarding the value of autonomy, Justice Stein believes that both civil and rabbinical courts are entitled—indeed, obligated—to honor explicit or implicit stipulations of giving by virtue of the specific partnership rule relating to the sexual behavior of the recipient.

The article deals with three main issues: (a) interpretation of multi-participant rulings of the rabbinical courts, including a willingness to read between the lines of what is said in them; (b) the criteria for intervention in the rulings of rabbinical courts in general, in particular with regard to rulings that rely on considerations of sexual fault in the intentions of the parties; and (c) the civic doctrine of Justice Stein regarding the centrality of the value of autonomy in determining the economic consequences of marriage, and its implications for the enactment and observance of agreements and status contingent upon sexual fault.

Based on discussion of these matters, the article reaches the conclusion that the ruling in HCJ 4602/13 was erroneous, both in its interpretation of the verdict of the Great Rabbinical Court and with respect to the criteria for intervention in it. The article also shows that the views of the majority justices, and especially the theory of neutrality toward the enactment of arrangements contingent upon sexual fault as proposed by Justice Stein, contain many hazards, as a basis for both independent civil policy and judicial review of rabbinical courts. Moreover, even if the ruling

itself did not overturn the previous jurisprudence, and even if the majority justices did not intend to do so, the analysis in the article warns that the ruling nevertheless opens the door to broad consideration of sexual fault in determining the economic consequences of divorce. It does so by basing the results on the presumed intentions of the parties not only with regard to private assets that are not subject to balancing, but also in cases of assets that are the product of the joint effort of the spouses and should therefore be considered marital property.

The article combines commentary on judicial rulings, in its classical form, with a broader independent discussion of three issues: (a) the nature of the regulation of property relations in Israel; (b) the rationale for specific partnership under general law; and (c) the place of sexual fault in determining the economic consequences of marriage in general, the relationship between these and the value of autonomy and the principle of neutrality in particular.