A CIVIL LEGAL FRAMEWORK FOR MARRIAGE AND DIVORCE IN ISRAEL

Avishalom Westreich and Pinhas Shifman

Metzilah
Center of Zionist, Jewish, Liberal and Humanist Thought

Editor: Ruth Gavison

Position Paper

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The Metzilah Center was founded in 2005 to address the growing tendency among Israelis and Jews worldwide to question the legitimacy of Jewish nationalism and its compatibility with universal values. **We believe** that Zionism and a liberal worldview can and must coexist; that public discourse, research and education hold the key to the integration of Zionism, Jewish values and human rights in the Jewish state; and that the integration of these values is critical for the lasting welfare of Israel and the Jewish people worldwide.

Metzilah aims at disseminating knowledge, deepening the understanding and awakening the public discourse in the areas that we deem are the core issues facing the citizens of Israel and the Jewish people worldwide. These key issues include: the Jewish people's right to national self-determination in (part of) the Land of Israel; contemporary Jewish identities; the complex nature of Israeli society; and the preservation of human rights for all Israeli citizens and residents.

The early stages of the Zionist movement were characterized by profound and comprehensive discussions. While the State of Israel and its society are still facing complex challenges, the contemporary public discourse has lost depth and tends to be characterized by the use of slogans and stereotypes. To counter this trend, the Metzilah Center focuses on the academic and historical research of these topics for ideological clarification and practical policy recommendations.

In our effort to meet this crucial challenge, the Metzilah Center strives to publish a variety of professional and accurate publications which shed new light on key issues and lay the necessary factual, historical and ideological foundations to promote public discourse and action in these essential matters. The clarification of these key issues is a necessity for Israeli society and the Jewish people.

The Metzilah Center believes that a sustainable State of Israel is crucial for the welfare and prosperity of the Jewish people and that actions need to be taken in order to achieve the State's objectives to their full extent: to reestablish the right of the Jewish people to self-determination by means of a Jewish state in their historical homeland; respecting the human rights of all of Israel's citizens and residents; and consolidating Israel as a democratic, peace-seeking, prosperous state that acts for the welfare of all its inhabitants.

About the Authors

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Executive Summary

This paper examines the existing legal and social reality in the area of marriage and divorce in the State of Israel. It argues that the current legal arrangement, which subjects such a central sphere of Israeli civil life to religious monopoly, is both unjustified and ineffective. Our paper proposes an alternative solution in the form of a civil legal framework for marriage and divorce in Israel.

The first section of the paper (chapters 1-3) discusses the existing legal arrangements and their shortcomings. Israel is the only Western democracy that legally sanctions a religious monopoly over marriage and divorce. From a historical perspective, this arrangement is in fact an extension of the status quo that existed in Palestine under the British Mandate, which itself evolved from the Ottoman Empire's millet legal codes, dating back to the 19th century. Today, however, many consider the issue of marriage and divorce to be a highly significant aspect of Israel's Jewish character, and even an integral part of its definition as a Jewish state. For members of other religions as well, marriage and divorce are central aspects of their collective identity.

The state currently entrusts the rabbinical courts with the sole authority over marriage and divorce matters of its Jewish citizens, and personal status issues of non-Jews are cared for by religious courts of the major denominations. A citizen's affiliation with one or other religious denomination is determined in accordance with the religious law, and sometimes without the person's consent. For the sake of comparison, in other Western democracies, the legal system provides a common, civil framework for marriage and divorce to all citizens, regardless of their cultural background and religious affiliation.

In the existing social and legal order, this arrangement causes significant difficulties and should clearly be altered. We argue that changing this legal norm is a social, moral, legal, religious, and cultural necessity.

- **Social** – because of the many couples that are interested in a non-religious marriage, and the many that are unable to enter into a religious marriage, either because they are religiously disqualified from doing so, or because they are not formally affiliated with any religion. The rising number of such couples stems from recent changes in Israeli society, following the massive immigration waves from the former Soviet Union, as well as from ideological changes in the social conception of family and marriage. These changes indicate an ever-growing difference between the customary liberal and religious views on marriage stability, implications of divorce, and religiously forbidden relationships, such as same-sex unions.
- **Moral** – because of the way the existing arrangements violate basic human rights: the right to get married and establish a family, freedom of religion, freedom from religion, and the right to equality.
- **Legal** – in light of the anomaly resulting from the fact that the civil law sanctions the existence of a full-fledged monopoly of religious law over marriage and divorce, while at the same time, the courts have gradually been expanding their recognition of civil marriages conducted outside of Israel. Moreover, they have been reinforcing the status and rights of cohabitants who, through such union, become legally and socially "quasi-married," thus establishing an alternative to religious marriage.
- **Religious** – because civil marriage might ease the challenge with some difficult problems, such as adultery and illegitimate children (*mamzerim*, i.e. the offspring of forbidden unions, that suffer from various liabilities; sometimes translated as "bastards"), resulting from the existing arrangements, which force religious marriage on non-consenting couples. In addition, there is a clear religious interest in modifying the current arrangement, under which the civil courts pass judgement, or presume to pass judgement, on strictly religious questions.
- **Cultural** – because of Israel's commitment to deal properly with its multiple religious cultures, as well as the public's various approaches

to religion, and each religion's cultural effect on marriage and divorce within its community. This commitment stands in contradiction to the monopoly that many exclusive religions and religious currents enjoy today over matters of marriage and divorce.

It is worth mentioning that in light of the difficulties caused by the existing situation, the Israeli legal system has in recent years established extensive bypass mechanisms, such as the provision of many legal rights to cohabitants, thus placing them in the same status as formally married couples, the legal recognition of marriage between two Jewish Israeli citizens who are married abroad, as well as partial recognition of inter-faith civil marriages and same-sex marriages performed abroad. The Israeli Civil Union Law for the Religiously Unaffiliated, which was passed in 2010, is another such bypass mechanism. These "local" solutions indeed make life somewhat easier for those who find their freedom curtailed by the religious-orthodox monopoly over marriage, but we believe they are not sufficient. Moreover, they actually perpetuate the existing state of affairs, thus making its resulting dilemmas permanent.

Our examination of these aspects of the matter leads us to conclude that the existing situation must be altered, and that a civil legal framework for marriage and divorce must be established. In the second part of this paper (chapters 4-5) we discuss our proposal for such a civil framework, while comparing it to previously-formulated proposals designed to revise the Israeli marriage and divorce laws.

Proposals for restricting or terminating the religious monopoly on marriage and divorce in Israel have long been an integral, continuous part of the legal, academic, religious, and public agendas in this country. Such proposals are divided into two main categories: the first category proposes retention of the religious route, but adds a civil alternative to it. This alternative comes in three versions: a minimalist version, which supports civil marriage only for those who are religiously disqualified from getting

married; an extensive version of varying applicability, which proposes to establish two equally accessible alternatives, civil marriage and religious marriage; and a third version, which retains the exclusivity of religious marriage, but offers to establish alternative "civil union" arrangements that would be more or less inclusive. The second category consists of proposals for forming a uniform civil legal framework for marriage, while recognizing the validity of a variety of ceremonies. According to such proposals, the various cultural and religious groups and their traditions would be fully represented through their corresponding ceremonies (civil or religious, and of various religions and denominations), and yet, all marriages and divorces would be covered by the same civil umbrella. The various proposals in this category differ in the weight and significance each attributes to religious provisions within the civil legal framework, concerning, for instance, the granting of a civil marriage certificate following a civil, but not religious, divorce.

Our analysis examines the advantages and disadvantages of these proposals. It should be noted, however, that they all acknowledge the urgent need to discontinue the religious-orthodox monopoly over this sphere. And yet, it often seems that such proposals pay a high price for their attempt to find the appropriate balance between all the various considerations that play a part in such a complex social and legal reality. Consequently, the first proposal, for example, which proposes to retain the religious route, does not provide appropriate solutions to the human rights violations that this route entails, since the existence of a religious route, fully sanctioned by the state, renders the state itself, and not the marrying couple, responsible for various aspects of inequality found in marriage and divorce arrangements of the different religions. In the light of these and additional difficulties, we now wish to present our proposal and to explain its advantages.

We propose adopting a uniform civil framework for marriage and divorce. Such a civil framework model would require advance registration

and fulfilment of the necessary preconditions for marriage, thus constituting an all-inclusive, normative civil system that would handle all matters of marriage and divorce in Israel. In light of the significant weight and importance of religion in Israeli society, this model would grant full legitimacy to a wide variety of religious and non-religious marriage ceremonies, as well as a variety of divorce ceremonies and procedures. However, for purposes of state recognition, there would be just one civil law. Those who wish to do so, especially if they were originally married in a religious fashion, would then be able to choose whether or not to continue litigating their marriage and divorce disputes in the religious courts, provided that these courts remain committed to the fundamental principles of civil property law, and to equal implementation of the right to divorce.

With respect to the state's accountability for marriage laws, this proposal entails a dramatic change, because the most important marriage decisions would now become the state's responsibility, whereas the religious and cultural aspects of marriage would be matters of personal choice. The state would formulate basic principles for a legal framework that would regulate marriage and divorce in a proper manner. It would take its own position with regard to restrictions on marriage (such as the prohibition of marriage by minors, bigamy, and perhaps even a requirement of certain medical examinations). Above all, such a framework would oblige the legislature, as the representative of the various public viewpoints, to determine the status of married couples in Israeli society as compared to that of non-married couples, and to determine the appropriate requirements for the dissolution of a marriage.

In general, this arrangement would directly force the state to develop civil family laws based on widely accepted social values, while at the same time allowing the representation of a broad spectrum of groups, currents, and cultures. It stands to reason that disagreements will arise with respect to these matters, and they should be resolved in the manner in which such disagreements are resolved, through discussion, negotiation, and

compromise. But this will have to be a decision made by the state, and not by various religious establishments. On the other hand, the state would not have to make decisions, or maintain institutions that would make decisions in strictly inner-religious matters, thus significantly reducing the enormous tension that exists today between state and religion in Israel, and between various conceptions of Jewish religiosity.

We do not believe that this type of civil legal framework would harm the unique Jewish nature of the state, since we expect that many of Israel's Jewish citizens would continue to integrate cultural, traditional, or religious Jewish contents into their marriage. Moreover, offering a civil marriage alternative would enable non-religious Israelis who wish to affirm their cultural Jewishness to do so, without first having to engage in a battle against religion or religious coercion, thus decreasing the state/religion tensions, as previously mentioned. A similar freedom to explore non-religious aspects of their culture will be given to non-Jewish communities in Israel, as well.

Since, according to our proposal, marriage would be regulated solely in accordance with the law of the state, the couple's separation in the eyes of the state would be accomplished by the state's usual means, i.e. through the civil courts, together with the regulation of property matters in accordance with civil law. This arrangement, however, raises religious-halakhic dilemmas (and usually serves as the main argument in favor of preservation of the present religious monopoly), since a civil divorce without a Jewish-orthodox divorce (by performing a valid writ of divorce, a *get*) might lead to the problem of illegitimate children (*mamzerim*).

We therefore propose two possible models in this context. The first grants the civil authority full jurisdiction over the recognition of divorce, and the other integrates the civil and religious courts. According to the exclusively civil model, a civil divorce would be completely valid even without a Jewish-orthodox divorce (*get*), i.e. a person becomes eligible for remarriage by virtue of his civil divorce, and he or she is permitted to remarry. However, the integrative model distinguishes between the different functions of divorce:

it enables the members of the couple to disengage from each other and to regulate their personal and financial rights and obligations, including those pertaining to their children, but does not allow them to remarry until they are regarded as eligible by religious law as well. The integrative model obviates the danger of giving birth to illegitimate children in such cases where marriage was originally conducted in accordance with the law of Moses and Israel; the first, exclusively civil model, might not do so.

In practice, however, even today, when religious courts have monopoly over marriage and divorce, the civil legal system does not prevent a second marriage (*de facto*, as cohabitants, and sometimes *de jure* as well) even when the previous, religious marriage had not been dissolved, just as it does not prevent marriage between the religiously disqualified (e.g. marriage of a Cohen to a divorcee), and in large part recognizes marriages between members of different religious communities (when performed abroad). Today, it is not primarily the civil authorities that prevent religiously forbidden unions, but rather the couples' own religious-cultural commitments, to the extent that these play a significant role in their lives. The proposed arrangement, even according to the exclusively civil model, would not alter this situation in any significant way: an Israeli court issuing a civil divorce verdict, in accordance with the exclusively civil model, would leave the decision of whether to remarry, without having obtained an orthodox *get*, to the members of the couple themselves. The power and novelty of this model lie only in the fact that it prevents a second marriage from being a violation of the law of the state. In any case, the paper does not determine which would be the most desirable model for matters of divorce, either the exclusive or the integrative one.

Whether or not the exclusive model is approved, or even more so, the integrative model, the civil legal system must not lose its sensitivity with respect to women whose husbands decline to grant them a religious divorce. We propose that the civil courts continue to grant these women legal aid in the form of compensation for damages, suspension of the civil divorce procedure in cases where the recalcitrant spouse is the one who applies for

it, and holding the husband's refusal against him financially, as is customary in other Western countries, as well as in the Israeli rabbinical courts.

It is the state's duty, as well as that of its leaders, to establish an appropriate and suitable legal framework for dealing with such a central sphere of civil life as marriage and divorce. This is true in every country. It is especially true in the Jewish and democratic state of Israel, as it strives to establish a political and legal framework for a cohesive society, based on deep, but different, cultural foundations. Therefore, despite political and other impediments, the treatment of such a central matter must be based on a clear vision. Formulating such a vision is the goal of this paper.

Introduction

Israel is the only democracy in the Western world that sanctions a religious monopoly over marriage and divorce. Such monopolies do indeed exist in post-colonial states like Lebanon, but as a Western democracy that is committed to the values of human rights, Israel is remarkably unlike any other. As part of its definition as a Jewish state, the issue of marriage and divorce constitutes for many in the majority group a reflection of a highly significant aspect of Israel's Jewishness. For members of other religions as well, marriage and divorce constitute significant aspects of their collective identity. In light of this, it is no wonder that the issue has remained on the national agenda ever since Israel was established, and it often comes up in political, social, academic, and religious discussions.

Aside from the legal aspects of this issue, social reality has a power of its own, which in Israel has led to the development of alternative "detours" around the religious monopoly over marriage and divorce. These detours do indeed provide solutions for a significant portion of the practical problems created by the existing legal situation, but paradoxically, they also perpetuate it, and thereby lead it further and further away from the social reality.

The purpose of this paper is to re-evaluate the legal and social reality in the area of marriage and divorce. Its conclusion is that the existing legal arrangement, which sanctions a monopoly over such a central aspect of civilian life on the part of religions and their institutions, is unjustifiable and ineffective. It is the state's duty, as well as that of its leaders, to establish an appropriate and suitable legal framework that will regulate the issue of marriage and divorce. This is true in every country. It is especially true in the Jewish and democratic state of Israel, as it strives to establish a political and legal framework for a cohesive society, based on deep cultural foundations. Therefore, despite political and other impediments, the treatment of such a

central matter must be based on a clear vision. Formulating such a vision is the goal of this paper.

We shall begin by providing the background to the existing legal arrangement in Israel and examining the changes it has gone through in recent years. We shall analyze the ways in which this arrangement is compatible with social, cultural, and religious values in Israel. Later, we shall examine the common claim that the religious monopoly over marriage in Israel is justifiable, and even inevitable, in light of the state's "Jewish and democratic" nature, and we shall discuss the halakhic attitude towards civil marriage. (The terms halakhah, halakhic, etc., refer to Jewish law, which in the Israeli context is usually interpreted in line with orthodox views). These background discussions will serve as the infrastructure for the substantive discussion, in which we will identify the significant flaws in the existing arrangement and the need for its modification. Finally, we shall examine the various proposals that have been raised for the civil regulation of marriage and divorce, and present our own proposal. Our conclusion will be that the religious monopoly over marriage must be terminated and replaced by a uniform, equal, civil framework that would leave significant room for religious ceremonies selected by the participants. We claim that this framework would best protect human rights and retain rich religious and cultural elements of marriage and patterns of family life in Israel. This is also the most appropriate structure for Israel as a Jewish and democratic state that respects the religious and communal identities of all its citizens. In the last section of this paper we shall discuss the practical application of our proposal.

Chapter 1:

Family and Society in a Jewish and Democratic State

Family, Society, Religion, and State Law

One cannot exaggerate the importance of the family unit for individuals as well as for society. Two people binding themselves in marriage wish in this way to express their love and friendship for each other. Such a relationship is the basic social unit within which most people give birth to their children and raise them.[1] The family patterns – the relationship between nuclear and extended families, the mating patterns (via match-making or individual choice), the customary marriage age, the number of children per family, approval or prohibition of multiple partners, the division of household chores between men and women, the responsibility for the children's upbringing, the willingness to accept same-sex partners, and so on – all of these are some of the most important basic characteristics of human societies and cultures. In a world of rapid social mobility and multicultural societies, disagreements concerning patterns of family life occur almost everywhere.

Despite the fact that family life is normally perceived as belonging to the "private" sphere, the world of monotheistic religions has developed rather detailed regulations of the family structure and the rights and obligations of its members.[2] However, as processes of enlightenment and secularization began to occur in various countries, they brought with them the secularization of social institutions that had previously been seen as religious, such as the institution of marriage. In all Western countries this process led to a distinct separation between the state's legal regulation of

marriage (civil regulation), and any influence of religious laws and religious institutions on the content of such regulation.

The state, through its legal system, plays a crucial role in regulating various aspects of the marriage bond (for the purpose of maintaining stability, enabling and protecting the rights of both partners to the relationship). However, this is only a partial, secondary role. The main influences on the family structure and on its dominant norms are cultural and social. In fully religious communities these norms are naturally socio-religious. However, even in communities in which the religious or conservative dimension is less significant, religious norms have a long-term influence over the institution of the family, even in sectors that do not proclaim themselves to be religious.

There are states that attempt to resist this influence of tradition over the institution of the family, but it is not necessary to act in this manner. Many states, including those that enjoy a constitutional separation of religion and state, reserve a place of honor for religious tradition and religious communities in the social and familial sphere. An outstanding example of such a situation is the United States, in which we can find a high degree of constitutional separation of church and state, as well as a high degree of religiosity and respect for religion's presence in social and political life. Either way, in Western democracies, the legal system provides a common – and civil – legal framework for marriage and divorce for all citizens, regardless of their culture, religious affiliation, or attitude toward religious practice. This framework applies to all citizens and obligates everybody, even in cases of conflict between a citizen's religious norms and the laws of the state.[3] The marriage framework set up by the state is also designed to make possible certain marriage bonds that some religions would not permit, such as interreligious or same-sex marriages. However, these tensions and conflicts between the civil framework and the religious norms indicate that in family life, even when legally regulated by the state, wider social norms would always apply as well, and in many cases and contexts, these norms will be religious ones. This phenomenon is particularly striking in places

where the civil, national, and religious identities are all interconnected, as is, of course, the situation in Israel.

A Jewish and Democratic State: Implications for the Legal Regulation of Marriage and Divorce

One of this paper's points of departure is its characterization of Israel as a Jewish and democratic state.[4] There are some who consider the Israeli religious monopoly over marriage and divorce to be a direct and simple consequence of the state's Jewish nature.[5] They believe that this religious monopoly is designed to preserve cultural and national interests of the utmost importance, such as preventing the division of the Jewish people, which might occur if the Jewish lineage is not properly preserved in accordance with the religious law.[6] According to the people who hold such views, abandoning the marriage and divorce religious monopoly would actually mean abandoning the important value of the Jewish people's unity, a step that would not be consistent with the basic values of the Jewish state.[7]

We believe that this claim is false, for several reasons.

First, we wish to distinguish between the legal and cultural aspects of the character of Israeli society. Israel's Jewish character might indeed lead to the conclusion that the state should encourage the establishment of inter-Jewish family ties in Israel in a way that would reflect the Jewish uniqueness of such ties. However, Jewish ties are not necessarily religious-orthodox ones. Israel's essential definition as a Jewish state does not make it a religious or a faith community, but rather a community with a joint national, cultural, and historical identity. Moreover, maintaining the religious monopoly might weaken the capacity to maintain pluralist Jewish forms of marriage, and thus deter those who do not adhere to the orthodox halakhic path from incorporating some Jewish content into their wedding ceremonies and family lives.

It should be further noted that even if we grant that the characterization of the State of Israel as a Jewish state has religious significance, there are

principled debates in Israel and throughout the world with regard to the precise nature of Jewish religiosity. In light of such debates, a religious-orthodox monopoly enforced by the state in fact means that Israel is taking a formal stand on an issue that is very much in dispute – the meaning of Judaism in our time. The complex position in which the state finds itself in this context can perhaps be better understood by getting to know the history of the religious monopoly over marriage and divorce (and few other matters of personal status) in Israel.[8]

The Background to Israel's Religious Monopoly over Marriage and Divorce

The religious monopoly over matters of personal status was not originally put in place in order to reinforce the state's Jewish identity. This monopoly is in fact an extension of the status quo that existed in Palestine under the British Mandate, which itself evolved from the Ottoman Empire's millet legal codes, dating back to the 19th century. Within the framework of these codes, the religious courts were granted exclusive formal jurisdiction in marriage and divorce and other matters of personal status, in an attempt to grant equal rights to members of various religious groups across the empire, while the central government retained its authority in matters of security, foreign affairs, and taxes.[9]

Jews in European countries and in the East had their own jurisdictional and communal autonomy already in the Middle Ages (to varying degrees, in different periods and places), but the Ottoman Empire code was different in that it reflected a formal recognition of the Jewish religious courts (at least *de jure*) as a part of the general legal system.

The British Mandate did not rely on customary imperial logic in this context, for Palestine was not a part of the British Empire. Therefore, as the authorities undertook legal regulation of matters of personal status, they turned to the leaders of the various communities and asked for their preferences. The Jewish leadership chose a civil marriage framework, but the

leaders of the Arab community preferred to retain the millet system, which has indeed remained intact, without any essential modification.

When the State of Israel came into being, its new legal system absorbed all of the existing legal arrangements that were in effect on the eve of its establishment. Israel had no reason to change the arrangements of autonomous jurisdiction previously granted to the non-Jewish communities. With regard to marriage and divorce in the Jewish sector, however, there was some controversy,[10] and only in 1953 did the Knesset adopt legislation with regard to the issue of marriage and divorce that preserved the principle of the millet system, albeit with a few changes. It was then decided, and it is the practice to this day, that some of the personal status matters, and in particular matters of marriage and divorce, would be dealt with by the religious courts, in accordance with the parties' religious affiliation,[11] and would be based in effect on arrangements that were established during the Ottoman period.[12]

The decision to preserve the religious monopoly over marriage and divorce was not a simple one, and the Knesset adopted it only after an exhaustive discussion. Under the circumstances of the early 1950s, this decision was a reasonable compromise between the differing conceptions prevailing in the Jewish community. The legislators emphasized that the religious monopoly was crucial for preventing a division in the Jewish people and for preventing marriage between Jews and members of other religions.[13] Social reality, to a large extent, reflected this decision, and therefore no great practical difficulty resulted from it. The number of people who wished to get married but were hindered by the rules of halakhah as interpreted by the religious-halakhic establishment was not large, the new legislation met with only minor objection, and ways were found to deal with the practical and ideological difficulties that this decision created.

In matters of marriage and divorce, therefore, Israel has chosen the path of continuity, not revolution. Despite the fact that it is a relatively small country, Israel has decided to adopt an arrangement that was originally

designed for the needs of an empire consisting of diverse communities and cultures, and has left broad religious autonomy in the hands of all the recognized religious communities in its midst. Apart from preserving the Jewish religious-orthodox monopoly, which was justified as essential for protecting Israel's Jewishness, the state has abstained from establishing legal frameworks for marriage and divorce for members of other religions as well. It has thereby prevented those members of non-Jewish communities (no less than members of the Jewish community) who were not interested in a religious regulation of their familial life from realizing their civil rights and acting in accordance with their cultural preferences.

Chapter 2:

Legal, Social, Religious, and Historical Aspects of Marriage

The Need for a Civil Framework for Marriage: Socio-Legal Background

Marriages and divorces of Jews in Israel are conducted in accordance with Jewish religious law.[14] Marriages and divorces of members of other religions are conducted in accordance with the law of the communities to which the couples belong.[15] The state of Israel does not permit marriage within its jurisdiction that is not conducted according to religious law (except in special cases), and for Jews, this means the religious law as interpreted by the orthodox rabbinical establishment. It should be noted, however, that although the legal regulation of marriage mandates a religious wedding ceremony, the legal consequences of such a ceremony (even when it is conducted in Israel, and certainly when abroad), as well as its registration and recognition, are handled by a number of civil authorities, from state clerks to state civil courts.

This forced linkage between marriage and the religious institutions comes at a heavy price: the Religiously Unaffiliated (persons who are not officially affiliated with any religion) cannot get married, Jews and non-Jews cannot marry each other, the religiously disqualified cannot get married, same-sex marriage is not recognized, etc. Some citizens cannot marry at all, and some cannot marry the person of their choice. Some can marry, but are forced to do so in accordance with a system of religious laws that subjects them to limitations that violate their consciences and that sometimes forces

them into a type of relationship that seems to them alien, wrong, and disturbing. Those who wish to dissolve the religious tie are forced to do so in compliance with religious law, and sometimes, as a result of its stipulations, they (especially women) find themselves locked into a relationship in which they are no longer interested.

In the previous chapter we mentioned that when the legislature decided to leave matters of personal status in the hands of the religious courts, its decision did not create significant social difficulties. However, various social and demographic changes that have taken place in Israel in recent decades have turned this situation into a much bigger problem. First, the ethno-cultural makeup of the Jewish Israeli population has changed. The people who were "classically" disqualified from getting married were joined by a new group: immigrants from the former Soviet Union, hundreds of thousands of whom are not considered Jews according to the halakhah.[16] These immigrants cannot marry Jews in the state of Israel – a significant social problem that results from the existing legal situation.[17] Many of these immigrants are not willing to convert to Judaism in order to get married as Jews, and even for those who are willing to do so, conversion is not a simple process, but rather an intricate journey that is also controlled by the rabbinical establishment that takes a strict halakhic line. [18] For this reason, monopoly over marriage and divorce goes hand in hand with a monopoly over conversion, both of which tie the hands of those who wish to get married.

However, this social change does not affect only the new group of immigrants. It is far wider, and relates to the basic structure of the Israeli family. This change also includes a rise in the divorce rate, and increasing social legitimization of religiously prohibited types of relationships, such as marriage between the religiously disqualified, interreligious marriage, non-marital relationships, and same-sex relationships.[19] Such relationships, each in its own way, lead to an ever increasing gap between the traditional concepts of marriage and divorce, represented by the religious courts, and

the concept of family and relationships prevalent among large portions of Israeli society.

As a result of these trends, the religious marriage and divorce establishment faces the rising impatience of the general public, which has been voting with its feet against the prevailing legal arrangement: tens of thousands of Israeli couples abstain from religious marriage (some by choice, and some for lack thereof – being religiously disqualified for marriage), and seek out alternative civil marriage frameworks, mainly in Cyprus. Additional tens of thousands avoid a formal marriage altogether, and remain cohabiting couples.[20] With respect to cohabitation, it is clear that some of those who live in this way are not interested in a formal marriage, religious or otherwise. This is in line with a worldwide trend of rising numbers of non-married couples, whose relationships are settled via the law of contracts (either explicit or implied). As far as such couples are concerned, religious marriage is not a problem. However, it does seem that many Israeli couples choose the option of cohabitation for lack of a civil marriage option, and not because of their giving up on the institution of marriage altogether (see below). Furthermore, a number of surveys indicate that many, if not the majority of Israeli citizens, support the termination of Israel's religious monopoly over marriage and divorce, and a large group of citizens would have preferred getting married via the civil route.[21]

We believe that the incidence of marriage (as well as divorce) in a society should be closely correlated with the sociological phenomenon of relationships that seek to be institutionalized, recognized, and formally acknowledged.[22] However, in the current legal and social situation in Israel, the sociological correlation between formal marriage (as recognized by the religious legal system) and familial relationships between two people has significantly decreased. This gap between the legal framework and the social reality is undesirable.[23]

Apart from this gap between the legal situation and social reality, the need for civil marriage also stems from moral arguments, which are derived

from the democratic ideological framework of a Jewish, multicultural, multi-religious state that defends the human rights of its citizens. Preventing the marriage of large groups of citizens within their own state stands in contradiction to the right to get married, which is recognized as a basic human right. In addition, forcing the route of religious marriage on a country's citizens contradicts their right to freedom from religion. The assignment of a religious-orthodox monopoly over marriage raises questions pertaining to the freedom of religion of those who identify with a non-orthodox Jewish outlook. In addition, some of the features of the religious legal arrangements raise questions of gender quality, especially with regard to the status of women. From the Jewish religious point of view, too, this state of affairs raises significant difficulties, formal-halakhic ones as well as others that stem from policy considerations.[24]

We believe that a state's law must provide a proper legal framework for dealing with such central and fundamental issues as marriage and divorce. However, since the law of the state applies to everything, and since it is supposed to establish a framework that would enable different groups of different cultural backgrounds and dissimilar approaches to religion to coexist successfully, there is a social logic to seeking a legal framework for marriage which would not force any particular religious concept of marriage and divorce on the population.[25] The following chapters will deal with our proposal of such a framework.[26] For now, we shall stress again that the variety of claims mentioned up to this point raises significant questions with regard to the (essential and practical) justification for the current legal norms in Israel. We believe, in fact, that it does more than that: it tips the scales toward a complete termination of the religious monopoly over marriage and a formal establishment of a uniform, civil, legal framework for marriage and divorce, which would leave room for religious laws and institutions.

Towards a Civil Framework for Marriage in Israeli Law

Measured Steps: Towards Full Recognition

Israeli law (and especially the court rulings) has acknowledged, partially and to the best of its ability, the challenges that the existing legal and social situation place before it. We shall present this practical situation briefly.

The Israeli Supreme Court has advanced step by step towards establishing a well-developed civil, legal framework which, in practice, recognizes civil marriage. This process began with the recognition of the validity of civil marriage of foreigners performed outside of Israel under private international law. It continued with the recognition of civil marriage of Israeli citizens for the purpose of registering and recognizing financial rights and maintenance duties by virtue of implied agreements and *bona fide* principles. The latest step was the formal recognition of civil marriages entered into by Israeli citizens and residents outside of Israel.[27]

The last step – the recognition of the validity of civil marriage – is the most important, and it is dramatically different from the position previously held by the court. During most of Israel's history, the court relied on the law of contracts when discussing marriage arrangements, thus avoiding the question of status, so as not to be entangled in the complications of family law. The court also abstained from ruling in cases concerning the validity of civil marriage performed by Israeli citizens and residents, and the maintenance rights deriving from them. The court simply justified the right to receive maintenance as deriving from an implied agreement, i.e. an agreement not actually undertaken, but one that can be assumed to exist on the basis of the parties' behavior. The existence of such an agreement flowed from and was solidified by the performance of the wedding ceremony, which the court has attempted to fill with content via the principle of good faith, and all this without ruling whether or not such a wedding ceremony produced a valid marriage.[28]

One cannot deny that the implied agreement strategy is vital for establishing justice between husband and wife. The fact that no status of marriage was originally established (by choice or because of religious legal limitations) does not necessarily mean that no agreement was formed between the two partners. Thus, for example, it would not be appropriate for a man to be exempted from his maintenance duties to his wife after having claimed he was not married to her since she was not Jewish, and that their marriage was therefore not religiously recognized. A similar right of maintenance should also be considered in the case of religiously forbidden marriage, civil marriages that are not recognized by private international law, and even in cases of cohabitation.

However, indecision concerning the validity of marriage bears a public and moral cost, even if the court's avoidance of a decision is purely tactical.[29]And indeed, as we previously mentioned, the Supreme Court was eventually required to make such a decision. In three later verdicts issued by the then-president of the Supreme Court, Aharon Barak, upon his retirement, a significant shift in the court's approach towards civil marriage became apparent. This shift can be summarized as follows: For the first time, the Supreme Court clearly determined that civil marriages by Jewish citizens and residents of the state, performed outside of Israel, would be fully valid. It recognized the rabbinical court's authority to dissolve such marriages, but the recognition of such authority also inspired the judges to develop a civil family law pertaining to the mutual duties and rights of the spouses (the "Noahide" case).[30] The court also granted some rights to interreligious couples married outside of Israel ,but formally, it made no decision on this issue.[31] In the end, the court removed the legal barriers preventing the recognition of same-sex marriages performed abroad, even though it made clear (it could be that, as in previous cases, this is merely a tactical clarification, while the principled decision remains valid) that it would rule only with regard to the question of registration.[32] The verdict does not take any explicit position with regard to "Israeli law's recognition

of same-sex marriages performed outside of Israel." However, it denies the claim that same-sex marriages fall outside the category of marriages by mentioning the various benefits which the courts have granted such couples, and in so doing it paves the way for expanding the wide recognition of heterosexual cohabitants to same-sex marriages as well. It should be noted that the past labelling of the relationship as a "social unit" as opposed to a "family unit" that adorned Justice Barak's verdict in the Danilovich case, which initiated the giving of benefits to homosexual couples, has meanwhile been forgotten.[33]

Civil marriages over which the court has jurisdiction, such as civil marriage of Israeli citizens abroad, same-sex marriage and interreligious marriage, would probably fall under the category of the civil family law that the court has begun to formulate via its previous verdicts.[34] However, at least in cases of same-sex and interdenominational marriages, the courts would have to formulate actual divorce laws, since the rabbinical courts would not deal with such divorce cases. Formulating divorce laws pertaining to such cases may pave the way toward the creation of a legal infrastructure for divorce, upon the future implementation of a civil framework for marriage and divorce.[35]

Cohabitation in Israeli Law

In addition to their measured recognition of the legal validity of civil marriages performed abroad, Israeli society and, following in its footsteps, the legal system as well, have broadly adopted an alternative to the recognized religious marriage in Israel: cohabitation.[36] Cohabitation (like other alternative civil unions) is a universal, sociological or cultural phenomenon; it is not a formal institution, but it is widely recognized by the legislature and the courts, and within this framework couples are able to receive various legal benefits.[37] In the Israeli context, the cohabitation institution was established as a (partial) response to an increasing social demand for a non-religious marriage, as well as a response (also partial) to

the ideological, practical, and moral difficulties that the religious-orthodox monopoly raises in regard to marriage and divorce.[38]

The Israeli legal system – via its laws, and to a large extent its court rulings as well – has granted cohabiting couples benefits similar to those of the formally married, and sometimes even superior ones. In many respects, the Israeli courts have gone farther on this issue than other legal systems.[39] As far as the financial relationship between the spouses is concerned, for instance, a cohabitant might even be in a better condition than his formally married counterpart.[40] Until recently, the formally married spouse would have had to wait until the marriage expired before he or she could claim their rights to the property accumulated during the marriage, whereas the members of a couple living together in a non-marital relationship, would under the shared property principle be able to claim such property at any given time. Indeed, in amendment No. 4 to the Property Relations between Spouses Law, 5733-1973 (2008), the court was empowered to apply the "balance of resources" arrangement at an earlier stage, so that it would no longer be linked to the religious divorce. Yet, the shared property principle, which creates a property right, and which might also apply to the couple's past property, is broader than the statutory arrangement that incorporates only the property accumulated during the period of marriage itself.[41] From the perspective of those who are trying to decide between living together in a marital or non-marital relationship, the second option might turn out to be financially more beneficial.

The fact that cohabiting couples were treated as formally married for various legal purposes shows us that the legislature wishes to apply the marriage laws, partially or in full, to recognizable family relationships between people who have decided not to get formally married, without first examining the reasons for their decision. This decision is more understandable when the couple is unable to marry because of statutory limitations. In such a case, the couple is afforded protection under contract laws that would not have been available to them under family laws. However, in cases where the decision

not to get formally married is voluntary, the above-mentioned expansion of marriage laws becomes more complex. It would have been better if the wedding ceremony, which represents the commitment expressed by the two parties to a shared future, would serve to identify the extent of the family law regulations which the legislature wished to apply. A non-marital relationship raises proof and definition difficulties, and sometimes it is only in retrospect that one can ascertain the real nature of the relationship and the intentions of its participants. As we mentioned earlier, it seems that the growing strength of the institution of cohabitation in Israel is due to a great extent to couples' inability or unwillingness to create a formal legal bond under the existing Israeli law. The legal system cannot ignore these phenomena, unless it wishes further to expand the gap between legal norms and social reality.

Indeed, the court has taken a clear and explicit stand against the existing legal situation, that is, against the religious restrictions on marriage and divorce, and particularly against the inability of citizens to perform a civil marriage.[42] This is how Justice H. Cohn described it:[43]

> One of the considerations that led the legislature to recognize the rights of a cohabitant woman was the fact that there are thousands of women who are 'chained' to husbands who refuse to give them a *get.* There is no 'justification' for the fact that a woman would be ineligible to receive her (informal) husband's inheritance just because she was unable to obtain a marriage certificate, especially when a husband whose wife declines to divorce him can much more easily obtain an approval for a new marriage and live in bigamy with another woman as he sees fit.

Can we really consider the institution of cohabitation to be a satisfactory alternative to a civil legal arrangement of marriage and divorce? Despite the far-reaching measures taken by the Israeli legal system in dealing with cohabitation, the improvement of the status of people involved in it constitutes only a partial solution to the lack of a civil marriage framework. The legal

system does indeed recognize the financial rights of cohabiting couples, but it does not grant those who wish it a formal marriage status. The couple's declaration of themselves to be married carries with it many implications, which are not necessarily legal[44] – but also social and psychological, as well as implications for the relationship between the spouses, the wellbeing of their children, and so on.[45] Couples who are interested in such a status expect that it will be given to them, in accordance with their choice and clear declarative acts. Cohabitation does not fully address these significant expectations. In addition, we must consider the different ways that certain laws address the rights of the formally married and those of cohabitants, and especially the requirement imposed on the latter to prove in a detailed manner the nature of their relationship, which sometimes violates their intimacy, unlike the merely formal evidence required from married couples. These and other differences undermine the claim that cohabitation serves as a sufficient replacement for civil marriage.[46]

As we intimated above, cohabitation also raises difficulties from the point of view of those who are not interested in the marriage route. Choosing to live together in a non-marital relationship apparently indicates the couple's wish for a relationship that entails less personal commitment than that of a formal marriage. In this type of relationship, mutual expectations gradually evolve during the course of the individuals' lives together, and are not determined in advance in an obligatory manner. This is why it is possible for either partner to quit the relationship without engaging in legal divorce procedures. Viewing cohabitation as similar to formal marriage might harm those who avoided formal marriage precisely in order to make a possible separation easy.[47] Cohabitation creates further difficulties in that it complicates the relationship from a civil point of view as well. Most important, in relation to our concerns, this status enables a person to engage in an active marriage life with more than one spouse simultaneously, thus legitimizing, in effect, bigamy.[48]

From an overall social perspective as well, the far-reaching expansion of the status of cohabitation raises a problem. The separation between two cohabiting spouses is, by its very nature, flexible and unlimited, and is obviously easier to perform than in the case of a formal marriage. Thus the state, which attempts to formulate alternative detours to the religious monopoly over marriage and divorce, causes in effect the erosion of the overall social values on which the institution of marriage rests, such as the protection of the family's integrity and stability.[49] In other words: the prevention of formal and state-recognized civil marriage serves in effect as a catalyst for tendencies that oppose the institution of marriage as such, and which instead prefer open personal relationships. We do not *a priori* object to such tendencies, but we think that they should be introduced after thorough discussion, and not incidentally, through "the back door."[50]

In conclusion, cohabitation can be seen as a *de facto* solution for the absence of a civil marriage framework. However, as was previously explained, this solution is merely partial, and it raises significant difficulties, both concerning the couple's desire for a marital or non-marital relationship, and with respect to the legislature's interests as well as with other, wider social considerations. The need for a civil marriage framework in Israel has indeed become a little less urgent as the institution of cohabitation has developed, but from many meaningful and essential perspectives, this need is still very much alive.

Israel's Civil Union Law for the Religiously Unaffiliated

In March 2010 the Knesset passed the Civil Union Law for the Religiously Unaffiliated (*chasrei dat*; the term refers to persons with no official religion, such as the 320,000 immigrants from the FSU who are not considered as Jews by the Israeli Chief Rabbinate, and see note 16).[51] This law grants for the first time a formal legal status to relationships that are not sanctioned by religious law, which it labels as Civil Unions. It regulates the civil aspects of the union's formation (registration, nominating registrars, and establishing

a database of such couples) as well as its dissolution (mutual agreement to separation, dissolution in cases of non-agreement and unresolved conflicts).[52]

The law does indeed go a long way, especially on the declarative level, toward a formal recognition of civil relationships, but in a very limited fashion: it applies only to those who are registered in the population registration database as religiously unaffiliated.[53] With respect to the rest of the population, the law leaves the existing arrangement standing, as per section 14: "This law does not, under any legal setting, come to replace the marriage and divorce regulations or infringe on the jurisdictional authority of the religious courts." In this way, the law provides merely a partial, limited solution to a very small group of people. It is indeed possible to suspect that the law would negatively label the very people who seek to benefit from it, for they are liable to be "marked" by society as outcasts who are unable to regulate their relationship in the same way as most citizens.

The law is based on a combination of compromises: on the one hand, a unique route designed for a very small portion of the population, and on the other hand, a route that is not formally defined as marriage.[54] Together, these routes have led to the situation described above. It seems this law is not very beneficial, and it is not hard to imagine that its application will be limited and even negligible. Beyond that, the law not only fails to provide a solution to the practical difficulties embedded in the existing legal situation, but it even intensifies them: it strengthens the religious monopoly by apparently rendering its termination as less urgent.[55]

Marriage from the Point of View of the Religious Denominations

Introduction

We have seen, then, that the courts and legislators have taken steps in order to minimize the social and ideological difficulties created by the religious monopoly over marriage and divorce. We have also explained the need for

a suitable response to a social reality in which many couples live together without formally binding themselves in marriage. The religious courts must also deal with this reality. In this section we shall discuss the question of recognition of a civil marriage framework from the religious perspective.

The Israeli legal system prescribes that matters of marriage and divorce should be handled according to the legal regulations of the religious denomination of the individuals concerned. For this reason, as we consider terminating the religious monopoly over marriage and divorce in its entirety we must also consider it from the perspectives of the various religious denominations in Israel. Usually, this discussion reflects the orthodox Jewish perspective, for two main reasons: first, it pertains to Israel's central religious community, the religion of the majority in the State of Israel, and the discussion therefore takes place from its point of view; second, while the termination of the religious monopoly could entail significant social and cultural implications for members of all religious denominations, and certainly for their leaders, from a narrow legal perspective, according to the non-Jewish religious legal systems, the possibility of recognizing or rejecting a civil marriage framework would not carry any dramatic repercussions (except perhaps in financial matters). In the halakhic Jewish legal system, however, such a recognition would have great significance, among other things because it might raise the question of the need for a *get*, and thus introduce various other problems, from the refusal of a *get* to concern for the possibility of illegitimate children (*mamzerim*).

During the first part of this section we shall examine the Jewish-halakhic aspect of this issue. In the second section we shall deal with non-Jewish religious denominations.

Civil Marriage in Jewish Religious Law and Rabbinical Courts Rulings

Marriage according to Jewish law is performed in the following ways: "through money, through a contract, or through sexual intercourse" (*Mishnah*, *Seder*

Nashim, *Tractate Kiddushin*: Chapter 1, Mishnah 1). According to section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, marriage and divorce in Israel are subject to Jewish law: "marriage and divorce of Jews in Israel shall be performed in accordance with Jewish religious law (lit. Torah Law)." What is therefore the status of civil marriage according to the halakhah?

In Jewish law, the status of civil marriage is highly controversial. Some halakhic decision makers do not recognize it at all, and actually claim that any type of recognition, even a limited one, would be wrong, since it would create the impression that a civil marriage can be valid. On the other hand, others have tried to depict the bond created via civil marriage as an act of marriage through money, contract, or sexual intercourse, which, as such, would be halakhically valid.

The current position of the rabbinical courts is to require the civilly married couples to obtain a "*get le-humra*" (a *get* issued as a precautionary measure).[56] This position derives from an approach according to which even though civil marriage does not establish a halakhically valid union, it still raises doubts, which call for stricter caution. Such doubts can be created by the fact that a final halakhic decision has not yet been made, and the marriage could still be considered valid after all,[57] or by the customary principle of strictness in marriage matters, even if according to the formal law it is not a valid marriage.[58] Accordingly, in cases of chained wives (*agunot*), where there is no possibility of obtaining a divorce, or in special cases,[59] the rabbinical court may exempt the civilly married couples from this requirement. Some even believe that in the Israeli social reality, it would have been better not to require a divorce in the first place.[60]

Until fairly recently, the halakhic discussion of matters pertaining to civil marriage focused on whether it constitutes a religiously valid marriage as well, and consequently, whether its dissolution requires a religious divorce (*get*). However, in the Rabbinical Court's famous "Noahide" verdict, a new perspective was suggested.[61] In this verdict, the court recognized the

halakhic validity of civil marriage in a unique way, and determined that its dissolution requires a judicial act (rather than a *get*). This means that the halakhah recognizes the status of a non-halakhic, and thus, one could say, a civil-universal, marriage.[62] Consequently, civil divorce is performed in accordance with global custom, by way of court-mandated "fault-free divorce" criteria, whenever the court finds that there is an irretrievable breakdown in the marriage.[63] This divorce policy also existed in the past and was expressed in court rulings that concerned civil marriage, as the verdict indicates,[64] but now the court defines and conceptualizes matters with explicit reference to the divorce regulations found in western legal systems.[65]

Despite the decision in the aforementioned case, the legal discourse in rabbinical verdicts is in general of a classically halakhic nature. In effect, the courts do not apply the Noahide Rabbinical Court verdict, and continue to require a religious divorce in civil marriage cases, both in cases where such marriage was the result of a free choice to avoid a religious marriage and in cases of refusal of divorce.[66] The verdict was explicitly criticized by the High Rabbinical Court *Dayan* (a rabbinical judge), Rabbi Abraham Sherman, who is one of the three judges who signed the verdict himself.[67] On the other hand, in some of the verdicts there are explicit references to the Noahide case, and perhaps this indicates the beginning of a significant assimilation of the Noahide legal construction by some of the judges of the Rabbinical Court. In these opinions the judges determined that civilly married couples should be allowed to divorce under the same conditions as those set in the Noahide case: where there is no likelihood of matrimonial reconciliation, as the court has put it, or an irretrievable breakdown in the marriage.[68]

It is not therefore completely clear whether the Noahide legal construction is merely rhetorical and was designed for political purposes only, or whether it really reflects actual recognition of the status of civil marriage. However, at least as far as financial relations are concerned, the halakhic norms evolved significantly (even if there is still some disagreement

on this issue) towards recognizing the financial implications of civil marriage, as well as the halakhic implications (also in dispute) of the civil financial rights of those who have married in accordance with religious law.[69] It should be noted that the application of civil rights with respect to halakhically performed marriage is not comprehensive, and is often still flawed. In such cases, when the courts refuse to rule according to the Property Relations between Spouses Law, 5733-1973, or when they do so improperly, they are subject to review by the Supreme Court.[70] And in any event, the halakhic principles upon which the religious courts base financial obligations flowing from civil law (such as "the law of the kingdom is the law" and "state customs") also apply to civil marriage as well.[71]

To speak concretely, the couple's joint property rights in accordance with the Property Relations between Spouses Law are valid, according to Jewish law, in civil marriage, as they are valid (according to some views) in a religious Jewish marriage. The same goes for maintenance in civil marriage. Rabbi Dichovsky indicated (thirty years ago) the roots of the dilemma connected with the application of this obligation.[72] Indeed, in the article he wrote on this subject, Rabbi Dichovsky decided that maintenance must not be charged, and he also expressed this position in the Noahide opinion, where he determined briefly, *obiter dictum*, that he believes the husband should not be charged with maintenance.[73] However, Rabbi Dichovsky reconsidered his position, and in a recent article he stated that:[74]

> I spoke at the time with *Dayan* Rabbi Eliezer Shapira... and he convinced me that the financial charges of civil marriage are valid in accordance with the law and custom of the place where the marriage was performed. Therefore, I have repudiated the conclusion as I expressed it in my article, published in *Tchumin*, according to which maintenance should not be charged.

This position, which in principle supports charging maintenance on the authority of "state customs," was recently adopted by the Rabbinical

Court of Netanya. The court decided that following the Supreme Court's ruling, according to which maintenance duty applies also in cases of civil marriage,[75] the state customs have now changed, thus making maintenance the customary norm, a fact which also makes it halakhically binding. Therefore, says the Religious Court, a husband must now be charged with paying his wife maintenance in civil marriage cases as well.[76]

In summary, Jewish religious law requires that marriage and divorce be performed via the religious route. However, the rabbinical courts do not ignore other routes. The civil route has received an initial recognition as Noahide marriage (a recognition whose sincerity remain to be demonstrated), and a more comprehensive recognition concerning the financial implications of the marriage. We believe that this recognition should be viewed as a central and important element in the process of achieving broad agreement to the formation of a comprehensive civil legal framework for marriage.

Marriage According to Civil Law: Non-Jewish Denominations

Israel has a large number of religious denominations made up of people who belong to its non-Jewish minorities. The question of civil marriage affects them just as much as it does the Jewish population. Therefore, we must consider the implications of terminating the religious monopoly over marriage and divorce for a variety of religious groups in Israel, an issue that shall be discussed in the next section. In this subsection we shall attempt to clarify the current status of civil marriage and the recognition accorded to it by the non-Jewish religious courts. Within the limited scope of this paper we shall not be able to examine all of the religious denominations, so we have chosen to focus on the position of the Sharia court, which deals with matters of marriage and divorce within the Muslim minority, which is the largest religious minority in Israel.[77]

Matters pertaining to Muslim marriage and divorce in Israel are dealt with, as we have just noted, by the Sharia courts and on the basis of the Muslim personal status legal code.[78] While the rabbinical courts have

developed a doctrine which grants some validity to civil marriage, the Sharia courts consider civil marriage to be completely invalid. This difference did not originate out of thin air, but is a product of the different historical processes that the Jews and Muslims have undergone. Jewish law's encounter with modernity over the past two centuries has been intense and powerful, and generated a significant interaction between the two. The encounter between Jewish religious law and civil law, especially concerning family issues, placed a challenge before halakhic decisors in Western countries, who needed to provide answers to questions arising under these new circumstances. In the Muslim society, such questions were less relevant, up until recently.[79] In Israel these differences were intensified due to jurisdiction conflicts that were more greatly characteristic of the civil court's relationship with the rabbinical courts than with the Sharia courts. Even the basic conflict concerning the relationship between state and religion occupies the Israeli Jewish population to a much greater extent than it does members of other religions.

In a verdict issued recently in the Jerusalem District Court, the court quoted the Sharia court's opinion concerning the status of civil marriage:[80]

> In the situation presented to us, where the husband is a Muslim and the wife is Jewish, and according to the wife's deposition from March 11th, 2009, the couple were married in a civil marriage ceremony in Cyprus. Since Muslims must undergo a Muslim religious marriage, and since their marriage did not meet these conditions, it is therefore void. In order for their relationship to be terminated, the Sharia court orders them to separate at once. If they do not, the Kadi will have to separate them.

The civil marriage agreement is defined here as "void." This does not mean that the Sharia court recognizes civil marriages and henceforth permits them, but, as the district court correctly interpreted,[81] it means that the Sharia court declares them to be void *ab initio*. Muslim law does not, therefore, provide any solutions for mixed couples, or for Muslim couples who are interested in a non-religious marital relationship.[82]

However, the encounter and conflict between religion and modernity are currently also relevant to cases handled by the non-Jewish religious courts, including the Muslim one, and require serious consideration. The confrontation is complex, and is characterized by a dialectic of rejection and acceptance, or more precisely, by open rejection and covert acceptance. Dr. Moussa Abu Ramadan has characterized the Muslim courts in recent years as "having begun a process of purification of their rulings of any secular characteristics on the rhetorical and symbolical plane, and as having forbidden any links to secular legislation." However, at the same time, they incorporate in their verdicts, through interpretive tools, principles that originate in Israeli law, while presenting them as principles internal to religious Muslim law.[83] This takes place mostly because of the complex position in which the Sharia court finds itself, caught between the hammer of the civil courts and the anvil of social organizations (feminists and Islamic movement on opposite sides).[84] In this respect the situation of the Sharia court is similar to that of the rabbinical court, and it is easy to see the similarities between their responses to the present challenges.[85]

Civil marriage and divorce are therefore, in general, institutions foreign to the religious concept of marriage. There exists, as previously mentioned, the possibility of recognition of civil marriages by the Jewish religious legal system, and from the point of view of policy, agreement on such substantive matters is indeed desirable. However, the Sharia courts, both because of their religious nature and because in Israel the Muslim community is a minority that uses its religious autonomy in matters of personal status in order to strengthen its communal cohesiveness, tend to be less flexible and creative in such matters. This situation further highlights the need for a joint legal framework for marriage and divorce that would apply to all of Israel's citizens and communities. Such a solution would prevent a situation in which regulation of marriage and divorce, as well as the civil/religious tension that accompanies it, would concern only the Jewish public, leaving the non-Jewish communities to handle their own issues by themselves,

while national and cultural considerations might make it difficult for them to promote any social changes in their own communities.[86]

Summary of the Israeli Reality: *De Facto* Legitimacy of Non-religious Marriage

The legal arrangement of marriage and divorce is to a great extent a historical inheritance from the Ottoman period through the British Mandate, and consists mainly of a complete religious monopoly over marriage and divorce in Israel. This arrangement was incorporated (with respect to non-Jews) and formally included in the legal system of the State of Israel during its early years (with respect to Jews). Back then, it had significant political, religious, public, and ideological support.

Ideological division and extensive social changes have created a gap between legal arrangements and reality on the ground. The absence of a civil option leads to legislative reform initiatives, as well as to mechanisms that facilitate detours around the existing legal custom, both feeding off each other. These mechanisms emerge from social necessity, and are justified by ideological and moral considerations, which sometimes also provide them with legal backing. This is how the existing legal arrangement has turned into a formal relic whose time has passed and which is essentially no longer valid.

Comparative law shows us that in countries where religious law initially had exclusive dominance, civil law developed through a gradual process. During its early stages, civil law had only a secondary status, and applied primarily to intergroup relationships and to foreigners, and only later did it become the primary law in those countries.[87] Similarly, in the Israeli legal system sufficiently solid foundations have been laid in recent years which can lead to the introduction of civil marriage – the same foundations that were initially applied to relatively exceptional cases: mixed couples, foreign couples, and to some small extent to Israeli couples who underwent their civil marriage abroad. Will the Israeli legal system take the same steps as

those of other Western countries and transform its secondary civil law into a primary one? We have already presented the practical necessity for such a transition, and established that despite the emotional burden that this issue entails, the gap between the existing reality and the situation that would come about if civil marriage were to be introduced is constantly shrinking. The current situation, however, as we have argued above, is not satisfactory, particularly because the state has placed the issue of marriage and divorce exclusively in the hands of the religious communities, and avoided dealing independently with its role as society's marriage and divorce regulator.

Like All Other Nations? Marriage in the West

Before we discuss the civil marriage and divorce arrangement that ought to be implemented in Israel, we shall briefly describe a few of the arrangements that are in place in some Western countries. This presentation will complete the picture we have sketched thus far, which covered the social, legal, and halakhic state of affairs in Israel today. After we complete this sketch, we shall be able to turn to a principled consideration of the best replacement for it. An examination of the legal arrangements in place in Western states will help us choose the one most suitable for Israel – while taking the precautions necessary in any case of importing legal arrangements from a foreign country, especially in areas of social and cultural significance.

In all Western democracies, people can enter into civil marriages without any restriction having to do with religious or ethnic affiliation, as is required by the Universal Declaration of Human Rights.[88] In all of these countries it is also permitted to have a religious marriage in addition to the civil one. The main differences among these countries have to do with the degree to which their civil legal systems recognize religious marriage as legally admissible. On one end of the scale there are those countries where religious marriage has absolutely no legal significance. In other words, these are countries where religious marriage is completely "privatized." Moreover, there are countries where the social reaction against the church's monopoly over marriage has

been so strong, that the performance of a religious marriage before the civil one is considered a criminal offense. This is how it is in France, where the state has an exclusive monopoly over marriage, and the religious authorities have no say in it. Post-revolutionary France has attempted to secularize the institution of marriage and to release the church's grip on it, yet some today believe that this arrangement interferes with the freedom of religion.[89]

Some countries permit religious marriage, but require that it be performed only by certified religious personnel, and forbid by law any unauthorized religious marriage.[90] Other countries are indifferent to religious marriage. They neither recognize nor forbid it. This is the situation in Germany and in other Western European countries. This type of solution is perhaps the most appropriate for those who wish to separate the civil and religious dimensions of marriage.[91] However, it is doubtful that the Israeli legislature, or Israeli society, would be inclined to prefer it. Only legal systems in which the religious ceremony is not particularly significant, or in which a separation between state and religion is deeply rooted and well accepted, can afford to be legally indifferent toward religious marriage, i.e. exclude it from the normative legal system of the state.

Another system establishes a uniform civil framework for all those who wish to get married, within which each couple is free to choose their own wedding ceremony. According to this approach, which is in effect in the United States, the couple is presented with the choice among a range of ceremonies by means of any one of which they can become formally married in accordance with the law of the state. Those desiring to marry must first meet the civil requirements for receiving a civil marriage permit, and only after such permit is issued can they marry each other through whatever ceremony they choose. Even if the couple chooses to marry via a religious ceremony, they must turn to a person authorized by the state to perform marriages. The civil validity of the marriage is not dependent on its religious validity, but only on the marriage being performed by a certified person, and on the prior (marriage certificate) and the subsequent

(civil registration) requirements. In other words, the selection is between different types of ceremonies, not legal regimes. In any event, the only way to dissolve the marriage, from the state's perspective, is the civil way, and it is not possible to prevent a couple from filing a civil divorce even if the marriage was performed via a religious ceremony.

Civil marriage, according to this model, is not a competitive alternative to religious marriage. The state, for its part, recognizes civil marriage and divorce, and provides all its citizens with a civil legal framework for handling their family matters, in accordance with its understanding of the relevant personal and public interests. However, this is to a great extent a framework arrangement. The system encourages the couple to freely choose a ceremony that would be meaningful to them. In traditional societies, and to a large degree in secular societies as well, these are religious ceremonies. Performing the religious ceremony completes the couple's marriage. The marriage is subject to state laws, but the couple is of course permitted to adopt their own community's religious laws, via the relevant voluntary religious institutions.[92] As far as the state is concerned, it is enough for the ceremony to be performed by a legally certified person. The state does not intervene in the content of the religious law, and the religious law is not a part of the state's legal system.

Chapter 3:

Normative Aspects: Terminating the Religious Monopoly over Marriage and Divorce

Introduction

The burden of proof with regard to social arrangements lies on those who request or demand a change. Even if the existing arrangement is not necessarily desirable, it is not advisable to hastily change an entire system of current arrangements with deep historical and cultural roots. This is certainly the case with respect to change in a diverse society like Israel's – one in which there are deep and complex ties linking religion, culture, and nationality. In Israel, identities are often the cause of profound disagreements and every attempt to change the arrangements in place might easily lead to a confrontation between different social groups.

Israel is committed to the protection of human rights, including human freedom, which encompasses the right to marry, free of religious restrictions, the right to cultural freedom, freedom of religion, and freedom from religion. As previously mentioned, Israel is the only Western democracy which does not provide a civil legal framework for marriage to all its citizens. It is, however, possible to argue that Israel's unique arrangement (on account of which it submitted its reservations upon signing the International Covenant for Civil and Political Rights, which includes the right to marry without any religious restrictions) is derived from the fact that it is not "simply" a democracy, but rather a "Jewish and democratic State."[93]

In this chapter we shall examine this position. Our claim is that even if in the past the weight of religious, cultural, and national considerations – along

with coalitional considerations – was enough to maintain the religious monopoly over marriage and divorce among all Israeli communities, such considerations are no longer sufficient to justify the current situation. This is true for the following reasons:

- The religious monopoly seriously violates some of the basic human rights of individuals in our society.
- The state's "Jewishness" is not merely a religious matter, and therefore does not mandate a religious monopoly (and it certainly does not mandate or permit the imposition of a religious monopoly on other, non-Jewish communities).
- A religious monopoly imposes inappropriate pressure on religious institutions to satisfy social needs that are properly the concern of the state itself, and tends to alienate large sectors of the population from religion. For this reason, and others, we believe that altering the existing situation is also a religious interest.
- And lastly, the legal arrangement of familial relations in a complex society, which aims at preserving a multiplicity of diverse cultures that are not based exclusively on religion, must provide some civil freedom for people who do not wish to live according to the rules of the religious group to which they belong. We believe that this conclusion follows both from a commitment to human rights and freedoms and from a proper understanding of the best ways in which to preserve the important role of religions and religious cultures in contemporary Israeli society, including the will to preserve and develop a cultural and social sphere in which multiple Jewish identities are able to flourish.

The search for a new arrangement is obviously also a search for one that would best reflect the state's democratic values as well as its protection of human rights (whose relationship to democratic values is not as simple and clear as it sometimes seems to be), and Israel's cultural characteristics both as a Jewish state and as a state which respects the cultures of all its communities.

Religious Marriage as an Exclusive Arrangement – A Violation of Human Rights

Israel's commitment to preserving human rights is not only a consequence of its being a democracy. It is a separate commitment that is valid also in non-democratic states. In addition, there is no necessary contradiction between Israel's Jewish nature and its protection of human rights. On the contrary, the basic principles on which human rights are based are also firmly fixed in the realm of Judaism.[94] Therefore, pointing out the fact that the (orthodox) religious monopoly over marriage and divorce significantly abuses human rights is a serious, normative argument against the continued implementation of this arrangement in Israel, from the religious point of view as well.

And indeed, the religious monopoly over marriage and divorce abuses a large number of elementary human rights: the right to get married and establish a family without religious or communal restrictions, the freedom of religion and the freedom from religion (which is perhaps a private case of the freedom of conscience), and the right to equality. We shall examine these matters.[95]

The Right to Get Married and the Right to Divorce

At the beginning of this paper we indicated that nuclear families and intimate relationships are essential building blocks of individual welfare and social stability. We argued that living together as a couple enables individuals to bind themselves to each other and express the love and friendship that exist between them. In addition, the couple is the basic social unit that bolsters and builds a society.[96] The recognition of the importance of marriage and family is common to all cultures in all times and places: "That is why a man leaves his father and mother and is united to his wife, and they become one flesh" (Genesis, 2:24).[97] It is therefore no wonder that the recognition of the centrality of this need in people's lives has also found its expression in the basic covenants concerning the protection of human rights in international

law. These covenants have reflected the awareness of the fact that during human history, marriage has at different times been restricted for reasons of religion, communal affiliation, or other concerns – and have attempted to nullify these restrictions. And indeed, the Universal Declaration of Human Rights determines that "Men and women of full age, without any restriction due to race, nationality or religion, have the right to marry and to found a family."[98] The right to get married is therefore one of the basic human rights. Human rights are granted to all people whatsoever, and the state is obligated to prevent, or to minimize as much as possible, the violation of these rights.[99] Indeed, this declaration does not specifically determine that a state must permit its citizens to enter into civil marriage, but it seems that declaring that the right to establish a family by way of getting married should be "without any restriction due to religion" is not compatible with a religious-orthodox monopoly over marriage and divorce. It certainly is not compatible with religious restrictions that prevent a couple from getting married (such as the case of the religiously disqualified). And indeed, the State of Israel has been aware of the fact that the legal situation prevailing within it is incompatible with international law, and has attached a relevant reservation to its signature of the International Covenant for Civil and Political Rights.[100]

The right to get married in and of itself is a complex right.[101] It includes the right to establish a family via marriage. It includes the right to choose a spouse without any restrictions having to do with religion or communal affiliation. It includes the freedom to choose a desirable type of marriage ceremony. And it also includes a certain measure of freedom pertaining to the extent of the commitments involved in the marriage. The international covenants specifically state that marriage must be based on free choice, and that it is necessary to make sure it is based on equality between the two partners.

The religious monopoly over marriage (and divorce) interferes with the right to get married in several ways. First, religious law places on

those who are subject to it restrictions pertaining to the identity of their spouse. Most religions do not allow interreligious marriage, and within each religion we can find additional restrictions (such as in Judaism, the prohibition of a Cohen marrying a divorcee). Second, the requirement of an exclusively religious marriage interferes with the couple's freedom to choose the character of their wedding ceremony as they see fit, whether it be an alternative religious ceremony (for Jews, a Reform or Conservative ceremony), or a ceremony devoid of religious features.[102] It also impinges upon their right to divorce, which is highly restricted by religious law.[103] As previously mentioned, such restrictions, especially on the identity of the person one may marry, have become more severe from a human and social standpoint in the light of various demographic changes Israel has undergone.[104] The difficulty increases when the marriage restriction is based on a religious law that may lack any clear validity or justification under the circumstances of modern life.[105]

We would like to emphasize that we do not contest the couple's right to choose a religious marriage, all of its obligations, privileges, and common characteristics included. We do claim, that the state cannot force such a way of life on its citizens. The nature of the institution of marriage, beyond the basic requirements that the state must set, should be determined by the free, personal choice of the couple themselves. In this respect it should be noted, that we believe that the halakhic framework for marriage and divorce does allow for egalitarian models, as well as the free choice granted to the couple to terminate the marriage, similar to that granted to them to create it.[106]

Concerning same-sex partners, Article 16 of the Universal Declaration of Human Rights specifically mentions "Men and Women", which means that this article does not establish the right of partners of the same sex, two males or two females, to marry each other. Perhaps if that article had been written today, it would have been phrased differently, but there is no certainty of that because a substantial portion of the states of the world still regards the

recognition of such a marriage as impermissible. However, the legislatures of some states have already decided that it is appropriate to recognize the right of same-sex partners to marry each other (New York, Canada, Spain, the Netherlands, and more). In other states, it was determined that despite the lack of particular legislation, same-sex marriage should be recognized judicially ("judicial legislation") on the strength of the combination of the right to get married and the right to equality. We believe that it is important that this issue be determined democratically, and according to our proposal – such a determination would be required along with the establishment of a civil legal framework for marriage and divorce.[107]

As far as divorce is concerned, the situation is complex. It is true that divorce was not included, for a variety of reasons, in the Universal Declaration of Human Rights.[108] However, we believe that the right to divorce is no less important than the right to get married: the right to divorce expresses every person's right to freedom, and the individual's autonomy to decide not to be bound to someone to whom he or she no longer wishes to be connected.[109] In this context it should be emphasized that there is a great difference between prohibiting divorce and establishing a restrictive divorce arrangement, and that not every such restrictive arrangement violates the right to freedom and autonomy. For example, the legal system sometimes restricts the right to divorce for various reasons, such as the prevention of too-hasty divorce, the protection of the financial interests of both parties, or the protection of the wellbeing and safety of the children. Therefore, the process of formulating the civil divorce laws will have to include a discussion on the question of the reasons for divorce and the circumstances under which it would be permitted. In effect, such a discussion would reach beyond the implications of human rights. The rules, which would require the couple and the legal system to attempt rehabilitation of the relationship and to examine alternative possibilities other than divorce, can send a message concerning the importance of the institution of marriage. However, the legal system must not ignore the fact that over-complicating

the divorce procedures might encourage divorce seekers to live with new partners without taking the trouble to marry them.[110]

In the current situation, religious law in Israel places restrictions on the right to divorce, and these restrictions significantly violate the freedom of those (mainly women) who wish to divorce.[111] The law also fosters an undesirable situation in which each of the partners rushes to file a divorce suit either at the rabbinical court or the civil family court, because the case will be dealt with where it was first submitted (in many cases the man would prefer filing with the rabbinical court, and the woman with the civil court).

Where the need for a religious marriage and divorce is a voluntary matter that concerns the religious partners themselves, the complication of divorce procedures is mainly an inner-religious problem, and the challenge is dealt with by the halakhic decisors and the individuals who choose the religious route. And yet, even under such circumstances, the civil law must sometimes intervene in order to resolve situations that cause extreme distress, as indeed occurs in many Western states. However, it is clear that in a legal system that sanctions a religious monopoly over marriage and divorce, this monopoly creates a problem for the entire population.

Freedom of Religion and Freedom from Religion

The demand to terminate the religious monopoly over marriage and divorce relates not only to the realization of the right to get married in light of the difficulties and restrictions imposed on those who enter into a religious marriage. Another significant aspect of this issue is also involved: even if no restrictions are applied to the marrying couple, should the state be allowed to force them into a marriage of a religious nature, which very often stands in contradiction to their own beliefs? In other words: Do not freedom of religion and freedom from religion compel the state to establish a civil regulation of marriage and divorce?

The law in Israel forces those who wish to get married to do so in accordance with the religious law of the religious denomination to which

they belong. It does not allow for any choice between various types of ceremonies, and not even between alternative ceremonies within the same religion. Therefore, Jews who wish to marry are obligated to do so via an orthodox marriage ceremony. Reform or Conservative ceremonies are not recognized as valid. In this way, the current situation in Israel contradicts the principle of freedom of religion, whose importance has been acknowledged in the Universal Declaration of Human Rights,[112] and integrated into all the Western legal systems.[113] The principle of freedom of religion leads us to the conclusion that the system should provide a variety of marriage options, which would grant each citizen the freedom of religion to which he or she is entitled. However, it is not only a matter of choosing among various religious marriage ceremonies, but also the ability to choose a ceremony completely devoid of any religious characteristics. This is what freedom from religion is. It enables a person to demand that the court recognize at least the possibility of the choice of a civil marriage.

The freedom from religion has been recognized in several Supreme Court verdicts.[114] Statman and Sapir indeed claim that freedom from religion is not self-evident, since quite a few justifications that apply in the case of freedom of religion are not valid in freedom from religion cases (like the argument concerning religion's social importance, which is relevant for freedom of religion, but not for freedom from religion). However, they claim that we can base the requirement for freedom from religion on the correlation between the violation of freedom of religion and of freedom of conscience.[115] Not every case of religious coercion violates one's freedom of conscience (for example, when a person has to drive a longer way because the shorter road is blocked on Saturday), but religious coercion is definitely present when a secular person is forced to realize an important basic right via a religious ceremony. Forcing recourse to religious marriage is a clear example of such a situation.[116]

One has to take note of the principled character of the resistance to religious marriage, which in many cases is not related to the actual contents

of the marriage and divorce laws. The very need to have recourse to a religious institution for establishing a relationship whose primary content is so strikingly intimate, when the citizen does not accept and may even despise its authority, seems incompatible with the freedom from religion.[117] One should also take note of the emotional character that such resistance may assume. The very idea of a coerced religious ceremony might stir up extreme emotional responses. It leads thousands of Israelis who are not even religiously disqualified from marriage to enter into civil marriage ceremonies in Cyprus, or by other means, in order to express their resistance or their indifference to a coerced religious ceremony.

The sensitivity to religious coercion and the violation of one's freedom of conscience is most noticeable among the Jewish population. In the non-Jewish religious denominations the demand for ending the rule of the religious law is not pronounced. On the contrary, this religious control is considered to be an integral part of the religious and legal autonomy these denominations enjoy. However, an approach which forgoes a comprehensive solution to the problem and makes do with a partial, exclusively Jewish solution, would be problematic: if the state must not force religious laws on those who do not voluntarily subject themselves to a religion's authority, then it should reject such forced rule on the part of all religions.[118]

The Right to Equality

In addition to the impact of the religious monopoly on the right to get married, the freedom of religion and the freedom from religion, there is also the impact on the right to equality, which we have only briefly addressed so far. Equality is a basic human right, and it is not incidental that the Universal Declaration of Human Rights states in its first article that "All human beings are born free and equal in dignity and rights". This right is also reflected in matters pertaining to marriage, in the right to get married and in various rights one has during marriage and after its dissolution. However, the law

in effect in Israel with regard to matters of marriage and divorce violates this equality in several ways, and especially (in Jewish halakhah) the right of gender equality as it pertains to the process of leaving a marriage. Since even though according to the halakhah in effect today the agreement of both parties is required for the divorce, there are still significant gaps between the parties, such as: the opportunity that is given to the husband alone to marry a second wife or to force a divorce on the wife, upon the approval of a hundred rabbis, and the sanction affecting only the wife that stipulates that any children she might give birth to outside her formal marriage would be considered illegitimate (*mamzerim*).

The violation of the right to equality appears in other aspects of the existing arrangement as well, such as in the lack of equality which exists between the various types of religious ceremonies, those sanctioned by the state and those which are not; and in the lack of recognition of the rights of interreligious couples or same-sex couples. In the end, some might claim that there is an inherent inequality in a number of aspects of the religious institution of marriage – social aspects, aspects pertaining to property, and others – an inequality which is perpetuated by the monopoly of religious law.[119]

The conclusion that the legal situation of a religious monopoly is incompatible with the recognition of certain human rights, like the right to get married, freedom of religion, freedom from religion, and the right to equality, is not, by itself, a solid enough reason for changing the existing legal arrangement. One could argue that the cost of such a change is too great, and that it is enough that the existing social arrangement in Israel provides in practice acceptable ways of fulfilling these rights. Statman and Sapir, in their above-mentioned article, maintain that a "symbolic preference" for formal marriage over cohabitation is a legitimate act from a liberal point of view, as long as the cohabiting couples are given equal rights. The legitimization of a preference for the formal marriage route includes, according to them, a preference for the religious routes as well, as long as the

above-mentioned condition is met.[120] We do not accept this position. The problematic character of the current legal situation does not consist solely of choosing between two equal routes. The heart of the problem is that the current religious law might prohibit couples who would otherwise choose the marriage route from doing so, and force them to live in cohabitation (such as interreligious and religiously disqualified couples). For such couples, the choice of cohabitation is at the very least an involuntary one; it does not reflect an autonomous decision, and therefore does not constitute a legitimate arrangement. Beyond the practical difficulties that still apply in the "improved" socio-legal situation, one must not underestimate the importance of principle and general considerations, both those concerning the protection of human rights, and those concerning the state's role in the legal arrangement of such matters as personal status. This entire set of considerations requires a principled change, and not only piecemeal corrections of the remaining practical problems.

Religious Marriage in a Multicultural Society

The serious and varied violations of human rights could serve by themselves as a strong argument for terminating the religious monopoly over marriage and divorce. However, quite apart from these violations, the religious monopoly also promotes some important values that some people describe as an integral part of the human rights dialogue, such as the right to culture. In this light, for example, some claim that "human beings have a right to maintain a culture – not **any** culture, but their own."[121] This right has several aspects to it: maintaining a certain way of life without disturbance, while being acknowledged by society at large, and while being allowed by the state to develop a unique way of life.[122] A number of justifications have been provided for the right to maintain a culture, including, for example, basing it on the right to liberty, which includes the possibility, granted to every person, to make his or her choices from within his or her own cultural context.[123]

The justification for the right to maintain a culture is usually propounded by minority groups that are forbidden by state laws to preserve certain important elements of their cultural identity because these elements stand in contradiction with the laws of the state. In order to evaluate this claim in relation to Israel's marriage arrangement we will need to differentiate between the natural requirements of the right to maintain a culture, which we would like to maintain in Israel, and aspects of the religious monopoly which are not derived from this right. In this chapter we shall review several considerations, based on the right to maintain a culture, advanced to support the existing arrangements. These are important considerations. We believe, however, that they justify respecting the couple's right to choose the route of religious marriage and divorce, but not forcing everybody to do so.

Communities' interest in preserving their social cohesiveness. Undoubtedly, the religious way of life is a very important part of the culture of those who observe the commandments (and sometimes it even defines it), and religious marriage is perceived as symbolically very significant for the social groups that seek to preserve it (which naturally exceed in size the group that observes the commandments). Moreover, every cultural and national group seeks to preserve its own cohesiveness. Permitting civil marriage might damage the existing cohesiveness of the Jewish public for two main reasons: the first is the fear that the civil marriage framework would make room for marriages between members of different religious communities, and the second is that civil marriage would encourage the creation of "genealogical trees," and the *de facto* division of Israeli Jewish society into several groups that would not establish ties with one another. Such considerations are not only limited to the Jewish population in the state of Israel. Claims for recognition of a culture on the part of the state are voiced even more ardently by minority groups that are threatened by the prospect of assimilation into the majority culture.

In our opinion, despite such considerations, the state's Jewish nature – even if interpreted as a religious characteristic, an interpretation which, as

previously mentioned, is controversial – does not lend any special force to the argument for a religious **monopoly** over marriage and divorce. This is a significant argument, which we accept insofar as it calls for recognizing the full right of individuals to choose a religious marriage, and insofar as it favors the adoption of educational positions that encourage individuals to marry within their culture in a way that authentically reflects it. However, this argument does not support a legal framework that prohibits a non-religious marriage. Moreover, such a monopoly might even weaken the cultural-educational significance of communal and cultural cohesiveness.

Contribution to the stability of marriage in society. And yet another cultural consideration in favor of preserving the existing social arrangement: The gap between the religious and civil legal systems, and a situation of a multiplicity of cultures in general, and religious cultures in particular, could also reflect gaps between the various approaches towards the institution of marriage, and towards the state's role in promoting one or other concept of family and marriage. The religious concept of marriage tends to be a conservative one, which includes serious restrictions on the dissolution of marriage and on extra-marital relationships throughout its duration. Non-religious concepts can vary between a conservative and a liberal-individualistic approach towards the institution of marriage, which might see marriage as a voluntary framework, and thus leave the decision about its dissolution to the couple itself (or to one member of it, unilaterally). Another possible outcome of such an approach is a lenient attitude towards extramarital relationships.[124] A state that grants a monopoly to religious approaches would necessarily tend to be conservative, while a civil approach can vary between an agnostic approach towards the institution of marriage and an alternative approach that is not necessarily influenced by religious tradition. A religious approach presents itself as fulfilling central social values, and especially the value of family. A liberal-individualistic approach makes the personal interest of the members of the couple just as central.[125] Therefore, forcing the religious institution of marriage on the entire public

could serve a general social interest in this respect as well, by helping to preserve the stability of the institution of marriage in society.

From our point of view, this argument as well, which concerns the will to maintain the stability and to fortify the importance of the institution of marriage, cannot justify a religious monopoly. Indeed, we do believe that the state should respect the institution of marriage and cherish its stability – a position that is based, among other things, on the state's Jewish nature. However, this important goal does not necessarily require a religious monopoly. Indeed, a monopoly would necessarily encourage a conservative approach towards marriage, but it is still possible to imagine choosing a civil legal framework that would also reflect a conservative approach, or at least an approach that respects the institution of marriage and is interested in preserving its stability, if this is the legislature's choice. Society, by means of the civil framework, could adopt a "non-permissive" approach towards the institution of marriage, and reflect it through arrangements for entering into marriage and especially through arrangements for leaving it in accordance with civil law. Moreover, it is not clear at all that a religious monopoly really promotes marriage stability. On the contrary, the religious monopoly actually reinforces other familial patterns, such as cohabitation, and thus contradicts the goal of those who see religious marriage as bedrock of marriage stability in society.

Recognition of Multiculturalism. One can also justify a place of honor for religious ceremonies in the state's legal framework on the basis of a pluralistic-multicultural approach that promotes the preservation of the unique characteristics of each social group, and that recognizes the internal value of each particular culture. A multicultural approach would sometimes accept an offense against other values, as long as it is not a significant offense to core values.[126] In our context, this approach necessarily leads to an examination of the following claim: religious marriage is an outstanding cultural expression. The interest in preserving the cultural dimension is very significant, and therefore it justifies the state's recognition of religious

marriage as one of the formally accepted ways of carrying out a marriage. However, can the cultural dimensions also justify creating a religious **monopoly**, claiming that it alone can really preserve society's communal cohesiveness? From this point of view, the cultural and national significance of such a monopoly takes precedence over the violation of the couple's rights by the restrictions and requirements of an exclusively religious marriage.

The question that we face here is not the question of selecting the legal arrangements that seem most beneficial to the leaders of one or another religious, national, or cultural group (even though the answer to such a question is not simple either). Our question concerns the position of the **state** in a society characterized by significantly different approaches towards the place of religious observance in its cultural identity. Such a state can respect the will of its various communities to preserve their uniqueness, and a Jewish state is specifically obligated to preserve the Jewish aspect of the society. However, it must at the same time also provide its citizens a civil legal framework that will enable them to fulfil their rights. Therefore, a multicultural approach also means recognizing the equal value of various approaches, and it must not prevent the movement of individuals from group to group.[127] The freedom to choose among several options is, as Joseph Raz notes,[128] an expression of human autonomy, and it cannot be restricted offhandedly.

In addition, from a practical point of view in a pluralistic society, or at least a tolerant one,[129] coercion is in fact a hindrance, and might cause more damage than benefits. Forcing the religious law as an obligation on the entire public, including those who do not willingly accept its authority, causes significant educational damage and alienates the public from religion. On the other hand, the multicultural approach suggests a different way of shaping the developing society: instead of intercultural battles, which reflect a derogatory approach of one culture towards the other, it suggests dialogue and mutual exchange. This type of connection between cultures would lead Israeli society into becoming a "particularly rich, multicultural society,

which is shaped by processes of dialogue, mutual enrichment, learning from the other and opening up to him, while understanding that no culture has a monopoly over the 'truth' or the 'worthy', and understanding that there is no one single 'good' worth living for, but that there are multiple 'goods' that exist in various societies."[130] Needless to say, this approach does not regard the religious monopoly over marriage and divorce as a contribution to the formation of such a society. On the contrary, establishing a civil legal framework for marriage and divorce is the appropriate way that enables each person to exercise freedom of choice.[131] This path does not negate the personal, religious, and cultural importance of religious marriage but rather turns its selection as a statement of one's culture or heritage into a free, individual choice. One could even argue that this makes religious marriage more important.

We should further mention that with respect to a primary matter – that of interdenominational marriages – what is involved is in fact the fear of losing the cohesiveness of the Jewish people, and a possible result of this fear is sub-communal seclusion. Despite this fear, many Jewish people resist the religious monopoly, both for the above-mentioned reasons and because they believe that in the existing social reality there is actually no real guarantee against interreligious marriage or any chance of preventing Jewish sub-communal seclusion in the hope of retaining the purity of the institution of marriage.

Indeed, this fear is highly charged and complex, and even the court deals with it in a very gingerly fashion. Therefore, when the court was asked to decide on the question of interreligious marriage performed abroad, Justice Rubinstein wrote:[132]

> I am indeed not ashamed to admit that mixed marriage, for long a painful subject (see in the days of the Return to Zion, Book of Ezra, chapter 9: 1-2, 12; and chapter 10; Book of Nehemiah, chapter 9, chapter 31), stings my heart due to its historical significance and existential effect on the size and condition of the Jewish people, and this is not the place to expand on

> this issue. But certainly, this pain must not allow us to violate the human rights of any individual whatsoever, including the right to get married, and we must not turn a blind eye to the Israeli reality in which many people are legally prohibited from marriage; and so, for instance, no solution has yet to be found for the religiously unaffiliated who are eligible to immigrate to Israel under the Law of Return...

This dilemma, therefore, still stands, but the significant violation of human rights that the existing arrangement causes, as well as the analysis of the role of state and its legal system in a diverse society, lead to the recognition that the state law must form a binding legal framework for marriage without any religious restrictions or monopoly. Such a framework would naturally not prevent the religious, cultural, or national leaders of society from taking educational measures that encourage members of their communities to form marriage ties that will enable them to lead full cultural lives.

Religious Policy Considerations

The Jewish opposition to civil marriage from a religious point of view usually focuses on the disastrous consequences that might weigh down individuals and the community on account of the religious requirements concerning marriage and divorce. From the halakhic point of view, separation without performing a religious divorce where a divorce is necessary might lead to illegitimate children (*mamzerim*). The multiplication of such children, along with an increase in the number of marriages between Jews and non-Jews, might eventually lead to the creation of genealogical trees and to the division of the Jewish people into two (or more) separate groups.

Such arguments were already made during the first years of the State of Israel. Zerach Warhaftig, the then-deputy minister of religion, declared during the Knesset discussions that preceded the legislation of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law:[133]

> Nothing is more important for the nation's unity than a uniform marriage and divorce law. The Jewish Law concerning marriage and divorce is the

> binding law, and any deviation from it could lead to a severe blow to the nation's unity and could result in its division. If civil marriage and divorce laws were to be implemented, it would necessarily lead to the division of the people of Israel, and two separate nations would emerge. Just like there are Jews and Muslims and Christians, there would be two separate categories of Jews.

When examining the resistance to non-religious marriage in light of the above-mentioned argument, it is important to distinguish between the formal and principled level and the practical level. On the level of principle, perhaps surprisingly, the problem is relatively easy to resolve. The claim is that formally recognizing civil marriage and divorce might lead to multiple cases of Jews marrying and divorcing by means other than halakhah. In cases where a religious divorce is necessary to dissolve a civil marriage,[134] severe repercussions could ensue, such as extramarital relationships and illegitimate children.

However, the great majority of rabbinical decisors, as well as the religious courts, do not consider civil marriage to be religiously valid, and the need for a religious divorce in such cases is relevant only as an extra-strict requirement. This requirement does not indicate a perception of such marriages as real marriages, which could potentially cause the above-mentioned problems.[135] Moreover, even those who attribute religious validity to civil marriage would not declare the children born outside of such marriage (i.e. children who would be born through a second marriage after the civil-married couple separate without obtaining a religious divorce) as illegitimate.[136] Rabbi Meir Isachar Mazuz summarizes:[137]

> In fact, there is obviously no doubt as to the child's legitimacy. The rabbinical court rulings in Israel, which sometimes require a strict divorce and are sometimes lenient in cases of a missing husband, prove that there is no fear of illegitimacy, because if such a fear had existed, the wife's second marriage would never have been allowed to take place...

In practice, in conclusion, a child should not be seen as (even) possibly illegitimate (*safek mamzer*). As Rabbi Moshe Feinstein put it: "We try to obtain a *get*, if we can, due to the stringency in halakhic decisions in the area of marriage and divorce… But as far as the child is concerned… there is no need to be strict, even *lechatchila* (i.e. even as a precautionary measure)."

Yet, even if civil marriage raises no problem of principle, after a civil framework has been established, it would be hard, in practice, to prevent a religiously-married couple from obtaining a civil, but not a religious, divorce.[138] In many cases, parallel ceremonies are performed, both civil and religious. In addition, a civil marriage framework would enable interreligious marriages, and probably religiously forbidden, incestuous relationships (such as the marriage of a man to his wife's sister, which is religiously forbidden even after the man has divorced his wife).[139] Therefore, from a halakhic point of view, even if civil marriages do not raise genealogical problems, for practical reasons the court is obligated to examine each case individually and make sure that such problems do not occur. Therefore, the claim concerning the halakhic implications of civil marriage crops up again, and with it, the fear that permitting civil marriage would bring about genealogical listings and cause an inner division in Jewish society. However, such problems are practical problems, and therefore their solution is a question of a religious and civil policy, matters with which we shall deal in the section that explains our proposal concerning civil marriage and divorce.[140]

Along with these problems, establishing a civil marriage framework could actually **solve** some serious halakhic dilemmas. Religious marriage includes a "prohibitive" dimension, i.e. a religious obligation to avoid any concurrent bigamous relationships. This obligation is placed on the husband by authority of the Rabbi Gershom's ban on bigamy or other rabbinical regulations.[141] As far as women are concerned, the religious prohibition is infinitely more severe. An intimate relationship between a married woman and a man who is not her husband is considered incest, which is of course forbidden in the Torah itself, and children born out of such relationship

are liable to be considered illegitimate.[142] Consequently, the "strictness of the married woman", i.e. the strict attitude towards a married woman who might carry out an intimate relationship with a man who is not her husband, is a consideration that leads to a strict attitude towards many other halakhic aspects of marriage and divorce.[143]

Undoubtedly there is a gap between the modern, social view of extramarital relationships, which is liberal, individualistic, and permissive, and the halakhic view of this matter. It is a significant gap that derives from different attitudes towards the freedom of the individual in the sexual realm. Halakhah seeks to delimit this freedom in every possible way, while the liberal approach sometimes legitimates such relationships. At the very least, the liberal approach would claim that there is no room for legal intervention in such cases,[144] while the halakhah would place a host of restrictions, and even sanctions, on extramarital sexual relationships.

The attitude of certain sectors of Israeli society towards premarital or extramarital sexual relationships is sometimes derived from a liberal-permissive approach (we should emphasize here that the division of opinion on this issue is not clear-cut, not within the diverse religions and not between them, and it is not meant to characterize the differences between one social group and another). Conservatism often goes hand in hand with religious observance, but not always. Some non-religious groups are also conservative in practice, and there are manifestations of a permissive and individualistic attitude in religious societies as well. However, the tendencies described above have a strong presence in the liberal worldview, and are at least to some degree indicative of its approach. It is a forgiving, and to some extent an accepting and sympathizing approach, and it has become ever more lenient over the years. The former president of the Supreme Court, Justice Aharon Barak, described the situation well enough:[145]

> There is no doubt that preserving the family unit is an integral part of the public interest in Israel, even today. The public interest supports a

> stable marriage. The institution of marriage is central to our society... However, over the years, various social perceptions of the termination of a marital relationship and the phenomenon of divorce have changed... even the revulsion toward extramarital relationships is not prevalent in Israeli society today, and the institution of cohabitation, whose development was aided by both the legislature and the courts, is proof of that.

Barak's opinion deals with a promise of marriage made by a married man to an unmarried woman. What he writes about the declining "revulsion against extramarital relationships" reflects an accepting attitude not only towards relationships between single people, but also towards extramarital relationships, which are the subject of this judgment.

Even if we adopt a conservative approach and say that such extramarital relationships are also regarded negatively from a non-religious, social point of view, there would still be a significant gap between the halakhic views on this matter and those prevailing in the general Israeli society. This gap finds expression in borderline situations, such as when the couple is formally married but practically separated. An intimate relationship of such married people with others would seem to some Israelis to be completely legitimate, while the religious view of such a situation would be strictly formal: the couple is married, and as far as the woman is concerned, the restrictions pertaining to married women fully apply to her, and any children she might bear from the extramarital relationship would be considered illegitimate.[146]

A couple undergoing a religious marriage enters, from a religious perspective, into the realm of halakhah. When the members of the couple do not consider themselves to be subject to halakhah, then the socio-moral code according to which they lead their lives is incompatible with the one according to which they got married, and therefore they might, from a halakhic point of view, violate extremely strict prohibitions. A civil marriage nullifies such fears, and provides the couple with a normative social framework that is compatible with their way of life and their conception of the institution of the family.

These are religious considerations and they should lead the halakhah to support civil marriage.[147] This, indeed, is the position arrived at by the former Chief Rabbi of Israel, Rabbi Eliyahu Bakshi Doron, on the basis of this as well as additional religious considerations:[148]

> The law today presents many obstacles – a large number of those legally getting married do not adhere to the Torah and its commandments, and do not abide by the prohibition of a married woman. So in fact, their marriage in accordance with the law of Moses and Israel actually causes them to violate this strict prohibition, thus making the wife forbidden to her husband on account of her betrayal, and causing the couple to live their whole lives in sin.

As Rabbi Bakshi-Doron further indicates, the borderline cases make the problem even worse:

> The law obligates the couple to marry in accordance with the law of Moses and Israel, but when the match fails, there is no legal obligation to get a divorce; and if there is no mutual agreement to get a divorce, the woman remains bound to her husband. Those of the women who do not observe the religion go on to live with new mates without having obtained a divorce. Some of them bear new children, thus increasing the number of illegitimate children in Israel. Had they not been religiously married, their status would have been similar to that of single women, free of the restrictions on married women, and their children would have been qualified to marry. Therefore, the law that obligates to marry these women according to halakhah actually presents many obstacles.

And here he continues with what is obviously a rhetorical question:

> The question is: Has profit from the law not been negated by the loss? Is it right in our times to sacrifice the sanctity of Israel on the symbolic altar of the identity of the Jewish state, and to continue to force a marriage according to the law of Moses and Israel even on one who is not interested

> in it, and whom it would be reasonable to assume does not hold to the concept of "a man's wife?"

In light of the problems raised here by Rabbi Bakshi-Doron, there are some who believe that it is appropriate to clasp the rope from both ends: on the one hand, to obligate any Jewish person in Israel to marry in accordance with the law of Moses and Israel, but on the other, to perform the marriage in such a way so as not to abide by the religious requirements (e.g. marriage performed with unfit witnesses). We would thus have a quasi-halakhic-Jewish ceremony, which is in fact not a marriage in accordance with the law of Moses and Israel. We agree with Bakshi-Doron that this is an unworthy, unethical proposal.[149]

We should emphasize that for Rabbi Bakshi-Doron, the choice between a marriage in accordance with the law of Moses and Israel and civil marriage is actually one that concerns the tension between the will to preserve the "sanctity of Israel" that requires a civil marriage framework, and the will to maintain a "Jewish state" that allegedly requires preserving the religious monopoly over marriage and divorce. According to the analysis that we presented above, this tension is not real, because the Jewish nature of the state, from a cultural, practical, and symbolical point of view, does not in any way require preserving the religious monopoly over matters of marriage and divorce in Israel.

We should mention, in passing, another aspect of this subject that requires some attention in the context of the set of religious considerations, and that is the problem of chained wives and husbands (*agunot*) and its connection to civil marriage.[150] We believe that the halakhah has its own internal tools to deal with this situation. Nevertheless, as far as the religious decisors (or at least those of them in influential positions) are unwilling or unable to apply the tools at their disposal to solve this problem, the calls for using external solutions in these cases keep growing louder.[151]

With regard to our issue, a legal civil marriage framework could make the right to get married and the ability to get a divorce much easier to

realize, and would thus increase individual freedom and freedom of choice, as well as solve the problem of refusal of divorce for those who do not accept the yoke of the halakhah. Moreover, much, if not the great majority of the Jewish community in Israel would continue to choose the route of religious marriage – and the writers of this paper even hope that this tendency would remain strong. Among them, there will be many who will not be satisfied with a civil divorce procedure, and for them there will still be the problem of *get* refusal, and the rabbinical authorities will have to deal with it, since its solution is first and foremost halakhic.[152] We can assume, however, that once a worthy alternative to religious marriage is offered, the rabbinical establishment will have to become flexible and alleviate the suffering of men and women who have been denied divorces, and this in light of the "competition" which "market forces" would facilitate in the area of family status.[153]

Chapter 4:

Terminating the Religious Monopoly over Marriage and Divorce: From Theory to Practice

Background: Past and Present Proposals for Civil Regulation of Marriage and Divorce in Israel

Proposals for restricting or terminating the religious monopoly on marriage and divorce have long been an integral, continuous part of the legal, academic, and religious agenda in Israel. The various options, their advantages and disadvantages are continuously debated in these three arenas, and from time to time receive practical political expression in the form of bills that attempt (unsuccessfully) to introduce a certain measure of civil marriage and divorce in Israel. Political constraints, as well as the complexity of Israeli society, make the acceptance of these various proposals difficult. Some of them are clearly compromise proposals, which seek to bridge various gaps by way of mutual concessions, although we believe, and will later show, that the cost of some of these concessions is too high.[154] Several of these proposals were shaped into a law, which was recently passed in the Knesset – the Civil Union Law for the Religiously Unaffiliated. However, as was previously mentioned, this is a minimal compromise, whose potential benefits are very doubtful.[155] In the present framework, we cannot review all of the proposals made in this connection, but only the main ones. It is worth noting that they all have in common the recognition of the pressing need to terminate the (orthodox) religious monopoly over marriage and divorce.

The main models we shall examine are divided into two main categories: the first category proposes retention of the religious route, but adds a civil route to it. This alternative comes in several versions: a minimalist version, which supports civil marriage only for those who are religiously disqualified from getting married; an extensive version of varying applicability, which proposes to establish two equally accessible alternatives, civil marriage and religious marriage; and a third version, which retains the exclusivity of religious marriage, but offers to establish alternative "civil union" arrangements that would be more or less inclusive. The second category consists of proposals for forming a uniform civil legal framework for marriage, while recognizing the validity of a variety of ceremonies. According to such proposals, the various cultural and religious groups and their traditions would be fully represented through their corresponding ceremonies (civil or religious, and of various religions and denominations), and yet, all marriages and divorces would be covered by the same civil umbrella. The various proposals in this category differ in the weight and significance each attributes to religious provisions within the civil legal framework, concerning, for instance, the granting of a civil marriage certificate following a civil, but not a religious, divorce.

We will say already at the outset that **we recommend adopting the approach of a uniform civil framework and multiple ceremonies**. In our opinion, only this approach provides a satisfactory solution to all of the issues we have raised. It affords the best protection for human rights, as well as the best way of advancing the important political, social, religious, and cultural interests of Israeli society. It also promotes a balance between maintaining civil cohesiveness and retaining the cultural uniqueness of various communities in society. And finally, it contributes to a proper balance between Israel's legal system and its cultural characteristics as a Jewish and democratic state.

The Religious Route and the Civil Route: Side by Side

Civil Marriage as an Escape Route for the Religiously Disqualified

In the past, there was a minimalist proposal that sought to introduce civil marriage but to permit it only to those who could not be wedded in Israel in accordance with the existing law.[156] This proposal preserves the principle that the religious law would apply to all those for whom it provides a way to realize their right to get married. Citizens who can get married through the religious system would not be able to choose non-religious marriage. On the other hand, the state would live up to its obligation and provide a formal, direct alternative to all those who **cannot** have a religious marriage. This proposal seeks to avoid the need for *post facto* litigation over the validity of the marriage, both to spare the couple the burden of a tiresome legal process and to spare the rabbinical courts the burden of sanctioning, directly or indirectly, an act of which they disapprove. It would enable every individual in Israel to marry within the state and in accordance with its laws, but would preserve the religious monopoly for those people who are permitted to marry via the religious route. Supporters of this proposal range from those who wish to limit its applicability only to people whose marriages are indeed forbidden *a priori* by the religious law, but are valid *post facto*, such as marriage of a Cohen to a divorcee – to those who have a more expansive approach and wish to extend this category to include everyone whom the rabbinate disqualifies from marriage, such as divorce-declined women, people whose Jewishness is in doubt, and even Jews seeking to marry non-Jews.[157] Obviously, only the expanded version of the proposal provides any solutions to the violation of the right to marry that exists under the current law. The first version preserves the religious monopoly, because it permits actual marriage only to those whom the halakhah itself would recognize as valid *post facto*.

The expansive version, even though it goes some way in the right direction, is also not sufficient, for several reasons. First, it does not enable anyone

who wishes to do so to enter into a civil marriage. From a civil perspective, the law thus forces upon the citizen a particular religious marriage route, and does not allow him or her free choice, freedom of religion (to those interested in an alternative religious route), or freedom from religion (to those interested in a non-religious route). Second, it makes no change in the restrictions imposed by the religious law on most of the state's citizens, often against their will, and thus, also from a religious point of view, its gain turns out to be a loss, as is the case with the current arrangement. Third, from a social point of view, this proposal creates a "sect" of people cast out from the "normal" institution of marriage, and for whom and only for whom, a civil marriage route is established, which is not open to the rest of the public. **In light of all this, we believe that the expansive version, and all the more so the more restrictive proposals, should be deemed manifestly unsatisfactory.**

The Two-Routes System: Civil Marriage and Divorce as an Alternative to Religious Law

The most widespread proposal for establishing civil marriage in Israel seeks to enact a civil law as an alternative to the religious law (henceforth also: the routes system).[158] According to this proposal, the current religious monopoly would be replaced by a system enabling the couple to decide which route, religious or civil, they wish to choose for themselves. If they wish – they could select the religious route; if they wish – they could marry by means of the civil route. This choice would continue to accompany them throughout their married life, i.e. those who got married by the civil route could only dissolve their marriage by way of a civil divorce, whereas those who chose the route of religious marriage could only dissolve their marriage through a religious divorce. This alternative is attractive because of the choice embedded in it between the two different legal systems, but choice is denied later, after the initial choice of marriage route is made. Even if a person (and in the decisive majority of cases, a woman) cannot dissolve his

or her religious marriage via the religious route, a civil dissolution would still not be available to him or her. The logic behind this restriction is the desire to avoid future illegitimate children (*mamzerim*), for if a woman who was married according to the law of Moses and Israel is allowed to obtain a civil divorce, the religious law would continue to consider her as a "married woman." The result would be that her future children from another man would likely be considered illegitimate.

The advantage of this alternative is that it makes possible a basic freedom of choice, as well as enabling all citizens to realize their right to get married (since the religiously disqualified and other restricted persons would be able to choose the civil marriage route), as well as a considerable measure of freedom from religion (since **any citizen** could choose to marry via the civil route). This alternative also has its advantages from the religious point of view, as well as some political appeal, since it preserves the existing characteristics of the current arrangement as far as the religious route is concerned, even though it removes its monopolistic power.

However, the two-route system also has important practical and principled disadvantages that lead us to the conclusion that it **must be rejected** as well. This system confronts the religious law with the civil law, while both laws are supported and sanctioned by the state. The state thus continues to avoid its responsibility to establish binding criteria for marriage and divorce regulations that apply to the entire population, and fails to issue the important principled statements it must make concerning the importance and conditions of the institution of marriage.

Another important difficulty with regard to this alternative stems from the fact that it does not allow for a full expression of the variety of attitudes towards religion itself, for it permits alongside the civil route only a single religious route – the orthodox one. This approach offers no satisfactory solution for those wishing to choose an alternative, non-orthodox religious route, or a non-religious route that still includes significant "religious" and cultural aspects. Such people would head for the "civil" route that would

be neutral and devoid of pronounced cultural and traditional content. Precisely for those who hope that the establishment of civil marriage would not weaken tradition but rather reinforce it, the system of only two routes, which conspicuously sets "religious" vs. "civil", is not a good one, particularly under Israeli circumstances.

According to the proponents of the two-route system, we need to make certain concessions in order to avoid social division. However, establishing two marriage routes would create a social partition and lead to the division of the Jewish population, as well as other religious denominations in Israel, into two separate groups whose members would avoid marrying each other (even if from a formal religious perspective, this would not be necessary). This division would be sanctioned by the law of the state, almost officially, and would not simply be the concern of some small minority groups.

An additional difficulty relating to the two-route system is that it creates a competition between the civil law and the religious one. The civil marriage route would lend some legitimacy to many marital relationships that would otherwise be considered illegitimate by the Jewish halakhah, as well as by the religious laws of other denominations (which would also compete, as far as the members of each denomination are concerned, with the civil marriage route). By setting up the religious and civil routes as alternatives to each other, the two-route system in fact strongly challenges the religious route. Our position is that a civil framework for marriage is not something anti-religious, and that there is therefore no reason for the two marriage routes to be seen as challenging each other.

The two-route system also does not provide the best solution to the issue of human rights violations caused by the religious monopoly. By fully backing the religious route, the state, and not the marrying couples, becomes responsible for aspects of inequality included in the contents of the marriage and divorce arrangements of the various religions.

It seems that this proposal also sends a negative message to women who are unable to obtain a religious divorce (*agunot*): whoever chooses

the religious marriage route will have fallen victim to her own choice. The religious law will not allow for the unlocking of the shackles by which such a woman is bound, and she would have only the option of getting into cohabiting relationship[159] or paying a personal bribe to her husband in order to obtain a religious divorce from him. Indeed, the arrangement that we ourselves will propose does not provide a comprehensive solution to this problem (as we have already indicated in previous chapters[160]), but it does not lock the door in the face of women who have been denied divorce; on the contrary: it opens up new possibilities for them.[161]

For all these reasons, the two-route system is not appropriate for the Israeli state and society.

The Civil Union Law

A third proposal from this first group of proposals leaves the religious monopoly over marriage intact, and seeks to provide a solution for the variety of practical and principled problems we have raised by establishing an alternative legal framework for marriage, called the "Civil Union." According to this model, a couple who cannot or will not get married in accordance with the religious law could sign a Civil Union pact, which would be recorded by a civil registrar, and whose dissolution would be carried out by the civil court.[162] In the eyes of legal scholars who take a formal approach, the difference between "marriage" and "civil union" may be perceived as merely cosmetic. And yet it seems that this proposal seeks to alleviate the symbolic tension involved in establishing a civil marriage framework as a true alternative to the religious law; it seems that in this way, the institution of **marriage** would continue to be associated exclusively with religious law on account of its cultural and historical significance. However, the new term, "civil union," would provide a solution for anyone interested in all the social, economic, and emotional advantages of marriage but willing to live without the substantial religious and symbolic significance involved in it. This change might even calm the fears of civil marriages

bearing religious consequences[163] that arise from a halakhic point of view, since the choice of the civil union route makes it clear that the parties wish in advance to avoid the entanglement of matrimony and religion.

However, as far as the state's legal system is concerned, the practical implications of the civil union would be similar to those of marriage. So, for instance, everyone registered as civil union partners would enjoy all the financial and other advantages enjoyed by married couples. It might seem that by adopting this proposal, the legislature would upgrade the status of cohabitation: the same couples that in the past were merely cohabitants could now be registered as formal couples. But it is also possible that this change might result in a lowered status: whoever chooses not to register with the civil union registrar would not receive the range of privileges granted today to cohabiting couples.[164]

This proposal leaves in the hands of the orthodox religious court the exclusive right to regulate the institution of marriage, while supplying the seemingly vague definition of "civil union" in order to establish the civil status of couples who are not married in accordance with religious law. From this respect, one could criticize the state's exclusion from the institution of marriage of those couples that cannot marry in accordance with religious law, while the state leaves them with a relationship that is inferior from the point of view of its symbolic significance. But it is possible to arrive at the opposite conclusion: the proposal seeks to utilize a more liberal, updated language to describe the intimate relationship. The language of Civil Union, precisely because of its vagueness, might eventually differentiate itself from the older language, that of marriage, which might remain as a description of the conservative relationships from which many people might prefer to distance themselves.

This is particularly true for same-sex couples.[165] The institution of civil union as it exists in Israeli law is different from apparently similar institutions in the Western world that enable same-sex couples to register in the framework of a "family partnership" that is similar, in most of its legal

consequences, to conventional marriage. This partnership, in some cases, is not available for other couples, and therefore some claim that painting same-sex relationships in a different color is similar to ostracizing them on the basis of illegitimate discrimination.[166] On the other hand, the proposed Israeli institution of civil union would be available to all people, and would therefore not be necessarily branded as socially inferior to marriage. And in any event, there are those who claim that the equal rights struggle of same-sex couples (like that of women) should focus on cutting the link between union and marriage, and abandonment of the attempt to infiltrate the well-established social institution of marriage, which is an aspect of that same patriarchal social framework that should in any case be revolutionized altogether.[167] The institution of civil union could be, in accordance with this approach as well, a first step in the right direction.

Is the semantic replacement for civil marriage presented by the civil union a worthwhile replacement? From a practical point of view, this arrangement is similar to the expansive version of the two-route system. It too preserves the orthodox monopoly of the religious route. It is indeed more flexible in that the alternative proposed relationship is not a "civil marriage" that competes with the institution of religious marriage, but appears to be an entirely new institution. Yet apart from this advantage, all the disadvantages that we attributed to the two-route system apply here as well.

Moreover, we believe that the system's practical advantage also reflects an essential deficiency. The institution of marriage has both substantive and symbolic significance, and our purpose is to include within its bounds all the manifestations of intimate relationships that the state wishes to sanction and whose members wish to consider as continuous, deep, and binding bonds.[168] The proposal to place civil union alongside marriage undermines this purpose, since, although a civil union anchors a couple's relationship in a formal manner, it does not reach the level of actual marriage. Even the initiators of the idea recognized that it is only a partial arrangement. It is a "compromise proposal," which does not aspire to present itself as the

optimal solution. This is its advantage – it offends the religious and secular interests only to a relatively lesser degree, and it is therefore easier for the Israeli political system to digest.[169]

And indeed, the Knesset has enacted a Civil Union Law, but the actual law is far narrower than the original proposal, and it enables only a couple composed of two religiously unaffiliated partners to enter the realm of civil union.[170] As we mentioned in the second chapter,[171] it is indeed a first step in the right direction of formally recognizing non-religious intimate relationships, but it is a very limited step: the existing law combines a compromise on civil union with a compromise on the religiously disqualified route in the most limited form. The meeting point of these two solutions provides a small-scale solution that shares the disadvantages of both of the above-mentioned proposals, and applies to a relatively miniscule, almost insignificant group of Israeli citizens.

Of course, the limited legislative attempt is not decisive for the purpose of this essay. In our context, we must examine the proposal while assuming that it would be possible to legislate a Civil Union law at a higher level of generalization: legislation that would provide a satisfactory practical solution to anyone who wished to establish a non-religious-orthodox relationship.[172] However, as we have already said, we believe that in this case, as well, the civil union is not a proper solution. We reject it for the same reasons that made us reject the two-route system, but also because we believe one of the goals of a proper legal system is to provide a shared "marriage" framework that applies to a society that is highly diverse in terms of religion and culture.

A Uniform Civil Framework and Free Choice of Ceremonies

An Exclusive Civil Law of Marriage and Divorce: Prof. Shifman's Approach

In 1995 Prof. Shifman published his proposal for civil marriage and divorce in Israel.[173] This proposal regards the civil law as the only applicable law.

According to this proposal, those who are interested in getting married must meet certain preliminary requirements in order to receive a civil marriage license enabling them to marry. The relevant law, concerning both marriage and divorce, would be the civil law, but the couple would be free to choose whichever type of ceremony they wished: either a religious ceremony (from a wide selection of religious ceremonies, of course), or a civil ceremony (and here too, from a range of possibilities, including, for instance, those that represent a particular cultural heritage that is non-religious, but all of which rest on the required legal foundation). Like marriage, divorce would also be performed in accordance with the civil law. Whoever got married in accordance with the religious law, or whose religious law obligates him to undergo a religious divorce, would of course be free to get a religious divorce as well. From a comparative viewpoint, this approach is very similar to the one practiced in the United States.

By means of this model, the state declares a separation between the civil and religious dimensions. The state would not intervene in the content of the religious law, and would not take a stand on religious matters, which are by their very nature controversial. In extreme situations, to be sure, the state might find it necessary to intervene, such as in the case of the state's involvement (in Israel as in other Western countries) in the issue of divorce refusal.[174] However, the marriage and divorce law in itself would be a civil law. The religious aspect, and coming to terms with the difficulties flowing from it, is a challenge facing the religious leadership and the observant community alone.

This model does not set the religious and civil laws up as competitors. On the contrary, the civil law reflects the state's basic requirements, and the couple is permitted to incorporate a religious ceremony in it as they see fit. This model does not create two separate groups in society, but applies one law to everybody. In the end – it opens the door to the development of civil family laws, as well as to decisions with respect to important matters of principle that have not yet received any civil attention (like the character

of marriage and the legal and social status of cohabitants) because of the character of Israeli family law. One may assume, or at least hope, that this model would also help to heal religion (and the Jewish halakhah in particular) as it releases it from the thick shackles of the state.[175] The connection with the state does indeed grant much power and authority to religious leaders, but it comes with a heavy price tag, both on the perception level and in more substantive respects (forcing the secular law on the men of halakhah).

This is the basis for our forthcoming proposal, whose various aspects we shall explain in what follows. In our proposal we adopt the civil model, while adding several ingredients concerning the status of the religious law and religious marriage and divorce under this arrangement. But before we turn to our proposal, we would like to present a different one, which also seeks to establish a uniform framework for marriage and divorce.

(Limited) Pluralism in Marriage and Divorce: The Gavison-Medan Covenant

Several years ago Prof. Ruth Gavison and Rabbi Ya'akov Medan jointly proposed a "Foundation for a New Covenant between Jews in Matters of Religion and State in Israel." The covenant also contains a proposal for regulating matters of marriage and divorce in Israel.[176]

According to this proposal, the state shall grant the authority to perform a marriage both to certified civil registration clerks, and to religious figures. The couple, after having obtained their marriage license (regarding its restrictions, see below), could select the marriage official in whom they were interested and be married in accordance with the ceremony of their choice, very much as in the above-mentioned proposal by Prof. Shifman. In this way, the proposal seeks to gain some significant achievements from the civil point of view.[177] The proposal enables every man and woman to fulfil the right to get married,[178] and sees marriage as deriving its validity from the civil law. This proposal facilitates freedom of religion, freedom from religion, and just as importantly the opportunity to choose among a

variety of different denominations within each religious community. This is comprehensive, normative pluralism, both with respect to the interaction between the religious and non-religious approaches, as well as from an internal religious perspective.

Despite the structural similarities between them, the Gavison-Medan covenant and Prof. Shifman's proposal differ on several points, such as the identity of the marriage registrars and the authority of religious courts to handle marriage and divorce cases,[179] as well as cases of civil divorce. The issue of divorce is particularly significant since it stands in the background of any discussion of civil marriage and divorce, because of the strict "married woman" restriction and the issue of illegitimate children (*mamzerim*) in Jewish law.

With respect to this issue, the Gavison-Medan covenant goes farther than the two-route system, in that it allows for "marriage dissolution" to be performed both through the religious and the civil court, regardless of the form of marriage.[180] The proposal does not therefore present two completely separate alternatives, but it recognizes a variety of legitimate paths, both concerning marriage and divorce, from which anyone can make a selection at any particular stage.

However, the proposal still contains a restrictive aspect, which is mainly due to the limitations imposed by Jewish religious law, and primarily from the threatening shadow of the illegitimate children problem. According to the proposal, a marriage certificate would only be granted to single, unmarried men and women (who also meet other usual requirements). And a person would be considered unmarried, also for purposes of a civil marriage certificate, "only if he is considered unmarried by both religious and civil law." The writers of the proposal thus wish to avoid the multiplication of illegitimate children in Israel, which might occur if people whose civil marriage has been dissolved but who are still religiously bound to each other were allowed to contract new marriages.

The restriction imposed on a post-divorce second marriage follows the path of other proposals, which likewise impose various restrictions on the couple in order to minimize the problem of illegitimate children. Usually – unlike the case of the Gavison-Medan covenant which deals with the post-divorce marriage certificate and not the divorce itself – these proposals deal with the very possibility of obtaining a divorce. They regard as their main objective the realization of the right to get married, and are willing to compromise on the right to divorce in light of the fairly significant position of religion in Israeli society.[181]

Gavison and Medan acknowledge the fact that their proposal is a compromise proposal, which, as Rabbi Medan puts it, "is based on the principle that when marriage is concerned, the 'religious' side would be as forthcoming as possible, and insofar as divorce is concerned, the 'secular' side would do the same."[182] However, such restrictions, according to the writers of the proposal, are in fact an advantage, because they permit on the one hand the protection of the cultural-national (or religious) interest, and on the other hand they preserve alongside it basic individual liberties, notwithstanding a reasonable and measured violation of them. In what follows we will examine whether the abovementioned principles can be protected while minimizing the aspects of compromise in the proposed legal arrangement.

Chapter 5:

A Civil Legal Framework for Marriage and Divorce in Israel: Recommendations

The Model: Civil Law as a Uniform Framework

We believe that it is high time to re-examine the proposal of terminating the religious monopoly over marriage, and that all of the considerations we have presented in this paper thus far make such a change necessary. Legal and social developments, as well as the willingness of forces within the rabbinical establishment to internalize and accept the need for such a change, make this proposal possible. Even if at first glance our proposal might seem quite far-reaching, the practical changes it involves are not great in light of the continuous erosion in the enforcement of the religious monopoly embedded in the law. We shall therefore present our recommendations, which are based on the conclusions of our discussions in the previous chapters.

We propose adopting a uniform civil framework for marriage and divorce. Such civil framework model would require advance registration and fulfilment of the necessary preconditions for marriage, thus constituting an all-inclusive, normative civil system that would handle all matters of marriage and divorce in Israel. In light of the significant weight and importance of religion in Israeli society, this model would grant full legitimacy to a wide variety of religious and non-religious marriage ceremonies, as well as a variety of divorce ceremonies and procedures. However, for purposes of state recognition, there would be just one civil law. Those who wish to do so, especially if they were originally married in a religious fashion, would then be able to choose whether or not to continue litigating their marriage

and divorce disputes in the religious courts, which will be required to follow the fundamental principles of civil property law, and of an equal right to divorce.

With respect to the state's role in making marriage laws, this proposal entails a dramatic change, because the most important marriage decisions would now become the state's responsibility, whereas the religious and cultural aspects of marriage would be matters of personal choice. The marriage and divorce framework must be such that it could be filled with differing substantive contents in accordance with the couple's choice, but in our eyes it is vital that the state take responsibility for maintaining a proper social order, as well as protecting the primary interests of the institution of the family and its members. The state would bring to an end the current practice, according to which all issues of marriage eligibility are determined by the relevant religious courts of the denominations; the state would formulate basic principles for a legal framework that would regulate marriage and divorce in a proper manner; it would take its own position with regard to restrictions on marriage (such as the prohibition of marriage by minors, bigamy, and perhaps even a requirement of certain medical examinations); and it would determine the appropriate requirements for the dissolution of a marriage. It stands to reason that disagreements will arise with respect to these matters, and they should be resolved in the manner in which such disagreements are resolved, through discussion, negotiation, and compromise. But this will have to be a decision made by the state, and not by various religious institutions.

This principled revolution in the state's role would have a far-reaching significance: it would strengthen the state's responsibility to protect the wellbeing and rights of all its citizens. In addition, the uniform civil marriage framework would help create a shared social sphere for the diverse cultural and religious groups living in Israel. This arrangement would force the state to develop civil family laws based on widely accepted social values, while at the same time allowing the representation of a broad spectrum of groups,

positions, currents, and cultures in Israeli society. However, the state would not have to make decisions, or maintain institutions that would make decisions in strictly inner-religious matters, thus significantly reducing the enormous tension that exists today between state and religion, and between different conceptions of Jewish religiosity.

Would this type of civil framework deal a mortal blow to the uniquely Jewish character of the state? There is no doubt that anyone to whom this uniqueness is based on the dictates of the Jewish religion in its strict, orthodox sense, would be likely to see things this way. However, such an interpretation of Israel's Jewish nature is sharply controversial. In any event, offering a civil marriage alternative would enable non-religious Israelis who wish to affirm their cultural Jewishness to do so, without first having to engage in a battle against religion or religious coercion.

There is no denying that the civil framework would also facilitate the creation of intercultural spheres connecting national, religious, and cultural groups in Israel. Some would say that it is precisely here that we see one of the major problems that could result from this proposed change: it demonstrates openness, to all appearances, to the possibility of interreligious and inter-communal marriage. As we have already said, we do not make light of the question of interreligious marriage and its possible implications. However, we do not believe that it is the responsibility of the state via its law to prohibit such relationships. In a modern society it is not appropriate to prevent coalescence or assimilation by legally prohibiting human interaction. The prevention of assimilation is an activity that should flow from values imparted to the citizens of Israel by means of the educational system, whose role is to transmit to the next generation the cultural tradition into which they were born, and to which one should hope they would like to continue belonging.

Our proposed model also has advantages from an administrative point of view. The role of the "registering authority," for instance, would now be completely entrusted to the state, which would issue marriage certificates

to those fulfilling the clearly defined requirements of marriage. Today, the issue of marriage registrars is not regulated, standardized, or properly supervised. This aspect of the matter, we should add, is administrative, but it has essential and significant ramifications, such as the authority granted to the registering officials to determine who is eligible for marriage.[183]

The Contribution of the Proposed Model: The State's Decision Concerning the Social Status of Marriage

One of the central problems with Israel's Family Laws, which is at least partially derived from the religious monopoly over marriage and divorce, is the privatization of alternative partnership models along with the expansion of the legal recognition of them, which in effect renders them equal to legal marriage. This reality blurs the distinction between people who are formally married, and those who are not formally married. Other models would not solve this problem: even in the proposed framework that offers a choice between the religious and civil law, it is unlikely – as we have already seen – that the state would narrow its recognition of quasi-marriage models, mainly due to the problem of chained spouses, even though the partners, or at least one of them, are still formally married to their previous spouses. The Civil Union model is in fact an official recognition of both formal and alternative forms of marriage, which are in some ways granted equal status. As we said, it is unclear what ramifications the adoption of this model would have on the legal status of those who would prefer not to include themselves in the Civil Union registration (e.g. cohabitatants).[184]

As we have seen, the result of this state of affairs is that the state takes in effect an apparently neutral stand in the conflict between full and official marriage and other alternative forms of partnership. In this way, the state shows that it has no particular preference for marriage as the formal way for couples to live together and establish a family. On the other hand, establishing the civil law as the exclusive authority in matters of marriage and divorce might enable the state to transmit its clear preference, by way

of dedicating particular benefits for the formally married, as part of a social-cultural message concerning the importance of marriage, its formality, and stability. This system would encourage religious people to take care to register their religious marriage with the civil registrar, and on the other hand would lessen the motivation of secular people to live together without marriage.

We see this result as a significant advantage of our proposal – both in view of the uniqueness of the marriage bond, which is designed to be a significant, long-range bond recognized by the state, and in order to "restore", to those who want it, the possibility of living together in a less committed way (which is perhaps entitled to less recognition or support from the state) the opportunity to choose such a connection. Introducing a civil legal framework for marriage and divorce would thus obligate the legislature to decide on the exact status of marriage in Israeli society.

Legislating a civil marriage law and stipulating the conditions required for issuing a civil marriage certificate would bring up for discussion the question of same-sex marriage. The Western countries are divided in their attitude towards this issue, even as more and more of them are joining the list of those recognizing such marriages.[185] This is a constitutional and ideological issue. It also touches on the question of the role of the law as an agent of social change, i.e. as a system whose stipulations are designed to shape the society's way of life, or as a system responding to changing social conditions. From both of these perspectives the state must decide the validity of same-sex marriage. From a religious perspective the question is settled in advance, for the Jewish halakhah has no room for the legitimatization of such unions. Nevertheless, the civil arrangement of marriage would obligate us to hold a serious discussion of this issue, and thus examine, among other things, the significance of the institution of marriage as well as values of democracy and equality, and the role of the law in our society. These are questions that this paper does not seek, and is not able, to answer. We believe that such questions should be decided upon by the public through its representatives.

However, if the civil framework law does not include the option of same-sex marriage in its marriage certificate stipulations, the legislature would have to protect the rights of such couples in alternative ways, possibly by allowing the future application of the arrangements developed for cohabitants.

Civil Divorce and the Status of Religious Law

Since, according to our proposal, marriage would be regulated solely in accordance with the law of the state, the couple's separation in the eyes of the state would be accomplished by the state's usual means, i.e. through the civil courts, together with the regulation of property issues in accordance with civil law.

There are two possible models concerning the status of the religious authorities. The first grants the civil authority full jurisdiction over the recognition of divorce, and the other integrates the civil and religious courts.[186]

According to the exclusively civil model, a civil divorce would be completely valid even without a Jewish-orthodox divorce (*get*), i.e. a person becomes eligible for marriage by virtue of his civil divorce, and he or she is permitted to remarry. Indeed, in the absence of a religious divorce, we would assume that at least the woman would be forbidden from remarrying in a religious (at least a Jewish orthodox) ceremony, and her children from another man (if Jewish) might be considered illegitimate (*mamzerim*), but the civil system does not prevent a person from remarriage for this reason.

On the other hand, the integrative model distinguishes between the different functions of divorce: it enables the members of the couple to disengage from each other and to regulate their personal and financial rights and obligations, including those pertaining to their children, but does not allow them to remarry until they are regarded as eligible by religious law as well. The integrative model obviates the danger of giving birth to illegitimate children in such cases where the marriage was originally conducted in accordance with the law of Moses and Israel. It leaves unresolved the

problem of women who are denied a religious divorce. To be sure, a civil divorce also does not always solve the problem of a woman who is denied a divorce and who considers herself prohibited from remarriage as long as she has not obtained a religious divorce. The law, however, according to the exclusively civil model, does not prevent a woman who underwent a civil divorce from remarrying via a civil ceremony.

The gap between the two models is not as great as it seems at first glance. Even according to the exclusively civil model, the civil system need not remain indifferent to the suffering of a woman who might for the rest of her life remain alone unless she is granted a *get*. As we have seen, even in Western states where the courts have the exclusive legal authority in matters of divorce, the partner in need of a religious divorce, usually the woman, is granted different sorts of legal aid that are designed to place a variety of sanctions on recalcitrant spouses. Even if the exclusive model is accepted, we are not recommending that the civil legal system abandon its sensitivity to the evil caused by husbands who decline to divorce their wives. We do not wish to decide on the controversial question of which model of divorce is desirable, the exclusive or the integrative. However, we propose that the civil courts continue to grant these women legal aid in the form of compensation for damages, suspension of the civil divorce procedures in cases where the recalcitrant spouse is the one who applies for it, and holding the husband's refusal against him financially, as is customary in other Western countries, and even in the rabbinical courts themselves. As far as the religious courts are concerned, it would be advisable for the legislature to consider the possibility of continuing to authorize the religious court to impose various legal sanctions on divorce decliners, such as incarceration or restriction orders, when the marriage was originally performed in accordance with the law of Moses and Israel, or when the marriage partners initially agreed to accept this kind of rabbinic ruling. We do not think, however, that it is acceptable to subject a person who was married via the civil route to a rabbinical ruling against his or her will. Needless to say, the marriage

partners can always turn to the religious court on their own accord, even if they were married via the civil route, in order to obtain a "*get le-humra*" (a religious divorce issued as a precautionary measure).

Another possibility worth considering is allowing the religious courts, when both sides agree to it, to determine matters of divorce, while continuing to implement the civil law as it pertains to financial matters, as is (normally) the law and custom today.[187] The religious court would thus be authorized to dissolve a civil marriage that did not incorporate religious elements, as long as the court recognized the legal implications of such a marriage. We have witnessed such recognition by the rabbinical courts in the Noahide case, and beyond that with respect to the financial implications of civil marriage. It must be stressed that granting the religious court civil authority concerning civil marriage does not diminish the importance of the proposed arrangement, even in reference to the civil arrangement of the divorce. The most significant part of this arrangement pertains to the civil court's authority to perform civil divorce (even if without permitting a new marriage) even if only one of the marriage partners is interested in it, and even if the partners were religiously married. This matter is perceived by many to be the central weakness of other arrangements of civil marriage.

The main claim of the supporters of the two-route system[188] is that this arrangement would prevent a division of the Jewish people. It is clear that if a woman who was married in accordance with the law of Moses and Israel were to be allowed to obtain a civil divorce and marry another man without having received a religious divorce as well, her children from the second man would be considered by the religious law to be illegitimate (*mamzerim*). The two-route system, according to those who support it, would prevent this – because it would not enable whoever was married according to the law of Moses and Israel to get a civil divorce. However, some claim that even the two-route model would not prevent the division of the Jewish people and the establishment of genealogical listings.[189] If this claim is correct, then it

nullifies a very central reason for preferring the two-route model advocated by its supporters.

In practice, however, even today, when religious courts have monopoly over marriage and divorce, the civil legal system does not prevent a second marriage (*de facto*, as cohabitants, and sometimes *de jure* as well[190]) even when the previous, religious marriage has not been dissolved, just as it does not prevent marriage between the religiously disqualified (e.g. marriage of a Cohen to a divorcee), and in large part recognizes marriages between members of different religious communities (when performed abroad).[191] So the halakhic problem would not be worsened if and when civil marriages were to be permitted by the state. Today, it is not primarily the law that prevent Israelis from entering religiously forbidden unions, but rather their own religious-cultural commitments, to the extent that these play a significant role in their lives. The proposed arrangement, even according to the exclusively civil model, would not alter this situation in any significant way: an Israeli court issuing a civil divorce verdict, in accordance with the exclusively civil model, would leave the decision of whether to remarry, without having obtained an orthodox *get*, to the members of the couple themselves. The power and novelty of this model lie only in the fact that it prevents a second marriage from being a violation of the law of the state. Possibly, the verdict itself would clearly state that it cannot serve to dissolve a marriage according to religious law itself.[192]

Conclusion

The civil regulation of marriage and divorce in the state of Israel is a social, moral, legal, religious, and cultural necessity.

- **Social** – because of the many couples that are interested in a non-religious marriage, and the many that are unable to enter into a religious marriage, either because they are religiously disqualified from doing so, or because they are not formally affiliated with any religion. The rising number of such couples stems from recent changes in Israeli society, following the massive immigration waves from the former Soviet Union, as well as from ideological changes in the social conception of family and marriage. These changes indicate an ever-growing difference between the customary liberal and religious views on marriage stability, modes of divorce, and religiously forbidden relationships, such as same-sex unions. The proposed arrangement also creates a shared civil sphere, which is not "taken over" by distinct religious institutions, and in which individuals and groups can fulfil their right to "exit" their particular cultural-religious communities.
- **Moral** – because of the way the existing arrangements violate basic human rights: the right to get married and establish a family, freedom of religion, freedom from religion, and the right to equality.
- **Legal** – in light of the anomaly resulting from the fact that the civil law sanctions the existence of a full-fledged monopoly of religious law over marriage and divorce, while at the same time the courts have gradually been expanding their recognition of civil marriage conducted outside of Israel. Moreover, they have been reinforcing the status and rights of cohabitants who, through such union, become legally and socially "quasi-married," thus establishing an alternative to religious marriage.

- **Religious** – because civil marriage might ease the challenge with some difficult problems, such as adultery and illegitimate children (*mamzerim*), resulting from the existing arrangements, which force religious marriage on non-consenting couples. In addition, there is a clear religious interest in modifying the current arrangement, under which the civil courts pass judgement, or presume to pass judgement, on strictly religious questions.
- **Cultural** – because of the challenge to Israel to accommodate its multiple religious cultures, as well as the multiple approaches towards religion. A civil arrangement of marriage and divorce, along with reserving a respectable role in it to religious marriage and divorce, would help improve religion's social image in general, and strengthen the marriage institute in Israel in particular. Such an arrangement could contribute to the development of Jewish cultural creativity in the field of marriage and divorce within non-religious or non-orthodox populations, and thus to the shaping of Israel as a Jewish democratic state. This arrangement might even enable the development of a similar, highly valuable sphere of creativity, without state intervention, among the other religious communities in Israel.

Our proposal – a civil legal framework for marriage and divorce for everyone – may appear to be a radical idea. However, in light of the continuous and widening erosion of the legally sanctioned religious monopoly, the changes our proposal brings are not so dramatic. We believe that the time has come to re-examine the termination of this monopoly. Certain legal and social developments, as well as the willingness of forces within the rabbinical establishment to internalize and accept the need for a new arrangement, now make the fulfilment of this proposal possible. The significant violation of human rights caused by the current arrangement, along with the severe results of the state's avoidance of taking a clear stand on such a central and important issue, make this change a necessary one.

Notes

1. These two aspects – the family unit as an expression of personal love and friendship on the one hand, and as a nucleus of the social structure on the other, can also be found in Aristotle's *Nichomachian Ethics* (VIII); *Politics* (I) as well as in Vernon L. Provencal's *The Family in Aristotle* (http://www2.swgc.mun.ca/animus/Articles/Volume%206/provencal6.pdf)

2. It should be noted that the term **marriage** according to Jewish, as well as Muslim law, is not a political, nor is it a public term, but is basically a personal one. However, the regulation of family matters has remained within the social realm, as is proven by various legal regulations (such as the Ketubah's "Rabbinical Court Condition", which regulates the husband's commitments within the marriage).

3. In this way, for instance, the prohibition of bigamy conflicts with the Mormon teaching that encourages the multiplication of women (and children). There is also a tension between the Catholic prohibition of divorce and the permission to file for a divorce under state law.

4. This expression was in fact only coined within the Basic Laws of 1992, but ever since its foundation, the state of Israel has been striving to maintain itself both as a Jewish state as well as one which respects the human rights of all its inhabitants. This duality is clearly expressed in the Israeli Declaration of Independence. There are those who criticize this dual characterization for various reasons, but a discussion of this issue would take us beyond the scope of this paper.

5. In his initial writings which post-dated the passing of the 1992 Basic Laws, Justice Aharon Barak used to mention the religious monopoly over personal status as one of Israel's Jewish tradition characteristics. In later essays he did not mention the issue further, and it seems that this omission was not accidental. See for instance, Aharon Barak, *The Judge in a Democracy* (2004), p.88 (heb.).

6. See Eliav Shochetman, "The Question of Civil Marriage in Israel", *Landau's Festschrift* (ed. Aharon Barak and Elinoar Mazuz, Vol. 3, 1995), pp.1561-1564 (heb.) (henceforth: Shochetman, Civil Marriage); Zvi Triger, "A Homeland for Love: Marriage and Divorce between Jews in the State of Israel", *Law, Society, and Culture – Trials of Love* (2005), pp.198-207 (heb.) (henceforth: Triger, A Homeland for Love); and see more below.

7. The grounds for such a claim, which links the religious monopoly over marriage and divorce and the state's Jewish nature, can be found, somewhat surprisingly, in Justice Barak's previously mentioned book (see note 5, above). For a general discussion on the multiple meanings of the term "The Jewish State", see Ruth Gavison, "A Jewish and Democratic State: Political Identity, Ideology, and Law", *Iyunei Mishpat*, 19 (1995), pp.640-644 (heb.). The claim that links marriage and divorce to Israel's Jewish nature obviously considers the Jewish state as a term that bears a cultural, and from certain aspects, a religious significance, and not an only genealogical one (as in, Israel is the state **of** the Jews). However, even for those who consider the content and cultural aspects of the term as central to it, the debate between Judaism as halakhah and Judaism as a multi-faceted Hebrew and Jewish culture is one of the greatest and deepest debates that accompany the ongoing struggle over the identity of the state of Israel.

8. The arguments outlined above are normally presented from the Jewish perspective (as is customary in discussions pertaining to matters of state and religion), but not exclusively. The religious monopoly over marriage and divorce plays a complex role in the lives of minority groups as well. On the one hand, the religious marriage framework preserves their cohesiveness. On the other, it impedes social and cultural developments within these groups that seek to preserve national and cultural identity, but not necessarily in strictly orthodox religious ways.

9. In the year 1839 the Ottoman Sultan issued a "Hati Al Sharif" decree, which granted full equality to Muslims and non-Muslims across the empire. Various laws, as well as particular decrees, which were issued during the following decades, granted religious and civil jurisdiction to the empire's senior rabbis. In addition, and most importantly for us, the religious courts were granted jurisdiction over personal status and other affairs. For more information on this process in the Ottoman Empire, see Elimelech Westreich, "Jewish Judicial Autonomy in Nineteenth Century Jerusalem: Background, Jurisdiction, Structure", *JLAS*, 22 (2012), pp.306-319.

10. For a description of events prior and during the passage of this law, as well as of the various arguments which were raised in the context of the debate about it, see below, text next to note 133.

11. Sometimes (in cases pertaining to Christians and Muslims) by authority of the British King's Order in Council 1922, and at other times by way of Israeli legislation (Jews and Druze), see the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, and the Druze Religious Courts Law, 5723-1962.

12. For matters of personal status and their foundations in Israel, see Pinhas Shifman, *Family Law in Israel* (Vol. 1, 2nd edition, 1995), pp.19-55 (heb.) (henceforth: Shifman, Family Law).

13. Dr. Zvi Triger believes that beyond the effort (also, if not primarily, the secular Zionist effort) to promote this legislation, lies the wish to reestablish the family institution, as well as the male and female roles within it, so as to comply with the Zionist ethos; see Triger, "A Homeland for Love" (note 6, above), pp.212-225. In this paper, however, we shall not address the above-mentioned hidden layers. On the contrary, with regard to the case in question we shall claim that in the current reality, such considerations have probably become invalid.

14. Article no.2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.

15. See articles no.52 and 54 to the King's Order in Council, 1922-1947.

16. By the end of the major wave of Jewish immigrants who arrived at Israel from the Russian Commonwealth during the early 2000s, the number of immigrants who were not halakhically Jewish was about 250,000; see Yair Sheleg, *Not Halakhically Jewish: The Dilemma of Non-Jewish Immigrants in Israel*, Policy Paper 51, The Israel Democracy Institute (2004), pp.10-11 (heb.): http://www.idi.org.il/media/312058/pp_51.pdf.

17. See Sheleg, *ibid*, pp.15-16, 19-22. The issue of marriage and divorce is mixed up with a variety of other issues which the Israeli society is forced to deal with in light of this social reality; these issues are discussed in Sheleg's aforementioned paper.

18. The conversion issue came to the forefront of public discussion following the legal opinion of Rabbi Abraham Sherman, the High Rabbinical Court *Dayan* (a rabbinical judge); see High Rabbinical Court Case 5489-64-1 (10.2.2008). A special bench appointed by the Chief Rabbi of Israel modified the decision concerning the particular proselyte who was the subject of the verdict; see Rabbinical Court Case (Tel-Aviv) 369472/1 (2.9.2010), *Hadin Ve'Hadayan*, 26 (2011), p.5; however, the sword of the conversion's revocation is still hanging above the converts' heads.

19. For information concerning the Israeli divorce rate, see *Women and Family in Israel: A Statistical Biyearly* (ed. Ruth Halperin-Kaddari and Inbal Karo, 2009), pp.42-45 (heb.) (henceforth: Statistical Biyearly). The divorce rate is constantly rising; see The Central Bureau of Statistics, *Statistical Abstract of Israel* 63 (2012), 3.2, http://www.cbs.gov.il/shnaton63/diag/03_02.pdf. The matter of social legitimization of extramarital relationships will be discussed below; see text next to notes 143-149.

20. According to recent data from the Central Bureau of Statistics, between the years 2000 and 2004, 45,412 Israeli residents got married abroad, while between 2005 and 2009, 40,067 residents did so; see *Statistical Abstract of Israel*, Marriage of Israelis Abroad, 2000-2009, Table 1. In the year 2007, for instance, 8,368 Israeli residents were married abroad (according to the population registration records of January 8th, 2009), see *Statistical Biyearly* (previous note), pp.33-41. It should be mentioned that Israeli citizens married abroad are not obligated by law to register themselves with the Israeli Ministry of Interior, which could explain a long time-gap between their marriage and their registration; in addition, the data (especially that of recent years) might not reflect the actual number of couples marrying abroad; see *Statistical Biyearly*, p.33. With regard to cohabiting couples, in the year 2006 there were in Israel approximately 47,000 couples living together without being married; see *Statistical Biyearly*, p.40, and see *ibid*, further information on additional years.

21. According to a 2011 survey conducted by the Central Bureau of Statistics, 61.7% of 20-years-old and above Jewish Israeli residents support the claim that "civil marriage should be permitted in Israel." This claim was also supported by 88.4% of immigrants from the former Soviet Union who have immigrated to Israel since 1990; see *Statistical Abstract of Israel* 62 (2011), section 7, Table 9. Similar information is reflected by a survey held by an NGO named *Hiddush – For Religious Freedom and Equality* (which also promotes the introduction of civil marriage and divorce) in early 2009, and whose results were recently published: 63% of the Israeli public (and 88.5% of those who define themselves secular) support the possibility of civil marriage in Israel. Among those who support civil marriage, 28.6% are sure they would have personally chosen this marriage route, and 23% think they would have; see Guy Ben-Porat and Yariv Feniger, "The Status-Quo and the Silent Majority: The Jewish Public's Positions on Issues of Civil Marriage" (2011) (heb.), http://hiddush.org.il/ArticleItem.aspx?aid=2753&pid=0

22. See Shifman, *Family Law* (note 12, above), pp.139-164. The institution of cohabitation significantly blurs this distinction; see Shifman, *ibid*, and see below, chapter 2, section: *Cohabitation in Israeli Law*.

23. According to this claim, which is fundamentally an ideological one, factual reality should bring about the termination of the various religious limitations in order to close the gap between the religious norms and reality. We claim that a combination of a rigid form of marriage and free relationships is in fact undesirable. Indeed, couples who choose to live together without acquiring a formal status for their relationship should be provided with relevant solutions. We have no objection to that, but the abovementioned lack of correlation is

mostly **forced,** and not chosen, and the state's legal system must deal with it properly.

24. For more on these matters see below, chapter 3: *Normative Aspects: Terminating the Religious Monopoly over Marriage and Divorce*.

25. See Menachem Mautner, Avi Sagi, & Ronen Shamir, "Thoughts on Multiculturalism in Israel", *Multiculturalism in a Democratic and Jewish State: Ariel Rosen-Zvi Memorial Book* (ed. Menachem Mautner, Ronen Shamir, & Avi Sagi, 1998), pp.75-76 (heb.) (henceforth: Mautner, Sagi, & Shamir, Thoughts on Multiculturalism).

26. See below, chapter 4: *Terminating the Religious Monopoly over Marriage and Divorce: From Theory to Practice*. These issues also pertain to the role of the state concerning matters of marriage and divorce in particular, and matters of religion and state in general; see below, chapter 5: *A Civil Framework for Marriage and Divorce in Israel: Recommendations*.

27. For information on the first stages of this process, see CA 191/51 *Skornik v. Skornik,* IsrSC 8(1) 141 (1954); HCJ 143/62 *Funk-Schlesinger v. Ministry of Interior*, IsrSC 17(1) 225 (1963). For very recent verdicts, which have completed the legal revolution of civil family law, see below.

28. See CA 8256/99 *Plonit v. Ploni,* IsrSC 58(2) 213 (henceforth: Plonit Case, Civil Maintenance).

29. As was vigorously stated by Justice Vitkon in the famous Skornik case: "The public policy obligates us to answer clearly the question of the validity of the couple's marriage. We must absolutely not leave them in doubt as to whether or not they are married to each other." See CA 191/51 *Skornik v. Skornik,* IsrSC 8(1) 141 181 (1954).

30. See HCJ 2232/03 *Plonit v. The District Rabbinical Court (Tel-Aviv Jaffa) and others*, IsrSC 61(3) 496 (2006). This verdict follows the High Rabbinical Court Case 4276/63 *H.Sh. v. H.Y.* (11.11.2003) (henceforth: the Noahide Case).

31. Family Appeal 9607/03 *Ploni v. Plonit*, IsrSC 61(3) 726 (2006). The verdict reflects a gradual development from a moderate to a broad model of civil marriage. It discusses not only the formal adequacy of the marriage, but also the capacity to get married, because the marriage in question was between a Jewish Israeli citizen and a non-Jewish Romanian woman. This is how the state-of-performance legal principle was expanded from questions of form only, to questions of qualification. The verdict is allegedly derived only from specific considerations taken from the law of inheritance, but in effect it continues the ongoing tendency of the Israeli legal system to validate interreligious marriages of "merely" this or that particular sort, so that eventually almost all sorts become valid.

32. HCJ 3045/05 *Ben Ari v. Director of the Administration of Population at the Ministry of Interior*, IsrSC 61(3) 537 (2006). The same thing occurred concerning the recognition of civil marriage between Israeli citizens conducted abroad – after the formal barrier to the registration of the marriage was eliminated, it became possible to recognize the marriage status itself.

33. For more information on these issues see Pinhas Shifman, "Civil Family Laws Gone Public: On President Barak's Contribution to Family Law", *Barak's Festschrift* (2009), pp.588-593 (heb.). It should be noted that similar processes take place in many western countries where the recognition of same-sex marriage is a matter of controversy. In addition to countries where the legislature has explicitly expanded by law the institution of marriage so as to include same-sex marriage, such as Spain, the Netherlands, Canada, and recently New York, there are also other countries which have offered same-sex couples frameworks very similar to marriage, whereas still other countries have recognized same-sex marriages as a legal or constitutional interpretation of Equal Right laws. See for example the discussion which appears in the second edition of Gerald Rosenberg's *The Hollow Hope* (2008).

34. This move is part of a long process (whose beginning was analyzed by professor Ariel Rosen-Zvi) led by the Supreme Court, in which additional figures other than Justice Barak also participate. See Ruth Halperin-Kaddari, "Civil Family Law in Israel – Towards Completion", *Mekhkarei Mishpat*, 17 (2001), p.105 (heb.).

35. For the time being, the Israeli civil divorce laws are not well developed, probably because the judicial energy is directed elsewhere (such as toward the conflict between civil and religious law). This was lamented by Shachar Lifshitz; see Shachar Lifshitz, "Family Law in a Civil Age: From the Marriage Law of Those who Got Married Abroad to the Day After the Founding of Civil Marriage in Israel", *Mishpat Ve-Ásakim*, 10 (2009), pp.472-474 (heb.) (henceforth: Lifshitz, Family Law in a Civil Age).

36. For more details see Shachar Lifshitz's *Cohabitation Law in Israel in Light of a Civil Theory of the Family* (2005) (heb.) (henceforth: Lifshitz, Cohabitation Law); Shifman, *Family Law* (note 12, above), pp.156-164.

37. The cohabitation institution was established in light of various social and legal developments in the western world, beginning after the end of WWI, and especially during the second half of the 20th century. See S.M. Cretney and J.M. Masson, *Principles of Family Law* (6th edition, 1997), pp.106-110; Lifshitz, *Cohabitation Law* (note 36, above), pp.50-54.

38. It is difficult to estimate precisely how many of the cohabiting couples elected this route as part of the universal tendency described above, and how many did so because of the problems created by the marriage and divorce laws in Israel

(see Lifshitz, *Cohabitation Law* [note 36, above], p.100, note 106). However, it is pretty clear that the latter are hardly insignificant in number. In any event, the Israeli courts thought cohabitants were influenced by the legal situation and granted them significant benefits, even beyond the norm in other western countries. In the eyes of the courts, therefore, cohabitation reflects both the hardship caused by the Israeli family law as well as the existence of a possible, even if partial, solution. See Pinhas Shifman, "Civil Marriage in Israel: The Case for Reform", *Jewish Law Association Studies*, 13 (2002) (henceforth: Shifman, Civil Marriage); Lifshitz, *ibid*, pp.55-66, 89-120, and more, and see below. This perspective has led the courts to apply far-reaching benefits (as well as duties) to cohabitants, even against their will, and even to those couples who are not at all interested in the institution of marriage. This move has been severely criticized – see Lifshitz, *ibid*, pp.98-101. This phenomenon might even create a situation of "underground love", in which people live together or apart in order to not be considered cohabitants, such as in situations where the woman is a widow eligible for a stipend, and a cohabitation status might deprive her of it; see Pinhas Shifman, *One Language, Different Tongues: Studies in Law, Judaism, and Society* (2012), pp.182-183 (heb.) (henceforth: Shifman, One Language). Our proposal therefore solves not only the problem of those who are interested in marriage, but also the hardships created by the above-mentioned legal approach, as well as the problem of whoever is not interested in marriage, but only in a non-marital relationship (see below, and also Lifshitz, *ibid*, pp.251-252).

39. See above, previous note; Lifshitz, *ibid*, pp.94-96, and more.

40. See CA 690/82 *Cohen & others v. The Legal Advisor to the Government*, IsrSC 39(1) 673, 686. This dilemma could be avoided if we were to accept the notion that the principle of shared property applies also to couples who were married after the law was passed. See Shifman, *One Language* (note 38, above), pp.202-203.

41. See Shachar Lifshitz, "Familial and Financial Relationships: Challenges and Tasks Following Amendment no.4 to the Financial Relationships between Spouses Law", *Hukim*, 1 (2009), pp.227-317 (heb.).

42. The court declared this on several occasions; see for example Justice Vitkon's statement in HCJ 73/66 *Zmolon v. The Minister of Interior*, IsrSC 20(4) 645, 660; HCJ 693/91 *Efrat v. Director of the Administration of Population at the Ministry of Interior*, IsrSC 47(1) 749 par. 38-47 of Justice Barak's opinion. See further, Shifman, "Civil Marriage" (note 38, above).

43. *Haim Cohn – Supreme Justice, Conversations with Michael Shashar* (1989), p.234 (heb.). Justice Cohn refers to his decision in the Pesler case, but in the verdict itself he claims that his decision does not come in response to the rigidness of the religious law. See CA 384/61 *The State of Israel v. Pesler*, IsrSC 16 102, 110.

It is reasonable to assume that in the verdict itself Justice Cohn attempted to portray as allegedly irrelevant the resistance to cohabitation on account of its negative impact on the legislature's recognition of the religious law in the area of marriage and divorce.

44. For the implications of a marital status and the attempts to differentiate between such status and a sociological relationship from a legal perspective, see Shifman, *Family Law* (note 12, above), pp.139-164.

45. For social, psychological and other implications of the marital status, see Lifshitz, *Cohabitation Law* (note 36, above), pp.202-205.

46. See Lifshitz, *Cohabitation Law* (note 36, above), pp.249-251.

47. Shifman, "Civil Marriage" (note 38, above); Lifshitz, *Cohabitation Law* (note 36, above), pp.89-101. As mentioned above (text next to notes 37-38 and note 38), cohabitation is a universal phenomenon. Therefore it is reasonable that many cohabitants belong to a group that is not interested in marriage at all.

48. See Lifshitz's extensive discussion in *Cohabitation Law* (note 36, above), pp.265-360. In continuation of this discussion it is worth mentioning that there are indeed cases where the legislature felt its clinging to the normative definition of marriage as the only basis for legal consequence might not allow it to fully cover the social phenomenon which it decided to deal with, but these are the exceptional cases. So, for example, according to the Single-Parents Families Law, 5752-1992, a single parent who does not have a formal spouse, but is in cohabiting relationships, is not considered "a single-parent family." On the other hand, a parent who does have a formal spouse, but who lives separately from him or her, can under certain circumstances be considered as such a family. The functional definition, which is based on the existence of an actual relationship, does in effect assist the legislature in focusing on the social phenomenon which requires its intervention.

49. G. Tedeschi, "The Crisis of Family and the Followers of Tradition", *Legal Studies in Memory of Abraham Rosenthal* (1964) (heb.).

50. Indeed, there exist today gradually increasing tendencies to call for the abolition of the institution of marriage, and its replacement by contractual agreements between the spouses. The improved legal status of cohabitants, even if it was originally designed to solve problems arising from the religious laws, in effect strengthens such tendencies. We believe that formal marriage is valuable (alongside the provision of alternative frameworks), and that at the very least a serious and thorough discussion must be held in order to evaluate where things are headed.

51. The Civil Union Law for the Religiously Unaffiliated, 5770-2010.

52. *Ibid*, sections 2-8 (the conditions for union registration), 10-11 (dissolution of the union) and 13 (the legal status of the Civil Union couple).

53. *Ibid*, section 2.

54. For more information on these routes – civil marriage for religiously unaffiliated and the civil union proposal, see chapter 4: *Terminating the Religious Monopoly over Marriage and Divorce: From Theory to Practice*.

55. This law is a result of political constraints and coalitional agreements, which sought to find a balance between those who rallied around the flag of the struggle for a solution to the problem of civil marriage, and the ultra-orthodox political forces, that wish to leave the exiting arrangement untouched. The result is a form of compromise which carries a declarative significance, but also, as previously mentioned, many disadvantages. It is possible, however, that in the future the courts will expand the Civil Union law, on the basis of the right to equality and other considerations. It is also possible that this hope was partly what motivated the legislators to enact the law. In any event, we believe that the religious monopoly over matters of marriage and divorce should be completely terminated, through the appropriate channels, and not via legal detours. Even if it is advisable to take political feasibility into consideration during the implementation stage, the principled and declarative goals we wish to reach must be clear to us.

56. See for instance Rabbi Zalman Nechemya Goldberg, "Maintenance in Civil Marriage", *Tchumin*, 24 (2004), pp.188-193 (heb.), and in agreement with this, in many of the verdicts the requirement to obtain a *get* is referred to as the "custom of the rabbinical courts."

57. As Rabbi Abraham Isaiah Karelits, the Hazon Ish, determined in regard to civil marriage, "the halakhah is not yet been decided upon". See his letter to Rabbi Shraga Steinberg from June 18th, 1941: *Light of Israel*, 18 (2000), p. 12 (heb.). His words are the basis for the relatively strict position of the (retired) High Rabbinical Court *Dayan*, Rabbi Abraham Sherman; see Amichai Radzyner, "Problematic Halakhah: Creative Halakhic Rulings in Israeli Rabbinical Courts", *Jewish Law Annual* 20 (forthcoming), text next to note 179 (henceforth: Radzyner, Problematic Halakhah).

58. This seems to be the position of Rabbi Feinstein (Responsa *Iggrot Moshe, Even Ha'ezer* 1, 64 [heb.]) and other halakhic decisors. For other aspects relating to doubtful marriage, as well as the tendency toward a strict approach in marriage and divorce matters, even when the doubt is not substantial, see Pinhas Shifman, *Doubtful Marriage in Israeli Law* (1975), pp.55-58, 143-150 (heb.) (henceforth: Shifman, Doubtful Marriage).

59. Such as when the wife wished to marry a Cohen, and the requirement of a *get le-humra* might have made this impossible; see Rabbinical Court Case (Tel

Aviv) no. 029055209-21-1 (11.2.09); *Hadin Ve'Hadayan*, 21 (2009), pp.7-8 (heb.).

60. See Rabbi Meir Isachar Mazuz, "Civil Marriage and its Implications", *The Jewish Law Annual*, 3-4 (1976-1977), pp.269-270 (heb.) (henceforth: Mazuz, Civil Marriage).

61. See the Noahide Rabbinical Court Case (note 30, above).

62. See Ariel Picard, "'According to the Law of Moses and Israel': The Significance of Marriage in the Eyes of Twentieth Century Halakhic Decisors – Civil Marriage as a Case Study", *Tarbut Democratit*, 12 (2009) (heb.).

63. One must differentiate between divorce by demand (which means a divorce by unilateral demand, irrespective of attempts to restore the marriage), and no fault divorce (where a unilateral divorce is justified without a concrete fault on the part of the other side, when there is an irretrievable breakdown of marriage) – a position agreed upon by the Supreme Court and the Rabbinical Court in the Noahide case. See Shachar Lifshitz, "Family Law in the Civil Age" (note 35, above), pp.475-477, and see also *idem*, "I Want to get a Divorce Now! On Civil Regulation of Divorce Law", *Iyunei Mishpat*, 28 (2005), p.671 (heb.).

64. "It is difficult to say when exactly the rabbinical courts began dissolving civil marriages by way of issuing a verdict, but today it is a widespread custom in the legal system" [p.8 in the verdict]. On this policy (while doubting its sincerity) see discussion on the Shmuel case, CA 566/81 *Shmuel v. Shmuel*, IsrSC 39(4) 399 (1985); Pinhas Shifman, "On the Right to Convert, the Right to Divorce, and the Obligation to Decide", *Mishpatim*, 16 (1986), pp.221-227 (heb.); *idem*, *Family Law* (note 12, above), pp.367-382.

65. In fact, the court indicates that the criteria for no fault divorce should be applied to religious divorce as well (even though in such cases they should obviously be applied with reservations and greater hesitancy): "It should be mentioned that in religious marriage as well, a situation of complete separation and irreparable breakdown would also constitute a cause for a divorce verdict" (pp.12-13 to the verdict); see Avishalom Westreich, "The Right to Divorce in Jewish Law", *International Journal of the Jurisprudence of the Family*, 1 (2010), p.177 (henceforth: Westreich, The Right to Divorce).

66. See verdicts quoted in *Hadin Ve'Hadayan*, 26 (2011) pp.3-5 (heb.), and editor Amichai Radzyner's summary of them (*ibid*, p.2): "The first two verdicts in this edition [to which we must add the declaration of the third verdict – A.W. and P.S.] show us that a *get* is still required in cases of civil marriage. In situations of refusal of divorce, the courts prefer to enforce the giving of the *get* (even by way of incarceration) rather than permit a civil dissolution without a *get*."

67. Rabbi Sherman orally admitted that he signed the verdict in order to maintain the authority of the rabbinical court, but that he does not agree with the legal construction created around the Noahide marriage principle. According to Rabbi Sherman, civil marriage should be perceived as a doubtful marriage, and therefore as requiring a religious divorce, as well as a rabbinical court hearing. Rabbi Sherman bases his position on that of Hazon Ish (see note 57, above), according to which civil marriage has the same status as doubtful marriage. For more on Rabbi Sherman's position see Radzyner's "Problematic Halakhah" (note 57, above). For further (implied) criticism against the Noahide legal construction, see High Rabbinical Court Case no. 015168958-21-1 (22.3.2007), *Hadin Ve'Hadayan*, 15 (2007), p.4 (heb.), Rabbi Amar's and Rabbi Bar-Shalom's positions.

68. See for instance the decision of rabbis Nahari, Yeguda, and Meisels in Rabbinical Court Case (Haifa) no.583236/1, *Ploni v. Plonit* (2.6.2010). The Netanya Rabbinical Court verdict also accepts in principle the High Rabbinical Court's decision in the Noahide case, see Rabbinical Court Case (Netanya) no.764411/1, *Ploni v. Plonit* (3.10.2010), pp.3-7 of the verdict (henceforth: Netanya Rabbinical Court case).

69. For a principled discussion of the legal status of civil law concerning property division see the series of articles (and the responses to them) of the former High Rabbinical Court *Dayanim* Dichovsky and Sherman, *Tchumin*, 18 (1998) and *Tchumin*, 19 (1999) (heb.). For other aspects of the principled discussion, as well as its practical applications, see Rabbinical Court Case (Netanya) (note 68, above), pp.8-9 of the verdict, and more.

70. See for instance HCJ 5416/09 *Ploni v. Plonit and others* (unpublished) (2010), and the opinion of Justice Rubinstein, par. 10: "This court's judges can testify that the religious courts do apply the instructions of the Property Relations between Spouses Law. In this sense, and here we may have come a long way since the Bavli case, the religious courts show no principled objection to applying the instructions of the Property Relations between Spouses Law... In this current issue it is difficult to decide whether this is a case of ignoring the law, or rather of its improper application, despite the fact that the law itself was not mentioned by name."

71. Rabbinical Court Case (Netanya) (note 68, above), p.40 of the verdict.

72. See Rabbi Shlomo Dichovsky, "Civil Marriage", *Tchumin*, 2 (1981), section 5 (heb.).

73. The Noahide Rabbinical Court Case (note 30, above), p.3 of the verdict.

74. Rabbi Shlomo Dichovsky, "The Rabbinical Courts and Civil Courts: Thoughts on the Zones of Conflict between them in Issues of Family Law", *Moznei Mishpat*, 4 (2005), pp.287-291 (heb.).

75. Plonit Case, Civil Maintenance (note 28, above).

76. The Noahide Rabbinical Court Case supports this ruling. It says that the recognition of civil marriage does not in and of itself create the duty of maintenance, but it still carries significance. It serves as a "sign" of the popularity of the custom recognizing civil marriage and its deriving financial aspects (see note 30, above).

77. According to recent data from the Central Bureau of Statistics (2010), approx. 75% of Israel's population is Jewish, 17% are Muslims, and the rest are Christians, Druze, and members of other denominations. See the Central Bureau of Statistics, *Statistical Abstract of Israel* 61 (2010), 2.2, http://www.cbs.gov.il/shnaton61/st02_02.pdf

78. Concerning Christians and Muslims see articles 52 and 54 to the King's Order in Council, 1922-1947.

79. However, in recent decades, the cultural, religious, and legal encounter has become more and more significant. This pertains both to the encounter between the Israeli and Muslim laws (see below), and, in a wider and quite significant context, the social integration of Muslims in various western countries. This process has intensified during the last few decades, and has given birth to fascinating conflicts, as well as interactions, between the cultures and their legal systems. This phenomenon goes beyond the scope of this current paper, and we shall therefore confine ourselves to one reference, and point to the tension which arose in Britain concerning the proposal to grant some legitimacy to Muslim Law; see Bernard S. Jackson, "Transformative Accommodation and Religious Law"*, Ecclesiastical Law Journal*, 11 (2009), pp.131-153.

80. Family Appeal no. 41782-04-10, *Plonit v. Ploni* (23.3.2011) (Justice Moshe Drori), par. 23 of the verdict.

81 In accordance with the appellant's claim in this case, as opposed to the Family Court's ruling. See *ibid*, par. 26-31, 82-92.

82. This case involves a mixed couple. However, the Sharia court's opinion emphasizes the procedure and not the couple itself, which means that this opinion represents the court's position regarding all cases of civil marriage.

83. For instance, the principle of the child's best interest; see Mousa Abu Ramadan, "Recent Developments in Child Custody in Muslim Courts", *Mishpacha Ba'Mishpat*, 2 (2008), pp.69-105 (heb.) (quoted from p.71). By the way, concerning the child's best interest, the Israeli law was influenced by the Jewish law; see Pinhas Shifman, "The child's Best Interest in the Rabbinical Court", *Mishpatim*, 5 (1973-1974), pp.421-430 (heb.).

84. Mousa Abu Ramadan and Daniel Monterasko, "Islamic Jurisdiction in a Jewish and Democratic State – Cooptation and Islamization of the Islamic Field of Justice", *Mishpat U'Mimshal*, 11 (2008), pp.433-471 (heb.).

85. For the uniqueness of the approach towards issues of state and religion among the Israeli Arab minority, in contrast with the disputed approach towards such issues on the part of the Jewish majority, see for instance Michael Karayannni's research (below, note 86).

86. See Michael Karayanni, "Jewish and Democratic Ricochets", *Mishpat U'Mimshal*, 9 (2006), pp.477-495 (heb.). Karayanni analyzes how in certain dimensions of the state and religion debate the concerns of non-Jewish communities are completely ignored. This is the result, he argues, of the "ricochet" effect of the legal definition of Israel as a Jewish and democratic state.

87. Shifman, *Family Law* (note 12, above), p.414.

88. A full version of the Universal Declaration of Human Rights (10.12.1948), whose articles will later be quoted in this paper, can be viewed at: http://www.un.org/en/documents/udhr/index.shtml

89. According to this interpretation, freedom of religion includes the freedom to formally marry by way of religious ceremony alone. Our own proposed arrangement, as we shall soon show, does allow the performance of a binding marriage by way of religious ceremony, and it should not be considered as harming the freedom of religion.

90. For instance, see in Australia, Finalay, *Family Law in Australia* (1983), pp.112-113.

91. See Eliezer Don-Yehiyeh and Charles Liebman, "Separation between Religion and State: Slogan or Content?", *Molad*, 5 (1972), pp.71-89 (heb.).

92. Even in these systems, the state intervenes in religious arrangements in cases in which they do extreme harm to one of the marriage partners, as when they sanction the refusal to grant a religious divorce. For instance, see N.Y. Domestic Relations Law § 236 B(5)(h), (6)(d), act of July 17, 1992.

93. On the weight and significance of the state's Jewish nature as pertaining to its objection to civil marriage see below, next to note 133.

94. See Avishalom Westreich, *Human Rights, Jewish Law, and Humankind* (2012) (heb.). This is true not only concerning Judaism. Religious thinkers, especially Christian, often claim that the foundation of human rights, and especially the foundation of the principle of human dignity, is the religious tradition of the creation of man "in God's image."

95. For more on this issue see Pinhas Shifman, *By Religion or By Law: Marriage and Divorce Alternatives in Israel – An Essential and Possible Change* (ed. Na'ama Carmi, 2001) (heb.) (henceforth: Shifman and Carmi, By Religion or By Law).

96. The Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights both determine that "family is the basic natural social unit, and as such it deserves the protection of society and the state" (quoted from the Universal Declaration of Human Rights, article 16(3)).

97. New International Version, 2011. The two aspects mentioned here, the personal and the social, are both expressed in the various legal systems, but not equally so – some attribute greater importance to the personal dimension, and some to the social one. So, for example, in the Christian legal system the personal dimension is fuzzy, while the social dimension (reproduction and children's education) receives great emphasis in comparison with the Jewish legal system, where both of these dimensions are equally emphasized; see Shifman, *Family Law* (note 12, above), pp.139-141.

98. Article 16(1) of the declaration (note 88, above).

99. See James Nickel, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2010 edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2010/entries/rights-human, Section 1: "Human rights are international norms that help to protect all people everywhere from severe political, legal, and social abuses."

100. See, however, Yehuda Zvi Blum, "Marriage Law in Israel and Human Rights", *Ha'Praklit*, 22 (1966), p.361 (heb.), who believes that the Human Rights declaration does not prohibit marriage restrictions such as those found in the Jewish religious law. Blum reaches this conclusion based on a historical analysis of the Human Rights declaration, and especially of the UN discussions that accompanied it, as well as its original English version. In any event, we feel that the text's history does indeed carry significance and is important, but that a text – any text, including a legal document as well as this particular declaration – should be evaluated by the way in which it has been perceived since it was written, and by the context in which it is implemented.

101. The appropriate article here is article no.23 of the International Covenant for Civil and Political Rights, and it is best to quote it here in full: (International Covenant on Civil and Political Rights, 1966)

    1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

    2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

102. This violates the freedom from religion; see below, the next sub-section.

103. See the matter of the chained women (*agunot*), below, next to notes 150-153.

104. See discussion next to notes 16-23, above.

105. See below.

106. See Michael J. Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law* (2001), pp.25–28 (henceforth: Broyde, Marriage). See also Pinhas Shifman, "The Jewish Halakhah in a Changing Reality: What Withholds Those Withheld a Divorce?", *Alei Mishpat*, 6 (2007), pp.27-46 (heb.); Shifman, *One Language* (note 38, above), pp.115-142; Westreich, "The Right to Divorce" (note 65, above). The halakhah offers several possible routes; for a review and presentation of the various solutions, see Avishalom Westreich, *Talmud Based Solutions to the Problem of the Agunah* (2012), Chps. 1–7 (henceforth: Westreich, Agunah); see further below, next to note 151.

107. See below, chapter 5: *A Civil Legal Framework for Marriage and Divorce in Israel: Recommendations*. It should be mentioned that the courts and other state authorities have come a long way towards the recognition of the rights of same-sex couples. This is only natural in light of the wider social developments we witness around us.

108. Included in such considerations was the Christian tradition, that opposed divorce altogether, as well as the restrictions imposed on divorce by many legal systems. See Amnon Rubinstein, "The Right to Get Married", *Iyunei Mishpat*, 3 (1973), pp.457-458 (heb.) (henceforth: Rubinstein, The Right to Get Married).

109. The Israeli courts consider the prohibition of divorce to be against the constitutional principles of human freedom, individual autonomy, etc. Accordingly, the refusal of divorce justifies casting tort liability on the refusing party, which is usually done through the tort of negligence. An alternative route via the constitutional wrong of violating the Basic Law: Human Dignity and Liberty was also examined (for discussions on this matter see for instance Family Court Case 19270/03 *K.Sh. v. K.P.* (21.12.2004); Ronen Perry and Yechiel S. Kaplan, "On the Liability in Torts of the Recalcitrant Spouse", *Iyunei Mishpat*, 28 (2005), pp.773-794 (heb.).

110. We should also mention that there is room here for social norms which complement the (religious or civil) legal ones. The question of when it is right to get a divorce and to what extent should the couple attempt to preserve the marriage is an important social question that is related to the basic beliefs and values of a good life. Generally speaking, it is not the court's task to limit the freedom of people to discontinue an undesirable marriage, but it does not follow that the state should be neutral in its attitude towards the continuation or dissolution of marriages.

111. This is not the only tendency in the halakhah; on the contrary – there is considerable latitude for tendencies that render divorce by choice possible. See note 106, above.

112. See article 18 of the declaration: "Everyone has the right to freedom of thought, conscience and religion" (see note 88, above).

113. See Daniel Statman and Gideon Sapir, "Freedom of Religion, Freedom from Religion, and the Protection of Religious Sentiments", *Mekhkarei Mishpat*, 21 (2004), p.8, n. 10 (heb.) (henceforth: Statman and Sapir, Freedom of Religion). The freedom of religion was justified in several ways: moral, utilitarian, and cultural; see Statman and Sapir, *ibid*.

114. See Statman and Sapir's article, *ibid*.

115. Statman and Sapir, *ibid*, pp.38-45.

116. See Statman and Sapir, *ibid*, and see also Gidi Sapir and Daniel Statman, "Religious Marriage in a Liberal State", *Cardozo Law Review*, 30 (2009), pp.2867–2868 (henceforth: Sapir and Statman, Religious Marriage). Another example is the religious monopoly over burial. In this case it might be a matter of the living relatives' rights, since it is not clear whether the deceased himself has any rights, but in any event, it is only appropriate to allow secular burial ceremonies to those who wish for them.

117. See for example the verdict of Justice Zussman: "It would be appropriate to take into account a person's choice not to seek aid from a religious authority. Religion is a matter of belief, and it elevates the soul of the believer. What is the sense in forcing a non-believer to seek aid from a religious authority?" HCJ 130-132/66 *Segev and others v. The High Rabbinical Court and others,* IsrSC 21(2) 505, 555. For an analysis of the phrase "coercion of religious feelings" in this context see Haman P. Shelah, *Freedom of Conscience and Religion in the Israeli Law* (1978), p.84 and onward (heb.). See also S. Shetreet, "Freedom of Conscience and Religion: The Freedom from Coercion of Religious Norms, Setting the Obligation to Seek Aid from a Religious Authority, and Casting Religious Restrictions", *Mishpatim*, 3 (1971), pp.467-493 (heb.).

118. In such matters it is always important to remember the influence of the political and social reality. Regulation of personal status of minority communities under conditions of an unresolved conflict and in a conservative region where religion is growing stronger and its political influence is ever increasing, especially insofar as Islam is concerned – will always be a politically sensitive issue. From the point of view of human rights and from a civic point of view it is appropriate and obligatory that a civil framework for marriage and divorce should apply to all inhabitants of the state, regardless of community or religion. The state's obligation to assist those who might fall victim to a religious monopoly within their own community is even greater than its obligation to act against religious coercion within the majority community. However, the state would probably decline to intervene in the legal arrangement of personal status matters within the minority communities if the political leaders of such communities voiced their ardent political resistance to such intervention, in order not to seem as attempting to forcibly assimilate the members of the minority community. On the other hand, it is important to avoid a situation in which the state keeps its hands off such communities on account of a national conflict. This paper does not deal with such issues directly, but they obviously should remain in the background of our recommendations, and play a part in any subsequent practical action. For more on this see Karayanni (note 86, above).

119. See Shifman and Carmi, *By Religion or By Law* (note 95, above).

120. See Sapir and Statman, "Religious Marriage" (note 116, above), pp.2878-2880. Preferring the religious route is possible from a liberal point of view under certain conditions, which mainly consist of minimizing the religious aspect of this arrangement; see *ibid*, pp.2867-2868.

121. Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture", *Multiculturalism in a Democratic and Jewish State: Ariel Rosen-Zvi Memorial Book* (ed. Menachem Mautner, Ronen Shamir, & Avi Sagi, 1998) (heb.).

122. *Ibid*, p.97.

123. See Will Kymlicka, *Liberalism, Community and Culture* (1989), and compare to Margalit and Halbertal, *ibid*, pp.100-102.

124. On no fault divorce and divorce by demand see note 63, above. On extramarital relationships see next to note 145, below.

125. This is of course only a crude distinction between the various approaches towards marriage, but it is not far off. See the above-mentioned references, note 63.

126. For the foundations of the multicultural approach in its Israeli context, see a series of articles in *Multiculturalism in a Democratic and Jewish State:*

Ariel Rosen-Zvi Memorial Book (ed. Menachem Mautner, Ronen Shamir, & Avi Sagi, 1998) (heb.). The multicultural approach is based on ideological pluralism; however, as indicated in our paper, it is not relativism. See Avi Sagi, "The Jewish Religion: Tolerance and the Possibility of Pluralism", *A Challenge: Returning to Tradition* (2003), pp.302-311 (heb.).

127. In this context, on the question of the dynamic formation of Jewish identity, see Avi Sagi, "Critical analysis of the Jewish Identity Discourse", *Jewish Culture in the Eye of the Storm: Yosef Ahituv's Festschrift* (ed. Avi Sagi and Nahem Ilan, 2002), pp.248-292 (heb.).

128. Joseph Raz, *The Morality of Freedom* (1986), pp.336–338, 369–399.

129. On the distinction between the terms pluralism and tolerance see Sagi, (note 127, above), pp.302-309. Briefly, pluralism recognizes an essential equality among various opinions, and does not consider its own view better than others; tolerance holds onto the belief in the rightness of its own path, but allows others to express their own views without any restrictions.

130. See Mautner, Sagi, & Shamir, "Thoughts on Multiculturalism" (note 25, above), p.75.

131. It should be emphasized that this involves merely a violation of the religious monopoly, but does not eliminate the possibility of religious marriage, Jewish or non-Jewish. Our proposed arrangement would also allow cultural expression for those who prefer a religious marriage (see below, chapter 5: *A Civil Legal Framework for Marriage and Divorce in Israel: Recommendations*).

132. See Family Court Appeal 9607/03, note 31, above, paragraph 10 of Justice Rubinstein's verdict. In this case the court decided that the wife of the deceased, who married him by way of interreligious marriage abroad, is entitled to his inheritance according to section 11 of the Inheritance Law. The court abstained from deciding on the validity of interreligious marriages performed abroad, even though Justice Barak, *obiter dictum*, said that it would be appropriate to declare such marriages to be valid.

133. Rabbi Yitzhak Halevi Herzog expressed himself similarly in his "Legislation and Law in the Jewish State", *Law in Israel according to the Torah* (part 1, 1989), p.207 (heb.). In addition to preventing the division in the Jewish people there is also the need to prevent interreligious marriages. See Warhaftig's statements, *Knesset's Protocols* 14 (1953), p.1410 (heb.).

134. See chapter 2, section: *Civil Marriage in the Jewish Religious Law and Rabbinical Courts Rulings*.

135. See Shifman, *Doubtful Marriage* (note 58, above), pp.55-58, 143-150.

136. For a more qualified position on this matter see Shochetman, "Civil Marriage" (note 6, above), pp.1566-1572.

137. Mazuz, "Civil Marriage" (note 60, above), pp.246-247. The quote of Rabbi Moshe Feinstein by Rabbi Mazuz (below) is taken from Responsa *Iggrot Moshe*, *Even Ha'ezer* 2, 19 (heb.).

138. For our position on this point see below, chapter 5: *A Civil Framework for Marriage and Divorce in Israel: Recommendations*.

139. A man's marriage to his wife's sister is allowed only after the wife has died. See Maimonides, *Mishneh Torah, Hilkhot 'Isurey Bi'ah*, 2: 9. We should mention, however, that the state can also include such prohibitions in the civil conditions for issuing a marriage license. So, for example, this condition can be included under what the Gavison-Medan Covenant calls "forbidden family relations", see *Gavison-Medan Covenant* (below, note 176), p.173, sec. 2 (heb.).

140. See below, chapter 5: *A Civil Framework for Marriage and Divorce in Israel: Recommendations*.

141. The Rabbi Gershom's ban on bigamy relates to a rule forbidding multiple spouses. This rule was mainly administered in the Ashkenazi communities, but there were also local rules in other communities forbidding the same practice. See *Shulchan Aruch, Even Ha'ezer* 1: 1-11. On the rule and its development, as well as its other aspects (the ban on forcefully divorcing a wife), see Elimelech Westreich, *Transitions in the Legal Status of the Wife in Jewish Law: A Journey Among Traditions* (2002) (heb.).

142. See Maimonides, *Mishneh Torah, Hilkhot 'Isurey Bi'ah*, 1:6, 15:1.

143. A quick review of halakhic responses and of verdicts concerning marriage and divorce would clearly illustrate this. For a short example, see Abraham H. Freimann, *Marriage and Divorce in Post-Talmudic Era* (1964) (heb.). The main axis of Freimann's essay is the tension between the halakhic interest in annulling marriage in certain cases and the characteristic strictness of matters of marriage and divorce in the halakhah. For more on this, see Shifman, *Doubtful Marriage* (note 58, above).

144. See HLA Hart, *Law, Liberty and Morality* (1981).

145. CA 5258/98 *Ploni v. Plonit*, IsrSC 58(6), pp.209, 223.

146. This situation could be resolved, or at least significantly minimized, if the rabbinical courts would take vigorous action toward granting a divorce to chained women. Some *dayanim* (rabbinical court judges) have called for this, while indicating the halakhic dilemma of a married couple bound together in a practically non-existent relationship. However, other *dayanim* are overly

afraid of the halakhic result of allegedly improper coerced divorce (*get me'use*), and would rather avoid compelling the husband to divorce his wife even at the cost of aiding the violation of severe Torah restrictions. See the slashing article of Rabbi Shlomo Dichovsky, "Proper Execution of Justice in Rabbinical Courts", *Tchumin*, 28 (2008) (heb.), section A.2: "An allegedly improper coerced divorce scares me less than a non-divorce situation. A coerced divorce is possible to handle, and very often it is valid, at least in an after-the-fact level (*bedi'avad*). However, a non-divorce situation is impossible to handle [due to its possible severe outcomes – A.W. and P.S.]."

147. See Yeshayahu Leibowitz, *Judaism, the Jewish People, and the State of Israel* (1975), pp.161-162, 171-172, 187-188 (heb.). This is certainly not to say that the halakhah considers civil marriage as a preferred arrangement. The meaning here is that under the current social and cultural circumstances, it is also preferable from a halakhic point of view to establish a civil marriage framework. From this perspective, the described situation is an emergency situation (*she'at ha-dehak*). Compare Shochetman, "Civil Marriage" (note 6, above), pp.1585-1591. Some of Shochetman's claims, which object to a civil marriage arrangement (and especially his criticism of Silberg's proposal), refer to the proposed arrangement as a preferable one, which, as we have noted, it is not.

148. Rabbi Eliyahu Bakshi-Doron, "The Marriage and Divorce Law – Has the Gain Turned Out to be a Loss?", *Tchumin*, 25 (2005), pp.99-100 (heb.) (henceforth: Bakshi-Doron, Has the Gain Turned Out to be a Loss). Rabbi Bakshi-Doron raises this issue as a question, which remains unanswered, a rhetorical question, as its answer is self-evident.

149. Rabbi Bakshi-Doron severely criticizes the custom of performing marriage with the aid of unfit witnesses (a custom which later enables retroactive annulment of the marriage), not only because it amounts to a blessing said in vain, or even because the marriage might turn out to be valid after all because of other fit witnesses in the audience, but mainly because this custom deceives the couple themselves who may not know that their marriage is invalid because of the craftiness of those who arranged it. This leads the rabbi Bakshi-Doron to wonder: "So we cry out: Why should we perform a marriage according to the laws of Moses and Israel for those who in the first place are not likely to preserve the sanctity of their family?" See Bakshi-Doron, "Has the Gain Turned Out to be a Loss" (note 148, above).

150. For a thorough study, which examines the religious solutions to the problem, see the publications of the Agunah Research Unit: http://www.manchesterjewishstudies.org/publications/. For the summary of the study, see Bernard S. Jackson, *Agunah: The Manchester Analysis* (2011).

151. See Shifman, *One Language* (note 38, above), pp.281-297; Westreich, *Agunah* (note 106, above), pp.106-110, and for further references, see note 106.

152. This does not mean that the halakhah concerning this matter should be changed. Religion has its own internal tools to overcome this problem, as was previously mentioned. The avoidance of the use of such tools reflects an emphasis on strictness, or sometimes a struggle for political power (see the above-mentioned sources, note 151). For this reason, we have formulated our analysis in terms of an expectation that the rabbinical establishment will become more flexible.

153. The availability of civil divorce, for instance, would not actually provide a woman the opportunity to remarry in accordance with the religious law, but in other respects, civil and social, this would be a perfectly valid divorce. Perhaps this new situation would lead the rabbinical court to soften its strict approach, and embrace certain halakhic solutions, which even if not acceptable by everyone, would still be based on a sufficiently broad halakhic grounding to enable their adoption. For the sake of comparison, the Second Divorce Law of the state of New York is perceived by many as possibly leading to improper coerced divorce (*get me'use*), and see for instance the exchange of letters published in *Yeshurun*, 8 (2001), pp.516-536 (heb.). Yet, a halakhic effort is made in order to make the divorce valid, at least in an after-the-fact level, see Broyde, *Marriage* (note 106, above), pp.103-117. This move, we believe, is derived to a great extent from the conflict of the (non-governmental) rabbinical courts in America, which cannot prevent the divorce, and yet would not like to take drastic measures and declare the divorce to be invalid and the children born from the woman's second marriage to be illegitimate.

154. In continuation of what was said above, the compromises taking shape with respect to these matters are mostly discussed within the Jewish public only, without the organized participation of representatives of the non-Jewish population.

155. See chapter 2 above, section: *Israel's Civil Union Law for the Religiously Unaffiliated*.

156. See for instance Moshe Silberg, *In Inner Harmony* (1981), pp.243-244 (heb.), and also Pinhas Shifman, "Unsettling Law", *Deot*, 41 (1972) (heb.).

157. At the time when such proposals were raised and discussed, there was not much interest in same-sex marriages, and therefore the issue of state approval was not raised in this context. However, in principle, the expansive approach can also apply to same-sex couples.

158. See for instance Rubinstein, "The Right to Get Married" (note 108, above), pp.453-457; Ariel Rosen-Zvi, "The Rabbinical Courts, Jewish Law, and the Public: A Very Narrow Bridge", *Religion, Liberalism, Family, and Society: A*

Collection of Essays by Ariel Rosen-Zvi (ed. Ariel Porat, 2001), pp.180-189 (heb.).

159. Even in this respect the two-route proposal is lacking: it leads to the perpetuation of the existing, problematic situation concerning the status of cohabiting couples. See Shifman, "Civil Marriage" (note 38, above).

160. See above, next to notes 150-153.

161. For additional difficulties embedded in the two-routes system see Shifman, "Civil Marriage" (note 38, above).

162. For more on this, see Shachar Lifshitz, *The Civil Union,* Policy Paper 68, The Israel Democracy Institute (2006) (heb.) (henceforth: Lifshitz, The Civil Union).

163. See above, chapter 2, section: *Civil Marriage in Jewish Law and Rabbinical Courts Rulings*.

164. This would also solve the "married against their will" problem, i.e. couples who are not interested in the variety of rights (and duties) given them today as cohabitants (and are certainly not interested in marriage); see next to notes 46-47, above.

165. Civil Union proposals also vary in their willingness to include same-sex relationships in their proposals. For example, a bill formulated in the days of Prime Minister Sharon's government (2003-2006) concerning Civil Union did not include in this context same-sex couples. But the proposal's framework is flexible, and the important proposal is opened to all types of family, including same-sex relationships: See Lifshitz, *The Civil Union* (note 162, above), p.71.

166. See Yuval Marin, "Same-sex Marriage and the Failed Alternatives to Legal Regulation of Same-sex Union", *Hamishpat*, 7 (2002), pp.253-281 (heb.).

167. For more on these claims see the article by Dan Yakir and Jonathan Berman, "Same-sex Marriage: Is It Really Necessary? Is It Really Desirable?", *Maásei Mishpat*, 1 (2008), p.169 (heb.).

168. See above, chapter 2, section: *Cohabitation in Israeli Law*.

169. See Lifshitz, *The Civil Union* (note 162, above), pp.13-14.

170. The Civil Union Law for the Religiously Unaffiliated, 5770-2010.

171. See above, chapter 2, section: *Israel's Civil Union Law for the Religiously Unaffiliated*.

172. For this reason it is possible that if such a proposal were to be submitted to the Knesset, and it were to seem that this is the best one could hope for, it would

be worthy of support. But this is not the only consideration in the principled discussion of the establishment of a civil legal framework for marriage and divorce in Israel.

173. Pinhas Shifman, *Who's Afraid of Civil Marriage?* (1995) (heb.). (For an English version, see Shifman, "Civil Marriage" [note 38, above]). The publication of the final version was the high water mark of Shifman's long and diverse series of writings on various aspects of this issue. The proposal was also published in a document composed by the Association for Civil Rights in Israel and edited by Na'ama Carmi (see note 95, above).

174. See for instance the New York *Get* Law (see note 92, above); for tort compensation to chained women see Jean Claud Nidam, "The Position of French Civil Courts Concerning Divorce Suits Against Jewish Husbands", *Dinei Israel*, 10-11 (1981-1983), pp.385-404, and more (heb.).

175. See Yeshayahu Leibowitz, *Faith, History, and Values* (1982), p.189 (heb.).

176. Prof. Ruth Gavison, Rabbi Ya'akov Medan, *Foundation for a New Covenant among Jews in Matters of Religion and State in Israel* (2003), pp.173-222 (heb.) (henceforth: Gavison-Medan Covenant). For a summary version see Yoav Artsieli, *The Gavison-Medan Covenant: Main Points and Principles* (2004), pp.42-54 (henceforth: Artsieli, Gavison-Medan Covenant, Principles).

177. For Ruth Gavison's explanation see *Gavison-Medan Covenant* (note 176, above), pp.174-215.

178. The proposal does not recognize same-sex marriage, see *ibid*, pp.192-195, and also Artsieli, *Gavison-Medan Covenant, Principles* (note 176, above), pp.47-48. See also clarification by Gavison and Medan on this issue (Gavison-Medan Covenant website: http://www.gavison-medan.org.il/marriage/?did=269, March, 2006) (heb.), which makes clear that the lack of recognition of same-sex marriages will not affect the financial and other rights granted today to partners in same-sex marriage, which will be settled by way of contract laws or other legal means or through continued recognition of the status of cohabitants for those who cannot legally marry.

179. See sections 4 & 6 of the *Gavison-Medan Covenant* (note 176, above), p.173, and also Prof. Gavison's commentary, *ibid*, pp.199-204, particularly on p.200.

180. The term "dissolution of marriage" was intentionally selected in order to differentiate semantically between religious and civil divorce. Such differentiation probably makes the proposal easier to digest, particularly in situations where marriage is permissible from a civil point of view, but not

from a religious one (Artsieli, *Gavison-Medan Covenant*, Principles [note 176, above], p.50). We shall discuss such situations shortly.

181. See Rubinstein, "The Right to Get Married" (note 108, above), pp.457-458. Rubinstein proposes to make civil divorce conditional on rabbinical consent, in order to prevent the fear of illegitimate children. Rubinstein believes that this would indeed involve a measure of religious coercion and a violation of the freedom of conscience. However, he claims that there is a difference between the right to get married, which is a basic human right, and the right to divorce, which by its very nature requires attention to the partner's needs and to wider familial considerations, thus making it easier to restrict.

182. See *Gavison-Medan Covenant* (note 176, above), p.217.

183. On the "registering authority" issue and the defects in the existing situation see Shifman, *Family Law* (note 12, above), pp.305-324.

184. Concerning the relation between marriage, Civil Union and cohabitation, it seems that the answer would also depend on how inclusive the Civil Union framework would be. The more inclusive, the less obligated the legal system would be to grant cohabiting couples the same type of benefits given to the formally married or to partners in civil unions.

185. See note 33, above. For the position of the Gavison-Medan Covenant on this issue and for their commentary see notes 176 & 179, above.

186. For more on this issue see Shifman, *One Language* (note 38, above), pp.218-226.

187. The Gavison-Medan Covenant takes a similar approach, on section 6. See *Gavison-Medan Covenant* (note 176, above), pp.173, 201-204.

188. See chapter 4: *Terminating the Religious Monopoly over Marriage and Divorce: From Theory to Practice*.

189. See Shochetman, "Civil Marriage" (note 6, above), pp.1582-1585, 1591-1596.

190. See Shifman, *Family Law* (note 12, above), p.259.

191. This is reflected in civil marriage performed abroad, in the tendency to apply the law of the state where the marriage was performed also to the question of eligibility for marriage (for example, in marriage cases where one partner is Jewish and the other is not). See Shifman, *One Language* (note 38, above), pp.245-251.

192. Despite this, the civil law (even if devoid of religious elements) has an interest in preventing immoral deeds, such as *get* refusal, as we have previously mentioned.

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The religious monopoly which currently exists in Israel over the sphere of marriage and divorce, and which leaves in the hands of exclusive religious establishments complete authority over this field, leads to a wide range of legal, moral, religious, social, and cultural difficulties. Localized legal attempts to partially solve these problems did not succeed to do so, and in many ways even ended up perpetuating them.

In this comprehensive position paper, legal experts Dr. Avishalom Westreich and Professor Pinhas Shifman explore the existing legal situation, analyze the social, religious, and moral difficulties it entails, and present their elaborate proposal for a unified civil legal framework for marriage and divorce in Israel. This text also makes clear why this is one of the most burning issues in Israeli reality today.

Dr. Westreich is a lecturer in Jewish Law and philosophy of law at the College of Law and Business in Ramat Gan, and his research focuses on family law and Jewish law of torts. Professor Shifman, the former president of the College of Law and Business in Ramat Gan, has been writing and teaching about family law for over four decades, and published multiple influential books on this topic.

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