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Citations:

Bluebook 21st ed.

Ariel Rosen-Zvi, Israel: An Impasse, 29 J. FAM. L. 379 (1990).

ALWD 6th ed.

Rosen-Zvi, A. ., Israel: An impasse, 29(2) J. Fam. L. 379 (1990).

APA 7th ed.

Rosen-Zvi, A. (1990). Israel: An impasse. *Journal of Family Law*, 29(2), 379-386.

Chicago 17th ed.

Ariel Rosen-Zvi, "Israel: An Impasse," *Journal of Family Law* 29, no. 2 (1990-1991): 379-386

McGill Guide 9th ed.

Ariel Rosen-Zvi, "Israel: An Impasse" (1990) 29:2 J Fam L 379.

AGLC 4th ed.

Ariel Rosen-Zvi, 'Israel: An Impasse' (1990) 29(2) *Journal of Family Law* 379.

MLA 8th ed.

Rosen-Zvi, Ariel. "Israel: An Impasse." *Journal of Family Law*, vol. 29, no. 2, 1990-1991, p. 379-386. HeinOnline.

OSCOLA 4th ed.

Ariel Rosen-Zvi, 'Israel: An Impasse' (1990) 29 J Fam L 379

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ISRAEL: AN IMPASSE

Ariel Rosen-Zvi*

I. FAMILY LAW—THE NEEDS OF SOCIETY AND POLITICS

More than in any other sphere of life, there has developed in Israeli family law an ever-increasing gap between the law as laid down in the statute book and that which is applied in everyday life: between binding legal rules, some of which are derived from religious law and are applied in the religious courts, and social legitimacy which affects the individual and the community; between the basic ideology underlying those mores and ideology accepted by society, and, at times, between written legal prescriptions and arrangements actually put into practice by sections of the community. Israeli law, following religious law, imposes restrictions on freedom of marriage, creates difficulties with regard to non-consensual dissolution of marriage and results in lack of equality of bargaining power between spouses, generally to the detriment of the wife.

In recent years, family law in Israel has reached an impasse, owing to political sensitivity, intricate social reality and legal complexity, whereas the enactment of effective and expeditious solutions to family disputes is not a high priority on the social and political scale.

The legal system falls somewhere between religious and civil law. Religious law does not adjust itself to the needs of a secular public, which constitutes the majority in Israel, nor does it recognize the legitimacy of the secular outlook on life. In instances in which religious law offers a solution, it is not acceptable to the public. Such solutions are brought about only at the price of a severe blow to basic values of Israeli society. The Israeli legislature has great difficulty in finding solutions which are not contradictory to religious law and which would not involve fierce opposition on the part of the religious establishment. Under the Israeli electoral system and the Israeli political scene, the

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legislature would not presume to enact statutes likely to arouse the opposition of the religious public.

As a result, no proposals for reform, or even proposed amendments of a less far-reaching character, ever reach the stage of implementation. The legislature, owing to its desire to preserve the religious settlement recognizing the political exigencies which impede its ability to act, is in no hurry to go ahead. Courts, which are called upon to close the gaps, are careful not to overstep the demarcation line between putting forward realistic solutions to practical problems on the one hand, and making ideological decisions which belong to the realm of the legislature, on the other. Numerous problems are not settled either because they require detailed and thorough regulation which is beyond the capabilities of judicial involvement, or because they require more drastic measures which are beyond the legitimate capacity of judicial lawmaking. The courts, having acted frequently in the past by developing legal techniques in attempts to circumvent some of the difficulties which have arisen, are tending to discontinue this creative judicial activity.

In such a situation, there is little wonder that there has been so little development in Israeli family law. In recent years, this situation has become more serious. It has become difficult to amend or adjust to changing reality even those statutes that were enacted in the past by the Knesset.

II. DEVELOPMENT OF THE INSTITUTION OF COHABITANTS ("REPUTED SPOUSES")

In this situation, the courts have developed solutions which in the past have received legislative legitimation and which are capable of indirectly alleviating the problems that have arisen, at least to a certain extent. Such is the solution by way of cohabitants ("reputed spouses"). In a considerable number of legal systems of the world, rights of reputed spouses are becoming increasingly recognized. In addition to the prevalent trend in the Western world towards recognizing the status of quasi-marital relationships and extending the rights of the parties to such a relationship, the Israeli system had its own special needs. Restrictions originating in religious laws regarding marriage disqualifications apply to marriages between Jews. The plight of the wife who is an *aguna* (and thus cannot get a divorce) or who is refused a *get*, deriving from a difficulty under religious law to dissolve the marriage, is exem-

plified by the difficulties placed in the way of remarrying for the purpose of making a new start in life, of establishing freedom of choice or of overcoming personal distress. These special needs, deriving from "the stringency of religious law," have had the effect of closing the gaps, *inter alia*, by the indirect means of resorting to reputed spouses as "a necessary evil."¹ The institution of the reputed spouse offers an alternative both to marriage and to divorce, not only to the married man but to the married woman also. It is, therefore, not surprising that with regard to quasi-marital relationships Israeli legislation has shown the way to other systems in the world.

Thus, in Israel recognition of reputed spouses plays a special role in finding an indirect solution to problems brought about by the gap between religious law and secular reality.

We shall devote this year's contribution to developments in this field. We have to begin by a short survey which will place developments in their proper perspective.

Shortly after the establishment of the State in 1948, a long series of Israeli statutes granted various rights to reputed spouses. Such rights are confined to relationships between reputed spouses and third parties, and from this point of view such rights are less substantial as compared with those of married couples. Thus, a reputed spouse has been given the right to receive benefits from the employer on the death of the other reputed spouse (*e.g.*, pensions) as if they had been married. A reputed spouse is heir to the deceased partner as if they had been married to each other. In statutes relating to tenant protection, some of the rights of reputed spouses towards the landlord have been assimilated to the rights of a married couple. Conversely, there is no statutory regulation of the right to maintenance. On this basis, it has been held that, in the absence of an explicit agreement, a reputed wife is not entitled to maintenance from her partner where they are no longer living together.²

¹ As the court put it in H.C. 73/66, *Zemulun v. Minister of the Interior* 20 P.D. (4) 645, 660, 668. This case considers, *inter alia*, the connection between the concept of reputed spouses and the special needs of the legal system and the stresses resulting from Israeli legal realities. The Minister of Justice, Pinchas Rosen, put forward religious prohibitions as a ground for justifying the grant of rights to reputed spouses; see *Devrei HaKnesset* (records of the Parliamentary debates) (1957) 313.

² C.A. 563/65 *Yager v. Plavitz* 20 P.D. (3) 244.

The court has followed the Israeli legislature by adopting a policy of extending the rights of reputed spouses, and thus has gradually broadened that concept and the scope of reputed spouses' rights. The court achieved this by various means: (1) by recognizing agreements for setting up a joint household; (2) by making it easier to benefit from legal rights and to prove their existence; and (3) by adding further rights to those conferred by statute. The last two trends have undergone development in recent years.

An agreement to establish relations between a man and a woman, covering also extramarital sexual relations, is not regarded as illegal or immoral by the civil courts.³ Such a relationship between a man and a woman would be regarded by religious ideology as living "in sin."

The court has gone even further in holding that a maintenance agreement between a married woman and a man who is not her husband is not illegal or immoral.⁴ However, in the eyes of religious law, which controls matters of marriage, this would constitute a grave sin. The court in the past had extended the concept of the reputed spouse to a married spouse,⁵ except in cases where statute explicitly prohibits this.⁶

Recognition of an agreement between parties to a joint household who are reputed spouses, even where one of them is married to another, is not only contrary to religious principles as to the institution of marriage and its sanctity, but also contravenes the most severe religious prohibitions which are the basis of the laws of marriage and divorce. The court thus has served clear notice, by means of this doctrine of the reputed spouse, that legal consequences originating in religious law do not necessitate adoption of the religious ideology which accompanies them, nor is the court prepared to regard religious law as a part of local public policy according to which it is bound to give its ruling.⁷

The court has curtailed formal requirements and facilitated the burden of proof required to show the existence of a relationship of reputed spouses. It had already held that mistaken knowledge on the part

³ *Id.*; C.A. 805/82 Versano v. Cohen 37 P.D. (1) 529.

⁴ C.A. 337/62 Riesenfeld v. Jacobson 17 P.D. 1009.

⁵ C.A. 384/61 State of Israel v. Pasler 16 P.D. 102.

⁶ Succession Law, 1965, § 55.

⁷ As to the moral aspect of the subject and rejection of the moral outlook of religious law, see *inter alia* the ruling in Riesenfeld v. Jacobson, *supra* note 4, at 1025; Yager v. Plavitz, *supra* note 2; Versano v. Cohen, *supra* note 3; F.H. 13/84 Levi v. Chairman of Knesset Finance Committee 41 P.D. (4) 291, 293-94.

of the public as to the personal status of the reputed spouses was not required.⁸ In the last two years, the court has laid down more flexible criteria for determining the relationship of reputed spouses. While requiring the basic condition of a joint household, that condition is not a rigid one. The court is prepared to give consideration to the special circumstances of each case, and to understand the circumstances and the subjective intention of the parties, rather than rigid objective intentions, from evidence based on extraneous circumstances.⁹ It has thereby expanded the number of those entitled to benefit from the rights conferred by statute on reputed spouses.

The court has also extended the rights of reputed spouses beyond those laid down by statute. It has not confined them to rights vis-à-vis third parties, but has granted rights to the parties as against each other, therefore opting to apply the proprietary regime of community of property to reputed spouses.¹⁰ Spouses marrying after January 1, 1974 are subject to the regulation of balancing of resources which is obligatory—not proprietary—in nature, and which is postponed to the time of dissolution of the marriage.¹¹ The position of reputed spouses in respect to community of property is preferable to that of married couples under the Spouses (Property Relations) Law of 1973.¹² This is not the only case where the position of reputed spouses is preferable to that of a married couple. Two additional matters come to mind: (1) whereas marriage is a ground for terminating rights to benefits or other rights (e.g., pensions) this does not apply to reputed spouses;¹³ and (2) despite the assimilation of some rights of reputed spouses to those of married spouses, the relationship of reputed spouses is not regarded as bigamy for purposes of that offense under section 176 of the Penal Law 1977.

⁸ C.A. 481/Rosenberg v. Stessel 29 P.D. (1) 505.

⁹ C.A. 79/83 Attorney General v. Shukran 39 P.D. (2) 690; C.A. 107/87 Alon v. Mendelsohn 43 P.D. (1) 431.

¹⁰ C.A. 2/80 Shahar v. Friedmann 38 P.D. (1) 443; C.A. 749 82 Moteson v. Wiederman 43 P.D. (1) 278.

¹¹ Spouses (Property Relations) Law 1973, ch. 2.

¹² C.A. 640/82 Cohen v. Attorney General 39 P.D. (1) 673, 686.

¹³ See Shifman, *State Recognition of Religious Marriage: Symbols and Content* 21 ISRAELI L.R. 501 (1986). In Professor Shifman's opinion, the automatic recognition of religious marriages by the state actually harms the religious public. Whoever, owing to his religious belief, is not able to live "in sin" and maintain a relationship of reputed spouses, loses out. The legal system does not allow him a lawful means of maintaining a "private" legal relationship, not recognized as marriage status by the state. On the other hand, the secular public may find refuge in the reputed spouse relationship.

In recent years the courts have expressed their readiness to examine the possibility of awarding maintenance to a reputed wife even where the relationship has become estranged and separated on the basis of a mere implied agreement.¹⁴ According to the decision in *Yager v. Plavits*, which is the existing rule, an explicit agreement is required to confer maintenance in such case.¹⁵ In the same decision, the court also included its willingness to consider granting compensation to a reputed spouse for damage resulting from eviction without notice from an apartment where the parties had resided during the course of their relationship. Such a right may find formal legal support by implying an agreement between the parties which requires a reasonable time for the process of separation.¹⁶

If this obiter dictum becomes a binding rule, a situation may arise for the first time where, by an obligation to pay compensation, a restriction is indirectly placed on the freedom of reputed spouses to sever the connection between themselves at any time. Awarding compensation may well assimilate reputed spouses to marital status to an unprecedented degree.

Together with this significant extension of their rights, other rulings have appeared which have the effect of preserving the status quo instead of extending the rights of reputed spouses. Thus, the High Court of Justice dismissed the petition of a reputed wife against the refusal of the Ministry of the Interior to confirm the change of her name to that of her reputed husband.¹⁷ The term "spouse" has been interpreted in the context of various enactments conferring rights and determining obligations of spouses as being confined to married spouses only.¹⁸ The conclusion to be drawn therefrom is that statutes granting rights to spouses are not capable of being construed as applying to reputed spouses unless they so explicitly state. However, it is considered that the meaning of this ruling does not extend so far as to bar any extension of the rights of reputed spouses. First, the interpretation of the term "spouse" is likely to be specific to each enactment in accor-

¹⁴ C.A. 805/82 *Versano v. Cohen*, 37 P.D. (1) 529.

¹⁵ C.A. 563/65 *Yager v. Plavits*, 20 P.D. (3) 244.

¹⁶ *Versano*, 37 P.D. (1) 529.

¹⁷ *Zemulun v. Minister of the Interior*, *supra* note 1; H.C. 243/71 *Isaak (Schick) v. Minister of the Interior* 26 P.D. (2) 33. Both these decisions were given by a majority. The majority opinion is based also on H.C. 71/65 *Stand v. Minister of the Interior* 19 P.D. (1) 501.

¹⁸ *Cohen v. Attorney General*, *supra* note 11; Pub. Office Holders Appeal 1/82 *Levi v. Director of Courts* 36 P.D. (4) 123; *Levi v. Chairman of Knesset Finance Committee*, *supra* note 7, at 295.

dance with its particular legislative purpose, so that it cannot be held that the ruling is a general one in respect of all statutes. Second, the court can judicially extend the rights of reputed spouses as it has done in practice for a long time.

At any rate, these restrictive rulings can be explained on two similar grounds. First, while preserving the symbolic trappings of the family, the court is prepared to go far in according equal rights to reputed spouses and married couples, but will refrain from conferring a right where it is of symbolic rather than practical significance. The fear is that such involvement is liable to appear in the eyes of the public as expressing an ideological determination, and as provocation against the institution of religious marriage. Such criticism may result in the court becoming wary in the future even of extending rights on the practical level. Second, for the purpose of recognizing the rights of reputed spouses, the legislature has opted for the method of detailed and specific legislation by way of numerous statutes, rather than a skeleton statute which would determine principles. As a result, wherever statutory provisions occur, the court prefers to preserve the separate interpretive framework and to develop the ruling as to the rights of reputed spouses wherever judicial interpretation or lawmaking allow for this.

An examination of the overall result in practice reveals that these restrictive rulings do not prejudice the consistent, gradual trend towards extension of rights to reputed spouses.

III. CONCLUSION

The dual basis of the Israeli system, which has both civil and religious aspects, finds clear expression in this topic of reputed spouses. The necessity to close the gap between religious law and the prevailing ideology and social reality also explains the paradox whereby a system which manifests an excess of puritanism in the realm of marriage laws regulated by religious law accords at the same time normative expression to excessive liberalism through the institution of the reputed spouse.

