ISRAEL: PROTECTION OF FAMILY MEMBERS AND STRENGTHENING THE PARTNERSHIP BETWEEN SPOUSES

Ariel Rosen-Zvi*

I. INTRODUCTION

In recent years, family law has been marking time. The extensive developments that have characterized civil law as well as public law in the past decade have, for the most part, passed by family law, where no such development has taken place.

In the last two years, little has changed in the field of marriage and divorce law. In one particular area, protection of family members against violence within the family, and in particular the protection of battered wives and children against violence or abduction, there has been substantial progress following legislative intervention. A number of statutes were enacted in that area in 1990 and 1991.

Generally speaking, case law has also remained static, with two exceptions. The first is that of the mutual relationship between the religious and civil court systems, and the extension of the civil courts' jurisdiction at the expense of the religious tribunals. The second area is that of matrimonial property relations.

II. VIOLENCE AND THE USE OF FORCE WITHIN THE FAMILY

In recent years, serious cases of violence within the family have come to light. Violence was manifested both between spouses, particularly wife battering and sexual abuse, maltreatment and injury of minors.[1] The recommendations of the *Knesset* Labour and Social Affairs Committee of March 3, 1988 speak of a phenomenon covering some

* Professor, Dean of the Faculty of Law, Tel Aviv University, Israel.

[1] *See* research paper published in booklet, *Violence Within the Family* (Naamat Centre for Prevention of Violence Within the Family, ed. Ronit Lev-Ari, (1986)).

one hundred thousand persons, but the source for such data is not clear. As a follow up, a public committee was set up to examine policy regarding investigation, prosecution and trial for offenses of violence within the family and violence between spouses unnecessary.

The committee found[2] that violence within the family in Israel is in part a local reflection of a universal phenomenon in this area. However, peculiarly Israeli elements also play a part in this problem. Among others, the committee enumerates the following factors: (1) religious and cultural values tending towards confinement of the wife to the house and her dependence on her husband; (2) stress caused by the security situation, engendering a male set of values and a high threshold of tolerance for violence in general; (3) a combination of the realities of war with religious values that encourage an outlook which stresses the prominence of the family unit, domestic calm and the responsibility of the wife for family unity; (4) family laws peculiar to the State of Israel, making it difficult to dissolve the marital bond, complicating procedure and prolonging litigation. Such a situation creates an atmosphere in which hatred and violence between spouses can flourish.

The committee found that there were defects in the way the authorities responsible for law enforcement deal with cases of family violence. The defects concern both the basic policies of the various authorities and lack of co-ordination between them.

Only a combination of legal measures, a rehabilitative therapeutic approach and a physical means of protection for the victim can assist in reducing the proportions of this phenomenon. There is difficulty in resorting to legal means when these are not complemented by social services and educational means. This applies in particular to the relationship between the offender and victim within the scope of the family unit. Because Israel has no problems with regard to budgeting for educational and social needs, any legal plans are, to that extent, defective.

The recommendations of the committee can be divided into a number of different headings. On the first level, there are a number of recommendations for the law enforcement authorities, the police and the State Attorney's office as to policy and operational methods. The principle recommendation is for change in the policy of the police in

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[2] Report of the Committee on Policy regarding Investigation, Prosecution and Trial of Offenses of Violence within the Family and Violence between Spouses (Ministry of Justice (1989)). The Committee was headed by the Deputy Attorney General, Mrs. Yehudit Karp.

the way it responds to complaints. The approach recommended is a strict enforcement of the law instead of the existing "social" approach to settlement of disputes within the family. To this end, police handling of complaints of violence must be firm, with consideration for the battered wife and her needs, ensuring the welfare of minors and regarding the criminal process as an aid in dealing with the crisis between the spouses. On the basis of this policy, detailed guidelines have been proposed for dealing with such complaints. These include rules for handling the assailant, including the duty to bring him to a police station, providing information as to means of defense, treatment, nursing and rehabilitation at the disposal of the victim and consideration as to the possibility of arresting the assailant. As for the prosecution, the recommendation is to lay down a number of guidelines regarding indictments. The recommendations also discuss closing a file in cases in which the victim withdraws his or her complaint and in cases of minor offenses or extenuating circumstances, including rehabilitation of the family relationship.

On the second level, the committee recommended strengthening the machinery of enforcement and coordination among all concerned. The handling of offenders and treatment of the family should be improved. Treatment should be resorted to at the earliest possible moment, and the police should be contacted early. Liaison should be established between the rehabilitative approach and that of law enforcement.

The third part contains recommendations for legislative amendments. The findings of the committee and recognition of the gravity of the situation brought about three statutes: the Penal Law (Amendment No. 26) 1989, (hereinafter referred to as "the first amendment") the Penal Law (Amendment No. 30) 1990, (hereinafter, "the second amendment"); and the Prevention of Violence Within the Family Law 1991.

In addition to incidents involving violence, the trend toward resort to force within the family by abduction of children has continued. The abduction of children to Israel and from Israel has brought about the enactment of the Hague Convention (Return of Abducted Children) Law 1991, which incorporates the Hague Convention into Israeli law and accords most of its provisions legal effect.

A. Increased Responsibility of Members of the Family to Prevent Violence

The legislative changes relate to the subject on a number of different levels. On the first level, increased responsibility for preventing violence has been imposed on members of the family. The first amendment amended sections 323 and 337 of the Penal Law 1977, which provide for the duty of a parent responsible for a minor. The existing duty of providing for the minor's subsistence and health has been augmented by the duty to prevent maltreatment of the minor or bodily injury to him. In certain circumstances, breach of that duty carries a penalty of up to three years imprisonment.

B. Provision for Sexual Offenses Within the Family and Increase of Penalties

On the second level, penalties for sex offenders and violence within the family have been increased, as compared with those for offenders outside the family. The family circle provides a breeding ground for dangerous abuse of the protection afforded to minors and dependence of minors on those responsible for them. By creating a meaningful deterrent, this situation can be tackled by legal means, in addition to educational means, institutions and social machinery that must be responsible for relieving the stress.

Under sections 368A to 368C, within Chapter VI, 1, added to the Penal Law 1977 by the first amendment, the maximum prison sentence for a person responsible for a minor or a helpless person who causes him substantial or serious injury (physical or mental) or molests him physically, mentally or sexually, has been increased by two years, as compared with other offenders. The second amendment amends the provisions of sections 346-351 of the Penal Law by increasing penalties for sexual offenses committed by abuse of relationships involving dependence, authority, education, supervision, work or service.

Furthermore, the second amendment has added to the Penal Law section 351, dealing with sexual offenses within the family. This section lays down particularly severe penalties. Rape or sodomy committed against a minor who is a family member carries a prison sentence of twenty years as compared with sixteen years for the same offense against a victim who is not a family member. An indecent act committed against a minor who is a family member carries a sentence of ten

years, or if in aggravated circumstances fifteen years, compared to seven and ten years respectively for the same offense against someone who is not a family member.

The most significant difference between sexual offenses committed against a family member as compared with offenses against any other victim relates to sexual relations with a female within the family or an act of sodomy with a male in the family between the ages of fourteen and twenty-one (section 351). In this area, in addition to an increased penalty, a special offense has been provided relating to sexual relations with a female member of the family or an act of sodomy with a male, which does not exist in respect of sexual relations between persons outside the scope of the family. The Penal Law mandates five years imprisonment for having sexual relations with a minor with her consent if she is within the age group of fourteen to sixteen years, and exempts from criminal liability sexual relations by her consent with a minor above the age of sixteen years, which does not involve abuse of a relationship of dependence or authority. Sexual relations with a minor above the age of eighteen years is regarded as a criminal act only when it occurs by exploiting authority in a work or service relationship or by a false promise of marriage. On the other hand, section 351 provides that sexual relations or an act of sodomy with a family member between the age of fourteen to twenty-one years is in every case an offense carrying a penalty of sixteen years imprisonment.

C. *Protection Orders Under the Prevention of Violence Within the Family Law*

Under the Prevention of Violence within the Family Law, which came into force on June 28, 1991, the court has been granted extensive powers to take far-reaching measures. These measures include the removal of a violent family member from the home and the issue of additional orders for protection of family members from harm inflicted by any relative. Protection orders may also be issued to protect minors and helpless persons against anyone responsible for their upkeep, health, education or welfare. The statute authorizes the court to issue protection orders of various kinds. Orders may be issued to prohibit molestation, restrict the carrying or possessing of weapons and restrict the use of any asset. Other orders may provide for removal from an apartment, or an order may ban entry to an apartment or prohibit a person's presence within a certain distance from the apartment of a protected family member. Such an order, as specified in section 2 of the statute, may be

issued even when the person against whom it is issued has rights in the apartment or the asset and even if he is the exclusive and full owner. The court may in a protection order provide a guarantee for compliance with the order for good behavior as well as any other provision required for securing the welfare and safety of any family member.

Circumstances justifying the issue of such an order are detailed in section 3 of the Statute and include violent behavior towards a family member or the commission of a sexual offense. Another circumstance may be behavior giving rise to a reasonable assumption that the person against whom the order is sought constitutes a real physical danger to a relative or is liable to commit a sexual offense against the child.

A protection order may be given *ex parte*.[3] It may be in force for up to three months, and may be extended as long as its total duration is not more than six months.[4]

The special circumstances in which the statute operates require special arrangements. The family set-up causes daily tensions, anxieties about personal implications (involving revenge or other measures) and the economic consequences against a family member who takes legal steps and the fear of involving the outside world in the autonomy of the family unit and the intimacy of the family ties. In addition, the family set-up creates difficulties of proof, on the one hand, difficulties involving outside institutions on the other hand, as well as the fear of exploitation by the person requesting the order.

The Statute lays down a number of safeguards that strike a balance between the various interests in an attempt to overcome the difficulties inherent in the system. First, it is not only a family member exposed to harm who may initiate proceedings. The Attorney General or his representative, as well as a welfare officer, may take proceedings as provided in the statute.[5] Second, the statute is mandatory, so that it is not possible to contract out of its provisions.[6] Third, no conclusion may be drawn from the behavior of a family member, including lack of insistence on implementing the provisions of the statute or on compliance with an order made thereunder, as to waiver of a right under the statute or waiver of a breach of a judicial order under the statute.[7]

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[3] Prevention of Violence Within the Family, § 4.
[4] *Id.* at § 5.
[5] *Id.* at § 3.
[6] *Id.* at § 10.
[7] *Id.* at § 7(c).

Fourth, breach of a protection order does not merely confer a civil sanction. In order to deter the violent family member, the statute has enhanced the effect of a protection order by means of criminal machinery. It is sufficient for a complaint to be lodged regarding the breach of a protection order for the defaulting party to be arrested, in addition to proceedings under the Contempt of Court Ordinance.[8] The court may also take additional steps, at its discretion, as required to ensure the welfare and safety of any family member.[9] Fifth, in proceedings under the statute, the exception under sections 3 and 4 of the Evidence Ordinance [New Version], 1971, as to the incompetence of spouses and of parent and child to testify against each other does not apply.[10] Sixth, an application that is dismissed after it has been determined that it is vexatious allows the court to impose heavy costs on the applicant as well as appropriate compensation for anyone prejudiced by the application.[11] The statute seeks thereby to provide a deterrent against abuse of the means it provides.

The statute has the effect of adding to existing legal provisions.[12] Thus, protection orders do not provide a substitute for removal orders derived from legal provisions as to maintenance. Such removal orders continue to be effective, and will continue to be issued by the court wherever the right of accommodation of the wife and children is interfered with as a result of the behavior of the husband who is liable for maintenance.[13]

There are six advantages of a protection order over a removal order. First, it does not require an additional cause of action (the right to maintenance), but creates a cause of action in itself. Second, it extends the list of those who may initiate proceedings to every family member (including the husband) as well as to others, including the Attorney General and a welfare officer. On the other hand, a removal order based on maintenance laws enables only the maintenance creditor to take proceedings. Third, the statute is territorial in scope, and therefore not confined only to persons to whom the personal law under which a removal order may be issued (Jewish religious law) applies. Fourth, a

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[8] *Id.* at § 7(a), (b).

[9] *Id.* at § 2(b).

[10] *Id.* at § 8.

[11] *Id.* at § 11.

[12] *Id.* at § 12.

[13] For a discussion of removal orders, see A. ROSEN-ZVI, FAMILY LAW IN ISRAEL—SACRED AND SECULAR 426 ff (Tel-Aviv 1990).

protection order, as discussed above, allows for a very wide variety of remedies. Under a removal order the only sanction is removal of a defaulter from the department. Fifth, removal orders are granted *ex parte* only in rare and exceptional cases.[14] On the other hand, the statute regulates explicitly and in detail the procedure for issuing protection orders *ex parte* as a matter of course.[15] Sixth, the means of enforcement of a protection order and remedies for its breach, if properly carried out, are likely to be speedier and more effective than in the case of removal orders.

On the other hand, a removal order has two advantages. First, it is not confined to a period of six months, while the court has held that the duration of removal orders must be limited,[16] though they can be extended from time to time without limit. Secondly, removal orders may be employed in order to achieve the wider aims of family law.[17] However, it should be pointed out that following the case law of the Supreme Court, the courts refrain from making such use of those orders.[18]

D. Return of Abducted Children

The Hague Convention (Return of Abducted Children) Law 1991 incorporates into internal Israeli Law the majority of the provisions of the Convention regarding Civil Aspects of International Child Abduction, which was concluded at The Hague in October 1980. The statute, by section 2, accords the majority of the provisions of the convention the force of law. The schedule includes all the substantive provisions of the Convention, the wording of which is identical with that in the Convention.[19]

Despite the split jurisdiction in matters of child custody between the District Court and the Religious Courts, and the fact that the Reli-

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[14] *See* C.A. 410/80 Barazani v. Barazani, 35 P.D.(2) 317, 323; C.A. 192/82 Sedan v. Sedan, 36 P.D.(4) 169, 175.

[15] Section 4 of the Statute. *See also* reg. 2(b) and Form no. 3 of the Prevention of Violence Within the Family (Procedure) Regulations (1991).

[16] *See* C.A. 410/60, Barazani, 35 P.D.(2) at 321; C.A. 192/82 Sedan v. Sedan, 36 P.D.(4) at 177.

[17] *See* A. ROZEN-ZVI, *supra* note 13, at 426 ff.

[18] *See* C.A. 192/82 Sedan v. Sedan, 36 P.D.(4) at 174-75, 181; C.A. 680/82 Nahum v. Nahum, 37 P.D.(4) 667, 671.

[19] The numbering of the sections in the Schedule is also identical with that of the Articles in the Convention.

gious Courts apply religious law, Israel nevertheless consented to the application of almost all the provisions of the Convention, and did not enter any substantial reservation. The only reservation relates to Article 26 of the Convention concerning payment of costs. The State of Israel will not cover the costs and expenses involved in proceedings or other outlay regarding the handling of return of children except to the extent that such expenses can be covered by the legal aid scheme.[20]

The provisions of the Convention enjoy normative preference over any other law and apply despite any legal provision.[21] It follows that the jurisdictional provisions of the statute take precedence over any provision granting jurisdiction to any religious court. The provisions of the Convention take precedence over any provision of Israeli private international law, whether statutory or incorporated into Israeli law by another method, as well as over the provisions of the law of evidence and civil procedure that are inconsistent with the provisions of the schedule.

The statute applies only to the States that were parties to the Convention. Thus, in practice it relates to cases in which the habitual residence of the minor whose return is sought is situated within the territory of a state party. The statute applies only to children up to the age of sixteen.[22]

The Hague Convention Law places a direct duty on the designated state authorities toward applicants for return of children or for securing rights of custody and visitation. This duty relates to three relevant levels of operation: the institutional, the procedural and that of substantive law.

On the institutional level the Central Authority has the duty to act expeditiously and effectively to realize the objects of the Convention. The Central Authority in Israel under the Hague Convention Law is the Attorney General who may authorize welfare officers.[23] The competent judicial authority in Israel under the statute is the District Court. The District Court is also invested with all the powers of a juvenile court in respect of a minor or a "minor in need of protection" under the Youth Care and Supervision Law 1960.[24]

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[20] Section 2 of the Hague Convention Law, § 2.
[21] *Id.*
[22] *Id.* at § 4 of the Schedule.
[23] *Id.* at § 4.
[24] *Id.* at § 6.

In addition to applying to the Central Authority in their own country, any persons affected may apply to two further authorities. They may apply directly to the Central Authority of the State where the abducted child is present, or directly to the competent judicial or administrative authority of that State. That authority will consider the matter in accordance with the provisions of the procedural and substantive law detailed in the Convention. A person affected may therefore apply to the District Court in Israel and sue for the return of a child who has been abducted to Israel. The Court will consider the matter under the provisions of the Hague Convention Law.

On the procedural level it is provided that "the judicial . . . authorities of the Contracting Parties shall act expeditiously for the return of the child."[25] In Section 7 of the Hague Convention Law it is provided that the Minister of Justice is authorized to make regulations to ensure expeditious hearings in the courts in proceedings under the Convention. Such regulations have not yet been made, but as required by the Statute, the Court is bound to give priority to such proceedings and deal with them expeditiously. If the Civil Procedure Rules make it difficult to fulfill this requirement, precedence must be given to the Hague Convention Law.

A hearing under the Hague Convention Law is dependent on a determination by the court regarding the child's place of habitual residence and regarding the rights of custody prevailing there and their violation. The Hague Convention Law facilitates such proceedings and simplifies them to a significant extent. First, it provides that proceedings for proof of foreign law and for recognition of foreign judgments or decisions prevailing under Israeli private international law should not apply. The Court dealing with proceedings under the Convention may refer directly to the relevant foreign law and to the relevant decisions of the foreign court without being restricted by the rules of private international law generally prevailing in Israel.[26] Moreover, the Hague Convention Law provides for exemption from security for recovery of legal costs and from the requirement of formal authentication of documents.[27]

On the level of substantive law, the Hague Convention Law ensures the return of an abducted child as well as implementation and

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[25] *Id.* at § 11 of the Schedule.
[26] *Id.* at § 14 of the Schedule.
[27] *Id.* at § 22 of the Schedule.

enforcement of rights of custody and visitation as provided in the State where the habitual residence of the child was situated. The statute does not restrict itself to institutional assistance and procedural facilities, but also regulates the uniform substantive law that binds the Contracting States and now binds the Israeli courts.

The Hague Convention Law is not exhaustive of the right of a person affected for restoration of rights of custody and visitation of the abducted child. Thus, a parent may apply to the High Court of Justice by a petition under section 15(d)(1) of the Court Law 1984 (Consolidated Version) in a *habeas corpus* petition for return of an abducted child.[28] A person affected may also apply to the District Court or to a religious court, in accordance with the competence of each of them, for enforcement or determination of rights of custody. The jurisdiction of these courts is certainly retained where States not parties to the Convention are concerned or regarding a matter falling outside the ambit of the Convention. However, it is also retained even when the matter comes within the Convention, albeit to a limited extent. When notice is received of the abduction of a child, the court in Israel may not decide on the merits of a question of custody, except in two instances: if no application under the Convention has been made within a reasonable time after receiving such notice, or until it is decided that the child is not to be returned under the Convention.[29]

There are many advantages for a person affected in proceeding under the Convention. Such advantages are on each of the three levels enumerated above. From an institutional point of view, the applicant has at his disposal an orderly system of state institutions and an organized connection with the State to which the child has been abducted. Furthermore, the applicant is granted effective and prompt means of implementing his right. From a procedural point of view, we have already considered the significant advantages offered under the Convention both from the point of view of expediting proceedings and that of procedural and evidentiary facilities. The applicant also stands to gain from the point of view of substantive law.

Under the Hague Convention Law, there is no need for a judicial order or an agreement between the parents for a cause of action to

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[28] On jurisdiction of the High Court *see, e.g.*, H.C. 125/49 Amadu v. Director of Immigrants' Camp, Pardess Hanna, 4 P.D. 4; H.C. 268/80 Jansen - Zohar v. Zohar, 35 P.D.(1) 11; H.C. 405/83 Kavali v. Kavali, 37 P.D. (4) 705, 711.

[29] Section 16 of the Schedule to Hague Convention Law.

arise thereunder. It is sufficient that a legal provision accords a right of custody or visitation. On the other hand, the existing law under High Court rulings does not clearly define the prior conditions for intervention of the High Court of Justice for return of an abducted child. There is no doubt that the High Court may intervene when there is no dispute as to the rights of custody of the parties, for example, when there is a judicial order given in the foreign State or when there is an agreement between the parents.[30] However, in other cases the High Court makes its intervention dependent on there being no substantive dispute between the parties on the right of custody. Such cases are not sufficiently clear.[31] The High Court attaches much importance to a foreign order dealing with the merits of the case. If no meaningful foreign order has been given, the High Court will tend to consider the child's best interest and refrain from returning the child.[32]

The High Court does not go into the merits of the custody issue,[33] and thus use of the concept of the child's best interest is also restricted.[34] In this situation, it would seem that there is an affinity between the different proceedings. But in practice this is not so. Before the Hague Convention Law, no absolute duty to return the abducted child was recognized. The discretion of the court under the Hague Convention Law is restricted solely to the cases which come under the narrow scope of the few exceptions. On the other hand, the discretion of the High Court to refrain from giving an order for return of the abducted child is a wide one[35] and the use of the concept of the child's best interest is not defined in terms of narrow exceptions as under the Hague Convention Law.[36] That statute thus provides the applicant with

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[30] *See* H.C. 268/80 Jansen-Zohar v. Zohar, 35 P.D.(4) 11; H.C. 444/81 A. v. B., 35 P.D.(4) 658; H.C. 405/83 Kavali v. Kavali, 37 P.D.(4) 705, 711.

[31] *See, e.g.*, H.C. 76/71 Landerer v. Landerer, 25 P.D.(2) 258; H.C. 36/77 Bulstein v. Bulstein, 31 P.D.(2) 536; H.C. 110/81 Sobel v. Stern, 35 P.D.(3) 241, 244; H.C. 405/83 Kavali v. Kavali 37 P.D.(4) at 711.

[32] *See* dicta in this context in H.C. 836/86 Behar v. Gale, 41 P.D.(3) 701; H.C. 18/86 Morgenstern v. Morgenstern, 44 P.D.(2) 452.

[33] *See* H.C. 405/83 Kavali v. Kavali, 37 P.D.(4) at 712-13; H.C. 243/88 Consalos v. Turgeman, 45 P.D.(2) 626, 638.

[34] The term adopted in recent case law is "prevention of substantial harm to the minor." *See* H.C. 405/83 Kavali v. Kavali, 37 P.D.(4) at 714-18; H.C. 243/88 Corsalos v. Turgeman, 45 P.D.(2) at 643-44.

[35] *See* H.C. 76/71. Landerer v. Landerer, 25 P.D.(2) at 269; H.C. 250/72 Steinberg v. Steinberg, 26 P.D.(2) 436; H.C. 405/83 Kavali v. Kavali, 37 P.D.(4) at 711-12; H.C. 18/86 Morgenstern v. Morgenstern, 44 P.D.(2) 452.

[36] The term "prevention of substantial harm to the minor," which served as a basis for considering the child's best interest, covers a wide range of situations. Thus, if the petitioner does not

a substantive law which is far more unequivocal than that which was in force prior to its enactment.

The concept "right of custody" in the Hague Convention is not clear. The content of the rights of custody and their scope are not the same in all countries. Thus, Article 5 provides that the right of custody includes also the right to determine the child's place of residence. That right is included in Israel within the right of guardianship granted to both parents, but does not belong to the right of custody granted to a particular parent. In view of the specific provision of Article 5, any breach of the right of a parent to determine the child's place of residence, although not necessarily the custodial parent, amounts to breach of custody rights. To redress such a breach, all the measures laid down in the Convention for breach of custody rights can be invoked, particularly the duty of return.

The clear distinction in the Convention between breach of custody rights and visitation rights thus becomes blurred in Israel. Under Article 21, which is aimed at protecting the rights of visitation (or access), there is no absolute duty of return. The provision is general, providing that arrangements should be made to ensure the effective exercise of rights of access and their promotion, by taking all possible steps to remove any obstacle to the exercise of those rights. The Central Authorities and the Court have wide discretion.

It could be said that a petition for the High Court for *habeas corpus* is likely to be more effective than application under the Hague Convention for protection of visitation rights, since under High Court rulings, an abduction affecting rights of visitation of the applicant is legally the same as a breach of his rights of custody. The High Court may thus accede to a request for the return of a child to the country where the applicant was granted rights of visitation.[37] However, in view of the definition of right of custody in the Convention, and the provisions of Israeli Law as to the right of parents as natural guardians, every breach of visitation rights is likely to be regarded as a breach of rights of custody, giving the right to unconditional return subject only

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have the proper conditions for caring for the child, or if the child has settled down in the abductor's home and if removal would cause harm to the child, those factors would be regarded as amounting to substantial harm. *See* H.C. 405/83 Kavali v. Kavali, 37 P.D.(4) at 717-18; H.C. 243/88 Consalos v. Turgeman, 45 P.D.(2) 626.

[37] H.C. 836/86, Behar v. Gale, 41 P.D.(3) 701; H.C. 18/86, Morgenstern v. Morgenstern, 44 P.D.(2) 452.

to narrow exceptions. This interpretation of the Hague Convention Law in Israel is strengthened by the case law of the High Court.

As with the Prevention of Violence within the Family Law, the real test of the Hague Convention is not just in its provisions, but principally in the way it is enforced administratively and judicially. The proper implementation of the statute requires a special organization of the system charged with implementing the Convention within the Ministry of Justice, institution of expeditious procedures and understanding on the part of the courts. Implementation of the statutory provisions by the courts requires exercising their discretion for realizing the objects of the Convention. The courts should not be deflected into dealing with the merits of the custody issue, and they should abandon the traditional approach that overburdens the concept of the "child's best interest" in order to avoid returning an abducted child.

E. Adjustment of Laws

On the fourth level, various laws are being adjusted to tackle the special difficulties of violence within the family, including the lack of information as to cases of violence and sexual abuse, difficulties as to evidence and difficulties of enforcement. The recent legislation creates a duty to impart information, with exceptions for cases of immunity. Likewise, the law of evidence has been modified to facilitate proof of acts of violence and sexual abuse and adjust the rules to pathological states of affairs within the family.

The first amendment to the Penal Law, which increased the penalty for an attack on a minor, particularly by a family member or a person responsible for the minor, also imposes a duty to report and give information regarding such offenses. First of all, it imposes a general duty on any person who has a reasonable basis for believing that an offense has been committed by a caretaker against a minor or dependent person to report to a welfare officer or to the police. Failure to carry out this duty carries a penalty of three months' imprisonment. This duty is set forth in section 368 D(a) of the Penal Law. Second, Section 368 D(b) - (h) of the same Law imposes a duty to report and give information about offenses against minors upon. Physicians, nurses, educational workers, social workers, policemen, psychologists, directors or members of staff in children's institutions, or any person responsible for a minor. Failure to do so carries a prison sentence of six months. Such persons cannot plead immunity in their defense.

The duty to give information does not imply the duty to investigate or take automatic action. The sensitivity of the subject and its special nature require involvement of a different kind. For this reason section 368 D(f) of the Penal Law provides that the police should not act in such cases before consulting with a welfare officer, unless immediate action is required. Section 368 D(g) completes the regulation by providing that a welfare officer who receives such information is bound to refer it to the police with a recommendation to act or refrain from acting. However, such officer can receive authorization not to pass on the information from one of the committees set up for this purpose by the Minister of Justice.

In cases of violence or sexual offenses within the family, as well as in cases of neglect or abandonment of a child, one spouse is allowed to testify against the other and a child against his parent, thereby creating an exception to sections 3-4 of the Evidence Ordinance.[38] To facilitate the taking of evidence from a child against whom a sexual offense has been committed by his parent, the Law of Evidence Amendment (Protection of Children) 1955, has been amended. The amendment provides that in such cases the court may order that his evidence be heard without the accused parent being present, as long as his better attorney is.[39]

F. Effectiveness of Legal Protection

The effectiveness of the protection afforded by the various enactments for the protection of victims of violence and sexual abuse within the family is primarily dependent on the various law enforcement authorities. The degree of firmness exercised by the police, welfare officers and the prosecution in investigating cases in a sensible manner and putting offenders on trial will determine the nature and extent of the deterrent and the basic attitude of society.

Social and institutional cooperation is essential for reducing such obnoxious behavior to a minimum. Educational measures and support for affected families are essential complimentary steps together with criminal proceedings and civil action. Insisting on reporting abuse is the best way to deter potential offenders, who benefit from deep-set fears and insistence on family intimacy. The most effective way is to

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[38] *See* Evidence Ordinance [New Version] § 5, (1971), as amended by Evidence Ordinance Law (Amendment No. 9) (1991). *See also* Prevention of Violence Within the Family Law § 8 (1991).

[39] The amendment was affected by the Penal Law (Amendment No. 26) (1989).

allow information to flow from within the family. But in order to reach that stage, information must result from the perceptiveness of social workers and welfare officers and their ability to get people to speak, as well as from neighbors and friends.

Making the non-reporting of violence within the family and consequent sexual abuse a criminal offense ought to have the effect of proclaiming the message to society that concealing information provides encouragement for the offender within the family. If society is instilled with the notion that offenders within the family should be condemned, and reporting incidents and lodging of genuine complaints is encouraged in every case of sexual abuse and maltreatment on the part of a family member, this will assist in inducing the victims to come into the open. The damage they are liable to suffer will thereby be minimized, and deterrence of potential offenders will be increased.

III. Property Relations Between Spouses

A. Jurisdiction and Law

On the topic of matrimonial property relations, there are differences of outlook as well as different legal rules in the civil and religious court. While the civil courts operate according to the rules of community of property, the religious courts as a rule operate on the principle of separation of property between the spouses. Each court system resorts to its own laws in this field. Determination of the jurisdiction is thus decisive regarding the substantive law. Proceedings in the religious court are likely to prove advantageous to the owner of property, who is usually the husband, and disadvantageous to the party with no property, usually the wife.

The jurisdiction of the religious court is dependent on two conditions. First, the property suit has to be attached to a divorce suit. Second, the determination of matrimonial property disputes has to be essential for the settlement of all questions necessary for terminating relations between the spouses. In two recent cases, the Supreme Court restricted the jurisdiction of the religious courts to deal with property disputes between spouses. Restriction of the religious courts' jurisdiction necessarily leads to equality of rights between the sexes and prevention of adverse discrimination against the wife. In one of the cases, the Sharia Courts' jurisdiction over Moslem spouses was restricted.[40] In

[40] C.A. 65/89 Mustafa v. Matua, 44 P.D.(4) 197.

the other case, it was implied that the jurisdiction of the Rabbinical Court to deal with property matters attached to divorce and based on community of assets under civil law was likely to be very narrow.[41]

B. Consolidation of the Community of Property Rule.

On a number of levels, the trend toward consolidating the rule as to community of property between spouses has continued. One can see this first of all in alleviation of conditions needed for proving the presumption of community of property and alternatively enhancement of conditions required to disprove it. In one case, the couple had been married for a long period, but for a considerable part of that time the wife had been confined to a mental hospital. The Court did not accept the argument that application of the presumption of community had not been proved owing to a lack of sufficient common effort. The Court regarded the human partnership as being sufficient and did not consider that "common effort" should be expressed only in personal or economic terms:

> Common effort is based on a human life pattern, in which the two spouses contribute their share, each giving of his or her ability and receiving his or her needs according to the ability of the family . . . . Where the spouses are both in good health, they both contribute to the common effort. Where one of them is ailing for part of the duration of the marriage, his or her share is reduced, so that the other spouse's share is increased. These are human facets of "common effort," not derogating therefrom. Partnership in life is a partnership in happiness and in suffering, in joy and sorrow. In all these phases, the spouses act in unison.[42]

The presumption as to community of property may be rebutted by evidence as to lack of intention to create a common economic family unit or by rebuttal of the presumption that the spouses had the intention of holding a particular asset in community. It is not sufficient to prove that there is a quarrel or a crisis between them or that one of them is not actually making a financial contribution but is giving his share only by his labor for the family as a whole. Only where it can be proved that the spouses have maintained a merely formal family relationship ("empty shell") and were actually inimical to one another can

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[41] C.A. 488/89 Noferber v. Noferber, 44 P.D.(4) 293.

[42] C.A. 370/87 Estate of Madjer v. Estate of Madjer, 44 P.D.(1) 99, 101.

the formation of community of property not be assumed, but rather intentional lack of community.[43]

An additional case, decided this year, strengthens and consolidates the right deriving from the rule of community of property. In the past, failure to claim community until a certain stage had been regarded as waiver of community. In the *Kivshani* case[44] it was held that failure to claim community in the stage before a succession order was issued was to be regarded as waiver of the right. This rule was calculated to favor the tax authorities. A spouse who at the time of the death of the other spouse took out a succession order without taking into account the right deriving from the community rule, may become liable to a higher payment of tax at the time of sale of the right to third parties. The original date of acquisition will not be regarded as the time of acquisition for tax purposes. The day that the spouse died will be regarded as the date of acquisition.

The latest case, *Weinfeld*,[45] facilitates the position of the spouse who claims community. The President of the Supreme Court, Justice Shamgar, examined the *Kivshani* case and dissented; his opinion was shared by another three of the five Justices who sat on the case. Under *Weinfeld*, a spouse should be allowed to plead and prove community of property even if he does so after the community came into being. The right, by virtue of the presumption of community, should not be regarded as having been waived despite the fact that it was not pleaded on earlier occasions. A person may show no interest in his formal rights, particularly where relations within the family are concerned, since the matter may not seem important to him in his everyday routine. When circumstances alter, so that determination of his rights becomes relevant, it would not be right to disallow the adjustment of the position to reality, to deny the right to community which has been created and to regard the spouse as being estopped by waiver. The conclusion as to waiver is not justified or realistic from a legal point of view.

Thus, there is no justification for the argument that a claim for community brought a considerable time after the community came into being creates "ownership for tax purposes." On the contrary, there are cases and circumstances constituting unquestionable ownership, brought about by virtue of community of property. There is no justifi-

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[43] C.A. 26/89 Argov v. Argov, 44 P.D.(1) 793.
[44] C.A. 388/76 Kivshani v. Director of Land Betterment Tax, 31 P.D.(3) 253.
[45] C.A. 177/87 Weinfeld v. Director of Land Betterment Tax, 44 P.D.(4) 607.

cation for depriving the spouse of the right of ownership, just at the first opportunity that he has to benefit from it. The argument that he has waived his right by not pleading its existence all the years that he did not have recourse to it has no basis. The tax authorities should not benefit from the fact that the owner of an asset chooses to realize his potential legal rights only at a late stage and before payment of tax.

The matter is dependent on the circumstances. It could be proved that on a previous occasion the spouse had recourse to a plea of community but did not raise it, and he has no reasonable explanation therefore. In such a case, failure to make a claim could be considered as a waiver.

Consolidation of the right deriving from the rule of community in the *Weinfeld* case is on two levels. On the first level, the independent status of the right is strengthened. On the second level, the scope for maneuvering the facts in order to rebut the presumption of community or waive it has been narrowed.

The impact of the rule of community has also been increased in respect of a residential apartment and in respect of a foreign marriage agreement. The rule of community property takes precedence over a marriage agreement signed between spouses in a foreign country that is the domicile of the parties. There is no need for a written agreement in order to alter a foreign marriage agreement. An implied agreement suffices, including the conduct of the parties in Israel, from which it can be concluded that they intended their assets to come under the community rule, and takes precedence over the foreign agreement.[46] However, the court points out that in order to overcome a foreign agreement that provides for separation of property between spouses, the presumption of community alone is not sufficient, but "the burden on the party pleading that a prior formal agreement should be altered is much heavier." In any event, this ruling does not have the effect of prejudicing vested rights determined in respect of property acquired up to the time that the community rule applied to the spouses. Despite the protection afforded to vested rights, the effect of the community rule derived from an implied agreement is such that it may even prevail over such rights. The court so held in a case in which an apartment was acquired in Israel from the funds that one of the spouses had brought with him at the time he settled in Israel. The apartment served as the

[46] C.A. 291/85 Valid v. Valid, 42 P.D.(1) 215; C.A. 755/85 Estate of Shamen v. Estate of Shamen, 42 P.D.(4) 103, 106.

residence of the couple for thirty years. The court did not apply the rules of substitution of assets to the rights in the apartment.[47] It concluded from the circumstances in which the spouses lived together and the common use of the property over many years that there was an implied community agreement despite the fact that the source of funds for acquisition of the apartment was separate and not common.

C. *Third Parties*

The court left unresolved the question of how to classify the right deriving from the rule of community.[48] In respect of third parties, the rule that the registered title is decisive was confirmed. A third party can enter into a transaction with the spouse who is the registered owner without any concern for the rights acquired under the presumption of community of property or for the nature of the relationship between the two spouses in general and in respect of the transaction in particular. He will not be regarded as lacking good faith if he relies on the registration even if he knew of a rift between the spouses, unless collusion is proved. The right of the spouses will be preserved in the internal relationship between them, including the right to trace the consideration for the sale. This was held in the *E.T.S.* case.[49]

D. *Assets Included in the Community or in the Resource Balancing*

Within the topic of the scope of the assets included within the community arrangement or in that of resources balancing, a tendency towards extending and intensifying the community of property can also be discerned. The Spouses Property Relations Law 1973 was amended in 1990 by the Spouses Property Relations (Amendment) Law 1990. This amendment extends the scope of the assets included within the resources balancing arrangement. The original version of section 5 of the Statute, which lays down the scope of the assets included in the balancing, excluded therefrom rights which by law are not transferable. As a result of this limitation, pension funds, benefits, damages and directors' insurance were excluded from the balancing arrangement. It was doubtful whether shares or rights in cooperative societies were included within that arrangement. It was realized that, as a result of this limitation, the major assets in many families became separate assets.

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[47] C.A. 755/85 Estate of Shamen v. Estate of Shamen, 42 P.D. (4) 103, 106.
[48] C.A. 29/86 E.T.S. Self Drive Ltd. v. Carol, 44 P.D.(1) 864, 869, 876, 879.
[49] *Id.*

This was inconsistent with the policy underlying the principles and rules of the statute.

The statute, as amended, rescinds that restriction entirely. Nor does it make any distinction as to what stage the right is, whether before or after its maturity. The amended statute excludes from the balancing arrangement only benefits payable by the National Insurance Institute and any benefit or compensation payable under any enactment to one spouse in respect of physical injury or death. In 1987, the court held that pension rights, even if they have not yet matured, also form a part of the assets included within the rule of community of assets.

At the same time, in order to prevent a situation in which difficulties may arise for the spouse who is in debt because of problems of livelihood, liquidity or financing, the amendment to the Spouses Property Relations Law set forth, in section 6, guidelines for the court to calculate the economic situation of each of the spouses for the implementation of the balancing arrangement.

In the case law relating to the rule of community of property, the question of business assets has been finally settled. They form an integral part of the community of property within the scope of the presumption relating thereto.[50] The principle of substitution of community assets was also set forth once again.[51] The spouse has the right to trace community assets even where there is a sale to third parties.[52] The court may declare that the spouses hold a particular asset, or assets in general, in common.[53]

E. Gifts Between Spouses

The subject of gifts within the family commands the attention of the cases with increasing frequency. It often happens that a spouse retracts a gift that he has made to the other spouse from his own money or that of his parents. This frequently occurs when the marriage runs into difficulties and the donor accuses the other party of bringing about a crisis. In such cases the donor feels cheated or exploited by the spouse who is the recipient of the gift.

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[50] C.A. 841/87 Ron v. Ron, 45 P.D.(3) 793.

[51] C.A. 370/87 Estate of Madjer v. Estate of Madjer, 44 P.D.(1) 99; C.A. 488/89 Noferber v. Noferber, 44 P.D.(4) 293.

[52] C.A. 370/87 Estate of Madjer v. Estate of Madjer, 44 P.D.(1) 99.

[53] C.A. 29/86, E.T.S. Self Drive Ltd. v. Carol, 44 P.D.(1) at 880.

The rules relating to gifts between spouses are dealt with by civil law, not religious law.[54] The court refrains from laying down special rules as to gifts between spouses even by way of interpretation.[55] Thus, it has been held that it cannot be concluded from ordinary married life that a gift made by one spouse to the other is accompanied by an implied agreement that the gift is to revert to the donor if and when the marriage runs into difficulties. Special implied arrangements relating to gifts between spouses are not to be recognized. The presumption is that once a gift is vested, it is final and conclusive. The fact that expectations for the future have proved illusory is not in itself a reason for regarding the gift as void. If it were assumed that an implied condition existed for restitution of gifts between spouses in certain circumstances, this would turn almost every gift between spouses into a returnable gift, and this would be in flat contradiction of the provisions of the Gift Law. Anyone who chooses to proceed by way of gift, and even alters the entries in the land register, can be presumed to be aware of the outcome and the risk that he assumes. The relative blame for the breakup of the marriage has nothing to do with rights in the common property. Anyone seeking to make a gift dependent on a condition precedent or subsequent, or attach an obligation to a gift must do so in a clear, identifiable way. A condition or obligation attached to a gift must be made known by examining the intention of the parties or by hearing evidence as to words exchanged between them orally or in writing.

It should be pointed out that despite the unequivocal rule, the court found a way to annul a gift when justice so required. Thus, the way was found for restoration of a gift by the husband by resorting to the general power of attorney that he received from his wife at the time the gift was made. In an earlier case, a mother-in-law made a gift to her daughter and son-in-law, which was accompanied by a promise on their part that she could reside in the apartment during her lifetime. The daughter died and the son-in-law, recipient of the gift, evicted the mother-in-law from the apartment. The court found that breach of the promise given to the mother-in-law was a condition subsequent enabling the gift to be annulled.[56]

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[54] C.A. 370/87 Estate of Madjer v. Estate of Madjer, 44 P.D.(1) 99; C.A. 26/89 Argov v. Argov, 44 P.D.(1) 793.

[55] C.A. 384/88 Zissermann v. Zissermann, 43 P.D.(3) 205.

[56] C.A. 343/87 Perry v. Perry, 44 P.D.(2) 154.