INTRODUCTION TO THE LAW OF ISRAEL

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Chapter 5
Family and Inheritance Law

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I. Introduction: A Split in Both Law and Judicature

Family law in Israel is anchored in historical arrangements based on a delicate social and political balance. As part of Israel's historical heritage and within the framework of the social-political arrangement commonly known as the 'status quo,' various aspects of family law in Israel are controlled by religious law. In the area of family law, Israel's legal system is characterized by a laminated structure of religious laws, territorial legislation unique to family law, judge-made law grafted onto religious laws and general, civil and criminal laws. Some of the layers derive from historical strata of laws which have piled upon each other and endured due to the principle of maintaining the status quo. The principle which guided Ottoman law on religious matters was that of granting autonomy to the various religious communities. Family law, seen as a religious matter, enjoyed a legal Ottoman acknowledgement of religious pluralism. The main substance of the Ottomans' legal heritage in the realm of family law was preserved by the British Mandatory Rule and also served to guide the State of Israel, though with various amendments.[1]

There are two central senses in which Israeli law includes no uniform arrangement for various areas of family law:

In the first sense, the members of different religious communities are subject to the respective religious laws of these communities, laws which vary from one community to another. As decreed by section 47 of the Palestine Order in Council 1922–1947, some of the matters of personal status (mainly those pertaining to marriage and divorce) continue to be judged under the personal (that is, in this context, the religious) law applying to the parties involved.

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1. For English translations of the laws mentioned in this chapter, *see* the volume of the *Laws of the State of Israel* for the year in which the particular statute was enacted. M. Shava, *The Personal Law in Israel* 69 (3rd ed. 1991) (Hebrew); M. Chigier, 'The Rabbinical Courts in the State of Israel,' 2 Isr. L. Rev. 147 (1967); I. S. Shiloh, 'Marriage and Divorce in Israel,' 5 Isr. L. Rev. 479, 481–485 (1970).

In the second sense, the legal settlement of family law matters is split between religious and civil law. Thus, for instance, matters such as child custody, including adoption, inheritance and property relations between spouses are settled by civil law which is, in the main, territorial. The legal settlements of such matters under the civil and religious laws run parallel at times, complement each other in other cases and sometimes duplicate each other. Civil laws settle areas which remain unsettled by personal law or apply to people for whom there is no personal law. In part, they are also forced upon and grafted onto personal law. At times civil regulations contradict the settlement existing in personal law and are intended as replacements, supplanting the relevant settlements of personal law.

This split exists not only in the law but in the judicature as well. Various matters are decided by religious courts, belonging to different religious communities. These matters are settled by the various religious laws according to the religious membership of the adjudicating parties. The decisions of such courts are made, in the main, on the basis of the religious law of their community. In some cases, on some questions and for some purposes the religious courts are obliged to apply the civil law. Other matters are decided in civil courts which apply the religious law on some questions and the civil law on others. The split in both law and judicature thus engenders numerous secondary splits.

Various religious communities are recognized in Israel and operate special judicial authorities. The list of religious communities recognized for this purpose appears in the Second Supplement to the Palestine Order in Council. The Israeli Government has the authority to add a religious community to the list of recognized religious communities. Prior to the establishment of the State, the list included ten communities to which the governments of Israel have meanwhile added two more.

The jurisdiction of every religious court is contingent upon a statutory order instituting each court and granting its jurisdiction. This jurisdiction does not follow automatically from the State's recognition of the community indicated by its inclusion in the aforementioned list. A religious community may also be authorized to apply its religious law and granted jurisdiction by law, without its inclusion in the list appended to the Palestine Order in Council. Thus, jurisdiction was granted to the Muslim courts in the Palestine Order in Council and to the Druze courts in the Druze Religious Courts Law of 1962. In the case of Jews, the rabbinical courts were granted jurisdiction in the Palestine Order in Council, but the State of Israel also enacted a special law vesting authority in the rabbinical courts, that is, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953.

Parts of the Palestine Order in Council still hold today. The matters of personal status are defined in section 51 of the Palestine Order in Council and these are subject, under section 47, to personal law even when they are decided in civil courts which have jurisdiction to make such decisions.

Originally, the list of matters of personal status included matters of marriage and divorce, alimony, maintenance, guardianship, the legitimation and adoption of minors, inhibition from dealing with property of persons who are legally

incompetent, successions, wills and legacies, and the administration of the property of absent persons. The Israeli legislature has deleted matters of adoption, inheritance, wills and legacies from this list. The authority of the religious courts on the matters struck from section 51 of the Palestine Order in Council is contingent upon the written consent of the interested parties, as explained in each of the pertinent laws. For most religious communities, Israeli judgments have determined that paternity does not fall under the category of personal status.[2]

The list of matters of personal status with regard to Muslim courts in Israel follows from item 7 of the Procedure of the Muslim Courts Act. This is a broader list, also including the matter of paternity, for instance.[3]

It is a well established rule that the personal law of a local citizen of a recognized religious community is provided by the religious law of his or her community. The personal law of a foreign citizen is the law of his or her state of citizenship. For an unrecognized religious community, with no recognized religious courts, it is unclear what law applies to personal status.[4] A decisive majority of jurists supports separation of the religious courts of the religious community from the application of the community's religious law as personal law, to matters of personal status. The religious law of a local citizen belonging to an unrecognized religious community is thus usually thought to apply to this citizen as his or her personal law.[5] There has not yet been any ruling as to the personal law of a local citizen belonging to no religious community.[6] A man who lacks citizenship is subject to the law of his or her domicile and, in the absence of that, of his or her place of residence.[7] If the domicile is Israel and he or she belongs to a religious community, he or she is subject to the religious law of that community.[8] A Jew who is domiciled abroad and lacks citizenship but has acted in accordance with Jewish law, in matters of marriage and divorce, is subject to this law with the aim of approving and validating his or her action.[9] Problems of jurisdiction and law on matters of personal status arise concerning persons of dual nationality, when neither of these is Israeli,[10] and concerning members who possess two or more religions.[11]

2. H.C. 283/72, *Buaron* v. *Rabbinical Court*, 26(2) P.D. 727 (1972); C.A. 718/75, *Amram* v. *Skuvnik*, 31(1) P.D. 29, 34 (1977); C.A. 201/82, *Peretz* v. *Asulin*, 37(2) P.D. 838, 840 (1983).
3. S.C. 1/62, *Abu-Anjela* v. *Population Registry's Officer*, 17(4) P.D. 2751, 2758 (1963).
4. *See* M. Shava, *The Personal Law in Israel* 69–169 (3rd ed. 1991) (Hebrew).
5. P. Shifman, 'Religious Affiliation in Israeli Interreligious Law,' 15 Isr. L. Rev. 1, 32–33 (1980); M. Shava, *The Personal Law in Israel* 157–169 (3rd ed. 1991) (Hebrew).
6. B. Bracha, 'Personal Status of Persons Belonging to No Recognized Religious Community,' 5 Isr. Y.B. Hum. Rts. 88 (1975).
7. C.A. 65/67, *Litushinski* v. *Kirshen*, 21(2) P.D. 20 (1967); M. Shava, *The Personal Law in Israel* 114–130 (3rd ed. 1991) (Hebrew).
8. M. Shava, *The Personal Law in Israel* 129 (3rd ed. 1991) (Hebrew).
9. C.A. 65/67, *Litushinski* v. *Kirshen*, 21(2) P.D. 20, 25, 27 (1967); C.A. 191/51, *Skurnik* v. *Skurnik*, 8(1) P.D. 141, 178 (1954).
10. M. Shava, *The Personal Law in Israel* 105–113 (3rd ed. 1991) (Hebrew).
11. P. Shifman, 'Religious Affiliation in Israeli Interreligious Law,' 15 Isr. L. Rev. 1 (1980); M. Shava, *The Personal Law in Israel* 170–174 (3rd ed. 1991) (Hebrew).

The jurisdiction of the religious courts in Israel is limited as to the list of matters they are authorized to decide, as to the people on whose matters they are authorized to decide and also territorially. The jurisdiction of the various courts is not uniform. The broadest jurisdiction is enjoyed by the Muslim courts. This is a remnant of the Ottoman regime under which these courts served as general courts for matters of personal status. The effort to maintain the status quo continues to breathe life into this legal situation in the State of Israel.

On certain matters, the jurisdiction of the religious courts is exclusive. On others it is concurrent and conditional upon the consent of all the parties involved. At times, jurisdiction in matters of divorce entails jurisdiction in matters incidental to divorce as well. Also recognized is jurisdiction vested in the court by choice of the plaintiff.[12] Religious courts can be authorized as arbitrators. In this case, the scope of the authority is determined in keeping with the Arbitration Law, 1968.[13]

The conditions of suitability to an appointment as judge in a religious court, the appointment procedures, the duration of the appointment and regulations concerning the court officials are determined for Jewish judges in the *Dayanim* Law, 1955, for Muslim judges in the *Qadis* Law, 1961, and for Druze judges in the Druze Religious Courts Law, 1962. From 1981, religious courts deciding on matters within their jurisdiction were also given all the authorities falling under items 6 and 7 of the Contempt of Court Ordinance, subject to the necessary amendments.

According to section 55 of the Palestine Order in Council, when questions arise as to the categorization of a given dispute as a matter of personal status, it is brought before a special court of two Supreme Court justices and a judge from the relevant religious court.

Religious (community) affiliation is one of the decisive factors in determining the jurisdiction of a religious court, also determining which law applies to the given matter of personal status. The question of a person's affiliation with a given religion is decided in Israeli law – in the absence of civil regulations – in keeping with the religious laws. When more than one religion claims someone's membership, there is no civil arrangement for settling the conflict. Some believe that such problems may be resolved by recourse to the rules of conflict of laws. On the other hand, the question of religious affiliation for several purposes of the Israeli law in cases of changing religion and moving from one religious community to another, was settled by the mandatory legislators in the Religious Community (Change) Ordinance, 1927. This legislation lists the conditions and manner in which the legal results of a change of religious community are recognized. Religious recognition of the change is a

12. A. Hecht, 'Recent Developments Concerning Jurisdiction in Matters of Personal Status,' 2 Isr. L. Rev. 488 (1967); A. Rosen-Zvi, 'Forum Shopping Between Religious and Secular Courts (And Its Impact on the Legal System),' 9 Tel Aviv Univ. Stud. L. 347 (1989).
13. 22 L.S.I. 210 (1967–1968); *see* H. Porat-Martin, 'Israeli Rabbinical Courts – Aspects of a More "Responsive" Legal System,' 8 *Dine Israel* 49, 62 (1977); P. Shifman, *Family Law in Israel* 33–35 (1984) (Hebrew).

prerequisite of any legal results, but not every case of religious recognition necessarily entails recognition for the purposes of Israeli law.[14]

Civil courts are also authorized to decide on matters of personal status and settle disputes between spouses. The district court has the residual jurisdiction to decide on matters of personal status when no religious court is authorized to settle them, either because no religious court is authorized or because the religious court has not been granted authority over this case for substantial, personal or any other reasons. District courts also have jurisdiction – either exclusive or concurrent – concerning some of the matters of personal status or concerning certain persons, and sometimes by the choice of one party only.

Matters pertaining to marriage or personal status (other than the dissolution of a marriage) are decided by the district court for persons who are unaffiliated with any recognized religious community, for interreligious couples, and for couples one of whom is a foreign citizen (whose matters the religious court is not authorized to decide, either exclusively – as for Muslim couples in some cases – or subject to agreement). The religious court has jurisdiction to decide on various matters concerning the personal status, other than the dissolution of a marriage, of interreligious couples only when the President of the Supreme Court, on his jurisdiction under section 55 of the Palestine Order in Council, has decided to refer the parties in question to the religious court of one party or the religious court on which both parties have agreed. If one of the parties is a foreign citizen, the consent of both is always required in order that jurisdiction may be conferred upon one of the religious courts (except for those Muslims whose national law subjects them to the jurisdiction of the Muslim court). Even the President of the Supreme Court cannot refer interreligious couples one of whom is a foreign citizen, to a religious court, in the absence of their consent.

In the absence of a request to the President of the Supreme Court made by one of the spouses in an interreligious couple one of whom is a foreign citizen, or when the President of the Supreme Court refrains from referring the matter to the religious court, jurisdiction is conferred upon the district court which usually has residual jurisdiction to decide on matters of personal status.

Section 55 of the Palestine Order in Council determines a judicial mechanism for determining jurisdiction in cases caused by the special legal circumstances pertaining both to the persons involved and to the disputed matters.

Other courts are also authorized to settle disputes between spouses. Every court, within the jurisdiction conferred upon it and under the conditions of its jurisdiction, is authorized to try any dispute classifiable as falling under family law or personal status and not listed under matters of personal status, or any dispute following from civil law. The magistrate's youth court deals with various matters concerning minors and also has jurisdiction to decide on matters concerning custody, care and supervision of the minor.[15] The district

14. M. Shava, 'Legal Aspects of Change of Religious Community in Israel,' 3 Isr. Y. B. Hum. Rts. 256 (1973); P. Shifman, 'Religious Affiliation in Israeli Interreligious Law,' 15 Isr. L. Rev. 1 (1980).
15. *See* the Youth (Care and Supervision) Law, 14 L.S.I. 44 (1960).

court, on its jurisdiction in matters of possession of land and severance of joint ownership in immovable property, is authorized to decide on the spouses' property, including severance of joint ownership, even if this concerns their dwelling.[16]

A single property or matter concerning the same parties may be the subject of different proceedings in various courts, based on different grounds originating in religious law or civil law. Thus different laws may apply to a single matter at one and the same time.

In an attempt to afford the family with some protection in such cases, the Litigation between Spouses (Regulation) Law, 1969, has included a set of qualifications. The law has authorized the court to postpone the beginning or any other stage of legal proceedings for three month periods in the following cases: when the court sees the interest in beginning or pursuing proceedings as overridden by the damage that these are liable to cause to domestic harmony, or when the civil or religious court is already attempting to restore domestic harmony through proceedings initiated before the present lawsuit.[17]

From another direction, the various courts have developed rules for the reciprocal respect of one another's authority. They have thus instituted a rule of continuing jurisdiction in the court which originally tried and decided on a given dispute. The principles of *res judicata* have been adjusted to these special conditions. They have been developed so as to prevent contradictory rulings, to protect the integrity of the judicial system, to prevent any incentive to repeated trials in different courts, to decrease costs, to placate the controversy fed by prolonged disputes in different courts and to decelerate deterioration of the spouses' relationship in an effort to minimize damage to the family and its environment.

In district courts too, personal law (which is, in most cases, religious law) is also applied to matters of personal status. However, in this context the applicable law is largely a reflection of the court and is determined by it. Unlike religious courts, civil courts apply the civil procedure practiced in them, the civil laws of evidence and the rules of private international law.[18] The instructions of general (rather than religious) law on property and contracts apply to spouses who litigate in the civil courts. Within this framework, the Supreme Court has developed special laws, under general law and as part of it, which pertain, *inter alia*, to the property relations between spouses. The exercise of judicial discretion – especially on matters touching on ideology or fundamental views, such as applying the principle of the child's best interests – also differs from the religious to the civil courts.[19]

16. Courts Law (Consolidated Version) § 51(a)(3), 38 L.S.I. 271, 284 (1983–1984).
17. § 1, 23 L.S.I. 165, 165 (1968–1969); *see* E. Livneh, 'The Litigation Between Spouses (Regulation) Law, 1969,' 5 Isr. L. Rev. 457 (1970).
18. Z. Falk, 'Twenty-Five Years of Family Law According to Jewish Religious Law,' 5 *Dine Israel* vii (1974); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 69–72 (1990) (Hebrew).
19. M. Shava, 'The Nature and Scope of Jewish Law in Israel as Applied in the Civil Courts as Compared with its Application in the Rabbinical Courts,' 5 Jewish L. Ann. 3 (1985); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 67–99 (1990) (Hebrew).

Israel's legal system is characterized by a struggle of jurisdictions in the area of family law. A large portion of the energy inherent in the system is directed towards the development of rules of compatibility between the various courts, towards improving the techniques for deciding on the division of jurisdiction and towards solving the questions raised by the existence of a multi-judicial system sometimes engendering internal competition or confusion. The struggle of authorities in of itself becomes one of the main points of disagreement in every family dispute.

The special judicial situation is used, among other things, for maneuvering between courts, for attaining results allowing the parties any kind of achievements. This leads to more complicated and more prolonged procedures, increased costs, deepened rifts in the family and negative incentives to reach a peaceful settlement.[20]

II. Concurrent Arrangement: Civil and Religious

Since the establishment of the State, civil family law has come to occupy a gradually growing area of the legal settlement of family matters. A settlement concurrent with the religious one and applied chiefly in the civil courts is evolving continuously. Part of the concurrent settlement binds the civil courts only. Other parts of it are territorial, binding religious courts as well.

In general, religious courts are authorized to decide according to the law of their religious community. In the absence of other regulations, they are entitled to determine their trial procedures and the laws of evidence they follow, according to their religious laws. Common opinion has it that these courts are not generally subject to the regulations of Israeli law. Nonetheless, a growing body of regulations and laws do apply to them as well as to the civil courts. (As will be discussed later, the Supreme Court has broadened the scope of constitutional law norms that are binding on religious courts in certain matters of family law.)

Items of legislation which bind the religious courts include those regulating the methods of appointing judges, their conduct, the jurisdiction of the religious courts, their functioning and their modes of operation. Also binding are laws expressly designated by the legislature as applying to the religious courts. In this way, the legislature broadens the scope of civil law at the expense of religious laws. The territorial settlement enforced through this legislation pertains in some matters to the equal rights of women (Women's Equal Rights Law, 1951); to the protection of minors and imposing the principle of the child's best interests (Adoption of Children Law, 1981, and the Capacity and Guardianship Law, 1962); to the settlement of property matters between spouses on a basis of cooperation and equality (Spouses (Property Relations) Law, 1973). The interpretation of these laws by the Supreme Court has enhanced the scope of their application to Israel's religious courts. Also among

20. A. Rosen-Zvi, 'Forum Shopping Between Religious and Secular Courts (And Its Impact on the Legal System),' 9 Tel Aviv U. Stud. L. 347 (1989).

the laws which bind the religious courts are basic principles such as the rules of natural justice and of judges' ethics.

Recently, the Supreme Court ruled on the issue of the obligation of the religious courts to abide by basic laws and civil law. In an unprecedented decision (H.C. 1000/92, *Bavli* v. *Bavli*), the Court held that the presumption of community property (which it developed thirty years ago) applies to cases before the religious courts despite the fact that there is no explicit legislative provision to this effect. Indeed, the Court's reasoning in this case has even more far-reaching implications. Former prevailing notions concerning the inevitable linkage between the forum and the law it applies, the dependence of religious courts on religious law, and the exemption of religious courts from civil law (unless specifically provided otherwise by legislation) must now be abandoned.

The Supreme Court's ruling in *Bavli* v. *Bavli* requires the religious courts to abide by civil law (which includes both legislation and judge-made law, such as contract or property law) with respect to various spheres of family law, except matters concerning marriage and divorce and other matters of personal status over which the religious courts have exclusive jurisdiction.

An equally revolutionary decision was rendered by the Supreme Court in another case (H.C. 3914/92, *Lev* v. *Lev*). In this case, the Court held that constitutional law and principles of fundamental human rights are binding upon the religious courts. As a result of the decision rendered in this case, basic laws enacted by the Knesset (such as the Basic Law: Human Dignity and Freedom), as well as fundamental constitutional principles and values (including fundamental human rights and liberties) found in either legislation or judge-made law, are now binding upon decisions rendered by the religious courts insofar as the application thereof does not contravene the basic tenets of religious laws in matters of marriage and divorce and unless there is an explicit legislative provision to the contrary (e.g., as in the case of marriage and divorce *strictu sensu*).

In following this ruling, the Supreme Court revoked an order issued by a rabbinical court prohibiting the petitioner from leaving the country for the purpose of preventing her from meeting her lover abroad. The Supreme Court held that the rabbinical court was duty bound to abide by the constitutional right of freedom of movement as it is with other constitutional rights.

These recent Supreme Court decisions have changed the 'rules of the game' pertaining to the relationship between the religious courts and the civil courts and the respective laws they apply. Consequently, a new common denominator has been created. This common denominator is civil (secular) and territorial, and it renders family law in Israel with respect to various matters more coherent, more homogeneous, and to a certain degree more unified. The scope of the applicability of religious law has been significantly reduced.[21]

21. On the subject of the law that is applicable to the religious courts, *see*, e.g., M. Chigier, 'The Rabbinical Courts in the State of Israel,' 2 Isr. L. Rev. 147 (1967). The religious courts are, on the one hand, independent and not subordinate to the civil law; on the other hand, however, they are subject to the civil law to a certain degree. *See* A. Rosen-Zvi, *Israeli*

Taking the recent developments into consideration, there are grounds for the view that civil law binds the religious courts on a scope much broader than present convention would have it. The court can interpret certain laws or enactments as cogent in the sense of applying to the religious courts too. Cogent interpretation can apply to the state laws providing the framework for the functioning of all the state authorities. Cases in point are, for instance, the Penal Law, 1977; the Prisons Ordinance (New Version); the Extradition Law, 1954, and so forth. Cogent interpretation can apply, for example, to laws dealing with the acceptability of evidence, intended to set general and unified norms of conduct, such as: the Secret Monitoring Law, 1979, or the Protection of Privacy Law, 1981.

III. Gaps and Bridges between the Law on the Books and Law in Reality

A. General

In the areas settled by religious law there is a growing gap between the law on the books and reality: between the binding law and the social legitimization of the law affecting the public; between the world view on which the norms are grounded and the ideology currently prevalent in society; at times between the written legal settlements and the settlements actually practiced in part of the community.

Gaps open up on matters which are of central importance. Among these are the areas of restrictions on the freedom of marriage for various religious reasons,[22] of difficulties in dissolving marriages,[23] of violating women's status and their bargaining power,[24] of distress of litigation.[25]

Family Law – The Sacred and the Secular 84–99 (1990) (Hebrew). On the rule in general, *see* H.C. 187/54, *Briye* v. *Qadi of the Shari'a Court in Acre*, 9(1) P.D. 1193, 1198 (1955); H.C. 202/57, *Sides* v. *High Rabbinical Court*, 12 P.D. 1528, 1539 (1958); H.C. 323/81, *Vilozni* v. *High Rabbinical Court*, 36 (2) P.D. 733, 739 (1982). The religious courts are exempt from the application of the rules of private international law, *see* H.C. 301/63, *Strayte* v. *Chief Rabbis*, 18(1) P.D. 598, 608, 620–629 (1964). In contrast, on the application of parts of the civil law and public law to the religious courts, *see*, e.g., H.C. 10/59, *Levi* v. *Rabbinical Court*, 13(2) P.D. 1182 (1959) (the application of the rules of natural justice to the religious courts); H.C. 732/84, *Tzaban* v. *Minister of Religious Affairs*, 40(4) P.D. 141, 151–153 (1986) (the application of the civil code of ethics to the religious judges).

22. A. Rubinstein, 'The Right to Marriage,' 3 Isr. Y.B. Hum. Rts. 233 (1973).
23. A. Rosen-Zvi, *Solutions to Problems of Laws of Personal Status in Israel* (1986); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 138–143 (1990) (Hebrew).
24. Z. Falk, 'Religious Law and the Modern Family in Israel,' *Family Law in Asia and Africa* 235, 248–249; Z. Falk, *The Divorce Action by the Wife in Jewish Law* (1973) (Hebrew); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 136–165 (1990) (Hebrew).
25. A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 127–135 (1990); A. Rosen-Zvi, *Solutions to Problems of Laws of Personal Status in Israel* (1986); Z. Falk, *The Divorce Action by the Wife in Jewish Law* (1973) (Hebrew); A. Rosen-Zvi, 'Forum Shopping Between

B. Marriage Law

The main area still settled by religious law with a minimum of intervention on the part of civil law is that of marriage and divorce law in the narrow sense. This is an area for which there is no territorial civil settlement. The conditions of marriage, its form and results are governed by the relevant religious laws. The validity of interreligious marriages between Israeli citizens, when undertaken in Israel, is apparently determined by the personal law of each party, as applied to his or her personal status. A marital status cannot be created by contract alone or be recognized as such under and according to contract law.[26] Israeli law does not allow civil marriage in Israel, as this institution is construed in most other countries. It is only when both spouses are non-Jewish foreign citizens that the State will recognize a civil marriage performed by a foreign consul, if such marriage is recognized by the State in question. This procedure is set by section 67 of the Palestine Order in Council and by the regulations on the authority of consuls in Israeli law.

C. Divorce Law

The dissolution of marriage too, its grounds and form, are controlled by religious laws. In all but a few cases to be listed later, Israeli law avoids the enactment of any substantial territorial settlement regarding the dissolution of marriage. As a result, Israeli Christians who come under the jurisdiction of the Catholic courts may be subject to a law disallowing divorce altogether. It may be maintained that the difficulty of dissolving a marriage in Israel, chiefly between Jews, constitutes the weakest point of the settlement of relations between spouses.

Jewish divorce law contains three progressive elements: 1) The mutual consent of the spouses is always sufficient grounds for divorce. 2) The principle of the 'clean break' is practiced in divorce. On divorce the woman is entitled to a lump sum, a 'compensatory' payment. The amount is determined in the *ketubah* (the Jewish marriage contract) made by the husband upon entering into the marriage. The woman is not entitled to alimony after divorce. This prevents a continuing negative dependence between the spouses after divorce. 3) The litigation in the rabbinical court is combined with an attempt to achieve reconciliation, conciliation or mediation.

Despite these progressive elements, however, many difficulties in Jewish law make the divorce problematic. In the absence of mutual consent between the spouses, the divorce is contingent upon the proof of one or more of a variety of grounds, all based on the element of fault divorce. Moreover, the divorce is a private act of the spouses. The court accordingly lacks authority to dissolve the marriage through a court decision. At most, some of the proven grounds

Religious and Secular Courts (And Its Impact on the Legal System),' 9 Tel Aviv U. Stud. L. 347 (1989).

26. C.A. 32/81, *Tzonem* v. *Shatal*, 37(2) P.D. 761, 765 (1983).

allow for the implementation of obligational measures or the coercion of the refusing spouse to grant a divorce.

The grounds for divorce are severely limited and do not include grounds suited to the distresses of modern man. Thus, for instance, they do not include incompatibility or unmet sexual needs between the spouses. Moreover, it is not only the grounds for divorce that are restricted. Their implementation in the rabbinical courts is even more so. For various religious reasons the rabbinical courts' interpretation of the grounds for divorce is a severely reductive one. The court often avoids a ruling and recommends that the parties reach a settlement. Achieving consent (the most effective way of attaining divorce) usually depends on the more interested spouse's waiver of rights, in answer to exorbitant and even extortionist demands presented by the other spouse.[27]

It should be kept in mind that the rabbinical courts do not enjoy the same amount of authority they would have in a mainly Orthodox society. Due to the secularization of Jewish society, the religious courts tend to become increasingly entrenched in preserving existing Jewish law. They ignore the distresses caused by a reality they consider unacceptable and refuse to recognize the existence of problems arising from the secular reality. They, of course, refrain from adjusting the law to this reality for fear of legitimizing it. The courts' attempt to function as in the past and to solve problems individually while exercising religious authority has failed almost totally. Solutions appropriate to a homogenous Jewish community are not acceptable to most of Israeli society.

The gap between a large section of Israeli society and the religious courts stems from their disparate views of marriage, of its aims, of the conduct appropriate to a family framework, and from different psychological approaches. There is no common denominator upon which it is possible to base cooperation between the religious courts and the parties to the litigation. The lack of cooperation is manifest in the parties' unwillingness to accept the authority of the religious courts and in the failures in communication occurring as solutions are sought.

The problem is further aggravated in view of the inequality between the sexes as regards divorce and remarriage. In some cases, husbands can obtain permission for second marriages, when their wives refuse to divorce them. Such permission provides protection against criminal charges of bigamy. A Jewish woman, on the other hand, cannot obtain such permission.

These difficulties, underlining the woman's partially inferior status and the limited power of the religious courts, cause grave results. Given the rise in divorce rates,[28] a new class has come into existence in Israel, comprising

27. On the subject of divorce and the legal problems and implications thereof, *see supra* note 23 and I.H. Haut, *Divorce in Jewish Law and Life* (1983); Z. Falk, *The Divorce Action by the Wife in Jewish Law* (1973) (Hebrew); B. Schereschewsky, *Family Law in Israel* 275 (1993) (Hebrew); M. Meiselman, *Jewish Woman in Jewish Law* 103 (1978).
28. In the last twenty years, the number of divorces in Israel has almost tripled (from 2665 divorces in 1972, to 6301 divorces in 1991), while the number of marriages has stabilized (the number of marriages in 1991 was identical to the number of marriages in 1974, and the 1991 number was smaller than those for 1976 and 1977). Even in absolute numbers, and particularly in light of the growth in population size during the last twenty years, it is possible to

'divorce-refusees' the considerable number of which is increasing steadily over the years. The legislature refrains from intervening on this issue for fear of violating religious law, while the religious court is helpless. Recently, the Parliament (the Knesset) was presented with legislative proposals according to which the religious courts would have authority to deny 'divorce-refusers' certain civil rights. It is, however, doubtful whether these proposals, requiring the involvement of the religious courts, will suffice to solve the majority of the problems in question.

Until the end of the 1960s, no judicial authority in Israel was authorized to dissolve a marriage in which one of the spouses was a foreign citizen or held no citizenship. In that period, in the absence of a territorial law, difficulties were encountered by the district courts in prescribing a law applicable on interreligious marriages, that is, between local citizens from different religious communities each of whom is subject to the authority of a different religious court. A similar difficulty faced local couples at least one of whom was a member of a religious community with no authorized religious court. The Israeli legislature intervened and enacted the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969. The matter will be dealt with at some length in the forthcoming paragraph on private international law.[29]

D. Civil Intervention: Direct Legislation

The bridging of gaps between the law on the books and the law in reality in the field of family law in Israel is effected by the legislature to some degree, but it is carried out in the main by the courts. At times the courts are moved by the creative imagination of activist lawyers. The gaps are bridged through various means, some direct and some indirect.

Direct intervention on the part of the legislature has occurred on a variety of questions for a variety of purposes. In some cases, as shown above, such intervention has served as a means of imposing civil law on religious courts. In other cases it provided a means of imposing civil law on the religious law applying to some family matters in civil courts. In a few rare cases it served as a means of annulling a religious settlement appearing to contradict the ideology of most of the public, while imposing a settlement suited to secular

conclude that the number of marriages is gradually decreasing, while the number of divorces is increasing. The ratio between the number of marriages *vis-à-vis* the number of divorces in the 1970s was one divorce per eleven marriages. This ratio has been changing rapidly. In 1991, the ratio was one divorce per five marriages. The ratio of divorces per marriages is even greater with respect to the Israeli Jewish community. The percentage of divorces for the population of Israel as a whole has increased by 2.4 times the percentage in the 1970s, while the percentage for the Jewish population has increased by 2.6 times in the same period. Indeed, the percentages of divorces among minority populations in Israel have remained almost constant, while there have been significant increases with respect to the Jewish population. *See Statistical Abstract of Israel* 104–108 (Central Bureau of Statistics, Jerusalem).

29. *See infra* paragraph X.C.

ideology. This is the case on matters pertaining to the status of women in the family and to the determination of the equality of women, especially with regard to their property rights and prevention of husbands' control over their property, to their right to child custody and equal status to their husbands' in deciding on the care and education of the children. This intervention is effected without violating the religious laws prohibiting and permitting marriage and divorce, although men enjoy superior status under most of these.[30] This is also the case with regard to the duty to pay support for children in instances in which Jewish religious law exempts men in principle from that duty. A case in point is that of a child born to a gentile woman.[31]

Direct legislative intervention has also occurred in cases where the foreseeable opposition of the religiously observant to the settlement in question is small. This holds, for instance, for all the matters pertaining to the settlement of the property relations between spouses under the Spouses (Property Relations) Law, 1973. As property settlements can be contracted by the parties under religious Jewish law, opposition to the civil settlement was relatively small.

Additional cases of direct intervention by the legislature concern the augmentation of religious settlements. For example, this holds in the area of protection of minors within the family, their supervision and care and in the area of prevention of violence and sexual exploitation. Intervention towards similar purposes occurred in the enactment of the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969. As explained above, this law made it possible to dissolve marriages in cases for which no court had previously held the jurisdiction to do so in Israel.

Direct intervention towards attaining results indirectly has occurred in the recognition of various rights for unmarried couples living together and conforming to the definition of 'cohabitation' or 'reputed spouses.' The universal emergence of a search for ways of creating binding alliances outside of marital status has resulted in many legal systems throughout the world in a certain acknowledgement of quasi-marital relations, that is, in the creation of an institution of cohabitation. The swift and broad evolution of this institution in Israel is specifically attributable to the control of matters of marriage and divorce by religious-personal law, resulting *inter alia* in the creation of a group of people who are ineligible to marry under that law, as well as difficulties in the dissolution of marriages.

The recognition of 'reputed spouses' in Israel plays the special role of providing an indirect solution to problems arising from the gap between the religious law and the secular reality. This recognition constitutes one of the means of bridging such gaps. The institution of 'reputed spouses' offers an alternative to marriage and, in this context, an alternative to divorce as well, not only for the married man but for the married woman too.

30. Women's Equal Rights Law, 5 L.S.I. 171 (1950–1951).
31. Family Law Amendment (Maintenance) Law § 3, 13 L.S.I. 73, 73 (1958–1959).

It is thus not surprising that on all matters concerning quasi-marital relations, the Israeli legislature blazed a pioneering trail for various legal systems throughout the world.[32]

E. Civil Intervention: Indirect Legislation

Part of the legislative intervention meant to impose specific norms is carried out indirectly. The legislature, like the courts, avoids intervention at the core of the religious settlement of marriage and divorce. The area of marriage has proven a rather limited arena for creative judicial intervention. However, in this area too the Israeli legislature has employed indirect intervention in an attempt to avoid direct violation of the rules of religious law.[33]

An indirect approach of this type was employed with regard to the limitations on the age for marriage (the Marriage Age Law, 1950), to the prohibition on divorcing a woman against her will and the prohibition of polygamy (Penal Law, 1977). The means selected for attaining these objectives were implementation of the penal code and recently of the Civil Wrongs Ordinance (New Version) as well, against the violators of the said civil norms. However, the validity of the act violating the penal code is governed by religious rather than penal law.

Another form of indirect civil intervention employed by the legislature, has been subjecting the religious authority acting under the religious law to the administrative control of an administrative authority – whether religious or civil. This is the case with regard to obtaining permission to remarry under religious law (when a wife refuses to divorce) and to the application of measures for coercing a Jewish husband to divorce his wife.

An additional case of indirect legislative intervention on the administrative level originated in the early days of the British Mandate in Palestine. The Marriage and Divorce (Registration) Ordinance imposes civil duties of registering marriage and divorce. The Ordinance entrusts the duty to an authorized party, a cleric of the pertinent recognized religious community. The registrar is fulfilling a civil duty, not a religious one. The authority to appoint these registrars is currently held by the Minister of Religious Affairs. In exercising this authority, the Minister of Religious Affairs refrains from authorizing

32. A. Rosen-Zvi, 'Israel: Calm Before the Storm,' 25 J. Fam. L. 167, 174–177 (1986–1987); A. Rosen-Zvi, 'Israel: An Impasse,' 29 J. Fam. L. 379, 380–385 (1990–1991); D. Friedman, 'The "Unmarried Wife" in Israeli Law,' 2 Isr. Y.B. Hum. Rts. 287 (1972); P. Shifman, 'Marriage and Cohabitation in Israeli Law,' 16 Isr. L. Rev. 439 (1981); M. Shava, 'The Property Rights of Spouses Cohabiting Without Marriage in Israel – A Comparative Study,' 13 Ga. J. Int'l & Comp. L. 465 (1983).

33. On the subject of the indirect intervention by the legislature, *see* A. Rosen-Zvi, 'Freedom of Religion: The Israeli Experience,' 46 *Zeitschrift für ausländisches offentliches Recht und Völkerrecht* 213 (1986); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 300–312 (1990) (Hebrew); P. Shifman, 'Family Law in Israel: The Struggle Between Religious and Secular Law,' 24 Isr. L. Rev. 537 (1990); Z. Falk, 'Twenty-Five Years of Family Law According to Jewish Religious Law,' 5 *Dine Israel* vii (1974).

Jewish Reform and Conservative Rabbis to perform marriages. This position has been recognized as legal by Israel's High Court of Justice.[34]

F. Civil Intervention: The Courts

1. Indirect Means

The main bulk of the efforts towards bridging the gaps and those made in the most sensitive areas, are made within the courts. These usually make use of indirect means to attain the goal in question.[35] At times they employ a means originally meant for one purpose, to achieve another. The means intended for the removal of a spouse from the couple's home may, for example, be employed for the advancement of a divorce in the absence of mutual consent. In some cases the religious courts 'fight back,' struggling to defend their authority. Thus, the religious courts have recently issued a relatively large number of injunctions barring spouses from extramarital relationships. In matters of property and child custody too, the religious courts sometimes attempt to act on religious ideology. The High Court of Justice may intervene in such cases and annul such rulings reached by the religious courts.[36]

2. Recognition of the Status of Civil Marriage

The most significant effects by the civil courts, towards the closure of gaps between the law on the books and reality, consist in the recognition of the status of marriage created outside of and even against religious law. The civil courts have gradually come to recognize the status of marriages created in various manners, unsuited to the word or spirit of religious law. They have thus assisted the process of bridging the gaps.

The courts have thus recognized a status created within a foreign legal system – unknown to the religious laws presently applying to the parties in question. They have accordingly had recourse to private international law. Yet, the scope of its application has not been delineated precisely and remains unclear. The matter will be dealt with in the forthcoming paragraph on private international law.[37]

Another manifestation of this approach is the recognition of the validity of private marriage contracts. The High Court of Justice has employed the legal validity of the private marriage under religious Jewish law and recognized the validity of private marriage between people barred from marrying under this

34. C.H. 47/82, *Fund for Reform Jewry in Israel* v. *Minister for Religious Affairs*, 43(2) P.D. 661 (1989).
35. *See supra* note 33.
36. H.C. 181/81, *More* v. *Rabbinical Court*, 37(3) P.D. 94 (1983); H.C. 7/83, *Biares* v. *Rabbinical Court*, 38 (1) P.D. 673 (1984); C.A. 680/84, *Shany* v. *Shany*, 39(2) P.D. 444 (1985).
37. *See infra* para. X.D.

law, for purposes of their registration under the Population Registry Law, 1965. In applying this additional means towards bridging the gaps in question, the High Court of Justice was forced to deny the application of the prohibitive rule of Jewish law to Israeli law, thus restricting section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, which specifies that 'marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.' The scope of the recognition of the private marriage ceremonies in these cases is unclear, as is the extent of the rights possessed by the parties to such frameworks.[38]

This civil recognition is limited to the civil courts. In the event of a dispute between the parties and when jurisdiction is vested in the religious courts, these may act in keeping with the religious law to which they are bound, without any duty towards private international law.[39] And yet, the results of the civil marriage are recognized by civil law, regardless of the position of religious law or of the religious courts.

The legal situation arising from the grafting of secular onto religious law sometimes results in the incompatibility of the two bodies of law and even creates a married status for purposes of bigamy only. In these circumstances a person who is unmarried according to the religious law applying to him or her is prevented from marrying by the criminal charges of bigamy that he or she will face in consequence.

3. Judicial Control over the Religious Courts

A combination of legislation and case law for the closure of gaps was defined in section 15(d)(4) of the Basic Law: Judicature (1984). This section lays the foundation for judicial review by the High Court of Justice over the religious courts. The section as it is drafted stipulates that the scope of the intervention as far as the religious courts are concerned is more restricted than that allowed it in other administrative tribunals, administrative authorities and various judicial authorities external to the normal judicial system. Its control is limited to issues of lack of jurisdiction, *ultra vires* or refrainment from exercising jurisdiction.

In practice, the decisions of the High Court of Justice have broadened the scope of its intervention. Assigning its authority a broad interpretation, it has understood judicial review as including the following: violation of the rules of natural justice, infringement of procedural principles (e.g., lack of quorum) set by the *Dayanim* Law, 1955, violation of duties of trust and ethics identical to those applying to civil judges, ignoring laws interpreted by the High Court of Justice as referring directly to the religious court. The High Court of Justice has also assigned a restrictive interpretation to the conditions, either substantial or personal, under which jurisdiction is vested in the religious courts. In this way,

38. *See*, e.g., H.C. 80/63, *Gurfinkel & Chaklay* v. *Minister of Interior*, 17(3) P.D. 2048 (1963); H.C. 51/69, *Rodnitzki* v. *Rabbinical Court*, 24(1) P.D. 704 (1970).
39. *See*, e.g., H.C. 301/63, *Strayte* v. *Chief Rabbis*, 18(1) P.D. 598, 608, 620–629 (1964).

the High Court of Justice has, on the one hand, broadened the scope of judicial review over religious courts while restricting the jurisdiction of these courts, on the other.[40]

IV. The Right to Parentage and the Right of Abortion

The relations between spouses and the personal rights and obligations following from the status of marriage are contained in the term 'marriage' as defined by the courts. However, on questions such as artificial insemination, the use of contraceptives and a woman's right to abortion, Israeli law does not speak with one voice. The prohibitions imposed by any relevant religious law are not enforceable through Israeli law. Within this context, these are questions to which civil law applies.

The Supreme Court has ruled that the question of abortion is entirely settled through and by the Penal Law.[41] The Penal Law makes abortion a criminal offence. However, it authorizes a committee exclusively comprised of professionals to permit abortion for a number of reasons. The Court has also ruled that the husband has no right to prevent his wife from discontinuing a pregnancy and has no standing before the statutory committee authorized to permit the abortion. Religious law does not affect the prohibitions or licenses applied to this question and the religious courts have no jurisdiction to intervene on it.[42] The husband has no legal power to prevent his wife from undergoing an abortion by injunction of a religious court or a district court as a matter of marriage subject to religious law or to the jurisdiction of the religious court.

On the face of it, the Israeli settlement seems quite conservative in its application of a broad prohibition. In practice, however, cooperation between the legislature, the administration (the professional committee) and the courts ensures a fairly liberal settlement.

The questions of artificial insemination and artificial fertilization are settled in Israel through civil regulations, orders and rules. The Ministry of Health controls the organizational-institutional aspects of these questions and the prohibitions and licenses governing doctors and professional function in this context. The Ministry of Health has promulgated the Public Health Regulations (Semen Bank) 1979, the Public Health Regulations (In Vitro Fertilization) 1987, and has also issued orders for artificial insemination.[43]

40. M. Chigier, 'The Rabbinical Courts in the State of Israel,' 2 Isr. L. Rev. 147, 174–175 (1967); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 84–99 (1990) (Hebrew).
41. Penal Law ch. B, Art. 10, L.S.I. (Special Volume) (1977).
42. C.A. 413/80, *Plonit* v. *Plonit*, 35(3) P.D. 57 (1981).
43. A. Rosen-Zvi, 'Israel: Proposed Reformed in Anticipation of a Political and Legal Contest,' 27 J. Fam. L. 171, 181–183 (1988–1989); A. Shapira, 'In Israel, Law Religious Orthodoxy, and Reproductive Technologies,' Hastings Center Rep. 12 (1987); P. Shifman, 'First Encounter of Israeli Law with Artificial Insemination,' 16 Isr. L. Rev. 250 (1981); P. Shifman, 'The Right to Parenthood and the Best Interests of the Child: A Perspective on Surrogate Motherhood in Jewish and Israeli Law,' 4 N.Y. L. Sch. Hum. Rts. Ann. 555 (1987).

Religious law has been relegated to the sidelines with regard to all prohibitions and licenses in these areas. On the other hand, it determines the results of such steps in the context of rights and obligations following from the marriage and decided by religious courts and in the context of the possibility of permitting marriage. Thus, for instance, a flaw may be found in the lineage of the child born through such means so as to limit his or her eligibility for marriage. A woman wishing to realize her right to parentage in one of the said manners, permitted by Israeli law, may find herself forced to undergo divorce or to lose part of those property rights which are settled under religious law.

V. The Obligation of Maintenance

Concerning the rights following from the status of marriage, Israeli civil law adopts an approach of limited intervention. The obligation to pay maintenance between spouses is determined under religious law. This result has been prescribed by the Family Law Amendment (Maintenance) Law, 1959. The directives of this law apply only in the absence of a religious law. As to the children, the duty of child support is determined, first of all, by religious law. However, a person to whom no such law applies or a person who is not obliged by this law to pay child support for his children or the children of his spouse, is obliged to pay under the said law. A parent is thus obliged to pay child support for his children even if the relevant religious law exempts him from this duty. A parent will thus be obliged to pay child support for a child born out of wedlock even if the relevant religious law does not recognize this duty to such a child.

VI. Parents and Children

A. The Child's Status

Following the tradition of Jewish Law, Israeli law does not, in fact, recognize the concept of an illegitimate child. Every child is granted full rights with respect to his parents, regardless of the relations between the parents, be they formal or not. The child's natural parents are its guardians whether or not they are married. In the absence of a will stipulating otherwise, a child inherits from his parents whether or not he was the issue of a marriage. A child is entitled to all these rights although he was born to a woman married to a man who is not his father. In Jewish law as in Israeli civil law, the decisions on the child's education, its care and supervision are performed in keeping with the principle of the child's best interests.[44] This principle does not distinguish on the basis

44. A. Rosen-Zvi, 'Israel: Inter-Family Agreements and Parent-Child Relationships: Developments within an Anachronistic System,' 28 J. Fam. L. 526, 534–541 (1989–1990); A.H. Shaki, 'Parental Duty of Child Custody in Israel – Main Characteristics,' 6 Tel Aviv U. Stud. L. 122 (1983–1984).

of the child's status. As to the remaining matters, the question of the child's status is settled by the religious law pertinent to the issue. However, in view of the broad specific settlements, not much is left to the domination of religious law.

B. The Protection of Minors

The protection of minors has generated a long line of legislation settling various areas. The most important of these are: the Youth (Care and Supervision) Law, 1960, the Welfare Act (Procedure in Matters of Minors, Sick Persons and Absent Persons) Law, 1955, Family Law Amendment (Maintenance) Law, 1959, Capacity and Guardianship Law, 1962, and the Adoption of Children Law, 1981. The central principles guiding these settlements are: the child's best interests, introduction of caretaking and therapeutic functions in the processes of decision and treatment, avoidance as far as possible of relying on presuppositions (legal presumptions) accepted mainly by the religious laws, state intervention through its institutions in the nature of the minor's care and supervision.

In principle, Israeli law protects the autonomy and intimacy of the family unit from external intervention. It gives parents the power and authority to raise and educate their children as they see fit, subject to the obligation to provide for these children's physical and spiritual needs and to the mandatory instructions of the law, such as the Mandatory Education Law, etc.

The State places at the family's disposal limited assistance towards the improvement of its functioning and material conditions. Thus, for instance, the welfare authorities are obliged to provide for therapeutic and rehabilitative measures, assisting the family in improving its functioning, alleviating its financial burden and enhancing its ability to raise and care for children.

On a variety of grounds defined in various laws and subject to the principle of the child's best interests, the legislature allows the welfare authorities to intervene in the matters of the family and impinge upon the status of the parents. In the lighter cases, this is done in order to improve the parents' functioning. In more severe cases it is done in order to protect the children from their parents, that is, to protect them from neglect, abandonment, cruelty, exploitation or other forms of injury by their parents.

Under the Capacity and Guardianship Law, 1962, the court has jurisdiction, *inter alia*, to fully or partly cancel the guardianship of one or both parents or to appoint additional guardians. When the court declares a minor 'a minor in need,' under the Youth (Care and Supervision) Law, a welfare officer may take authority over the care and supervision of this minor, including the authority to revoke the parents' authority on various decisions. Such a declaration also allows for transferral of the minor to a foster family and restriction of the parents' visitation rights. In very extreme and exceptional cases, it is within the jurisdiction of the court, under the Adoption of Children Law, 1981, to declare the minor adoptable, to dissociate the child from the natural parents and place him or her with adoptive parents.

The Law of the Hague Convention (Return of Abducted Children), 1991, embeds most of the items of the convention concerning the civil aspects of the international kidnapping of children, into internal Israeli law. The enactment of this law forms an important phase of the struggle against the kidnapping of children out of and into Israel. The law was meant to decrease the use of violence within the family and the exploitation of children as part of a struggle between the parents. It imposes a direct duty upon the state authorities and through them, to the parties requesting the child's return or the guarantee of visitation and custody rights. This duty concerns three levels of action or reference grounded in the convention: the organizational-institutional level, the level of court's procedure and the level of substantive law.

VII. Domestic Violence

Severe cases of domestic violence and sexual exploitation in the family have motivated the legislature to intervene on both the criminal and the civil levels. These phenomena are combatted on several levels:

On the level of penal law:

1) increased accountability of family members for the prevention of violence;[45]
2) definition of sexual offences specific to family members;[46]
3) increased penalties for offenders in the areas of domestic violence and sexual abuse.[47]

45. Sections 323–327 of the Penal Law, 1977, impose certain duties on the parents of a child or on a person having charge of a minor. In addition to the preexisting duty to supply the minor with the basic necessities of life and the care for his or her health, the Penal Law imposes another duty – the duty to protect the minor against child abuse. The failure to fulfil this duty is, under certain circumstances, a crime punishable by up to three years imprisonment.
46. Under section 351 of the Penal Law, 1977, a person is liable to imprisonment for up to 16 years if he or she has sexual intercourse or commits sodomy with a family member who is between 16–21 years of age. Consensual sexual intercourse with a person in this age range who is not a family member or who is not a person to whom a fiduciary duty is owed does not constitute a criminal offence.
47. Within the framework of sections 368(A) – 368(C) the legislature increased the maximum punishment *vis-à-vis* offences committed by a person who has charge of a child or charge of another who is physically or mentally disabled by two years (as compared to people who commit the same type of harm, but not with respect to an individual whom they have charge of) in cases in which said person causes the child or the disabled other grave physical or mental harm, or abuses the child or the disabled other physically, mentally, or sexually. The amendments of sections 346–351 of the Penal Law impose greater penalties in cases of sexual abuse where said abuse was committed by a person who had a fiduciary relationship (e.g., caretakers, educators, or others on whom the abused individual is dependent) with respect to the individual who was abused and who took advantage of that relationship to commit the abuse. Section 351 of the Penal Law imposes severe penalties with respect to sexual offences committed within the family framework, particularly for acts of rape and acts of sodomy

On the level of civil law:

4) granting protective civil injunctions under the Prevention of Domestic Violence Law, 1991.

On a complementary level:

5) adjustment of various laws to combatting difficulties in solving the problem of domestic violence and the use of force within the family. To this purpose evidence laws have been readjusted.[48] Also duties have been defined as to transmitting information and reporting cases of domestic violence and sexual abuse;[49]
6) creation of an integrated and multi-adapted interface between the law enforcement systems and the therapeutic, aid and rehabilitation system. To this purpose the police is under an obligation to consult a welfare official before deciding on investigative measures or legal procedures. Conversely, welfare officials must notify the police as to information reaching their knowledge.

involving a minor (in such cases the law imposes a penalty of twenty years imprisonment, as compared to sixteen years imprisonment for an identical offence committed against a person who is not a member of the family). The law imposes a penalty of ten years imprisonment for indecent acts committed upon a minor if said minor is a member of the family framework, as compared to a penalty of seven years for the same acts committed upon an individual who is not a member of the family.

48. A spouse may testify against his or her spouse and a child may testify against his parents in cases of domestic violence or sexual abuse within the family that constitute abandonment or neglect. These are exceptions to sections 3 and 4 of the Evidence Ordinance, which restrict the testimony of spouses and children. The purpose behind these exceptions is to facilitate the possibility of obtaining evidence in cases in which a child has been sexually abused by a parent. Furthermore, the court has the discretion to order that such testimony be heard in the presence of the child's legal counsel and in the absence of the accused if this is, in the court's opinion, necessary to prevent any further harm to the child.
49. Sections 368D(a)–(h) of the Penal Law, 1977, prescribe a duty to report in certain cases: 1) There is a general duty to report that is imposed upon anyone who has reasonable grounds to believe that an offence has been committed by a person who has charge of a minor or of another who is mentally or physically disabled against said minor or against said other person who is mentally or physically disabled. Failure to report by the person who has reasonable grounds to believe that an offence has been committed constitutes an offence that is liable to a maximum penalty of three months imprisonment. 2) A duty to report is imposed upon certain professionals and caretakers who have responsibilities *vis-à-vis* a minor (e.g., physicians, nurses, social workers, police, psychologists, the director of an institution or an employee in said institution that has charge of the minor, etc.). These persons have a duty to report any offence committed against the minor whom they have charge of, and their failure to report in such circumstances constitutes a criminal offence subject to a penalty of six months imprisonment.

VIII. PROPERTY RELATIONS

Another subject on which the legislative intervention has been notable is that of settling financial and property matters in view of the fact that the majority of religious laws recognize the parties' freedom of contract in this context. By the end of the 1950s the High Court of Justice had already ruled that those instructions of religious law that limited a woman's right to her property while giving her husband more right to it, no longer constituted part of Israeli law.[50] Into the vacuum resulting from this conception, the High Court of Justice introduced, at the beginning of the 1960s, a property regime, inspired by English law, of community property, under which property that is acquired or accrued during the marriage is shared between spouses due to the creation of a presumption of community of property. In keeping with this presumption, in the absence of other intentions implied by the couple's way of life and their general conduct on joint financial and material matters, the couple living together on relatively good terms for a significant period of time during which both partners somehow contribute to the joint effort of the family unit, are presumed to intend to share their property in equal portions.[51]

The beginning of the 1970s saw the enactment of the Spouses (Property Relations) Law, 1973,[52] which replaces the presumed community of property with a settlement of balance of resources between parties married after 1 January 1974. Some see both property regimes as applying to such couples concurrently. The law states that in the course of a marriage the spouses' assets are subject to separation of property. When the marriage is dissolved due to a death or a divorce, the spouse with assets that are subject to balancing that are of less value is entitled to a payment equaling half the value of the other spouse's assets that are subject to balancing. At the center of each of these property regimes is the principle of the freedom of contract between spouses. A property agreement between the spouses requires both writing and the confirmation of a suitable authority as prerequisites for its validity.

Both regimes are based on equal rights for both genders, on the principle of common effort which includes the recognition of spouses' contribution to

50. S.C. 1/50, *Sides* v. *Head of the Execution*, 8(1) P.D. 1020 (1954); H.C. 202/57, *Sides* v. *High Rabbinical Court*, 12(2) P.D. 1528, 1539 (1958); C.A. 313/59, *Balaban* v. *Balaban*, 14(1) P.D. 285 (1960); H.C. 185/72, *Gur* v. *Rabbinical Court*, 26 (2) P.D. 765 (19). *See further*, Z. Falk, 'Women's Equal Rights,' 7 Isr. L. Rev. 313 (1972); Z. Falk, 'The Working Wife,' 6 Isr. L. Rev. 266 (1971).

51. On the presumption of community of property, *see*, e.g., D. Friedman, 'Matrimonial Property in Israel,' 41 Rabels Z 112 (1977); J. Sussman, 'Matrimonial Property Relations in Israel,' *Beitrage Zum Deutschen und Israelischen Privatrecht* 165 (1977); A. Rosen-Zvi, *The Law of Matrimonial Property* 224 (1982) (Hebrew); A. Rosen-Zvi, 'Israel: Calm Before the Storm,' 25 J. Fam. L. 167, 168–174 (1986–1987); P. Shifman, 'Property Relations Between Spouses,' 11 Isr. L. Rev. 98 (1976); M. Shava, 'Israeli Conflict of Laws Relating to Matrimonial Property – A Comparative Commentary,' 31 Int'l & Comp. L. Q. 302 (1982); J. Weisman, 'Can a Spouse Confer a Better Title Than He Possesses?,' 7 Isr. L. Rev. 302 (1972); A. Rosen-Zvi, 'Israel,' 8 Ann. Sur. Fam L. 83, 85 (1985).

52. On the provisions of the law and their analysis, *see* the references in note 51, *supra*.

maintaining the home, managing the household and raising the children, on the need for each spouse's personal and economic rehabilitation following divorce, on the protection of third parties, on the dynamic nature of real estate and property markets and on a certain degree of flexibility attained through granting the court some amount of discretion. Neither regime includes as part of the shared assets or as part of the assets that are subject to balancing properties that were owned by the spouses prior to the marriage or received by either of them in its course as a gift or a legacy, and these are the separate property of the relevant spouse.

The trend shown by the legislature and the case law in the area of property relations between spouses is towards increasingly broader sharing and fuller equality. The courts broaden the understood sharing by decreasing the evidence required for proving the essential components for the conclusion of the presumption and stiffening the requirements for contradicting it. Precedent, as well as legislation, also extends the classes of assets that are subject to balancing or the shared assets. Sharing and balancing have been extended to the following: monies accumulated during a marriage in pension funds, life insurance rights, rights constituting part of the worker's social rights, pension rights, both before and after realization, and untransferable rights, with some exceptions.[53]

IX. Cohabitants or 'Reputed Spouses'

The prevalent view, under the recognition of 'reputed spouses,' is that an agreement on a shared life out of wedlock is not illegal. Consensual settlements of monies and property within this framework are thus enforceable. A contract will only be considered illegal if at least one of the parties to it was married when it was made and the contract itself caused the rift between the spouses.[54] The legislature has granted 'reputed spouses'' rights mainly toward third parties. Some of the rights have included the pension rights of a deceased person granted to his or her 'reputed spouse.' A 'reputed spouse' is also entitled to inheritance rights and to maintenance out of the estate, as if he or she had been married to the deceased.[55]

The right to maintenance following separation between the parties exists when so stipulated expressly in a mutual contract between them. However, there is an apparent willingness on the part of the court to re-examine this precedent and perhaps even to grant compensation for violation of an implied

53. On the distribution of pension rights, *see* C.A. 841/87, *Ron* v. *Ron*, 45(3) P.D. 793 (1991). On the distribution of pension rights that have not yet matured, *see* C.A. 809/90, *Lidai* v. *Lidai*, 46 (1) P.D. 602 (1992).
54. C.A. 337/62, *Risenfeld* v. *Yacobson*, 17(2) P.D. 1009 (1963); C.A. 563/65, *Yeger* v. *Palevitz*, 20(3) P.D. 244 (1966); C.A. 805/82, *Versano* v. *Cohen*, 37 (1) P.D. 529 (1983). The court rejected the moral values stemming from the religious law according to which extramarital relationships are considered a sin.
55. Succession Law §§ 55 & 57(c), 19 L.S.I. 58, 66, 67 (1964–1965).

condition stemming from their conduct, such as the right not to be evicted from one's residence except on specific conditions.[56]

Until recently the area of 'reputed spouses' was settled mainly through the initiative of the legislature. Now, the courts seem willing to play an active and creative role in this field too. Lately, the legislation has been followed by a decision extending the respective rights of 'reputed spouses' within the joint relationship, in the area of property relations. In keeping with the said decision, the presumption of community of property will apply to 'reputed spouses' too, with limited changes required by the circumstances.[57]

The definition of 'reputed spouses' is not consistent across the various pertinent laws. In some of these (inheritance laws, for instance) a married person cannot be considered as a 'reputed spouse' for purposes of recognizing rights. In other laws a married person too can be a 'reputed spouse,' despite the severe prohibition in the different religious laws on sexual intercourse outside of wedlock, especially for married women. The mainstays in defining 'reputed spouses' are the existence of family life shared by a man and a woman in a joint residence, as if they were a married couple.[58]

Here too, Israeli law speaks with two voices. Moreover, it conveys a double message, a religious message with one content and a secular message with another, leading at one and the same time to disparate normative results. On the one hand, under religious law, a married woman living with someone other than her husband is an adulteress destined to encounter severe consequences. On the other hand, the civil law rewards such a woman, granting her rights as the 'reputed wife' of a man other than her husband. The necessity of bridging the gaps between the religious law on the one hand and the prevalent world view and the reality of common practice on the other, also explains the paradox whereby a system expressing ultra-puritanism through its marriage laws as settled under religious law, simultaneously gives normative expression to ultra-liberalism through the institution of 'reputed spouses.'

Furthermore, in some cases the rights of 'reputed spouses' are not only equal but superior to those of married spouses.[59] Thus, for instance, while re-marriage gives reason for the discontinuation of an allowance or various other rights, 'reputed spouses'' relationships provide no such reason. Property relations between 'reputed spouses' are more advantageous than those of married couples married after 2 January 1974. The latter are not entitled to divide their rights to the balancing of resources until after their divorce, while

56. C.A. 805/82, *Versano* v. *Cohen*, 37(1) P.D. 529 (1983).
57. C.A. 52/80, *Shachar* v. *Friedman*, 38(1) P.D. 443 (1984); C.A. 749/82, *Mutson* v. *Widerman*, 43(1) P.D. 278 (1989); *see also* M. Shava, 'The Property Rights of Spouses Cohabiting Without Marriage in Israel – A Comparative Study,' 13 Ga J. Int'l & Comp. L. 465 (1983); A. Rosen-Zvi, 'Israel: Calm Before the Storm,' 25 J. Fam. L. 167, 174–177 (1986–1987).
58. On the subject of cohabitation, *see supra* note 32.
59. P. Shifman, 'State Recognition of Religious Marriage: Symbols and Content,' 21 Isr. L. Rev. 501 (1986); A. Rosen-Zvi, 'Israel: Calm Before the Storm,' 25 J. Fam. L. 167, 174–175 (1986–1987); A. Rosen-Zvi, *Israeli Family Law – The Sacred and the Secular* 304–306 (1990) (Hebrew).

'reputed spouses' are entitled to do so under the regime of community property.[60] The relations of 'reputed spouses' are not considered bigamous for purposes of the offence of polygamy under section 176 of the Penal Law, 1977. Nonetheless, a 'reputed wife' is not entitled to maintenance except by contract and divorce is not recognized between 'reputed spouses.'

X. Private International Law

A. The Connecting Factor

In private international law situations, the centrality of (religious) personal law in deciding which law applies to personal status, causes the center of the argumentation to shift to the inter-religious law. The main connecting factor resorted to during the Mandate on international conflict of laws questions, and still practiced today on various matters, is the law of nationality. This holds for matters of marriage and divorce. When one of the parties is a foreigner, the civil court authorized to decide the matters of the marriage applies the foreigner's national law.

In recent years the Israeli legislature has put domicile before nationality with regard to both jurisdiction and the decision on the applicable law. This is true of all matters concerning maintenance in the Family Law (Maintenance) Amendment Law, 1959. It is also true of matters concerning minors: the Adoption of Children Law, 1981, confers jurisdiction upon the Israeli court when the domicile of the adoptive parent is Israel. In the Capacity and Guardianship Law, 1962, the jurisdiction of the court to declare a person legally incompetent is conditional upon the person's residence in Israel or domicile. In matters of parents and children, as in matters of guardianship, the jurisdiction is conferred upon the Israeli court whenever the need to decide these matters arises in Israel. The law of the domicile will apply in matters arising from the aforementioned law concerning minors or legally incompetent persons. The law of the domicile is subject to the principle of the child's best interests, taken to be the local public policy overriding any foreign law contradicting it. The law of the domicile is also the central connecting factor in the property matters of spouses. This point is discussed in detail later on.

The law of the domicile refers to the center of a person's life. This definition was determined explicitly by the Capacity and Guardianship Law, 1962. Before the latter was enacted, the term 'domicile' was interpreted by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, as referring to a person's permanent place of residence. The manner in which this definition was applied testifies to the marked affinity between this term and the center of a person's life.

60. On the difficulties arising from the Spouses (Property Relations) Law, 1973, as to the date of the materialization of the arrangement instituted by the law, *see* M. Shava, 'The Spouses (Property Relations) Law 5733 – 1973 in Light of Religious Divorce in Israel,' 2 Tel Aviv U. Stud. L. 113 (1976). On the property relations between cohabitants *see supra* note 57.

B. The Religious Courts

As shown above, every matter referred to a religious court is usually decided in accordance with religious law, with several exceptions. The religious courts have jurisdiction to decide on matters of the personal status of foreign citizens if both spouses belong to the religious community of the religious court, in the following cases: for Jews and Muslims, if their domicile is Israel. If the domicile of the parties is not Israel, the religious court has such jurisdiction only subject to the consent of both parties. For Muslims, if their national law subjects them to religious Muslim courts or subject to the consent of both parties. For Druze, if their domicile is Israel. If their domicile is not Israel, the religious court has such jurisdiction only subject to the consent of both parties. For Christians, only subject to the consent of both parties and on the condition that the court does not decide to dissolve their marriage, as explained below.

The interpretation of section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, determines that Jews cannot perform a civil marriage or a civil divorce in Israel, even when they are foreign citizens and possessed of a foreign domicile. They can marry provided the marriage is a religious one. If they both consent to the jurisdiction of the rabbinical court, they can also litigate on the matters of their divorce in the religious court, in accordance with religious law.

C. Divorce

As stated, civil divorce is only possible under the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969, in cases where at least one of the parties is affiliated with an unrecognized religious community or in cases where the marriage is an interreligious one, regardless of whether or not their citizenship or domicile are foreign. The law determines a mechanism for deciding jurisdiction in such cases, the center of which is an appeal to the President of the Supreme Court to assign jurisdiction to the religious or civil court. The law also determines a series of conflict of law rules, applying to the district court, should it be assigned jurisdiction on the matters of dissolving the marriage. These determine the following order of precedence: 1) the domestic law of the spouses' common domicile; 2) the domestic law of the spouses' last common domicile; 3) the domestic law of the country of which both spouses are nationals; 4) the domestic law of the place where the marriage was contracted provided that the court shall not deal with the matter in accordance with any such law if different rules would apply thereunder to the two spouses; 5) when none of the previous four possibilities provides for an applicable law the court may decide the matters in question in accordance with the domestic law of the domicile of one of the spouses, as it may deem just in the given circumstances. Mutual consent is always sufficient grounds for divorce under the said law.

When all the connecting factors, citizenship and domicile, are Israeli and the court is referred to Israeli law, the problem of the applicable law nonetheless

remains unsolved except when both parties consent to the divorce. The district court cannot be addressed directly, within either original or residual jurisdiction, on the matters or persons subject to the law.[61]

The law does not apply to Christians who belong to a recognized religious community, to Jews, to Muslims or to Druze. Accordingly, spouses who both belong to a recognized religious community, at least one of whom is a foreign citizen, can litigate the matter of the dissolution of their marriage in Israel, only in the religious court of their religious community and only if they consent to the jurisdiction of this court. For Muslims the jurisdiction of the court is not conditional upon consent. However, it is conditional upon the person's being subject to the jurisdiction of a religious Muslim court by the law of his or her nationality. Conversely, for Christians who belong to a recognized religious community, at least one of whom is a foreign citizen, there is no possibility of divorce in Israel. It is not within the jurisdiction of the court to decide on the dissolution of their marriage due to the restriction included in the instruction of section 65 of the Palestine Order in Council.

The absurdity of this system lies in the fact that persons lacking affiliation with a recognized religious community (Protestants, for instance) cannot marry in Israel in accordance with their religious law but can nevertheless dissolve their marriage in Israel in the district court, in accordance with the said law. The members of unrecognized Christian communities are married in Israel by Catholic priests who are members of a recognized religious community.

D. The Law and the Choice of Law in the Civil Courts

Which law is to be applied by the civil courts to matters of personal status that are litigated before them, but which do not concern the dissolution of marriage subject to the rules of conflict of laws expounded above, when no instructions have been determined by the domestic civil law?

For the members of an unrecognized religious community, their religious law will apply. For persons lacking any religious community, the legal situation remains unclear and the matter of the applicable law has not yet been decided.

When a foreign party is involved, the following settlements apply: on matters of marriage, the court shall apply the law of the nationality, including the *renvoi*. On matters of the dissolution of marriage, litigated under the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969, there is no *renvoi*, as explained above. On these matters, the Israeli court is bound to apply the internal foreign law. Moreover, the foreign law is not the national law but firstly the law of the foreign domicile. Aside from embodying a failure on the part of the law to distinguish between capacity for marriage and the form of marriage, these distinctions may lead to a multiplicity of applicable laws to one and the same couple. Thus, for instance, when the court is required to

61. P. Shifman, 'Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969,' 2 *Mishpatim* 416 (1970) (Hebrew); M. Shava, 'The Rules of Jurisdiction and Conflict of Laws in Matters of Dissolution of Marriage,' 1 Tel Aviv U. L. Rev. 125 (1971) (Hebrew).

declare the validity of a marriage or decide on such validity for the purposes of a given litigation (maintenance, for example), it will decide the matter according to the foreign national law, including *renvoi*, in accordance with the distinction between capacity and form. When required to dissolve or annul the same marriage, it will decide the matter in accordance with the internal law of the domicile. This creates the possibility of a contradiction within the personal status of the spouses for various purposes.

A serious question concerns the applicability of the rules of private international law with regard to the validity of a marriage of spouses whose national status changes between the time of the marriage and the time of the litigation. Will precedence be given to the local (that is, the religious) law which applies to the couple on the day of the hearing or will the court prefer the foreign national law which applied on the day of the marriage or the law of the place of marriage? Moreover, will a distinction be drawn (as it is under the rules of private international law in common law) between the capacity to marry (the national law) and the law applicable to the form of marriage (the law of the place of the marriage)?

The Supreme Court has decided that a marriage will be pronounced valid under the foreign national law applying at the time of the marriage rather than the time of the litigation. Thus, for example, the marriage of a Jewish couple will be recognized as valid if they were married in a civil marriage recognized by the foreign country of which they were citizens at the time of their marriage.[62] This is also the case when the marriage is an interreligious one, provided it is recognized by the national law applying to the parties at the time of the marriage.[63] This recognition is far-reaching as according to the religious law which applies to these parties (or to one of them if the marriage is an interreligious one) on the day of the hearing, the marriage is invalid and totally unrecognized.

More difficult questions which have not yet been decided arise with regard to the relevant connecting factor or the relevant foreign factor for marriages celebrated outside of Israel and recognized by the country where they occur, when one or both of the parties are citizens of Israel. Will the religious law apply, that is, the law that applies to all the parties involved at the time of the marriage as well as the time of the hearing, by virtue of the fact of Israeli citizenship? Will the applicable law be that of the place of marriage, this being the law which applies to the form of the marriage? And if so, what will the relevant foreign factor be in the case of an interreligious marriage, when one of the spouses lacked the capacity to marry the other according to the religious law applying to one of the spouses, as a citizen of Israel, at the time of marriage? Court decisions have indicated that the decisive connecting factor may be the law of the place of the marriage.[64]

62. C.A. 191/51, *Skurnik* v. *Skurnik*, 8(1) P.D. 141, 178 (1954).
63. C.A. 566/81, *Shmuel* v. *Shmuel*, 39(4) P.D. 399 (1985).
64. *Contra* M. Shava, 'Civil Marriages Celebrated Abroad: Validity in Israel,' 9 Tel Aviv U. Stud. L. 311 (1989).

In cases where the court has recognized the validity of a marriage performed outside of Israel, which is not recognized by the religious law applying to the parties on the day of the hearing, this has been an attempt to protect the couples' vested rights. However, given that the religious law, applying to the matter at the time of the hearing does not recognize their status, a fictitious settlement is necessary in order to impose obligations stemming from the said status. The obligation is imposed according to the religious law applying on the day of the hearing, but the framework for this obligation, namely, the validity of the marriage, is determined according to the foreign law. Consequently, the religious law according to which the parties are subjected to obligations, is employed on the basis of a fictive assumption that the marriage is valid. However, this assumption is actually totally unacceptable to the religious law, which does not recognize the validity of the marriage and would accordingly have rejected the obligation due to its rejection of the validity.

It has already been shown that a preference for the rules of private international law over religious law, in situations involving a foreign element, forms one of the means of closing the gaps within the Israeli system, by recognizing civil marriages which cannot be performed in Israel and as a result of it infringing upon the status of the religious law and its normative influence.

The recognition of foreign divorce is identical, in terms of the rules of private international law, to the recognition of foreign marriage. It should be kept in mind that in any case the recognition of foreign civil marriages leads to serious conflicts with the religious law and creates difficult problems of compatibility between the religious and civil systems. The recognition of civil divorce is even more complicated from the point of view of religious law. At the end, some of the matters affected by the recognition of the marriage or the divorce, and especially the capacity for re-marriage, are decided by the religious law. The civil law can solve property or monetary problems to some extent, but the religious law will have the last word at the end of the day. This is so when the religious court declares a civil marriage invalid, despite the recognition of its validity by the civil court, and when the religious court demands a divorce despite the previous recognition of a civil divorce.

What rules apply to the case of a split in foreign law, that is, when a different result is applicable to each of the spouses according to the foreign law applying to each? We have already seen that for the dissolution of marriage, the law disallows the application of a foreign law which entails a split, namely, disparate results, for each of the spouses. Concerning other matters, the private international law in Israel apparently takes a cumulative approach, according to which the validity of a marriage is conditional upon its recognition under the laws applying to both spouses. Due to the recognition of *renvoi*, this matter also depends upon the stance of the various national laws as to the cumulative or distributive approaches.

Concerning the property relations between spouses, property acquired and accumulated prior to January 1974 is subject to the rules of the conflict of laws of the common law, introduced into domestic Israeli law with the necessary amendments. Consequently, such spouses are subject to the principle of partial mutability. According to this principle the spouses' property relations are

subject to the law of their domicile at the time of their marriage. If their domicile has changed in the course of the marriage, the property acquired and accumulated since the date of the change is subject to the law of their new domicile. The rights to the property acquired and accumulated prior to the date of change are protected by the principle of the protection of vested rights.[65] The court has not recognized the distinction practiced within common law, between the law applying to movables and that applying to lands. In the Israeli legal tradition, which does not distinguish between different types of property for the purposes of private international law, all types of property are subject to the law of the domicile.

The private international law concerning property acquired and accumulated after January 1974 is defined by section 15 of the Spouses (Property Relations) Law, 1973. The instructions of this section, also applying to spouses married before the law's application, preserve the law of the domicile, based, however, on the principle of immutability. The law of the domicile at the time of the marriage continues to apply to the parties even after they have changed their domicile. It is only when the parties have reached an agreement, in accordance with the law of their new domicile, concerning the amendment of their property regime, that the law applying to the property relations between them will be changed in keeping with the said agreement. The law of the domicile at the time of the marriage is apparently the law of the intended domicile of the spouses.

An absurd situation results for parties married before the application of the law. The law of their ancient domicile (at the time of the marriage) will suddenly re-apply to their property relations with regard to property acquired since January 1974 despite the fact that they had changed their domicile many years before the said date and were – according to the rules of conflict of laws practiced in Israel before the enactment of the Spouses (Property Relations) Law, 1973 – subject to Israeli law since their immigration to Israel, and not to the law of their domicile at the time of their marriage. In such cases the previous law will be reinstated as a normative reality. Although the law of the domicile at the time of the marriage will not be applied retroactively, and vested rights granted in the past according to the law will be preserved, this renewed application of the law of the domicile at the time of the marriage is an unjust anachronism.

The bitter pill is sweetened somewhat with respect to those spouses by a presumed consent to continue their property relations in keeping with the presumption of community of property applying to them before the enactment of the Spouses (Property Relations) Law, 1973. Instead of the law of the domicile at the time of the marriage, the presumption of community of property will continue to apply to them by virtue of a presumed consent.

65. C.A. 2/77, *Azugi* v. *Azugi*, 33(3) P.D. 1 (1979).

XI. SUMMARY

The split in judicature and law, the gaps between the law on the books and reality, the grafting of a secular law onto a religious one and the introduction of a territorial law into a personal law all create a highly problematic complex. The following are some of the problems and difficulties posed by the field of family law within Israeli law. The legal system leads to a multiplicity of court proceedings, to human exhaustion and a waste of resources. The division of proceedings between various judicial authorities causes fragmentation, inconsistencies and the lack of an integrative approach to family disputes.

Family law is often piecemeal, containing inconsistent settlements, detrimental to the unity of the legal system and to the consistency of the settlements it offers. It combines settlements grounded on disparate fundamental principles and on different, sometimes contradictory, world views. It gives rise to states of double or split status. The system speaks with two voices and conveys double messages. It expresses ultra-puritanism along with ultra-liberalism.

In various areas women do not have equal rights and their power of bargaining is diminished. The difficulty of dissolving marriages engenders acute distress and creates opportunities for coercion and exploitation of the advantages following from this or that law.

The gap between the religious norm and reality, along with the combined, religious and civil settlement, lead to problems in the normative functioning of both the religious and the civil law. Neither is free to realize its full potential. Various parties may be left without answers, thus increasing and broadening the distress of the individual.

All this has negative effects on the relations between the disputing parties and the possibilities for peaceful settlements. This situation widens the existing rift between the spouses and causes severe damage to the subsequent rehabilitation of the parties and the best interests of their children.

As explained above, over the years, the civil courts have introduced indirect means and created 'substitute divorces' and 'substitute marriages,' in order to overcome the various difficulties inherent in Israel's legal system in the field of family law and in order to narrow the gaps between the word of the religious law and the 'law of life.' These means, however, only provide a partial solution suited to specific cases. Even patently necessary arrangements such as: amending the procedure in the civil courts, an integrative approach to family disputes and bringing the welfare authorities and additional professionals into the process, are not carried out. Civil responsibility for family law is only partial. The legislative authorities are caught in a blind alley in intervention in family law. They intervene only in those matters in which intervention is acceptable to religious law, such as criminal legislation or the combatting of domestic violence. Even the readjustment of defective civil settlements (such as the Spouses (Property Relations) Law, 1973) meets with opposition. Also, in recent years the civil courts have refrained from extending the said means and from indirect treatment of the difficulties posed by religious law and the religious courts. The use of marriage and divorce contracts and their interpretation, along with a certain restriction of the jurisdiction of the religious courts,

the use of property means and greater equality in the division of family assets might ease the predicament somewhat and narrow the gaps.

XII. INHERITANCE

A. Principles of Inheritance

The Succession Law, enacted in 1965, prescribes the distribution of a person's property after his or her death. The law defines a unified, civil, territorial settlement.[66] Although it was not meant to infringe upon the property relations between spouses or the rights following from the status of marriage and settled by personal law, inheritance rights and rights to maintenance out of the estate are settled by the Succession Law alone.

Inheritance is determined by law unless it is settled by a will. According to the principle of the immediate passage of the estate to the heirs, the estate of the deceased passes to his heirs immediately after his or her death. However, the assets of the estate are not actually passed on to the inheritor until after, and as a result of, the estate's distribution. The estate is not an independent legal personality or entity.

The principle of intestate succession is based on a system of descent, and the order of inheritance is determined by the immediacy of the family relation between the heir and the common parent heading the particular line of descent. The heirs are children and their children, parents and their children and grandparents and their children. Inheritance is restricted to the third line of descent. It is determined subject to equality between genders and the principle of a substitute (an heir who dies before the deceased is replaced by his or her children who become the heir's substitute). The existence of heirs from a prior line of descent cancels the right of the next line of descent to inherit.

The spouse is also an inheritor, an exception to the parental structure of inheritance.[67] In recent years the Israel legislature has shown a tendency to prefer the core family unit (spouse and children) for purposes of inheritance, at the expense of the deceased's other relatives. The spouse's portion of the inheritance changes according to the identity of the co-inheritors and the immediacy of their family relations to the deceased, and also according to the property regime between the inheriting spouse and the deceased. In addition to his or her portion of the inheritance the spouse is entitled to a portion of the property by virtue of the presumption of community of property or the settle-

66. U. Yadin, 'Reflection on a New Law of Succession,' 1 Isr. L. Rev. 132 (1966); P. Elman, 'The Succession Law, 1965: A Lustrum,' 7 Isr. L. Rev. 286 (1972); U. Yadin, 'The Succession Law as Part of Israeli Civil Law Legislation,' 1 Tel Aviv U. Stud. L. 36 (1975); A. Rosen-Zvi & A. Maoz, 'Principles of Intestate Succession in Israeli Law,' 22 Isr. L. Rev. 287 (1988); *Inheritance in Israel for the Layman and the Lawyer* (J. Harpaz & M. Zaslansky eds., 1990).

67. A. Rosen-Zvi & A. Maoz, 'Principles of Intestate Succession in Israeli Law,' 22 Isr. L. Rev. 287 (1988).

ment of balancing resources, to the return of the property received by the deceased due to the marriage so as to return it upon dissolving the marriage and, in appropriate cases, the spouse of the deceased is entitled to maintenance out of the estate as well. The spouse is also entitled to rights following from the marriage relation and realized upon his or her spouse's death (a woman's *ketubah* – marriage contract – for instance), but these are subtracted from the spouse's portion of the estate.

B. Wills

The principle of the liberty to will one's estate, the freedom to make testaments and the principle of respecting the wishes of the deceased form the basis of the settlement of inheritance under Israeli law. The Succession Law thus recognizes a person's full liberty to bequeath his or her property by means of a will. It does not set any entrenched portion for a person's spouse or any other of his or her relatives. Neither does the law recognize a person's power to restrict his or her power to make a will. Accordingly, the law does not recognize contracts of any kind concerning a person's estate or a restriction of any kind on a person's power to will his or her property. It may be that only a property agreement between spouses, made in writing and confirmed by the appropriate authority, is an exception to this rule.

A will is valid if made in the person's handwriting or in the presence of witnesses or before an authority or orally. For each of these ways of making a will the law defines the manner of its making and the conditions for recognizing its validity. Will laws involve a heavy dose of formalism. Formalism in turn necessitates a certain degree of technicality. On the one hand, a certain degree of formalism is required so as to reflect the soundness of mind, the finality, the determination and the firmness of someone who is unable to testify to these just at the time when such testimony is most needed. On the other hand, excessive formalism often works against the real wishes of the testator even though the formal basis may be defective. The Israeli system attempts to effect a balance between the formalist approach and the substantive one. Against this background, the law has determined that when the court has no doubt as to the authenticity of a will and the soundness of mind of the deceased, it may grant probate thereof notwithstanding certain formal defects. The tendency of Israeli courts is to discuss the formal requirements stipulated by the law from the standpoint of substance, while subjecting the formalist approach to the preservation of substance.

C. Miscellaneous Matters

Despite the liberty to will, maintenance out of the estate cannot be contracted out either by will or by contract or by waiver in the lifetime of the deceased. After the death of the deceased, such a contract or waiver requires the court's approval as a condition for their validity. A claim which arises out of the

marital bond (such as the *ketubah*) cannot be contracted out by will and is not subject to bequest. In this way the Israeli legislature protects those dependent on the deceased in the absence of the recognition of an entrenched portion.

The Succession Law also determines the inheritors' responsibility for the debts of the estate, the order in which the debts are to be covered, the manner of the estate's distribution, the procedure for appointing the administrator of the estate, the powers of this administrator and the court's control of him, *inter alia* through court instructions.

D. Private International Law

In the Succession Law too the rules of jurisdiction and the rules of conflict of law turn on the connecting factor of domicile, defined as the center of a person's life. The international jurisdiction of Israeli courts to decide on matters of inheritance is based on the domicile of the deceased at the time of his or her death being in Israel or on property left by the deceased in Israel at the time of death. The inheritance is subject to the law of the deceased's domicile at the time of his or her death. The Succession Law makes no distinction here between different kinds of property. Capacity to make a will is subject to the law of the domicile at the time when the will was made. The validity of the form of the will is subject to the principle of validation. A will is valid according to each of the following alternatives: domestic Israeli law; the law of the place where the will was made; the law of the ordinary residence of the testator at the time the will was made or at the time of death; the law of the country of which the testator was a citizen at the time the will was made or at the time of death; when the will concerns lands, also according to the *lex situs* law of these lands.

The law of the domicile which applies to an inheritance is replaced by the *lex situs* of the property (usually lands) in cases where the foreign law stipulates that the inheritance is subject to its regulations alone. This reservation in the Succession Law was determined as an exception and interpreted in a restrictive sense. The Supreme Court has decided that the regulations to be considered are not the internal ones of the *lex situs* but rather its rules of private international law. The application of the *lex situs* to property holds only when the rules of the conflict of laws of that law have recourse exclusively to the domestic law of the *lex situs*, disallowing the application of any other law.

Accordingly, it has been decided that when the domicile of the deceased is Israel but the *lex situs* of his property includes a principle of an entrenched portion for family members (unlike Israeli law), the Israeli law will apply whenever the application of any other law is not disallowed by the foreign rules of the conflict of laws.[68] The practical upshot is that the foreign *lex situs* applies to property located within the territory only when its private international law necessitates the application of the domestic *lex situs* alone. In every

68. C.A. 598/85, *Kahana* v. *Kahana*, 44(3) P.D. 473 (1990).

case of inheritance settlements or restrictions upon the will in certain matters, the law of the domicile will usually override the *lex situs*.

An inconsistency may arise due to the disparity between the law applying to the rights of the surviving spouse under property relations between the spouses (the domicile at the time of marriage) and the law applying to the inheritance of the surviving spouse (the domicile at the time of death).

The classification of legal terms will be made according to their meanings under Israeli law. The law says that on matters of inheritance only partial *renvoi* will apply. Accordingly, if the foreign law has recourse to another law, the *renvoi* will be rejected by the Israeli forum and the domestic foreign law will apply. Conversely, if the referral of the foreign law is to Israeli law, Israeli law accepts the *renvoi* and domestic Israeli law will accordingly apply. The foreign law will apply subject to the principle of public policy. An additional restriction to the application of the foreign law occurs in cases where the estate is passed to a person with whom the deceased did not have blood relations, marriage relations or adoptive relations. In this case (inheritance by the State, for instance), the foreign law will be applied only on the basis of reciprocity. In other words, only if the foreign law recognizes an analogous right of inheritance defined under Israeli law.

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