

**The Right to Family Life and Civil Marriage under International Law and its  
Implementation in the State of Israel**  
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## I. Introduction

International law recognizes the fact that the family plays an essential and central role in human society. The family is perceived to be “the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>1</sup> This outlook lies at the foundation of the broad protection granted to the family by international law. The right to family life, which has been recognized as a fundamental right in international law, is enunciated in all major international instruments and conventions, and has also been the subject of a comprehensive discourse in various contexts of Israeli law.

This article deals with the protection of the right to family life under international law and its implementation in the State of Israel on three levels: protection of the family cell as a single unit (the right to establish a family and, particularly, the right to marry); protection of the individuals comprising the family unit (particularly, women and children); and protection of the family in special circumstances (such as immigration rights).

Israeli family law may be divided into two parts: the laws of marriage and divorce, which are governed exclusively by religious law, on the one hand, and most other aspects of family law (including maintenance, child custody, adoption, and succession), which are regulated by substantive secular law, on the other hand.<sup>2</sup> The major inconsistencies between Israeli family law and the provisions of international law relating to the right to family life are to be found in those areas governed by substantive religious law. Various international conventions that were signed and ratified by Israel mandate the prohibition of discrimination on the basis of, *inter alia*,

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<sup>1</sup> Article 16(3) of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) (hereinafter: “Universal Declaration of Human Rights”). Article 23(1) of the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (hereinafter: “Covenant on Civil Rights”), reiterates that which is stated in the Universal Declaration. See also Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (hereinafter: “Covenant on Social Rights”), which provides: “The States Parties to the present Covenant recognize that ... [t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society ...”. Similar treatment may be found in Article 4 of the Declaration on Social Progress and Development, G.A. res. 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969) (“A basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth”), in Article 16 of the European Social Charter, October 18, 1961, E.T.S. 35, 529 U.N.T.S. 89, entered into force Feb. 26, 1965 (hereinafter: “European Charter”), and in Article 22 of the Declaration on Social Progress and Development, G.A. res. 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969). Similar provisions may be found in various regional conventions, such as: American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (Article VI: “Every person has the right to establish a family, the basic element of society, and to receive protection thereof”); Article 17(1) of the American Convention on Human Rights, Nov. 22, 1969 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”); Article 18(1) of the African Charter on Human and Peoples’ Rights, June 27, 1981 (“The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health”).

<sup>2</sup> See A. Rosen-Zvi, “Family and Inheritance Law,” in Introduction to the Law of Israel (A. Shapira and K. DeWeitt-Arar, eds., 1995) at 75; P. Shifman, “Family Law in Israel: The struggle between Religious and Secular Law”, 24 Is. L. Rev. 537, 538 (1990).

sex, national origin, race, and religion. However, Israeli law regarding marriage and divorce, which is discriminatory in terms of the aforesaid categories, has not been affected by the ratification of international conventions. To a certain extent, this is because only international customary law automatically becomes part of Israeli law, whereas conventional international law (constitutive treaties) becomes part of Israeli law only if it is adopted or combined with Israeli law through legislation. While the Israeli government has ratified the international conventions discussed in this article (some of which were ratified with specific reservations), they have not been incorporated into domestic legislation. Thus, they have no formal effect in the Israeli legal system and are not applied if they contradict Israeli law. The rights and duties enumerated in these conventions, therefore, cannot be directly invoked by individuals, and do not fall under the jurisdiction of Israeli courts.<sup>3</sup> This article argues that despite the fact that international conventions pertaining to the right to family life have not been incorporated into Israeli law, the Supreme Court of Israel should give proper weight to the right to family life as a fundamental human right grounded in principles of international law, and that the Israeli legislature should take the necessary steps to bring Israeli family law into conformity with the precepts of international law.

Part II of the article discusses the characteristics of the right to family life and examines various definitions of the “family” under international and Israeli law. It also examines what it is that the right to family life encompasses and how it should be classified within the context of the accepted division into civil and political rights, on the one hand, and social and economic rights, on the other hand. It argues that the right to family life should not be viewed as limited solely to one category of rights or another, since it has the characteristics of both a positive social right as well as those of a negative civil right. Part III of the article analyzes the degree of protection accorded to the family in various contexts, both in international and Israeli law, including: the right of the family to social security, parent-child relations, and immigration rights based on family ties. This part concludes that the State of Israel provides adequate protection regarding most of these aspects of the right to family life, except for its discriminatory practices against Arab Israeli citizens and Palestinians in matters relating to immigration and family unification.

Part IV of the article, which discusses the freedom to marry, argues that Israeli law exhibits a particular difficulty in the equal application of the right to family life insofar as it relates to the right to marry, for the laws of marriage and divorce in Israel are governed exclusively by religious law, which discriminates against various groups of the population (women, persons without a religion, and persons disqualified for religious marriage). International law, on the other hand, dictates the application of the right to marriage without discrimination. The conclusion of this part of the article is that the only way to guarantee equality within the family context – and to ensure the right of every individual to marry, free of the shackles of religious law, as mandated by international law – is the introduction of civil marriage in Israel.

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<sup>3</sup> See Ruth Lapidot, “International Law within the Israel Legal System,” 24 *Isr. L. Rev.* 451, 459 (1990); N. Lerner, “International Law and the State of Israel,” *in* Introduction to the Law of Israel, *Id.* at 383, 386-387. See also Yaffa Zilbershats, “The Adoption of International Law into Israeli Law: The Real is Ideal,” 25 *Israel Yearbook on Human Rights*, 243 (1996).

## II. Characteristics of the Right to Family Life

### A. The Right to Family Life – A Fundamental Right

The right to family life is a fundamental right of the highest degree that has attained broad and comprehensive protection in international law. A first expression of the recognition of the right to family life as a basic human right, and of the protection of the family unit, may be found in Articles 12, 16 and 25 of the Universal Declaration of Human Rights, which state as follows:

#### Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference.

#### Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

#### Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Moreover, the right to family life is enshrined in a significant number of international and regional conventions that emphasize the centrality and social importance of the family unit, and which list the right to family life as a fundamental right. First and foremost, the right is enunciated both in the Covenant on Social Rights and in the Covenant on Civil Rights. Article 10(1) of the Covenant on Social Rights states that:<sup>4</sup>

The States Parties to the present Covenant recognize that ... [t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

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<sup>4</sup> Covenant on Social Rights, *supra* note 1. The Covenant was ratified by Israel in 1991.

Similar protection is granted to the institution of the family under Articles 17 and 23 of the Covenant on Civil Rights; These provisions state, respectively, as follows:<sup>5</sup>

#### Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

#### Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Specific protection for children within the family context may be found in the Convention on the Rights of the Child<sup>6</sup>; likewise, the Convention on the Elimination of All Forms of Discrimination against Women includes provisions that grant comprehensive protection to women in the context of the family.<sup>7</sup> Among regional conventions, comprehensive protection for the family institution may be found in the European Convention for Protection of Human Rights and Fundamental Freedoms.<sup>8</sup>

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<sup>5</sup> Covenant on Civil Rights, *supra* note 1. The Covenant was ratified by Israel in 1991.

<sup>6</sup> See the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990 (hereinafter: "Convention on the Rights of the Child"). The Convention was ratified by Israel in 1991. Article 16 of the Convention states that: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation; 2. The child has the right to the protection of the law against such interference or attacks."

<sup>7</sup> See Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 (hereinafter: "Convention on the Elimination of Discrimination against Women"). The Convention was ratified by Israel in 1991. The State of Israel also ratified the Convention on the Nationality of Married Women, 309 U.N.T.S. 65, entered into force Aug. 11, 1958. Article 3(1) of this Convention states that: "Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the citizenship of her husband through specially privileged naturalization procedures; the grant of such citizenship may be subject to such limitations as may be imposed in the interests of national security or public policy."

<sup>8</sup> See European Convention for Protection of Human Rights and Fundamental Freedoms, October 4, 1950 213 U.N.T.S. 222, entered into force Sept. 3, 1953 (hereinafter: "The European Convention"):

#### Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in

The right to family life has also been recognized as a fundamental constitutional right in Israeli law. The Israeli legislature has enacted various arrangements intended to encourage the family unit. Thus, for example, within the context of marriage, various provisions that have been laid down are designed to foster a caring and intimate relationship between spouses, in order to sustain and nurture the family unit. Promotion of the emotional relationship between the spouses is achieved, *inter alia*, by the following: granting a right to sick leave in order to care for an ill spouse<sup>9</sup>; giving preference to the request of a foreign spouse to immigrate to and become naturalized in the State of Israel, in order to live with his or her spouse<sup>10</sup>; the lack of competence of one spouse to give evidence against the other spouse<sup>11</sup>; visitation rights in prisons,<sup>12</sup> etc. In a similar fashion, the Supreme Court has recognized the right to family life as a “particularly important” fundamental right, pointing out that every individual has “a basic right to marry and to establish a family.”<sup>13</sup> The Court has emphasized the social importance of the family unit in a long series of judgments,<sup>14</sup> adding that Israel is committed to protect the family unit under the aforementioned international conventions.<sup>15</sup>

The Israeli Supreme Court has held that the right to family life – which, according to the Court, encompasses the right of an individual to belong to a family unit, the right of a couple to marry and live together, the right to bear children, the right of parents to raise their children and care for them, and the right of children to grow up with their parents – is grounded in the constitutional rights to privacy, self-fulfillment, dignity and liberty, which are enshrined in the Basic Law: Human Dignity and Liberty: “In an

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the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

<sup>9</sup> Section 1 of the Sick Pay (Absence Because of a Spouse’s Sickness) Law, 1998.

<sup>10</sup> Section 7 of the Nationality Law, 1952 (hereinafter: “Nationality Law”) provides that: “The spouse of a person who is an Israeli national or who has applied for Israeli nationality ... may obtain Israeli nationality by naturalization ...”. See also: Section 4A of the Law of Return, 1950 (hereinafter: “Law of Return”). In this matter, the Court has ruled that “an extension of the right of return to family members is intended to preserve the unity of the family, one member of which is Jewish”; H CJ 3648/97 *Israel Stamka v. Minister of Interior*, P.D. 53(2) 728, 755 (hereinafter: “*Stamka*”) [All citations of Israeli case law refer to Hebrew versions, unless the existence of an English translation is indicated]. Regarding limitations on rights of immigration and naturalization in Israel, in various contexts, see *infra*, Part III.D.

<sup>11</sup> See Section 3 of the Evidence Ordinance (New Version), 1971, which provides that “in a criminal trial a spouse shall not be competent to give evidence against the other spouse.”

<sup>12</sup> See Proposed Family Visits in Prison Facilities Law, 2003, of June 23, 2003 (“the link to the family unit is considered a basic human need, necessary to the prisoner and his family ... these needs are among the minimal civilized human conditions of every prisoner who belongs to a family unit”). The Bill may be viewed on the Knesset website <<http://www.knesset.gov.il>> (visited April 25, 2004) [Hebrew].

<sup>13</sup> See *Stamka*, *supra* note 10, at 781-82. See also the Court’s remarks in CFH 2401/95 *Nachmani v. Nachmani*, P.D. 50(4) 661, 683 (hereinafter: “*Nachmani*”): “every person has the right to establish a family and to bear children.”

<sup>14</sup> See, for example, the comments of Justice Barak, regarding the essentiality of the family to the life of Israeli society, in H CJ 639/91 *Efrat v. Director of Population Registry at Ministry of Interior*, P.D. 47(1) 749, 783 (hereinafter: “*Efrat*”).

<sup>15</sup> *Stamka*, *supra* note 10, at 787.

era in which ‘human dignity’ is a protected fundamental constitutional right, effect should be given to the aspiration of a person to fulfill his personal being, and for this reason, his desire to belong to the family unit that he considers himself part of should be respected.”<sup>16</sup>

However, although the case law has recognized the right to family life as a fundamental constitutional right, it has not been enshrined as a negative civil right in the Basic Law: Human Dignity and Liberty, nor as a positive social right in the Proposed Basic Law: Social Rights, in its different versions.<sup>17</sup> Among other things, the Proposed Law enumerates the right to education, the right to health, and the right to housing and social welfare, but surprisingly, it does not include the right to family life.<sup>18</sup>

## **B. The Definition and Scope of the Right to Family Life**

As indicated by the provisions of the aforementioned international conventions, the right to family life encompasses, first and foremost, the following: the right to marry; the right to be a parent; equality between the sexes within the family context; protection for children within the family context; and the family’s right to privacy. The right to family life also includes the right of individuals within the family to not be exposed to physical violence or verbal abuse; the right of family members to live together in the same country (“family unification”); the right of single-parent families and large families to receive state assistance; protection for working mothers and safeguards related to pregnancy and childbirth; the right to benefit from the educational and cultural resources of the state; the right to an adequate standard of living; and the right to family health services.

These rights are not based on a clear, standard definition of the term “family,” but rather derive from an individual examination of the various needs and functions of the family. Determining the scope of the right to family life, and identifying those persons entitled to benefit from it, mainly depends, therefore, on the definition given to the term “family.” It appears impossible to find a single, clear, exhaustive and standard definition for the concept of the “family” – whether in international law, comparative law or Israeli law. Article 10(1) of the Covenant on Social Rights deals with “family rights,” but does not define what constitutes a “family”<sup>19</sup> (although, a

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<sup>16</sup> CA 7155/96 *John Doe v. Attorney General*, P.D. 51(1) 160, 175. An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at <<http://www.court.gov.il>> (visited April 25, 2004).

<sup>17</sup> See Proposed Basic Law: Social Rights, 1994 (two versions) and Proposed Basic Law: Social Rights, 2002.

<sup>18</sup> Even if we do not read a right to family life into the Basic Law: Human Dignity and Liberty, and even if it will not be enshrined in the Basic Law: Social Rights, then, as a basic human right, it is still appropriate to examine every provision that infringes on the right to family life according to the standards outlined in the limitation clause of the Basic Law: Human Dignity and Liberty. See HCJ 5016/96 *Horev v. Minister of Transportation*, P.D. 51(4) 1, 41-3. An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at <<http://www.court.gov.il>> (visited April 25, 2004).

<sup>19</sup> The member states that are parties to the Covenant give substance and meaning to the term “family” as accepted in each and every country. See P. Alston, “The International Covenant on Economic, Social and Cultural Rights,” *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (U.N. Doc. HR/PUB/91/1 (1991)) 39, 57. In the General Comment of the Human Rights Committee of 1990, it was noted “that the concept of the family may differ in some

patriarchal view of the family institution may be inferred from the Covenant<sup>20</sup>). Furthermore, a meticulous search in other international conventions, in decisions of various international tribunals, and in Israeli law – as well as the law of other legal systems – demonstrates that a satisfactory definition for this concept cannot be found. The lack of consensus regarding the definition of the family is not evident only in the legal realm, but also, and primarily, in the fields of sociology and anthropology.<sup>21</sup> The nature and perception of the “family” change from place to place and from time to time, and are dependent on points of view as well as on social and cultural conditions. Historically, the family has been defined as a permanent, monogamous, heterosexual institution, based on marriage, and including a clear division of gender roles. Determining who counts as a “family member,” who is a “spouse,” what is a “marriage,” and who is considered a “parent,” has long been based on widely accepted legal and social perceptions. However, these perceptions have been questioned – mostly in the past few decades – as a result of social, legal and political changes.<sup>22</sup>

From a sociological point of view, it is customary to draw a distinction between the “traditional” family (“extended family”) and the “modern” family (“nuclear family”),<sup>23</sup> and between both of these and the “post-modern” family.<sup>24</sup> The traditional family and the modern family are based on ties of blood and marriage, and they differ in regard to the degrees of relation included in the definition of the term. The post-modern family encompasses also relations that are not based on blood or marriage (such as, unmarried heterosexual couples and same-sex partners), “absent” family relations (such as single-parent families), and the “bi-nuclear” family, where

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respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.” See Human Rights Committee, General Comment 19, Article 23 (Thirty-ninth session, 1990), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994)) (hereinafter: “G.C. 19”). Even prior to this, the UN Human Rights Committee stated that the term “family” in this Covenant, as in other conventions, should be interpreted as including: “All those comprising the family as understood in the society of the State Party concerned” (Human Rights Committee, General Comment 16, (Twenty-third session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994)).

<sup>20</sup> Despite the existence of provisions that deal with equal rights for women (see *infra*, Part IV.C), the man is the universal subject of the Covenant. Article 11 of the Covenant on Social Rights provides that “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for **himself** and **his** family ...” (emphasis added). As such, the Covenant presumes that it is the man who requires an adequate standard of living for his family, an assumption based on the perception that it is the man who heads the family. D. Otto, “Gender Comment’: Why does the UN Committee on Economic, Social and Cultural Rights need a General Comment on Women?,” 14 *Canadian Journal of Women and the Law* 1, 19 (2002).

<sup>21</sup> For different and varied definitions of the concept of the “family” in the fields of sociology and anthropology, see R. Bar-Yosef, “Sociology of the Family in view of Social Changes and Biotechnological Innovations,” 38(1) *Megamot* 5 (1996) [Hebrew].

<sup>22</sup> N. Bala & R.J. Bromwich, “Context and Inclusivity in Canada’s Evolving Definition of the Family,” 16 *International Journal of Law Policy and the Family* 145 (2002).

<sup>23</sup> See Z. Falk, *Marriage Law* (1983) 11 [Hebrew]. The accepted definition of the family in the field of sociology, since the 1940s and up to this day and age, is that of Murdock, who defines the nuclear family as one that includes a married man and woman and their offspring: G.P. Murdock, *Social Structure* (New-York, 1949) 1-2. Bar-Yosef argues that Murdock’s model is incompatible with the characteristics of the post-modern family; see Bar-Yosef, *supra* note 21.

<sup>24</sup> For a discussion of the characteristics of the post-modern family in the State of Israel, see S. Fogiel-Bijaoui, “Families in Israel: Familism and Post-Modernism,” *Sex, Gender and Politics* (1999) 107 [Hebrew].

parents have separated and established new nuclear families. While, in reality, there is no denying the existence of many different sorts of family units, it would appear that Israeli law still essentially regards the nuclear family – based on a lawful marriage between a man and a woman who have common children, whether biological or adopted – as the normative family model, and finds it difficult to recognize the wide variety of families that actually exist.<sup>25</sup>

As far as Israeli legislation is concerned, different definitions for the term “family” may be found in various laws, the scope of the definition varying from law to law, depending on the purpose of the statute. Furthermore, since the definition of “family” is a functional context-dependent definition, it is even possible to find different definitions for this concept within the same statute.<sup>26</sup> Some laws adopt a broad approach, while other statutes adopt a narrow approach.<sup>27</sup> Examples of a broad definition for the concept of the “family” may be found in the Prevention of Family Violence Law, 1991<sup>28</sup> and the Family Courts Law, 1995.<sup>29</sup> The definition of a

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<sup>25</sup> Such recognition finds only partial expression, mainly in the area of social rights. See, for example, the Single-Parent Families Law, 1992 (hereinafter: “Single-Parent Families Law”), which grants various benefits to a single-parent, such as preferential admissions to day-care centers or an increased state loan for housing purposes; in a similar fashion, same-sex partnerships have been accorded limited recognition that finds expression in the right of a same-sex partner to receive various employment benefits routinely granted to partners of a different sex. See H CJ 721/94 *El Al v. Danilowitz*, P.D. 48(5) 749 (hereinafter: “*Danilowitz*”). An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at <<http://www.court.gov.il>> (visited April 25, 2004). The legal conception of the nuclear family as the normative model, up to the present day, is reflected, for example, in the comments of Justice Porat in FA (Tel-Aviv) 10/99 *Jane Doe v. Attorney General*, (unpublished), *Takdin* - District Court 2001(2) 125 (hereinafter: “*Jane Doe I*”), who refused to view a lesbian couple and their children as a family unit and to grant them second-parent adoption, ruling that: “the children in question have mothers and no one has expressed any doubt as to their fitness to raise their children. Each one of the mothers chose to bring her children into the world without the participation of a man in her life. **What is lacking for these children (if it is indeed lacking) is a father, but definitely not another mother**” (emphasis added); at para. 18 of the judgment. See also B. Schereschewsky, *Family Law* (Fourth Edition, 1993) 1 [Hebrew], in which Prof. Schereschewsky defines the institution of the “family” as follows: “A family for the purposes of family law means all those persons who are related to one another by blood or by marriage.”

<sup>26</sup> In this matter, compare, for example, the definition of “family relation” in Section 174A(g) of the Municipalities Ordinance (New Version), which deals with restrictions on the employment of a family relation (“‘family relation’ – a spouse; a parent; a son or daughter and their spouses; a brother or sister and their children; a brother-in-law or sister-in-law; an uncle or aunt; a father-in-law or mother-in-law; a son-in-law or daughter-in-law; a grandson or granddaughter; including step-relations or adoptive relations”), to the definition of “family member” in Section 235A(a) of the same Ordinance (“a spouse, a child, a parent, a brother or sister, a grandson or granddaughter, a great-grandson or great-granddaughter”).

<sup>27</sup> Regarding this distinction, see the Report by the State of Israel to the UN Committee on Economic, Social and Cultural Rights, Ministry of Justice: *Implementation of the International Covenant on Economic, Social and Cultural Rights* (1998) E/1990/5/Add.39(1) (hereinafter: “Israeli Report to the UN Committee”). The Report may be viewed at:

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.5.Add.39\(1\).En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1990.5.Add.39(1).En?OpenDocument)> (visited April 25, 2004).

<sup>28</sup> Section 1 of the Prevention of Family Violence Law, 1991 (hereinafter: “Prevention of Family Violence Law”) defines “family member” as follows: “(1) a spouse, a parent or the spouse of a parent, a parent of a spouse or the parent’s spouse, a grandfather or a grandmother, an offspring or the offspring of a spouse, a brother or a sister, a brother-in-law or a sister-in-law, an uncle or an aunt, a nephew or a niece; (2) a person responsible for the sustenance, health, education or welfare of a minor or incapacitated person residing with him, and a minor or incapacitated person residing with a person responsible for him, as stated.” The statute also provides that the term “family member” includes “someone who was a family member in the past,” and that the term “spouse” includes “a common-law

“family member” in these two statutes includes, *inter alia*, a “reputed spouse” (a category akin to common law spouses) and a former spouse, children (including the children of a spouse), a parent and the spouse of a parent, the parents of a spouse and their spouses, a grandfather and a grandmother, brothers and sisters, and brothers-in-law and sisters-in-law.<sup>30</sup> This broad definition is not based only on marital relations and blood ties, but also on relations between reputed spouses and their families. On the other hand, there are statutes that adopt a narrow language insofar as it relates to the definition of a “family member.” The narrow definition is solely based on blood ties and marital relations, and does not include, for example, a reputed spouse, or even the family of a spouse. Thus, for example, the National Insurance Law (Consolidated Version), 1995 (hereinafter: the “National Insurance Law”), provides that a “family member” only includes “one of the parents, a child, a grandchild, a brother or a sister.”<sup>31</sup> In a similar fashion, the Equal Opportunities in Employment Law, 1988, provides that a “family member” is “a spouse, a parent, a child, a grandchild, a brother, a sister, or a spouse of any of these.”<sup>32</sup> Definitions that are narrow, to one degree or another, may be found in a long list of additional statutes.<sup>33</sup>

In contrast to the variety of statutory definitions of the “family,” it is difficult to find an attempt to define this concept in Israeli case law and legal literature.<sup>34</sup> It seems

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spouse.” This definition also applies to several other statutes: see, for example, Section 3 of the Law Against Stalking, 2001.

<sup>29</sup> Section 1 of the Family Courts Law, 1995 (hereinafter: “Family Courts Law”) defines a “family member” as: a spouse – including a common-law spouse, a former spouse, a spouse the marriage to whom has been dissolved – provided that the subject of the claim derives from the relationship between them during the period when they were a couple; a child, including the child of a spouse; parents, the parents of a spouse or their spouses; a grandchild; the parents of parents; brothers and sisters, or the brothers and sisters of a spouse. Furthermore, the term “parent” is defined as “including an adoptive parent or a guardian.”

<sup>30</sup> The Prevention of Family Violence Law even includes uncles and aunts, and nieces and nephews, while the Family Courts Law also includes grandchildren as “family members.” In keeping with its objective, the Prevention of Family Violence Law provides a broad definition that even applies to the relationship between someone who is responsible for a minor/incapacitated person residing with him or her and the minor/incapacitated person.

<sup>31</sup> Section 1 of the National Insurance Law. This definition is identical to that found in Section 1 of the Planning and Building Law, 1965.

<sup>32</sup> Section 21(a)(1) of the Equal Opportunities in Employment Law, 1988. For a similar definition, see the Victims of Road Accidents (Assistance to Family Members) Law, 2002: “‘family member’ – a spouse, a child, a parent, a brother or a sister, or another family member who was dependent upon the road accident victim.”

<sup>33</sup> See, for example, Section 8(7) of the National Health Insurance Law, 1994, which defines “family” as follows: “An individual and his spouse and their children up to the age of 18, or an individual and his children up to the age of 18.” Also, see and compare Section 17A(b) of the Government Companies Law, 1975; Section 351(e) of the Penal Law, 1977 (hereinafter: “Penal Law”); Section 1 of the Fallen Soldiers’ Families (Pensions and Rehabilitation) Law, 1950; Section 1 of the Invalids (Pensions and Rehabilitation) Law, 1959 (Consolidated Version); Section 28F of the Political Parties Law, 1992; Section 2 of the Crime Victims’ Rights Law, 2001. See also Proposed Basic Law: The Family, drafted by the New Family Organization <<http://www.newfamily.org.il>> (visited April 25, 2004), which defines “family” as follows: “(1) married couples; (2) unmarried adult couples unrelated by blood who live together in the same home, maintain a joint household and are mutually committed to a shared life; (3) an adult and a minor maintaining a joint household, where the adult is the parent or legal guardian of the minor.”

<sup>34</sup> While it is extremely difficult to find a clear definition for the term “family” in Israeli case law and legal literature, a very comprehensive discussion may be found, in this context, regarding the definition of the term “spouse,” which constitutes a basic element of the “family.” Opinions are divided on this subject and various questions remain unanswered, such as: For the purposes of family law, as well as in

that the courts, as well as most legal scholars assume that the definition of the family is obvious; in fact, they appear to be referring to the nuclear family. Thus, for example, in the *Ofri* case, Justice Orr held that for the purposes of the matter in question “there is no reason to interpret this broad term, ‘family,’ **the meaning of which is known to all**, as if it only refers to this or that specific person” (emphasis added).<sup>35</sup> Nevertheless, on this subject, the Israeli courts usually follow the lead of the legislature; in other words, when it comes to the meaning of the term “family,” the court adopts a functional approach, taking into account the purposes of the relevant statute.<sup>36</sup>

### C. The Right to Family Life: A Social-Civil Right

Traditionally, international legal scholars have distinguished between the characteristics of the rights enunciated in the Covenant on Civil Rights and the characteristics of the rights enunciated in the Covenant on Social Rights. Thus, for example, Scott has proposed the distinctions listed in the following table.<sup>37</sup>

<b>Economic, Social and Cultural Rights</b>	<b>Civil and Political Rights</b>
Positive	Negative
Resource-Intensive	Cost-Free
Progressive	Immediate
Vague	Precise
Unmanageably Complex	Manageable
Ideologically Divisive/Political	Non-Ideological/Non-Political
Non-Justiciable	Justiciable
“Aspirations” or “Goals”	“Real” or “Legal” rights

The most prevalent distinction is that found in the first line of the table: it is customary to classify the rights enunciated in the Covenant on Social Rights as “positive” rights, which necessitate the intervention of state authorities for their implementation (such as providing minimal means of subsistence), and the rights enunciated in the Covenant on Civil Rights as “negative” rights, which mandate state noninterference, or an obligation to refrain from activity that may infringe on a right (such as freedom of expression).<sup>38</sup> These distinctions have been criticized and it has

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other legal contexts, should a common-law partner be included within the definition of the term “spouse” that appears in legislation?; Or: Is a same-sex partner also a “spouse” for the purpose of recognizing various rights emanating from this status? See, for example: *Daniowitz*, *supra* note 25, at 785-86; CA 2000/97 *Lindorn v. Karnit – Road Accident Victims Compensation Fund*, P.D. 55(1) 12; M. Shava, “The ‘Unmarried Wife’” 3 *Iyunei Mishpat* 484 (1973) [Hebrew].

<sup>35</sup> CA 449, 464/88 *Ofri v. Perlman*, P.D. 45(1) 600, 609. Similarly, in most basic textbooks dealing with family law in Israel, it is impossible to find a definition for the term. See, for example, P. Shifman, *Family Law in Israel* (Second Edition, 1995, Volume I) [Hebrew]; A. Rosen-Zvi, *Israeli Family Law: The Sacred and the Secular* (1990) [Hebrew]; M. Shava, *The Personal Law in Israel* (Fourth Edition, 2001) [Hebrew].

<sup>36</sup> Israeli Report to the UN Committee, *supra* note 27, at 76.

<sup>37</sup> C. Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights,” 27 *Osgd Hall L.J.* 768, 833 (1989).

<sup>38</sup> For a discussion of additional distinctions between social rights and civil rights, including a survey of their different historical development, the hierarchy between them, and their different political and theoretical characteristics, see M.C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Oxford, 1995) 8-9. Regarding the distinction

been argued that the differences between the two categories of rights are not at all obvious or unequivocal.<sup>39</sup> And, indeed, there are political rights with characteristics found in the right column of the table (for example, affirmative action) and social rights with characteristics found in the left column of the table (for instance, the right of association and the right to strike); furthermore, there are rights with characteristics in both columns of the table, their exact nature varying according to the context in which they are being discussed (like the prohibition against discrimination).<sup>40</sup> In this regard, even if we ignore the criticism and adhere to the classic distinction between social rights and civil rights, not only would we find that the right to family life is enunciated in both the Covenant on Civil Rights and the Covenant on Social Rights,<sup>41</sup> but also that this right, in its various aspects, has a mixed nature: both civil and social. Several aspects of the right to family life have more of a negative-civil nature than a positive-social nature, such as the demand for recognition of the family's right to privacy, as well as the right to marry and to establish a family, and even the demand for equal rights between the sexes within the context of the institution of marriage – all “legal” rights that may be implemented immediately, without an investment of resources, and which mainly entail noninterference by the state in the individual's freedom of choice.<sup>42</sup> On the other

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between positive and negative human rights in international law, see, for example: C. Baez & others, “Multinational Enterprises and Human Rights,” 8 *Yearbook of Int'l Law* 183, 223-24 (1999/2000); J. Donnelly, *International Human Rights* (Boulder, 1993) 26.

<sup>39</sup> There are those who argue that, ultimately, all human rights require the state to act in a positive manner in order to ensure that all individuals have the opportunity to fully benefit from them. See A. Hendriks, “The Right to Health Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention,” 44 *Am. U.L. Rev.* 1123, 1133 (1995).

<sup>40</sup> See, for example: G. McGregor, “The International Covenant on Social, Economic, and Cultural Rights: Will it Get its Day in Court?,” 28 *Man. L.J.* 321, 334 (2002).

<sup>41</sup> See Articles 17 and 23 of the Covenant on Civil Rights and Article 10 of the Covenant on Social Rights. It is interesting to note that Article 10 of the Covenant on Social Rights provides that “the widest possible protection and assistance should be accorded to the family,” while it is customary to interpret the term “protection” as an obligation on the part of the state to prevent interference, by third parties, with the family institution; according to this interpretation, the wording of Article 10 is narrow and only relates to the protection of the family in the sense of preventing interference, by certain individuals, with the right of other individuals to family life. See Craven, *supra* note 38, at 109. If that is the case, then the right to family life in the Covenant on Social Rights may be interpreted as a right that is mainly negative in character. However, it should be remembered that, like the rest of the provisions in the Covenant, Article 10 is also subordinate to the general implementation clause, Article 2(1), which imposes positive obligations on the state. Indeed, Article 10 of the Covenant does not make use of the word “right,” and, therefore, *prima facie*, Article 2(1) does not apply to it. This interpretation is unreasonable, and Article 2(1) should be read as also applying to Article 10 of the Covenant, both in view of the intention of the Covenant's drafters to lay down binding legal obligations, and because it is not appropriate to interpret Article 10 in a different manner from the rest of the Covenant's provisions, since Article 2(1) was designed to lay down the responsibility of the states regarding all provisions of the Covenant. Moreover, the Economic and Social Committee, in its guidelines for the submission of reports, expressly used the term “rights” when it referred to Article 10 of the Covenant. See Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties obligations (Art. 2, para.1 of the Covenant) (Fifth session, 1990), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (U.N. Doc. HRI/GEN/1/Rev.1 at 45 (1994)). Reporting Guidelines, UN Doc.E/1991/23, Annex IV, 97-9, UN ESCOR, Supp. (No. 3) (1991) (hereinafter: “G.C. 3”); Craven, *supra* note 38, at 135.

<sup>42</sup> Within the context of the right to privacy, as well as the right to equality, a guarantee of full enjoyment of the right necessitates the prior implementation of administrative safeguards, legal and otherwise, against the possibility of an infringement of this right. That is to say, the state must also

hand, other aspects of the right to family life have more of a positive-social nature than a negative-civil nature: in this context, it is possible to include the family unit's right to receive economic assistance and social welfare from the state (such as "maternity insurance") – a right that necessitates positive intervention on the part of the state, entailing an investment of resources, whereas both the manner and the rate of implementation are dependent on the economic capability of the state. In my view, it is not advisable to dissociate the civil characteristics from the social characteristics of the right to family life,<sup>43</sup> since those are different aspects of the same material right. Therefore, for the remainder of this article, I will discuss both the "negative" and the "positive" aspects of the right to family life.

### **III. Protection of the Right to Family Life in Various Fields – International and Israeli Law**

#### **A. Protection of the Family Unit - General**

The UN Committee on Economic, Social and Cultural Rights, which serves as a supervising body for the implementation of the Covenant on Social Rights, provides clarifications, from time to time, regarding the interpretation of various provisions in the Covenant (General Comments). However, the right to family life, enunciated in Article 10 of the Covenant, has yet to be discussed by the Committee or to be interpreted by international judicial tribunals.<sup>44</sup> This is one of the reasons for the fact that the appropriate degree of protection for the family unit, mandated by the Covenant on Social Rights, has not been clarified to this very day. In any case, even regarding those matters that the Committee discusses, and on which it publishes a General Comment, its determinations are not considered a binding interpretation and, therefore, the interpretation of the Covenant is generally left to the discretion of the individual states.

In Israel, as in most countries, it is customary, in principle, to view the family cell as an independent unit immune from state interference. In the words of the Supreme Court, this approach is grounded in the recognition that the family is "the most basic and ancient social unit in human history which was, is, and will be the foundation

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take "positive" steps in order to guarantee the existence of a right that is, primarily, "negative." See Hendriks, *supra* note 39, at 1133-34.

<sup>43</sup> It may be argued that, even though the right to family life is referred to in a similar fashion in both the Covenant on Civil Rights and the Covenant on Social Rights, these should not necessarily be viewed as overlapping references, but rather as referring to different aspects of the right. That is to say, the right should be interpreted according to the context in which it appears. Therefore, to the extent that the right to family life is mentioned in the Covenant on Social Rights, it should be interpreted as requiring economic support for the family unit (i.e., its interpretation should be limited to the socio-economic context); and when it appears in the Covenant on Civil Rights, it should be interpreted as referring to the civil characteristics of the right to family life.

<sup>44</sup> An attempt to give substance to the right to family life may be found, primarily, in judgments of the European Court of Human Rights. For a discussion of this attempt, see *infra* text accompanying notes 69-70 and 128-32. Perhaps the lack of a special legal discussion regarding Article 10 of the Covenant by the UN Committee on Economic, Social and Cultural Rights may be explained by the fact that the right to family life is a broad right encompassing numerous secondary rights that sometimes overlap other rights.

that serves and ensures the existence of human society.”<sup>45</sup> The Court has further held that:<sup>46</sup>

In principle, the autonomy to establish a family, to plan a family and to bear children is a matter of personal privacy. Human liberty encompasses the freedom of independent choice on matters of marriage, divorce, childbirth, and any other private matter within the sphere of personal autonomy.... “The state does not interfere in this sphere except for reasons of special weight justified by the need to protect the right of the individual or a significant public interest”.... The aspiration to minimize state involvement in relations within the family unit, whether by direct intervention or by means of the legal system, emphasizes the unit’s right to autonomy, which is protected from interference both in the relations between the family unit and the state, as well as in the relations between the different members of the family unit. The situations requiring intervention are usually sensitive and complex, and it is needed when a crisis in the family unit has occurred that calls for state intervention through the courts in order to obtain a resolution that the parties themselves have failed to achieve.

The tendency to minimize state intervention in family relations is, therefore, grounded in recognition of the privacy and autonomy of the family. For example, the Supreme Court has ruled that “the parents are autonomous in reaching decisions in everything regarding their children – education, lifestyle, place of residence, and so forth, and the intervention of society and the state in these decisions is an exception that must be justified.”<sup>47</sup> Nevertheless, it is possible to discern a growing tendency of increased intervention in the autonomy of the family unit as part of the democratization and individualization processes taking place in the modern family.<sup>48</sup> Such intervention is perceived of as justifiable when the familial environment becomes oppressive and coercive.<sup>49</sup> Thus, for example, the Prevention of Family Violence Law allows for the issuance of a protection order prohibiting a person from entering a dwelling where a family member resides or from being found within a certain distance from such a dwelling, or from harassing a family member in any manner and in any place.<sup>50</sup> Furthermore, and as will be discussed below, the requirement of protection for the right to family life is not limited to a demand for state noninterference in family life or for intervention at a time of crisis, but also includes the need to support the family unit for the purpose of its subsistence, welfare and development, as well as a demand that the state identify those persons who are entitled to benefit, without discrimination, from the definition of “family.”

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<sup>45</sup> CA 488/77 *John Doe v. Attorney General*, P.D. 32(3) 421, 434.

<sup>46</sup> CA 5587/93 *Nachmani v. Nachmani*, P.D. 49(1) 485, 499, 501.

<sup>47</sup> CA 577/83 *Attorney General v. Jane Doe*, P.D. 38(1) 461, 468, 485 (hereinafter: “*Jane Doe II*”).

<sup>48</sup> See Fogiel-Bijaoui, *supra* note 24, at 109.

<sup>49</sup> *Id.*, at 127.

<sup>50</sup> Section 2 of the Prevention of Family Violence Law, *supra* note 28. Another example is the power to temporarily or permanently remove children from the custody of their parents, by means of an adoption order pursuant to the Adoption of Children Law, 1981 (hereinafter: “Adoption of Children Law”) and the Youth (Care and Supervision) Law, 1960 (hereinafter: “Youth Law”).

We will focus below on the legal protection afforded the right to family life, to the extent that this relates to the entire family, as a single unit. In this context, we will discuss several specific rights derived from the right to family life, where reference to the term “family” means the family in all its forms: the nuclear family, the extended family and even “alternative” family ties. Nevertheless, as we shall see, most of the legal protection and recognition is granted to the nuclear family, whether in regard to the relations between (heterosexual) spouses or the relations between parents and their children.

## **B. The Right of the Family to Social Security and Means of Subsistence**

Article 25 of the Universal Declaration of Human Rights provides, among other things, that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family ... motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.” Article 11(1) of the Covenant on Social Rights similarly provides that “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.” Article 10(1) of this Covenant also mandates that the state accord protection and assistance to the family, to the widest extent possible, “particularly for its establishment and while it is responsible for the care and education of dependent children.” Sub-articles (2) and (3) add provisions requiring that special protection be granted to women and children, as follows:<sup>51</sup>

- (2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
- (3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.

These provisions are designed to encourage the international community to continuously raise the standard of living of family members, to ensure their economic well-being and social development, and to create adequate conditions for the proper establishment and functioning of the family unit. These declarations are highly

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<sup>51</sup> Covenant on Social Rights, *supra* note 1.

significant in view of the tremendous resources at the disposal of the international community, on the one hand, and the great poverty suffered by many families throughout the world, on the other hand.<sup>52</sup> These provisions demonstrate that, within the context of the economic and social rights of the family, special emphasis has been placed on the protection and assistance that should be granted to working mothers.<sup>53</sup> It appears that the State of Israel, primarily through its social security system, affords extensive support and protection to working mothers during pregnancy, childbirth and post-childbirth care. As mandated by Article 10(2) of the Covenant on Social Rights, the Employment of Women Law, 1954 (hereinafter: “Employment of Women Law”) grants women the right (as well as the obligation) to take paid maternity leave for a period of 12 weeks (while providing the opportunity for fathers to take half of the maternity leave in lieu of the mother); the statute provides that an employer cannot dismiss a female employee during her pregnancy, save under a permit from the Minister of Labor and Social Affairs.<sup>54</sup> The National Insurance Law provides a series of benefits under the heading “maternity insurance,” including free hospitalization for childbirth, maternity grants (and if more than two children are born in a single birth – a maternity pension), maternity allowances for working mothers during their maternity leave, and high risk pregnancy benefits.<sup>55</sup>

### C. The Parent-Child Relationship

We have seen above that Article 10(3) of the Covenant on Social Rights provides, *inter alia*, that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.” Additional comprehensive safeguards for children, within the context of the family, may be found in the Convention on the Rights of the Child. Article 5 of this Convention provides that “States Parties shall respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.” Article 18(1) further provides that:<sup>56</sup>

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

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<sup>52</sup> A. Belembaogo, *The Family in International and Regional Human Rights Instruments* (New York, 1999), at 7.

<sup>53</sup> Article 11 of the Convention on the Elimination of Discrimination against Women, *supra* note 7, which deals with equal employment opportunities, is also designed to enable women to maintain their economic independence. Therefore, the international community recognizes that family responsibility does not need to adversely affect the equal opportunities of women within the context of the labor market.

<sup>54</sup> See Sections 6 and 9 of the Employment of Women Law.

<sup>55</sup> Regarding the history of maternity insurance in Israel, and for details about the level of benefits, see Israeli Report to the UN Committee, *supra* note 27, at 83-85.

<sup>56</sup> Convention on the Rights of the Child, *supra* note 6.

The State of Israel grants various social benefits to families with children, including a children's pension from the National Insurance Institute, and economic assistance for single-parent families, under both the Single-Parent Families Law and the Assurance of Income Law, 1980.

Alongside the protection and assistance granted by the state to children, within the family context, the law recognizes the right to parenthood – a right leading to the imposition of various duties on parents vis-à-vis their children. The Supreme Court has recognized that “the right to parenthood is a fundamental human right to which every individual is entitled.”<sup>57</sup> In a similar fashion, the Courtheld that:<sup>58</sup>

The right of parents to raise and educate their children as they see fit is a fundamental constitutional right, a natural right inherent in and stemming from the relationship between parents and their offspring. The family context does not stand apart from the constitutional system, but is an integral part thereof. Within the context of the family unit, parents are granted rights recognized and protected by constitutional law. The right of parents to have custody of their children and to raise them, with all this entails, is a natural and primary constitutional right – an expression of the natural connection between parents and their children [cite omitted].

As stated in the Israeli Report to the UN Committee on the Implementation of the Covenant on Social Rights, “the fundamental assumption of Israeli law is that the initial obligation to support family members lies with the family itself”; whereas this principle is enshrined, *inter alia*, in the Legal Capacity and Guardianship Law, 1962, which states that parents, as the natural guardians of their minor children, have “the right to fulfill their duties” vis-à-vis their children,<sup>59</sup> which include fulfilling their needs and seeing to their education, their studies and the preservation of their property.<sup>60</sup> Nevertheless, when the need arises, and in accordance with the primary principle of the “best interests of the child,” various statutes grant the state authority to intervene in order to ensure the welfare of a minor; for instance, the power to temporarily or permanently remove a child from the parents’ custody by means of an adoption order under the Adoption of Children Law and the Youth Law. Furthermore, the Penal Law imposes criminal sanctions on parents for neglecting, assaulting or abusing their children, physically, emotionally or sexually.<sup>61</sup>

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<sup>57</sup> CA 451/88 *John Does v. State of Israel*, P.D. 44(1) 330, 337.

<sup>58</sup> CA 2266/93 *John Does v. Richard Roe*, P.D. 49(1) 221, 235 (hereinafter: “*John Does*”).

<sup>59</sup> ET 1/81 *Nagar v. Nagar*, P.D. 38(1) 365, 393; *John Does*, *supra* note 58, at 239-40.

<sup>60</sup> Israeli Report to the UN Committee, *supra* note 27, at 80.

<sup>61</sup> The “best interests of the child” principle also dictates, *prima facie*, that children not be harmed by the status or acts of their parents. However, the application of religious law in matters of personal status, which we will discuss in more detail below, also harms certain groups of children as a result of the acts or status of their parents. Thus, for example, according to Jewish Law, a child born to a Jewish mother and a non-Jewish father is not legally related to the father; likewise, a child born to a married woman by a man who is not her husband is considered a *mamzer* [this term translates to English as “bastard”, and it refers to the offspring of a forbidden union], something that imposes serious limitations on the child’s legal capacity to marry, since a *mamzer* is forbidden to marry a Jew and may only marry another *mamzer* or a non-Jew. See C. Shalev, “Freedom of Contract for Marriage and a Shared Life,” in *Women’s Status in Israeli Law and Society* 459-60, 465, 479 (1995) [Hebrew].

Just as various restrictions are placed on the right to marriage (see discussion below), so too are various restrictions placed on the right to parenthood (in its “positive” sense). The State of Israel grants extensive recognition to the right to parenthood, insofar as it relates to married heterosexual couples, and even provides support and assistance to married couples unable to bear children. Thus, for example, the Adoption of Children Law states the principle whereby “[a]n adoption shall only be made by a man and his wife jointly.”<sup>62</sup> In a similar fashion, the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, 1996 only allows a man and a woman who are a couple to benefit from surrogacy arrangements.<sup>63</sup> The Supreme Court has refused to rule that these laws are discriminatory against unmarried persons.<sup>64</sup> Therefore, unmarried couples (or, in the case of surrogacy – those who are not reputed spouses), single persons and same-sex couples may benefit from the “negative” aspects of the right to parenthood, but not from its “positive” aspects.<sup>65</sup>

#### **D. Immigration Rights and “Family Unification”**

One of the areas which reflect on the degree of commitment by the state to the right to family life is immigration policy. In this context, a distinction should be made between the immigration of all family members (usually, the migration of workers and their families from one state to another<sup>66</sup>) and “family unification,”<sup>67</sup> i.e., the

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<sup>62</sup> Section 3 of the Adoption of Children Law.

<sup>63</sup> Section 1 of the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, 1996 (hereinafter: “Surrogacy Agreements Law”), defines those entitled to benefit from surrogacy arrangements as follows: “‘intended parents’ – a man and a woman who are a couple, who enter into a contract with a surrogate mother for the purpose of bearing a child.” For further discussion of the Surrogacy Agreements Law, see Rhona Schuz, “The Right to Parenthood: Surrogacy and Frozen Embryos,” in Bainham, A. (ed.) *The International Survey of Family Law*, p. 237 (1996)

<sup>64</sup> See HCJ 2458/01 *New Family v. Approvals Committee for Surrogate Motherhood Agreements, Ministry of Health*, P.D. 57(1) 419 (hereinafter: “*New Family*”), in which the Court deliberated the question of the right of a single woman to use the services of a surrogate mother under the Surrogacy Agreements Law, holding that the statute does not grant such a right; CA 1165/01 *Jane Doe v. Attorney General*, P.D. 57(1) 69, which dealt with the question of whether the term “spouse” in Section 3 of the Adoption of Children Law also includes a common-law spouse. In the end, the question was left for further consideration, and the Court did not even rule that common-law spouses are entitled to jointly adopt a foreign child. To the extent that this relates to the right of one partner of a same-sex couple to adopt the biological child of the other, the District Court has ruled that the law does not permit such an adoption; see *Jane Doe I*, *supra* note 25; an appeal of this judgment is pending before the Supreme Court. In HCJ 1779/99 *Berner-Kadish v. Minister of Interior*, P.D. 54(2) 368, the Court ordered the Ministry of Interior to register a lesbian couple as the dual mothers of the biological child of one of them, who was adopted by the other in California. A motion has been submitted for a further hearing of this decision, and it is pending before an expanded panel of the Supreme Court.

<sup>65</sup> Unlike adoption and surrogacy, which, as stated, are restricted to a man and a woman who are a couple (to the extent that this relates to adoption, even individuals are entitled to adopt a child under certain conditions), the Supreme Court nullified the policy that discriminated between married and single women (including lesbian women), regarding the unrestricted access to artificial insemination services. See HCJ 2078/96 *Weitz v. Minister of Health* (unpublished) (hereinafter: “*Weitz*”). Therefore, the Supreme Court’s decision in *New Family*, *supra* note 64, to not allow a single woman to avail herself of a surrogacy arrangement under the Surrogacy Agreements Law, is in conflict with its previous ruling in *Weitz*.

<sup>66</sup> A discussion of the subject of the migration of workers with their families is beyond the scope of this article. In this matter, there is a special convention that regulates the rights of the families of migrant

immigration of one spouse in order to live together with the other spouse, or the immigration of children/parents in order to live with or near their parents/children. In this article, we will deal with the second type of immigration, i.e. family unification aimed at protecting the right to family life, in two main contexts: first, the immigration rights of a foreign spouse, based on marriage; second, the immigration rights of foreign parents or children, based on the parent-child relationship.

## 1. Immigration Rights Based on Marriage

The principle whereby the state grants immigration rights to a foreign spouse does not stem from the recognition of a duty on the part of the state vis-à-vis the foreigner, but rather from its obligation to recognize and enforce the right of the spouse who is a citizen to enjoy the benefits of family life in his or her own country – if the foreign spouse is not permitted to immigrate, then, in effect, the spouse who is a national is forced to leave the country in order to realize his or her right to family life. Therefore, granting immigration rights to the foreign spouse primarily constitutes recognition of the right to family life of the spouse who is a citizen.<sup>68</sup> The European Court of Human Rights has long recognized that the right to family life enshrined in Article 8 of the European Convention may impose positive duties on the state in the field of immigration.<sup>69</sup> Nevertheless, the Court has allowed the state broad discretion to choose which foreigners will enter into or be deported from its territory, and greater weight is sometimes given to this prerogative than to the right to family life.<sup>70</sup>

The Israeli Supreme Court has also been asked to deliberate this issue in a series of cases. A comprehensive discussion regarding the discretion of state authorities in granting citizenship to the foreign spouse of an Israeli national may be found in the *Stamka* case,<sup>71</sup> which debated the reasonable basis for the Ministry of Interior policy regarding the naturalization process for a non-Jewish foreign spouse married to a Jewish Israeli in a “mixed marriage.” Under this policy, which had been in effect since 1995, a non-Jewish foreign spouse, who had married a Jewish Israeli citizen

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workers. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, G.A. res. 45/158, annex, U.N. Doc. A/45/49 (1990).

<sup>67</sup> In this context, I use the term “family unification” in its broad sense, i.e., every case involving the immigration of a person so that he or she may live in the same country together with his or her family members. Further on, I will discuss the meaning of the term in the Israeli context and its application in the Occupied Territories and within the borders of the State of Israel.

<sup>68</sup> See G. Cvetic, “Immigration Cases in Strasbourg: The Right to Family Life Under Article 8 of the European Convention,” 36 *INT’L & COMP. L. Q.* 647, 654-55 (1987); R. Cholewinski, “The Protection of the Right of Economic Migrants to Family Reunion in Europe,” 43 *INT’L & COMP. L. Q.* 568, 589 (1994); H. Storey, “The Right to Family Life and Immigration Case Law at Strasbourg,” 39 *INT’L & COMP. L. Q.* 328, 337 (1990).

<sup>69</sup> C. R. Howell, “The Right to Respect for Family Life in the European Court of Human Rights,” 34 *U. of Louisville J. of Fam. L.* 693 (1995-1996).

<sup>70</sup> See, for example: *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (1985) 34 (the European Court ruled that the right of the couple to family life was not infringed, since they were married after the foreign spouse had already been staying in Britain illegally, and, under these circumstances, the state had no obligation to grant immigration rights to the foreign spouse). In other cases, the European Court found a breach of the right to family life enshrined in Article 8 of the European Convention, in particular, when it concerns foreign nationals who have lived with their families in the “foreign” country for most of their lives and faced deportation because of the commission of criminal offenses. See, for example: *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991); *Beldjoudi v. France*, 246 Eur. Ct. H.R. (ser. A) at 26-28 (1992).

<sup>71</sup> *Stamka*, *supra* note 10.

while illegally staying in Israel, was required to leave the country for several months during which the Ministry of Interior would check whether this was a fictitious or a genuine marriage; once it was determined that the marriage was authentic, the spouse would then be entitled to return to Israel in order to begin the naturalization process. The naturalization process itself lasted many years and was preceded by a trial period for permanent residence, whereas the request for naturalization would only be discussed at the end of the trial period; this, because marriage to an Israeli, in and of itself, does not grant a foreigner the right to naturalization<sup>72</sup> (this lengthy process applies equally to a foreign spouse legally staying in Israel at the time that the marriage was performed). This policy had been formulated as part of the discretion granted to the Minister of Interior by the Entry into Israel Law, 1952 (hereinafter: “Entry into Israel Law”) and the Nationality Law. Contrary to the wording of Section 4A of the Law of Return, the Supreme Court ruled that, in view of the purpose of this statute (i.e., to avoid splitting up the families of mixed marriages among the Jews of the Diaspora and to encourage their immigration to Israel), the foreign non-Jewish spouse was not entitled to the rights that the Law of Return and the Nationality Law grant to the spouse of a Jewish immigrant (to the extent that this relates to citizenship by right of return), because this arrangement is intended to apply to the family members of Jews **prior** to their immigration to Israel, and not to the foreign spouse of a Jew who is a citizen of the State of Israel at the time of the wedding. Accordingly, it was ruled that Jews who are Israeli citizens could not impart a right of return to their non-Jewish spouses. In this way, the Court denied the foreign spouse the benefit of acquiring citizenship by right of return, which bestows social rights such as an “absorption package,” and the like. However, the Court further ruled that the Ministry of Interior requirement, whereby the foreign spouse had to leave the country until the authenticity of the marriage could be determined, was “incompatible with the axioms of a democratic regime bent on the preservation of civil rights”<sup>73</sup>; this policy does not meet the test of proportionality and is therefore null and void.<sup>74</sup> The Court based its ruling on the fundamental right to family life and, within its context, the right to marriage, as these are recognized by international law:<sup>75</sup>

**The Respondents did not properly weigh the individual’s right to marriage, and the grave harm to family life attendant upon the policy that they adopted for themselves.** Regarding the harm to a fundamental right, our colleague, Justice Dorner, has said in *Tenufa Personnel Services* case (HCJ 450/97 *Tenufa Ltd. v. Minister of Labor and Welfare*, P.D. 52(2) 433), at p. 452: “As regards the test for selecting the means that causes the lesser harm, which, as stated, is not an absolute test, the selection of the means will be affected by the right that is infringed. When this is a particularly important fundamental right, greater care will be taken in selecting the means that cause minimal harm, even where the cost of employing the means is substantial.” **We should remember that the present case revolves around the**

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<sup>72</sup> *Id.*, at 763. Section 1 of the Nationality Law, which lists the different ways to acquire Israeli citizenship, does not count marriage to an Israeli national as one of them.

<sup>73</sup> *Id.*, at 783.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, at 781-82.

**fundamental right granted to the individual – every individual – to marry and to establish a family. Needless to say, this right has been recognized in international conventions accepted by all [...] Indeed, the magnitude of the right and the powerful radiation that shines from within it,** would dictate, as if of themselves, that the means chosen by the Ministry of Interior be milder and more moderate than the harsh and drastic action that it decided to take. And it is hard for us not to conclude that **the Respondents completely disregarded – or gave minimal weight to – these fundamental rights of the individual to marry and to establish a family.** (emphases added).

Insofar as it concerns the naturalization process, the Court has held that an immigrant who is a foreign spouse constitutes a special category and that therefore his or her right to citizenship “is superior to the right of others.”<sup>76</sup> This, too, is based on the recognition of the fundamental right to family life.

The naturalization of a spouse is regulated by Section 7 of the Nationality Law, under the heading “Naturalization of Husband and Wife.” According to this provision, “[t]he spouse of a person who is an Israeli national or who has applied for Israeli nationality and meets or is exempt from the requirements of Section 5(a) may obtain Israeli nationality by naturalization even if he or she does not meet the requirements of Section 5(a).” The main purpose of this provision, which allows flexibility in the requirements for a spouse’s naturalization, is the desire to preserve the integrity of the family unit, and to avoid a disparity between the nationalities of the spouses.<sup>77</sup> Nevertheless, the provision does not grant the spouse of an Israeli national automatic citizenship on the basis of marriage, since Section 5(b) of the statute – according to which naturalization is at the discretion of the Minister of Interior – also applies to the naturalization of a spouse.<sup>78</sup>

As Justice Cheshin explains in *Stamka*:<sup>79</sup>

Section 7 of the Nationality Law upholds international commitments that Israel has undertaken, and according to which it is obligated to facilitate the naturalization of married women. In the language of Article 3(1) of the Convention on the Nationality of Married Women: “Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.” The wording of the Convention expresses a will to protect the rights of women, however, considering the principle of equality customary in our country, it may be said – in principle – that this right is also granted to men.

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<sup>76</sup> *Id.*, at 790.

<sup>77</sup> *Id.*; H CJ 754/83 *Rankin v. Minister of Interior*, P.D. 38(4) 113, 117 (hereinafter: “*Rankin*”).

<sup>78</sup> *Rankin*, *supra* note 77, at 113; H CJ 4156/01 *Dimitrov v. Minister of Interior* (not yet published) (hereinafter: “*Dimitrov*”).

<sup>79</sup> *Stamka*, *supra* note 10, at 792.

The purpose of the statute – in Section 7 – is to protect the rights of the spouse, which indicates that the Minister of Interior must incorporate this purpose in the policy established for implementing the provisions of Section 7.

Justice Cheshin further ruled that, indeed, Section 7 of the statute does not eliminate the discretion granted to the Minister of Interior under Section 5(b), however, it should be interpreted as granting special privileges based on marriage in the sense that the Minister should exercise the discretion granted to him by Section 7 and, in worthy cases, waive any of the requirements listed in Section 5(a) of the statute, particularly the requirement of permanent residence in Israel.<sup>80</sup> This ruling gives proper substance to Section 7 of the statute, since its practical effect is to shorten the process by approximately six years and to significantly ease the naturalization of a foreign spouse.

Thus, in *Stamka*, the Court saw fit to nullify the policy of the Ministry of Interior according to which the foreign spouse would be deported for several months in order to determine the authenticity of the marriage, as well as its policy stipulating that the hearing for a naturalization application would only commence after the obligatory period of time needed to grant the foreign spouse with permanent resident status had elapsed. The Court based its decision on the argument that these policies were extremely detrimental to the fundamental right to marriage and family life, while expressly recognizing the state's commitment to protect the family unit in view of the norms of international law in this matter.<sup>81</sup>

Even so, it would appear that the Supreme Court does not adopt a uniform stance concerning the fundamental right to family life in the realm of immigration law. Whereas, in *Stamka*, the Supreme Court granted a superior status to the right to family life, both rhetorically and in the application of the right to the facts of the case, it does not apply this insight to other judgments, even when rhetorically recognizing, in the words of Justice Cheshin, “the powerful radiation that shines” from within the right. This lack of uniformity is embodied in decisions of the Supreme Court regarding applications for “family unification” by residents of the West Bank and Gaza Strip, i.e., applications for permission from the State of Israel to bring a non-resident spouse into the region, so that he or she may cohabit permanently with a spouse who is a resident.<sup>82</sup> In the *Shahin* case, the applicants, who lived in the

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<sup>80</sup> *Id.*, at 793. It should be noted that, following this case, the Ministry of Interior changed its policy. See H CJ 338/99 *Sabri v. Minister of Interior* (unpublished), *Takdin* - Supreme Court 1999(3), 508.

<sup>81</sup> Following the decision in *Stamka*, the Ministry of Interior formulated a new procedure, in 1999, which shortened the period of time necessary to receive citizenship. According to this new procedure, during the trial period, the foreign spouse must extend his or her temporary resident permit each year. After the trial period, the foreign spouse receives Israeli citizenship without the interim stage of permanent residence. In this matter, the Supreme Court has recently rejected a petition in which it was asked to rule that the procedure for extending the permit of a temporary resident be performed every two years, instead of every year. See H CJ 7139/02 *Abbas-Batza v. Minister of Interior* (not yet published; from April 1, 2003). Nevertheless, in April 2003, the new policy of Interior Minister Avraham Poraz, to grant a temporary permit of stay for two years, came into effect. See M. Mualem, “A sympathetic ear can make a legal difference,” *Ha'aretz* English Edition, April 7, 2003.

<sup>82</sup> See, for example, H CJ 500/72 *Abu Al Tin v. Minister of Defense*, P.D. 27(1) 481; H CJ 209/73 *Ali Odeh v. Minister of Interior*, P.D. 28(1) 13; H CJ 802/79 *Samara v. Regional Commander of the West Bank*, P.D. 34(4) 1; H CJ 263/85 *Awad v. Commander of the Civil Administration, Ramallah District*,

Occupied Territories, claimed that the State of Israel's refusal to permit women married to residents of the region to remain in the territories with their spouses was a violation of the principles of international humanitarian law.<sup>83</sup> The petitioners relied on Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, which states that "Protected Persons are entitled, in all circumstances, to respect for ... their family rights."<sup>84</sup> Similar protection of the right to family life may be found in Article 46 of the Hague Regulations (IV) Respecting the Laws and Customs of War on Land, of 1907, which provides that "[f]amily honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."<sup>85</sup> These two provisions require that the occupier protect the right to family life, but it is doubtful that they also mandate family unification in those cases where the marriage to a foreign resident was entered into after the occupation, since the separation of the family requesting to be united is not necessarily a result of the state of war and the occupation.<sup>86</sup>

The policy of the military government in the Occupied Territories during the 1980s was to limit the approval of requests for family unification, since the military government no longer viewed such applications as authentic requests, but rather as "a means for immigration into the regions."<sup>87</sup> In order to attack this policy, the petitioners in *Shahin* relied on two legal opinions by experts in international law. These experts expressed their view that the military government's refusal to permit family unification was in violation of aforesaid Articles 27 and 46. According to the legal opinion by Prof. Brownlie of Oxford University, the State of Israel is obligated to grant a permit of stay and permanent residence to the foreign spouses in the West Bank and Gaza Strip, for otherwise it is harming the "unity of family life," in violation of Article 27.<sup>88</sup> Prof. Brownlie concluded that this unjustified harm to family life constitutes a violation of a human rights norm that applies to the State of Israel under customary international law.<sup>89</sup> According to the legal opinion of Prof. Shelton, from the University of Santa Clara, Israel is, indeed, entitled to regulate the entry into and the stay of foreigners in its territory, but this prerogative should not be abused **and must be balanced against the right of the individual to marry and to establish a family.**<sup>90</sup> Prof. Shelton pointed out that, in certain circumstances, preventing the entry of a foreigner into the territory of the state may constitute a violation of the right to marry and to establish a family: "The right to marry and found a family is generally recognized in international law and has been applied to

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*P.D.* 40(2) 281; H CJ 673/86 *Al Saudi v. Head of the Civil Administration in the Gaza Strip*, *P.D.* 41(3) 138.

<sup>83</sup> H CJ 13/86 *Adel Ahmed Shahin v. Regional Commander of IDF Forces in the West Bank*, *P.D.* 41(1) 197 (hereinafter: "*Shahin*").

<sup>84</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 (hereinafter: "Fourth Geneva Convention"). A similar provision may be found in Article 12 of the Universal Declaration of Human Rights, *supra* note 1.

<sup>85</sup> A. Roberts and R. Guelff eds., "Hague Regulations Annexed to Convention No. IV Respecting the Laws and Customs of War on Land," *Documents on the Laws of War* (2<sup>nd</sup> ed., New York, 1982) 44; U.S.T.S. 539, 2 A.J.I.L. Supp. 90, entered into force January 26, 1910.

<sup>86</sup> Y. Dinstein, "Reunion of Families in the Administered Territories," 13 *Iyunei Mishpat* 221, 227 (1988) [Hebrew].

<sup>87</sup> *Shahin*, *supra* note 83, at 214.

<sup>88</sup> *Id.*, at 202.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*, at 204.

require permitted residence in a state of which an individual may not be a national. Denial of family unification amounts to an abuse of right in such situations.”<sup>91</sup>

The Supreme Court rejected the conclusions reached in these legal opinions and ruled that both the Hague Regulations and the Fourth Geneva Convention “do not contain any explicit reference pertaining to family unification, in general, or to the right of foreign citizens to enter a militarily occupied area.”<sup>92</sup> Moreover, the Court has ruled that “general principles have not been formulated that create a binding, general customary norm regarding a militarily occupied area, and no precedents have been established in this field which serve as evidence of a general practice accepted as law.”<sup>93</sup>

Therefore, in *Shahin*, the Court gave very little weight, if any, to the right to family life as a fundamental human right grounded in principles of international law. Indeed, the Court did note that “family unification is always considered an important humanitarian matter,” but added that the treatment of these matters has always been “on the basis of ad-hoc arrangements specific to the circumstances of each case, which have varied according to the security and political conditions at the time.”<sup>94</sup>

The policy of the military government regarding family unification for residents of the Occupied Territories is similar, in one respect, to the Ministry of Interior policy within the borders of the State of Israel up to the *Stamka* decision. This similarity is reflected in the fact that the Ministry of Interior, like the military government, has not viewed the marriage to a foreign spouse as a genuine marriage but rather as a fictitious marriage designed to enable the foreign spouse to legally remain in the State of Israel. However, whereas the foreigner married to an Israeli national was required to leave the country for several months and was entitled to return to Israel afterwards and begin the naturalization process, the refusal to permit family unification for Arab residents of the Occupied Territories and their foreign spouses sealed the fate of their applications and caused a grave and irreversible harm to their right to family life. Moreover, and despite the similarity between the two cases, in contrast to *Stamka* – where the Court ruled that each case should be judged on its own merits, and that the general policy of deporting the foreigner from Israel, until after an examination of the authenticity of the marriage, was null and void – in *Shahin*, insofar as it concerns residents of the Occupied Territories, the Court ruled that a concrete, individual examination, on the merits, of each request for family unification based on marriage, was not required, and that the military government was entitled to treat this as a general “phenomenon” of mass immigration and to implement general measures that would apply to most requests for family unification, in view of the “state of war” in the Occupied Territories<sup>95</sup>; therefore, in view of the “general security, political and economic implications of the phenomenon, and its

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, at 208. Prof. Dinstein notes that it is puzzling that neither the petitioners nor the Court referred to the most relevant provision of humanitarian law in this matter, i.e., Article 74 of the First Protocol of 1977, annexed to the Geneva Conventions of 1949, whereby: “The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts ...”. Indeed, Israel is not a contracting party to the Protocol, however, it has never objected to the aforesaid provision in Article 74. See Dinstein, *supra* note 86, at 227-28.

<sup>93</sup> *Shahin*, *supra* note 83, at 210.

<sup>94</sup> *Id.*, at 209.

<sup>95</sup> *Id.*, at 215.

consequences,” the Supreme Court approved the minimalist policy of the military government.<sup>96</sup>

Regarding family unification in Israel, as opposed to family unification in the Occupied Territories, Justice Cheshin has said, in *Stamka*:<sup>97</sup>

Pertaining to the grant of rights to the foreign spouses, the parties’ counsels have used the term “family unification”; however, this is not the correct term, and we should clarify this at the outset. A distinction should be made between “family unification,” insofar as it relates to the Occupied Territories – and in that context, this is the correct term to use – and the use of the term and its application to the territory of the State [of Israel]. *Prima facie*, these matters are similar in nature, since both cases relate to the desire of family members to live together. However, despite the (partial) substantive identity between “family unification” in the Occupied Territories and “family unification” in Israel, there is no legal identity: the law is different, the competent authority is different, the nature of the right is different. We do not intend to go into detail in regard to arrangements for “family unification” in the Occupied Territories. Our only intention is to state that no inference can be made from these arrangements to the present case, just as no inference can be made from the present case to aforesaid arrangements. Each matter is a case unto itself.

In this same judgment, Justice Cheshin added that:<sup>98</sup>

The State of Israel recognizes the right of the citizen to choose a spouse according to his wishes and to establish a family in Israel together with that person. Israel is committed to the protection of the family unit under international conventions (see Article 10 of the Covenant on Economic, Social and Cultural Rights, 1966, and Article 23.1 of the Covenant on Civil and Political Rights, 1966); and even though these conventions do not dictate any given policy in the matter of family unification, Israel has recognized – has and does recognize – its obligation to provide protection to the family unit also by granting permits for family unification. In doing so, Israel has affiliated itself with enlightened nations, those states that recognize – subject to reservations regarding national security, public safety and public welfare – the right of family members to live all together in a territory of their choosing.

Despite the Supreme Court’s impressive rhetoric, the basic human right to family life – “the fundamental right acquired by the individual - **every individual** - to marry and to establish a family” – is in fact given different meanings in different contexts, such

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<sup>96</sup> *Id.*, at 214-15.

<sup>97</sup> *Stamka*, *supra* note 10, at 786. Regarding the use of the term “family unification” by the Supreme Court, in the context of Jewish residents of Israel, see, for example: H CJ 758/88 *Kandel v. Minister of Interior*, P.D. 46(4) 505, 518-20 (hereinafter: “*Kandel*”).

<sup>98</sup> *Stamka*, *supra* note 10, at 787.

that while a Jewish Israeli citizen has the basic right to be united with a foreign spouse, an Arab resident of the Occupied Territories requesting to be joined to a foreign spouse is at the mercy of the military government, and this right is denied because of one security reason or another; this was the case in 1986 (in *Shahin*) and remains the case up to this very day (the *obiter dictums* in *Stamka*). Therefore, and to the extent that it relates to the Occupied Territories – as Justice Cheshin notes, “the nature of the right [to family life] is different.” Still, neither in *Stamka* nor in *Shahin* does the Supreme Court explain the different nature of the right to family life in the Occupied Territories, or, to be more exact: whether, apart from a declarative right, the residents of the Occupied Territories are granted any right whatsoever to family life. It would seem that the Supreme Court has not given proper weight to the provisions of the first part of Article 27 of the Fourth Geneva Convention and Article 46 of the Hague Regulations of 1907, which expressly provide that, even in a time of war, the right to family life of the residents of the occupied region must be respected (even if these provisions are not to be interpreted as requiring family unification in the manner requested by the petitioners); this approach is puzzling in view of the Court’s assumption that “Israel respects the humanitarian principles in the laws of war and does not rely on the applicability, or lack thereof, of the Fourth Convention.”<sup>99</sup>

In *Shahin*, the Court added that the right to family life enunciated at the beginning of Article 27 of the Fourth Geneva Convention must be read together with the reservation at the end of said provision, whereby “... the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”<sup>100</sup> The question is whether this reservation justifies the occupying state’s disregard of the need to respect the rights of the residents of the occupied territory, rights enunciated at the beginning of the provision, especially considering that there must be a causal relation between the adoption of such measures of control and security and a state of war. In *Shahin*, the respondent’s central argument was that “the family unification phenomenon ... has become a complicated and problematic issue with both political and security aspects – as a means of immigration into the regions.”<sup>101</sup> It is highly doubtful that this argument can justify a policy that automatically rejects **most** applications for family unification based on marriage to foreign nationals, except for some applications with special circumstances. Furthermore, as the Court has noted in a different context, national security “is not a magic word and its priority does not arise in every case and under all circumstances, and it is not identical at all levels of security and the harm thereto.”<sup>102</sup>

The fundamental right to marriage, as will be discussed below, is one of the most basic expressions of the right to family life; it constitutes a right **to establish** a family, unlike derivative rights of lesser importance, such as the right of adult children to receive a permit of stay in order to live near their parents.<sup>103</sup> Shouldn’t a respect for the basic human right to family life lead the courts to critically examine

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<sup>99</sup> *Shahin*, *supra* note 83, at 206.

<sup>100</sup> *Id.*, at 209.

<sup>101</sup> *Id.*, at 214.

<sup>102</sup> H CJ 4541/94 *Miller v. Minister of Defense*, P.D. 49(4) 94, 124.

<sup>103</sup> Regarding this right and its restriction, see *infra*, Part III.D.2; see also in this matter H CJ 1689/94 *Harari v. Minister of Interior*, P.D. 51(1) 15 (hereinafter: “*Harari*”).

the discretion of the competent authorities and the reasonableness of their policy, and to hold, for example, that the rule of choice be the opposite, i.e., a hearing for each application on the merits, and automatic rejection only in exceptional cases?<sup>104</sup>

Even if we accept the Court's position – whereby, to the extent that it relates to the Occupied Territories, the legal right (in our case, the right to family life) does not need to be examined in isolation from the security background – it seems that it would have been appropriate for the Court to set a balance between the right of the State of Israel to prevent the entry of foreigners into the Occupied Territories for security reasons and the right of the individual to marry and to establish a family. By adopting the arguments of the military government without reservations, the Court freed itself of the need to balance the different rights. Such a balance could have been expressed, as stated above, by requiring that the military authorities individually examine each request on the merits.<sup>105</sup> It is true that the provisions of the aforesaid conventions do not mandate that the State of Israel permit the entry of foreigners into the Occupied Territories, just as the state has wide discretion to prevent foreigners from settling in its own territory,<sup>106</sup> however, approval of a policy that sweepingly prohibits the immigration of spouses into the Occupied Territories is tantamount to a disregard of the provisions of international humanitarian law regarding the right to family life.

Therefore, it is no wonder that the UN Committee on Economic, Social and Cultural Rights has recently censured this discriminatory practice, stating that it is “...

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<sup>104</sup> Israel has recently begun to apply this discriminatory policy between Jews and Arabs even within the borders of the State of Israel. On July 31, 2003, the Knesset enacted the Nationality and Entry into Israel (Temporary Order) Law, 2003, the provisions of which were laid down as a temporary order for a period of one year. Section 2 of the statute, under the heading “Restriction on citizenship and residence in Israel,” provides: “During the period in which this Law shall be in effect, notwithstanding the provisions of any law, including Section 7 of the Nationality Law, the Minister of Interior shall not grant citizenship to a resident of the region pursuant to the Nationality Law and shall not give a resident of the region a permit to reside in Israel pursuant to the Entry into Israel Law, and the regional commander shall not give such residents a permit to stay in Israel pursuant to the defense legislation in the region.” According to this new law, the spouses of Israeli citizens will be unable to obtain citizenship, pursuant to Section 7 of the Nationality Law, on the basis of marital ties, when the foreign spouse is a resident of the West Bank or Gaza Strip. In this matter, the Association for Civil Rights has filed a petition that is pending before the Supreme Court: HCJ 7052, 7082/03 *Association for Civil Rights in Israel v. Minister of Interior*. In this petition, it has been claimed that the reasoning of the Ministry of Interior, which relies on the “security risk” ostensibly posed by the Palestinian spouses, lacks an evidentiary basis, that the decision stems from illegitimate considerations – including a preservation of the demographic balance and a desire to avoid the payment of pensions and welfare benefits – and that it is invalid, being racist and discriminatory on the basis of national origin. There is no doubt that the new law severely infringes the right to family life of said couples.

<sup>105</sup> For a similar criticism, see Dinstein, *supra* note 86, at 228-29, who notes that the Court has displayed “excessive willingness to avoid an individual examination of the specific cases of family unification on the ‘micro’ level,” adding that “concrete humanitarian problems cannot be resolved solely on the basis of general considerations.”

<sup>106</sup> Regarding the principle whereby the state has wide discretion to prevent foreigners from settling in its territory, see HCJ 482/71 *Clark v. Minister of Interior*, P.D. 27(1) 113, 117: “There is nothing special or extraordinary about Israel in regard to the entry of foreigners and their residence in the country. Generally, every country reserves for itself the right to prevent foreign persons from entering its territory or to deport them when they are no longer wanted there, for any reason – and even without giving a reason. From our easy access to English and American legal sources, we know that, in fact, such law does exist in those countries, and it is well-known that this state of affairs also exists in other nations.”

concerned about the practice of restrictive family reunification with regard to Palestinians, which has been adopted for reasons of national security.”<sup>107</sup> As such, the Committee has reiterated “... its recommendation [to Israel] contained in paragraph 36 of its 1998 concluding observations that, in order to ensure equality of treatment and non-discrimination, the State party undertake a review of its re-entry and family reunification policies for Palestinians.”<sup>108</sup>

## 2. Immigration Rights Based On the Parent-Child Relationship

To the extent that it concerns recognition of the right of children to settle in the State of Israel by virtue of their parents being Israeli citizens, the Nationality Law grants citizenship on the basis of a family connection only to a child born in Israel to an Israeli citizen (or born abroad to a parent who, at the time, was an Israeli citizen) and to the spouse of an Israeli citizen. Apart from these categories, the law does not expand the circle of eligibility to other family members, including children born to a foreign spouse within a previous marriage to a spouse who was not an Israeli citizen.<sup>109</sup> The *Harari* case concerned two Burmese nationals who had requested permission to remain in the State of Israel in order to live together with their mother, who was an Israeli citizen. The *Harari* children were 19 and 21 years old at the time that the petition was filed and, during their stay in Israel, their father, who lived in Burma, had passed away. Accordingly, in their petition, they claimed that they had no other home than their mother’s home in Israel. The policy of the Ministry of Interior is to not give a permit for permanent residence to a foreign adult requesting to be near a family member who is an Israeli national or resident, except to an elderly parent of an Israeli national who remains alone and isolated in his or her country of residence. The Supreme Court approved the Ministry of Interior policy and ruled that adult children are not entitled to permanent residence in Israel by the fact that their mother is an Israeli national.<sup>110</sup> The Supreme Court thus rejected the petitioners’ argument and held that – to the extent that it concerns adult children – the Basic Law: Human Dignity and Liberty does not mandate giving extra weight to the right of a mother and her sons to live together.

The degree of recognition afforded to the right of a parent to settle in the State of Israel by virtue of the fact that his or her children are Israeli nationals has been deliberated more than once before the Supreme Court. In *Kandel*, the petitioners argued, *inter alia*, that since their minor daughter was entitled to the visa of an *oleh*

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<sup>107</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 23/05/2003 E/C.12.1/Add.90, para. 18 (hereinafter: “Concluding Observations”). The report, in its entirety, may be viewed at the UN website:

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.90.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.90.En?Opendocument)> (visited April 25, 2004).

<sup>108</sup> *Id.*, para. 34.

<sup>109</sup> See Section 4(a) of the Nationality Law, which provides: “the following shall, from the day of their birth, be Israeli nationals by birth: (1) a person born in Israel while his father or mother was an Israeli national; (2) a person born outside Israel while his father or mother was an Israeli national – (a) by return; (b) by residence in Israel; (c) by naturalization; (d) under paragraph (1); (e) by adoption under Section 4(b)(1).” This is different from Section 4A of the Law of Return, which expands the circle of eligibility for rights of “returnees” to also include other family members, such as the child and even the grandchild of a Jew.

<sup>110</sup> *Harari*, *supra* note 103, at 20.

[the Hebrew term for a Jewish immigrant to Israel], they too were entitled to settle in the country on the basis of *oleh* status under the Law of Return, based on the daughter's rights vis-à-vis the parents or the parents' responsibilities vis-à-vis the daughter, as her guardians.<sup>111</sup> The Court rejected this argument, holding that a minor's right does not also encompass the rights of the parents:<sup>112</sup>

A minor's place is with his parents – where they reside, he shall reside, and not the reverse. A minor is dependent on his parents – the parents are not dependent upon him. As guardians, they determine his place of residence – he does not determine their place of residence. This category – the parents of a child eligible under the Law of Return – is not included in the group of persons eligible under Section 4A(a).

In *Dimitrov*, the petitioner was a foreigner married to an Israeli national, with whom he had a minor daughter, born in Israel.<sup>113</sup> After the couple had separated, and at the request of the petitioner's wife, the Ministry of Interior decided that, at the conclusion of the divorce proceedings, the petitioner would be deported from Israel. The petitioner requested to continue the naturalization process on the basis of his marriage, but the Court rejected this argument because of the disintegration of the marital relationship leading up to the petition.<sup>114</sup> Another argument raised by the petitioner was that the Ministry of Interior was obliged to grant him permanent resident status, as the father of an Israeli national, under Section 2 of the Entry into Israel Law. The Ministry of Interior policy in this matter is to deny foreigners a visa for permanent residence in Israel, other than in exceptional cases and for special reasons<sup>115</sup>; in the case in question, the Ministry of Interior had decided that there were no special humanitarian circumstances to justify granting a permit for permanent residence, since the girl was in the custody of her mother and the petitioner would be allowed to enter Israel from time to time in order to visit her.<sup>116</sup> The Supreme Court rejected the petition, holding that, in principle, the nationality of

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<sup>111</sup> *Kandel*, *supra* note 97, at 518.

<sup>112</sup> *Id.*

<sup>113</sup> *Dimitrov*, *supra* note 78.

<sup>114</sup> In this context, the Court held that from the moment the marital relationship between the couple had, to all intents and purposes, broken down, there was no ground for the acquisition of Israeli citizenship based on the citizenship of the Israeli spouse, since the rationale behind Section 7 of the Nationality Law, which allows for the facilitation of requests for naturalization on the basis of marriage, no longer existed. *Id.*, at para. 7 of the judgment.

<sup>115</sup> In accordance with this policy, the Ministry of Interior grants a visa for permanent residence only in exceptional cases, according to the following general criteria:

- (a) To a spouse lawfully married to an Israeli national or to a permanent resident of the State of Israel, who is residing in Israel.
- (b) To an elderly and isolated parent of a national or permanent resident of Israel, who has no other children or spouse outside of Israel.
- (c) To a minor child, accompanying a parent who has obtained a right of permanent residence or citizenship in Israel, if this parent has lawful custody of the minor for a period of at least two years prior to their arrival together in Israel.
- (d) In exceptional cases, for humanitarian reasons or when the State of Israel has a special interest in granting the permanent residence visa.

These criteria are internal Ministry of Interior guidelines that have not been published in official form. See AP 529/02 (Jerusalem) *Bornea v. Minister of Interior* (not yet published), at para. 21 of the judgment (hereinafter: "*Bornea*").

<sup>116</sup> *Dimitrov*, *supra* note 78, at para. 2 of the judgment.

the child does not suffice to grant permanent resident status to a foreign parent; only in exceptional cases, where special humanitarian circumstances exist, can a foreigner's parenthood of a minor who is an Israeli national justify granting the parent the status of a permanent resident, but such circumstances did not exist in this case.<sup>117</sup>

The *Bornea* case involved a petition by a foreign worker illegally staying in Israel, whose marriage to an Israeli national had dissolved after a son was born to them; consequent to the breakup of the marriage, the Ministry of Interior decided to discontinue her naturalization proceedings.<sup>118</sup> The petition dealt with the question of whether or not the naturalization proceedings of a foreign spouse should be terminated following the breakup of the marital relationship, when a child had been born to the couple, in Israel, during the period of their marriage. In this case, too, as in *Dimitrov*, the application was based on the connection between the parent and the child, and not on the marital relationship that had dissolved and which had been the basis for the approval of the original application for temporary residence. The petitioner argued, *inter alia*, that the right to family life establishes a right for the child to a relationship with both parents; and that the state authorities should take measures to allow for the existence of an appropriate, regular and continuous relationship between the child and his parents, and not to hinder it, even if one parent is not an Israeli national and does not have a lawful status in Israel. The District Court, sitting as a court for administrative matters, interpreted the petition as a request to introduce a new criterion – i.e., the connection between a foreign parent and a child born out of a marriage to a spouse with Israeli nationality – in order to prevent the separation of the foreign parent from the child, even after the marriage had dissolved.<sup>119</sup> In rejecting the petition, the Court held that no distinction should be made between the acquisition of a status based on a parental connection, under the Law of Return (the *Kandel* case), and a request for permanent residence or a grant of citizenship based on the same connection, under the Entry into Israel Law or the Nationality Law.<sup>120</sup> The Court further ruled that the legal right and the duty of the parent to raise the child do not supersede the right of the state to bar the foreign parent from obtaining permanent residence or Israeli citizenship solely on the basis of the parental connection:<sup>121</sup>

Balanced against the interest of a child's right to live in a country where both of his parents reside, so that they can both fulfill their duties to raise him, to educate him, to nurture him, and to support him, are the public interests and considerations of the state – national security, public safety, maintenance of public order, preservation of the character and culture of the nation, its identity, its Jewish and democratic nature, and even considerations of immigration policy based on economic and work force policy that will encourage the employment of the citizens and residents of the nation, 'importing' foreign laborers only when there is an absolute necessity.

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<sup>117</sup> *Id.*, at para. 9 of the judgment.

<sup>118</sup> *Bornea*, *supra* note 115.

<sup>119</sup> *Id.* at para. 16 of the judgment.

<sup>120</sup> *Id.* at para. 25 of the judgment.

<sup>121</sup> *Id.* at para. 31 of the judgment.

Therefore, in the conflict between the best interests of the child and the immigration policy of the State of Israel, the Court has held that the state interest is to be preferred.

Time and again, it would seem that these and other state interests prevail over the right to family life, without the latter having been given the proper weight due to it according to its status as a fundamental constitutional right. In *Bornea*, the District Court did not properly consider the grave harm to the best interests of the minor, the son of the petitioner, which resulted from the negation of her lawful status in Israel, and which would apparently lead to a severance in the relationship between him and his father. The ruling that, in the circumstances of the case, the state interest supersedes the best interests of the child is puzzling, particularly in light of the principle laid down by the Supreme Court whereby “there is no judicial matter regarding minors where the best interests of the minor are not the paramount concern.”<sup>122</sup> The Supreme Court has also ruled that the best interests of the child dictate that he or she be educated equally by both parents and not kept away from the father or mother, even when they live separately.<sup>123</sup> The District Court, therefore, did not properly weigh the fundamental right to family life, which establishes a child’s right to grow up with his or her father and mother, as well as the right of parents to raise their children, as these rights have been recognized in both Israeli and international law. To the extent that it concerns the right of parents to raise their children, on more than one occasion, the Supreme Court has laid down the basic principle whereby this is a fundamental constitutional right:<sup>124</sup>

No one disputes that the connection of the parent to his child is not only a duty but that it is also a right. The nature of this right is that the parents – and no one else – are entitled to fulfill the duties vis-à-vis the minor child. The legal right of the parent is that he, and nobody else, shall fulfill the duties vis-à-vis the child. This right of the parents is an important constitutional right, for it constitutes an expression of the natural connection – “the call of blood,” in the words of Justice Cheshin in CA 50/55, at p. 799 – between parents and their children.

Furthermore:<sup>125</sup>

It is the law of nature that a child be raised in the home of his father and mother: it is they who will love him, it is they who will nourish him, it is they who will educate him, it is they who will support him until he reaches adulthood. This is the right of a father and a mother, and this is the right of the minor [cite omitted]. This right of a mother and a father has existed prior to statute and constitution. The law of nature is the law within our hearts. And even if these matters are stated in statute or constitution, they are none other than an echo of that same right from nature. Much

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<sup>122</sup> CA 549/75 *John Does v. Attorney General*, P.D. 30(1) 459, 465.

<sup>123</sup> CA 5532/93 *Gunsburg v. Greenwald*, P.D. 49(3) 282, 291.

<sup>124</sup> *Jane Doe II*, *supra* note 47, at 466-67.

<sup>125</sup> CA 3798/94 *John Doe v. Jane Doe*, P.D. 50(3) 133, 155.

ground water gives life to this right, and this is what sustains the forest of law that grows upon it. And the law of the land shall go in the wake of the law of nature.

The family bond also establishes rights for the child:<sup>126</sup>

These rights are also based on the duties of parents vis-à-vis their children – as expressed in written law – regarding custody, education, preservation of property, health, etc., as well as rights granted to a minor by the very fact that he is a minor, i.e., rights that recognize the state of the minor and his limitations and special needs ... the duties of the parents, as defined in the Legal Capacity and Guardianship Law, are no longer general obligations, but rather duties that establish collateral rights for the child. Noncompliance by parents with the duties they have vis-à-vis their children will be met with action by the state, as the entity that protects the child and his interests.

In these cases, the infringement of the parent's right to a family life with his or her children constitutes a grave harm, since one of the parents will be forced to sever himself or herself from the minor child; if the foreign parent is the custodial parent, then the right of the Israeli parent will be harmed; if the Israeli parent is the custodial parent, then the right of the foreign parent will be harmed.

These rights are also firmly enshrined in international law.<sup>127</sup> Article 9(3) of the Convention on the Rights of the Child imposes a duty on the member states, *inter alia*, to “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.” In a similar fashion, Article 10(1) of this Convention provides for the child's right to reunification with his or her parents and obliges the member states to allow the entry of the child or his or her parents into the member country for the purpose of realizing this right. Furthermore, Article 14(2) of the Convention imposes a duty on the member states to respect the rights of the child and the rights of his or her parents, and Article 18(1) requires the member states to “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”

The European Court of Human Rights has ruled that the term “family life” includes the bond between parents and their minor children, a bond that does not cease in the event of a separation between the spouses: “From the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to ‘family life,’ even if the parents are not then living together.”<sup>128</sup>

Moreover, and despite the fact that the European Convention does not apply to the State of Israel, we should mention several decisions of the European Court of Human Rights, handed down on the basis of Article 8 of this Convention, the facts of which

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<sup>126</sup> *John Does*, *supra* note 58, at 255.

<sup>127</sup> *Bornea*, *supra* note 115, at para. 28 of the judgment.

<sup>128</sup> *Berrehab v. The Netherlands* 138 Eur. Ct. H.R. (ser. A) 14 (1998).

are similar to cases that have come before the Israeli courts. From these cases, it is possible to draw conclusions regarding the proper weight that should be given to the right to family life. The *Berrehab* case concerned a Moroccan national married to a Dutch woman, whose daughter was born in the Netherlands.<sup>129</sup> As in the *Bornea* case, the father had been given a permit to stay based on his marriage, and when the couple divorced, the Dutch immigration authorities refused to extend his residence permit. Subsequently, the father was deported. The European Court based its decision on the existence of a continuous and permanent bond between the father and his daughter, ruling that the deportation violated the provisions of the Convention, and that the separation from the child forced on the parent constitutes a violation of the “right to family life,” as specified in Article 8 of the European Convention.<sup>130</sup> In a similar fashion, the *Ciliz* case concerned a Turkish national who had received permanent status based on his marriage to a Dutch woman, in the Netherlands, with whom he had a child who was a Dutch national.<sup>131</sup> Following the couple’s divorce, it was decided not to extend the husband’s permit to stay. The petitioner argued that this decision prevented him from realizing his right to family life, as far as it concerned the relationship with his son. The European Court accepted his petition and ruled, *inter alia*, that:<sup>132</sup>

The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective “respect” for family life... the instant case features both types of obligation: on the one hand, a positive obligation to ensure that family life between parents and children can continue after divorce, and, on the other, a negative obligation to refrain from measures which cause family ties to rupture.

It would seem that the degree of recognition given to immigration rights based on family ties between parents and their children is weaker than the degree of recognition accorded to the immigration rights of a foreign spouse based on marriage. However, it is not at all obvious why the strength of the bond between a minor and

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<sup>129</sup> *Id.*

<sup>130</sup> In this matter, see also: *Al-Nashif v. Bulgaria* (Application no. 50963/99, Judgment of June 20, 2002), at para. 114 of the judgment: “However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention.” See also the recommendation of the European Council’s Committee of Ministers on the legal status of persons applying for family reunification, whereby the principle of the best interests of the child is the primary consideration to guide the member states:

III. Autonomy of the family member’s residence status in relation to that of the principal right holder

1. ....

2. In the case of divorce, separation or death of the principal, a family member having been legally resident for at least one year may apply for an autonomous residence permit. Member states will give due consideration to such applications. In their decisions, the best interests of the children concerned shall be a primary consideration (Recommendation Rec (2002) 4 of the Committee of Ministers to member states on the legal status of persons admitted for family reunification (Adopted by the Committee of Ministers on March 26, 2002 at the 790th meeting of the Ministers’ Deputies).

<sup>131</sup> App. No. 29192/95 *Ciliz v. The Netherlands*, Eur. Ct. H.R. (July 11, 2000).

<sup>132</sup> *Id.*, at para. 61.

his or her parent is weaker than the bond between spouses, and it seems only proper that the former right be accorded protection in the same manner and to the same degree as the latter right.<sup>133</sup> Since the Ministry of Interior and the courts in Israel have determined that the marital bond mandates the granting of a residential status in Israel to a foreign spouse who is in a marital relationship with an Israeli citizen, there is no justification for a policy negating such status when the bond is parental. In this context, it is appropriate to adopt the arrangement laid down by international law, whereby, in the case of a separation between a couple with common children, when one spouse is not a citizen, the state – as part of its commitment to protect the bond between parent and child – undertakes to refrain from deporting the foreign parent and to grant him or her lawful status.

#### **IV. The Right to Civil Marriage in Israeli Law in View of International Law**

##### **A. The Right to Marriage and its Limitation**

The right – or the “freedom” – to marry and to establish a family is a fundamental right of the highest order that has been recognized as a basic human right under international law. Article 16(1) of the Universal Declaration of Human Rights provides, *inter alia*, that: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.” Article 23(2) of the Covenant on Civil Rights states that: “The right of men and women of marriageable age to marry and to found a family shall be recognized.” Article 10(1) of the Covenant on Social Rights reiterates that stated in Article 23(3) of the Covenant on Civil Rights, whereby “... [m]arriage must be entered into with the free consent of the intending spouses.” A combined reading of the provisions of these instruments reveals the centrality of the right to marriage in the context of the right to family life. In the spirit of these documents, the State of Israel, like most western nations, also grants the highest degree of protection and recognition to the traditional nuclear family, that which is based on the heterosexual married couple and their children. In this context, it should be stressed that the issue of the right to marry also has far-reaching economic implications (e.g., tax benefits, national insurance rights, pension rights, etc.); furthermore, the provision or preclusion of economic benefits is a central means at the disposal of the state to direct individuals towards existing family models preferred by society. By granting a preferential status to the institution of marriage over other types of partnerships, the state expresses its position that the heterosexual relationship based on marriage embodies the normative family unit deserving of various state benefits. However, even within this narrow framework, the state imposes various limitations on the right to marry.

In most western countries, as in the State of Israel, several explicit limitations on the right to marry are accepted as a matter of public policy. Three such limitations relate to the following: a minimum age for marriage; family relations between the spouses (a prohibition against incestuous marriages on grounds of both consanguinity and affinity); and the existence of a previous marriage (a prohibition of bigamy and polygamy). An additional prohibition relates to the sex of the spouses, i.e., a

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<sup>133</sup> See briefs submitted to the Supreme Court by the Association of Civil Rights in its appeal of the District Court judgment in *Bornea*: APA 8569/02 *Bornea v. Minister of Interior*, appeal notice of October 8, 2002.

prohibition of marriage between same-sex partners. We will discuss each one of these limitations, respectively.<sup>134</sup>

**Minimum Age for Marriage:** Even though the specific age varies from country to country, a limitation on the age for marriage is accepted in most western nations and is based, *inter alia*, on the notion that “the creation of a family unit with a formal, binding relationship requires personal maturity, and, in a civilized society, one waits for the development of the personality – i.e., attributes of mind and body – before permitting marriage.”<sup>135</sup> This limitation finds expression both in Article 16(1) of the Universal Declaration of Human Rights, which provides that “[m]en and women **of full age** ... have the right to marry and to found a family” (emphasis added), and in Article 23(2) of the Covenant on Civil Rights, which states that the right to marry shall be granted to “men and women of marriageable age.” In a similar fashion, Article 16(2) of the Convention on the Elimination of Discrimination Against Women provides that “... all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.” The rationale behind these provisions is that the free consent of the marrying couple is a prerequisite for marriage, and that it is necessary to lay down a minimum age in order to ensure that this consent is, in fact, given freely. Another reason is the need to guarantee stable married life and the view that such stability can only be guaranteed if the two spouses are mature enough to be fully aware of their obligations within the family context. The aforesaid conventions do not specify the minimum age required, and this is with the understanding that each state will give substance to its obligation to set a minimum age for marriage in accordance with the accepted values of its own society.<sup>136</sup>

The principle of a minimum age for marriage is also enshrined in a special international convention designed for this specific purpose, which Israel has signed: the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. This Convention reiterates the principle expressed in the Universal Declaration of Human Rights and states, in Article 2, that:<sup>137</sup>

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

In the State of Israel, this matter is regulated by the Marriage Age Law, 1950. Up until 1998, this statute specified the age of 17 as the minimum age of marriage for

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<sup>134</sup> An additional limitation specific to the State of Israel, which will be discussed further on in this section, is the lack of a possibility to marry in a civil ceremony.

<sup>135</sup> CA 4736/94 *Angel v. Attorney General* (unpublished), *Takdin* - Supreme Court 1994(3) 319, 320. See also Shifman, *supra* note 35, at 150.

<sup>136</sup> Belembaogo, *supra* note 52, at 9.

<sup>137</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 521 U.N.T.S. 231, entered into force Dec. 9, 1964. In this matter, see CA 501/81 *Attorney General v. Jane Doe, P.D.* 35(4) 430, 433-34 (hereinafter: “*Jane Doe III*”).

women.<sup>138</sup> For men, however, no minimum age of marriage was specified. In order to address this disparity, the statute was amended so that its provisions limiting the marriage of young girls were applied equally to the marriage of young boys under the age of 17, out of the understanding that “the prevention of underage marriages is necessary for young boys to the same extent that it is required for young girls.”<sup>139</sup> According to the amended statute, the performance of a marriage ceremony for a young boy or girl under the age of 17 constitutes a criminal offense punishable by two years imprisonment. The statute does not annul the validity of underage marriages but rather imposes criminal sanctions on the man or woman who marries the young girl or boy, on those persons who perform the ceremony and on anyone who assists them.<sup>140</sup> Nevertheless, Section 5 of the statute specifies two alternative grounds for a court to permit an underage marriage. The first case arises in circumstances in which the young girl has become pregnant by or has given birth to the child of the person she is asking to marry, or, in the case of a young boy, when the woman who he wants to marry has become pregnant or has given birth to his child. The second case, which also applies both to the marriage of a young boy and the marriage of a young girl, is when they have reached the age of 16 and, in the court’s opinion, there are special circumstances that justify granting such permission – however, the statute does not specify exactly what these “special circumstances” are.<sup>141</sup> The Israeli Report to the UN Committee regarding the implementation of the Covenant on Social Rights indicates that, in actuality, while the percentage of marriages between young girls under the age of 17 and adult men averaged about 48% between the years 1975-1979, in 1993 this number stood at about 10%; nevertheless, the marriage of minors in the State of Israel is still an ongoing phenomenon – albeit, on the decline – in spite of the Marriage Age Law and the criminal sanctions imposed therein.<sup>142</sup>

**Prohibition against incestuous marriages on grounds of consanguinity and affinity:** Regarding the prohibition of marriage between persons related by blood or marriage, it is the applicable religious law that specifies the degrees of relation included in the prohibition.<sup>143</sup> Nevertheless, the prohibition is not limited to religious law and should not be viewed only as a religious norm, since it is accepted in all

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<sup>138</sup> As explained by Shalev, *supra* note 61, at 468: “In effect, this norm prevents the marriage of young girls, which is permitted and accepted under traditional laws and customs according to which the marriage contract is entered into by the fathers of the bride and the groom.”

<sup>139</sup> See the Proposed Marriage Age (Amendment No. 4) (Marriage Age for a Young Boy) Law, 1998. The Bill was passed by the Knesset on July 28, 1998.

<sup>140</sup> The sanction does not have the force to annul the marriage, provided that it is valid under the personal applying to the parties. Section 3 of the statute provides grounds for dissolving a marital relationship that has been performed in violation thereof. See Shifman, *supra* note 35, at 150.

<sup>141</sup> The Supreme Court has laid down various guidelines regarding such circumstances. Among other considerations, the Court has indicated the need for the young girl’s consent to marry, although this consent, on its own, does not suffice to justify granting permission; the Court has also noted that “the customs of the community to which the couple belongs, according to which the marriage of a young girl, not yet 17 years of age, is accepted, are not, in and of themselves, a sufficient reason for permitting the marriage. As we have seen, it is these very customs that the statute was intended to uproot.” See *Jane Doe III*, *supra* note 137, at 435-36.

<sup>142</sup> Israeli Report to the UN Committee, *supra* note 27, at 79.

<sup>143</sup> See Shalev, *supra* note 61, at 471. In Jewish Law, incestuous marriages are null and void and the offspring are considered *mamzerim* [this is the plural form of the Hebrew term, *mamzer*; see explanation, *supra* note 61].

civilized societies and has rational justifications that suffice on their own.<sup>144</sup> Thus, for instance, one of the explanations for this prohibition is genetic, i.e., the fear that children born to people who are related by blood are liable to be afflicted with various genetic defects.<sup>145</sup> Of course, the genetic fear does not justify prohibitions based on relations by marriage and, in this matter, it seems that the rationale stems from psychological and sociological considerations.<sup>146</sup>

**Prohibition of Bigamy:** The prohibition against multiple marriages is designed to uproot customs accepted in traditional societies that harm the status of women.<sup>147</sup> If we accept the definition of the institution of marriage as a permanent, exclusive relationship between two spouses, not only does this restriction do no harm to the right to family life, but it even reinforces the right.<sup>148</sup> Section 176 of the Penal Law specifies bigamy as a criminal offense, whereby: “A married man who marries another woman, or a married woman who marries another man, is liable to imprisonment for five years.” Since matters of marriage and divorce in Israel are governed by religious law, the legislature cannot declare bigamous marriages as void when such marriages are recognized by the relevant religious law (such as in a case where permission has been granted by a Rabbinical Court for the second marriage of a Jewish man), however, the legislature does take steps to eliminate the phenomenon by means of criminal sanctions.<sup>149</sup> Accordingly, Section 179 of the Penal Law states that the criminal prohibition does not apply to the extent that it relates to the second marriage of a Jew that has been performed after the husband had received permission to remarry from a Rabbinical Court (an option not available to a woman who is an *agunah*; literally translated as a “chained woman,” in Jewish Law, this Hebrew term refers to a woman bound in marriage by a husband who refuses to grant a divorce or who is missing and not proved dead); regarding persons who are not Jewish, Section 180 of the Penal Law provides that a second marriage shall not be deemed a violation of the prohibition of bigamy if the spouse by the earlier marriage is mentally ill or has been missing for a period of seven years under circumstances raising a reasonable presumption of death.

**Prohibition of Marriage between Same-Sex Partners:** Up until recently, the institution of marriage has been defined and perceived of as being limited to the relationship between a man and a woman, without there having been any need for explicit legislation prohibiting same-sex marriages. In the past, it was even argued that this was not to be viewed as a restriction on the freedom to marry, since by its very definition, marriage was limited to partners of different sexes.<sup>150</sup> So far, the only countries that have recognized same-sex marriages are the Netherlands, Belgium, Canada (in Ontario, British Columbia, and Quebec), and one US state (Massachusetts), and in other countries throughout the world there is an ongoing legal and public struggle for such recognition. Many countries recognize same-sex couples as a family and, in differing measures, extend various provisions to them that

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<sup>144</sup> A. Rubinstein, “The Right to Marriage,” 3 *Iyunei Mishpat* 433, 437-38 (1973) [Hebrew].

<sup>145</sup> For a detailed account of the various arguments, see *Id.*, at 438-39.

<sup>146</sup> See Shifman, *supra* note 35, at 186-87.

<sup>147</sup> See Shalev, *supra* note 61, at 469-70; Shifman, *id.*, at 155 n.1.

<sup>148</sup> Rubinstein, *supra* note 144, at 434-35.

<sup>149</sup> Israeli Report to the UN Committee, *supra* note 27, at 80.

<sup>150</sup> See, for example: M.A. Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (Chicago, 1989) 49.

apply to married couples.<sup>151</sup> The right to family life is not the exclusive domain of heterosexual society. Many gays and lesbians conduct a family life for all intents and purposes. Alongside the limited recognition granted by the Israeli Supreme Court to same-sex partnerships and the right to parenthood of gays and lesbians,<sup>152</sup> the case law of the Family Court and the District Court negates such recognition.<sup>153</sup> While restrictions as to the age for marriage, polygamous marriages and marriages between relatives are rational and desirable, the restriction of marriage to heterosexual partnerships is unjustified and results from prejudice against gays and lesbians. Nevertheless, it seems that as long as religious law exclusively governs matters of marriage and divorce in Israel, the legislature cannot be expected to recognize the rights of gays and lesbians to marry. However, if and when the barriers to civil marriage are removed, as mandated by the international conventions that Israel has signed – so I will argue below – then their restriction to heterosexual relationships may be considered illegitimate discrimination that violates the principle of equality.

In addition to the first three limitations on the right to marriage discussed above (a minimum age, the prohibition of the marriage of relatives and the prohibition of bigamy) – restrictions, which, as stated, are accepted in all western nations and perceived of as legitimate in all civilized societies, and which are not to be viewed of as religious coercion – there are several additional limitations on the right to marry that are specific to the State of Israel. Not only is the right to marriage not applied equally to all residents of the country, but there is also an inherent discrimination between men and women in the laws of marriage and divorce in Israel. These limitations stem from the application of religious law to matters of marriage and divorce and from the lack of civil marriage. In contrast to the Israeli legal situation, in most western nations, the transition from religious law to the regulation of marriage as a secular civil right had already begun in the 18<sup>th</sup> and 19<sup>th</sup> centuries, with the end of the church's monopolistic jurisdiction and the introduction of civil marriage.<sup>154</sup> Israel is one of the only democratic countries in the world where personal law is still exclusively governed by religious law.<sup>155</sup> Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 (hereinafter: "Rabbinical Courts Jurisdiction Law") provides that: "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law."<sup>156</sup> The

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<sup>151</sup> See Y. Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago, 2002); Y. Merin, "Same-Sex Marriage and the Fallacy of Alternatives for the Legal Regulation of Gay Partnerships," 7 *Hamishpat* 253 (2002) [Hebrew]. Recently, the Massachusetts Supreme Court has held that the prohibition of same-sex marriages fails the basic test of rationality, ruling that:

Without the right to marry – or more properly, the right to choose to marry – one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed relationship"... Laws may not "interfere directly and substantially with the right to marry" (*Goodridge v. Department of Public Health* (2003) WL 22701313 (Mass.) p. 8).

<sup>152</sup> Danilowitz, *supra* note 25; Berner-Kadish, *supra* note 64.

<sup>153</sup> See, for example, *Jane Doe I*, *supra* note 25.

<sup>154</sup> Rubinstein, *supra* note 144, at 433.

<sup>155</sup> For a discussion of the historical reasons for the subordination of personal law to religious law, see M. Shava, *supra* note 35, at 69-75. For an analysis of the implications of the historical compromise regarding the status of women in Israel, see J. Buber Agassi, "The Status of Women in Israel," *The Double Bind: Women in Israel* 210 (1994) [Hebrew].

<sup>156</sup> Regarding the application of religious law to members of other religious communities in Israel, see Articles 52, 54 and 64 of the Palestine Order in Council, 1922.

application of religious law to matters of marriage and divorce for Jews in Israel, and the lack of an option to marry in a civil marriage ceremony, constitutes a serious infringement of the right to family life, in general, and of the right to marriage, in particular. This infringement is further aggravated by the exclusive jurisdiction of the religious courts in matters of marriage and divorce – institutions that completely exclude women. The absence of an option for civil marriage harms three main groups: first and foremost, the application of religious law to matters of marriage and divorce constitutes a violation of the principle of equality between the sexes, since many religious laws discriminate against women; secondly, the lack of a civil arrangement for marriage also harms those persons who are unable to marry according to religious law (such as those persons who have no religion); thirdly, the religious monopoly also harms the freedom from religion of all those couples who do not want religious law to apply to their marriages.

## **B. The Laws of Marriage and Divorce in Israel: Discrimination against Women and Additional Groups**

### **1. Discrimination Against Women**

Religious law – all religious law – is based on a patriarchal viewpoint and tradition,<sup>157</sup> and, as such, discriminates against women. This discrimination is apparent, *inter alia*, in the subordination of women to the authority of men, in an unequal division of roles within the family, and in the perception that women possess a very limited social and personal status.<sup>158</sup> Moreover, for Jews in Israel, the religious law that governs in matters of personal status is the law as interpreted by Orthodox Judaism, which leaves no room for a more lenient interpretation that is inclined to greater equality between the sexes, such as that of the Conservative or Reform Movements.<sup>159</sup>

To the extent that it relates to the inequality between the sexes within the context of the laws of marriage and divorce, the Women's Equal Rights Law, 1951 has merely declarative significance. Indeed, the purpose of this statute is “to lay down principles for the guarantee of full equality between men and women,”<sup>160</sup> and, indeed, the statute provides that “one law shall apply to men and women regarding any legal act; and any statutory provision that discriminates against a woman, as a woman, regarding any legal act, shall not be binding”<sup>161</sup> – however, the reservation in Section 5, whereby the statute “shall not affect any legal prohibition or permission

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<sup>157</sup> F. Raday, “On Equality,” 24 *Mishpatim* 241, 266 (1994) [Hebrew]; Shalev, *supra* note 61, at 460.

<sup>158</sup> Shalev, *id.*, at 460. See, for example, *Psalms* 45:14; *Yebamot* 17a: “The king's daughter is all glorious within”; and *Genesis Rabbah* 18:1: “A woman's place is in the home and a man's place is out in the world.”

<sup>159</sup> E. Sivan, *Divorce in Israel and the Status of Women – The Building of Inequality and Alternatives for a Solution* (2002) 37 [Hebrew]; P. Shifman, *Who is Afraid of Civil Marriage?* (Second Edition, 2000) 13-15 [Hebrew]; HCJ 47/82 *Israel Movement for Progressive Judaism v. Minister of Religious Affairs*, P.D. 43(2) 661. See also Heather Lynn Capell, Comment: After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel, 33 *Tex. Int'l L.J.* 331 (1998).

<sup>160</sup> Section 1 of the statute.

<sup>161</sup> Section 1A(a) of the statute.

relating to marriage or divorce,” in effect, renders it meaningless and actually reinforces the discrimination against women prevailing in religious law.<sup>162</sup>

The laws of marriage and divorce regulate three different areas: (a) the manner of entering into a marriage, from the perspective of form and capacity; (b) the system of rights and duties constituting the substance of a marriage; (c) the manner in which a marriage is dissolved.<sup>163</sup> In all three areas, provisions of Jewish religious law may be found that are discriminatory against women.<sup>164</sup> It suffices to give several examples from the field of divorce law applying to Jews in Israel, although similar problems also exist according to the religious law applying to other population groups in Israel (Christians, Muslims, etc.). Discrimination against women in divorce law is expressed, primarily, in the fact that the grounds for divorce available to them are different and fewer than those available to men. A ground of action sufficient to obligate a wife to accept a *get* [the “writ of divorce”], does not necessarily suffice to force the husband to deliver a *get*.<sup>165</sup> This results in an asymmetry, between the husband and the wife, in the grounds for obligating and compelling the delivery of a *get*, something that acts to the detriment of the wife. It should be further noted that the Rabbinical Courts are very reluctant to coerce a husband to deliver a *get*. Likewise, without having received a *get* from her husband, a woman is unable to obtain permission to remarry, whereas, in contrast, a husband is entitled to remarry by special permission of the Rabbinical Court.

The UN Committee on Economic, Social and Cultural Rights has censured this discriminatory practice, stating that:<sup>166</sup>

The Committee expresses concern about the fact that the Jewish religious courts’ interpretation of personal law with respect to divorce is discriminatory to women, especially the regulation that allows the husband to re-marry even when the wife is opposed to the divorce, whilst the same rules do not apply to the wife.... The Committee recommends that the State party undertake steps to modify the Jewish religious courts’ interpretation of the law concerning divorce to ensure equality between men and women, as provided for in Article 3 of the Covenant.

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<sup>162</sup> For a discussion of Section 5 of the statute and the background to its enactment, see H CJ 49/54 *Melcham v. Sharia Judge, Aco Region P.D.* 8, 910, 916. Moreover, despite the fact that Section 8(b) of the statute provides that it is forbidden to dissolve a marriage against the will of the wife, this provision only applies in the absence of a judgment by a competent court; therefore, if the precepts of religious law allow it, there is nothing in this provision to protect the woman. See A. Rubinstein and B. Medina, *Constitutional Law in the State of Israel* (Fifth Edition, 1997, Volume I) 316 [Hebrew].

<sup>163</sup> Shalev, *supra* note 61, at 459-60.

<sup>164</sup> Both marriage and divorce are, essentially, legal acts performed by the man, and not by the woman; the woman plays a passive role and is silent both during the marriage ceremony (in which the husband “purchases” the wife) and in the divorce ceremony (the consent of the husband is a condition without which there is no divorce). See *id.*, at 461; Rubinstein and Medina, *supra* note 162, at 316. The wife owes the husband “her work”: household chores, care of the husband and the children, and additional work limited to the home. See Shalev, *id.* See also A. Rosen-Zvi, *supra* note 35, at 225-28. S. Lifshitz, *A Civil Reorientation in Israeli Family Law 7* (Zivion 2002).

<sup>165</sup> Rosen-Zvi, *id.*, at 138-39. See also Edwin Freedman, *Religious Divorce in Israel*, 2000 *Int’l Fam. L.* 19.

<sup>166</sup> Concluding Observations, *supra* note 107, at para. 23, 29.

Therefore, in contrast to men, women are “sentenced” to monogamy, since, according to Jewish Law, adultery is only forbidden to women (in the sense that a married woman, who has not received a *get* from her husband, is considered an adulteress if she has relations with another man). This monogamy is imposed upon her all the more forcefully by the rule providing that any child born to her from a man who is not her husband will be considered a *mamzer* [the offspring of a forbidden union].<sup>167</sup> Therefore, frequently, the option of a life as the reputed spouse of another man is also closed off to her, if she has not received a *get* from her husband. In contrast, the husband is not exposed to any sanction if he lives with another woman as his reputed spouse. Moreover, the relative bargaining power of the wife is inferior to that of the husband.<sup>168</sup> The problem of *aganut* [the wife’s status as an *agunah*] leads to a situation in which the woman is sometimes willing to make significant economic concessions in order to be released from an extortionist spouse.<sup>169</sup> Matters are further complicated by what is known as the “jurisdictional race,” i.e., the race between the spouses to file suit first in the instance he or she prefers, either the religious court or the Family Court (generally, women prefer the Family Courts, while men prefer the Rabbinical Courts); this race is detrimental to the bargaining power of the parties, especially that of the economically weaker party, which, in most cases, is the wife.<sup>170</sup>

Further discrimination is reflected in the property arrangements between the spouses prior to the divorce. On the subject of maintenance, despite the fact that the law applying in both the religious court and the Family Court is the same law – the personal law of the parties<sup>171</sup> – studies by the National Insurance Institute indicate that the level of maintenance payments in judgments by the Rabbinical Courts is 30% lower than that in those handed down by the civil courts.<sup>172</sup>

The situation is no better concerning the division of property between separating spouses who have not made a property agreement. According to the resources-balancing arrangement laid down in the Spouses (Property Relations) Law, 1973, resources balancing only takes place upon the dissolution of the marriage as a result of a divorce or the death of one spouse. This arrangement leads to a problematic situation potentially more harmful to women than to men, because women who are denied a *get* are unable to benefit from a resources-balancing arrangement, even

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<sup>167</sup> Schereschewsky, *supra* note 25, at 59, 346.

<sup>168</sup> Rosen-Zvi, *supra* note 35, at 137.

<sup>169</sup> Another practice that may lead to the *aganut* of the wife, and which may serve as an opening for extortion on the part of others, is the religious rule whereby, the rite of *chalitzah* is required in a case of *yibbum* [for an explanation of these terms, see *infra* note 179]. For a discussion of this subject, see *id.*, at 252.

<sup>170</sup> *Id.*, at 142. Recently, Judge Granit, of the Tel Aviv Family Court, has relied on the Convention on the Elimination of Discrimination against Women as an interpretive tool to justify nullifying the “jurisdictional race” and to grant the Family Court parallel jurisdiction to that of the Rabbinical Court, even when the husband has first filed suit for divorce in the Rabbinical Court and included (a good faith inclusion) the matter of maintenance payments. See Misc.Civ.Appl. (Tel Aviv) 10408/01 *L.S. v. L.A.* (not yet published), *Takdin* - Family Court 2003(1) 126 (hereinafter: “*L.S.*”).

<sup>171</sup> Family Law Amendment (Maintenance) Law, 1959.

<sup>172</sup> Sivan, *supra* note 159, at 17. For an analysis of the inferior economic status of women in the Israeli social reality and a discussion of the implications of this situation on their weaker bargaining power within the context of divorce negotiations, see Rosen-Zvi, *supra* note 35, at 144-58.

when the marriage has been effectively over for many years. The later the resources balancing takes place, the greater the bargaining power of the husband.<sup>173</sup>

## 2. Discrimination against Additional Groups

In addition to the discrimination against women resulting from the application of religious law in matters of marriage and divorce, several other groups are also discriminated against, since the exclusive application of religious law leads to a situation in which persons belonging to these groups are completely unable to get married in the State of Israel. The groups that are harmed include, first of all, those persons without a religion and those persons whose religious community is not recognized.<sup>174</sup> Secondly, Israeli law does not permit mixed marriages, i.e., marriages between members of different religious communities (except for those isolated cases in which the personal law of both parties recognizes such marriages<sup>175</sup>). Under Jewish Law, a marriage between a Jew and a non-Jew is *void ab initio*.<sup>176</sup> The third group includes persons disqualified for religious marriage: even when both spouses are Jewish, there are various prohibitions in religious law that limit their right to marry. Such couples are “disqualified for marriage” because they are unable to marry according to the laws of the State of Israel. The impediments to marriage may be classified into three categories, according to their consequences<sup>177</sup>: (a) marriages that are *void ab initio*: including, *inter alia*, the second marriage of a woman still considered to be married to her previous husband and incestuous relationships<sup>178</sup>; (b) doubtful marriages: cases in which there is a question as to the validity of the marriage, and because of this doubt (which may arise, for example, in a case of a private marriage or a civil marriage that has been performed abroad) the wife requires a *get* in order to remarry<sup>179</sup>; (c) prohibited marriages that are retroactively valid: this

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<sup>173</sup> Sivan, *id.*, at 19-21; Rosen-Zvi, *id.*, at 156-57.

<sup>174</sup> This is the case, for instance, regarding members of the Protestant faith and the Karaite community. This also means that even a Jew who belongs to the Reform Movement cannot be married in Israel in a Reform ceremony that will be recognized by state authorities. In this regard, see Shifman, *supra* note 159, at 13.

<sup>175</sup> Rubinstein, *supra* note 144, at 440.

<sup>176</sup> Shalev, *supra* note 61, at 472. Nevertheless, the secular legislature has provided for a way to dissolve mixed marriages in the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969. This statute also applies to those persons without a religion or members of an unrecognized religious community. However, the civil courts and the religious courts of the Christian communities do not have the authority to dissolve the marriage of a foreign couple who are both members of a Christian community that has a competent religious court in Israel. This discrimination is unjustified and illogical. See Rubinstein and Medina, *supra* note 162, at 300; M. Shava, “Rules of Jurisdiction and Conflict of Law in Matters of Dissolution of Marriage,” 1 *Iyunei Mishpat* 125, 141-42 (1971) [Hebrew].

<sup>177</sup> Shalev, *supra* note 61, at 476.

<sup>178</sup> Shifman, *supra* note 35, at 199. A child born in consequence of such relations is considered a *mamzer*, who is forbidden to marry another Jew and is only permitted to marry another *mamzer* or a non-Jew. See Shalev, *id.*, at 479.

<sup>179</sup> Shalev, *id.*, at 477. A doubt also arises in the case of a childless widow who has married without the rite of *chalitzah*. The rules of *yibbum* (levirate marriage) and *chalitzah* are a further example of how religious law is more prejudicial to women than it is to men. Under these rules, when the husband dies childless and is survived by a brother, according to Jewish Law, the brother must marry the widow. If the brother does not wish to marry the widow, then, as long as he has not released her through the rite of *chalitzah*, the widow is forbidden from marrying another man. Even though regulations by the Israeli Rabbinate have ruled that the *yibbum* is forbidden (i.e., that the brother may not marry the widow), they still require the rite of *chalitzah* in order that the wife may remarry. This obligation makes the wife dependent upon the goodwill of her husband’s brother. *Id.*

category (which results in the couple being forced to divorce one another) includes, *inter alia*, the prohibition against the marriage of a *Kohen* [a descendant of the ancient priestly caste] to a divorced woman, to a *chalutzah* [a widow released from a levirate marriage] or to a convert.<sup>180</sup> These groups include about a quarter of a million immigrants from the CIS (the former Soviet Union) and many Ethiopian immigrants, who are not Jewish or whose Jewishness is questioned by the religious establishment; they, too, are unable to realize their right to marry and to establish a family in Israel.<sup>181</sup>

These restrictions are just an example of the many limitations imposed by religious law, in general, and by Jewish Law, in particular. These and other restrictions cause grave harm to the freedom of the couple to marry and to establish a family. The solutions that exist in order to circumvent these prohibitions are limited and partial.<sup>182</sup>

In addition to the discrimination against women and other groups that results from the restrictions imposed by religious law, its application in matters of marriage and divorce also does harm to the freedom from religion of those Israeli citizens who do not want religious law to govern their personal status. The imposition of religious restrictions that entail the jurisdiction of Rabbinical Courts and the application of religious law in matters of marriage and divorce is incompatible with freedom of conscience and freedom from religion.<sup>183</sup> Freedom of conscience and religion dictate that the individual has the legal and practical option to realize his or her rights – including the right to marriage – without being compelled to rely on religious norms, religious ceremonies and religious authorities.<sup>184</sup>

### C. The Freedom to Marry without Discrimination – International Law

The Universal Declaration of Human Rights, the Covenant on Civil Rights and the Covenant on Social Rights all recognize the right to marry as a fundamental right.<sup>185</sup> Moreover, these three instruments lay down the principle of equality of rights between the sexes within the context of the institution of marriage, in the three areas discussed above: the creation of the marriage, the duties and rights during married life and the dissolution of the marriage. The Universal Declaration of Human Rights provides, at the end of Article 16(1), that the spouses “are entitled to equal rights as to marriage, during marriage and at its dissolution.” The Covenant on Civil Rights also provides for equality of rights within the context of marriage; according to Article

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<sup>180</sup> For additional prohibitions included in this category, see Schereschewsky, *supra* note 25, at 56-60.

<sup>181</sup> J. Algazy, “A marriage of inconvenience,” *Ha’aretz* English Edition, January 21, 2002.

<sup>182</sup> The mechanisms that enable, to one extent or another, the circumvention of religious law in matters of marriage and divorce, include: marriage outside of Israel, private marriage ceremonies, a shared life as reputed spouses and marital agreements. See Rubinstein, *supra* note 144, at 443-49; Shalev, *supra* note 61.

<sup>183</sup> Justice Landau in H CJ 80/63 *Gurfinkel v. Minister of Interior*, P.D. 17(3) 2048; Justice Berenson in H CJ 287/69 *Miron v. Minister of Labor*, P.D. 24(1) 337, 363. A discussion of the degree of harm to freedom from religion in the application of religious law in matters of marriage and divorce in Israel is beyond the scope of this article. Regarding this matter, see Rubinstein and Medina, *supra* note 162, at 190-95; Shifman, *supra* note 159, at 7-19.

<sup>184</sup> Rubinstein and Medina, *id.*, at 193. See also Basheva E. Genut, Note: Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel, 19 *Fordham Int’l L.J.* 2120 (1996).

<sup>185</sup> In this matter, see *supra* Part IV.A.

23(4) of the Covenant, “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.” In the Covenant on Social Rights, the requirement of equality of rights between the spouses arises both from Article 2(2), which provides that the rights enunciated in the Covenant be exercised without discrimination of any kind, including discrimination on the basis of sex, and from Article 3, which states the principle of equality between the sexes as follows: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” Another convention that also provides for equality of rights between the sexes within the context of the institution of marriage is the Convention on the Elimination of Discrimination against Women. Article 16(1) of this Convention provides as follows:<sup>186</sup>

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

In addition to the explicit prohibition of discrimination between the sexes within the context of marriage, these three instruments also provide for the prohibition of discrimination on the basis of national origin, race and religion: Article 2(2) of the Covenant on Social Rights specifies an open list of prohibitions against

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<sup>186</sup> For a discussion of this provision, including the reservations of the State of Israel, see *infra*, Part IV.D.

discrimination (“or other status”); Articles 2(1) and 26 of the Covenant on Civil Rights lay down a prohibition of discrimination on the basis of race, religion, national origin “or other status”; and Article 16(1) of the Universal Declaration of Human Rights states that the right to marry shall not be limited “due to race, nationality or religion.”

These conventions do not define the nature of the marriage ceremony that is the subject of the right or the nature of the law that applies to marriage. In fact, in the wording of the international conventions, we did not find an explicit requirement for the implementation of civil marriage. Nevertheless, since these conventions forbid discrimination on the basis of sex, national origin, race and religion in the implementation of the right to marriage, they should be interpreted as indirectly forbidding the exclusive application of religious law in matters of marriage and divorce. In the General Comment of the Committee on Human Rights of 1990, the Committee expressly noted that “the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious **and civil marriages**” (emphasis added).<sup>187</sup> If that is the case, then the implementation of the provisions of the conventions necessitates the grant of a right to marriage without discrimination of any kind whatsoever.<sup>188</sup> Therefore, the word “marriage” in the aforesaid conventions should be interpreted as referring to civil marriage.

#### **D. The Laws of Marriage and Divorce in Israel in View of International Law**

The laws of marriage and divorce in the State of Israel are incompatible with the fundamental human right to marry and to establish a family as recognized and accepted in the international sphere.<sup>189</sup> Israeli law in matters of marriage and divorce, therefore, gravely harms the possibility for many people to fully realize their right to family life. This law leads to an inequality in the legal status of men and women, and imposes arbitrary restrictions on various groups in the population, discriminating against them on the basis of religion, national origin and race.

The ways in which the State of Israel restricts the right to marriage and infringes on it by applying religious law, as mentioned, are as follows: (a) negation of the right to marry for persons without a religion and members of unrecognized religious communities; (b) restriction of the possibility for mixed marriages between spouses of different religions; (c) restriction of the right to marry for persons disqualified for religious marriage; and (d) a violation of the equality between women and men within the context of the institution of marriage.

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<sup>187</sup> G.C. 19, *supra* note 19.

<sup>188</sup> Freeman bases the requirement for the implementation of civil marriage on Article 16(1) of the Convention on the Elimination of Discrimination against Women. According to her approach, this provision requires that all couples be permitted to marry according to civil law, without any connection to their religion, origin or race. See M.A. Freeman, “The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women’s Convention,” *Women’s Rights, Human Rights: International Feminist Perspectives* (New-York, J. Peters & A. Wolper eds., 1995) 149, 157.

<sup>189</sup> See also Rubinstein, *supra* note 144, at 442 n.20.

The question, therefore, is to what degree is Israel in breach of the provisions of Article 16(1) of the Universal Declaration of Human Rights, Articles 2(1) and 26 of the Covenant on Civil Rights, and Article 2(2) of the Covenant on Social Rights – to the extent that it concerns the prohibition against discrimination on the basis of **national origin, race and religion**; and the provisions of Article 16(1) of the Universal Declaration of Human Rights, Article 23(4) of the Covenant on Civil Rights, Articles 2(2) and 3 of the Covenant on Social Rights, and Article 16(1) of the Convention on the Elimination of Discrimination against Women – to the extent that it concerns the prohibition against discrimination on the basis of **sex**. Regarding Article 16 of the Universal Declaration of Human Rights, it had been argued that Israel is in breach of this provision only in those cases where the right to marry has been completely denied to certain groups (persons without a religion and members of unrecognized religious communities), i.e., it was claimed that the prohibition of discrimination should only attach to the subjects of the right – men and women – and not to the right itself.<sup>190</sup> This interpretation is unacceptable, since it is incompatible with the wording of Article 16 of the Universal Declaration of Human Rights and is liable to render the provision meaningless.<sup>191</sup> As for Article 16(1) of the Convention on the Elimination of Discrimination against Women and Article 23 of the Covenant on Civil Rights, the State of Israel has given notice that it has reservations regarding these provisions, insofar as it concerns their incompatibility with the personal law binding upon the religious communities in Israel. These reservations run contrary to the subject matter and purpose of the conventions – the prevention of discrimination against women, even under the laws of personal status.<sup>192</sup> Undoubtedly, in view of the aforesaid international instruments, any kind of discrimination in granting the right to marriage – on the basis of race, national origin, ethnicity, religion and sex – is a breach of international commitments by the State of Israel. Therefore, it is not only the denial of the right to certain groups that constitutes a breach of the conventions that Israel has signed, but also its restriction for religious reasons, like the arrangements that discriminate against women in the context of the institution of marriage – all of these constitute illegitimate discrimination that gravely harms the individual's right to marry.<sup>193</sup> The aforesaid international instruments also provide for the right of equality between the spouses, not only in the creation of the marriage,

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<sup>190</sup> See Y. Z. Blum, "Israel Marriage Law and Human Rights," 22 *Ha'praktit* 214 (1966) [Hebrew].

<sup>191</sup> See Rubinstein, *supra* note 144, at 440-41.

<sup>192</sup> See *L.S.*, *supra* note 170. In response to Israel's reservation to Article 16 of the Convention on the Elimination of Discrimination against Women, the Committee on the Elimination of All Forms of Discrimination Against Women suggested in its review of Israel's compliance in 1997 that "[I]n order to guarantee the same rights in marriage and family relations in Israel and to comply fully with the Convention, the [Israeli] Government should complete the secularization of the relevant legislation, place it under the jurisdiction of the civil courts and withdraw its reservations to the Convention." See Report of the Committee on the Elimination of All Forms of Discrimination Against Women, 16-17 Sessions, 1997, at 91. See also Ruth Halperin-Kaddari, Women, Religion and Multiculturalism in Israel, 5 *UCLA J. Int'l L. & For. Aff.* 339, 345-46 (2000).

<sup>193</sup> One can argue that, in addition to the Universal Declaration of Human Rights and the Covenant on Civil Rights, Israeli law is also in conflict with Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, which Israel has signed. This provision states that civil rights also include "the right to marriage and choice of spouse." This right is to be accorded to all citizens of the member states without discrimination on the basis of "race, colour, or national or ethnic origin." Since the religious law applied in Israel adopts criteria of "national or ethnic origin" – such is the case, for example, when this law denies a person the right to marry only because of the fact that he or she was born to a non-Jewish mother – the right to equality, in accordance with the Convention, is infringed. See Rubinstein, *supra* note 144, at 443.

but also in its dissolution; therefore, the right to freely marry (freedom from the restrictions of religious law, in other words, the right to civil marriage) also includes the right to civil divorce.

The conclusion is that the State of Israel is in breach of both the prohibition against discrimination between men and women, as well as prohibitions against discrimination on the basis of race, national origin and religion, during all three stages of marriage: its creation, its content and its dissolution. As stated, the right to marriage under international law should be interpreted as referring to the implementation of civil marriage. It is true that many countries that have signed these conventions recognize marriages that have been performed according to religious law, however, except for Israel, all western nations that have signed the conventions grant such recognition **alongside and in addition to** the option of civil marriage. Moreover, the law that governs in these countries, both during the marriage and for the purpose of its dissolution, is the civil law. Accordingly, there is, in fact, nothing illegitimate in the recognition of religious marriage as an **additional** way to form the marital bond, provided that the state (also) grants its citizens the right to civil marriage.

Ostensibly, it could be argued that the right to civil marriage, like other rights enunciated in the Covenant on Social Rights, is not an absolute but rather a relative right, since Article 4 of this Covenant provides that the member states are entitled to limit the rights enunciated therein by law “in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Therefore, *prima facie*, the State of Israel could claim that, by implementing marriage according to religious law, it is limiting the right to civil marriage lawfully and in accordance with the Covenant. Such a claim would be untenable, for several reasons. Firstly, the relativity of the rights is expressed in their cost, and the principle of equality between the sexes is not diminished because of the relativity of the right. That is to say, the responsibility of the member states to implement the rights is dependent on the amount of resources at their disposal<sup>194</sup> – which, as stated, has no relevance concerning the nature of marriage. Secondly, the Committee for the Implementation of the Covenant on Social Rights has interpreted Article 4 very narrowly.<sup>195</sup> Thirdly, even if such a claim was accepted, then, as stated, the right to civil marriage arises from several other conventions that Israel has signed (the Covenant on Civil Rights and the Convention on the Elimination of Discrimination against Women<sup>196</sup>).

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<sup>194</sup> See the article by Y. Shany, “Economic, Social and Cultural Rights in International Law: What Use May the Israeli Courts Make of Them?,” in Y. Shany and Y. Rabin eds., *Economic, Social and Cultural Rights in Israel* (forthcoming 2004) [Hebrew].

<sup>195</sup> *Id.*

<sup>196</sup> The Covenant on Civil Rights also allows for a deviation from the principles stated therein because of the relativity of the rights. Thus, for example, Article 4 of the Covenant provides that the states may derogate from the principles of the Covenant in a time of national emergency which threatens the existence of the nation; however, even in such a situation, they are prohibited from discriminating on the basis of “colour, race, sex, language, religion or social origin.” The Covenant also includes provisions that allow the states to limit certain rights: for instance, Article 18, which deals with freedom of religion, provides that limitations may be placed on freedom of religion if they “are necessary to protect public safety or the fundamental rights of others.” In any case, it seems that the clause in the Covenant authorizing the state to derogate from its provisions, or to limit various rights enunciated therein, does not permit derogation from or limitation of the right to marriage on the basis of sex, national origin, religion or race.

Being well aware of the cultural, economic and social differences between various nations, both the Covenant on Social Rights and the Covenant on Civil Rights set forth minimum standards of respect for human rights binding upon the states that have signed these conventions.<sup>197</sup> International law, therefore, tries to achieve a consensus in regard to such a minimum standard for the recognition of basic social and civil rights, as reflected in the conventions regulating these matters.<sup>198</sup> These conventions specify the lowest threshold for the degree of protection required of the states in the socio-political realm. Of course, the member states should aspire to the widest possible protection in these areas, but the states are not entitled to settle for less protection than that specified in the conventions. The lowest threshold, or the “minimum core”,<sup>199</sup> of the right to family life is the right to freely marry, and if we interpret “marriage” as “civil marriage,” as I have proposed, then a state that does not grant its citizens the freedom to marry in a civil ceremony is in breach of the provisions of the Covenant on Civil Rights and the Covenant on Social Rights, as well as the provisions of the Convention on the Elimination of Discrimination against Women. As to the pace and time for implementing the rights enunciated in the conventions, it is customary to differentiate between the Covenant on Civil Rights and the Covenant on Social Rights, since the former imposes obligations on the state that must be fulfilled immediately, while the latter sets standards that the state must aspire to realize, and whereas for some of the rights – those rights the implementation of which entails an investment of resources – the pace of implementation may be progressive. However, where it is possible to grant the right without a need for resources – even when it is enunciated in the Covenant on Social Rights – it must be granted immediately.<sup>200</sup> Various aspects of the right to family life require the allocation of resources, such as the right of the family to social security and means of subsistence, while others, such as the right to be a parent (in its negative sense), do not impose any economic burden on the state. As stated, the right to marriage is both a civil and a social right, and a change in its manner of implementation (replacing religious marriage with civil marriage, or introducing civil marriage alongside religious marriage) does not necessitate an investment of resources. Accordingly, for this right, there is no reason to apply the progressive principle specified by the Covenant on Social Rights, and it should be dealt with as mandated by the Covenant on Civil Rights: by the absolute and immediate adoption of the measures necessary for its implementation.

A different question is whether there is a need for a legislative reform or whether an Israeli court has the authority to invalidate the current arrangement regarding matters of marriage and divorce. First of all, the right to freely marry in the State of Israel should be recognized as a part of the right to “human dignity and liberty” enshrined in the Basic Law of the same name. In the words of Prof. Rubinstein: “From the

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<sup>197</sup> B.B. von Maydell, “The Impact of the EEC on Labor Law,” 68 *Chi.-Kent. L. Rev.* 1401, 1404 (1993); J.J. Paust, “Antiterrorism Military Commissions: Courting Illegality,” 23 *Mich. J. Int’l L.* 1, 12 (2001).

<sup>198</sup> J. Crawford, “Democracy and the Body of International Law,” *Democratic Governance and International Law* (New-York, G.H. Fox & B.R. Roth eds., 2000) 91, 91-92.

<sup>199</sup> Shany, *supra* note 194.

<sup>200</sup> See Craven, *supra* note 38, at 136; General Comment No. 3 of 1990, the Committee for Implementation of the Covenant on Economic, Social and Cultural Rights stated that there is an immediate obligation to adopt measures the implementation of which does not entail significant financial cost; see G.C. 3, *supra* note 41; Shany, *id.*

perspective of the values of the state as a democratic country, it is hard to see what proper purpose is served by forcing the Jewish citizens of the state to be subject to Jewish Law in matters of marriage and divorce.”<sup>201</sup> Nevertheless, in this context, it is not necessary to resolve the conflict between the values of the State of Israel as a democratic country and its values as a Jewish state, since the “validity of laws” provision in the Basic Law: Human Dignity and Liberty precludes Section 1 of the Rabbinical Courts Jurisdiction Law from being declared unconstitutional. Moreover, on more than one occasion, the Supreme Court has ruled that the solution of the problem of the right to marriage in the State of Israel is out of its hands.<sup>202</sup>

It is obvious to anyone who follows the Knesset’s work and the positions of the various political parties that this issue is a major bone of contention among the Israeli public, and that there has not yet been a decision, with proper legal form, to introduce civil marriage. And who are we, as judges ordered to distance ourselves from all political debate and argument, to take the place of the legislature and to decide on a question that divides the public?

Furthermore:<sup>203</sup>

With all due respect to the struggle of the Petitioners and those groups that think like them regarding their right to marry in a non-religious context, their claim should be addressed to the proper [authority] – the legislature. There is no solution for their problem other than by means of civil marriage performed by the state without any consideration for the religious affiliation (or lack thereof) of the parties. The courts should not be asked to resolve this problem.

In *Efrat*, Justice Barak, has ruled that:<sup>204</sup>

In Israeli society, there is no consensus on this issue, and the Court cannot be expected to decide pronouncedly one way or the other. The Court crystallizes public policy as it is reflected, from its own objective perspective. Unequivocal decisions in this sensitive matter can only come from non-judicial entities. There are those who believe that the solution to the problem is the introduction of civil marriage ... others believe that the solution is to be found in the field of Jewish law itself ... in any event, the Court itself cannot and should not resolve the basic problem. The Court

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<sup>201</sup> Rubinstein and Medina, *supra* note 162, at 991.

<sup>202</sup> CA 373/72 *Tepper v. State of Israel*, P.D. 28(2) 7, 15. See also the discussion in A. Barak, *Judicial Discretion* (Yale University Press, 1987) 213-214.

<sup>203</sup> *Id.*, at 13. Recently, the Supreme Court has ruled that a Jewish Israeli couple married in a civil ceremony outside of Israel have a maintenance obligation towards one another. The Court did not deliberate the question of the validity of the marriage, and held that the maintenance obligation is grounded in contract law, by force of the agreement to marry in a civil ceremony outside of Israel. The Court reiterated its position, stating that the legislature should address this question and find a solution for it. See LCA 8256/99 *Jane Doe v. John Doe*, (not yet published), at para. 19 of the judgment.

<sup>204</sup> *Efrat*, *supra* note 14, at 788-89; See also CA 450/70 *Rogozhinsky v. State of Israel*, P.D. 26(1) 129.

should not be expected to order the introduction of civil marriage, and the Court has consistently refused to do so.

In view of these rulings, it would seem that the demand for the introduction of civil marriage in the State of Israel should be directed at the legislature.<sup>205</sup> However, it is highly doubtful that in the current Israeli political framework the legislature will be inclined to provide a comprehensive arrangement for civil marriage. At present, the apparent trend is a compromise whereby a quasi-marriage institution (a “partnership registry”) will be introduced that will only solve the problem of persons disqualified for religious marriage in Israel.

## V. Conclusion

International law recognizes the right to family life as a fundamental right of paramount importance. The courts in Israel have also recognized the right to family life as a fundamental constitutional right. However, as we have seen, in various contexts, proper weight has not been given to this basic right. The absence of a clear, standard definition for the “family” and the exclusion of “alternative” family bonds leads to an infringement of the rights of many who, in practice, conduct a family life. Thus, for instance, only married heterosexual couples are entitled to adopt a foreign child together and only a man and a woman who are a couple are entitled to use the services of a surrogate mother – as a result, the right to parenthood of unmarried couples (or couples who are not reputed spouses), including that of same-sex couples, is limited. Moreover, we have found a disparity in the manner of implementation of the right to family life between Jewish Israeli citizens, on the one hand, and Arab Israeli citizens and Arab residents of the Occupied Territories, on the other hand. This discrimination is primarily expressed in regard to the right to immigrate to the State of Israel based on family ties and the right of residents of the Occupied Territories to “family unification.”

The most severe limitation on the right to family life within the borders of the State of Israel relates to the lack of an option to marry in a civil ceremony. While international law recognizes the imposition of certain limitations on the freedom to marry (the age for marriage, prohibitions regarding incest and bigamy), the additional limitations on the right to marry, imposed by Israeli law, constitute a breach of international commitments by the State of Israel.

Making the right to marriage conditional on compliance with the requirements of a substantive religious law that does not recognize the marriages of persons without a religion, marriages between members of different religious communities, and even certain cases of marriage between members of the same religion, and which further lays down precepts that discriminate against women, is undoubtedly a violation of the provisions of the international conventions and instruments discussed in this article. The only way to ensure equality within the family context in Israel, and by so doing to guarantee the right of every person to marriage free of the fetters of religious law, is by legislative reform that would permit civil marriage. The proper arrangement

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<sup>205</sup> Regarding various proposals for legislative reform, see Sivan, *supra* note 159; Shifman, *supra* note 159, at 52-69.

would specify civil law as the exclusive substantive law applying in matters of marriage and divorce, and would allow a choice between a civil marriage ceremony and a religious marriage ceremony.