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THE RIGHT TO FAMILY LIFE AND CIVIL MARRIAGE UNDER INTERNATIONAL LAW AND ITS IMPLEMENTATION IN THE STATE OF ISRAEL

YUVAL MERIN*

Abstract: The Article begins by analyzing the characteristics of the right to family life and examining various definitions of the “family” under international and Israeli law. It argues that 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. Following this discussion, the Article analyzes the degree of protection accorded to the family in various contexts including: the right of the family to social security; parent-child relations; immigration rights based on family ties; and the freedom to marry. The most severe limitation on the right to family life within 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 additional limitations on the right to marry imposed by Jewish religious law constitute a breach of Israel’s international commitments. The Article thus concludes 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.

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

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to protection by society and the State.”¹ 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.²

This Article deals with the protection of the right to family life under international law and its implementation in Israel on three levels: protection of the family cell as a single unit (the right to establish a family and, in particular, the right to marry); protection of the individuals comprising the family unit (in particular, 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, and most other aspects of family law (including maintenance, child custody, adoption, and succession), which are regulated by substantive

¹ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Part I, art. 16(3), at 74, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights].

² See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 23(1), 999 U.N.T.S. 171, 179 [hereinafter Covenant on Civil Rights] (reiterating that which is stated in the Universal Declaration of Human Rights); see also International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 10(1), 993 U.N.T.S. 3, 7 [hereinafter Covenant on Social Rights] (providing that “[t]he 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”). For similar sentiments, see the Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1969) (stating that the family is “[a] basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth”), and the European Social Charter, Oct. 18, 1961, art. 16, 529 U.N.T.S. 89 [hereinafter European Charter]. 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”); American Convention on Human Rights, Nov. 22, 1969, art. 17(1), 9 I.L.M. 673, 680 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”); Banjul Charter on Human and Peoples’ Rights, June 27, 1981, art. 18(1), 21 I.L.M. 58, 61 (“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.”) .

secular law.³ The major inconsistencies between Israeli family law and the provisions of international law relating to the right to family life are found in those areas governed by substantive religious law. Various international conventions that Israel has signed and ratified mandate the prohibition of discrimination on the basis of, *inter alia*, sex, national origin, race, and religion. Nevertheless, 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 customary international law automatically becomes part of Israeli law, whereas conventional international law, embodied by constitutive treaties, becomes part of Israeli law only if it is adopted or combined with Israeli law through legislation.⁴ 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.⁵ 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.⁶ This Article argues that, although international conventions pertaining to the right to family life have not been incorporated into Israeli law, the Supreme Court of Israel (Supreme Court) should give proper weight to the right to family life as a fundamental human right, and that the Israeli legislature should take the necessary steps to bring Israeli family law into conformity with the precepts of international law.

Part I 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 the right to family life encompasses and how it should be classified within the context of civil and political rights, on the one hand, and social and economic rights, on the other. It further argues that the right to family life should not be viewed as limited solely to one category of rights or an-

³ See Ariel Rosen-Zvi, *Family and Inheritance Law*, in INTRODUCTION TO THE LAW OF ISRAEL 75, 75–76 (Amos Shapira & Keren DeWitt-Arar eds., 1995); Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISR. L. REV. 537, 538 (1990).

⁴ See Ruth Lapidoth, *International Law Within the Israel Legal System*, 24 ISR. L. REV. 451, 459 (1990); Natan Lerner, *International Law and the State of Israel*, in INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 3, at 383, 386–87; see also Yaffa Zilbershats, *The Adoption of International Law into Israeli Law: The Real is Ideal*, 25 ISR. Y.B. HUM. RTS. 243, 245–47 (1995).

⁵ See Lapidoth, *supra* note 4, at 459.

⁶ See *id.*; Zilbershats, *supra* note 4, at 245–47.

other, since it has the characteristics of both a positive social right as well as those of a negative civil right. Part II 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 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 III of the Article discusses the freedom to marry and 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 because the laws of marriage and divorce in Israel are governed exclusively by religious law, which discriminates against various groups of the population (such as 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. This Part concludes 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.

I. 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 and 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.⁷

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:

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.⁸

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:

⁷ Universal Declaration of Human Rights, *supra* note 1, art. 25, at 76.

⁸ Covenant on Social Rights, *supra* note 2, art. 10(1), 993 U.N.T.S. at 7. The Covenant was ratified by Israel in 1991.

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.⁹

Specific protection for children within the family context may be found in the Convention on the Rights of the Child.¹⁰ 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.¹¹ Among regional conventions, comprehensive protection for the family institution may be found in

⁹ Covenant on Civil Rights, *supra* note 2, arts. 17, 23, 999 U.N.T.S. at 177, 179. The Covenant was ratified by Israel in 1991.

¹⁰ See Convention on the Rights of the Child, Nov. 20, 1989, art. 16, 1577 U.N.T.S. 43, 49 [hereinafter Convention on the Rights of the Child] (stating that “[n]o 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,” and that “[t]he child has the right to the protection of the law against such interference or attacks”). The Convention was ratified by Israel in 1991.

¹¹ See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 16, 1249 U.N.T.S. 13, 20 [hereinafter Convention on the Elimination of Discrimination Against Women]. The Convention was ratified by Israel in 1991; *see also* Convention on the Nationality of Married Women, Feb. 20, 1957, art. 3(1), 309 U.N.T.S. 66, 68. (stating that “[e]ach 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 European Convention for Protection of Human Rights and Fundamental Freedoms.¹²

The right to family life is also recognized as a fundamental constitutional right in Israeli law. The Israeli legislature has enacted various laws intended to encourage the family unit. For example, within the context of marriage, various provisions have been enacted to foster a caring and intimate relationship between spouses in order to sustain and nurture the family unit. The emotional relationship between the spouses is promoted, *inter alia*, by the following: granting a right to sick leave in order to care for an ill spouse;¹³ giving preference to the request of a foreign spouse to immigrate to, and become naturalized in, Israel in order to live with his or her spouse;¹⁴ the lack of competence of one spouse to give evidence against the other spouse;¹⁵ and visitation rights in prisons.¹⁶ Similarly, the Supreme Court recognizes the right to family life as a “particularly important” fundamental right, pointing out

¹² See Convention for Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter The European Convention]. According to the treaty:

Article 8

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 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.

Id. art. 8, 213 U.N.T.S. at 230; *see also id.* art. 12, 213 U.N.T.S. at 232 (“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.”).

¹³ The Sick Pay (Absence Because of a Spouse’s Sickness) Law, 1998, S.H. 234, § 1.

¹⁴ The Nationality Law, 1952, 6 L.S.I. 50, § 7 [hereinafter Nationality Law] (providing that “[t]he spouse of a person who is an Israeli national or who has applied for Israeli nationality . . . may obtain Israeli nationality by naturalization”); *see also* The Law of Return, 1950, 4 L.S.I. 114, § 4A [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.C. 3648/97 Israel Stamka v. Minister of Interior, 53(2) P.D. 728, 755. Regarding limitations on rights of immigration and naturalization in Israel, in various contexts, *see infra*, Part III.D.

¹⁵ *See* The Evidence Ordinance (New Version), 1971, 2 L.S.I. 198, § 3 (providing that “in a criminal trial a spouse shall not be competent to give evidence against the other spouse”).

¹⁶ *See* Proposed Family Visits in Prison Facilities Law, 2003, at <http://www.knesset.gov.il/privatelaw/data/16/1013.rtf> (last visited Dec. 6, 2004) [Hebrew] (“[T]he 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.”).

that every individual has “a basic right to marry and to establish a family.”¹⁷ The Supreme Court has emphasized the social importance of the family unit in a long series of judgments,¹⁸ adding that Israel is committed to protect the family unit under the aforementioned international conventions.¹⁹

The Supreme Court has held that the right to family life—which 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, and dignity and liberty, as enshrined in the Basic Law: Human Dignity and Liberty (Basic Law).²⁰ The Supreme Court stated that “[i]n an 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.”²¹

Nevertheless, 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, nor as a positive social right in the Proposed Basic Law: Social Rights (Proposed Law), in its different versions.²² 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, does not include the right to family life.²³

¹⁷ See *Stamka*, 53(2) P.D. at 781–82; see also C.F.H. 2401/95, *Nachmani v. Nachmani*, 50(4) P.D. 661, 683 (stating that “every person has the right to establish a family and to bear children”).

¹⁸ See, e.g., H.C. 639/91, *Efrat v. Dir. of Population Registry at Ministry of Interior*, 47(1) P.D. 749, 783 (discussing the essentiality of the family to the life of Israeli society).

¹⁹ *Stamka*, 53(2) P.D. at 787.

²⁰ See Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

²¹ C.A. 7155/96, *John Doe v. Attorney General*, 51(1) P.D. 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> (last visited Jan. 12, 2005).

²² See Basic Law: Human Dignity and Liberty, 1992, S.H. 150; Proposed Basic Law: Social Rights, 1994 H.H. 326; Proposed Basic Law: Social Rights, 1994 H.H. 337; Proposed Basic Law: Social Rights, 2002 H.H. 214.

²³ 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. See H.C. 5016/96, *Horev v. Minister of Transportation*, 51(4) P.D. 1, 41–43. An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at <http://www.court.gov.il> (last visited Jan. 12, 2005).

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

The right to family life, as indicated by the provisions of the aforementioned international conventions, encompasses 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 not to 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.²⁴

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. Therefore, determining the scope of the right to family life, and identifying those persons entitled to benefit from it, mainly depends 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"²⁵ (although, a patriarchal view of the family institution may be inferred).²⁶ Furthermore, a meticulous search of other

²⁴ See *supra* Part I.A.

²⁵ See Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in U.N. CENTRE FOR HUMAN RIGHTS & UNITAR, *MANUAL ON HUMAN RIGHTS REPORTING* 39 at 57, U.N. Doc. HR/PUB/91/1, U.N. Sales No. E.91.XIV.1 (1991). 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 *id.* In the General Comment of the Human Rights Committee of 1990, it was noted "that the concept of the family may differ in some 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 U.N. GAOR Hum Rts. Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: General Comment 19*, art. 23, 39th Sess., 1990, U.N. Doc. HRI/GEN/1 at 28 (1992) [hereinafter General Comment 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 "[a]ll those comprising the family as understood in the society of the State party concerned." U.N. GAOR Hum. Rts. Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: General Comment 16*, art. 17, 23d Sess., 1988, U.N. Doc. HRI/GEN/1 at 21 (1992).

²⁶ 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. See Covenant on Social Rights,

international conventions, decisions of various international tribunals, and 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 only evident in the legal realm, but also, and primarily, in the fields of sociology and anthropology.²⁷ The nature and perception of “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.²⁸ Historically, the family has been defined as a permanent, monogamous, heterosexual institution based on marriage, including a clear division of gender roles.²⁹ Determining who is 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. Nevertheless, these perceptions have been questioned—mostly in the past few decades—as a result of social, legal, and political changes.³⁰

From a sociological point of view, it is customary to draw a distinction between the traditional, extended family and the modern, nuclear family,³¹ and between both of these and the post-modern family.³² The traditional family and the modern family are based on ties of blood and marriage, and differ in regard to the degrees of relation included in the definition of the terms. The post-modern family encompasses rela-

supra note 2, art. 11(1), 993 U.N.T.S. at 7 (providing 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. Dianne Otto, “Gender Comment:” *Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?*, 14 CANADIAN J. WOMEN & L. 1, 19 (2002).

²⁷ For different and varied definitions of the concept of the “family” in the fields of sociology and anthropology, see Rivka Bar-Yosef, *Sociology of the Family in View of Social Changes and Biotechnological Innovations*, 38(1) MEGAMOT 5 (1996) [Hebrew].

²⁸ See generally Nicholas Bala & Rebecca Jaremko Bromwich, *Context and Inclusivity in Canada’s Evolving Definition of the Family*, 16 INT’L J. L. POL’Y & FAM. 145 (2002) (arguing that the definition of family is not static).

²⁹ See *id.* at 145.

³⁰ See *id.*

³¹ See ZEEV W. FALK, MARRIAGE LAW 11 (1983) [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. GEORGE PETER MURDOCK, SOCIAL STRUCTURE 1–2 (1949). *But see generally* Bar-Yosef, *supra* note 27 (arguing that Murdock’s model is incompatible with the characteristics of the post-modern family).

³² For a discussion of the characteristics of the post-modern family in Israel, see generally Sylvie Fogiel-Bijaoui, *Families in Israel: Familism and Post-Modernism*, in SEX, GENDER AND POLITICS 107 (1999) [Hebrew].

tions that are not based only 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 parents have separated and established new nuclear families.³³ While, in reality, there is no denying the existence of many different types 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 biological or adopted children—as the normative family model, and finds it difficult to recognize the wide variety of other family models that actually exist.³⁴

As far as Israeli legislation is concerned, different definitions for the term “family” are found in various laws, with the scope of each definition varying depending on the purpose of the statute.³⁵ 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.³⁶ Some statutes adopt a broad ap-

³³ See generally *id.* (noting the presence of new family units in the post-modern world).

³⁴ Such recognition finds only partial expression, mainly in the area of social rights. See, e.g., The Single-Parent Families Law, 1992, S.H. 147 (granting 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.C. 721/94, *El Al Israel Airlines Ltd. v. Danielowitz*, 48(5) P.D. 749. An English translation of this judgment may be found on the official website of the Israeli Judicial Authority at <http://www.court.gov.il> (last visited April 25, 2004). The legal conception of the nuclear family as the normative model up to the present day is reflected in the comments of Justice Porat in F.A. (Tel-Aviv) 10/99, *Jane Doe v. Attorney General, Takdin* (District Court) 2001(2) 125 [hereinafter *Jane Doe I*]. The Justice 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.*” *Id.* at ¶ 18 (emphasis added). This decision was recently overturned by the Supreme Court, which allowed for second parent adoption by a lesbian couple. See C.A. 10280/01, *Yaros-Hakak v. Attorney General* (not yet published; decided Jan. 10, 2005); see also B. SCHERESCHEWSKY, FAMILY LAW 1 (4th ed., 1993) [Hebrew] (defining 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.”).

³⁵ INITIAL REPORT BY THE STATE OF ISRAEL TO THE U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1998), U.N. Doc. E/1990/5/Add.39(1), ¶ 338, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.5.Add.39\(1\).En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.1990.5.Add.39(1).En?OpenDocument) (last visited Jan. 12, 2005) [hereinafter ISRAELI REPORT TO THE U.N. COMMITTEE].

³⁶ Compare, e.g., The Municipalities Ordinance (New Version), 1 L.S.I. 247, § 174A(g) (defining “family relation” as “a spouse; a parent; a son or daughter and their spouses; a

proach, while others adopt a narrow approach.³⁷ Examples of a broad definition for the concept of the “family” may be found in the Prevention of Family Violence Law, 1991,³⁸ and the Family Courts Law, 1995.³⁹ The definition of a “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.⁴⁰ This broad definition is not based only on marital relations and blood ties, but also on relations between reputed spouses and their families.⁴¹ On the other hand, there are statutes that adopt a narrow definition of a “family member.” The narrow definition is based solely on blood ties and marital relations, and does not include, for example, a reputed spouse, or even the family of a spouse. For example, the National Insurance Law (Consolidated Version), 1995 (National Insurance Law), provides that a “family member” only includes “one of the parents, a child, a grandchild, a brother or a sister.”⁴² Similarly, 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.”⁴³ Further narrow

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”), *with id.* § 235A(a) (defining “family member” as “a spouse, a child, a parent, a brother or sister, a grandson or granddaughter, a great-grandson or great-granddaughter”).

³⁷ See ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, ¶¶ 338–40 (discussing this distinction).

³⁸ See The Prevention of Family Violence Law, 1991, S.H. 138, § 1; see also The Law Against Stalking, 2001, S.H. 1809, § 3.

³⁹ See The Family Courts Law, 1995, S.H. 393, § 1.

⁴⁰ See The Prevention of Family Violence Law, 1991, S.H. 138, § 1; The Family Courts Law, 1995, S.H. 393, § 1. The Prevention of Family Violence Law even includes uncles and aunts, and nieces and nephews, 1991, S.H. 138, § 1, while The Family Courts Law also includes grandchildren as “family members,” 1995, S.H. 393, § 1. 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. See 1991, S.H. 138, § 1.

⁴¹ See The Prevention of Family Violence Law, 1991, S.H. 138, § 1; The Family Courts Law, 1995, S.H. 393, § 1.

⁴² The National Insurance Law (Consolidated Version), 1995 S.H. 205, § 1; see also The Planning and Building Law, 1965, 19 L.S.I. 330, § 1 (containing an identical definition).

⁴³ The Equal Opportunities in Employment Law, 1988, S.H. 38, § 21(a)(1). For a similar definition, see The Victims of Road Accidents (Assistance to Family Members) Law, 2002, S.H. 130 (defining a “family member” as “a spouse, a child, a parent, a brother or a sister, or another family member who was dependent upon the road accident victim”).

definitions, to one degree or another, may be found in a long list of additional statutes.⁴⁴

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 or legal literature.⁴⁵ It seems 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. For example, in *Ofri v. Perlman*, 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”.⁴⁶ 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.⁴⁷

⁴⁴ See, e.g., The National Health Insurance Law, 1994, S.H. 156, § 8(7) (defining “family” as “[a]n 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”); The Fallen Soldiers’ Families (Pensions and Rehabilitation) Law, 1950, 4 L.S.I. 115, § 1; The Invalids (Pensions and Rehabilitation) Law (Consolidated Version), 1959, 13 L.S.I. 315, § 1; The Government Companies Law, 1975, 29 L.S.I. 162, § 17A(b); The Penal Law, 1977, Special Volume L.S.I. 50; The Political Parties Law, 1992, S.H. 190, § 28F; The Crime Victims’ Rights Law, 2001, S.H. 183, § 2; see also Proposed Basic Law: The Family, at <http://www.knesset.gov.il/privatelaw/data/16/1013.rtf> (last visited Jan. 12, 2005) [Hebrew] (defining “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”).

⁴⁵ 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 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 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 C.A. 2000/97, *Lindorn v. Karnit—Road Accident Victims Compensation Fund*, 55(1) P.D. 12, 25–26; *Danielowitz*, 48(5) P.D. 749 at 785–86; Menashe Shava, *The “Unmarried Wife,”* 3 IYUNEI MISHPAT 484 (1973) [Hebrew].

⁴⁶ C.A. 449, 464/88, *Ofri v. Perlman*, 45(1) P.D. 600, 609. Similarly, in most basic textbooks dealing with family law in Israel, it is impossible to find a definition for the term. See generally PINHAS SHIFMAN, 1 FAMILY LAW IN ISRAEL (2d ed., 1995) [Hebrew]; ARIEL ROSEN-ZVI, ISRAELI FAMILY LAW: THE SACRED AND THE SECULAR (1990) [Hebrew]; MENASHE SHAVA, THE PERSONAL LAW IN ISRAEL (4th ed., 2001) [Hebrew] (all finding a general definition elusive).

⁴⁷ See ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, at 76, ¶ 341.

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 those enunciated in the Covenant on Social Rights.⁴⁸ For example, Craig Scott has proposed the distinctions listed in the following table:⁴⁹

Economic, Social, and Cultural Rights	Civil and Political Rights
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).⁵⁰ These distinctions have been criticized, and it has been argued that the differences between the two categories of rights are not at all obvious or unequivocal.⁵¹ Indeed,

⁴⁸ See, e.g., Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOOD HALL L.J. 768, 833 (1989).

⁴⁹ *Id.*

⁵⁰ See *id.* 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 MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 8-9 (1995). Regarding the distinction between positive and negative human rights in international law, see, for example, JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 26 (1993); Cristina Baez et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. 183, 223-24 (1999/2000).

⁵¹ 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 Aart 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).

there are political rights with characteristics found in the left column of the table (for example, affirmative action) and social rights with characteristics found in the right 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).⁵² In this regard, even if we ignore the criticism and adhere to the classic distinction between social rights and civil rights, we would find that the right to family life is enunciated in both the Covenant on Civil Rights and the Covenant on Social Rights,⁵³ and 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. For example, the demand for recognition of the family's right to privacy, right to marry, right to establish a family, and equal rights between the sexes within the context of marriage are all "legal" rights that may be implemented immediately, without an investment of resources, and

⁵² See, e.g., Gaile McGregor, *The International Covenant on Social, Economic, and Cultural Rights: Will It Get Its Day in Court?*, 28 MAN. L.J. 321, 334 (2002).

⁵³ See Covenant on Civil Rights, *supra* note 2, arts. 17, 23, 999 U.N.T.S. at 177, 179; Covenant on Social Rights, *supra* note 2, art. 10, 993 U.N.T.S. at 7. It is interesting to note that the Covenant on Social Rights provides that "the widest possible protection and assistance should be accorded to the family." Covenant on Social Rights, *supra* note 2, art. 10(1), 993 U.N.T.S. at 7. 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, then, 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 50, 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. Nevertheless, 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. See Covenant on Social Rights, *supra* note 2, art. 2(1), 993 U.N.T.S. at 5. 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. See *id.* 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 Sess., 1990, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 45, U.N. Doc. HRGEN/Rev.1 (1994). Reporting Guidelines, UN Doc.E/1991/23, Annex IV, 97-9, UN ESCOR, Supp. (No. 3) (1991) [hereinafter "General Comment 3"]; CRAVEN, *supra* note 50, at 135-36.

which mainly entail noninterference by the state in the individual's freedom of choice.⁵⁴ On the other hand, other aspects of the right to family life have more of a positive-social nature than a negative-civil nature, such as the family unit's right to receive economic assistance and social welfare from the state (such as maternity insurance). Such rights necessitate positive intervention from the state, entailing an investment of resources, where both the manner and the rate of implementation depend on the economic capability of the state.⁵⁵ In my view, it is not advisable to dissociate the civil characteristics from the social characteristics of the right to family life,⁵⁶ 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.

II. 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 (UN Committee), which serves as a supervising body for the implementation of the Covenant on Social Rights, provides clarifications regarding the interpretation of various provisions in the Covenant (General Comments). Nevertheless, the right to family life, enunciated in Article 10, has yet to be discussed by the UN Committee or interpreted by international judicial tribunals.⁵⁷ This is one of the rea-

⁵⁴ See Hendriks, *supra* note 51, at 1133–34. 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 take "positive" steps in order to guarantee the existence of a right that is, primarily, "negative." See *id.*

⁵⁵ See CRAVEN, *supra* note 50, at 135.

⁵⁶ 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.

⁵⁷ An attempt to give substance to the right to family life may be found, primarily, in judgments of the European Court. 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

sons why the appropriate degree of protection for the family unit, mandated by the Covenant on Social Rights, has not yet been clarified. In any case, with respect to those matters that the UN Committee does publish a General Comment, its determinations are not considered a binding interpretation.⁵⁸ Therefore, the interpretation of the Covenant is generally left to the discretion of the individual states.⁵⁹

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 that serves and ensures the existence of human society.”⁶⁰ The Supreme Court has further held that:

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

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. See CRAVEN, *supra* note 50, at 135.

⁵⁸ See *Human Rights Committee Concludes Consideration of Initial Report of United States*, Hum. Rts. Comm., 53d Sess., 1406th mtg., U.N. Doc. HR/CT/405 (1995), available at [gopher://gopher.undp.org:70/00/uncurr/pressreleases/HR/CT/9503/405](http://gopher.undp.org:70/00/uncurr/pressreleases/HR/CT/9503/405).

⁵⁹ Andrew Byrnes & Jane Connors, *Enforcing The Human Rights of Women: A Complaint Procedure for the Women’s Convention?*, 21 BROOK. J. INT’L L. 679, 726 (1996).

⁶⁰ C.A. 488/77, *John Doe v. Attorney General*, 32(3) P.D. 421, 434.

the courts in order to obtain a resolution that the parties themselves have failed to achieve.⁶¹

The tendency to minimize state intervention in family relations is, therefore, grounded in recognition of the privacy and autonomy of the family.⁶² 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.”⁶³ Nevertheless, there is a growing trend of increased state intervention into the family unit, as part of the democratization and individualization processes taking place in the modern family.⁶⁴ Such intervention is considered justifiable when the familial environment becomes oppressive and coercive.⁶⁵ 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, from being found within a certain distance from such a dwelling, or from harassing a family member in any manner and in any place.⁶⁶ Furthermore, the right to family life is not limited to state noninterference in family life or to intervention at a time of crisis. It 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.”

I 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, I 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, most of the legal protection and recognition is granted to the nuclear family, whether in re-

⁶¹ C.A. 5587/93, *Nachmani v. Nachmani*, 49(1) P.D. 485, 499, 501.

⁶² *See id.*

⁶³ C.A. 577/83, *Attorney General v. Jane Doe*, 38(1) P.D. 461, 468, 485 [hereinafter *Jane Doe II*].

⁶⁴ *See* Fogiel-Bijaoui, *supra* note 32, at 109.

⁶⁵ *Id.* at 127.

⁶⁶ The Prevention of Family Violence Law, 1991, S.H. 138, § 2. Another example is the power temporarily or permanently to remove children from the custody of their parents, by means of an adoption order pursuant to The Adoption of Children Law, 1981, 35 L.S.I. 360, and The Youth (Care and Supervision) Law, 1960, 14 L.S.I. 44.

gard 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 . . . [and] 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.”⁶⁷ 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.⁶⁸

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.”⁶⁹ Sub-articles (2) and (3) add provisions requiring that special protection be granted to women and children as follows:

(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

⁶⁷ Universal Declaration of Human Rights, *supra* note 1, art. 25, at 76.

⁶⁸ Covenant on Social Rights, *supra* note 2, art. 11(1), 993 U.N.T.S. at 7.

⁶⁹ *Id.* art. 10(1), 993 U.N.T.S. at 7.

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.⁷⁰

These provisions are designed to encourage the international community to continuously raise the standard of living of family members, ensure their economic well-being and social development, and create adequate conditions for the proper establishment and functioning of the family unit.⁷¹ These declarations are highly 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.⁷² 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.⁷³ It appears that 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, (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 further provides that an employer cannot dismiss a female employee during her pregnancy, save under a permit from the Minister of Labor and Social Affairs.⁷⁴ 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 pen-

⁷⁰ *Id.* art. 10(2)-(3), 993 U.N.T.S. at 7.

⁷¹ *See id.*

⁷² OFFICE OF THE U.N. HIGH COMM'R FOR H.R. & THE DEP'T FOR ECON. & SOC. AFFAIRS, THE FAMILY IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS, at 7, U.N. Doc. HR/PUB/1999/1, U.N. Sales No. E.98.XIV.2 (1999).

⁷³ Convention on the Elimination of Discrimination Against Women, *supra* note 11, art. 11, 1249 U.N.T.S. at 18-19. The Convention deals with equal employment opportunities and 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.

⁷⁴ *See* The Employment of Women Law, 1954, 8 L.S.I. 128, §§ 6, 9.

sion), maternity allowances for working mothers during their maternity leave, and high risk pregnancy benefits.⁷⁵

C. *The Parent-Child Relationship*

As discussed above, 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.”⁷⁶ 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.”⁷⁷ Article 18(1) further provides that:

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.⁷⁸

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, 1980.⁷⁹ 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

⁷⁵ Regarding the history of maternity insurance in Israel, and for details about the level of benefits, see ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, ¶¶ 257–262.

⁷⁶ Covenant on Social Rights, *supra* note 2, art. 10(3), 993 U.N.T.S. at 7.

⁷⁷ Convention on the Rights of the Child, *supra* note 10, art. 5, 1577 U.N.T.S. at 47.

⁷⁸ *Id.* art. 18(1), 1577 U.N.T.S. at 50.

⁷⁹ See The Assurance of Income Law, 1980, 35 L.S.I. 50, §§ 5 (addition 2), 12A(a) (2) (addition 3), 30A (addition 4); The Single-Parent Families Law, 1992, S.H. 147, §§ 2–4.

every individual is entitled.”⁸⁰ In a similar fashion, the Supreme Court held that:

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.⁸¹

As stated in the Israeli Report to the UN Committee on the Implementation of the Covenant on Social Rights, “the basic premise of the Israeli law is that the primary obligation to support the members of a family lies with the family itself.”⁸² This principle is enshrined, *inter alia*, in the Legal Capacity and Guardianship Law, 1962, which states that parents are the natural guardians of their minor children and, as interpreted by the courts, have “the right to fulfill their duties” vis-à-vis their children.⁸³ Those duties include fulfilling their children’s needs and seeing to their education, their studies, and the preservation of their property.⁸⁴ 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 state has 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.⁸⁵ Furthermore, the Penal Law imposes criminal sanctions on parents for neglecting, assaulting, or abusing their children, physically, emotionally, or sexually.⁸⁶

⁸⁰ C.A. 451/88, *John Does v. State of Israel*, 44(1) P.D. 330, 337.

⁸¹ C.A. 2266/93, *John Does v. Richard Roe*, 49(1) P.D. 221, 235 [hereinafter *John Does*] (citation omitted).

⁸² ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, ¶ 361.

⁸³ E.T. 1/81, *Nagar v. Nagar*, 38(1) P.D. 365, 393; *John Does*, 49(1) P.D. at 239–40.

⁸⁴ See ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, ¶ 361.

⁸⁵ See The Youth (Care and Supervision) Law, 1960, 14 L.S.I. 44, § 3; The Adoption of Children Law, 1981, 35 L.S.I. 360, §§ 12–13.

⁸⁶ The “best interests of the child” principle also dictates, *prima facie*, that children not be harmed by the status or acts of their parents. Nevertheless, the application of religious

Just as various restrictions are placed on the right to marriage, so too are various restrictions placed on the right to parenthood (in its positive sense). 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. For example, the Adoption of Children Law states that “[a]n adoption shall only be made by a man and his wife jointly.”⁸⁷ Similarly, 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.⁸⁸ The Supreme Court has refused to rule that these laws are discriminatory against unmarried persons.⁸⁹ Therefore, unmarried couples (or, in the case of surrogacy, those who are not reputed spouses), single persons, and

law in matters of personal status, which I 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 Carmel 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].

⁸⁷ The Adoption of Children Law, 1981, 35 L.S.I. 360, § 3.

⁸⁸ The Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, 1996, S.H. 176, § 1 [hereinafter Surrogacy Agreements Law] (defining those entitled to benefit from surrogacy arrangements as “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 *THE INTERNATIONAL SURVEY OF FAMILY LAW* 237 (Andrew Bainham ed., 1996).

⁸⁹ See, e.g., H.C. 2458/01, *New Family v. Approvals Comm. for Surrogate Motherhood Agreements*, Ministry of Health, 57(1) P.D. 419 (holding that a single woman does not have a right to use the services of a surrogate mother under the Surrogacy Agreements Law). C.A. 1165/01, *Jane Doe v. Attorney General*, 57(1) P.D. 69 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. See *New Family* 57(1) P.D. at 460. However, to the extent that this relates to second parent adoption, the Supreme Court has recently ruled that a partner of a same-sex couple has the right to adopt the biological child of the other. See Yaros-Hakak, *supra* note 34. Moreover, in H.C. 1779/99, *Berner-Kadish v. Minister of Interior*, 54(2) P.D. 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. Despite the recent recognition of same-sex second-parent adoption, unmarried couples and gay partners are still excluded from the right of jointly adopting an unrelated child.

same-sex couples may benefit primarily from the negative aspects of the right to parenthood, but not from its positive aspects.⁹⁰

D. *Immigration Rights and “Family Unification”*

One of the areas which reflects 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)⁹¹ and family unification⁹² (*i.e.*, the 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). This Article will deal with the second type of immigration, family unification aimed at protecting the right to family life, in two main contexts: (1) the immigration rights of a foreign spouse, based on marriage; and (2) 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 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 a citizen to enjoy the benefits of family life in his or

⁹⁰ While joint adoption and surrogacy are largely restricted to a man and a woman who are a couple—thereby discriminating against single people—single women are no longer discriminated against as far as artificial insemination services are concerned. In 1997, the Supreme Court nullified a policy that discriminated against single women (including lesbians) in terms of unrestricted access to artificial insemination services, and equated between their rights with those of married women. *See* H.C. 2078/96, *Weitz v. Minister of Health, Takdin* (Supreme Court) 1997(1) 939. Therefore, the Supreme Court’s decision in *New Family* 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*.

⁹¹ 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 workers. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 158, 45th Sess., U.N. Doc. A/RES/45/158 (1990).

⁹² 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.

her own country.⁹³ If the foreign spouse of a citizen is not permitted to immigrate, then, in effect, the citizen 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.⁹⁴ The European Court of Human Rights (European Court) 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.⁹⁵ Nevertheless, the European 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.⁹⁶

The Supreme Court has also been asked to deliberate this issue in a series of cases. A comprehensive discussion regarding the discretion of the state in granting citizenship to the foreign spouse of an Israeli national is found in *Israel Stamka v. Minister of Interior*, which considered the reasonableness of the Ministry of Interior policy regarding the naturalization process for a non-Jewish foreign spouse married to a Jewish Israeli in a “mixed marriage.”⁹⁷ Under this policy, which had been in effect since 1995, a non-Jewish foreign spouse, who had married a Jewish Israeli citizen while illegally staying in Israel, was required to leave the country for several months during which the Ministry of Interior would check whether it was a fictitious or a genu-

⁹³ See Goran 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); see also Ryszard Cholewinski, *The Protection of the Right of Economic Migrants to Family Reunion in Europe*, 43 INT'L & COMP. L.Q. 568, 589 (1994); Hugo Storey, *The Right to Family Life and Immigration Case Law at Strasbourg*, 39 INT'L & COMP. L.Q. 328, 337 (1990).

⁹⁴ See Cholewinski, *supra* note 93, at 589; Cvetic, *supra* note 93, at 654–55; Storey, *supra* note 93, at 337.

⁹⁵ Courtney R. Howell, Note, *The Right to Respect for Family Life in the European Court of Human Rights*, 34 U. LOUISVILLE J. FAM. L. 693, 693–94 (1995–1996).

⁹⁶ See, e.g., *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471, 498 (1985) (Eur. Ct. H.R.) (ruling 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 concerning 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, e.g., *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 802 (Eur. Ct. H.R.) (1991); *Beldjoudi v. France*, App. No. 12083/86, 14 Eur. H.R. Rep. 801, 801 (Eur. Ct. H.R.) (1992).

⁹⁷ See *Stamka*, 53(2) P.D. at 990.

ine marriage.⁹⁸ Once the Ministry of the Interior determined that the marriage was authentic, the spouse would then be entitled to return to Israel in order to begin the naturalization process.⁹⁹ The naturalization process itself lasted many years and was preceded by a trial period for permanent residence.¹⁰⁰ The request for naturalization would only be discussed at the end of the trial period because marriage to an Israeli, in and of itself, does not grant a foreigner the right to naturalization (this lengthy process applies equally to a foreign spouse legally staying in Israel at the time that the marriage was performed).¹⁰¹ This policy was formulated as part of the discretion granted to the Minister of Interior by the Entry into Israel Law, 1952, (Entry into Israel Law) and the Nationality Law.¹⁰² 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 Israel at the time of the wedding.¹⁰³ Accordingly, it was ruled that Jews who are Israeli citizens could not impart a right of return to their non-Jewish spouses.¹⁰⁴ In this way, the Supreme Court denied the foreign spouse the benefit of acquiring citizenship by right of return, which bestows social rights such as an “absorption package.”¹⁰⁵ Nevertheless, the Supreme 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

⁹⁸ *Id.* at 783.

⁹⁹ *Id.* at 783–84.

¹⁰⁰ *Id.* at 763.

¹⁰¹ *Id.* 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. *See* The Nationality Law, 1952, 6 L.S.I. 50, § 1.

¹⁰² *See* The Entry into Israel Law, 1952, 6 L.S.I. 28, §§ 1–9; The Nationality Law, 1952, 6 L.S.I. 50, § 2.

¹⁰³ *Stamka*, 53(2) P.D. at 760.

¹⁰⁴ *See id.* at 764–66.

¹⁰⁵ *See id.* at 760.

the preservation of civil rights.”¹⁰⁶ This policy did not meet the test of proportionality and was therefore null and void.¹⁰⁷ The Supreme 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:

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 . . . :

“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 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.”¹⁰⁸

Insofar as it concerns the naturalization process, the Supreme Court has held that an immigrant who is a foreign spouse constitutes a special category, and therefore, his or her right to citizenship “is superior to the right of others.”¹⁰⁹ This, too, is based on the recognition of the fundamental right to family life.¹¹⁰

¹⁰⁶ *Id.* at 783.

¹⁰⁷ *See id.* at 778.

¹⁰⁸ *Stamka*, 53(2) P.D. at 781–82 (quoting HCJ 450/97 *Tenufa Ltd. v. Minister of Labor and Welfare*, P.D. 52(2) 433, 452).

¹⁰⁹ *Id.* at 790.

¹¹⁰ *See id.*

The naturalization of a spouse is regulated by Section 7 of the Nationality Law under the heading “Naturalization of Husband and Wife.”¹¹¹ 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).”¹¹² The main purposes of this provision, which allows flexibility in the requirements for a spouse’s naturalization, are to preserve the integrity of the family unit and avoid a disparity between the nationalities of the spouses.¹¹³ 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 Nationality Law—according to which naturalization is at the discretion of the Minister of Interior—also applies to the naturalization of a spouse.¹¹⁴

As Justice Cheshin explained in *Stamka*:

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. 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 7.¹¹⁵

¹¹¹ See The Nationality Law, 1952, 6 L.S.I. 50, § 7.

¹¹² *Id.*

¹¹³ See *Stamka*, 53(2) P.D. at 790; H.C. 754/83, Rankin v. Minister of Interior, 38(4) P.D. 113, 117.

¹¹⁴ See H.C. 4156/01, Dimitrov v. Minister of Interior, 56(6) P.D. 289; *Rankin*, 38(4) P.D. at 113.

¹¹⁵ *Stamka*, 53(2) P.D. at 792.

Justice Cheshin further ruled that, indeed, Section 7 of the Nationality Law does not eliminate the discretion granted to the Minister of Interior under Section 5(b).¹¹⁶ Rather, Section 7 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), in particular, the requirement of permanent residence in Israel.¹¹⁷ This ruling gives proper substance to Section 7, since its practical effect is to shorten the process by approximately six years and to ease significantly the naturalization of a foreign spouse.¹¹⁸

Thus, in *Stamka*, the Supreme Court nullified the policy of the Ministry of Interior whereby a foreign spouse would be deported for several months while the authenticity of the marriage was determined, as well as its policy of commencing naturalization application hearings only after the period of time required to grant the foreign spouse permanent resident status had elapsed. The Supreme Court reasoned 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.¹¹⁹

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 recognizing "the

¹¹⁶ See *id.* at 765.

¹¹⁷ See *id.* at 793. It should be noted that, following this case, the Ministry of Interior changed its policy. See H.C. 338/99, Sabri v. Minister of Interior, Takdin (Supreme Court) 1999(1) 154.

¹¹⁸ See *Stamka*, 53(2) P.D. at 793.

¹¹⁹ 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.C. 7139/02, Abbas-Batza v. Minister of Interior, Takdin (Supreme Court) 2004(1) 1266. 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 Mazal Mualem, *A Sympathetic Ear Can Make a Legal Difference*, HA'ARETZ ENGLISH EDITION, Apr. 7, 2003, available at <http://www.hotline.org.il/english/news/Haaretz040703.htm> (last visited Jan. 12, 2005).

powerful radiation that shines” from within the right.¹²⁰ This lack of uniformity is embodied in decisions of the Supreme Court regarding applications for family unification (*i.e.*, applications seeking permission from Israel to bring a non-resident spouse into the region, so to cohabit permanently with a resident spouse) by residents of the West Bank and Gaza Strip.¹²¹ In *Adel Ahmed Shahin v. Regional Commander of IDF Forces in the W. Bank*, the applicants, who lived in the Occupied Territories, claimed that 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.¹²² 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.”¹²³ 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 (Hague Regulations), 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.”¹²⁴ 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 took place 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.¹²⁵

The military government in the Occupied Territories limited the approval of family unification requests during the 1980s, since the military government no longer viewed such applications as authentic

¹²⁰ *Stamka*, 53(2) P.D. at 782.

¹²¹ *See, e.g.*, H.C. 673/86, *Al Saudi v. Head of the Civil Admin. in the Gaza Strip*, 41(3) P.D. 138; H.C. 263/85, *Awad v. Commander of the Civil Admin., Ramallah District*, 40(2) P.D. 281; H.C. 802/79, *Samara v. Reg’l Commander of the W. Bank*, 34(4) P.D. 1; H.C. 209/73, *Ali Odeh v. Minister of Interior*, 28(1) P.D. 13; H.C. 500/72, *Abu Al Tin v. Minister of Def.*, 27(1)P.D. 481.

¹²² H.C. 13/86, *Adel Ahmed Shahin v. Regional Commander of IDF Forces in the W. Bank*, 41(1) P.D. 197.

¹²³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art.27, 75 U.N.T.S. 287, *opened for signature* Aug. 12, 1949 [hereinafter Fourth Geneva Convention]. A similar provision may be found in Article 12 of the Universal Declaration of Human Rights, *supra* note 1, at 73–74.

¹²⁴ Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, art. 46, 36 Stat 2277, 2306–07, 205 C.T.S. 277, 295 [hereinafter Hague Regulations].

¹²⁵ *See* Yoram Dinstein, *Reunion of Families in the Administered Territories*, 13 IYUNEI MISHPAT 221, 227 (1988) [Hebrew].

requests, but rather as “a means for immigration into the regions.”¹²⁶ In order to attack this policy, the petitioners in *Shahin* relied on two legal opinions by experts in international law. These experts argued that the military government’s refusal to permit family unification was in violation of aforesaid Article 27 of the Fourth Geneva Convention and Article 46 of the Hague Regulations.¹²⁷ According to the legal opinion by Professor Brownlie of Oxford University, 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 27.¹²⁸ Brownlie concluded that this unjustified harm to family life constitutes a violation of a human rights norm that applies to Israel under customary international law.¹²⁹ According to the legal opinion of Professor 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.¹³⁰ Shelton pointed out that, in certain circumstances, preventing the entry of a foreigner into the territory of the state constitutes 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 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.”¹³¹

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.”¹³² Moreover, the Court ruled that “general principles have not been formulated that create a bind-

¹²⁶ *Shahin*, 41(1) P.D. at 214.

¹²⁷ *See id.* at 202–04.

¹²⁸ *Id.* at 202.

¹²⁹ *Id.*

¹³⁰ *Id.* at 204.

¹³¹ *Shahin*, 41(1) P.D. at 204.

¹³² *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, which states that “[t]he 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 125, at 227–28.

ing, 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.”¹³³

Therefore, in *Shahin*, the Supreme 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 Supreme 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.”¹³⁴

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 Israel up to the *Stamka* decision. This similarity is reflected in the fact that the Ministry of Interior, like the military government, did not view 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 Israel.¹³⁵ Nevertheless, 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. In contrast to *Stamka*—where the Supreme Court ruled that each case should be judged on its own merits, and nullified the general policy of deporting the foreigner from Israel until confirming the authenticity of the marriage—in *Shahin*, the Supreme Court ruled that an individual examination, on the merits, of each marriage-based family unification request in the Occupied Territories was not required.¹³⁶ The military government was entitled to treat the family unification requests as a general “phenomenon” of mass immigration and to implement general measures applicable to most such requests, in view of the “state of war” in the Occupied Territories.¹³⁷ Therefore, in view of the “general security, political and economic implications of

¹³³ *Shahin*, 41(1) P.D. at 210.

¹³⁴ *Id.* at 209.

¹³⁵ See *Stamka*, 53(2) P.D. at 767.

¹³⁶ Compare *id.* with *Shahin*, 41(1) P.D. at 214–15.

¹³⁷ *Shahin*, 41(1) P.D. at 215.

the phenomenon, and its consequences,” the Supreme Court approved the minimalist policy of the military government.¹³⁸

Regarding family unification in Israel, as opposed to family unification in the Occupied Territories, Justice Cheshin said in *Stamka*:

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.¹³⁹

In this same judgment, Justice Cheshin added that:

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 rec-

¹³⁸ See *id.* at 214–15.

¹³⁹ *Stamka*, 53(2) P.D. 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.C. 758/88, Kandel v. Minister of Interior, 46(4) P.D. 505, 518–20.

ognize—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.¹⁴⁰

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. 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 join a foreign spouse is at the mercy of the military government, which generally denies this right 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, "the nature of the right [to family life] is different."¹⁴¹ 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, more precisely, whether, apart from a declarative right, the residents of the Occupied Territories are granted any right whatsoever to family life. It seems 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, 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 interpreted as requiring family unification in the manner requested by the petitioners).¹⁴² This approach is puzzling in view of the Supreme 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."¹⁴³

In *Shahin*, the Supreme 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

¹⁴⁰ *Stamka*, 53(2) P.D. at 787.

¹⁴¹ *See id.* at 767.

¹⁴² *See* Fourth Geneva Convention, *supra* note 123, art. 27, 75 U.N.T.S. at 306; Hague Regulations, *supra* note 124, art. 46, 36 Stat. at 2306–07, 205 C.T.S. at 295.

¹⁴³ *Shahin*, 41(1) P.D. at 206.

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.”¹⁴⁴ The question is whether this reservation justifies the occupying state’s disregard for the rights of the residents of the occupied territory, rights enunciated at the beginning of the provision, especially since there must be a causal relation between the adoption of such measures of control and security and a state of war.¹⁴⁵ In *Shahin*, the respondent argued 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.”¹⁴⁶ 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 in some special circumstances. Furthermore, as the Supreme 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.”¹⁴⁷

The fundamental right to marriage, as 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.¹⁴⁸ A respect for the basic human right to family life should lead the courts to critically examine the discretion of the competent authorities and the reasonableness of their policies. Courts should hold, for example, that the rule of choice for family unification requests in the Occupied Territories be the opposite (whereby a hearing on the merits of each application is generally required, with automatic rejection only in exceptional cases).¹⁴⁹

¹⁴⁴ *Id.* at 209.

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 214.

¹⁴⁷ H.C. 4541/94, *Miller v. Minister of Def.*, 49(4) P.D. 94, 124.

¹⁴⁸ Regarding this right and its restriction, see *infra*, Part III.D.2; see also H.C. 1689/94, *Harari v. Minister of Interior*, 51(1) P.D. 15.

¹⁴⁹ 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 re-

Even if one accepts the Supreme Court's position—whereby, to the extent that it relates to the Occupied Territories, 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 Supreme Court to set a balance between the right 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 Supreme Court freed itself of the need to balance the different rights. Such a balance could have been expressed, as stated above, by requiring the military authorities to examine individually each request on the merits.¹⁵⁰ It is true that the provisions of the aforesaid conventions do not mandate that 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.¹⁵¹ Nevertheless, approval of a policy that sweepingly prohibits the immigra-

side 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.

Id. 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, H.C. 7052, 7082/03, Ass'n 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.

¹⁵⁰ For a similar criticism, see Dinstein, *supra* note 125, 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." *Id.*

¹⁵¹ Regarding the principle whereby the state has wide discretion to prevent foreigners from settling in its territory, see H.C. 482/71, Clark v. Minister of Interior, 27(1) P.D. 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.

Id.

tion 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 has recently censured this discriminatory practice, stating that it is “concerned about the practice of restrictive family reunification with regard to Palestinians, which has been adopted for reasons of national security.”¹⁵² As such, the UN 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.”¹⁵³

2. Immigration Rights Based on the Parent-Child Relationship

With respect to the right of children to settle in 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.¹⁵⁴ Apart from these categories, the law does not expand the circle of eligibility to other family members, such as children born to a foreign spouse within a previous marriage to a spouse who was not an Israeli citizen.¹⁵⁵ *Harari v. Minister of Interior* concerned two Burmese nationals who had requested permission to remain in Israel in order to live together with their mother, who was an Israeli citizen.¹⁵⁶ The *Harari* children were 19 and 21 years old at the time that the petition was

¹⁵² Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. ESCOR, 30th Sess., para. 18, U.N. Doc.E/C.12/1/Add.90 (2003), available at [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) (last visited Jan. 12, 2005) [hereinafter Concluding Observations].

¹⁵³ *Id.* ¶ 34.

¹⁵⁴ See The Nationality Law, 1952, 6 L.S.I. 50, § 4(a), stating

[T]he 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).

Id. 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. See The Law of Return, 1950, 4 L.S.I. 114, § 4(a).

¹⁵⁵ See The Nationality Law, 1952, 6 L.S.I. 50, § 4(a).

¹⁵⁶ See *Harari*, 51(1) P.D. at 17.

filed and, during their stay in Israel, their father, who lived in Burma, had passed away.¹⁵⁷ Accordingly, in their petition, they claimed that they had no other home than their mother's home in Israel.¹⁵⁸ The Ministry of Interior does not give permits for permanent residence to foreign adults requesting to be near Israeli family members, except for elderly parents of Israeli nationals who remain alone and isolated in their country of residence.¹⁵⁹ The Supreme Court approved this policy and ruled that adult children are not entitled to permanent residence in Israel simply because their mother is an Israeli national.¹⁶⁰ The Supreme Court thus rejected the petitioners' argument and held that—to the extent that it concerns adult children—the Basic Law does not mandate giving extra weight to the right of a mother and her children to live together.¹⁶¹

The issue of the right of a parent to settle in 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 v. Minister of Interior*, the petitioners argued, *inter alia*, that since their minor daughter was entitled to the visa of an *oleh* (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.¹⁶² The Supreme Court rejected this argument, holding that a minor's right also does not encompass the rights of the parents:

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).¹⁶³

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 18–19.

¹⁶⁰ *Id.* at 20.

¹⁶¹ *See generally id.* (interpreting the Basic Law).

¹⁶² *See Kandel*, 46(4) P.D. at 518.

¹⁶³ *Id.*

In *Dimitrov v. Minister of Interior*, the petitioner was a foreigner married to an Israeli national, with whom he had a minor daughter, born in Israel.¹⁶⁴ 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.¹⁶⁵ The petitioner requested to continue the naturalization process on the basis of his marriage, but the Supreme Court rejected this argument because of the disintegration of the marital relationship leading up to the petition.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ The Supreme Court rejected the petition, holding that, in principle, the nationality of the child does not

¹⁶⁴ *Dimitrov*, *supra* note 114, ¶ 290.

¹⁶⁵ *Id.* ¶ 291.

¹⁶⁶ In this context, the Supreme Court held that from the moment the marital relationship between the couple had, for all intents and purposes, broken down, there were no grounds 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. *See id.* ¶ 7.

¹⁶⁷ *See Dimitrov*, *supra* note 114, ¶ 293.

¹⁶⁸ 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* A.P. 529/02, *Bornea v. Minister of Interior*, Takdin (District Court) 2003(3) 7058.

¹⁶⁹ *Dimitrov*, *supra* note 114, ¶ 2.

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.¹⁷⁰

Bornea v. Minister of Interior 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.¹⁷¹ The petition raised 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.¹⁷² In this case, 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.¹⁷³ 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 should allow for the existence of an appropriate, regular, and continuous relationship between the child and his parents, and should not hinder this relationship, even if one parent is not an Israeli national and does not have a lawful status in Israel.¹⁷⁴ The District Court, sitting as a court for administrative matters, interpreted the petition as a request to introduce a new criterion—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 after the marriage had dissolved.¹⁷⁵ In rejecting the petition, the District 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.¹⁷⁶ The District Court further ruled that the legal

¹⁷⁰ *Id.* ¶ 9.

¹⁷¹ *Bornea*, *supra* note 168, ¶ 744.

¹⁷² *See id.*

¹⁷³ *See id.* ¶ 757.

¹⁷⁴ *See id.* ¶ 760.

¹⁷⁵ *See id.* ¶ 16.

¹⁷⁶ *Bornea*, *supra* note 168, ¶ 25.

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. The Court stated:

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.¹⁷⁷

Therefore, in the conflict between the best interests of the child and Israel's immigration policy, the District Court held that the state interest is preferred.

Time and again, it seems that these and other state interests prevail over the right to family life, without the latter receiving the proper consideration due to it as a fundamental constitutional right. In *Bornea*, the District Court did not properly consider the grave harm to the interests of the minor, the son of the petitioner, resulting from the negation of the petitioner's lawful status in Israel, and which would apparently lead to a severance in the relationship between the petitioner's son and his father. The ruling that, in the circumstances of the case, the state interest superseded the best interests of the child is puzzling, particularly in light of the principle set forth by the Supreme Court whereby "there is no judicial matter regarding minors where the best interests of the minor are not the paramount concern."¹⁷⁸ 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.¹⁷⁹ 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

¹⁷⁷ *Id.* ¶ 31.

¹⁷⁸ C.A. 549/75, *John Does v. Attorney General*, 30(1) P.D. 459, 465.

¹⁷⁹ *See* C.A. 5532/93, *Gunsburg v. Greenwald*, 49(3) P.D. 282, 291.

well as the right of parents to raise their children, as these rights have been recognized in both Israeli and international law. On more than one occasion, the Supreme Court has ruled that the right of parents to raise their children is a fundamental constitutional right:

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 . . . —between parents and their children.¹⁸⁰

Furthermore:

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. 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 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.¹⁸¹

The family bond also establishes rights for the child:

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

¹⁸⁰ *Jane Doe II*, 38(1) at 466–67 (referring to Justice Cheshin’s opinion in in CA 50/55, at p. 799).

¹⁸¹ C.A. 3798/94, *John Doe v. Jane Doe*, 50(3) P.D. 133, 155 (internal citation omitted).

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.¹⁸²

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.¹⁸³ 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."¹⁸⁴ In a similar fashion, Article 10(1) 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.¹⁸⁵ Furthermore, Article 14(2) 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."¹⁸⁶

The European Court 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: "[f]rom 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."¹⁸⁷

¹⁸² *John Does*, 49(1) P.D. at 255.

¹⁸³ See *Bornea*, *supra* note 168, ¶ 28.

¹⁸⁴ Convention on the Rights of the Child, *supra* note 10, art. 9(3), 1577 U.N.T.S. at 47.

¹⁸⁵ *Id.* art. 10(1), 1577 U.N.T.S. at 48.

¹⁸⁶ *Id.* arts. 14(2), 18(1), 1577 U.N.T.S. at 49, 50.

¹⁸⁷ *Berrehab v. The Netherlands*, App. No. 10730/84, 11 Eur. H.R. Rep. 322, 329 (1988) (Eur. Ct. H.R.).

Moreover, and despite the fact that the European Convention does not apply to Israel, it is noteworthy that several decisions of the European Court of Human Rights, handed down on the basis of Article 8 of the European Convention, the facts of which 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. *Berrehab v. The Netherlands* concerned a Moroccan national married to a Dutch woman, whose daughter was born in the Netherlands.¹⁸⁸ As in the *Bornea* case, the father had been given a permit to stay in the Netherlands based on his marriage. When the couple divorced, the Dutch immigration authorities refused to extend the residence permit, and the father was subsequently deported.¹⁸⁹ 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 European Convention, and that the separation from the child forced on the parent constituted a violation of the “right to family life,” as specified in Article 8 of the European Convention.¹⁹⁰ In a similar fashion, *Ciliz v. The Netherlands* 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.¹⁹¹ Following the couple’s divorce, the husband’s permit to stay was not extended. 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:

¹⁸⁸ *Id.* at 323.

¹⁸⁹ *Id.*

¹⁹⁰ *See id.* at 329; *Al-Nashif v. Bulgaria*, 36 Eur. H.R. Rep. 37 (2002) (Eur. Ct. H.R.), 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 Recommendation 4 of the Committee of Ministers to Member States on the Legal Status of Persons Admitted for Family Reunification*, 790th Meeting of the Ministers’ Deputies, app. 3, at 36 (Mar. 26, 2002):

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.

Id.

¹⁹¹ *Ciliz v. The Netherlands*, App. No. 29192/95, Eur. Ct. H.R. (July 11, 2000).

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.¹⁹²

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. Nevertheless, it is not at all obvious why the strength of the bond between a minor and his or her parent is weaker than the bond between spouses; it seems only proper that the former right be accorded protection in the same manner and to the same degree as the latter.¹⁹³ Since the Ministry of Interior and the courts in Israel have determined that the marital bond mandates the granting of residential status in Israel to a foreign spouse who is married to an Israeli citizen, there is no justification for a policy negating such status when the bond is parental. In this context, Israel should adopt the arrangement set forth by international law, whereby, in the case of a separation between a couple with common children, the state refrains from deporting a foreign parent and grants him or her lawful status as part of its commitment to protecting the bond between parent and child.

III. 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: “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a fam-

¹⁹² *Id.* ¶ 61.

¹⁹³ See generally Briefs of The Association of Civil Rights, *Bornea* (making a similar argument).

ily.”¹⁹⁴ Article 23(2) of the Covenant on Civil Rights states that: “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.”¹⁹⁵ Article 10(1) of the Covenant on Social Rights reiterates what is 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.”¹⁹⁶ A combined reading of these provisions reveals the centrality of the right to marriage in the context of the right to family life. In the spirit of these documents, Israel, like most western nations, also grants the highest degree of protection and recognition to the traditional nuclear family, 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, and pension rights). 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 marriage embodies the normative family unit deserving of various state benefits. Nevertheless, even within this narrow framework, the state imposes various limitations on the right to marry.

In most western countries, as in 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 prohibition of marriage between same-sex partners).¹⁹⁷

1. 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,

¹⁹⁴ Universal Declaration of Human Rights, *supra* note 1, art. 16(1), at 74.

¹⁹⁵ Covenant on Civil Rights, *supra* note 2, art. 23(2), 999 U.N.T.S. at 179.

¹⁹⁶ *Id.* art. 23(3), 999 U.N.T.S. at 179; Covenant on Social Rights, *supra* note 2, art. 10(1), 993 U.N.T.S. at 7.

¹⁹⁷ An additional limitation specific to Israel, which will be discussed further on in this Section, is the lack of a possibility to marry in a civil ceremony.

and, in a civilized society, one waits for the development of the personality—*i.e.*, attributes of mind and body—before permitting marriage.”¹⁹⁸ 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),¹⁹⁹ 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.”²⁰⁰ 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.”²⁰¹ 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 establish a minimum age in order to ensure that this consent is, in fact, given freely.²⁰² 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.²⁰³ The aforesaid conventions do not specify the minimum age required, 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.²⁰⁴

The principle of a minimum age for marriage is also enshrined in the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, a special international convention which Israel has signed.²⁰⁵ This Convention reiterates the principle expressed in the Universal Declaration of Human Rights and states, in Article 2, that:

¹⁹⁸ C.A. 4736/94, *Angel v. Attorney General, Takdin* (Supreme Court) 1994(3) 319; see SHIFMAN, *supra* note 46, at 150.

¹⁹⁹ Universal Declaration of Human Rights, *supra* note 1, art. 16(1), at 74.

²⁰⁰ Covenant on Civil Rights, *supra* note 2, art. 23(2), 999 U.N.T.S. at 179.

²⁰¹ Convention on the Elimination of Discrimination Against Women, *supra* note 11, art. 16(2), 1249 U.N.T.S. at 20.

²⁰² See Luke T. Lee, *Population: The Human Rights Approach*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 327, 336 (1995).

²⁰³ See *id.*

²⁰⁴ OFFICE OF THE U.N. HIGH COMM'R FOR H.R. & THE DEP'T FOR ECON. & SOC. AFFAIRS, *supra* note 72, at 9.

²⁰⁵ See C.A. 501/81, *Attorney General v. Jane Doe*, 35(4) P.D. 430, 433–34 [hereinafter *Jane Doe III*].

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.²⁰⁶

In Israel, this matter is regulated by the Marriage Age Law, 1950 (Marriage Age Law). Until 1998, this statute specified the age of seventeen as the minimum age of marriage for women.²⁰⁷ For men, however, no minimum age of marriage was specified.²⁰⁸ 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 seventeen, 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.”²⁰⁹ According to the amended statute, the performance of a marriage ceremony for a young boy or girl under the age of seventeen constitutes a criminal offense punishable by two years imprisonment.²¹⁰ 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.²¹¹ Nevertheless, Section 5 of the Marriage Age Law specifies two alternative grounds for a court to permit an underage marriage. The first case arises when a young girl has become pregnant by, or has given birth to the child of, the person she is asking to marry, or when a young boy wants to marry a woman who

²⁰⁶ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art. 2, 521 U.N.T.S. 231, 234, *opened for signature* Dec. 10, 1962. In this matter, see *Jane Doe III*, 35(4) P.D. at 433–34.

²⁰⁷ See Marriage Age Law, 1950, 4 L.S.I. 158 (original version). As explained by Shalev, *supra* note 86, at 468, “[i]n 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.”

²⁰⁸ See Marriage Age Law, 1950, 4 L.S.I. 158 (original version).

²⁰⁹ See The Proposed Marriage Age (Amendment No. 4) (Marriage Age for a Young Boy) Law, 1998, H.C. 2728 (5758), 426. The Bill was passed by the Knesset on July 28, 1998.

²¹⁰ See *id.*

²¹¹ The sanction does not have the force to annul the marriage, provided that it is valid under the personal law applying to the parties. Section 3 of the statute, *id.* at 426, provides grounds for dissolving a marital relationship that has been performed in violation thereof. See SHIFMAN, *supra* note 46, at 150.

has become pregnant with, or has given birth to, his child.²¹² The second case, also applicable to both the marriage of a young boy and the marriage of a young girl, arises when the girl or boy has reached the age of sixteen and, in the court's opinion, there are special circumstances that justify granting such permission. The statute does not specify, however, exactly what these "special circumstances" are.²¹³ The Israeli Report to the UN Committee regarding the implementation of the Covenant on Social Rights indicates that, while the percentage of marriages between young girls under the age of 17 and adult men averaged about 48% between the years 1975–1979, by 1993 this number stood at about 10%.²¹⁴ Nevertheless, the marriage of minors in Israel is still an ongoing phenomenon—albeit, on the decline—in spite of the Marriage Age Law and the criminal sanctions imposed therein.²¹⁵

2. 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.²¹⁶ Nevertheless, the prohibition is not limited to religious law and should not be viewed only as a religious norm; it is accepted in all civilized societies and has rational justifications that suffice on their own.²¹⁷ For instance, one of the explanations for this prohibition is based on genetics and the fear that children born to people who are related by blood

²¹² See Proposed Marriage Age (Amendment No. 4) (Marriage Age for a Young Boy) Law, 1998, H.C. at 426–27.

²¹³ See *id.* The Supreme Court has laid down various guidelines regarding such circumstances. Among other considerations, the Supreme 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 Supreme 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." *Jane Doe III*, 35(4) P.D. at 435–36.

²¹⁴ ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, ¶ 358.

²¹⁵ See *id.*

²¹⁶ See Shalev, *supra* note 86, at 471. In Jewish Law, incestuous marriages are null and void and the offspring are considered *manzerim* (the plural form of the Hebrew term, *manzer*; see definition given *supra* note 61).

²¹⁷ Amnon Rubinstein, *The Right to Marriage*, 3 IYUNEI MISHPAT 433, 437–38 (1973) [Hebrew].

are liable to be afflicted with various genetic defects.²¹⁸ 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.²¹⁹

3. Prohibition of Bigamy

The prohibition against multiple marriages is designed to uproot customs accepted in traditional societies that harm the status of women.²²⁰ If we accept the definition 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.²²¹ 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.”²²² Since matters of marriage and divorce in Israel are governed by religious law, the legislature cannot declare bigamous marriages 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).²²³ Nevertheless, the legislature does take steps to eliminate the phenomenon by means of criminal sanctions.²²⁴ Accordingly, Section 179 of the Penal Law states that the criminal prohibition does not apply to the second marriage of a Jewish man who has received permission to remarry from a Rabbinical Court (an option not available to a woman, who is an *agunah*, or “chained woman,” who, in Jewish Law, is bound in marriage by a husband who refuses to grant a divorce or 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.²²⁵

²¹⁸ See *id.* at 438–39.

²¹⁹ See SHIFMAN, *supra* note 46, at 186–87.

²²⁰ See Shalev, *supra* note 86, at 469–70; SHIFMAN, *supra* note 46, at 155 n.1.

²²¹ Rubinstein, *supra* note 217, at 434–35.

²²² Penal Law, 1977, Special Volume L.S.I. 50, § 176.

²²³ See Shalev, *supra* note 86, at 469–70.

²²⁴ ISRAELI REPORT TO THE U.N. COMMITTEE, *supra* note 35, ¶ 359.

²²⁵ Penal Law, 1977, Special Volume L.S.I. 50, § 180.

4. Prohibition of Marriage Between Same-Sex Partners

Until recently, the institution of marriage had been defined and perceived as being limited to the relationship between a man and a woman, without 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.²²⁶ So far, the only countries that have recognized same-sex marriages are the Netherlands, Belgium, Canada (in Ontario, British Columbia, and Quebec), and one U.S. state (Massachusetts), and in other countries throughout the world there is an ongoing legal and public struggle for such recognition.²²⁷ Many countries recognize same-sex couples as a family and, in differing measures, extend various provisions to them that apply to married couples.²²⁸ 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,²²⁹ the case law of the Family Court and the District Court negates such recognition.²³⁰ 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.²³¹ Nevertheless, it seems that as long as religious law exclusively governs matters of marriage and divorce in Israel, the legislature cannot be expected to rec-

²²⁶ See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 49 (University of Chicago Press 1989).

²²⁷ See YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* (2002) [hereinafter MERIN, *EQUALITY FOR SAME-SEX COUPLES*]; Yuval 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 Judicial Court held that the prohibition of same-sex marriages fails the basic test of rationality, ruling that “[w]ithout 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. Dep’t of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003) (internal quotation omitted).

²²⁸ See generally MERIN, *EQUALITY FOR SAME-SEX COUPLES*, *supra* note 227 (presenting a comparative study of legal regulation of same-sex partnerships worldwide).

²²⁹ *Danielowitz*, 48(5) P.D. at 781; *Berner-Kadish*, 54(2) P.D. at 368.

²³⁰ See, e.g., *Jane Doe I*, *supra* note 34.

²³¹ See MERIN, *EQUALITY FOR SAME-SEX COUPLES*, *supra* note 227, at 278–307.

ognize the rights of gays and lesbians to marry. If and when, however, the barriers to civil marriage are removed, as mandated by the international conventions that Israel has signed, 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 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 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 begun in the 18th and 19th centuries with the end of the Church's monopolistic jurisdiction and the introduction of civil marriage.²³² Israel is one of the only democratic countries in the world where personal law is still exclusively governed by religious law.²³³ Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, (Rabbinical Courts Jurisdiction Law) provides that: "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law."²³⁴ The 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

²³² Rubinstein, *supra* note 217, at 433.

²³³ For a discussion of the historical reasons for the subordination of personal law to religious law, see SHAVA, *supra* note 46, at 69–75. For an analysis of the implications of the historical compromise regarding the status of women in Israel, see Judith Buber Agassi, *The Status of Women in Israel*, in *THE DOUBLE BIND: WOMEN IN ISRAEL* 210 (1994) [Hebrew].

²³⁴ Regarding the application of religious law to members of other religious communities in Israel, see Palestine Order in Council, arts. 52, 54, 64, in 2 *LAWS OF PALESTINE* 432–33, 435 (Mosen Doukhan ed., 1934).

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. Second, 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). Third, 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,²³⁵ 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.²³⁶ 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.²³⁷

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. The purpose of this statute is "to lay down principles for the guarantee of full equality between men and women,"²³⁸ and, indeed, the statute pro-

²³⁵ See Frances Raday, *On Equality*, 24 MISHPATIM 241, 266 (1994) [Hebrew]; Shalev, *supra* note 86, at 460.

²³⁶ Shalev, *supra* note 86, at 460; see, e.g., *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."

²³⁷ See H.C. 47/82, *Israel Movement for Progressive Judaism v. Minister of Religious Affairs*, 43(2) P.D. 661; PINHAS SHIFMAN, WHO IS AFRAID OF CIVIL MARRIAGE? 13–15 (2d ed., 2000) [Hebrew]; ESTHER SIVAN, DIVORCE IN ISRAEL AND THE STATUS OF WOMEN—THE BUILDING OF INEQUALITY AND ALTERNATIVES FOR A SOLUTION 37 (2002) [Hebrew]; 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) (comparing, with respect to divorce, the secular family law of the United States with the religious family law of Israel).

²³⁸ The Women's Equal Rights Law, 1951, 5 L.S.I. 171, § 1.

vides 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”.²³⁹ Nevertheless, the reservation in Section 5, whereby the statute “shall not affect any legal prohibition or permission relating to marriage or divorce,” in effect, renders it meaningless and actually reinforces the discrimination against women prevailing in religious law.²⁴⁰

The laws of marriage and divorce regulate three different areas: (1) the manner of entering into a marriage, from the perspective of form and capacity; (2) the system of rights and duties constituting the substance of a marriage; and (3) the manner in which a marriage is dissolved.²⁴¹ In all three areas, provisions of Jewish religious law are discriminatory against women.²⁴² 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, and so forth). 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*.²⁴³ 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.²⁴⁴ It should be further noted that the Rabbinical Courts are

²³⁹ *Id.* § 1(A)(a).

²⁴⁰ *Id.* § 5. For a discussion of Section 5 of the statute and the background to its enactment, see H.C. 49/54, Melcham v. Sharia Judge, Aco Region, 8 P.D., 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 AMNON RUBINSTEIN & BARAK MEDINA, 1 CONSTITUTIONAL LAW IN THE STATE OF ISRAEL 316 (5th ed., 1997) [Hebrew].

²⁴¹ Shalev, *supra* note 86, at 459–60.

²⁴² 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 RUBINSTEIN & MEDINA, *supra* note 240, at 316; Shalev, *supra* note 86, at 461. 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, *supra* note 86, at 461; see also SHAHAR LIFSHITZ, A CIVIL REORIENTATION IN ISRAELI FAMILY LAW 7 (2002); ROSEN-ZVI, *supra* note 46, at 225–28.

²⁴³ ROSEN-ZVI, *supra* note 46, at 138–39.

²⁴⁴ See ROSEN-ZVI, *supra* note 46, at 138–39.

very reluctant to coerce a husband to deliver a *get*.²⁴⁵ 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.²⁴⁶

The UN Committee has censured this discriminatory practice, stating that:

The Committee expresses concern about the fact that the Jewish religious courts' interpretation of personal status law with respect to divorce is discriminatory as regards women, especially the regulation that allows the husband to remarry 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 take 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.²⁴⁷

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).²⁴⁸ 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.²⁴⁹ Moreover, the relative bargaining power of the wife is inferior to that of the husband.²⁵⁰ The problem of *aginut* (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.²⁵¹ Matters are further complicated

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Concluding Observations, *supra* note 151, ¶¶ 23, 39.

²⁴⁸ SCHERESCHEWSKY, *supra* note 34, at 59, 346.

²⁴⁹ ROSEN-ZVI, *supra* note 46, at 137.

²⁵⁰ *Id.*

²⁵¹ Another practice that may lead to the *aginut* 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 *chalit-*

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).²⁵² 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.²⁵³

The property arrangements between the spouses prior to the divorce reflect further discrimination. 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 parties²⁵⁴—studies by the National Insurance Institute indicate that the level of maintenance payments in judgments by the Rabbinical Courts is thirty percent lower than that in those handed down by the civil courts.²⁵⁵

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.²⁵⁶ 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 when the marriage has been effectively over for many years.²⁵⁷ The later the resources balancing takes place, the greater the bargaining power of the husband.²⁵⁸

zah is required in a case of *yibbum* (for an explanation of these terms, see *infra* note 264). For a discussion of this subject, see ROSEN-ZVI, *supra* note 46, at 252.

²⁵² ROSEN-ZVI, *supra* note 46, at 142.

²⁵³ *Id.* 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., Takdin (Family Court) 2003(1) 126.

²⁵⁴ See generally The Family Law Amendment (Maintenance) Law, 1959, 13 L.S.I. 73 (dictating the applicable law for maintenance disputes).

²⁵⁵ SIVAN, *supra* note 237, 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 46, at 144–58.

²⁵⁶ The Spouses (Property Relations) Law, 1973, 27 L.S.I. 313, § 5.

²⁵⁷ See *id.*

²⁵⁸ ROSEN-ZVI, *supra* note 46, at 156–57; SIVAN, *supra* note 237, at 19–21.

2. Discrimination Against Additional Groups

In addition to the discrimination against women, the application of religious law in matters of marriage and divorce also discriminates against several other groups. The exclusive application of religious law leads to a situation in which persons belonging to these groups are completely unable to get married in Israel. The groups that are harmed include, first of all, those persons without a religion and those persons whose religious community is not recognized.²⁵⁹ Second, 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).²⁶⁰ Under Jewish Law, a marriage between a Jew and a non-Jew is *void ab initio*.²⁶¹ 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 Israel. The impediments to marriage may be classified into three categories, according to their consequences:²⁶² (1) 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;²⁶³ (2) doubtful marriages in which there is a question as to the validity of the marriage (which may arise, for example, in a case of a private marriage or a civil marriage that has been performed abroad), and where, be-

²⁵⁹ 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. See SHIFMAN, *supra* note 237, at 13.

²⁶⁰ Rubinstein, *supra* note 217, at 440.

²⁶¹ Shalev, *supra* note 86, 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, 23 L.S.I. 274. This statute also applies to those persons without a religion or members of an unrecognized religious community. See *id.* Nevertheless, 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 & MEDINA, *supra* note 240, at 300; Menashe Shava, *Rules of Jurisdiction and Conflict of Law in Matters of Dissolution of Marriage*, 1 IYUNEI MISHPAT 125, 141–42 (1971) [Hebrew].

²⁶² See Shalev, *supra* note 86, at 476.

²⁶³ See SHIFMAN, *supra* note 46, 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, *supra* note 86, at 479.

cause of this doubt, the wife requires a *get* in order to remarry;²⁶⁴ and (3) prohibited marriages that are retroactively valid—this 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.²⁶⁵ 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.²⁶⁶ They, too, are unable to realize their right to marry and to establish a family in Israel.²⁶⁷

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.²⁶⁸

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 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

²⁶⁴ See Shalev, *supra* note 86, 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. See *id.*

²⁶⁵ For additional prohibitions included in this category, see SCHERESCHEWSKY, *supra* note 34, at 56–60.

²⁶⁶ Joseph Algazy, *A Marriage of Inconvenience*, HA'ARETZ ENGLISH EDITION, Jan. 21, 2002, available at <http://www.interfaithfamily.com/article/issue81/algazy.phtml> (last visited Jan. 12, 2005).

²⁶⁷ See *id.*

²⁶⁸ 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 217, at 443–49.

freedom of conscience and freedom from religion.²⁶⁹ 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.²⁷⁰

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.²⁷¹ 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.”²⁷² The Covenant on Civil Rights also provides for equality of rights within the context of marriage. According to Article 23(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.”²⁷³ 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: “[t]he 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 Cove-

²⁶⁹ Justice Landau in H.C. 80/63, *Gurfinkel v. Minister of Interior*, 17(3) P.D. 2048; Justice Berenson in H.C. 287/69, *Miron v. Minister of Labor*, 24(1) P.D. 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 & MEDINA, *supra* note 240, at 190–95; SHIFMAN, *supra* note 237, at 7–19.

²⁷⁰ RUBINSTEIN & MEDINA, *supra* note 240, 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).

²⁷¹ In this matter, see *supra* Part IV. A.

²⁷² Universal Declaration of Human Rights, *supra* note 1, art. 16(1), at 74.

²⁷³ Covenant on Civil Rights, *supra* note 2, art. 23(4), 999 U.N.T.S. at 179.

nant.”²⁷⁴ 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) provides as follows:

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:

The same right to enter into marriage;

The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

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.²⁷⁵

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

²⁷⁴ Covenant on Social Rights, *supra* note 2, arts. 3, 2(2), 993 U.N.T.S. at 5, 5.

²⁷⁵ For a discussion of this provision, including the reservations of Israel, see *infra*, Part IV. D.

origin, race, and religion. Article 2(2) of the Covenant on Social Rights specifies an open list of prohibitions against discrimination (“or other status”),²⁷⁶ 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,”²⁷⁷ 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.”²⁷⁸

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 do not find an explicit requirement for the implementation of civil marriage.²⁷⁹ 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. The General Comment of the Committee on Human Rights of 1990 expressly notes 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.”²⁸⁰ 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.²⁸¹ 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 Israel are incompatible with the fundamental human right to marry and to establish a family as rec-

²⁷⁶ Covenant on Social Rights, *supra* note 2, art. 2(2), 993 U.N.T.S. at 5.

²⁷⁷ Covenant on Civil Rights, *supra* note 2, arts. 2(1), 26, 999 U.N.T.S. at 173, 179.

²⁷⁸ Universal Declaration of Human Rights, *supra* note 1, art. 16(1), at 74.

²⁷⁹ See Covenant on Social Rights, *supra* note 2, art. 2(2), 993 U.N.T.S. at 5; Covenant on Civil Rights, *supra* note 2, arts. 2(1), 26, 999 U.N.T.S. at 173, 179; Universal Declaration of Human Rights, *supra* note 1, art. 16(1), at 74.

²⁸⁰ General Comment 19, *supra* note 25, art. 4.

²⁸¹ See Marsha A. Freeman, *The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women's Convention*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 149, 157 (Julie Peters & Andrea Wolper eds., 1995).

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. *Id.*

ognized and accepted in the international sphere.²⁸² Israeli law in matters of marriage and divorce, therefore, gravely harms the possibility for many people to realize fully 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 Israel infringes on the right to marriage by applying religious law are as follows: (1) negation of the right to marry for persons without a religion and members of unrecognized religious communities; (2) restriction of the possibility for mixed marriages between spouses of different religions; (3) restriction of the right to marry for persons disqualified for religious marriage; and (4) a violation of the equality between women and men within the context of the institution of marriage.

The questions, therefore are, first, 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 those provisions concern the prohibition against discrimination on the basis of national origin, race, and religion. And, second, to what degree is Israel in breach of 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 those provisions concern the prohibition against discrimination on the basis of sex. It has been argued that Israel is in breach of Article 16 of the Universal Declaration of Human Rights 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).²⁸³ It has been claimed that the prohibition of discrimination should only attach to the subjects of the right—men and women—and not to the right itself.²⁸⁴ This interpretation is unacceptable, since it is incompatible with the wording of this provision and is liable to render it meaningless.²⁸⁵ As for Article 16(1) of the Convention on the Elimination of Discrimination against Women and Article 23 of the Cove-

²⁸² See Rubinstein, *supra* note 217, at 442 n.20.

²⁸³ See generally Y. Z. Blum, *Israel Marriage Law and Human Rights*, 22 HA'PRAKLIT 214 (1966) [Hebrew].

²⁸⁴ See *id.*

²⁸⁵ See Rubinstein, *supra* note 217, at 440–41.

nant on Civil Rights, Israel has given notice that it has reservations regarding these provisions, insofar as they are incompatible with the personal law binding upon the religious communities in Israel.²⁸⁶ These reservations run contrary to the subject matter and purpose of these instruments—the prevention of discrimination against women, even under the laws of personal status.²⁸⁷ 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 Israel’s international commitments. 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 the 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 harm the individual’s right to marry.²⁸⁸ The aforesaid international instruments also provide for the right of equality between the spouses, not only in the creation of the marriage, but also in its dissolution. Therefore, the right to marry freely (free from the restrictions of religious law or, in other words, the right to civil marriage) also includes the right to civil divorce.

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

²⁸⁶ See *L.S.*, *supra* note 253.

²⁸⁷ See *id.* 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*, U.N. GAOR, 52 Sess., Supp. No. 38 para. 173, U.N. Doc. A/52/38/Rev.1 (1997); see also Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT’L L. & FOREIGN AFF. 339, 345–46 (2000).

²⁸⁸ 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. 2106 (XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, art. 5, U.N. Doc. A/6014 (1966), 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 217, at 443.

three stages of marriage: its creation, its content, and its dissolution. 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. Except for Israel, however, all Western nations that have signed the conventions grant such recognition alongside 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 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 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."²⁸⁹ Therefore, *prima facie*, 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.²⁹⁰ Such a claim would be untenable for several reasons. First, 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. The responsibility of the member states to implement the rights is dependent on the amount of resources at their disposal,²⁹¹ which has no relevance concerning the nature of marriage. Second, the Committee for the Implementation of the Covenant on Social Rights has interpreted Article 4 very narrowly.²⁹² Third, even if such a claim was accepted, then 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).²⁹³

²⁸⁹ Covenant on Social Rights, *supra* note 2, art. 4, 993 U.N.T.S. at 5.

²⁹⁰ *See id.*

²⁹¹ *See* Yuval Shany, *Economic, Social and Cultural Rights in International Law: What Use May the Israeli Courts Make of Them?*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ISRAEL (Yuval Shany & Yoram Rabin eds., forthcoming 2005) [Hebrew].

²⁹² *Id.*

²⁹³ 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 provides that the states may derogate from the principles of the Covenant on Civil Rights in a time of national emergency which threatens the existence of the nation. Even in such a situation,

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.²⁹⁴ 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.²⁹⁵ 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,”²⁹⁶ of the right to family life is the right to marry freely, and, if we interpret “marriage” as “civil marriage,” 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 where for some of the rights—those rights the implementation of which entails an investment of resources—the pace of implementation may be progressive.²⁹⁷ Nevertheless, where it is possible to grant the right without a need for resources—even when it is enunciated in the Covenant on Social

however, they are prohibited from discriminating on the basis of “colour, race, sex, language, religion or social origin.” Covenant on Civil Rights, *supra* note 2, art. 4, 999 U.N.T.S. at 174. 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.” Covenant on Civil Rights, *supra* note 2, art. 18, 999 U.N.T.S. at 178. 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.

²⁹⁴ See B.B. von Maydell, *The Impact of the EEC on Labor Law*, 68 CHI.-KENT. L. REV. 1401, 1404 (1993); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 12 (2001).

²⁹⁵ James Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 91–92 (Gregory H. Fox & Brad R. Roth eds., 2000).

²⁹⁶ See generally Shany, *supra* note 291.

²⁹⁷ See CRAVEN, *supra* note 50, at 136.

Rights—it must be granted immediately.²⁹⁸ 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. 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 marry freely in 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 Professor Rubinstein: “[f]rom the 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.”²⁹⁹ Nevertheless, in this context, it is not necessary to resolve the conflict between the values of Israel as a democratic country and its values as a Jewish state, since the “validity of laws” provision in the Basic Law precludes Section 1 of the Rabbinical Courts Jurisdiction Law from being declared unconstitutional.³⁰⁰ Moreover, on more than one occasion, the Supreme Court has ruled that the solution of the problem of the right to marriage in Israel is out of its hands:

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

²⁹⁸ See *id.*; 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 which do not entail significant financial cost. See generally General Comment 3, *supra* note 53; Shany, *supra* note 291.

²⁹⁹ RUBINSTEIN & MEDINA, *supra* note 240, at 991.

³⁰⁰ See The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. 139, § 1.

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?³⁰¹

Furthermore:

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.³⁰²

In *Efrat*, Justice Barak ruled that:

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 should not be expected to order the introduction of civil marriage, and the Court has consistently refused to do so.³⁰³

³⁰¹ C.A. 373/72, *Tepper v. State of Israel*, 28(2) P.D. 7, 15; see also AHARON BARAK, JUDICIAL DISCRETION 213–14 (1987).

³⁰² *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. See generally C.A. 8256/99, *Jane Doe v. John Doe*, 58(2) P.D. 213 (addressing the issue). The Supreme 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 Supreme Court reiterated its position, stating that the legislature should address this question and find a solution for it. See *id.* at 229–30.

³⁰³ *Efrat*, 47(1) P.D. at 788–89; see also C.A. 450/70, *Rogozhinsky v. State of Israel*, 26(1) P.D. 129.

In view of these rulings, it seems that the demand for the introduction of civil marriage in Israel should be directed at the legislature.³⁰⁴ It is highly doubtful, however, 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 from religious marriage in Israel.³⁰⁵

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. Nevertheless, 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, there is clearly 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. This discrimination is primarily expressed in regard to the right to immigrate to 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 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 and prohibitions regarding incest and bigamy), the additional limitations

³⁰⁴ Regarding various proposals for legislative reform, see SIVAN, *supra* note 237; SHIFMAN, *supra* note 237, at 52–69.

³⁰⁵ See Shahar Ilan, *New Legislation Proposes Civil Marriage Under Another Name*, at http://www.bambili.com/bambili_news_en/katava_main.asp?news_id=2090&sivug_id=2 (June 10, 2004) (last visited Jan. 12, 2005); Yuval Yoaz & Gideon Alon, *NRP Threatens to Bolt Gov't if Couple Registration Bill Passed*, at <http://www.unitedjerusalem.org/index2.asp?id=470287&Date=7/26/2004> (July 26, 2004) (last visited Jan. 12, 2005).

on the right to marry, imposed by Israeli law, constitute a breach of Israel's international commitments.

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 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 a marriage free from the fetters of religious law, is by legislative reform that would permit civil marriage. The proper arrangement 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.