

## COMPARATIVE MODELS FOR TRANSITIONING FROM RELIGIOUS TO CIVIL MARRIAGE SYSTEMS IN LIGHT OF INTERNATIONAL HUMAN RIGHTS NORMS

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Speaking in June 2008 at a conference on constitutions and marriage at Bar-Ilan University School of Law, former Chief Justice Aharon Barak stated his opinion that the public discourse in Israel about marriage is very poor, and that the time has come for change. He also observed that Israeli family law is very complicated, and that the law is constantly in flux. Justice Barak noted that when it comes to family law in Israel, “you never wash in the same river twice.”

According to Justice Barak, the primary challenge facing family law in Israel is the absence of civil marriage. This results in many anomalies, based in large part upon Israel’s status as an immigrant nation. For example, with over one million immigrants from Russia in the past decade, Israel has seen an influx of newcomers who are not by definition Jewish (because they have non-Jewish mothers). These individuals often serve in the Israeli armed forces, but are not able legally to marry under Jewish law. This raises problems under both Israel’s Basic Law and under international human rights norms.

Justice Barak noted that there are two primary objections to recognizing civil marriage in Israel. The first reason is rooted in nationalism – the fear that if Israel recognizes civil marriage, Israel will lose its Jewish identity. Barak noted that in America there are liberal policies regarding civil marriage, and one result has been that most children of Jews are not raised within the faith. He cited a Rabbi who observed that while he had met many Reformed Jews, he had never met a grandchild of a Reformed Jew.

The second, related reason for opposing civil marriage is religious – if civil marriage is recognized, then with it comes recognition of civil divorce, which raises the prospect that divorce laws for religious and civil marriages will diverge. This raises particularly urgent issues with regard to the definition of illegitimacy. This paper takes up Justice Barak’s invitation to broaden the conversation about the need in Israel to transition from an exclusively religious model for marriage and divorce to a model that includes civil marriage and divorce. The paper will do this by engaging in a comparative analysis of other legal systems that have undergone a transition from religious to civil marriage, and by considering the requirements and standards of international human rights norms. While a legal outsider such as I cannot hope to understand the complexities and nuances of Israeli family law, it may be possible to contribute in a modest way to the public discourse by focusing on comparative law and international human rights materials.

The comparative law dimension of this paper will be based in large part by an analysis of the transition to from a religious to a civil law paradigm for regulating marriage and divorce in Turkey as well as perhaps one or two other countries. Justice Barak noted that Israel’s marriage law was based upon legal structures that existed in Turkey, where the concern was with protecting the Muslim majority. There, family law was based upon Shari’a, but there were exceptions for Russians who were Orthodox Christians. In Turkey, the law governing marriage and divorce has transitioned to a civil system, whereas in Israel there is still no provision for civil law marriage. As justice Barak put it, “we are the old Turks.”

The international law dimension of the paper will be based in large part on an analysis of the jurisprudence of the European Court of Human Rights. Over the past two decades, the ECHR has developed a sophisticated and complex jurisprudence on a large range of human rights issues, including issues involving family law. While this jurisprudence is quite respectful of national differences, and affords a significant “margin of appreciation” to national law, the Court has set some clear benchmarks that nations must meet in order to comply with the terms of the European Convention on Human Rights. These provisions regarding family law matters are quite similar to those of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Looking to this jurisprudence can provide guidance to countries such as Israel who are seeking to find mechanisms for implementing a civil marriage option that meets international human rights standards.

This paper will not propose a solution to the marriage and divorce conundrums facing Israel. Its ambition is far more modest: to provide some comparative and international law analogues that may be helpful as Israel seeks to find solutions that will be uniquely responsive to the legal and cultural context that exists in Israel.