

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

**Brett G. Scharffs¹
Suzanne Disparte²**

FAMILY LAW IN A MULTICULTURAL ENVIRONMENT:
CIVIL AND RELIGIOUS LAW IN FAMILY MATTERS

ISFL Regional Conference
Bar-Ilan University School of Law
Centre for the Rights of the Child and the Family, Sha'arei Mishpat Law College
Tel-Aviv (and nearby locations), Israel
June 7-9, 2009

[Preliminary draft of June 5, 2009
Please do not cite or quote without permission of the authors]

I. Introduction

A. You Never Wash in the Same River Twice

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.”³

As Americans and outsiders, who are not experts on family law, we do not propose to describe this river in detail, nor do we propose to prescribe how it should be channeled or maintained. We come with the perspective of comparative law scholars whose primary work is in the area of law and religion. It is with the hope that we will not be mere meddlers, and with a desire to

¹ Professor of Law, J. Reuben Clark Law School, Brigham Young University; Associate Director, International Center for Law and Religion Studies. B.S.B.A., M.A., Georgetown University, B.Phil Oxford University, J.D. Yale Law School. Comments and suggestions are welcome at scharffsb@law.byu.edu or by phone, 801-422-9025. Thanks to the conference organizers and to Megan Grant for research assistance. Copyright © Brett G. Scharffs and Suzanne Disparte 2009.

² J.D. 2008, J. Reuben Clark Law School, Brigham Young University. Publications Project Manager, International Center for Law and Religion Studies, BYU Law School. I would like to express special thanks to Quinn.

³ Justice Barak’s presentation has not been published. The account given here is based upon contemporaneous notes taken by our colleague Lynn Wardle.

contribute in some small way to the public discourse, that we approach this complex area with a certain fear and trembling and a rather acute case of vertigo.

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 legal outsiders such as us do not 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.

B. Roadmap

We focus here on three points of comparison: Turkey, the United Kingdom, and International Human Rights norms as articulated in the jurisprudence of the European Court of Human Rights.

In part II we briefly describe the legal framework governing marriage, divorce and family law in Israel. We will describe what we call the marriage conundrum that exists in Israel, where there is a framework of religious marriage for Orthodox Jews, certain Muslims, some Christians, and Druze, but no direct mechanism for civil marriage. This creates a familiar set of anomalies and problems.

Part III focuses on Turkey. 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."

Part IV focuses on the United Kingdom. The United Kingdom is a useful point of comparison because it is a state that transitioned from a Christian model of marriage to a civil model, but where there is still a special role for the Established Church of England. There is also a historical and legal connection between Israel and the United Kingdom dating back to the days of the British Mandate.

Part V focuses on international human rights norms governing marriage and family life. 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 laws, 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 that are seeking to find mechanisms for implementing a civil marriage option that meets international human rights standards.

Part VI contains a few observations and suggestions. 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.

Part VII is a brief conclusion.

II. Israel

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 many of whom 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.

A. The Legal Framework for Marriage and Family Law in Israel

Constraints of time and space allow only for the briefest summary of the legal framework governing marriage and family law in Israel. For purposes of present analysis, the key defining feature of the situation in Israel is the overlay of religious and secular law governing marriage and other family law matters. While the laws of marriage and divorce are governed exclusively by religious law, most other aspects of family law (including maintenance, child custody, adoption, and succession) are regulated by substantive secular law.⁴

B. The Court System in Israel

Israel has a well developed civil court system with municipal courts, magistrates’ courts, district courts, and the Supreme Court.⁵ In addition, there is a network of tribal and religious courts

⁴ Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. Int’l & Comp. L. Rev. 79, 80-81.

⁵ Andrew Treitel, *Conflicting Traditions: Muslim Shari’a Courts and Marriage Age Regulation in Israel*, 26 Colum. Hum. Rts. L. Rev. 403, 408 (1995).

recognized by the government. There are four officially-sanctioned religious court systems: Rabbinical (Jewish); Shari'a (Muslim), Christian, and Druze.⁶

The Rabbinical courts have exclusive jurisdiction over marriage and divorce of Jewish citizens and residents.⁷ The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 provides that “[m]arriages and divorces of Jews shall be performed in Israel in accordance with religious law” and that the rabbinical courts shall have exclusive jurisdiction in these matters over Jews who are residents or nationals of Israel.⁸

Muslim religious courts have exclusive jurisdiction over all matters of personal status of Muslims (whether citizens or foreigners subject to religious courts in their home jurisdictions), including adoption and inheritance.⁹ There are Christian religious courts spread among nine recognized Christian denominations in Israel, which have exclusive jurisdiction over marriage, divorce, and alimony for their community members.¹⁰ “Under the Druze Religious Courts Law the Druze courts were also granted exclusive jurisdiction over marriage and divorce of citizens. If granted consent by all parties, the courts also have jurisdiction over inheritance and personal status issues.”¹¹

C. Issues and Anomalies

Justice Barak noted that there are two primary objections to recognizing civil marriage in Israel.

1. National Identity and Unity

The first reason is rooted in nationalism – the fear that if Israel recognizes civil marriage, Israel will lose its Jewish identity.¹² This argument, based upon unity and national identity, has been subject to harsh criticism. For example, Daniel Friedmann has argued, “The ‘unity’ represented by this approach is based upon two elements, compulsion and exclusion. Those who are

⁶ Treitel, *supra* note __, at 411.

⁷ Treitel, *supra* note __, at 411, citing Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, S 1,7 L.S.I. 139 (1953). As explained by Treitel, “Exclusive jurisdiction was also granted for alimony decisions even if filed in proceedings unconnected to divorce proceedings. Rabbinical court jurisdiction is not exclusive for personal status matters such as guardianship or administration of property. For complete control over these matters, these courts need the consent of all parties concerned. The Rabbinical courts also have jurisdiction under the Adoption of children Law, and the Succession Law. There is a Rabbinical Court of Appeals which sits in Jerusalem.” *Id.* at 411-12 (internal citations omitted).

⁸ Daniel Friedman, *Perpetual Dilemma* book review, 92 *Harv. L. Rev.* 952, 956 (1979).

⁹ Treitel, *supra* note __, at 412.

¹⁰ Treitel, *supra* note __, at 412. “Similarly, with consent, the Christian courts may proclaim jurisdiction over personal matters of foreigners with the single limitation that they cannot decree the dissolution of foreign subjects’ marriages.” *Id.* (internal citations omitted).

¹¹ Treitel, *supra* note __, at 413 (internal citations omitted).

¹² See, e.g., S. Zalman Abramov, *Perpetual Dilemma* (Jerusalem: World Union for Progressive Judaism, 1976), at 194 (citing examples that religious marriage and divorce laws protect national unity and national identity).

regarded as belonging to the group are required to follow the religious rules; those who are either unwilling, unable, or unqualified under religious rules to participate are excluded.”¹³

The problems associated with compulsion, disqualification and exclusion are significant.

There are several categories of people who are precluded from marrying under Israeli law.¹⁴ These include:

- (i) Those who do not identify with any religion.
- (ii) Those who belong to a religious community that is not recognized.¹⁵
- (iii) Those who want to enter into a mixed marriage involving spouses who belong to different religious communities (unless the personal law of both parties recognizes such marriages).¹⁶
- (iv) Those who belong to a recognized religious group who do not qualify for marriage within the rules of that group.¹⁷

Friedmann observes that the vast majority of Jews reside outside of Israel under systems of civil marriage. “If there is to be a split between those who live under such a system and those who recognize only religious marriage, then there must also be a schism between Jewish society in Israel and the Diaspora. Yet no one seriously maintains that there must be such a rift,”

¹³ Friedmann, *supra* note __, at 956. Friedman cites as an example, the Jewish Karaite community, which is excluded from getting married because the Orthodox Rabbis do not recognize as valid the manner of Karaite divorce (*get*). *Id.* at n.21.

¹⁴ The following list of those disqualified from getting married in Israel is adapted from Merin, *supra* note __, at 135.

¹⁵ This includes not only anyone who is not a Christian, Muslim, Jew, or Druze, but also anyone who may consider themselves as being a part of any of these categories who is not recognized by the religious courts as belonging to those groups.

¹⁶ “Under Jewish law, a marriage between a Jew and a non-Jew is *void ab initio*. Merin, *supra* note __, at 135 (citation omitted). The personal law of the Protestant faith and the Karaite community permit mixed-marriages. *Id.*

¹⁷ This means, for example, “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.” Merin, *supra* note __, at 135, n.259 (citation omitted). Merin identifies three categories of such impediments to marriage: “(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; (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, because of this doubt, the wife requires a *get* in order to remarry; 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. 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.” Merin, *supra* note __, at 136 (citations omitted).

Friedman argues.¹⁸ Anticipating this line of argument, Justice 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.¹⁹ He cited a Rabbi who observed that while he had met many Reformed Jews, he had never met a grandchild of a Reformed Jew. So perhaps the concern about a loss of Jewish identity is valid.

2. Multiple Systems of Regulation

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.

Here the arguments for a unitary approach are even more tenuous, since the existing marriage system in Israel is already what might be described as a crazy-quilt of overlapping rules and jurisdictions and exceptions to the religious marriage rules. While the laws governing marriage and divorce are governed by religious law, other aspects of family law such as maintenance, child support, adoption and succession are governed by civil law.²⁰

Even in the area of marriage and divorce, which is exclusively under the jurisdiction of religious law, a number of caveats must be noted. While the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 provides that “Marriages and divorces of Jews shall be performed in Israel in accordance with religious law,” and that the Rabbinical Courts shall have exclusive jurisdiction over marriage of Jews, a variety of exceptions have emerged.

¹⁸ Friedmann, *supra* note __, at 956 (citation omitted).

¹⁹ [see if we can find some sociological data on this.]

²⁰ One way of addressing this overlap in jurisdiction is to simply expand the jurisdiction of the rabbinical courts, strengthening the exclusive role of the courts even further. Such a proposal was made as recently as May 2009 in the form of a government bill that would give rabbinical courts exclusive authority to hear all suits stemming from divorces concluded in a rabbinical court, including suits concerning financial and custody matters. Though rabbinical courts have decided such cases in the past, the High Court of Justice determined that they did not have legal authority to do so, and current law therefore requires that suits stemming from a divorce be filed in civil court. According to a recent Israeli news article, “Proponents of the bill say this ruling created an absurd situation, in which the rabbinical courts approve divorce settlements but then have no power to enforce them. Opponents of the bill argue that granting the rabbinical courts such broad powers would essentially create two parallel court systems, one religious and one civil, and would violate the status quo on questions of religion and state. They also say this would seriously undermine women’s rights, especially of women whose husbands refuse to divorce them.” Yair Ettinger, *Justice Minister pushes bill to extend rabbinical courts’ authority*, HAARETZ, May 18, 2009, available at <http://www.haaretz.com/hasen/spages/1086222.html>.

There are several possibilities available to those who are prohibited from marrying under religious law. These include: (1) renouncing an earlier marriage and seeking another that conforms to religious law; (2) in the case of mixed marriage, converting to Orthodox Judaism or having one's partner convert; or (3) to circumventing the "official" system, by one of the following means: (i) entering into a civil marriage abroad; (ii) entering into a de facto marriage; (iii) having a "private" religious ceremony in Israel;²¹ and (iv) having a non-Orthodox religious ceremony abroad.²²

The Supreme Court has ruled that a couple married abroad, even if it is a mixed couple, is entitled to have its marriage registered in Israel.²³ The route of circumvention, option three described above, is the most common, which suggests that the "unity" the Rabbinical Courts Jurisdiction Law "was expected to create has not materialized."²⁴ The legislature has responded by enacting special legislation to deal with de facto marriages,²⁵ as well as legislation enabling couples who do not belong to any recognized religious community to obtain a divorce.²⁶

Thus, it is not really accurate to describe the existing system as one that is unitary or unifying. As the existing system has evolved to accommodate existing social realities, a number of exceptions to the rule of exclusive religious marriage have been made.

One result of this system is a common "jurisdictional race" to the courthouse between spouses eager to be the first to file suit in anticipation of divorce, at either the Rabbinical Courts (which men are said to generally prefer) and the Family Courts (which women are said to generally prefer).²⁷

²¹ Friedmann notes, "Under Jewish law, a marriage may be valid although the ceremony was not supervised by a rabbi, provided that the rules pertaining to the ceremony were observed." Friedmann, *supra* note __, at n.24..

²² See Funk Schlesinger v. Minister of Interior, 17 P.D. (1) 225 (1963). Friedmann explains that the "question of the validity of a mixed marriage of an Israeli couple performed abroad was left open, registration not being conclusive on this point. In any event, such marriages are recognized for the purpose of registration and the couple will at least enjoy the rights of a de facto married couple." Friedmann, *supra* note __, at n.26 (citations omitted).

²³ Daniel Friedman, Perpetual Dilemma book review, 92 Harv. L. Rev. 952, 957 (1979).

²⁴ Daniel Friedman, Perpetual Dilemma book review, 92 Harv. L. Rev. 952, 958 (1979).

²⁵ Friedmann explains that the term "reputed spouse" and "reputed wife" is often used in these statutes.

Friedmann, *supra* note __, at n.27, citing Friedman, The "Unmarried Wife" in Israeli Law, in 2 Israel Yearbook on Human Rights 287 (1972).

²⁶ Law of July 17, 1969 (2 Av 5729), Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, cited in Friedmann, *supra* note __, at n.28. Friedmann notes that while this law enables mixed couples and couples who do not belong to any recognized religious community to obtain a divorce, the law does not apply "where both spouses are Jews, Moslems, Druze, or members of the Christian communities which maintain a religious court in Israel." *Id.* § 1(b).

²⁷ See, e.g., Yuval Merin, The Right to Family Life and Civil Marriage Under International Law and its Implementation in the State of Israel, 28 B.C. Int'l & Comp. L. Rev. 79 (2005), at 134. ("Matters are further complicated by what is known as the 'jurisdictional race,' i.e., the race between eh 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)." (citation omitted)).

III. Turkey

A. A Brief History and Legal Framework for Marriage and Family Law in Turkey

The official doctrine of the Ottoman Empire was the Hanafi school of Sunni Islam, and the empire operated under Shari'a (Islamic law).²⁸ However, codes of Western origin were periodically adopted and incorporated by the Empire throughout the Nineteenth Century.²⁹ These changes in the legal system, though made in the interest of modernization, were considered complementary and not contrary to Shari'a.³⁰

By the early 1900s most of the laws governing the Empire had come to reflect Western models.³¹ Family law was the single exception to this change, remaining entirely governed by Shari'a.³² As one author observed, "[Family law] has always represented the very heart of the Shari'a and has been the most critical issue confronting the forces of tradition and change in the Muslim world."³³ Nevertheless, this accumulation of changes in Ottoman law toward Western models laid a foundation for the success and sustainability of the Revolution of the 1920's.³⁴ The result of that accumulation was that the adoption of the Swiss Civil Code as the governing law (the 1926 Code) of the new Turkish society was not a dramatic upheaval but simply the next step in a century-long process of legal reform.³⁵ Mahmut Esat Bozkurt, Justice of Minister at the time, argued in his "General Justification for the Proposed Law" that this departure from Shari'a was necessary to the progression of the Turkish Republic because "laws based on religion were inherently rigid, immutable, stagnant and incapable of meeting the changing needs of society."³⁶

As most other areas of law had already been codified under Western models prior to the Revolution, family law would presumably be the primary area of change under the 1926 Code. In reality, the Swiss Civil Code was modified and adapted so that family law under the 1926 Code was in many ways identical to or at least in harmony with family law under Shari'a, so the departure was not as abrupt as one might have thought.³⁷

²⁸ Paul J. Magnarella, The Reception of Swiss Family Law in Turkey, Vol. 46, No. 2 Anthropological Quarterly 100, 101 (Apr. 1973).

²⁹ C.J. Hamson, The Istanbul Conference of 1955, Vol. 5 No. 1 International and Comparative Law Quarterly 26, 29-30 (Jan. 1956).

³⁰ Magnarella, *supra* note 287, at 102.

³¹ *Id.* (Magnarella 102)

³² *Id.* (Magnarella 102)

³³ *Id.* (Magnarella 102)

³⁴ Hamson, *supra* note 28, at 30.

³⁵ *Id.* (Hamson) at 29.

³⁶ Seval Yildirim, Aftermath of a Revolution: A Case Study of Turkish Family Law, 17 Pace Int'l L. Rev. 347, 358 (Fall 2005).

³⁷ *Id.* at 359.

For example, the requirement under Islamic law that a widow must wait 300 days after her husband's death or the divorce or annulment before remarrying appeared without alteration in the Turkish adaptation of the Swiss Code.³⁸ The family structure also remained patriarchal under the 1926 Code, requiring, for example, that women obtain permission from their husbands to work outside the home, and giving control over any property coming into the family to the husband though the wife maintained some right to property she brought into the family herself.³⁹

Nevertheless, there were some changes within family law. The most fundamental change was the fact that religious ceremonies no longer had any legal validity.⁴⁰ A civil marriage must be performed or no legally binding marriage existed at all.⁴¹ A civil ceremony required that a government official conduct a service with two witnesses present in which the two parties verbally agreed to marry.⁴² Another significant change was the abrogation of polygamy.⁴³ Though permitted under Islamic law, polygamy was not widely practiced in Turkey by the early 1900s and was therefore not a point of great resistance when abandoned in the law.⁴⁴ Other significant changes included the provisions for divorce. Under Islamic law the husband had absolute and unilateral privilege regarding divorce and could dissolve a marriage without cause, simply by verbalizing his intent to do so.⁴⁵ The 1926 Code made divorce available only through the court system, thereby abolishing the husband's option of mere verbalization, and also made spouses equally entitled to divorce.⁴⁶ The grounds for divorce were made applicable to both spouses on an equal basis.⁴⁷ This change was a tremendous step forward in the status and treatment of women.

Even with these changes, family law maintained its basic Islamic character under the 1926 Code. This combination of creating zeal among the people for a revolutionary, progressive law while actually maintaining much of Muslim law and custom is likely a large part of why the Turkish introduction of the Swiss Code was successful.⁴⁸ It is questionable whether the 1926 Code would have been accepted had the change in family law been too drastic or fundamentally offensive to Islam in any way.⁴⁹ After all, though the Revolution claimed to cast

³⁸ *Id.* at 361.

³⁹ *Id.* at 359.

⁴⁰ Magnarella, *supra* note 27, at 103.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Yildirim, *supra* note 35, at 357.

⁴⁴ Hamson, *supra* note 28, at 36-37.

⁴⁵ Magnarella, *supra* note 27, at 102.

⁴⁶ Yildirim, *supra* note 35, at 357-358.

⁴⁷ Yildirim, *supra* note 35, at 358.

⁴⁸ *Id.*

⁴⁹ *Id.*

off the Islamic nature of the Ottoman past in the name of making Turkey a modern and civilized nation⁵⁰, religious identity with Islam was, and remains, a prominent feature of Turkish identity, and that religious identity did not become noticeably less important in practice even with the changes in the law.⁵¹ Indeed, one of the reasons for adopting the Swiss Law given in the Justification was that it would operate well in a largely homogenous republic such as Turkey.⁵²

Indeed, for years after the adoption of the Swiss Code, the majority of Turkish people, particularly in rural areas, did not obtain a civil marriage because they saw no need.⁵³ Many felt that a religious ceremony was sufficient and even more respectable than a civil marriage.⁵⁴ In addition, dissolution of a marriage through a religious divorce could be done easily and respectably, whereas civil divorce required for civil marriages was expensive and more complicated.⁵⁵ Other inconvenient obstacles also contributed to the low number of civil marriages, such as the necessity of a birth certificate or the requirement of a physical examination when applying for a civil marriage.⁵⁶ This failure to obtain a civil marriage perhaps reflected a failure to understand the legal significance of civil marriage within the reformed legal system and the fact that no marriage was valid in the eyes of the state unless it conformed to civil marriage requirements. It was in the wake of World War II and the Korean War that civil marriage began to take root among the Turkish people.⁵⁷ Wives of servicemen were eligible for a “separation allowance,” and many who had married only in a religious ceremony now discovered that as far as the state was concerned, they had never been married and must be married civilly in order to claim the allowance.⁵⁸ Modern tax benefits available to married persons also encouraged increased recognition of the legal significance of civil marriage.⁵⁹

By 1955, a study of one village in rural Turkey revealed that 91% of married couples had had both a religious ceremony and a civil ceremony.⁶⁰ The conductor of the study, Ibrahim Yasa, observed that “Apparently the girl’s family wants the civil marriage so that in case of divorce or separation their daughter can claim her rights.”⁶¹ However, in the eyes of the community it was still the religious ceremony that morally united the betrothed.⁶² A second study of the same village fourteen years later in 1969 showed that the religious ceremony and the civil ceremony

⁵⁰ *Id.* at 358-359.

⁵¹ *Id.* at 357.

⁵² *Id.* at 363.

⁵³ Hamson, *supra* note 28, at 36.

⁵⁴ *Id.* at 37.

⁵⁵ *Id.* at 37.

⁵⁶ Magnarella, *supra* note 27, at 103-104.

⁵⁷ Hamson, *supra* note 28, at 38.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Magnarella, *supra* note 27, at 104.

⁶¹ *Id.*

⁶² *Id.*

had now come to be viewed as equal in importance.⁶³ Today, couples wishing to celebrate their marriage with a religious ceremony typically do so after they have already completed the requisite civil ceremony.⁶⁴

One of the difficulties created by two decades of marriages not registered with the state was that of illegitimate children. Recognizing this problem, but believing that the people simply needed a transitional period to adapt to the new system of law⁶⁵, the government made provision for the legitimization of children during the transition from Islamic law to Code by passing legislation with such effect in 1933, 1945, and 1950.⁶⁶

The years since the establishment of the 1926 Code have shown the Code to be stable but moldable. Attempts to revise the code in 1951, 1971, 1974, 1976 and 1984 were rejected by parliament.⁶⁷ In 1998 a new draft finally received approval and the proposed law replaced the 1926 Code in 2002. The changes made in the Civil Code of 2002 were primarily in the area of family law and aimed at creating greater gender equality as well as replacing Arabic words for Islamic terms in the Code with Turkish words.⁶⁸

B. Possible Insights from the Turkish Model

One author noted of Revolutionary Turkey that “The reality facing the nation building elite was a climate where even the most anti-Islamic minded reformists had to negotiate with the representatives of a people who very much defined themselves around their religion.”⁶⁹ This statement resonates in Israel, but perhaps in application to both camps – the religious and the non-religious – rather than to only one or the other. Those individuals not belonging to the Orthodox Jewish faith find themselves in a nation founded in large measure on Orthodox Jewish identity. While seeking basic religious and human rights of their own, they must therefore also be mindful and respectful of the predominant religious tradition, to “negotiate” through thoughtful discourse. On the other hand, those political and religious leaders belonging to the Orthodox Jewish faith may also need to recognize the realities of Israeli society as it currently is—realities that may require some change—and also engage in thoughtful discourse to address those realities within the legal system.

The Turkish provision for civil marriage in the 1926 Code allowed for an orderly system that could regulate important aspects of society affected by family law, such as taxes, government

⁶³ *Id.*

⁶⁴ <http://www.weddings-abroad-guide.com/turkey-wedding-ceremony.html>

⁶⁵ Hamson, *supra* note 28, at 38.

⁶⁶ Magnarella, *supra* note 27, at 103.

⁶⁷ Yildirim, *supra* note 35, at 364.

⁶⁸ *Id.*

⁶⁹ *Id.* at 363.

aid, legitimacy, etc., while still leaving the predominant faith free to continue according to its tenets and precepts. The added layer of civil marriage did not destroy the religious identity of the people but simply codified rules of family law seen to be necessary for a healthy and orderly society, such as a minimum age of consent. The religious customs and rites surrounding marriage were left untouched and those customs and rites continued to be practiced and embraced by the people. Having observed the Turkish experience, Israeli leaders might work to develop a system of family law that will provide order and regulation for the thousands of individuals and their children who are currently excluded by the law, but which at the same time will respect and protect the religious freedoms, traditions, and identity of Israeli Orthodox Jews. We do not presume to prescribe the content of such a system of law, but rather to point to the great need for discourse among those who know the laws, culture and dynamics of Israel well and who are in a position to prescribe effective legal solutions.

There may be concern on the part of some about the “slippery slope” phenomenon – the fear that providing for civil law marriage will open the door to a host of unwanted results. However, the Turkish model can be instructive on this point as well. As mentioned, the 1926 Code proved to be stable but moldable. Revisions to the law were rejected as unnecessary or undesirable for approximately 70 years after the law was established. Only when parliament found proposed changes necessary and acceptable was the law molded to fit the need. Until that time, the Turkish government opted to let society transition and adjust to the new law, making ancillary laws and provisions to aid in that process of transition. On the other hand, because the Code was indeed amendable, the Turkish government could arguably have made larger changes and revisions to the law had it discovered that the law was not serving Turkish society well or producing the results it was expected to produce. The Turkish example illustrates that even a move to an exclusively secular system for regulating marriage and divorce need not be disruptive of religious identity and tradition. No doubt, there was a shift in power, away from the religious courts to the civil, but this did not bring with it a marked decline in religious identity or affinity. As members of the various parts of Israeli society continue to actively engage in the public discourse and the development of the law, this discourse can act as a guiding hand upon the law, ensuring that Jewish culture and identity are respected within the laws while at the same time allowing basic religious and human rights for others.

IV. United Kingdom

A. A Brief History and Legal Framework for Marriage and Family Law in the United Kingdom

Until the mid 1700s, marriage law fell under the exclusive jurisdiction of the Church of England

and its ecclesiastical courts.⁷⁰ In medieval times, a marriage was considered to have validly taken place when two people who were legally free to marry uttered wedding vows.⁷¹ Observing the ease with which a marriage could be formed, the Church determined to better regulate marriage by imposing several formalities.⁷² Publicity of marriage was considered “necessary to the order and good government of society.”⁷³ New rules therefore required that marriage vows be made in public and be solemnized by a priest.⁷⁴ However, many evaded this rule, opting instead for a “clandestine marriage.”⁷⁵ One significant reason for clandestine marriage was religious objection. That is, since marriage fell under the province of the Church and therefore only Anglican clergymen were authorized to perform marriages, individuals belonging to other religious groups were compelled to seek clandestine marriages if they wished to be married under the rites of their own faith.⁷⁶ Others who wished to avoid public marriage included domestic servants, who risked dismissal if their marriage was known to their master, and also individuals whose union was discouraged or forbidden because of differences in age, social status, religion, or for other cause.⁷⁷ Many simply sought to avoid the fee required for public marriages.⁷⁸

These widespread clandestine marriages were opposed by many, including wealthy parents who feared undesirable channeling of property and inheritance, clerics who stood to lose the income they could gain by performing marriages, and lawmakers who pointed to the difficult tangles in property rights that would result from clandestine marriages.⁷⁹ Efforts were made again and again to pass a law that would restrain clandestine marriage. All proposals were defeated, however, until the Marriage Act of 1753, or Lord Hardwicke’s Marriage Act.⁸⁰ This Act constituted the first ever intervention of the state into marital regulation.⁸¹

The Marriage Act of 1753 required that “with an exception for persons professing to be Quakers or Jews, all marriages must be celebrated in a parish church or chapel of the Church of England within prescribed daylight hours, after the required publication of banns⁸² and in accordance with the form of words found in the Office of Matrimony in the Book of Common

⁷⁰ Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 *S. Cal. Rev. L. & Women’s Stud.* 1 (Fall 2001).

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ James Muirhead, *Notes on the Marriage Laws of England, Scotland, and Ireland* 29 (1862).

⁷⁴ *Id.*

⁷⁵ Lord, *supra* note 69, at 4.

⁷⁶ *Id.* at 5.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 6-7.

⁸⁰ *Id.* at 7.

⁸¹ *Id.* at 8.

⁸² For a description of the publication of banns, see Lord, *supra* note 69, at 3.

Prayer. Entries had to be made in an official parish register. Thus, Protestant dissenters and Roman Catholics were compelled to marry according to the Anglican rite, or not at all.” Clandestine marriages were no longer valid under the Act.

As one might expect, the Act did not escape criticism. Some predicted that the law would cause “flight from marriage, declining population, increasing fornication and illegitimacy.”⁸³ Others pointed to the confusion it caused by putting into question the validity of many existing marriages.⁸⁴ Those not belonging to the Church of England opposed the virtual monopoly given to the Church by the Act.⁸⁵ The wealthy simply continued to evade the law by traveling outside of England to be married, a practice that continued for nearly a century until legislation was passed to make such marriages invalid unless inconvenient requirements were met.⁸⁶

It was not until 1836, however, that opposition to the law arising from several fronts culminated in the passage of a new Act. The impetus of this change stemmed partly from the growth of the Methodist and Baptist congregations, joining with other groups, such as Protestant non-conformists, Roman Catholics, and those with no religious affiliation, none of whom were allowed exemption from the law.⁸⁷ The result of combined lobbying on the part of these groups was the Marriage Act of 1836, which still serves as the fundamental framework of marriage law in the United Kingdom today.⁸⁸

The Marriage Act of 1836 left intact the provisions for Anglican marriages for those who desired to be married within that religious tradition, while allowing others to marry according to the rites of their own faith upon obtaining certificate and license from civil registrars – a newly formed office.⁸⁹ Secular marriages were also made available for those with no religious belief. With the passage of this Act “citizens had a choice of religious or civil marriage, and the registration of marriages became a civil act, rather than an ecclesiastical exercise.”⁹⁰

The United Kingdom currently recognizes four types of marriage ceremonies under the Consolidated Marriage Acts of 1949-1986, which build upon the framework of the Marriage Act of 1836.⁹¹ The first is a Church of England ceremony, the second are Jewish and Quaker ceremonies conducted according to the rites of those faiths, the third are ceremonies of religious groups other than the Church of England, Jewish or Quaker, and the fourth are secular

⁸³ Lord, *supra* note 69, at 8.

⁸⁴ *Id.*

⁸⁵ *Id.* at 10.

⁸⁶ *Id.* at 9.

⁸⁷ *Id.* at 10.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

ceremonies. In addition to this provision for recognizing four types of marriages, marriage law in the United Kingdom also specifies other basic elements required for the validity of marriage. These include issues of age, mental state of the individuals, consanguinity, and current marital status (for purposes of prohibiting bigamy).

Though the state has made provision for those not belonging to the Church of England as well as those without any religious affiliation to marry, the Church of England, as the established church, still holds a privileged position in the nation's marriage law. The authority of the clergy of the Church of England to marry is equal to the authority of superintendant registrars. To illustrate, a couple being married civilly must be married by a superintendant registrar and must also have a registrar present to register the marriage.⁹² A couple marrying in a religious ceremony other than in the Church of England (or Church in Wales) may be married by an authorized officiator of their own faith, but must still arrange to have a registrar present to register the marriage.⁹³ Couples of both civil marriages and non-Anglican religious marriages are also required to give formal notice, in person, to the superintendent registrar in the district(s) in which they reside.⁹⁴ A couple being married in the Church of England, however, has no need to involve a superintendent registrar or registrar at any point in the proceedings.⁹⁵

An additional illustration of the Church of England's continuing privileged position in British marriage law are the rules concerning the venue at which marriages take place. Civil marriages must take place at a registrar's office. A civil marriage can also be held at another approved premise, such as a stately home or hotel, but may not be held at a location that is in any way religious.⁹⁶ A religious ceremony not of the Church of England must take place in a building registered both as a place of worship and as a place approved for the solemnization of marriage, and the state provides specific rules and procedures on qualifying and registering for both statuses.⁹⁷ The venue for marriages in the Church of England, however, is legislated and determined internally by the Church of England itself. Describing the most recent legislative process in its own words, the Church of England stated:

The Church of England has been considering for some time possible alternatives to the calling of banns and widening the choice of places in which couples can marry. The Marriage Law working group was established by the Archbishops Council in October

⁹² <http://www.gro.gov.uk/gro/content/marriages/what-i-need-to-do/where--to--give--notice.asp>,

<http://www.weddingguideuk.com/articles/legal/englandwales.asp#civil>

⁹³ <http://www.gro.gov.uk/gro/content/marriages/where-can-i-marry/index.asp>

⁹⁴ <http://www.gro.gov.uk/gro/content/marriages/where-can-i-marry/index.asp>

⁹⁵ <http://www.gro.gov.uk/gro/content/marriages/where-can-i-marry/index.asp>,

<http://www.barnet.gov.uk/marriage-arrangement-and-ceremony>

⁹⁶ <http://www.gro.gov.uk/gro/content/marriages/your-wedding-ceremony/index.asp>

⁹⁷ <http://www.gro.gov.uk/gro/content/marriages/index.asp> (http://www.gro.gov.uk/Images/CertRegBuild_tcm69-3545.pdf)

2002 following the debate in the General Synod in July 2002 on The Challenge to Change. The details of the proposals and the means by which the Marriage Law working group envisaged that church legislation would give effect to them were inextricably bound up with Government proposals to reform the civil registration system. However, when the Government decided not to proceed with their reforms, the group embarked on a more limited programme of reform regarding the place of marriage and certain ecumenical issues relating in a new marriage measure.

In July 2007, the General Synod overwhelmingly passed the Church of England Marriage Measure and it received the Royal Assent on 22nd May. The Archbishops have now signed an instrument bringing all the provisions of the Measure into force from 1st October 2008.⁹⁸

This new legislation provided that rather than being limited to the church of the parish where one or both parties to the marriage reside, couples may choose to be married in any church where either of them have a “qualifying connection,”⁹⁹ such as having been baptized or confirmed in that church or having resided in that parish at one time for a period of at least six months.¹⁰⁰ This power of internal determination, though subject to royal assent, shows an independence and privilege in matters of marriage law on the part of the established Church of England that it appears no other group, religious or non, enjoys. Additionally, if a Church of England priest feels unable to perform a marriage (because it is a remarriage after divorce or for other reasons of conscience) the priest is permitted by law to refuse to perform the marriage and can also prohibit the use of the church or chapel of which they are a minister for the marriage.¹⁰¹ This right existed well before the Marriage Measure of 2008.

B. Possible Insights from the United Kingdom Model

Like the Orthodox Jewish Church in Israel, the Church of England originally had exclusive jurisdiction over marriage and divorce. Once the state began to intervene for the sake of order and regulation, it did so by simply codifying the established Church’s complete monopoly on marriage. Although it took the state nearly a century, England gradually recognized that social realities required that provision be made for those not belonging to the Church of England. Israel has already recognized this to some extent in providing for Muslims, Christians, and Druze to be married within the rites of their respective faiths. However, England also recognized at that time under the Marriage Act of 1836, that there was a need for secular marriage for those

⁹⁸ <http://www.cofe.anglican.org/info/socialpublic/marriagefamily/marriageanddivorce/marriage Measure/>

⁹⁹ See *Church of England Marriage Measure 2008*, available at http://www.opsi.gov.uk/uk-church-measures/2008/pdf/ukcm_20080001_en.pdf.

¹⁰⁰ *Id.*

¹⁰¹ MARK HILL, *ECCLESIASTICAL LAW 168* (Oxford Uni. Press 2007).

who claimed no religious affiliation. It is conceivable that Israel could follow a similar road to providing a means of marriage for those who do not fall into one of the categories of people currently able to marry. The English experience, however, illustrates that an “all or nothing” approach is not necessary, and a system can be developed through gradual and careful steps.

For example, in contrast with Turkey, where marriage by an imam has no legal standing and all marriages must be performed in a civil ceremony to be valid, the United Kingdom has continued to give its established church a privileged place in the rules and laws of marriage while still allowing basic freedom for others. This model might be adapted by Israel by continuing to provide the Orthodox Jewish Church with legal authority to regulate marriage among its adherents, while still providing a way for those who do not belong to the Orthodox Jewish faith, or to one of the other three churches currently provided for, to marry.

V. International Human Rights Norms

[This section remains to be drafted.]

VI. Observations and Suggestions

It is not tenable to maintain that religious freedom is respected when the very ability to legally marry is limited based upon one’s religious status. The problem is particularly acute for several categories of people. First, for those who are not religious, the possibility of being legally married in Israel does not exist (or is at least severely limited). Reliance upon foreign marriages and other mechanisms are not sufficient long-term solutions. Second, similar restrictions exist for those who belong to religions other than the four recognized churches that are permitted to perform marriages. Third, couples of mixed religious affiliations are limited by the rules of the churches of their respective spouses. Fourth, even couples that consider themselves as belonging to one of the four recognized religions may find themselves ineligible for marriage based upon the rules of their church. This amounts to what has been described as a system characterized most prominently by coercion (for those who are eligible to be married) and exclusion (for those who are ineligible to be married).¹⁰²

It is preferable for solutions to sensitive social and political issues such as marriage to come from the legislative branch rather than the judiciary. As Aristotle maintained over two millennia ago, laws are best when they are enacted by legislators, who can think generally and prospectively, rather than dictated by judges, who decide based upon particular cases and looking backwards.¹⁰³ Israeli courts have shown an admirable deference to the political branches of government to find a solution to the marriage conundrums facing Israel, but it is

¹⁰² [create cite]

¹⁰³ [cite Aristotle’s Rhetoric]

unrealistic to expect that their patience will be unlimited. A solution that is broadly acceptable within Israeli society seems more likely if it comes from the political branches.

There is an important, constructive role for religious groups to play in constructing a civil marriage system in Israel. In Spain, religious freedom became a reality when the Catholic Church, bolstered by the commitments to religious freedom that emerged from the Second Vatican Council, took a leadership role in creating a legal and cultural landscape that was respectful of religious freedom. By many measures, the Catholic Church in Spain is a healthier institution today than it was when it was closely identified with a particular political party, and when there were strong anti- and pro-clerical swings in government policy that accompanied political change. In Israel, one important (perhaps the) key to the prospect of addressing the marriage conundrum lies with Orthodox Jewish leaders. The Orthodox Church will likely be more comfortable with the political outcome if they are constructive rather than obstructionist in their stance.

Both the United Kingdom and Turkey have found ways of creating a mechanism for civil marriage while maintaining significant involvement for churches in marriages involving their adherents. Most importantly, for ecclesiastical purposes, churches should be allowed to have autonomy in deciding who is eligible to be married within the rites of that church. If a civil marriage system exists, it is easier for religious groups to resist state pressure to marry people that the religion does not consider eligible for marriage within their religious tradition. Churches are better off if they are free to resist political pressure to make their marriage rules conform with societal trends or fashions.

Monopolies and oligopolies can be expected to fight to protect their privileges. In countries with a dominant historical religion, including the Russian Orthodox Church in Russia and the Greek Orthodox Church in Greece, the dominant religion makes numerous arguments that their special status should be preserved in the name of national unity, cultural identity, and so forth. Many of these arguments are very similar to the types of arguments that are made by industrial monopolists and oligopolists. As the analogy to industrial monopolies also suggests, sometimes churches are better off if they are able to compete in the market place of ideas. A church that is overly dependent upon the state, or too closely identified with it, may find itself enervated and dependant. As Roger Williams observed in the context of established churches in colonial America, a wall of separation of church and state may be warranted to protect the “garden of the church” from the wilderness of the world.

VII. Conclusion

Looking to other models of civil marriage can only be suggestive rather than prescriptive. The solution that will be found in Israel will be forged by Israelis, working together and in good

faith. It is unlikely that the solution in any one place will serve as a template or road map that can be used to navigate very different terrain. The particular challenges in Israel are as complex and multifaceted as any place in the world – if not more so.

One of the most important approaches that we can take when dealing with difficult social and political issues is to think about the issue from the point of view of the minority (when we find ourselves in the religious or political majority) and from the point of view of the majority (when we are in a political or religious minority). Ultimately, all of us benefit from the realization that, when it comes to religion, we all belong to a religious minority. In the flat, crowded and dangerous world in which we live, there is no such thing as a religious majority. Even Christians, with their billion or so, and Muslims, with their billion or so, are a religious minority when we think from a global perspective. Remembering the rights and interests of minorities is especially important at times when we find ourselves in temporary or localized majorities. Our claims to be treated fairly and with respect when we are in the minority will be stronger if we treat others fairly and with respect when we are in the majority.