Echoes of Nonmarriage

Ayelet Blecher-Prigat*

I. INTRODUCTION

This Article aims to draw attention to the dynamic interrelationship between nonmarriage and marriage in which the principles, values, and rhetoric used in laws that relate to nonmarital intimate relationships infiltrate the traditional laws governing marriage. The Article argues that the laws governing nonmarriage affect the legal institution of marriage inasmuch as the laws governing marriage affect how nonmarital relationships are treated under the law. To demonstrate this dynamic interrelationship and influence, the Article uses observations drawn from the extensive Israeli legal experience with nonmarital relationships. Nonetheless, it advances a theoretical claim about the interrelationship between the laws of nonmarriage and of marriage that is relevant in general, including in the U.S. context.

The Article focuses on two trends in Israeli laws governing nonmarital relationships and examines how these trends have influenced laws governing marriage. First, it examines how an emphasis on *function rather than form* in the realm of nonmarital relationships has had an impact on how the law addresses marriage. This is most apparent in how the law treats marriages that have ceased to function. The Article shows that for married spouses as well as for unmarried intimate partners, the law has placed a growing emphasis on their actual relationship rather than on their formal marriage status, and has attached considerable legal consequences to de facto separation, even without a formal divorce.

The second trend concerns the significance of *autonomy and choice* in defining the mutual rights and obligations that nonmarried partners have toward one another, especially in the contexts of property rights and post-separation maintenance. Here again, the use of reasoning and terminology that emphasize these features in the context of nonmarital relationships resonates in the laws of marriage, particularly those concerning marital

* Dean of Law School, and Associate Professor of Law, Academic College of Law & Science, Israel. I thank the participants of the 2019 Nonmarriage Roundtable; I greatly benefitted from their thought provoking comments. Special thanks are due to Kaipo Matsumura for his insightful commentary on an earlier version of this Article, which was presented at the Roundtable. I also thank Shelly Kreiczer-Levy and Ruth Zafran for reading an earlier draft of the article and providing me with invaluable comments. Last, I wish to thank the editorial board of the ARIZONA STATE LAW JOURNAL and especially Brian Teed for the editorial work on this Article.

property, and impedes attempts in caselaw and legislation to structure marital property law on normative values of equality and fairness, independent of the parties' choices. Thus, the way spouses choose to live their lives is an increasingly relevant factor in the caselaw examining marital property rights.

The Article proceeds as follows: Part II provides a brief overview of Israeli family law as a necessary background to the discussion. Part III describes several of the laws that apply to nonmarried partners who may be recognized as "reputed spouses." It addresses both the way Israeli law defines reputed spouses and the legal consequences of that designation. The purpose of this description is to lay the foundations for the discussion in Part IV, which demonstrates the repercussions of the laws of nonmarriage on the laws of marriage. Part IV moves on to examine how the laws of nonmarriage have affected the laws of marriage. Part V concludes.

II. BACKGROUND: MARRIAGE AND DIVORCE IN ISRAEL

Given the complexity of Israel's unique family-law system, an overview of its basic principles is essential to understanding the multifaceted legal rules and arrangements governing nonmarital relationships. Although the Israeli legal system is generally secular, significant portions of family law are an exception to this rule. Israel is the only Western democracy that grants religious institutions a monopoly over marriage and divorce.[1] No civil marriage exists in Israel, and no uniform territorial law applies to either marriage or divorce; instead, the "personal law" of the parties governs these matters.[2] The personal law of Israeli citizens and residents is the law of their religion, provided they belong to a recognized religious community: Jewish, Muslim, Druze, or one of ten different Christian denominations recognized under Israeli law.[3] This means that Jewish citizens are married according to Jewish law, Muslim citizens are married according to Shari'a law, and

1. PINHAS SHIFMAN, MI MEFAHED MI-NISSU'IN EZRAHI'IM? [WHO IS AFRAID OF CIVIL MARRIAGE?] (Jerusalem Inst. for Israeli Research 1994) (Hebrew); AVISHALOM WESTREICH & PINHAS SHIFMAN, A CIVIL LEGAL FRAMEWORK FOR MARRIAGE AND DIVORCE IN ISRAEL 48 (Ruth Gavison ed., Kfir Levy trans., 2013).

2. "Personal law" is defined as a law that applies to a certain class or group of people or a particular person, based on certain attributes of that person or persons—usually religious or cultural affiliation. This concept, which attaches the law to a person, is distinguished from territorial law, which attaches the law to a particular territory. *See, e.g.*, Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941, 954–55 (2008).

3. MENASHE SHAVA, HA-DIN HA-ISHI BE-YISRAEL [THE PERSONAL LAW IN ISRAEL] (Tel-Aviv: Modan, 4th enlarged ed. 2001) (Hebrew).

Christian citizens are married according to ecclesiastical law.[4] The same is generally true with respect to divorce.[5] Israeli citizens and residents who do not belong to any recognized religious community have no personal law applicable to them.

As one can imagine, this legal arrangement significantly restricts access to both marriage and divorce. If no civil marriage exists but only religious marriage, and only for recognized religious communities, then no law of marriage applies to those who are outside of such communities—that is, those nonaffiliated individuals cannot marry.[6] Interfaith couples cannot marry because most of the country's recognized religions do not acknowledge interfaith marriages (with the exception of marriage between a Muslim *man* and a Jewish or Christian *woman*, which Shari'a law recognizes). Same-sex couples cannot marry because same-sex marriages are not acknowledged by any of Israel's recognized religious institutions.[7] Meanwhile, the religious monopoly over divorce limits the availability of that legal option, since most

4. The historical roots of this arrangement are contested. The conventional narrative attributes the origins of this arrangement to the Ottoman Empire's *millet* (religious community) system, which was preserved by British Mandatory rule and later adopted by the Israeli legislature with certain amendments. *See, e.g.*, Ariel Rosen-Zvi, *Family and Inheritance Law*, *in* INTRODUCTION TO THE LAW OF ISRAEL 75, 75–76 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). This narrative offers multiculturalism as the underlying value of this arrangement. However, recent scholarship challenges this narrative and presents this arrangement as a colonial tool, serving the purpose of "divide and conquer" established by British Mandatory rule (since it institutionalizes separation between religious groups). According to this version, it was a conscious decision of the British to present the personal-law system as merely a preservation of the status quo. *See, e.g.*, Iris Agmon, *Yesh Shoftim Bi'Yrushalayim Vehayu Mekhokekim Be'Istanbul: Al Hahistoria Shel HaKhok Hakaroi (Betaut) "Khok Hamishpacha Haotmanni"* [*There Are Judges in Jerusalem and There Were Legislators in Istanbul: On the History of the Law Called (Mistakenly) "The Ottoman Law of Family Rights"*], 8 MISHPAHA BAMISHPAT 125 (2017) (Hebrew).

5. The only exception is dissolution of interfaith marriages, or marriages of individuals who do not belong to a recognized religious community. Dissolution of such marriages is generally under the jurisdiction of the civil family courts, according to the Jurisdiction in the Matters of Dissolution of Marriage (Special Cases and International Jurisdiction) Law, 5729–1969, § 5, 23 LSI 274 (1968–69) (Isr.). Note that such marriages cannot be conducted in Israel but are, rather, entered into abroad. *See infra* text accompanying note 10.

6. Notably, religious affiliation for purposes of law and jurisdiction in Israel is independent from personal beliefs and, instead, relies on the relevant religious laws. Each recognized religious community determines whether an individual does or does not belong, based on its own religious law. Thus, even those who identify themselves as secular, atheist, or agnostic as a matter of personal belief may still be considered members of a religious community for purposes of law and jurisdiction. Conversely, when the relevant religious law does not recognize individuals who see themselves as affiliated with a particular religion, they do not belong to this religion for purposes of personal law.

7. Theoretically, if a relevant religious law of a recognized religious community recognizes same-sex marriage, then same-sex couples belonging to this recognized community could get married in Israel.

recognized religious laws severely restrict divorce. Many of the recognized Christian denominations either require the church's approval—even in cases where both spouses agree to divorce—or prohibit divorce outright.[8] Jewish divorce laws require the parties' mutual consent, so a spouse may be unable to break free from an unwanted marriage if the other spouse withholds consent, even unreasonably or for purely tactical considerations.[9]

Over the years, the Israeli legal system has developed partial solutions to some of the difficulties that the religious-based marriage and divorce laws cause for Israeli individuals. For example, Israeli law recognizes civil marriages entered into abroad between same-faith Israeli couples as valid,[10] and it partially recognizes interfaith and same-sex marriages conducted abroad.[11] In addition, the legislature has enacted a civil-partnership framework for heterosexual couples in which neither partner belongs to a recognized religious community in Israel, though, as defined, it applies to only a tiny fraction of the couples wishing to marry.[12] The Israeli legal approach to nonmarital relationships, which I examine below, is commonly understood as another response to the difficulties created by the religious laws of marriage and divorce, and is traditionally understood as offering an alternative to religious marriage, as well as partial relief from the religious strictures on divorce.[13]

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8. Michael M. Karayanni, *Ricochetim Yuhudim u-Dimocratim* [*Jewish and Democratic Ricochets*], 9 MISHPAT U-MIMSHAL 461 (2006) (Hebrew).

9. Muslim women in Israel face a different problem, since Shari'a law provides Muslim men with the right to unilaterally divorce their wives at will and without a court order (talaq divorce). *See, e.g.*, Mousa Abou Ramadan, *The* Shari'a *in Israel: Islamization, Israelization and the Invented Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E.L. 81, 111–12 (2005).

10. HCJ 2232/03 Plonit [Jane Doe] v. Tel Aviv Rabbinical Court 61(3) PD 496 (2006) (Isr.). Nonetheless, same-faith couples (who belong to a recognized religious community) who married abroad and seek divorce in Israel can only do so in the relevant religious court. *Id.*

11. LFA 9607/03 Ploni [John Doe] v. Plonit [Jane Doe] 61(3) PD 726 (2006) (Isr.); HCJ 3045/05 Ben-Ari v. Dir. of Population Admin., Ministry of the Interior 61(3) PD 537 (2006) (Isr.), translation available at https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\05\450\030\a09&fileName=05030450_a09.txt&type=4 [https://perma.cc/L6GL-Z5RD].

12. Covenant Partnership for the Religionless Law, 5770–2010, SH No. 2235 p. 428 (Isr.). ("Religionless" is the literal translation. In effect, it applies to those who do not belong to any recognized religious community). For the first four years after the enactment of this law, from September 2010 until the end of 2014, only 122 couples had registered based on this law. Netanel Fisher, *Fragmentary Theory of Secularization and Religionization—Changes in the Family Structure as a Case Study*, 10 POL. & RELIGION 363, 375 (2017).

13. It is worth noting, though, that the vast majority of Israelis marry in formal religious marriages, rather than adopting one of these alternatives. There is greater theoretical support in these alternatives than use of them in practice. *See, e.g.*, Fisher, *supra* note 12, at 375–80.

III. THE ISRAELI LAWS OF NONMARRIAGE

This Part provides an overview of the laws of nonmarriage. The purpose of this description is to lay the foundations for the discussion that follows in Part IV, which demonstrates how the values and reasoning that guide the law's approach to nonmarriage resonate in the laws of marriage.

Israeli law provides a rich and fascinating case study of the legal engagement of nonmarital relationships. Since the 1950s, Israeli legislation and caselaw have recognized that nonmarital relationships should entail legal implications.[14] Israeli scholarship has also engaged quite extensively with questions concerning the adequate legal consequences that should follow from nonmarital relationships, and under which conditions (that is, what requirements qualify a nonmarital relationship for legal recognition).[15] This seven-decade-long experience provides an extensive perspective for critically evaluating the laws of nonmarriage and their impact on the laws of marriage.

The laws of nonmarriage comprise two dimensions: one that defines which nonmarital relationships the law will recognize (i.e., what their characteristics are); and another that determines the legal implications that will flow from recognized nonmarital relationships. This Part of the article provides a broad overview of Israeli law on these matters. It describes the requirements for legal recognition of nonmarital relationships, and it addresses the legal consequences that follow recognition. It also distinguishes between the internal aspects of nonmarital relationships, which encompass the legal rights and obligations that nonmarried partners owe to one another, and the external legal implications of nonmarital relationships, which include the rights and obligations that such relationships give rise to vis-à-vis third parties, most notably the state.

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14. *See, e.g.*, Disabled Persons Law (Payments and Rehabilitation) Law, 5709–1949, 3 LSI 119 (1949) (Isr.); Fallen Soldier's Families (Pensions and Rehabilitation) Law, 5710–1950, 4 LSI 115 (1949–50) (Isr.); Disabled Veterans (War Against the Nazis) Law, 5714–1954, 8 LSI 63 (1953–54) (Isr.); Disabled Persons (Payments and Rehabilitation) Law (Consolidated Version), 5719–1959, 13 LSI 315 (Isr.); HCJ 73/66 Zemulun v. Minister of the Interior 20(4) PD 645 (1967) (Isr.); CA 563/65 Yeger v. Plavitz 20(3) PD 244 (1965) (Isr.).

15. *See, e.g.*, Daniel Friedmann, *HaYduaa BeTzibur BaDin HaisraelI* [*The "Unmarried Wife" in Israeli Law*], 3 TEL-AVIV U. L. REV. 459 (1973) (Hebrew); Menashe Shava, *The Property Rights of Spouses Cohabiting Without Marriage in Israel—A Comparative Commentary*, 13 GA. J. INT'L & COMP. L. 465 (1983) [hereinafter Shava, *Property Rights*]; Menashe Shava, *"HaYduaa BeTzibur KeIshto"–Hagdarata, Maamada U'Zchooyotehaa* [*The "Unmarried Wife"*], 3 TEL-AVIV U. L. REV. 484 (1973) (Hebrew); Haman Shelah, *The Reputed Spouse*, 6 MISHPATIM 119, 132–34 (1975).

A. Which Nonmarital Relationships Are Recognized

As noted above, Israeli legislation and caselaw have specified nonmarital relationships since the very early days of the state.[16] The terminology used in these statutes was quite varied, sometimes referring to "a man and a woman who live a family life in a joint household," sometimes to "a man and a woman who are known in the public as husband and wife," and to some other variations.[17] Over the years, the category of nonmarital relationship recognized by Israeli law has become known as a relationship of "reputed spouses."[18] Since legislation did not specify criteria that nonmarital relationships must meet to gain legal recognition—and, specifically, it did not define what makes a couple "reputed spouses"—Israeli caselaw, led mainly by Israel's Supreme Court, filled this void.

In general, the Israeli Supreme Court has adopted a broad definition of nonmarital relationships, with flexible criteria that allow courts a high degree of discretion to recognize unmarried partners as reputed spouses. There are two basic requirements for a couple to be recognized as reputed spouses: an intimate, sexual relationship, and a common household.[19] The requirement of a common household does not, however, mean that the couple must reside together; courts have recognized couples as reputed spouses even when the individuals lived in separate apartments.[20] Generally, there is no minimum amount of time a relationship must exist for the law to recognize the parties as reputed spouses.[21] Although some legislation stipulates a minimum duration as a condition for obtaining specific benefits or rights, the minimum in such cases is fairly short—usually one year.[22] Where legislation does not

16. *See supra* note 14 and accompanying text.

17. Friedmann, *supra* note 15, at 460. Some legislation referred specifically to women, using the term "the one who is known in the public as his wife." *Id.* Other legislation referred to "a man and a woman who live together in a joint household" (without adding a requirement of "a family life"). *See, e.g.*, Succession Law, 5725–1965, § 55, 19 LSI 58 (Isr.).

18. The literal translation of the Hebrew term *Yeduim Be'Tzibur* is "known in the public as spouses." However, existing scholarship in English translates this term as "reputed spouses," so I chose to maintain that translation.

19. *See, e.g.*, CA 1966/07 Ariel v. Egged Pension Fund (2010) (Isr.); CA 107/87 Alon v. Mendelson 43(1) PD 431 (1989) (Isr.); CA 621/69 Nassis v. Yuster 24(1) PD 617 (1970) (Isr.).

20. *See, e.g.*, LFA 3497/09 Plonit v. Plonit (May 4, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

21. Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. PUB. L. 359, 363 (2008) ("[M]ost of the laws granting rights to cohabiting couples do not stipulate a minimum period of time for them to be recognized as such.").

22. *Id.*

specify a minimum duration, Israeli courts have been reluctant to establish such a requirement.[23]

It should also be noted that preclusion from the institution of marriage is not a prerequisite for being recognized as reputed spouses, nor is it a condition for any of the benefits, rights, or obligations that nonmarital relationships may involve.[24] The same is true with regard to objection to the religious characteristics of marriage. In fact, Israeli legislation and caselaw do not distinguish between different unmarried couples based on the reasons why they did not marry.[25] Yet, early scholarship explained the recognition of nonmarital relationships—which preceded similar recognition in other Western countries—by the extensive limitations on access to legal marriage (or the infringement upon freedom of conscience), which is the result of its religious-based marriage laws.[26]

Regarding same-sex couples, to date there is still no Supreme Court precedent holding that the definition of reputed spouses under Israeli law conclusively includes same-sex couples, so that each statute or legal case that applies to reputed spouses necessarily applies to same-sex couples.[27] Israeli caselaw does apply most of the rights, benefits, and obligations of reputed spouses to same-sex couples, including in cases where the relevant legislation refers specifically to "a man and a woman."[28] Nonetheless, as the legal development in this respect has occurred on a case-by-case basis, referring separately to each right, benefit, or obligation accorded to reputed spouses by either legislation or caselaw, it still allows room for the limited caselaw that does exclude same-sex couples from the definition of reputed spouses.[29]

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23. *Id.* at 363–64.

24. *See, e.g.*, Friedmann, *supra* note 15, at 461 (noting the statutes referring to reputed spouses do not distinguish between different categories of reputed spouses based on the reason for their lack of marital status); *see also* LCA 2478/14 Plonit v. Plonit (Aug. 20, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

25. *See, e.g.*, Friedmann, *supra* note 15, at 483.

26. *Id.*

27. Ayelet Blecher-Prigat, *Same-Sex Relationships and Israeli Law*, *in* SAME SEX COUPLES: COMPARATIVE INSIGHTS ON MARRIAGE AND COHABITATION 131, 149 (Macarena Sáez ed., Springer Press 2015).

28. *See, e.g.*, CA 3245/03 (Nz) Estate of S.R. v. Attorney General (Nov. 11, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (referring to the Succession Law, 5725–1965, § 55, 19 LSI 58, which provides intestate inheritance rights to "a man and a woman who lived in a joint household").

29. There are a few family court decisions that refuse to recognize same-sex couples as reputed spouses. Thus, for example, one decision held that the term "reputed spouses" in the Family Courts Law, 5755–1995, § 1 1537 LSI 393 (1995) does not include same-sex couples, and so such couples do not come under the jurisdiction of the family court system. *See* FamC (TA) 16610/04 Ploni v. Attorney General (May 8, 2005), Nevo Legal Database (by subscription, in

Nonetheless, only intimate sexual relationships are legally recognized.[30] Thus, Israeli courts have refused to recognize the relationship between two sisters as entitling either of them, upon the death of the other, to receive a survivors' pension from the National Insurance Institute (NII).[31]

Another dimension of Israel's nonmarriage laws that merits attention is the willingness of Israeli courts to recognize partners as reputed spouses even when one or both partners are formally married to another person, notwithstanding Israel's criminal prohibition on polygamy.[32] And, in several cases, Israeli courts have recognized individuals as reputed spouses even though their relationship was not monogamous and one or both of the parties were involved in other intimate relationships.[33] As I discuss in a later section, these features of the law on nonmarital relationships are often interpreted as a response to the difficulties of obtaining divorce; but that rationale does not suffice to explain the many cases in which courts have recognized formally married individuals as reputed spouses.

Finally, despite the law's generally flexible approach to determining who qualifies as a reputed spouse, caselaw suggests that the legal definition of this intimate relationship is a matter for the courts—not the couples themselves—to decide. In *Bar-Nahor v. Estate of Osterlitz*, the parties entered into an agreement explicitly stipulating that they did not intend to create a legal relationship of "reputed spouses," nor would their relationship create rights

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Hebrew) (Isr.). For different holdings, see, for example, FamC (TA) 6960/03 K.Z. v. State of Israel (Nov. 21, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.); FamC (TA) 3140/03 *In re* R.A. & L.M.F (Feb. 16, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Other conflicting decisions refer to application of the Prevention of Family Violence Law, 5751–1991, SH 138, to same-sex couples. The Prevention of Family Violence Law, phrased in gender-neutral language, adopts a broad definition of "family members" and refers specifically to reputed spouses. Nonetheless, one family court held same-sex couples are not to be considered as reputed spouses for purposes of that statute. *See* FamC (TA) 1631/08 Ploni v. Almoni (Apr. 27, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.). *But see* FamC (Hi) 32520/97, Plonit v. Almonit (June 2, 1997), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (holding that the Prevention of Family Violence Law does apply to same-sex couples).

30. As noted, the requirement of sexual intimacy is specifically mentioned by several Supreme Court decisions. *See, e.g.*, CA 107/87 Alon v. Mendelson 43(1) PD 431 (1989) (Isr.) (holding that sexual intimacy is a basic feature of "family life" for legal purposes); CA 621/69 Nassim v. Juster 24(1) PD 617 (1970) (Isr.).

31. Labor Court (National) 45818-02-17 Fishbein v. Nat'l Ins. Inst. (June 15, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The two sisters, Edith and Gina, never married and neither of them has children. They have lived together since their parents' death. They have a joint bank account from which they manage their income and their expenses, and their old-age allowances have been deposited in that account. They purchased adjoining burial plots. Their vacations abroad have been together.

32. *See, e.g.*, SHAHAR LIFSHITZ, COHABITATION LAW IN ISRAEL IN LIGHT OF A CIVIL LAW THEORY OF THE FAMILY (University of Haifa Press 2005).

33. *See, e.g.*, CA 4385/91 Salem v. Carmi 51(1) PD 337 (1997) (Isr.).

or obligations beyond those expressly stated in their agreement.[34] Nonetheless, the court allowed Ms. Bar-Nahor to sue Mr. Osterlitz's estate for maintenance as a reputed spouse.[35] The court held that whether a couple should be recognized as reputed spouses is a matter for the court to decide based on the factual circumstances of the case, and cannot be predetermined by agreement of the parties.[36]

Although this case might suggest limitations on the ability of individuals to opt out of the legal arrangements that apply to reputed spouses, the court's ruling must be understood in the context of the right to maintenance from an estate. Under Israeli law, this right is an exception to the general principle of testamentary freedom, and it cannot be waived by agreement, nor can it be abridged or extinguished by a will.[37] Enforcing individuals' agreements as to whether or not they are reputed spouses for the purpose of maintenance from the estate would have made this right waivable, at least for unmarried partners. While some may view this as a desirable outcome, in this particular context the Israeli Law of Succession expressly extends the (nonwaivable) right to maintenance from the estate to unmarried partners.[38] Indeed, Chief Justice Shamgar, who delivered the court's opinion, clarified that his decision leaves open the question of the legal implications that the parties' agreement should have for other legal matters, such as the right to intestate succession.[39]

As discussed in the following sections, the parties' agreements play a central role when it comes to determining the legal implications that flow from the couple's recognition as reputed spouses, especially with respect to their respective rights and obligations toward one another. In other words, how the law defines reputed spouses is but one aspect of the laws of nonmarriage. The other aspect concerns the legal effects of falling within that

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34. CA 7021/93 Bar-Nahor v. Estate of Osterlitz 94(3) PD 1512 (1994) (Isr.). Ms. Bar-Nahor and Mr. Osterlitz became involved in a romantic relationship following the dissolution of their prior marriages. Before purchasing an apartment and moving in together, they entered into an agreement regarding the financial aspects of their relationship. The agreement stated that the apartment the couple intended to purchase for their joint residence would be joint property, as would their bank accounts. Their respective preexisting assets would remain separate property. The parties explicitly stipulated that although they would live together and share a common household, they did not intend to create a legal relationship of "reputed spouses," nor would their relationship create rights or obligations beyond those expressly stated in their agreement. After less than two years of cohabitation, Mr. Osterlitz passed away, and Ms. Bar-Nahor sued his estate for maintenance. Osterlitz's heirs argued that Ms. Bar-Nahor was not entitled to maintenance as a reputed spouse, based on the couple's agreement.

35. *Id.*

36. *Id.*

37. *See, e.g.*, Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 281 (1955).

38. The Succession Law, 5725–1965, § 55(c), 19 LSI 58 (Isr.).

39. CA 7021/93 Bar-Nahor v. Estate of Osterlitz 94(3) PD 1512 (1994) (Isr.).

definition—that is, the rights, benefits, and duties that the designation carries with it. Whereas parties may be limited in their ability to define their relationship, i.e., to decide whether to be recognized as reputed spouses, they enjoy vast autonomy in shaping the legal implications that their relationship entails.

B. The Legal Implications of Being Recognized as Reputed Spouses

Regarding the legal implications of being recognized as reputed spouses, there have been shifts and changes over the years. On this front, one should make a distinction between the laws that apply to reputed spouses in their relationships with third parties (most notably, the state), on the one hand, and the laws that apply to reputed spouses in their relationship with each other—what they owe one another. As this section demonstrates, Israeli law has evolved in seemingly opposite directions regarding these types of legal implications.

1. Reputed Spouses vis-à-vis Third Parties

As noted above, for over sixty years, Israeli legislation has referred expressly to reputed spouses and recognized them as eligible for certain rights and benefits. Most of this legislation concerned such socioeconomic support as survivors' pensions or benefits, tenancy protection benefits, and the like. However, not all statutes referred specifically to reputed spouses, and early scholarship noted that it was difficult to find a consistent underlying rationale to explain the legislature's approach.[40] Until the 1990s, the dominant view in legal scholarship and in caselaw was that because some statutes refer explicitly to reputed spouses, those that do not apply only to married couples. In other words, legislation that specifically names reputed spouses was deemed exhaustive with regard to such spouses' rights and benefits.

A note about Hebrew terminology is due here. Israeli legislation often uses the term *ben zug*, which literally means "a member of a couple" (*zug* means "a couple").[41] This term is not equivalent to the English word "spouse"; rather, it is broad enough to encompass both spouses and unmarried partners.

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40. *See, e.g.*, Pinhas Shifman, *Marriage and Cohabitation in Israeli Law*, 16 ISR. L. REV. 439, 456–60 (1981); Friedmann, *supra* note 15, at 459–60.

41. *Ben zug* is the masculine form of a member of a couple; *bat zug,* the feminine form of a member of a couple. *See* Aeyal M. Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition in Same-Sex Couples in Israeli Law*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 391, 395 n.18 (Robert Wintemute & Mads Andenas eds., Bloomsbury Publishing 2001).

Legislation that expressly refers to reputed spouses often does so by noting that the term *ben zug* in that specific act applies to reputed spouses; other statutes merely use the term *ben zug*. Therefore, the conventional approach, until the 1990s, considered the latter statutes as applicable only to spouses.[42] Israeli scholarship supported this interpretive approach, which maintained a clear distinction between marriage and nonmarital partnerships such that reputed spousal relationships carried with them only some of the legal consequences of marriage.[43]

Then, in a 1999 case, *Lindorn v. Karnit*, the Supreme Court interpreted the term *ben zug* in the Civil Wrongs Ordinance (New Version)[44] and in the Road Accident Victims Compensation Law[45] to include reputed spouses entitled to bring wrongful death claims as dependents, despite these statutes' lack of an express reference to reputed spouses.[46] Justice Barak applied a purposive interpretation of the pertinent legislation and held that dependents' rights against tortfeasors in wrongful death cases are aimed at compensating for economic loss suffered by those who were financially dependent on the deceased.[47] This interpretation could not justify a distinction between married and unmarried partners.[48] Justice Barak ruled that compensation is given due to the loss of a provider and should not be based on formal marriage.[49]

The *Lindorn* case, which was decided by an extended panel of five justices (rather than the usual panel of three),[50] marks an important point in Israeli law in the legal approach to reputed spouses and nonmarriage in general.[51] Not only did this decision deviate from previous caselaw, which refused to apply to reputed spouses laws that did not refer to them explicitly, but it also endorsed a new rationale, based on function and equality, for recognizing nonmarital relationships.[52] Justice Barak, writing for the court, handed down a deliberative, principled opinion that endorsed a functional approach to

42. *See, e.g.*, OHA 1/82 Levi v. Director of Courts, 36(4) PD 123 (1982).

43. *See, e.g.*, Shava, *Property Rights*, *supra* note 15, at 468–69.

44. Civil Wrongs Ordinance [New Version], 5728–1968, 10 LSI 266 (Isr.).

45. Road Accident Victims Compensation Law, 5735–1975, § 16, 29 LSI 311 (1974–1975) (Isr.).

46. CA 2000/97 Lindorn v. Karnit, 55(1) PD 12 (1999) (Isr.); Ayelet Blecher-Prigat, *A Basic Right To Marry: Israeli Style*, 47 ISR. L. REV 433, 444 n.52 (2014).

47. Shahar Lifshitz, *The External Rights of Cohabiting Couples in Israel*, 37 ISR. L. REV. 346, 390–93 (2003).

48. *Lindorn*, 55(1) PD at 27–29.

49. *Id.*

50. The Israeli Supreme Court usually sits in a three-justice panel. *See, e.g.*, Guy E. Carmi, *A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review*, 21 CONN. J. INT'L L. 67, 72 (2005).

51. Lifshitz, *supra* note 47, at 388.

52. *Id.* at 392–93.

family law and rejected distinctions based merely on form.[53] According to Barak, from a functional perspective married couples and unmarried reputed spouses are similarly situated for various purposes.[54] One such purpose is compensating for the economic loss suffered by a dependent of a wrongful death victim, since financial dependency is not based on formal marriage but, rather, on the reality of joint lives.[55] One of course could challenge this reasoning and question whether it is normatively appropriate to equate the financial dependency between spouses with that between reputed spouses, or whether there are data supporting this claim as a descriptive matter.[56] These questions, however, are beyond the scope of this article.

With function rather than form (of relationships) at the center of his opinion, Justice Barak evoked the principle of equality as an additional supporting precept.[57] According to well-established norms in Israeli law, courts must prefer an interpretation of statutes that is consistent with the right to equality.[58] If married spouses and unmarried reputed spouses are similarly situated for a certain purpose, then courts must adopt an interpretation that treats them alike. Regarding the specific legislation in *Lindorn*, an interpretation that recognizes the right of a married person to compensation following the death of a spouse, but denies such right to an unmarried partner, was held to constitute unlawful discrimination.[59]

Nonetheless, Justice Barak held that *Lindorn* did not stand for the proposition that all statutes that merely used the term *ben zug* applied to both married couples and reputed spouses.[60] Rather, that decision should be made on a case-by-case basis, applying a purposive interpretation for each statute.[61]

Despite these statements about the need for a case-by-case evaluation examining the purpose of each statute, the accumulated caselaw suggests that since *Lindorn*, courts tend to interpret legislation using the term *ben zug* in a manner that refers to both spouses and reputed spouses.[62] The functional approach to defining family relationships became the guiding principle for Israeli courts in deciding on the legal implications of nonmarital relationships

53. *Id.*
54. CA 2000/97 Lindorn v. Karnit, 55(1) PD 12, 27–29 (1999) (Isr.).
55. *Id.*
56. *See, e.g.*, Lifshitz, *supra* note 47, at 353.
57. *Lindorn*, 55(1) PD at 28.
58. Shlomo Guberman, *The Development of the Law in Israel: The First 50 Years*, ISR. MINISTRY FOREIGN AFF. (Sept. 25, 2000), https://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/development%20of%20the%20law%20in%20israel-%20the%20first%2050%20yea.aspx [https://perma.cc/33A8-HA9E].
59. *Lindorn*, 55(1) PD at 28–29.
60. Lifshitz, *supra* note 47, at 389 n.116.
61. *Id.*
62. *Id.* at 393–94.

vis-à-vis the state or other third parties.[63] Accordingly, cases have generally extended to reputed spouses the vast majority of rights, benefits, and obligations that Israeli legislation affords to married couples.[64]

Moreover, legislation since the 1990s tends to include reputed spouses specifically in its scope, and this legislation does not necessarily confer socioeconomic rights (that is, its rationale is not to protect financial dependency).[65] Rather, there are increasing references to unmarried reputed spouses in legislation whose underlying rationales seem to be recognition and protection of family relations.[66] Two notable examples are the extension of evidentiary trial privileges to reputed spouses, so that they are prevented—as are married partners—from testifying against each other,[67] and the inclusion of reputed spouses within the scope of the family court system that was established in 1995.[68] Evidentiary privileges between family members are based on the rationale of protecting and strengthening family relationships.[69] In a similar vein, the creation of the family court system as "caring courts," with ancillary social-service units that offer therapeutic services, recognizes the uniqueness of family disputes and the need to provide response to their significant emotional aspects.[70] The inclusion of unmarried reputed spouses within these legal schemes suggests that the Israeli legal system sees the value of family relationships in their intimate function rather than in their (marital) form.

Nonetheless, this view that emphasizes function seems limited only to the consequences of reputed spouses' relationships regarding third parties.[71] A different approach—one that distinguishes between married couples and unmarried reputed spouses, and emphasizes individual autonomy and choice—is reflected in the way Israeli law developed with respect to the

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63. *Id.* at 352–53.

64. The Supreme Court continued down this path in CA 2622/01 *Manager of Land Betterment Tax v. Levanon*, 37(5) PD 309 (2003) (Isr.), holding that tax exemptions for the transfer from an individual to his partner, without remuneration, of an asset other than a residential apartment should be applied to cohabiting and married couples equally.

65. Lifshitz, *supra* note 47, at 386–87.

66. *See id.*

67. Amendment to Evidence Ordinance (No. 16) Law, 5775–2015, SH No. 2517 p. 308 (Isr.) (subject to exceptions regarding family violence); Evidence Ordinance [New Version], 5731–1971, § 5, 18 LSI 421 (1971) (Isr.).

68. Family Courts Law, 5755–1995, § 1, 1537 LSI 393 (1995) (Isr.).

69. *See, e.g.*, Mark Glover, *Evidentiary Privileges for Cohabitating Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 751–65 (2010).

70. *See, e.g.*, Rhona Schuz & Ayelet Blecher-Prigat, *Israel: Dynamism and Schizophrenia*, *in* THE FUTURE OF CHILD AND FAMILY LAW: INTERNATIONAL PREDICTIONS 175, 177–88 (Elaine E. Sutherland, ed., 2012).

71. *See* Lifshitz, *supra* note 47, at 353.

internal aspects of nonmarital relationships; that is, aspects that concern the mutual rights and obligations unmarried partners owe another.

C. The Internal Aspects of Nonmarital Relationships: What Do Reputed Spouses Owe One Another?

Whereas the rights, benefits, and obligations created by nonmarital relationships vis-à-vis third parties were created by both legislation and caselaw, the financial rights and obligations that reputed spouses may owe one another were shaped almost exclusively by caselaw. Such caselaw—concerning both the property rights of reputed spouses and post-separation support—seemed at first to follow caselaw addressing the rights and obligations reputed spouses might incur in their relationships with third parties. This caselaw appeared to equate marital and reputed spousal relationships, and placed emphasis on the function of intimate relationships rather than on formal marriage. Nonetheless, from its inception, this caselaw also relied on private-law values of personal autonomy and choice; these latter values eventually eclipsed the function-based aspects of the caselaw.

Regarding property rights, prior to the enactment of the Spouses Property Relations Law in 1973, the Israeli Supreme Court developed a presumption of shared ownership that applied in matters of property relations between spouses.[72] It developed this presumption within the framework of contract law, using contract theory and principles to suggest that intimate partners implicitly agree to share assets accumulated during the course of their relationship.[73] The Supreme Court's goal of subjecting property relations between spouses to civil-secular law was what motivated its use of this framework.[74] As noted earlier, religious laws govern "matters of marriage" and "matters of divorce," which are under the exclusive jurisdiction of religious courts.[75] In order to gain jurisdiction over property relations, and to subject this issue to civil-secular law, the Court first needed to explain why this issue was neither a "matter of marriage" nor a "matter of divorce." The Court narrowly interpreted these phrases to exclude property issues. Instead,

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72. *See, e.g.*, Daniel Friedmann, *Matrimonial Property in Israel*, 41 RABEL J. COMP. & INT'L PRIV. L. 112, 116 (1970); Ariel Rosen-Zvi, *Israel: Calm Before the Storm*, 25 J. FAM. L. 167, 168–70 (1986).

73. *See, e.g.*, CA 2/77 Azugi v. Azugi, 33(1) PD 27 (1979) (Isr.); Rosen-Zvi, *supra* note 72, at 168–70.

74. *See, e.g.*, Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279, 280–81 (2009); Shahar Lifshitz, *On Past Assets and Future Assets and the Philosophy of Marital Property Law*, 34 HEBREW U. L. REV. 627, 753 (2004).

75. SHIFMAN, *supra* note 1, at 22 and accompanying text.

it suggested that the law of contracts and property governed property relations between intimate partners.[76] Under such an approach, it is not the marital bond (i.e., formal marriage) that generates rights in property accumulated during the parties' relationship.[77] Rather, it is the parties' implied agreement, which can be ascertained through the facts reflected in their joint lives together.[78]

Once the Court had determined that property relations were not a "matter of marriage" (nor a "matter of divorce") but, rather, a matter governed by the parties' (implicit) agreement,[79] the application of this rationale to property relations between reputed spouses had to follow. Indeed, it was difficult to limit this reasoning to spouses and to argue that a similar implied agreement could not be inferred from the relationship between reputed spouses. Thus, when the issue came before the Supreme Court in 1984 in the case of *Shachar v. Friedman*, the Court held that property relations between reputed spouses were also governed by the rules of contracts and property law.[80] Like spouses, reputed spouses could establish that they implicitly agreed to share property.[81] Nonetheless, Justice Barak noted that the fact that the parties did not formalize their relationship through marriage might be a relevant consideration, which in some cases could indicate their rejection of the presumption to share property.[82]

Thus, at the beginning, unmarried reputed spouses and married spouses were seemingly subject to the same caselaw-based property regime. Nonetheless, from this point the interpretation and implementation of this ruling to each type of relationship has diverged significantly. For married couples, courts consistently moved away from consent-based rationale and diminished the role of individual autonomy and choice (in favor of other values). For nonmarried partners, the agreement rationale took hold, with a growing emphasis on individual choice.

In cases involving married couples, the caselaw has developed in a manner that established a presumption that spouses agree to share assets accumulated during the course of their marriage, whether those assets served the common household or were business assets.[83] Furthermore, over the years the caselaw in this context evolved in such a way as to make it much more difficult, if not

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76. *See, e.g.*, ARIEL ROSEN-ZVI, MATRIMONIAL PROPERTY BETWEEN SPOUSES 296 (1982); Blecher-Prigat, *supra* note 46, at 454–55.

77. *See, e.g.*, *Azugi*, 33(1) PD 27.

78. *Id.*

79. *Id.*

80. CA 52/80 Shachar v. Friedman 38(1) PD 443 (1984) (Isr.).

81. *Id.*

82. *Id.* at 449.

83. *See, e.g.*, Rosen-Zvi, *supra* note 72, at 169–70.

impossible, to rebut this presumption absent an explicit written agreement.[84] Various scholars and judges have argued that the agreement-based rationale, if not merely lip service to begin with, was abandoned in favor of alternative normative justifications based on equality and fairness.[85] The move away from a consent-based property regime for married couples seemed to be completed with the enactment of the Spouses Property Relations Law, which applies only to married couples,[86] as explained in greater detail in the following Part.

In cases involving reputed spouses, however, the law has developed in the exact opposite direction, with the agreement-based rationale expanding and taking hold. Furthermore, the theoretical basis for the agreement-based approach relies on traditional individualistic perceptions of contracts (rather than relational perceptions). As applied to reputed spouses, the caselaw-based property rules refuse to recognize a presumption of shared property. Rather, after establishing that the couple meets the (admittedly quite flexible) criteria for being recognized as reputed spouses, they must still demonstrate that they intended to share property.[87] While an agreement to share property could be implied based on their relationship, they nevertheless need to provide evidence that such was the case.[88] Moreover, when such an implied agreement is established, it is ordinarily limited to property that served the parties' household (and was accumulated during the relationship).[89] Should a reputed spouse claim rights in other property, such as business assets or preexisting property, the burden of proof is heavier, and additional evidence

84. *See, e.g.*, *id.*

85. *See, e.g.*, *id.* (suggesting the contract-based reasoning was merely a legal fiction); *see also* CFH Nafisi v. Nafisi 50(3) PD 573, 615–20 (1996) (Isr.), *translated in Versa: Opinions of the Supreme Court of Israel*, BENJAMIN N. CARDOZO SCH. OF LAW (Feb. 18, 2019), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Nafisi%20v.%20Nafisi.pdf [https://perma.cc/T762-ED29]; Lifshitz, *supra* note 74, at 699–702. The nature of the alternative justification adopted by Israeli courts has been debated in Israeli scholarship: whether it is based on equality, on fairness, or on some other rationale. *See, e.g.*, ROSEN-ZVI, *supra* note 76, [Matrimonial Property] at 243–44, 251–52; Lifshitz, *supra* note 47, at 353. This issue, however, is beyond the scope of this article. For the purpose of the argument presented here, the emphasis is on the move away from the contract-based rationale.

86. The Spouses Property Relations Law, 5733–1973, 27 LSI 276 (1973) (Isr.).

87. *See, e.g.*, Ayelet Blecher-Prigat, *From Partnership to Joint-Parenthood: The Financial Implications of the Joint Parenthood Relationship*, 19 LAW & BUS.–IDC L. REV. 821, 840–41 (2016) (Isr.).

88. LFA 2478/14 Plonit v. Plonit (Aug. 20, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

89. Menashe Shava, *The Property Rights of Spouses Cohabiting Without Marriage in Israel—A Comparative Commentary*, 13 GA. J. INT'L & COMP. L. 465, 475–76 (1983) (reasoning that community property rules "are also applicable to reputed spouses" where there is an implied agreement between the spouses to share property).

is required beyond the evidence substantiating a general relationship of economic sharing.[90] The Court once again endorsed these rules in 2015 in its decision in *Plonit v. Plonit*, which concerned the property rights of lesbian partners who lived together for a period of twenty years.[91]

A similar paradigm obtains in the context of maintenance and post-separation support obligations between reputed spouses. Although for spouses, the Family Law Amendment (Maintenance) Law provides that religious law governs the matter of spousal maintenance,[92] the Supreme Court held in 2004 that spouses married abroad in a civil marriage are excluded from the scope of this legislation.[93] In a move that resembled the development of the presumption of joint property, Justice Barak, writing for the Court, established civil maintenance and post-separation obligations within a framework of contract law, which are to be distinguished from marital status-based maintenance obligations governed by religious law.[94]

According to Barak, support obligations can be grounded in the parties' agreement to share their lives together and undertake mutual rights and obligations toward each other.[95] For spouses married in a civil marriage abroad, the formal act of marriage attests to such an agreement.[96] Nonetheless, Barak emphasized that since these civil support obligations do not derive from the marital bond, but rather from the actual relationship between the parties, they can apply to reputed spouses as well.[97] However, reputed spouses need to establish their intention to commit, which includes mutual support obligations.[98]

Despite the primary reliance on agreement-based arguments, Barak's decision embodies a duality regarding the values of individual autonomy and choice, on the one hand, and normative policy considerations of fairness on the other—at least for spouses. Thus, Barak holds that within the agreement-based framework, spousal support obligations (including post-separation

90. CA 4385/91 Salem v. Carmi 51(1) PD 337 (1997) (Isr.).

91. LFA 2478/14 Plonit v. Plonit (Aug. 20, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

92. The Family Law Amendment (Maintenance) Law, 5719–1959, § 2(a) 13 LSI 73 (1958–59). According to section 2(b), if the defendant in a spousal maintenance claim does not have an applicable personal law (that is, if he or she does not belong to a recognized religious community), then spousal maintenance is governed by civil law. However, as individuals who do not belong to a recognized religious community cannot marry in Israel, but rather only in a civil marriage abroad, this subsection became irrelevant once all couples married in civil marriages abroad.

93. LCA 8256/99 Plonit v. Ploni 58(2) PD 213 (2004) (Isr.).

94. *Id.* at 229–30.

95. *Id.* at 231.

96. *Id.*

97. *Id.* at 238–39.

98. *Id.*

support) are not based only on the parties' implied agreement but also on the principle of good faith.[99] The principle of good faith, which is central in private-law jurisprudence, is a standard that determines the legal norms of behavior for individuals in a certain context.[100] It is a flexible standard, so courts can adapt its content to fit changing realities and social norms, but its declared aim is to introduce considerations of fairness and the protection of reliance and just expectations.[101] While this part of Barak's reasoning moves away from the parties' choice in undertaking obligations, Barak clarifies that for reputed spouses the application of the good-faith principle is subject to their initial agreement to live as reputed spouses.[102] Thus, the content and scope of the post-separation support obligations for reputed spouses might be different than such obligations for spouses married in a civil ceremony abroad. Review of existing caselaw suggests that courts are reluctant to find that reputed spouses undertook such mutual support obligations.[103]

IV. THE REPERCUSSIONS OF NONMARRIAGE ON THE LAWS OF MARRIAGE

This Part demonstrates the dynamic interrelationship between nonmarriage and marriage, focusing on how the laws of nonmarriage reverberate in the laws of marriage. It first shows that a focus on function rather than form in certain aspects of the laws governing nonmarriage has influenced the laws of marriage. To a growing extent, formal marriage is no longer sufficient to confer on spouses the benefits, rights, and obligations that flow from the function of marriage. Accordingly, formal marriage that has ceased to function no longer gives rise to the legal implications of marriage.

This Part then moves on to examine how the emphasis on individual autonomy and choice in determining the mutual financial obligations that nonmarried partners owe one another has influenced the laws of marriage. It demonstrates that consent-based rationales have worked their way into the laws of marital property and thwarted efforts to structure these laws on normative policy considerations independent of the parties' (implied) choice.

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99. *Id.* at 232.

100. *See, e.g.*, Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 92–93 (2002).

101. *Id.* at 93 (citing CA 6339/97 Roker v. Salomon 55(1) PD 199, 279 (1999) (Isr.)).

102. *See id.*

103. Blecher-Prigat, *supra* note 87, at 841. It should be noted that only limited published caselaw exists applying the caselaw-based support obligation for married couples and reputed spouses alike. *Id.*

A. Function Trumps Form: When Marriage Stops Functioning

In Part III, I described how Israeli law of nonmarriage has placed a growing emphasis on the functional aspects of intimate partnerships rather than on their (marital) form. This functional approach served as the basis for expanding the rights, benefits, and obligations that apply to reputed spouses in their relationship with third parties, and especially the state.[104] But if the laws of nonmarriage convey the message that function is more important than form, can the laws of marriage be immune from this expressive message? In this section, I posit that they cannot, and I suggest that this can be best illustrated by a review of how Israeli law treats formal spouses once their intimate relationship functionally ends. As I show, for married spouses, as well as for reputed spouses, the law places a heavier weight on their actual relationship than on their formal status of marriage. It attaches considerable legal consequences to the parties' de facto separation—even when the marital tie has not been dissolved.

Thus, courts routinely divide marital property, order the sale of the family home, decide child custody and support issues—all, while the parties are not legally divorced.[105] Even the Spouses Property Relations Law—which attempted to offset this trend and enable the realization of marital property rights only upon formal divorce[106]—was eventually amended to enable separating spouses to realize their property rights.[107] The manner in which courts interpret and apply this law further indicates that they consider de facto separation as legally more significant than formal divorce. For example,

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104. *See supra* note 15 and accompanying text.

105. *See, e.g.*, Ayelet Blecher-Prigat & Zvi Triger, גירושים לכולם – המקרה של גירושים חד-מיניים כמקרה מבחן [*Divorce for All: Same-Sex Divorce as a Test Case*], 21 LAW & BUS.-IDC L. REV. 81, 100–01 (2018).

106. Spouses Property Relations Law, 5733–1973, 27 LSI 276 (Isr.). Under the caselaw-based property regime that preceded the law, either spouse could apply to the court at any time—even during the course of the marriage—to realize his or her individual share. This regime had been criticized for giving undue consideration to the possibility of marital reconciliation. The legislature responded to this and other perceived flaws in the caselaw-based regime by establishing an equitable right to the value of the assets accumulated during the marriage, which could be realized only upon dissolution of the marriage.

107. Spouses Property Relations Law (Amendment 4), 5768–2008, 18 LSI 2186 (Isr.). It is true that the law's amendment was primarily motivated by the difficulties in applying its original scheme, due to how hard it was to obtain a divorce under the country's restrictive religious laws of divorce. *See* Family Law Amendment (Maintenance) Law, 5791–1959, § 2(a), 13 LSI 73 (Isr.); *supra* text accompanying note 92. Without a divorce, the law's scheme could not be realized. Nonetheless, the amendment is not limited to fixing the obstacles that those religious divorce laws create. Rather, it provides a broad scheme that, as sketched in the text to this footnote, allows separating spouses to realize their property rights based on a marital rift; no prerequisite exists of proof of an obstacle to divorce. Furthermore, this amendment cannot be considered in isolation but rather against the accumulated legislation and caselaw described in this section.

courts ordinarily use the date of separation as the relevant point of time for determining the scope and value of the spouses' assets (and obligations) that are subject to distribution.[108] This is so even though the law specifies that the relevant point of time for that purpose is the time at which legal proceedings were initiated.[109] Courts have discretion *under special circumstances* to decide on an earlier time,[110] but the exception seems to become the rule when courts routinely refer to the earlier date of separation.

A functional approach, which attaches less significance to the existence of formal marriage, is not confined merely to the economic relationship between spouses—that is, to deciding when financial sharing ends and dividing assets begins. Rather, a growing body of legislation excludes de facto-separated spouses from the legal definition of "spouse."[111] As an instance, some legislation denies socioeconomic benefits, and especially various survivors' benefits, to live-apart spouses.[112] It's worth remembering that the bestowal of socioeconomic benefits was the first legal consequence that the law attached to nonmarital relationships of reputed spouses.[113] Likewise, the same amendment of the Evidence Ordinance that extended evidentiary trial privileges to reputed spouses, excluded from its scope those spouses whose marriages had ceased to function.[114]

The key question raised by the functional approach to marriage law is, of course, how to decide what constitutes de facto separation. Although a full discussion of these criteria is beyond the scope of this article, it's important to point out certain issues surrounding this question. Relevant legislation provides little guidance and in many respects increases the ambiguities, as it sometimes specifically notes that such separation may exist even when the

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108. *See, e.g.*, FamA (Hi) 23541-01-17 Plonit v. Ploni, (Aug. 9, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); (BS) 9727-06-10 S.S v. S. Y., (July 3, 2010) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

109. *Id.*

110. Spouses Property Relations Law, 5733–1973, § 8(3), 27 LSI 276 (Isr.).

111. *See* Zvi Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 No.2 ISRAEL STUDIES REV. 1, 10 (2012).

112. *See, e.g.*, National Insurance Law, 5714–1953, § 238, 8 LSI 4 (definition of "widow" and "widower"); State Service (Pensions) Law [Consolidated Version], 5730–1970, § 4, 24 LSI 57 (Isr.) (definition of survivors).

113. *See, e.g.*, Karin Carmit Yefet, *Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction*, 2016 U. ILL. L. REV. 1505, 1513 (2016) ("Progressive forces in the civil legislature and the judiciary have raised the formal status of 'reputed spouses' to nearly equal that of proper religious spouses–and in some instances, have achieved an overcorrection, such that unmarried cohabitants may paradoxically enjoy stronger individual rights than lawfully wedded couples.").

114. Amendment to Evidence Ordinance (No. 16) Law, 5775–2015, SH No. 2517 p. 308 (Isr.).

parties still reside together.[115] Caselaw addressing this question exists mainly in the context of the economic relationship between spouses;[116] it thus far has adopted a flexible approach, determining the date of separation on a case-by-case basis. In making such a decision, courts take into consideration physical separation (the couple stops residing together), financial separation (the spouses cease to have a joint household in the economic sense), or an intimate rift (no actual intimate relationship exists, even if the parties still reside together).[117] One must also remember that the question of when the separation began comes before a court only after the parties have initiated divorce (or property distribution) proceedings, and at that point, usually no doubt exists that the spouses are separated. To note the instant article's salient point on this question—that the law is moving away from reliance on form—whatever "function" means in the context of determining separation date, courts consider it more relevant than formal divorce.

The most telling example of the growing emphasis on function over formal status in the marriage laws is the court's willingness to recognize new relationships formed by individuals who are formally married to others.[118] As discussed in Part III, the laws applied to reputed spouses allow recognition of, and generate rights and obligations under such relationships—in effect, giving recognition to multiple relationships notwithstanding Israel's prohibition on polygamy.[119] Moreover, except for the very few statutes that expressly mandate otherwise, where a benefit or a right may be afforded either to a formal-but-estranged spouse or to a functional intimate partner, Israeli caselaw prefers the latter.[120]

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115. *See, e.g.*, Spouses Property Relations Law (Amendment 4), 5768–2008, 18 LSI 2186 (Isr.); Amendment to Evidence Ordinance (No. 16) Law, 5775–2015, SH No. 2517 p. 308 (Isr.). Again, it might be interesting to note that joint residence is not required for the law to recognize a couple as reputed spouses.

116. *See* WESTREICH & SHIFMAN, *supra* note 1, at 14.

117. *See generally* LCA 8256/99 Plonit v. Ploni 58(2) PD 213, (2004) (Isr.); FamA (Hi) 23541-01-17 Plonit v. Ploni, (2017) (Isr.); (BS) 9727-06-10 S.S v. S. Y., (2010) (Isr.).

118. *See* LFA 3497/09 Plonit v. Plonit, (2009) (Isr.); Lifshitz, *supra* note 47, at 363.

119. *See also* CA 107/87 Alon v. Mendelson PD 43(1) 431 (1989) (Isr.); 621/69 Nassis v. Yuster 24 (I) PD 617 (1970) (Isr.); CA 1966/07 Ariel v. Egged Pension Fund (2010) (Isr.). Some legislation, especially socioeconomic legislation, enables more than one spouse to receive benefits in cases of plural marriages (again, despite the criminal prohibition on plural marriages). Courts addressing such legislation have enabled reputed spouse to enjoy benefits in addition to a formal spouse, when the two relationships coexisted.

120. *See, e.g.*, CA 1966/07 Ariel v. Egged Pension Fund (2010) (Isr.). The Israeli Succession Law is the only exception that recognizes the rights to intestate succession of reputed spouses only if neither partner is married to another person. *See* Succession Law, 1965, 19 LSI 58 (Isr.). For this reason, until recently courts adhered to a formal interpretation of the term "spouse" in this law, at least for intestate succession purposes. Nonetheless, in recent years several family-

This legal approach, which treats separated spouses as divorced, and especially its willingness to recognize new relationships despite the prohibition on polygamy, has traditionally been explained as a response to the obstructions in obtaining a divorce under the religion-based divorce laws.[121] Scholars such as Pinhas Shifman have suggested that because the civil legal system cannot provide individuals with divorce (which is subject to the exclusive jurisdiction of religious courts), it provides individuals *the consequences of divorce* as a substitute to formal divorce.[122] In other words, the legal framework is viewed as offering a civil-alternative remedy for those individuals who may find themselves unable to divorce under the religious laws. While this explanation is superficially attractive, it cannot account for the extensive body of law that attaches legal implications to de facto separation rather than to formal divorce.

To begin with, relevant legislation does not condition any of the legal consequences it ascribes to marital separation upon proof of difficulties in obtaining divorce; it simply refers to the situation of separation.[123] Courts, as well, seem to pay little notice to the reasons for the absence of formal

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law court decisions refused to recognize separated spouses as legal spouses for purposes of intestate succession and have denied them inheritance rights. *See, e.g.*, 12601-03-09 (Hi), Plonit v. Ploni, (Nov. 2, 2009) Nevo Legal Database (by subscription, in Hebrew) (Isr.); 57918-06-15 (Jer.), A.C.P. v. R.P. (Feb. 18, 2016) Nevo Legal Database (by subscription, in Hebrew) (Isr.). These decisions further attest to the expansion of the functional approach to marriage.

121. *See* Blecher-Prigat, *supra* note 46, at 434 n.5 ("New relationships formed by either spouse while still formally married are recognised [sic] and generate rights and obligations under the civil laws of cohabitants."); Yefet, *supra* note 113, at 1512–13 ("The second way the civil courts have neutralized the religious monopoly over formal marriage is by conferring on the informal institution of cohabitation legal recognition sufficient to render it a legitimate civil alternative.").

122. Pinhas Shifman, *On Divorce Substitutes Created by the Civil Court*, 3 LANDAU BOOK 1607 (Aharon Barak & Elinoar Mazuz eds.) (1995); *See, e.g.*, ARIEL ROSEN-ZVI, ISRAELI FAMILY LAW: THE SACRED AND THE SECULAR 306 (1990).

123. *See, e.g.*, National Insurance Law, 5714–1953, § 238, 8 LSI 4 (Isr.); State Service (Pensions) Law [Consolidated Version], 5730–1970, § 4, 24 LSI 57 (Isr.); Spouses Property Relations Law, 5733–1973, § 5A, 27 LSI 276 (Isr.). The Property Relations Law does specify a limited exception, according to which courts can take into account an applicant's lack of good faith, in divorce proceedings, in executing the decision according to the law. Spouses Property Relations Law, at § 5A. Thus, if a Jewish individual withholds consent to give or receive the *get* (the Jewish bill of divorce), a court may stall the execution of his or her property rights. Note, however, that this exception is limited in two senses. First, difficulty in obtaining a divorce is not a precondition for realizing one's property rights prior to divorce (or even prior to initiating divorce proceedings). Second, the sanction provided by § 5A(d) is only regarding the execution of the court's decision. The court, then, should issue a decision regarding the property rights but can stall its execution regarding the individuals who act in bad faith.

divorce.[124] In fact, except for some cases that do mention obstacles to obtaining religious divorce, cases generally do not reflect any inquiry into why the couple is not divorced.[125] Instead, function-based reasoning—suggesting that the spouses' relationship has ended—seems to lie at the center of such decisions.[126]

The same is true in cases that recognize individuals as reputed spouses even though they are formally married to others. Accordingly, in *Israel v. Pessler*, the first Supreme Court case to consider this issue, Ms. Pessler claimed a survivors' pension as the reputed spouse of Mr. Shiff, with whom she cohabited and shared an intimate relationship for many years, although she was formally married to another man.[127] In rejecting the state's claim that married individuals cannot be recognized as reputed spouses, the Supreme Court emphasized function as the basis for its ruling, rather than obstacles to obtaining divorce.[128] In fact, the Court was silent as to the reasons Ms. Pessler remained married to another. Subsequent scholarship has indicated, however, that she did not face any problem in getting a divorce; rather, it was she who withheld divorce.[129]

It is therefore difficult, if not impossible, to explain the function-based approach to marriage by reference to the restrictions on formal divorce. In this respect, one should also remember that the legal consequences ascribed to marital separation are not solely the positive ones that flow from being treated as divorced but may also be negative. Sometimes this approach denies a benefit from a spouse, to which the former partner would have been entitled under a form-based approach.[130] Here again, the court denies such benefits based on its factual finding of separation, without taking into account why

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124. Blecher-Prigat, *supra* note 46, at 439 n.31 ("When both spouses belong to the same recognised religion, the relevant religious court should allegedly have jurisdiction over divorce proceedings between the spouses . . . . Nevertheless, in the past, some have raised doubts regarding the jurisdiction of the rabbinical courts in dissolving civil marriages entered into abroad between Jewish spouses.").

125. *See, e.g.*, Lifshitz, *supra* note 21, at 365 n.33; LIFSHITZ, *supra* note 32, at 267–74.

126. *See, e.g.*, CA 52/80 Shachar v. Friedman 38(1) PD 443 (1984) (Isr.) (interpretation of the Spouses Property Relations Law); LFA 2478/14 Plonit v. Plonit (2015) (Isr.) (same); (Hi) 12601-03-09 Plonit v. Ploni, (2009) (Isr.). The "functional" reasoning in this latter case is particularly noticeable, as this case was given in the context of intestate succession, where the formal approach seemed to reign. *See* note 96 and accompanying text.

127. CA 384/61 State of Israel v. Pessler 16(1) PD 102 (1962) (Isr.).

128. *Id*. at 109. This case contemplates the functional relationship of Pessler and Shiff. In a rather stirring passage, the Court noted: "A woman who has given a man her body and soul, the fruit of her labors and the love in her heart, who bore with him and supported him in times of trouble,—why should her lot be less, regarding the various social benefits, simply for want of a marriage certificate?" (translation from Shifman, *supra* note 40, at 456–57).

129. *See generally* Lifshitz, *supra* note 47.

130. *Cf.* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1297 (2014).

the spouse did not get a divorce.[131] Using this approach, courts have sometimes denied benefits from a separated spouse who tried to obtain formal divorce but failed under the religious divorce laws.[132] In one such decision that involved a Jewish woman who struggled in vain for many years to obtain the Jewish bill of divorce (the *get*) from her recalcitrant husband, the court explained that the clear wording of the statute dictated the denial of her claim for survivors' pension.[133] In a decision that echoes Barak's decision in *Lindorn*,[134] the court explained that the purpose of survivors' pensions (established under the National Insurance Law) is to provide an economic safety net following the death of a provider spouse. Such a purpose cannot justify awarding the survivors' pension to a woman who effectively was separated from her formal husband and did not rely on him financially for many years.

It might be worth noting that there is no formal decision giving legal effect to a couple's separation; rather, courts recognize separation on a case-by-case basis in a specific context. The result is that spouses might be considered "married" for certain purposes until formally divorced, yet "functionally divorced" for other purposes. The same is true with respect to legislation that excludes separated spouses from the definition of "spouse." The exclusion is context-specific rather than exhaustive.

B. Growing Emphasis on Choice in Marital Obligations

In section III.B.2, I described how for spouses, the caselaw has moved away from rationales focusing on agreements and choice as the source of marital property rights and obligations. Instead, normative policy considerations of fairness and equality have taken hold as the basis for marital property rules. The departure from the consent-based property regime for married couples crystallized in the enactment of the Spouses Property Relations Law, which established the rights of spouses in property accumulated during the course of the marriage, regardless of the spouses'

131. *Id.*

132. A quite extreme example is provided by NI 2276/06 Mizrahi v. National Insurance Institute (2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.), where a woman had been denied the Jewish bill of divorce from her husband for over 30 years. After he passed away she was denied survivor benefits since she was excluded from the definition of a widow under § 238 of the National Insurance Law. *See* Lifshitz, *supra* note 47.

133. *Id.*

134. *See* CA 2000/97 Lindorn v. Karnit, 55(1) PD 12 (1999) (Isr.); Lifshitz, *supra* note 47 and accompanying text.

intentions.[135] This development appears to represent a move in the opposite direction from the property rules applicable to reputed spouses, which continue to be supported by agreement-based rationales and to place individual autonomy at the center. The law thus creates an apparent distinction between marriage and nonmarriage on this issue. This distinction itself has been based on a rationale of choice—the choice whether or not to marry—which allegedly justifies the creation of different property regimes for married couples on the one hand and nonmarried couples on the other.

However, in this section, I show how Israeli caselaw has reintroduced the values of (individualistic) autonomy and choice into the laws of marital property.[136] I argue that these values have always remained in the background of marital property law and that the persistence of these values in the property regime applicable to reputed spouses has prompted their resurrection in the marital realm.

I begin the discussion with a late-2018 Supreme Court case, *Plonit v. District Rabbinical Court of Haifa*, which illustrates the revival of autonomy and agreement-based rationales in marital property law.[137] This case provoked extensive and intense public and academic responses, not only because of its return to individualistic, consent-based reasoning, but also because it supposedly condoned considerations of fault in determining a wife's property rights.[138] For purposes of this article, however, I focus mainly on the first line of criticism.

In *Plonit v. District Rabbinical Court of Haifa*, the Supreme Court, sitting as a High Court of Justice, refused to intervene in—and thus effectively

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135. Spouses can opt out of the arrangement established in the Spouses Property Relations Law, but they can do so only by entering into nuptial agreements that meet the procedural requirement set forth in the statute. The statute provides that a nuptial agreement must be in writing (whether it is a prenup, a postnup, or a divorce agreement) and, in addition, it must be either confirmed or approved by one of the institutions listed in section 2 (a different procedure—i.e., confirmation or approval—and a different confirming or approving institution are required, based on whether the agreement is a prenup, a postnup, or a divorce agreement). The Spouses Property Relations Law, 5733–1973, § 2, 27 LSI 276 (Isr.). Absent such a formal agreement, the arrangement set forth in the statute (termed "the resources-balancing arrangement") will apply, regardless of the parties' intentions.

136. Autonomy is not inherently an individualistic term. It can be understood in a relational manner. *See* Yael Braudo-Bahat, *Towards a Relational Conceptualization of the Right to Personal Autonomy*, 25 AM. U. J. GENDER SOC. POL'Y & L. 111, 129 (2017); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989). However, this is not the way autonomy is understood and applied in existing caselaw.

137. HCJ 4602/13 Plonit v. District Rabbinical Court of Haifa (2018) (Isr.).

138. *See, e.g.*, Hanoch Dagan & Daphna Hacker, *The Specific Shared Ownership Doctrine–Towards the Forth Act in HCJ 4602/13*, (forthcoming 2020) (on file with author); Shahar Lifshitz, *Moral Judgment of Sexual Behavior in Marriage, Autonomy, and "Governance" Following HCJ 4602/13*, TEL AVIV U. L. REV. (forthcoming 2019) (on file with author).

approved—a rabbinical court decision[139] holding that after more than thirty years of marriage, a wife had no rights in the marital home—whether a property right or a share in the home's value—which was a preexisting asset the husband brought to the marriage.[140] On its face, the decision is consistent with the Spouses Property Relations Law, which expressly excludes preexisting property, as well as gifts and inherited property, from the assets available for distribution between spouses.[141] Nevertheless, Supreme Court precedents since the early 2000s have held that spouses could establish shared ownership in such property under what is known as the "specific-shared-

139. HCJ 4602/13. The Israeli Supreme Court operates in two capacities. First, as the Supreme Court, it sits as an appellate court (civil and criminal). In this capacity it has appellate authority over the different religious courts. However, the Court also sits as a High Court of Justice, a first and final instance, which has discretionary power to undertake administrative review of government agencies and judicial tribunals. When acting as the High Court, the Supreme Court can intervene in religious courts' judgments; however, the grounds for intervention are not as broad as intervention in judicial appeal. The High Court of Justice can only intervene in judgments of religious courts on the basis of *ultra vires*; *See* Basic Law: The Judiciary, 5744 § 15 38 LSI 101, (Isr.), http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm. In practice, the Supreme Court has broadly interpreted its grounds for intervention in decisions of the religious courts; thus, it intervenes in cases of violations of natural law principles, infringements of procedural rules, and religious courts' disregard of laws that apply to them. A determination that a law applies to religious courts can be found expressly in statutes or can be determined by the Supreme Court by way of interpretation. ARIEL ROSEN-ZVI, Family and Inheritance Law, *in* INTRODUCTION TO THE LAW OF ISRAEL 75, 90 (Amos Shapira & Keren C. DeWitt-Arar, eds., 1995). The most famous example of this approach by the Court (which is also relevant for the discussion here) is HCJ 1000/92 Bavli v. The High Rabbinical Court 48(2) P.D. 221 (1994) (Isr.). In *Bavli*, the Court held that religious courts, including the rabbinical courts, must apply civil laws, including Supreme Court precedents, in matters that are not considered "matters of personal status" (for our purposes, "matters of marriage" and "matters of divorce"). As explained above, property division upon divorce is not considered a "matter of personal status." *See supra* note 112 and accompanying text. According to *Bavli*, religious courts can obtain jurisdiction over property division, but when they do, they have to apply the civil law. *See* Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2786 (2009); Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 TUL. L. REV. 659, 687 (2003).

140. To be more precise, prior to the marriage the husband inherited a plot of land. After the marriage, he made a transaction with a construction contractor, according to which he transferred to the contractor three-fourths of the plot and in exchange received the marital home. For legal purposes, it is the same as if the marital home was a preexisting asset, and this understanding underlies the different decisions in this case.

141. The Spouses Property Relations Law, 5733–1973, § 5(a)(1) 27 LSI 276, (Isr.). This is in contrast to the caselaw-based presumption of shared ownership, which was sometimes applied to such assets in cases of long marriages.

ownership doctrine" (because it requires evidence of shared ownership in a specific asset).[142]

Religious courts adjudicating marital property disputes must apply Supreme Court precedents on this issue. But in *Plonit v. District Rabbinical Court of Haifa*, the rabbinical court denied the wife's claim to shared ownership of the marital home, ostensibly applying the relevant civil caselaw.[143] Two of the three rabbinical judges referred in their opinions to an extramarital affair the wife had had during the last months of the marriage, deliberating on whether the affair undermined shared ownership in the home or enabled the husband to nullify shared ownership to the extent it existed.[144] The latter possibility suggests that shared ownership in preexisting property may be conditioned on a spouse's continued faithfulness—or, stated differently, that shared ownership can be established conditionally, subject to potential termination in the event of an extramarital affair. The third rabbinical judge denied the wife's claim based on the facts of the case, without referring to her affair.[145]

The wife petitioned the Supreme Court as High Court of Justice, arguing that the High Rabbinical Court ignored well-established precedents holding that fault, and especially sexual fault, has no place in decisions allocating rights in marital property.[146] A majority of two Supreme Court justices (Justice Mintz and Justice Stein) denied the wife's claim, against the dissenting opinion of Justice Amit.[147] Justice Mintz held that a majority of

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142. This was first decided in CA 8672/00 *Abu Romi v. Abu Romi* 56(6) PD 175 (2002) (Isr.). Another term for this doctrine is the "specific intention to share" doctrine. As discussed in the text accompanying note 157, there is a debate in Israeli scholarship about whether this doctrine is contract-based or property-based. "Specific intention to share" emphasizes that showing of a specific *intent* to share such preexisting property is required; whereas, "specific shared ownership" emphasizes normative considerations other than intent, which may give rise to shared ownership in the pertinent asset. Since the normative basis of this doctrine is disputed, I chose to use the term that is flexible enough to fit either interpretation.

143. *See* 10736/1 Ploni v. Plonit, (holding rabbinical courts are obliged to apply the civil legislation and Supreme Court precedents in matters relating to marital property (citing HCJ 1000/92 Bavli v. The High Rabbinical Court 48(2) P.D. 221 (1994) (Isr.)).

144. *Id.*

145. *Id.*

146. For such precedents see, for example, HCJ 8928/06 Plonit v. High Rabbinical Court 63(1) PD 271 (2008) (Isr.); see also CA 264/77 Dror v. Dror 32(1) PD 829 (1978) (Isr.).

147. *Dror v. Dror* is currently before the Supreme Court for a "further hearing." A further hearing is a rather unique Israeli invention. Under British Mandatory rule, decisions of the local Supreme Court could be appealed to the Privy Council in London, England. This option was eliminated upon the establishment of the State of Israel and its independent judicature. In a further hearing, a panel of five or more Supreme Court judges hear a matter on which the Supreme Court has already ruled in a panel of three or more judges. In a way, the further hearing was established as a substitute for the option of appeal to the Privy Council. Chanan Goldschmidt, *Further*

the rabbinical court had based its decision on accepted considerations defined in civil caselaw and not on the wife's extramarital affair, since one rabbinical judge did not mention the affair in his decision, and another noted the affair but did not rely on it as a basis for denying the wife's claim.[148] Justice Stein refused to intervene in the rabbinical court's judgment for different reasons: his opinion reads as a manifesto for autonomy and choice, and, in particular, for the freedom of spouses to shape the terms of their relationship, including by basing their (financial) relationship on patriarchal or fault-based considerations.[149]

According to Stein, a distinction should be drawn between preexisting assets, inheritance, and gifts on the one hand, and assets that were accumulated during the course of marriage on the other.[150] Stein noted that existing caselaw, which excluded fault considerations from marital property law, referred to assets accrued during the marriage.[151] Regarding such assets, the Spouses Property Relations Law recognizes the rights of both spouses in their value.[152] Therefore, introducing fault considerations in distributing the value of these assets suggests that a spouse might be denied rights that she or he is entitled to under the law, based on sexual fault. However, preexisting property belongs to the registered owner, and the law does not provide a

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Hearing: Theoretical and Empirical Aspects, 35 Isr. L. Rev. 320, 328–29 (2001). A petition to have a further hearing is made by a litigant, and the President of the Supreme Court decides whether to accept the petition. There is no vested right to a further hearing, and it should only be granted when "the Supreme Court makes a ruling inconsistent with a previous ruling of the Supreme Court or where the importance, difficulty, or novelty of a ruling made by the Supreme Court justifies, in their view, such a further hearing." *See* Courts Law (Consolidated Version), 5744–1984, § 30, 38 LSI 271 (Isr.).

148. HCJ 4602/13 Plonit v. District Rabbinical Court of Haifa, ¶ 8 (2018) (opinion of Mintz, J.) (Isr.); Thus, there were no grounds to intervene in the rabbinical court's ruling, since it was based on factual determinations regarding whether the wife was able to establish intent to share ownership. For the grounds for intervening in rabbinical courts judgments see *supra* note 139.

149. *Id.* ¶¶ 6–8 (opinion of Stein, J.). Justice Stein's opinion is also a strongly reasoned supporting restraint in intervening in religious courts' decisions. However, this part of his opinion is less relevant for purposes of this article.

150. *Id.* ¶ 10.

151. *See id.*

152. The Spouses Property Relations Law, 5733–1973, § 8(2), 27 LSI 276, (Isr.). The law does not provide spouses with ownership rights in the assets accumulated during the marriage. Rather, it provides them only the right to an equal share of the value of assets accumulated during the marriage. The arrangement the law established is called "a balancing of resources arrangement," according to which courts should assess the value of the assets (and obligations) each spouse accumulated during the marriage, then balance the value between the spouses so that each will receive an equal share.

spouse with a right to a share in such property or its value.[153] According to Stein, the caselaw that enables a spouse to establish shared ownership requires a showing that the registered owner intended to give a share in his or her preexisting assets.[154] Such intention can be qualified, and the registered owner can condition sharing on the lasting fidelity of his or her spouse.[155] Fault, according to Stein, is excluded as a consideration in the *taking* of property rights from a spouse; however, such considerations are legitimate in connection with the *giving* of property rights to a spouse who did not have them to begin with. Any other interpretation of the caselaw on shared ownership, according to Stein, unduly interferes with the registered owner's freedom and sovereignty, as well as with spouses' autonomy to shape their marital property relationships.[156]

As noted, the Supreme Court's decision in *Plonit v. District Rabbinical Court of Haifa* triggered extensive criticism, and Justice Stein's opinion was the main target. Hanoch Dagan and Daphna Hacker, for example, have argued that the specific-shared-ownership doctrine should be understood as a property-based rather than a contract-based regime.[157] It should be understood as a legal way to acquire property rights independent of the spouses' implied intentions (and especially the implied intentions of the registered owner), when certain circumstances exist.[158] In particular, Dagan and Hacker applied their argument to the marital home, suggesting that in cases of a long and reasonably harmonious marriage (which is also the first marriage), where the spouses also share children, the specific-shared-ownership doctrine should recognize the property rights of the nonregistered spouse in the home.[159] Dagan and Hacker argue that such an understanding of the specific-shared-ownership doctrine and its application is supported by an extensive body of caselaw on marital property.[160] They refer to the caselaw, discussed above, which departed from agreement-based rationales

153. The Spouses Property Relations Law, 57331973, § 5(a)(1), 27 LSI 276, (Isr.). (The right to balancing excludes property that a spouse "had immediately before the marriage or received by way of gift or inheritance during the marriage."). The same is true regarding inheritance and gifts.

154. Friedmann, *supra* note 72, at 116 ("[T]he question of ownership in property acquired by one of the spouses is to be decided in accordance with the parties' intention.").

155. HCJ 4602/13 Plonit v. District Rabbinical Court of Haifa, ¶ 10 (2018) (opinion of Stein, J.) (Isr.).

156. *Id.*

157. Dagan & Hacker, *supra* note 138.

158. *See id.*

159. *See id.* This is a default rule, and spouses can agree otherwise, according to Dagan and Hacker, as long as they do so in a formal nuptial agreement that meets the requirements of the Spouses Property Relations Law. *See id.*

160. *Id.*

and endorsed, instead, normative public policy values of equality and fairness as the basis for marital property law.[161]

Shahar Lifshitz disagrees with Dagan and Hacker that the law should adopt a property-based regime allowing a nonregistered spouse to claim property rights in preexisting property of the other based on the length of the marriage or other considerations.[162] Lifshitz supports giving some weight to the parties' concrete economic relationship in determining the rights of a nonregistered spouse in preexisting property, including the marital home. Nonetheless, he, too, criticizes Stein's strong individualistic contract-based rationale of the specific-shared-ownership doctrine.[163] He also sees Stein's decision as a deviation from existing marital property law, which has consistently diminished the role of intent (especially that of the registered owner's) and relied more on normative public-policy considerations.[164]

Contrary to Dagan, Hacker, and Lifshitz, I argue that the values of autonomy and choice had been reintroduced to marital property law before Stein's decision in *Plonit v. District Rabbinical Court of Haifa*. First, I dispute Dagan and Hacker's description of the specific-shared-ownership doctrine as property-based. Rather, it was developed as a contract-based doctrine, which, in the vast majority of caselaw, is termed the "specific-intent-to-share" doctrine, requiring proof of *intent* to share the relevant specific asset.[165] Indeed, I argue that the development of this doctrine was the first indication of the revival of choice-based rationales in marital property law.

Moreover, I argue that the values of autonomy and choice not only play a role in determining the rights of a nonregistered spouse in preexisting property as suggested by Justice Stein. Importantly, they also affect how courts apply the Spouses Property Relations Law regarding assets accumulated during the course of marriage. I conclude this section by addressing one case, which provides a telling example of this legal approach.

The Spouses Property Relations Law gives spouses the right to an equal share of the value of assets accumulated during the marriage.[166] However,

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161. *See id.*

162. Lifshitz, *supra* note 138.

163. *See id.* Lifshitz also criticizes Stein for adopting, in fact, a default rule against sharing, as his opinion did not rely on any evidence regarding the intentions of the husband as the registered owner, and, in particular, no specific evidence supported the assertion that the husband had conditioned sharing on the wife's continual fidelity. *See id.*

164. *See id.*

165. *See, e.g.*, CA 11120/07 Simchoni v. Bank Hapoalim, Ltd. (Dec. 28, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (finding that a specific intention of shared ownership in the apartment could be assumed because the wife had invested in the apartment).

166. Spouses Property Relations Law, 5733–1973, § 5, 27 LSI 276 (Isr.).

courts have discretion *under special circumstances that justify so doing* to prescribe that the value of the assets will not be balanced equally but in some other proportion.[167] In *T.S. v. D.S.*, the principles of autonomy and choice led the court to use this discretionary power and determine that the accrued marital assets should not be divided equally between the spouses.[168]

The case concerned a husband and wife who married in 1980.[169] In 1994, the husband began to have a relationship with another woman in parallel with his relationship with his wife.[170] No divorce proceedings were initiated, despite the fact that the wife knew about the other woman.[171] The husband divided his life between the two households (though on weekends he stayed with his legal wife and their children).[172] After ten years, the husband ended his relationship with the other woman and started a relationship with yet a third woman.[173] He purchased another apartment, where he lived with the third woman—again, in parallel with his married life.[174] In 2011, the wife submitted a claim under the Spouses Property Relations Law to obtain her share in the assets accumulated during the marriage.[175] The family court held that the spouses' choices about their marital lives—specifically, the fact that the husband divided his life between the marital household and the households he shared with other women, and the wife's knowledge of these parallel relationships—all suggested an implicit agreement about a lesser degree of financial sharing.[176] This, according to the family court, justified the court's use of its discretionary power to divide the value of the marital assets unequally, seemingly in accordance with the spouses' implicit agreement.[177] The family court held that the husband was entitled to 70% of the marital assets, while the wife was entitled to only 30%.[178] The district court on appeal affirmed the family court's reasoning (though it increased the wife's share to 40%), and the Supreme Court denied leave to appeal.[179]

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167. Spouses Property Relations Law, 5733–1973, § 8(2), 27 LSI 276 (Isr.).
168. FamC (Petah Tikva) 38559-05-11 T.S. v. D.S. (2013) (Isr.).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* In 2005, the husband filed for divorce, but the rabbinical court denied his petition, finding he had no grounds for the divorce. Nonetheless, the two apartments in which the wife claimed her share were purchased in the 1990s.
176. *Id.*
177. *Id.*
178. *Id.*
179. 8206/14 Ploni v. Plonit (2015) (Isr.).

The reliance on the spouses' marital life as an indication of a weaker degree of financial sharing—thus justifying deviation from the rule of equal division—is striking in view of existing caselaw on applying discretion for such deviation. The Supreme Court has consistently held that deviating from a 50:50 division should be a rare exception.[180] The Court has held that fault considerations are excluded, and as a general rule, even marital violence cannot justify a different division.[181] The Court has emphasized the economic rationale of the Spouses Property Relations Law, indicating that the discretionary power to distribute marital assets unequally should be limited to the purpose of advancing economic fairness between the spouses.[182] It is also worth remembering that the Spouses Property Relations Law sets procedural requirements for spouses who agree to different arrangements from those set by this law.[183] However, the specific-intention-to-share doctrine already recognized that certain agreements between spouses do not need to meet these procedural requirements, and can be legally binding even though they are only implied.

Nevertheless, I argue that the values of individual autonomy and choice have always remained in the background of marital property law.[184] I further argue that it is difficult, if not impossible, to minimize the values of individualistic autonomy and choice in marital property laws while at the same time making these values the basis for property relations between nonmarital couples. After all, suggesting that nonmarried couples should have different mutual rights and obligations because they chose nonmarriage rather than marriage makes *choice* the underlying basis for the way family obligations are legally established.

Before concluding, I note that it is possible to offer an alternative interpretation of *T.S. v. D.S.*—one positing that it is not about spouses' autonomy and choice concerning their marital-financial life but, rather, about the role of *function* in the laws of marriage. Under this reading, because the spouses did not function as the ideal monogamous married couple, a lesser degree of economic sharing was applied in their case. Such an understanding strengthens the previous section's conclusion about the diminished significance of formal marriage and the disintegration of marriage as a legal institution. It is, in fact, a quantum leap from the cases discussed earlier regarding the way function plays out in the laws of marriage. This is no longer an all-or-nothing approach attaching legal effect to spouses' separation when

180. *See, e.g.*, LFA 7272/10 Plonit v. Ploni (2014) (Isr.).
181. *See, e.g.*, *id.*
182. *See, e.g.*, LFA 4623/04 A v. B, 62(3) PD 66 (2007) (Isr.).
183. Spouses Property Relations Law, 5733–1973, §§ 1–2, 27 LSI 276 (Isr.).
184. *See, e.g.*, 8206/14 Ploni v. Plonit (2015) (Isr.).

marriage becomes an empty shell: it is about different degrees of marriages and their consequences, how spouses' function is judged against an ideal of marriage and where they deviate from this ideal different degrees of marital rights and obligations will be applied to them. From this perspective this case also provides an interesting—and troubling—glimpse of what the law considers the basic elements of a functioning marriage.

V. CONCLUSION

In this Article, I offered observations drawn from the extensive Israeli experience with nonmarital intimate relationships to illustrate how the way a legal system addresses such relationships can affect the way it addresses marriage. The claim is not a claim about causation, in the sense that recognition of nonmarital relationships and attaching some legal consequences to such relationships lead to particular changes in the laws of marriage. Rather, the claim is about the implications of the way legal systems may divide the universe of intimate relationships. If, in the legal realm, relationships are divided across marital status lines so that they are either marital or nonmarital, a mutual influence is inevitable. Thus, marriage (or, rather, the way the law defines and perceives it) provides the benchmark for deciding which nonmarital relationships deserve legal recognition. It leads, for example, to denial of recognition of relationships that are not based on sexual intimacy (such as relationships between siblings or friends).[185] At the same time, as I demonstrated in this Article, the influence is not in one direction only, and the laws of nonmarriage reverberate within the laws of marriage.[186]

Note that this Article only describes the existence of the mutual effect of the laws of marriage and nonmarriage; it does not offer a normative evaluation of the different trends. Thus, it does not advocate the supremacy of function over form, or what role, if any, the values of autonomy and choice should play in shaping the mutual obligations owed between nonmarried

185. *See* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 191 (2007); Ruth Zafran, *Reconceiving Legal Siblinghood*, 71 HASTINGS L.J. (forthcoming 2020).

186. One might argue that the Israeli family-law system is so unique that it is hard to draw generally applicable conclusions from the Israeli experience. However, we can observe in other legal systems some of the issues discussed in this Article, even if not to the same degree as in Israel. For example, the exclusion of separated spouses from the legal definition of a spouse emerges in other legal systems, as does a willingness to recognize legal implications arising from a nonmarital intimate relationship, even when the parties to this relationship are formally married to others. These features often coincide with a developing recognition of legal consequences that arise in general from nonmarital intimate partnerships and are not dependent on the distinctive characteristics of the Israeli legal system.

partners, on the one hand, and spouses, on the other. One reason why this Article avoids such normative evaluations is that they are socially sensitive and differ from one legal system to another. It is possible that in the Israeli context, where religion governs marriage and divorce, the reliance on function more than on formal marriage in the laws of both nonmarriage and marriage is desirable; whereas, in the U.S. context, it is not.

The other, and more substantial, reason for this article's reluctance to offer a normative evaluation of these trends concerns a deeper critique of defining nonmarriage as a subject for scholarly engagement. Dividing the vast panoply of adults' most personal relationships across marital status into either "marital" or "nonmarital" suggests that sexual-intimate relationships of choice are the basic intimate relationships, which should be the center of family law. It excludes other relationships, including those between siblings and platonic friends. Asking the nonmarriage-versus-marriage question directs our attention in the wrong direction.

Many scholars have previously criticized the ways that family law prioritizes sexual intimacy over other relationships. A critical examination of the interrelationship of the laws of nonmarriage and marriage, as I do in this Article, provides yet another perspective from which to challenge the focus on sexual-intimate relationships as the principal relationships of family law. Framing the policy debate as a question of function versus form places the function of the parties as sexual-intimate partners at the center, as can be best demonstrated by *T.S. v. D.S.* Likewise, comparing nonmarriage and marriage highlights the value of individual autonomy and choice, rather than alternative policy considerations such as reliance, fairness, and equality. As long as the world of intimate relationships will be divided across marital lines, sexual intimacy, autonomy, and choice will be the values that continue to echo and reverberate in family law.