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A Basic Right to Marry: Israeli Style

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This article questions the value of the basic right to marry that was recognised by the Israeli Supreme Court in the early 2000s as part of the basic right to human dignity. Since its early days, Israeli law has developed a tradition that has diminished the significance of formal marriage as a way to bypass the religious-based restrictions on marriage in Israel, with the emphasis instead on the idea of functional joint intimate lives.

Against this legal background, the article explores the basic right to marry. It discusses and analyses the Supreme Court cases that have recognised a basic right to marry. It then considers several options to help in understanding the meaning of this right, and supports an understanding of the right to marry within a framework of equality, according to which human dignity requires equality in affording official recognition to intimate partnerships. Nonetheless, given the potentially limited effect of a basic right to marry in Israel, the article considers the idea of abolishing legal marriage in Israel altogether. Responding to potential critique by reference to the unique Israeli context, it suggests that such abolition could resolve the continuous conflict between Israel's self-definition as a Jewish state and its self-definition as a democratic state in the context of recognising adult intimate relationships. As presented in this article, constitutional limitations do not stand in the way for the State of Israel to abolish legal marriage.

Keywords: right to marry, human dignity, equality

1. Introduction

Writing about a basic right to marry under Israeli constitutional law is a peculiar task.[1] Traditionally, when the right to marry has been mentioned in the same breath as Israeli law, the context has been the alleged infringement by Israeli law of the internationally recognised human right to marry.[2] In Israel, there is no civil marriage, as marriage is governed exclusively by religious laws of the relevant religious communities.[3] Consequently, many individuals are barred from marrying in Israel as a result of restrictive religious doctrines.[4]

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[1] Israeli jurisprudence uses the term 'basic right'. It is the equivalent of the term 'constitutional right' used in other jurisdictions.

[2] A right to marry is recognised by a number of respected international human rights sources. See, for example, Universal Declaration of Human Rights, UNGA Res 217A(III), 10 December 1948, UN Doc A/810 (1948), art 16 ('Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family'); International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, art 23(2) ('The right of men and women of marriageable age to marry and to found a family shall be recognised').

[3] Israel recognises a number of religious communities, the list of which appears in *The Palestine Order in Council* 1922, supp 2. The Israeli government has the authority to add religious communities to the list, although it has exercised this authority in only two cases: see Ariel Rosen-Zvi, 'Family Law and Inheritance' in Amos Shapira and Keren C DeWitt (eds), *Introduction to the Law of Israel* (Kluwer Law International 1995) 75, 76.

[4] Thus, for example, individuals who do not belong to a recognised religious community are unable to marry in the State of Israel. Similarly, two individuals who belong to different religious communities are often unable to marry

Rather than asserting a right to marry to counter such religious-based restrictions, the Israeli Supreme Court has traditionally avoided this issue, most probably on the grounds of political considerations and the sensitivity of the issue. The Supreme Court's practice instead has been to bypass the difficulties in access to marriage by diminishing the practical implications of formal marriage under Israeli law.[5] Thus it has accorded similar rights, benefits and duties to unmarried cohabitants as those enjoyed by married spouses.[6] It has also ordered the state to register in the Israeli Population Registry marriages conducted abroad, even though such marriages may be invalid under Israeli law.[7] The Court has maintained this approach even after the 'constitutional revolution' of 1992, which transformed Israel into a constitutional democracy and enabled judicial review of Knesset legislation.

At the start of the 2000s, however, a basic right to marry surfaced in a few Supreme Court cases as part of the right to human dignity protected by Basic Law: Human Dignity and Liberty. Against a tradition of minimising the significance of legal marriage, the emergence of such a basic right is puzzling. The value of recognising a basic right to marry is also questionable, given that legislation that predated the 'constitutional revolution', including the legislation that established the religious governance of marriage, is immune from judicial scrutiny. Reading the cases in which a basic right to marry was recognised intensifies the confusion. The factual context and the legal questions that the Court considered in these cases are very different from those in cases that have established a constitutional right to marry in other legal systems.[8] Also, notwithstanding declarations regarding the elevated status of the basic right to marry among the recognised basic rights, its actual use by the Court has been somewhat limited.

This article explores the basic right to marry as it emerges from the Court's case law and considers its meaning and implications. It opens with the background to the Israeli law of marriage and divorce as well as Israeli constitutional law, emphasising the constitutional revolution of

in Israel, since most of the Israeli religious communities do not recognise mixed marriages. An exception to this rule of thumb is the recognition under Sharia law of a marriage between a Muslim man and a Jewish or Christian woman (but not between a Muslim woman and a non-Muslim man). Aside from restrictions on inter-religious marriages, religion-specific restrictions on intra-religious marriages may also apply; for instance, according to Jewish law, members of the Jewish priestly cast ('Cohanim') may not marry a divorcee: Menachem Elon, *The Principles of Jewish Law* (Encyclopaedia Judaica 1975) 361.

[5] A mirror image is the diminished significance of legal divorce. Under Israeli law, individuals may divide the property accumulated during their marriage prior to formal divorce, including the sale of the marital home. New relationships formed by either spouse while still formally married are recognised and generate rights and obligations under the civil laws of cohabitants: see Ayelet Blecher-Prigat and Benjamin Shmueli, 'The Interplay between Tort Law and Religious Family Law: The Israeli Case' (2009) 26 *Arizona Journal of International & Comparative Law* 279, 299.

[6] See discussion in text accompanying nn 50–58.

[7] HCJ 143/62 *Funk-Shlezinger v Minister of the Interior* 1963 PD 17(1) 225; HCJ 3045/05 *Ben-Ari v Director of Population Administration, Ministry of the Interior* 2006(4), official translation at http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.htm. Formally, the Population Registry merely collects statistical information; its records do not have evidential force as to the veracity of the data they contain, especially with regard to marital status (Population Registry Law, 1964–65, s 3). In practice, however, registration has broader practical implications, bestowing upon registered couples the legal benefits and burdens of formally married couples. See also discussion in text accompanying nn 85–86.

[8] See discussion in text accompanying nn 44–45.

1992 and its limited effect on aspects of family law. It then analyses the Supreme Court's jurisprudence that has recognised a basic right to marry. The following part of the article considers several options to imbue this right with meaning, and supports an understanding of the right to marry within a framework of equality, according to which human dignity requires equality in affording official recognition to intimate partnerships. It also analyses how this meaning can be incorporated into Israeli constitutional law, given that there is no express right to equality in the Basic Laws.

Regardless of the meaning that a basic right to marry might have, its actual effect is limited in that it cannot be used to invalidate the existing religious control over marriage. The remaining part of the article therefore considers the abolition of legal marriage in Israel altogether. Responding to potential critique by reference to the unique Israeli context, it suggests that abolition could resolve the continuing conflict between Israel's self-definition as a Jewish state and its self-definition as a democratic state in the context of recognising adult intimate relationships. The final section considers whether the newly recognised basic right to marry prevents the Israeli legislator from introducing the abolition of legal marriage.

2. The Emergence of a Basic Right to Marry

2.1. Background: Family Matters in the Israeli Constitutional Context

Until 1992 the Israeli Supreme Court lacked the power of judicial review. In 1992 the Israeli Knesset enacted two Basic Laws: Human Dignity and Liberty[9] and Freedom of Occupation.[10] Both of these laws were designed to protect human rights within their respective spheres of influence. As interpreted by the Israeli Supreme Court, these Basic Laws provide for judicial review, by any Israeli court, of legislation passed by the Knesset, thus transforming Israel from a parliament-supreme democracy to a constitutional democracy.[11]

The so-called Israeli 'constitutional revolution' of 1992 seemed at first to have little impact on family law matters in general, and on the status of the right to marry in particular. The Basic Law that is most intuitively relevant to rights relating to marriage, Human Dignity and Liberty, contains no express right to marry. Related rights, such as the right to equality and freedom of religion, are similarly absent from this Basic Law. Legislative history suggests that the omission of these rights from the Basic Law was intentional and motivated by objections expressed by some of Israel's religious political parties. These objections stemmed from concern that guaranteeing a

[9] Basic Law: Human Dignity and Liberty, 1992.
[10] Basic Law: Freedom of Occupation, 1992, repealed by Basic Law: Freedom of Occupation, 1994. Israel has no constitution per se. A series of Basic Laws to protect individual rights and address other matters that are normally addressed in a constitution were passed as a compromise measure. Basic Laws are in effect Israel's 'operational constitution'.
[11] CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* 1995 PD 49(4) 221.

right to equality, freedom of religion, and certainly an express right to marry, would bring about the eventual invalidation of existing religious family law.[12] As an additional safety measure against judicial review of existing religious family law, legislation that predates the Basic Law is immune from judicial review.[13] Thus, even if the right to 'human dignity' were to be interpreted as inclusive of the right to equality, freedom of religion and the right to marry (as eventually happened), existing family law legislation would be protected from being invalidated.

The absence of express rights relevant to family relations in general and to marriage in particular, as well as the immunity of pre-Basic Law legislation from judicial review, may account for the paucity of references to a constitutional analysis in family case law and in academic writing in the years that followed the enactment of these Basic Laws.[14] Constitutional discourse did appear in respect of some family law matters but was almost completely absent from the issues that are considered to be the core of family law matters – marriage and divorce.[15] This paucity of constitutional terminology and analysis stood in sharp contrast to the depth of constitutional discourse in other areas of law that followed the constitutional revolution of 1992. Nevertheless, in 2006, a constitutional basic right to marry emerged from three Supreme Court cases.[16]

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[12] Yoav Dotan, 'The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel' (2005) 53 *American Journal of Comparative Law* 293, 304; Gidon Sapir, 'Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment' (1999) 22 *Hastings Internationa1& Comparative Law Review* 617, 638.

[13] Art 10 of the Basic Law: Human Dignity and Liberty (n 9) (entitled 'Validity of Laws') states: 'This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law.'

[14] Another possible explanation is the backlash that followed the first attempt to limit the use of religious laws in family matters according to human rights principles. Soon after the enactment of the Basic Laws, Justice Barak handed down the famous decision in HCJ 1000/92 *Bavli v The High Rabbinical Court* 1994 PD 48(2) 221. In *Bavli*, the Court held that religious courts, including the rabbinical courts, must apply civil norms and principles in matters that are not considered 'matters of personal status' and are not governed by religious personal law. The Court therefore instructed the rabbinical courts to apply the principle of equal division of marital property rather than divide property in accordance with Jewish law. This first attempt to intervene in religious family law did not concern the very heart of family law – marriage and divorce – but only issues such as property division, which are not considered 'matters of personal status'. Nevertheless, some religious courts simply refused to follow the Supreme Court's ruling, and others tended to bypass their obligation to apply the civil law of equal division: Frances Raday, 'Gender and Religion: Secular Constitutionalism Vindicated' (2009) 30 *Cardozo Law Review* 2769, 2786; 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' (2003) 77 *Tulane Law Review* 659, 687; Margit Cohn, 'Women, Religious Courts and Religious Law in Israel – The Jewish Case' (2004) 27 *Retfaerd (Scandinavian Journal of Social Sciences)* 55, 70–73.

[15] An exception that has received attention in academic writing is the attitude of Judge Oded Alyagon in two family law cases dealing with divorce between two interfaith couples, declaring that the law that governs divorce in these cases should conform with the demands of Basic Law: Human Dignity and Liberty: Ruth Halperin-Kaddari, 'Towards Concluding Civil Family Law – Israel Style' (2001) 17 *Mehkarei Mishpat* 105, 138–42 (in Hebrew). When dealing with intrafaith couples, divorce is not governed by religious laws. Despite this differentiation between interfaith and intrafaith couples in matters of divorce, Judge Alyagon's reference to the Basic Law in his rulings is still considered an exception.

[16] In addition, in the context of divorce, the right of each individual to end a marriage was recognised as part of the right to human dignity, supporting the recognition of a tortious claim against Jewish men and women who refuse to grant or receive the *Get* (the Jewish contract of divorce): see FamC (Jer) 21161/07 *X v Y* (2001).

2.2. SUPREME COURT CASES ON THE BASIC RIGHT TO MARRY

2.2.1. THE *ADALAH* CASE: THE RIGHT TO MARRY, AND FAMILY REUNIFICATION

An explicit discussion by the Supreme Court of a basic right to marry as part of the right to human dignity first occurred in 2006 in the case of *Adalah v Minister of Interior*.[17] The case concerned the constitutionality of the Citizenship and Entry into Israel Law (Temporary Provision), which was enacted by the Knesset during the time of the second Intifada in 2003. This Law severely limited the possibility of granting Israeli citizenship to residents of the occupied territories pursuant to the Citizenship Law, as well as the possibility of granting residence permits to these people pursuant to the Entry into Israel Law. The Law thus denied the possibility of a family reunion within Israel for Israeli citizens whose spouses resided in the occupied Palestinian territories.[18]

It is worth mentioning that the Court had already considered the right of Israeli citizens to family life with their foreign spouses in 1999 in *Stamka v Minister of Interior*,[19] in which the Court considered the reasonableness of the Interior Ministry's policy towards the naturalisation process for a non-Jewish foreign spouse married to a Jewish Israeli.[20] While the Court found this policy to be null and void and referred to the internationally recognised right to marry in its holding, it did not refer to any of the Basic Laws, thereby avoiding a constitutional discussion.

Returning to the *Adalah* case, the petition submitted by Adalah (Legal Centre for Arab Minority Rights in Israel), challenged the constitutionality of the Citizenship and Entry into Israel Law (Temporary Provision). The petitioners argued that the law contravenes the right to marry and the right to family life of Israeli citizens of Palestinian origin in that it effectively precluded their marrying non-citizens belonging to the same ethnic group. In addition, the petitioners raised an argument based on infringement of equality, claiming that the law discriminates against citizens of Palestinian origin as opposed to Jewish citizens, since the former are more likely to marry Palestinians residing in the territories.

Although a majority of six out of eleven justices found that the Citizenship and Entry into Israel Law (Temporary Provision) is incompatible with rights protected by the Basic Law in a way that does not comply with the demands of the limitation clause,[21] one of the six, Justice

[17] HCJ 7052/03 *Adalah v Minister of Interior Affairs* 2006 PD 61(2) 202.

[18] Certain age groups were exempted from the Law's blanket prohibition; however, this is insignificant for the purposes of this article.

[19] HCJ 3648/97 *Stamka v Minister of Interior* 1999 PD 53(2) 728.

[20] The policy, which had been in effect since 1995, required the non-Jewish foreign spouse to leave Israel for several months during which period the Ministry of Interior would determine whether the marriage was genuine. Only after the Ministry of the Interior had determined the authenticity of the marriage could the non-Jewish spouse return to Israel in order to begin the naturalisation process.

[21] Basic Law: Human Dignity and Liberty (n 9) art 8, which states: 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.' President Barak and Justices Beinisch, Joubran, Hayut, Procaccia and Levy found that the Citizenship and Entry into Israel Law failed to meet the last condition of the limitation clause, which required that any violation of

Levy, refrained from declaring the Law to be void as he found that such a declaration would leave a void in security arrangements. He thought that the Law should be allowed to stand for the time being, and thus a majority of the Court denied the petition and refused to declare the Law invalid. My interest, though, is in the justices' discussion of the right to marry.

The opinions of all the justices recognised a basic right to family life as part of the right to human dignity, and a majority of them referred specifically to a right to marry as forming part of that right.[22] All of them, however, failed to explain the connection between the two rights, as well as the distinction between them. The main point of contention focused on whether the existence of these rights in general implies the specific right to realise life together *in Israel*. Here, Supreme Court Vice President Cheshin, Justice Naor and Justice Grunis found that there was no basic right to realise life together in Israel (what they described as a right to 'import' one's spouse). The remaining justices found that the right to human dignity encompassed the right (of Israeli citizens) to realise life together with their chosen partners *in Israel*.

As is discussed in further detail below, the justices' opinions reflect confusion concerning the right to marry, its meaning, content and scope. This can be attributed in part to the fact that *Adalah*, at least at first sight, was concerned more with the rights to family life and intimacy than with the right to marry. As President Barak, whose opinion reflected the majority view concerning the right to marry, noted: 'Certainly the Citizenship and Entry into Israel Law does not prevent the Israeli spouse from marrying the spouse in the territories. The freedom to marry is maintained.'[23] Nevertheless, subsequent case law, including case law that directly involved a right to marry in the meaning of access to the legal institution of marriage, recognises *Adalah* as the source for a basic right to marry under Israeli law.

Before moving on to discuss other cases that concerned a basic right to marry, and to complete the discussion of *Adalah*, it should be mentioned that in 2012 the Supreme Court once again considered the constitutionality of the Citizenship and Entry into Israel Law (Temporary Provision), as it was amended in 2007.[24] In *Gal-On* the Court again was split six to five. This time, however, the majority of six justices found the law to be constitutional. The *Gal-On* case provides a much less detailed and rich discussion of both the right to marry and the right to family life than does *Adalah*. For the purposes of this article, it is worth mentioning that while in *Adalah* only three justices held that there is no constitutional basic right to realise the right to family life together *in Israel*, in *Gal-On* five justices held this view.[25]

constitutional rights should not be excessive. The other five justices found either that there was no violation of basic rights or that the Law's violation of basic rights meets the above described proportionality test, and thus conforms with the conditions of the limitation clause and is valid.

[22] *Adalah* (n 17) President Barak, Vice-President Cheshin and Justices Beinisch, Joubran, Rivlin and Levy. In addition, Justice Hayut concurred with President Barak's opinion and analysis.

[23] ibid, President Barak, para 42. Note that Barak refers to *freedom* to marry as *a right* to marry.

[24] HCJ 466/07 *Gal-On v Attorney General* (decision of 11 January 2012). The amendment expanded the scope of the law to apply to citizens or residents of Iran, Iraq, Syria, Lebanon or any other 'area in which operations that constitute a threat to the State of Israel are being carried out'.

[25] ibid, Justices Grunis, Naor, Rubinstein, Hendel and Meltzer.

2.2.2. THE RIGHT TO MARRY AND THE VALIDITY OF CIVIL MARRIAGE

Following *Adalah*, the Supreme Court invoked a right to marry in support of its decision that civil marriage performed abroad between two Israeli citizens and residents is valid under Israeli law.[26] Since the early days of the State of Israel, civil marriage abroad has been a common practice to bypass the religious governance over marriage in Israel for couples who could not marry in Israel or did not want a religious marriage. Nonetheless, for over forty years, the Israeli Supreme Court had avoided having to decide on the validity of civil weddings conducted abroad.[27] Even on occasions in which the Court had sat in special extended panels, especially to decide this issue, it persisted in declaring that the decision concerning the validity of a civil marriage between Israelis conducted abroad was a matter for the legislature to decide.[28]

The Court chose instead to adopt a piecemeal strategy of deciding matters such as maintenance and property division on an issue-by-issue basis without addressing the underlying question of marital validity. Indeed, only two years before the critical decision in the *Noahides Case*, President Barak refused to decide on the validity of civil marriage, stating that it was a matter best left to the legislature.[29] He therefore recognised the existence of the obligation of support between spouses who married in a civil ceremony abroad based on contractual principles that apply to the parties whether or not they are legally married under Israeli law.

In 2006 President Barak concluded that it was time for the Court to determine the validity of civil marriages performed abroad.[30] The legal question in the *Noahides Case* concerned the jurisdiction to dissolve a civil marriage entered into abroad between two Jews who are Israeli citizens and residents – whether it belonged to the rabbinical courts or the civil family courts.[31] In

[26] HCJ 2232/03 *X v Regional Rabbinical Court, Tel Aviv* 2005 PD 61(3) 496 (*Noahides Case*). Family law cases have been brought anonymously in Israel since 1996. As such, a name should be given to each anonymously brought case to enable it to be distinguished from other cases. This case is known in the Israeli legal community as 'the *Noahides Case*' because the Court's judgment endorsed the High Rabbinical Court's judgment in this matter and its position on civil marriage. The High Rabbinical Court stated that the Jewish law, the Halakha, contains rules that apply to non-Jews, Noahides (*B'nei Noach* in Hebrew, translated as the Children of Noah), and they also refer to marriage and divorce. Noahide Laws refer to the seven laws of Noah, given by God to all mankind. Although Jewish law does not recognise a civil ceremony of marriage as creating a valid Jewish marital bond, the Noahide rules recognise civil marriage at least for limited purposes, even if it was performed between a Jewish man and a Jewish woman.

[27] Starting with *Funk-Shlezinger* (n 7).

[28] See HCJ 51/80 *Cohen v Rabbinical High Court of Appeals* 1980 PD 35(2) 8. The then President of the Court, President Landau, created a special panel of seven justices with the intention of resolving, among other matters, the question of the validity of a foreign marriage in Israel. At that time, when the Israeli Supreme Court sat in an extended panel, it was usually with five justices. President Landau explained his unusual decision to expand the panel in *Cohen* by the need to resolve a significant question of great importance. However, he declared that in retrospect the question of the validity of the marriage did not arise: *Cohen*, ibid 10.

[29] CA 8256/99 *X v Y* 2004 PD 58(2) 213.

[30] ibid, President Barak, paras 24–26, 44.

[31] When both spouses belong to the same recognised religion, the relevant religious court should allegedly have jurisdiction over divorce proceedings between the spouses, as matters of marriage and divorce are under the exclusive jurisdiction of the religious courts in Israel. 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: Asher Maoz, 'The Extra-Territorial Jurisdiction of the Rabbinical Courts' (1988) 38 *Hapraklit* 81 (in Hebrew).

deciding the jurisdiction question, Barak also addressed the validity of the marriage. In his decision, Barak considered three alternative approaches that had been developed in case law and scholarly writing with regard to the validity of such marriages. The first approach ignores the fact that the marriage ceremony was conducted abroad, stating that it does not alter the applicability of (religious) personal law in matters concerning marriage, including the determination of the validity of a marriage.[32] Thus, where the relevant personal law of the parties does not recognise a civil marriage ceremony as creating a valid matrimonial bond, the marriage is not legally valid. The second approach distinguishes between questions of form and questions of capacity to marry. Whereas questions concerning the form of the marriage are governed by the law of the place where the wedding was performed (*locus regit actum*), questions that concern substance, meaning the capacity of the parties to marry, are governed by the law of their domicile at the time of the marriage, which for Israelis refers to their personal law.[33] According to this approach a distinction is made between those who have the capacity to marry in Israel in a religious ceremony but chose a civil ceremony abroad, and those who could not marry in Israel and were forced to marry abroad. Although the plight of the latter is greater, this approach would invalidate their marriage, while upholding the marriage of individuals who are able to marry under Israeli law but choose not to for whatever reason. The third and final approach does not distinguish between form and capacity but rather considers both issues according to the law of the place where the wedding was performed.[34] According to this approach, subject to limitations based on considerations of public policy, the validity of the marriage is governed by the law of the state in which the marriage ceremony took place.

In his decision in the *Noahides Case*, President Barak rejected the first approach to marriage validity, which conditions the validity of the marriage on the personal-religious laws of the parties. Since the parties in this case had the capacity to marry each other under their personal (Jewish) law, President Barak held that there was no need to determine whether to adopt the second or third approach to recognition of foreign civil marriages in order to resolve the case at hand.[35] According to this decision, a civil marriage performed abroad is considered to be legally

[32] This approach relies on the following line of reasoning. Art 47 of the Order in Council, which determines the application of personal law to the question of personal status (which marriage and divorce stand at the core of), is part of Israeli private international law and establishes an entire arrangement. The applicability of this article does not depend on the nationality of the relevant parties, or on national character, in any way. Thus, wherever the parties were married, regardless of their nationality, the validity of their marriage in Israeli courts is to be determined according to their personal law (whereas the personal law of Israeli citizens and residents is their religious law, the personal law of non-resident foreign citizens is their law of nationality: Palestinian Order in Council, art 64(2)). This approach is identified with Justice Agranat's approach in CA 191/51 *Skornik v Skornik* 1954 PD 8 141 and with Professor Menashe Shava's approach: Menashe Shava, 'Civil Marriage Celebrated Abroad: Validity in Israel' (1989) 9 *Tel Aviv University Studies in Law* 311.

[33] This approach is based on the English rules of private international law, which were incorporated into Israeli law by virtue of art 46 of the Order in Council (ibid). This approach considers art 47 of the Order in Council to be part of Israel's internal municipal law. This approach was introduced by Justice Witkon in the *Skornik* case (n 32), as well as in the District Court of Jerusalem in CC (Jer) 2/85 *Kleidman v Kleidman* 1987(2) PM 377.

[34] This approach is associated with Justice Zusman's approach in *Funk-Shlezinger* (n 7), advocating for the adoption of the American approach to private international law.

[35] *Noahides Case* (n 26) President Barak, para 26.

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valid in Israel, at least where both parties to the marriage have the capacity to marry within the State of Israel. The validity of civil marriages conducted abroad between individuals who cannot marry in Israel remained open for future consideration and adjudication.

What I find interesting in the Court's decision is the quite negligible reference to constitutional discourse in general and the newly recognised basic right to marry in particular. Although Barak refers to the right to marry and cites *Adalah*, the constitutional discourse amounts to only a few lines in the decision.[36] A decision regarding the validity under Israeli law of a civil marriage conducted abroad concerns access to marriage itself. Until the *Noahides Case* the only way to obtain the status of marriage in Israel was through a religious ceremony. Following this decision, civil marriage outside Israel also enables couples to obtain the status of being married under Israeli law (at least for those couples who have the capacity to marry in Israel). In this respect, the *Noahides Case* involves the right to marry more than *Adalah* did, and yet it provides a much narrower discussion of the right and its constitutional significance and meaning. In fact, it is only a secondary support for Barak's decision. The main basis for the decision is the judgment of the rabbinical court itself, which recognised the marriage (even if only for the limited purposes of divorce). It could be expected, given the statement as to the elevated status of this right in *Adalah*, that it will play a far more meaningful part in the decision.

A subsequent case, the *Inheritance Case,* involved a Christian woman who married a Jewish man and, following his death (intestate), sought to inherit as his lawful wife.[37] Since the parties belonged to different religions, they had no capacity to marry in Israel and thus the validity of their marriage was not determined in accordance with the *Noahides Case*. Here, Justice Barak stated that he considered the third approach, according to which the validity of the marriage was to be determined by the law of the state in which the couple were married, to be the appropriate approach.[38] In this case, too, the fact that this approach was most compatible with the basic right to marry should have been a more central consideration taken into account by Barak.[39] Nonetheless this was a mere dictum as Barak resolved the case, which dealt with matters of inheritance, without addressing the question of marital validity for all purposes.

As far as the right to marry is concerned, this case seems to be the most significant as, in terms of outcome, the woman could have inherited as a non-married cohabitant ('reputed spouse') in that the Israeli Succession Law recognises the inheritance rights of non-married cohabitants.[40] Indeed, the Attorney General, in a submission to the Court, opined that the decision should be reached based on section 55 of the Law of Succession, which addresses the inheritance rights of non-married cohabitants, and would have provided the woman with inheritance rights equivalent to those of a married woman if she met the conditions set out in the section.[41]

[36] ibid.
[37] FA 9607/03 *X v Y* (2006) (*Inheritance Case*).
[38] ibid, President Barak, para 23.
[39] ibid.
[40] Succession Law, 1965, s 55.
[41] *Inheritance Case* (n 37) President Barak, para 9.

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Nonetheless, President Barak chose to base his ruling on the woman's inheritance rights as a *married* woman.[42]

For this reason, it is surprising again that the basic right to marry is mentioned only briefly, almost in passing, in the decision.[43] A possible explanation is that Barak chose not to decide on the general question of the validity of interfaith marriages entered into abroad. He chose to limit the effect of his decision, indicating that it applied only to questions of inheritance law and not necessarily to other circumstances. I, however, do not consider this to be an adequate explanation. In fact, given the now recognised basic right to marry and its relevance to the question of recognising civil marriage entered into abroad, it could be expected that Barak would decide on the validity of the marriage for all purposes and not only for the limited purpose of intestate inheritance.

3. THE MEANING OF THE ISRAELI BASIC RIGHT TO MARRY

The timing of the emergence of a basic right to marry in Israeli jurisprudence is puzzling, as is the context in which this right was recognised. As noted in the Introduction, before the recognition of the basic right a significant body of Israeli case law had diminished the significance of formal marriage. In addition, the context in which the Israeli basic right to marry was developed is quite different from typical 'right to marry' cases in other legal systems. In those systems, the right to marry is associated with cases of couples who were denied access to the legal institution of marriage. The American case of *Loving v Virginia*,[44] which invalidated laws that prohibited inter-racial marriages, is a paradigmatic example. More recent cases concern same-sex couples seeking to acquire marital status.[45]

Before the enactment of the Basic Laws, individuals had challenged the religious restrictions on access to marriage in Israel.[46] However, the Supreme Court (sitting as the High Court of Justice) refused to recognise a right to marry (or a right to freedom of conscience) as a superior right, which would have enabled it to review the religious control over marriage. The Court constantly held that it is for the Knesset, the Israeli legislator, to decide to end the religious monopoly on marriage in Israel and introduce civil marriage. It should also be remembered that the recognition

[42] ibid para 13.
[43] ibid para 23.
[44] *Loving v Virginia* 388 US 1 (1967).
[45] For US cases see *Baker v State* 744 A2d 864, 886 (Vt 1999); *Baehr v Lewin* 852 P2d 44, 59–60 (Haw 1993). For Germany see Jens M Scherpe, 'National Report: Germany' (2011) 19 *American University Journal of Gender, Social Policy & the Law* 151, 152–53. For South Africa see François du Toit, 'National Report: The Republic of South Africa' (2011) 19 *American University Journal of Gender, Social Policy & the Law* 277, 278–80. For a review of additional cases from various legal systems see Macarena Saez, 'Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World: Why "Same" is so Different' (2011) 19 *American University Journal of Gender, Social Policy & the Law* 1.
[46] See CA 450/70 *Rogozinsky v State of Israel* 1971 PD 26(1) 129; CA 373/72 *Tepper v State of Israel* 1974 PD 28(2) 7. See also Yuval Merin, 'The Right to Family Life and Civil Marriage under International Law and Its Implementation in the State of Israel' (2005) 28 *Boston College International & Comparative Law Review* 79, 144–45.

of a basic right to marry does not enable the invalidation of the existing religious monopoly over marriage and divorce, since laws that predate the Basic Law are immune from judicial review.

The Court chose to recognise a basic right to marry in a case that did not concern access to the institution of marriage, but rather the rights that should follow from marriage in the context of immigration and citizenship. Although, in the *Noahides Case*, the Court did address the issue of access to the status of marriage in Israel, a decision on this point was not required for deciding the question before the Court in that case, which concerned jurisdiction to dissolve the bond. In the *Inheritance Case*, which supposedly concerned access to the legal institution of marriage and the rights attached to it (in that case, the right to inherit), the discussion of the right to marry was almost negligible. Eventually it was not used to decide the general question of recognising civil marriages conducted abroad, when such marriages were entered into by spouses who were denied access to marriage in Israel. All this causes one to wonder what is the meaning and significance (if any) of the newly recognised basic right to marry.

3.1. MARRIAGE IS NOT A UNIQUE SYSTEM OF RIGHTS AND OBLIGATIONS UNDER ISRAELI LAW

Marriage may be thought of as a unique system of rights and obligations available exclusively to married individuals.[47] In other legal systems struggles over the right to marry were sometimes intended (at least partly) to obtain rights and benefits that are accorded to married people.[48] Under Israeli law spouses also enjoy various rights and benefits, as Barak noted in *Adalah*:[49]

> Spouses are given social rights, tax, accommodation and housing benefits. They enjoy rights of medical and pension insurance. They have visitation rights in hospitals and prisons. They have privileges and defenses in the laws of evidence. The criminal law protects the family; spouses have rights of inheritance, maintenance and mutual support during the marriage, and rights to a division of property when the marriage ends.

However, under Israeli law most of the benefits enjoyed by married individuals are not, by and large, reserved exclusively to them; there has been a constant movement towards extending to non-married cohabitants the rights and privileges accorded to married couples.[50] From the 1950s, extensive welfare and social benefits similar to those accorded to married couples have been accorded to non-married couples under Israeli legislation.[51] Where the legislation has

[47] Pinhas Shifman, 'Marriage and Cohabitation in Israeli Law' (1981) 16 *Israel Law Review* 439, 454.
[48] See *United States v Windsor* 570 US ___ (2013); 133 S Ct 2675 (estate tax exemption that is given to a surviving spouse).
[49] *Adalah* (n 17) President Barak, para 25.
[50] For further discussion on the expansion of these rights, see Shahar Lifshitz, 'The External Rights of Cohabiting Couples in Israel' (2003–04) 37 *Israel Law Review* 346.
[51] See Families of Soldiers Killed in Action (Payments and Rehabilitation) Law, 1950; Disabled Veterans of the War against the Nazis Law, 1954; Disabled Persons (Payments and Rehabilitation) Law, 1959 (Combined Version).

been silent, the Israeli Supreme Court has continued this trend of equalisation, expanding the list of benefits accorded to non-married cohabitants to match those of married couples.[52]

Placing unmarried cohabitants on the same – some would even argue higher[53] – legal plane as married couples did not stop with purely material benefits such as welfare, tax or property. A famous legal battle concerning differences between the rights of cohabitants and married couples involved the right of unmarried cohabitants to bear the same last name.[54] Historically, the policy of the Minister of the Interior has been to invalidate such changes of last name (usually by the woman to the last name of her male cohabiting partner) for fear that it would mislead the public by suggesting that the couple were in fact legally married. During the 1960s and 1970s the Supreme Court (sitting as the High Court of Justice) upheld this policy.[55] In the 1990s the Supreme Court reversed its previous ruling, holding that unmarried cohabitants may carry the same last name, and that their relationship as unmarried cohabitants cannot serve as a basis for denying them the right to change their name.[56] In 1996 the Names Law was amended by the legislature to reflect this ruling.[57] Furthermore, when one of the cohabiting parties is lawfully married to another, a request for a change of last name cannot be legally denied, even when coupled with the active objection of the formal spouse.[58]

Since, under Israeli law, most of the rights, obligations and benefits acquired by married couples are not exclusive to the state of marriage and are generally available to unmarried couples,

[52] See CA 52/80 *Shachar v Friedman* PD 38(1) 443, holding that the then existing presumption of community property applicable to married couples should also be applied to unmarried cohabitants; CA 2000/97 *Lindorn v Karnit* 1999 PD 55(1) 12, interpreting the term 'partner' in the Civil Wrongs Ordinance (New Version) and the Road Accident Victims Compensation Law, 1975, to include unmarried cohabitants. Until *Lindorn*, the dominant view had been that statutes that do not expressly refer to cohabitants apply only to married couples. *Lindorn* opened the door to interpreting all statutes that address spousal rights to include unmarried cohabitants. The Court continued down this path in CA 2622/01 *Manager of Land Betterment Tax v Levanon* 2003 PD 37(5) 309, holding that tax exemptions for the transfer without remuneration of an asset other than a residential apartment from an individual to his partner should be applied equally to cohabiting and married couples.

[53] See Ariel Rosen-Zvi, 'Israel: An Impasse' (1990–91) 29 *Journal of Family Law* 379, 383; Pinhas Shifman, 'State Recognition of Religious Marriage: Symbols and Content' (1986) 21 *Israel Law Review* 501. Thus, for example, the property relations of non-married cohabitants are governed by the case law-created presumption of community property, whereas couples who married after 1974 are subject to the Spouses Property Relations Law, which presents what many consider to be an inferior property rights regime. However, the reality is more complex, as the extent of the presumption of community property applicable to unmarried cohabitants is not equivalent to that applied to married couples: for example, while married couples' businesses are subject to the presumption of community property, the opposite is the case for unmarried couples: CA 4385/91 *Salem v Karmi* 1997 PD 51(1) 337.

[54] For a criticism of depicting the issue as concerning the rights of the unmarried woman versus the rights of the married woman, and the patriarchal character of such a depiction, see Orit Kamir, 'What's in a Woman's Name' (1996) 27 *Mishpatim* 327 (in Hebrew).

[55] HCJ 73/66 *Zemulun v Minister of the Interior* 1966 PD 20(4) 645; HCJ 243/71 *Isaak (Schick) v Minister of the Interior* 1972 PD 26(2) 33. In Israel changes to one's last name are regulated by the Names Law of 1956, which permits a person to change his or her last name on coming of age. A written notification of the change must be given to the Minister of the Interior, who may invalidate the name change if it is believed that the new name is likely to mislead, infringe public policy or offend the feelings of the public: Names Law, 1965, arts 10, 15, 16.

[56] HCJ 693/91 *Efrat v Commissioner of the Population Registry* 1993 PD 47(1) 749.

[57] Names Law (n 55) amendment 3.

[58] HCJ 6086/94 *Nizri v Commissioner of Population Registry* 1996 PD 49(5) 693.

the Israeli basic right to marry cannot imply a right to receipt of special benefits in comparison with non-married individuals. Furthermore, not only do unmarried couples enjoy many of the benefits traditionally associated with marriage, but even the traditionally privileged status of married individuals over single persons is being challenged in academic literature.[59]

Despite the apparent extension of the rights enjoyed by married couples to unmarried individuals, married people do still enjoy certain privileges above and beyond those of their unmarried counterparts: for example, the state cannot conscript a married woman into military service,[60] and evidentiary trial privileges may be restricted to married couples.[61] However, it seems it would be difficult to argue that these remnants of the preferred status of marriage are afforded constitutional protection of the type that would make their abolition an infringement of the basic right to marry.[62] Furthermore, it is difficult to argue that the basic right to marry means that married individuals have a right to any of the material benefits currently bestowed by the state. Thus, for example, it is hard to imagine that individuals could claim that their right to marry had been infringed if the state decided to abolish the tax credit points currently provided to married people. Although it is possible that the abrogation of a benefit would infringe a Basic Law, this has nothing to do with the right to marry, but rather with the nature of the benefit itself.[63]

The benefits, rights and obligations associated with marriage certainly affect the incentive to marry. For example, a widow may be entitled to certain benefits that she would have to relinquish if she were to remarry, although she may retain them if she cohabits with another short of marriage.[64] Nonetheless, no court has suggested that the conditioning of a widow's benefits on her marital status infringes her right to marriage. As a rule of thumb, mere discouragement from marriage is insufficient to be considered an infringement of the right to marry. In fact, Israeli courts have traditionally cooperated with such tactics, in some cases allowing individuals to claim rights as unmarried cohabitants while simultaneously enjoying the benefits afforded to single widows.[65]

On top of all that has been said so far, the enjoyment of material benefits associated with marital status do not truly exhaust the meaning of the right to marry. When individuals invoke their right to marry, they usually seek something *beyond* the material benefits provided to married

[59] Daphna Hacker, 'Beyond "Old Maid" and "Sex and the City": Singlehood as an Important Option for Women and Israeli Law's Attitude towards this Option' (2005) 28 *Tel Aviv University Law Review (Iyuney Mishpat)* 903 (in Hebrew).

[60] Shifman (n 47) 455.

[61] Evidence Ordinance (New Version), 1971, s 3, which provides: 'In a criminal trial, one spouse is not competent to testify against the other, nor may one spouse be compelled to testify against a person who is charged together with the other in one indictment.' It should be noted that trial courts have interpreted this section so as to extend the exemption and apply it to cohabitants as well: see CrimC (Hf) 477/02 *State of Israel v Bachrawi* (2004); CrimC (BS) 2190/01 *State of Israel v Moyal* (2004), although these rulings are not precedents and do not bind other courts.

[62] In fact, in the *Efrat* case (n 56) 784, President Barak stated that maintaining a distinction between marriage and cohabitation is not part of Israeli public policy.

[63] cf Cass R Sunstein, 'The Right to Marry' (2005) 26 *Cardozo Law Review* 2081, 2092–93.

[64] Until 2009 this was the case regarding IDF widows' pension benefits: see Shifman (n 47). In 2009, the Knesset amended the Families of Soldiers Killed in Action (Payments and Rehabilitation) Law by amendment no 30, so that remarried widows would not lose their pensions.

[65] Lifshitz (n 50) 398–99.

individuals and will not be satisfied with receiving the same benefits as married individuals without the recognition that they receive such benefits as a result of *being married*. This understanding underlies Barak's ruling in the *Inheritance Case*, in which he held that the petitioner should inherit as a spouse rather than as an unmarried cohabitant, though the substantive inheritance rights of married spouses and unmarried cohabitants are the same.

3.2. On Intimacy, Family Life and Marriage

Although related, the right to marry is distinct from the right to intimacy (or to intimate association), as well as from the right to family life. Close and intimate ties with others provide emotional enrichment for most individuals, and may play a central role in shaping their identity.[66] For most individuals, familial ties represent an elevated subset of intimate interpersonal ties.[67] This was recognised by all of the Supreme Court justices in *Adalah*. Thus, for example, President Barak noted that '[t]he family ties of a person are, to a large extent, the centre of his life. There are few decisions that shape and affect the life of a person as much as the decision as to the person with whom he will join his fate and with whom he will establish a family'.[68] Justice Joubran stated that '[i]n searching for a [partner], in living together with him, in creating a family, a person realises himself, shapes his identity, and builds a haven and a shield against the world. It would appear that especially in our turbulent and complex world, there are few choices in which a person realises his free will as much as in the choice of the person with whom he will share his life'.[69] Justice Procaccia declared that '[t]he right to family is a raison d'être without which the ability of man to achieve self-fulfilment and self-realization is impaired. ... Among human rights, the human right to family stands on the highest level. ... It reflects the essence of the human experience and the concretization of realising one's identity'.[70] Similar statements were made by the Court in *Gal-On.*

Note, however, that none of these assertions refer to a formal legal tie of marriage; instead they address joint lives. In addition, President Barak notes that the familial ties shared by individuals that are worthy of protection are not necessarily based on a formal matrimonial bond.[71] To be sure, marriage has historically been, and in some traditional societies still is, a precondition for an intimate relationship between partners (this was probably the case for most of the petitioners in *Adalah* and *Gal-On*). However, this has never been the case under Israeli law.[72] Yet, even if individuals enjoy freedom to live together and share intimate life, the modern struggles over the right to marry suggest that individuals seek something beyond such freedom, which

[66] See Kenneth L Karst, 'The Freedom of Intimate Association' (1980) 89 *Yale Law Journal* 624, 629–37.
[67] ibid 629.
[68] *Adalah* (n 17) President Barak, para 32 (citations omitted).
[69] ibid, Justice Joubran, para 3. The official translation of the Court used the word 'spouse' instead of 'partner'. Nonetheless, Justice Joubran used the Hebrew word '*ben zug*', which is used to refer both to a spouse and to a 'partner', especially in the Israeli context.
[70] ibid, Justice Procaccia, para 6.
[71] ibid, President Barak, para 27.
[72] Shifman (n 47) 441–45, 451–54.

they enjoy independently of their right to marry.[73] This brings us back to the expressive value of formal marriage, which I will discuss in the next section.

However, not only is formal legal marriage not a necessary condition for realising the value of intimate association, it is also not a sufficient condition for it,[74] as the cases of *Adalah* and *Gal-On* clearly demonstrate. The petitioners in these cases were married individuals, so they were not denied access to the formal institution of marriage. Their claim concerned the ability to realise joint intimate life in Israel, which they argued was an integral part of their right to marry. However, three justices in *Adalah* and five justices in *Gal-On* held that Israeli citizens do not have a basic right to live together in Israel with their foreign spouse as part of the basic right to marry (or the basic right to family life), which they did recognise.[75] Theoretically, the failure to recognise a right to realise intimate relationships *in Israel* does not prevent the realisation of intimate and family life elsewhere. However, the justices who expressed this view all noted that other legal systems do not recognise a constitutional right to fulfil one's family life with a foreign spouse in one's country,[76] and also stated that neither does international law recognise such a right. According to this analysis, individuals who marry foreign spouses have no right to fulfil their family life anywhere. Since, with nowhere in which to realise one's right, there is no meaning to a right,[77] it follows that a basic right to marry does not imply the enjoyment of intimate and family life.

3.3. Marriage as Public Recognition of Intimate Partnership Relationships

As the previous sections suggest, in claiming a right to marry individuals seek something beyond freedom to share intimate familial life and beyond specific rights and benefits. As various scholars have already noted, the legal institution of marriage provides individuals with official public recognition of their adult intimate relationship. Barak seemed to recognise this in the *Inheritance Case*; individuals may have an interest worthy of protection in obtaining such a form of expressive legitimacy for their relationship.[78] Beyond the value of official endorsement, Kenneth Karst and Milton Regan emphasise the self-identifying value of access to legal marriage. Against a backdrop of an existing legal institution of marriage, individuals who seek access to it often wish to make a statement about themselves and their relationships. As Karst noted more than 30 years ago:[79]

[73] Israeli jurisprudence has a number of cases in which couples sought recognition as being *married* and were not satisfied with the mere freedom to live together, or with having rights and benefits equivalent to married couples without official recognition of their marital status by the state: see *Ben-Ari* (n 7).
[74] Karst (n 66) 647.
[75] Justices Naor and Grunis sat in both cases. In *Gal-On* they were joined by Justices Hendel, Rubinstein and Meltzer.
[76] See *Gal-On* (n 24) Justice Hendel, para 2; Justice Naor, para 9; *Adalah* (n 17) Vice-President Cheshin, paras 2, 48–57; Justice Procaccia, paras 4–5.
[77] Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295.
[78] Sunstein (n 63) 2093.
[79] Karst (n 66) 651.

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> Even though the [marital] status may have little material importance, or may be readily terminated, it may have immense symbolic value for the people who seek to associate themselves formally. The homosexual couple who wish to enter a formal marriage will not be looking for material benefits, or even for the pleasure of each other's company (which they already have), so much as for the opportunity to say something about who they are and to obtain community recognition of their relationship.

Milton Regan, who also recognises the role that marriage can play in shaping individual identity, emphasises[80] that:

> For intimate commitment to be constitutive of identity ... requires that it be seen as something that derives its value from a source outside the self's choice to engage in it. It requires … social validation. The legal institution of marriage plays an especially significant role in providing such validation for the value of commitment.

Karst argues that because entry into a formal marital relationship may have significance as a statement of commitment or self-identification, the individual interest in access to legal marriage may deserve constitutional protection, independent of any material rights that marriage provides.[81]

Needless to say, the expressive and self-identifying benefits that the status of 'married' provides are almost an empty shell if they are not supplemented by the freedom of intimate association and by the panoply of material benefits accorded by the state to married individuals. It is, therefore, hard to reconcile a holding that the core of the right to marry does not include a right to share life together with one's foreign spouse in one's country with statements regarding the elevated status of the basic right to marry among the constitutional basic rights – as can be found, for example, in Vice President Chesin's opinion in *Adalah*.

Returning to the official endorsement of intimate relationships, addressing this issue in Israel is more complex than may at first appear. Although the only way to become married in Israel is via a religious ceremony, religious marriage is not the only way for Israeli citizens and residents to obtain married status in Israel; the law recognises civil marriage conducted abroad between two Israeli citizens and residents provided they had the capacity to marry in Israel.[82] More importantly, under Israeli law, marriage is not an 'all or nothing' exclusive status in terms of state recognition. Civil marriage conducted abroad between two Israeli residents who did not have capacity to marry in Israel are registered in the Population Registry regardless of the validity of their marriage.[83] This is true also for same-sex marriage.[84] The formal status of the Population Registry is merely a statistical tool, and its records do not have evidentiary force as to the veracity

[80] Milton C Regan Jr, 'Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation' (2001) 76 *Notre Dame Law Review* 1435, 1445.
[81] Karst (n 66) 651.
[82] *Noahides Case* (n 26). In the case of civil marriage between two foreign citizens who later immigrated to Israel, where the marriage is valid according to the laws of their previous nationality and residency laws, then this marriage is valid under Israeli law: *Skornik* (n 32).
[83] *Funk-Shlezinger* (n 7).
[84] *Ben-Ari* (n 7).

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of the data they contain, especially regarding marital status.[85] However, registration enables individuals to appear as married, and it is this information that appears on the official identity card. This, in itself, represents some form of official recognition of the relationship, and provides the expressive benefit of marriage. Also, in practice, registration has broader practical implications, as governmental agencies and other parties ordinarily rely on it, so that the rights and benefits that are accorded by the state to married couples are usually given to couples who are registered as married.[86] The result is that couples whose marriages are allegedly not valid under Israeli law still enjoy the appearance of state recognition; they appear as married and enjoy rights and benefits as *married* couples.

One could even argue that unmarried cohabitants enjoy official endorsement and recognition in Israel, where there is no general formal framework for recognising domestic partnership outside the marital framework.[87] Yet, unmarried cohabitants not only enjoy most of the rights and benefits (and are subject to the obligations) of married individuals, they are known and recognised under Israeli law as 'reputed spouses'. There is also case law that suggests that whether or not intimate partners are considered to be 'reputed spouses' is not entirely for the couple to decide, and the state (through the courts) will decide how to define their relationship.[88] This may suggest that being 'reputed spouses' is a legal status, parallel to marriage.[89]

Nonetheless, even if unmarried cohabitants enjoy de facto recognition and endorsement by the state as 'reputed spouses', and despite the official recognition of civil marriage conducted abroad, the current legal situation is perceived as unsatisfactory by those who claim a right to marry in Israel. This is because currently there are different classes of recognised intimate relationship in Israel:

- 'class A' marriages – celebrated in Israel, in a religious ceremony;
- 'class B' marriages – celebrated in a civil ceremony abroad; and
- 'class C' relationships of 'reputed spouses'.

Although in terms of the specific legal arrangements applicable to these types of relationship (concerning maintenance obligations, the financial aspects of the relationship, and the like) many perceive civil marriage abroad or cohabitation as being preferable to religious marriage in Israel;

[85] Population Registry Law (n 7) s 3, which provides that some details registered in the Population Registry constitute prima facie evidence as to their veracity; however, the personal status of an individual is not one of them.

[86] Ruth Halperin-Kaddari, *Women in Israel: A State of Their Own* (University of Pennsylvania Press 2004) 244; Eitan Levontin, 'Figment of the Imagination: Funk-Schlezinger and Civil Registry Law' (2008) 11 *Mishpat Umimshal* 125, 150.

[87] In March 2010, the Israeli Knesset passed the Covenant Partnership Law, which provides a very limited option of civil partnership, restricted to Israeli opposite-sex couples in cases where both partners do not belong to a recognised religious community.

[88] CA 7021/93 *Bar-Nahor v Estate of Osterlitz* 1994 PD 94(3) 1512.

[89] Shahar Lifshitz, 'Married against Their Will? A Liberal Analysis of Cohabitation Law' (2002) 25 *Tel Aviv University Law Review* 741, 803–08. I do not agree with Lifshitz's analysis of the *Bar-Nahor* case, which concerned the right to maintenance from the estate, which is mandatory and cannot be limited or waived by agreement. Had the court given effect to the parties' stipulation that they are not 'reputed spouses' in this context, it would have nullified the mandatory character of the right to maintenance from the estate.

the official recognition and endorsement of each of these relationships are *different*. This difference is considered problematic in itself,[90] and raises the question of equality and the connection between the right to marry and the right to equality.

3.4. The Basic Right to Marry as a Basic Right to Equality in Marriage

In considering the American constitutional right to marry, Cass Sunstein suggests that it should be understood in the context of equality jurisprudence (as part of the Equal Protection Clause). Sunstein's reasoning is that demands for equal treatment call into question a tradition of exclusion and prejudice, thus providing a powerful tool to demand public justification for denying some individuals access to the institution of marriage.[91] Undoubtedly the (federal) constitutional context of the US and the Israeli constitutional context are very different. The constitutional status of the right to equality, in particular, is different in American and Israeli jurisprudence. Nevertheless, I find the idea of understanding the basic right to marry as an equality right appealing and wish to explore it in the Israeli context.

Sunstein's emphasis on a conceptual framework that challenges exclusion and prejudice seems very convincing. First, it challenges the creation of separate institutions for officially recognising different intimate relationships (such as registered partnerships or civil unions alongside marriage). Second, experience suggests that the concept of marriage is especially susceptible to traditionalist and conservative interpretations. This can explain the failure of parties to non-traditional intimate partnerships (such as same-sex couples) in seeking constitutional redress in their struggle to access legal marriage in legal systems where the right to marry is expressly recognised in the constitution. Indeed, one could expect that in a legal system where the right to marry is expressly recognised in the constitution, a right to access marriage will have a better chance of being recognised. However, in various legal systems – such as Germany,[92] Switzerland[93] and Hungary[94] – marriage as protected by the constitution has been interpreted as an exclusively heterosexual institution. Thus, parties to non-heterosexual and other non-traditional relationships cannot claim access to 'marriage'. A traditional understanding of marriage is also reflected in the opinion of Justices Cheshin and Joubran in *Adalah.* In explaining the constitutional status of the right to marry, both justices present a traditionalist approach (which excludes, for example, same-sex couples) and refer to the law of nature.

Shifting the emphasis from the value of the individual interest in accessing legal marriage to the value of equality, in understanding the basic right to marry, surely does not guarantee that same-sex and other non-traditional relationships will be considered similar to traditional couples for the purposes of marriage. However, equality jurisprudence is designed to challenge traditional

[90] *Brown v Board of Education* 347 US 483 (1954).
[91] Sunstein (n 63) 2111–12.
[92] Saez (n 45) 19–20.
[93] ibid 22–23.
[94] ibid 23–24.

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biases. The problem is that in Israel the constitutional status of the right to equality itself, and the scope of this right, is still unclear.

In the pre-1992 period of parliamentary supremacy, the Israeli Supreme Court developed a rich jurisprudence of equality as an underlying principle.[95] Nonetheless, the constitutional status of the right to equality following the 'constitutional revolution' has been unclear, as equality has not been explicitly included in the Basic Laws.[96] Following the enactment of these Laws, questions arose regarding the possibility of deriving the right to equality from the general right to human dignity, thereby elevating its status to that of a constitutional right.[97] The Supreme Court eventually resolved this dispute by adopting an intermediate approach whereby the right to human dignity would include the right to equality only insofar as this right is closely and objectively connected with human dignity.[98] According to this approach, the right to equality is not recognised as an independently implied or non-enumerated basic right. Consequently, not all aspects of equality are elevated to the level of constitutional rights, as they would have been had equality been recognised as an independent basic right.[99]

I suggest that a violation of equality is a violation of human dignity either when the classification on which it is based is an affront to human dignity or when the benefit in question is closely connected with human dignity. The first idea, that certain types of classification (for example, sex-based, ethnicity-based, religious-based classifications) violate human dignity, finds support in Israeli case law, including *Adalah*.[100] I argue that certain benefits are closely related to human dignity so that their unequal distribution in itself is an affront to human dignity. I further suggest that marriage is such a benefit, so that exclusion of some groups from marriage affronts human dignity.

Some support for the idea that certain goods are connected with human dignity, in a manner that their unequal distribution will violate the latter, can be found in the opinions of President

[95] The case law and academic literature on equality in Israel is extensive. See Itzhak Zamir and Moshe Sobel, 'Equality before the Law' (1999) 5 *Mishpat Umimshal* 165 (in Hebrew); Frances Raday, 'On Equality' (1994) 24 *Mishpatim* 241 (in Hebrew).

[96] As noted above, the omission of the right to equality from the Basic Law was intentional: see n 12 and accompanying text.

[97] See Hillel Sommer, 'The Non-Enumerated Rights: On the Scope of the Constitutional Revolution' (1997) 28 *Mishpatim* 257 (in Hebrew); Yehudit Karp, 'Basic Law: Human Dignity and Freedom – A Biography of Power Struggles' (1992) 1 *Mishpat Umimshal* 323, 347–51 (in Hebrew); Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel*, vol 1 (5th edn, Shoken 1997) 921 (in Hebrew); Yehudit Karp, 'Several Questions on Human Dignity under the Basic Law: Human Dignity and Liberty' (1995) 25 *Mishpatim* 129, 145 (in Hebrew); Dalia Dorner, 'Between Equality and Human Dignity' in *Shamgar Book*, vol 1 (Israel Bar Association 2003) 9 (in Hebrew).

[98] HCJ 6427/02 *Movement for Quality Government in Israel v Knesset* (unpublished, 11 May 2006).

[99] *Adalah* (n 17) President Barak, para 39.

[100] President Barak and Justices Beinisch, Joubran, Hayut, Procaccia and Levy held that the Citizenship and Entry into Israel Law violated the constitutional right to equality because of the de facto ethnicity-nationality classification it makes. Since citizens of Palestinian origin are likely to marry Palestinians residing in the territories, the law effectively discriminated against them, as opposed to Jewish citizens. Another example that connects equality and human dignity based on the classification at issue is Justice Dorner's opinion in HCJ 4541/94 *Miller v Minister of Defence* 1995 PD 49(4), arguing that sex-based discrimination affronts human dignity, official translation at http://elyon1.court.gov.il/files_eng/94/410/045/Z01/94045410.z01.pdf.

Barak and Justice Procaccia in *Adalah*. In their analysis of the constitutionality of the equality claim in that case, Barak and Procaccia refer not only to the type of (de facto) classification the law makes, but also address the realisation of family rights separately as the benefit in question:[101]

> Does the right of the Israeli spouse to have a family unit in Israel, by virtue of equality with the right of other Israeli couples to have a family unit in Israel, constitute a part of the right of the Israeli spouse to human dignity? The answer is yes. Both the protection of the family unit in Israel, and the protection of the equality of this family unit with the family units of other Israeli couples, fall within the essence of human dignity. The prohibition of discrimination against one spouse with regard to having his family unit in Israel as compared with another spouse is a part of the protection of the human dignity of the spouse who suffers that discrimination.

According to Barak and Procaccia, given the significance of family relationships to individuals, inequality in the ability to realise one's family life violates human dignity (even when it is not based on a classification that is suspect). I argue that equality in marriage is also within the essence of human dignity, because of the official endorsement and recognition of intimate partnership relationship that accompanies legal marriage. Given the central place that intimate and familial relationships play in shaping and defining our identity, affording some intimate partnerships official recognition while denying it from others affronts human dignity. Against a backdrop of an existing legal institution of marriage, the exclusion from legal marriage, with the material and expressive benefits it provides, violates human dignity, regardless of the classification that forms the basis for exclusion.

Following Sunstein, I suggest that the best way to interpret the basic right to marry is within a framework of equality, according to which human dignity requires equality in affording official recognition to intimate partnerships. It must be admitted, though, that whether this, or any other, understanding of the basic right to marry is accepted, its actual effect is quite limited given the 'validity of laws' clause in the Basic Law, which exempts legislation that predates the Basic Law from judicial scrutiny. It does affect future involvement of the state in family life.[102]

Once the Israeli legislator decides to address the problem of inequality in marriage in Israel, it should be remembered that equality in marriage can be achieved not only by letting everyone in, but also by keeping everyone out.[103] Existing socio-political battles in Israel focus on letting everyone in. Nonetheless, in the unique Israeli context, the option of keeping everyone out through the abolition of the legal institution of marriage is an option worth considering. In the remainder of this article I explain why this is so, and consider whether the State of Israel could abolish the legal institution of marriage, given the now recognised basic right to marry.

[101] *Adalah* (n 17) President Barak, para 40; Justice Procaccia, para 1.
[102] It also affects the interpretation of existing laws: CC 537/95 *Ganimat v State of Israel* 1995 PD 49(3) 355, 412–21.
[103] Patricia A Cain, 'Imagine There's No Marriage' (1996) 16 *Quinnipiac Law Review* 27, 28.

4. The Basic Right to Marry and the State's Obligation to Maintain Legal Marriage

The discussion has thus far rested on the assumption that a state-created institution of marriage exists and that the constitutional claim concerns (equal) access to this institution, with all the material and expressive benefits it provides.[104] Suppose, however, the state decides to abolish legal marriage altogether. Is it prevented from doing so, given the now-acknowledged basic right to marry? Clearly, given that legal marriage exists in Israel (as in most other countries), the Israeli case law addressing the right to marry, even before the enactment of the Basic Laws, involved the question of access to the institution of marriage and its associated benefits. There is no Israeli case that addresses the question of whether the state is obligated to recognise and maintain an institution called marriage; the discussion therefore remains in the realm of the theoretical. Before delving into the question concerning the state's obligation to maintain this institution, I will briefly clarify what abolition of marriage does, or does not, mean, and why the possibility of abolishing legal marriage in Israel should be considered.

4.1. On Abolishing Legal Marriage in Israel

The religious monopoly over marriage in Israel has been severely criticised over the years for breaching the individual's right to marry, personal autonomy and freedom of conscience, and for the dominant role it plays in preserving the subordinate status of women as a result of the patriarchal character of religious family law.[105] It is not surprising, therefore, that proposals for restricting the religious monopoly over marriage have long been an integral, continuing part of the legal, social and political agenda in Israel. However, existing proposals in academic literature, as well as in bills, focus on introducing some form of civil marriage in Israel. The option of abolishing legal marriage as a way of bypassing the various difficulties that arise from religious law's control over marriage has not been considered. The scope of this article does not allow for an in-depth inquiry into this option,[106] but I will outline the main arguments as to why it is at least worth considering the abolition of legal marriage in Israel.

It should be clarified that abolishing legal marriage does not include prohibiting private ceremonies, religious or otherwise, for the purpose of celebrating a commitment to an intimate relationship. Furthermore, subject to protecting the interests of vulnerable groups (such as minors), individuals may choose to arrange their intimate associations in dyads, triads or any other grouping size, monogamously or otherwise, or without an intimate partner. The abolition of legal marriage also does not imply the privatisation of intimate partnership relationships in the sense that the Israeli legal system will withdraw from involvement in disputes, financial or

[104] Sunstein (n 63) 2083–84.
[105] For a recent summary of these critiques see Avishalom Westreich and Pinhas Shifman, *Position Paper: A Civil Legal Framework for Marriage and Divorce in Israel* (The Metzilah Center 2013), http://www.metzilah.org.il/publications_eng.
[106] This is an undertaking that I have assumed in an independent project.

otherwise, between intimate partners. Such disputes will continue to find legal redress, although their legal resolution will not be based on any kind of matrimonial bond between the parties, or the absence thereof. As is elaborated further below, in many respects this is already the current legal position in Israel when various financial disputes between intimate partners are addressed without reference to their marital status. Issues pertaining to joint parenthood also remain unaffected, as the parenthood relationship under Israeli law (whether vertical between parent and child, or horizontal between joint parents) is not influenced by the parents' marital status. What the abolition of legal marriage does mean is that the legal distinction between married, single and divorced becomes irrelevant and that the state does not provide expressive legitimacy to or official endorsement of any specific type of intimate relationship between adults.

4.1.1. The Ideology Supporting the Abolition of Legal Marriage

The idea of abolishing legal marriage is associated mainly with Martha Fineman, who argues that it is wrong to privilege a bond that is ultimately a romantic-sexual affiliation between two adults.[107] Though this bond is generally considered to be the permanent basis of the family, reality has proved otherwise – the romantic-sexual tie is fragile and marriage is easily terminated. This is not merely a descriptive statement, and ideology today supports the simple termination of marital relationships once 'love has gone'. Fineman, therefore, advocates not only the abolition of legal 'marriage' but that of any privilege granted to romantic-sexual bonds between adults. Instead, she suggests, the focus should shift to dependency relationships the paradigm for which is the mother–child dyad. Parent–child ties, unlike the pairing between adults, tend to last and are much more valuable to our society.

Some pro-LGBT scholars have also argued that rather than seeking an extension of marriage to lesbian and gay couples, LGBT activists should seek to abolish legal marriage altogether. They argue that marriage is an inherently hetero-normative, patriarchal and oppressive institution.[108] They further argue that recognition of same-sex marriage will demarcate acceptable LGBT relationships and sexualities from unacceptable ones and it will limit the multiplicity and complexities of relationships in the LGBT experience.[109]

4.1.2. The Unique Israeli Context

Despite some normative appeal, various reservations and doubts have been raised in the literature regarding the idea of abolishing legal marriage.[110] However, existing literature refers to the idea

[107] Martha A Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 161–66, 230–33.
[108] See Ruthann Robson and SE Valentine, 'Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory' (1990) 63 *Temple Law Journal* 511, 540; Paula L Ettelbrick, 'Since When is Marriage a Path to Liberation' (Autumn 1989) *OUT/LOOK: National Lesbian & Gay Quarterly* 8–12. See in general Nancy D Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press 2008).
[109] Robson and Valentine, ibid.
[110] See Carol Sanger, 'A Case for Civil Marriage' (2006) 27 *Cardozo Law Review* 1311; Pamela S Karlan, 'Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?' (2010) 98 *California Law Review* 697.

of abolishing marriage outside Israel (mainly in the US), and its major criticism is irrelevant in the Israeli context. Thus, for example, in the absence of the legal institution of marriage, intimate relationships between adults would be governed by general civil law (mainly contract law, but also tort and property law).[111] American scholarship has expressed scepticism concerning the ability of civil law to regulate intimate relationships.[112] Civil Israeli family law, however, has developed a rich body of jurisprudence governing intimate relationships through contract, property and tort laws, and has applied it to both married couples and unmarried cohabitants.[113] The Israeli legal system is therefore well equipped to address and regulate intimate relationships between adults without the formal legal institution called marriage.

Outside Israel, concerns have also been raised that the abolition of (civil) marriage suggests privatising marriage and surrendering it to religion.[114] This possibility gives feminists well-founded reasons for concern, since civil marriage law in many countries has evolved so as to guarantee safeguards for women against patriarchal religious family law. From a feminist perspective, as well as from that of same-sex couples, given a choice between legal civil marriage and no legal institution called marriage but merely a 'private' religious ceremony, the significance of legal marriage seems obvious. This, however, is not the case in Israel. Abolishing legal marriage in Israel presents a choice between state-sanctioned religious marriage, where religion is buttressed by the power of the state, and 'private' religious marriage without state support – a far more complex dilemma. It is not at all clear that the current state of affairs in Israel guarantees better protection for women.[115]

Last, in the unique Israeli context, abolishing legal marriage might offer a middle ground on which the continuing conflict between Israel's self-definition as a Jewish state and its self-definition as a democratic state can be resolved, at least with regard to recognising adult intimate relationships. One argument against establishing civil marriage in Israel points to the problem of Israel as a Jewish state endorsing intrafaith marriages (and possibly also same-sex marriages).[116] If civil marriage were introduced, Israel as a liberal democratic state obviously could not limit it to same-faith couples. Equality in access to marriage is thus understood to conflict with Israel as a

[111] See Martha A Fineman, 'Contract Marriage and Background Rules' in Brian Bix (ed), *Analyzing Law: New Essays in Legal Theory* (Oxford University Press 1998) 183.
[112] See Sanger (n 110).
[113] Thus, for example, before the enactment of the Spouses Property Relations Law in 1973, the Israeli Supreme Court developed a presumption of community property by which property relations between spouses were governed. The presumption of community property was originally developed based on contractual principles according to which spouses implicitly consented to jointly own property accumulated during their marriage: Blecher-Prigat and Shmueli (n 5) 280. Similarly, a support obligation between former intimate partners was developed based on contractual principles: *X v Y* (n 29).
[114] See Sanger (n 110).
[115] There is evidence to suggest, for example, that the state official rabbinical courts in Israel are more reluctant to adopt *Halakhic* (Jewish law) solutions to address the plight of women who encounter difficulties in obtaining a *get* (the Jewish divorce): Amihai Radzyner, 'State-Rabbinical Jurisdiction vs. Private Jurisdiction – Advantages and Disadvantages', a talk given at the Second Agunah Summit: State Solutions vs. Non-State Solutions, Bar Ilan University, Israel, 3 March 2014.
[116] See Pinhas Shifman, *Who's Afraid of Civil Marriage?* (Jerusalem Institute for Israeli Research 1994) (in Hebrew).

state that symbolises the unity of the Jewish people. If legal marriage were to be abolished, the State of Israel would not grant official endorsement to intimate relationships that seem to contradict its definition as a Jewish state. Interfaith marriages would not be endorsed, nor would any official recognition be granted to same-sex marriages. Equality between intimate couples would thereby be achieved while bypassing any potential conflicts with Israel's identity as a Jewish state.

Certainly, the discussion above is not exhaustive. It is merely intended to highlight the main issues to be addressed in considering whether or not the abolition of legal marriage in Israel is desirable. It also aspires to demonstrate that undertaking such an inquiry is a worthy project. This brings me back to the question of the meaning and implications of the now recognised basic right to marry in Israel. Suppose the Israeli legislator, the Knesset, decides to abolish legal marriage. Would the abolition of marriage infringe the basic right to marry? Is the State of Israel under a constitutional obligation to maintain a formal-legal institution of 'marriage'?

4.2. On Positive and Negative Aspects of Israeli Basic Rights

The question of whether a constitutional right to marry prohibits the abolition of legal marriage and requires states to maintain a formal institution of marriage has been discussed in scholarly literature outside Israel. In analysing the American constitutional right to marry and its meaning, scholars Patricia Cain and Cass Sunstein argue that it does not require states to maintain formal marriage. In reaching this conclusion they emphasise the distinction between 'negative rights' and 'positive rights', and the common understanding of American constitutional fundamental rights as negative rights.[117]

The jurisprudence of rights has traditionally distinguished between 'negative' and 'positive' rights. Negative rights correlate with duties of omission, requiring non-interference, whereas positive rights require an activity by some individual or entity.[118] Modern rights theorists have challenged this distinction, indicating that most recognised rights generate not a single duty but multiple duties, of both a negative and positive nature.[119] It is therefore more acceptable today to refer to negative aspects and positive aspects of a right.[120] In this respect, the Israeli constitutional basic rights, and especially the basic right to human dignity, are understood in a different sense from the American constitutional rights. Article 4 of Basic Law: Human Dignity and

[117] Sunstein (n 63) 2094–95; Cain (n 103) 38–40. Other scholars have disagreed. Thus, for example, Carlos Ball argues that even if constitutional fundamental rights are generally understood to be negative rights, the fundamental right to marry should be understood as an exception: Carlos A Ball, 'The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas' (2004) 88 *Minnesota Law Review* 1184, 1203–07. This debate is beyond the scope of this article, which focuses on the Israeli basic right to marry.

[118] Jeremy Waldron, 'Liberal Rights: Two Sides of the Coin' in *Liberal Rights* (Cambridge University Press 1993) 16, 24; Ran Hirschl, 'Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order' (1998) 46 *American Journal of Comparative Law* 427, 444–45.

[119] See Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, 511.

[120] See HCJ 10662/04 *Hassan v National Insurance Institute* (unpublished, 28 February 2012), para 28 and the references cited there.

Liberty is understood to impose an affirmative duty on the state to protect the right to human dignity.[121]

The right to marry was recognised as part of the basic right to human dignity. Therefore, the proposition that the basic right to marry requires the State of Israel to maintain the institution of legal marriage cannot be rejected just because it imposes a positive duty on the state. In this regard it is worth noting that the Supreme Court considered the scope of the basic right to parenthood, which is also part of the basic right to family life and is derived from the basic right to human dignity. It left open the question whether the basic right to parenthood imposes positive duties on the state to assist individuals to become parents, either through reproductive technologies or adoption.[122]

The question regarding a state's obligation to maintain a legal institution of adoption is an interesting one in the context of my inquiry regarding the meaning of the basic right to marry. Like marriage, adoption is a creation of the state, giving recognition to intimate or familial relationships between children and adult carers.[123] Nonetheless, I argue that while the state may be under an obligation to maintain the legal institution of adoption, it is not under an obligation to maintain legal marriage in view of the basic right to marry. The state's obligation to maintain legal adoption is not the subject of this article, and therefore I will not address this question in depth. However, some comparison between legal marriage and adoption, and the individual interests they serve, assist me in explaining why there should be no obligation on the state to maintain legal marriage. As noted, in making this argument I give no weight to the distinction between the positive and negative aspects of a right, as the Israeli jurisprudence on basic rights has raised serious doubts over this distinction and has ultimately refused to adopt it as a normative basis for deciding the scope and meaning of basic rights.

4.3. Is There an Individual Interest in the Institution of Marriage?

My doubts regarding the imposition of an obligation on the state to maintain legal marriage rely on a particular understanding of the concept of rights.[124] A traditional view of rights among theorists points to the uniqueness of the language of rights in that they express moral desirability from the viewpoint of an individual rights holder, rather than moral desirability as such.[125]

[121] Art 4 states: 'Every person is entitled to the protection of his … dignity': *Hassan*, ibid para 29.
[122] HCJ 4293/01 *New Family v Minister of Labor and Welfare* (unpublished, 24 March 2009).
[123] David E Meyer, 'A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption' (2006) 51 *Villanova Law Review* 891, 894–95. See the discussion concerning the purposes of the Adoption Law in CA 10280/01 *Yaros-Hakak v Attorney General* 2005 PD 59(5) 64.
[124] I borrow the use of the term 'traditional' from Alon Harel, 'Revisionist Theories of Rights: An Unwelcome Defense' (1998) 11 *The Canadian Journal of Law & Jurisprudence* 227. Harel distinguishes between (a) rights theorists whom he calls 'traditionalists', who locate the reasons that justify the protection of rights within individualistic concerns, and (b) rights theorists whom he calls 'revisionists', who deny this traditional claim and argue that rights can be partially or exclusively grounded in societal interests.
[125] Jeremy Waldron, 'Can Communal Goods Be Human Rights?' in Jeremy Waldron (ed), *Liberal Rights: Collected Papers* 339, 345 (Cambridge University Press 1993) (to argue that someone *has a right* to something is substantially different from saying that *it is a good thing*, or that *it is important to have* it). See also Alon Harel,

Raz's prominent interest theory of rights defines rights as human interests that were recognised as important enough and worthy of protection through the imposition of duties on others (an individual, or an entity such as the state).[126] The individual's interest is thus the ground for the imposition of the duty.[127]

This approach to rights presents a difficulty for the claim that there is an individual right to a state-sponsored institution of marriage, since this alleged duty of the state cannot be grounded in the interests of an individual.[128] No individual spouse's interest taken separately can adequately serve as a basis for a duty to maintain an institution of marriage, as the benefit *to the individual* from having an official institution of marriage makes sense only on the assumption that other individuals and couples also share in the institution of marriage. The expressive benefit of formal marriage depends on the involvement of many. Karst, for example, notes that the phenomenon of marrying and being married as a statement of identity and of identification with one's partner 'feeds on itself; if large numbers of people equate marriage and commitment, then each successive marriage is apt to seem to the marrying couple both the symbol of commitment and the undertaking itself'.[129] Thus, if a state-sponsored institution of marriage could be provided to a single couple, its value to the spouses is highly questionable.[130] Therefore, the value of the institution of marriage cannot be captured in terms of its value to individual people, since it makes immediate reference to the experience and benefits of others. According to Jeremy Waldron, the individualistic character of rights suggests that when the value of a benefit (in this case the expressive benefit of an official institution called marriage) cannot be captured in terms of its value to individuals, it cannot be the subject matter of a right since no individual interest can serve as a basis for imposing a duty to promote such a benefit.[131]

'Theories of Rights' in Martin P Golding and William Edmundson (eds), *Blackwell's Guide to the Philosophy of Law and Legal Theory* (Wiley-Blackwell 2005) 191.

[126] Joseph Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 195.

[127] Raz, ibid 196–97, 213. Needless to say, not every interest a person has should be protected by rights – that is, by the imposition of duties on others. Some interests are too trivial and do not justify the imposition of any burden on others. Furthermore, certain interests, while important, cannot be protected by the imposition of duties on others either because the duty would be disproportionately burdensome or impossible to impose in practice: Andrei Marmor, 'Do We Have a Right to Common Goods?' (2001) 14 *The Canadian Journal of Law & Jurisprudence* 213, 213.

[128] This analysis is based on Waldron (n 125) 359; Harel (n 124).

[129] Karst (n 66) 670.

[130] Denise Réaume, 'Individuals, Groups, and Rights to Public Goods' (1998) 38 *University of Toronto Law Journal* 1, 10.

[131] Waldron (n 125). There are rights theorists who do not accept this view. Andrei Marmor, for example, contends that the fact that an individual cannot enjoy a benefit on his or her own is not in itself sufficient to indicate that the item in question is not a benefit for that individual, thus the benefit to each individual is to be considered on its own. In his view there is no *conceptual* problem with recognising an individual right to such goods. Still, Marmor claims that there is a moral problem with recognising an individual's right to such goods, since the benefit to the individual depends on the involvement and or participation of others, and imposing a duty of involvement in such goods on others may be morally disturbing (imagine, for instance, a duty to marry rather than merely live together): see Marmor (n 127) 217–19. Alon Harel presents an entirely different approach, which he terms a Revisionist Theory of Rights. According to this theory individual rights may be grounded in societal interests and not only in the interests of individuals. Thus, the fact that the value of an institution of marriage cannot be captured in terms of its value to individuals, or that the individual interest in having an institution of marriage

Sunstein also seems to express doubts regarding an individual's right to have an institution of marriage, though his argument on this point is expressed more as a matter of common sense. He explains:[132]

> If a state abolished marriage, it would be because most people, or most influential people, had come to believe that the institution should be abolished. In those circumstances, the idea that there is a right to that institution would be difficult to accept.

A comparison with the institution of adoption may serve to further illuminate this matter. Like marriage, adoption is a state-sponsored institution providing official endorsement for relationships between children and adult carers. Of course, adoption often does more than merely giving official recognition to a parent–child relationship, but it also creates this relationship. Here, however, I focus on the official recognition. The benefit that a child derives from being officially adopted and having the state recognise the relationship between herself and her carers as a parent–child relationship does not depend on any other child being adopted. Thus, the interest of each individual child taken separately in having the state create and maintain an official institution of adoption may justify imposing a duty upon the state to create and maintain such an institution (assuming, of course, this interest is important enough to justify the imposition of such a duty).[133]

5. CONCLUDING REMARKS

This article questions the value of a basic right to marry that has recently been recognised as part of Israeli constitutional law. Israeli law has developed a tradition that diminishes the significance of formal marriage and instead emphasises joint intimate lives. The vast majority of rights, benefits and obligations that are normally attached to marriage are, in Israel, associated with the de facto intimate partnership relationship.

Although the article attempted to advance a specific understanding of this basic right within an equality framework, according to which human dignity requires equality in affording official recognition to intimate partnerships, it conceded that whether this or any other understanding of

cannot morally impose a duty to promote such a benefit do not necessarily negate an individual's right to the maintenance of an official institution of marriage. In any event, neither the conceptual nor the moral argument against an individual's right to have an institution of marriage maintained by the state concern an individual's right to access such an institution, once established. Harel does not necessarily reject the traditional-individualistic approach. Rather, he demonstrates that many well established and widely recognised rights are rights to communal goods. Harel gives several examples, including the right to *equal* liberty, as the interest in equality makes a reference to others.

[132] Sunstein (n 63) 2095.

[133] Note that I refer to the interest of the individual child to be adopted rather than the interest of the individual adult to adopt as the ground for such a duty. Analytically, the interest of an individual adult in having official adoption – giving public recognition to a caretaking relationship between herself and a child – may also serve as grounds for imposing a duty on the state to maintain an official institution of adoption. Nonetheless, the significance of the child's interest seems stronger, so as to justify the imposition of such a duty. This issue is beyond the scope of this article.

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the basic right to marry is accepted, its actual effect is quite limited. Given the 'validity of laws' clause in Basic Law: Human Dignity and Liberty, which exempts from judicial scrutiny legislation that predates the Basic Law, any meaning given to the basic right to marry cannot bring about the invalidation of religious laws of marriage (or divorce) in Israel.

The Basic Laws and the rights recognised within their scope clearly affect the future involvement of the state in family life. In this respect it should be recalled that the basic right to human dignity requires the state not only to refrain from involvement, but imposes an affirmative duty on the state to protect the right to human dignity.[134] The state is therefore under an obligation to guarantee equality in marriage. What is the scope of this obligation remains an open question. While this question is beyond the scope of this article, it is worth mentioning that during the period 2011– 13 three petitions were submitted to the Supreme Court, sitting as the High Court of Justice, asking the Court to order the Knesset to legislate for civil marriage in some form.[135] The Court decisively held that it cannot compel the state to legislate a certain law, but merely to review (and if necessary, to declare invalid) existing legislation. However, political constraints have kept the Israeli legislature inactive in the field of family law.[136]

Once the legislature decides to address the problem of inequality in marriage in Israel, it should be remembered that equality in marriage can be achieved not only by letting everyone in, but also by keeping everyone out.[137] Existing socio-political battles in Israel focus on letting everyone in. I suggested that, in the unique Israeli context, the option of keeping everyone out through the abolition of the legal institution of marriage is an option worth considering. As presented in this article, constitutional limitations do not stand in the way for the State of Israel to abolish legal marriage, as the basic right to marry should not be interpreted as imposing a duty on the state to maintain such an institution.

[134] See text accompanying nn 121–122.
[135] HCJ 129/13 *Axelrod v State of Israel* (unpublished, 26 January 2014). Two additional appeals, HCJ 7127/11 *Center for Jewish Pluralism v State of Israel* (2011) and HCJ 1143/11 *Jerusalem Institute of Justice v Knesset* (2011), are mentioned in para 2 of the Court's decision.
[136] Rhona Schuz and Ayelet Blecher-Prigat, 'Dynamism and Schizophrenia' in Elaine Sutherland (ed), *The Future of Child and Family Law: International Predictions* (Cambridge University Press 2012) 175, 176.
[137] Cain (n 103) 28.