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view of the long-term wellbeing of that part of the public which seeks to introduce civil marriage in Israel — to any other arrangement, which might cause their descendants irreparable harm.

4

EXPRESSIONS OF LEGAL PLURALISM IN ISRAEL: THE INTERACTION BETWEEN THE HIGH COURT OF JUSTICE AND RABBINICAL COURTS IN FAMILY MATTERS AND BEYOND*

by

RUTH HALPERIN-KADDARI**

* During the initial stages of this article, I was privileged to obtain the wise criticism and advice of my teacher, the late Professor Ariel Rosen-Zvi. I am grateful to Professor Michael Freeman for inviting me to participate in this important volume.

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1 H.C. 1000/92 *Hava Bavli* v. *The Rabbinical Court of Appeals and others*, 48(2) *P.D.* 221 (hereinafter: "the *Bavli* case"); H.C. 3914/92 *Lev* v. *Regional Tribunal of Tel-Aviv-Jaffa*, 48(2) *P.D.* 491 (hereinafter: "the *Lev* case").

A. *Introduction*

This article grew out of work written following two significant family law cases, *Bavli* and *Lev*, handed down by Deputy President, Justice Barak (as he then was) in the mid-90s, which were perceived as revolutionizing family law, particularly the relationship between the religious and the civil systems of adjudication.[2] My aim then was to suggest a new perspective for conceiving the dual system of family law in Israel and the interaction between the civil and the religious systems, namely the perspective of legal pluralism. I wanted to show how, when viewed from that perspective, these two cases formed a comprehensive approach, which I termed "the theory of unity", that was completely averse to the concept of legal pluralism. I also questioned the validity and relevance of the concept of legal pluralism within the context of family law in Israel. Since then, the growing tension between the religious and the civil judicial systems has reached new heights, a process that could be attributed in part to these two cases. Parallel to that, a careful reading of new case law can discern the formation of a new strategy on the part of the civil judicial system for confronting what seems to have become the impossible civil-religious partnership in this area of law. Besides these developments that are internal to the field of family law, there were some other developments that could be linked to the concept of legal pluralism in general. In this article, I present my original thesis along with discussions of the developments that have taken place since its publication.

2 See R. Halperin-Kaddari, "Rethinking Legal Pluralism In Israel: The Interaction between the High Court of Justice and Rabbinical Courts", 20 *Iyunei Mishpat* [Tel-Aviv University Law Review] 1997, 683.

The history of the relations between the civil judicial system and the religious judicial system in the area of family law in Israel is permeated by clashes and disputes. Deeper analysis allows one to distinguish a pattern of disputes succeeded by intervals of calm.[3] We thought that lately we had finally reached a period of fair weather in this area. Even if we foresaw renewed clashes between the judicial institutions, we expected them to be influenced by the enactment, primarily, of the new Basic Laws and the ensuing "constitutional revolution" which has swept through the legal arena in Israel.[4] Nevertheless, the more profound developments have come from a less predictable quarter, from an area which seemed to have already achieved consensus and regulation, in which no questions appeared to remain outstanding. This is the area of laws applying to the various judicial institutions in the field of family law in Israel, and the question of the law applicable in the Rabbinical Courts in particular, in the most comprehensive

3 Reference is, broadly speaking, to the formative period of the parallel legal system (including, for example, shaping legal procedures and the various laws of evidence); the formative period for shaping the relations between the systems in the light of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953 *Sefer Ha-Ḥukkim* 165 (hereinafter: "the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law") (including the issue of the rule of attachment); and the specific issue of private marriage (*kiddushin*).

4 For example, there was room for expanding the ground of excessive jurisdiction, justifying the intervention of the High Court of Justice, by means of extending the notion of excessive jurisdiction to disregard for the provisions of the new Basic Laws. An example of this is the issue of review of the Rabbinical Court's use of evidence obtained from eavesdropping, in the light of the right to privacy which is anchored in Basic Law: Human Dignity and Freedom, 1992, *Sefer Ha-Ḥukkim* 150.

and basic manner. After years in which this matter was left entirely undiscussed and the approach to this question seemed to be based on the implementation of "accepted conventions", the successive judgments in *Bavli* and *Lev* followed, both of which refer to this fundamental question,[5] and both

5 In this connection it is important to mention the judgment H.C. 609/92 *Baham* v. *Rabbinical Court of Appeals*, 47(3) *P.D.* 288 (hereinafter: "the *Baham* case"), which was delivered shortly before the decisions in the *Bavli* and *Lev* cases and which reflects the same conventions which had been accepted prior thereto on this fundamental question. No separate discussion will be offered on this case, and it will therefore be described briefly here, since, as will be seen later, this judgment was almost the only one with which Justice Barak had to contend in the *Bavli* case. The *Baham* case dealt with the return of a gift made by a husband to his wife, in circumstances in which the adultery of the wife had led to their divorce. The couple agreed that the Rabbinical Court would determine the issue of the division of the property. The court applied Jewish law to this issue and held that, in these circumstances, the gift was to be returned to the husband. The property under consideration was the place of residence of the couple, which had been purchased with money given by the husband's parents, and which was registered in the names of both husband and wife. After selling the flat, the couple used the consideration, and an additional sum of money provided by the husband's father, to buy a new flat which also was registered in the names of both husband and wife in equal shares. The Rabbinical Court of Appeals held that the full consideration for the flat was due to the husband, since according to the couple's agreement, the gift, which the husband gave the wife, had been given on condition that she did not betray him and would not leave him, and since the condition was not met, the gift was void. The wife petitioned the High Court of Justice on the ground that the ruling of the Rabbinical Court comprised an impairment of her property rights, contrary to the provisions of the Gift Law - 1968, *Sefer Ha-Hukkim* 102, and Basic Law: Human Dignity and Freedom, and also that this ruling was contrary to the provisions of the Women's Equal Rights Law - 1951, *Sefer Ha-Hukkim* 248 (hereinafter: "the Equal Rights Law") and the Spouses (Property Relations) Law - 1973, *Sefer Ha-Hukkim* 267 (hereinafter: "the Spouses (Property Relations) Law"). The petition was dismissed, the Court stating that these issues did not arise in the petition at all, and the only relevant question concerned "nothing other than an interpretation of this legal act [a gift between spouses — R.H.K.] according to the agreement and the intention of the parties" (*ibid.*, at 294). Under the heading "the law applicable in the Rabbinical Court", Justice Elon dealt with the question of the application of the Gift Law in the Rabbinical Court. He reiterated the view which he had stated previously in H.C. 323/81 *Vilozhny* v. *The Rabbinical Court of Appeals*, 36(2) *P.D.* 733 (hereinafter: "the *Vilozhny* case") and held that "'the law follows the judge' and in the absence of another express statutory provision, the Rabbinical Court would adjudicate in accordance with the religious law which it had to apply ... the Gift Law did not contain a stipulation that its provisions also bind the Rabbinical Court. The Rabbinical Court therefore acted within the scope of the jurisdiction conferred on it, and in accordance with the law which it had to apply, namely, in accordance with Jewish law" (*ibid.*).

of which involve a renewed examination of a number of fundamental premises in the area of family law in Israel. As a result, the more general substantive questions, concerning the role of the religious legal and judicial systems in Israel and concerning its attitude to the civil legal system, have risen afresh. The principal issue is the potential influence of the judgments in the *Bavli* and *Lev* cases on these questions.

These judgments, particularly the former, were regarded as revolutionary in the area of family law in Israel.[6] On the theoretical level, the *Bavli* judgment indeed signifies a shift in attitude on the part of the civil system with regard to the religious system. A combined reading of the two judgments in the *Lev* and *Bavli* cases leaves no doubt as to their impact, since the judgments jointly describe a revolutionary process on the theoretical level in the attitude of the civil system towards the Rabbinical judicial system, a revolution which is finally fully expressed by the adoption of the "theory of unity". To realize the full impact of the decisions, I shall refer to the alternatives which were available to the court in each of the cases.

The second part of the article is devoted to a theoretical analysis of the relationship between the civil judicial system and religious legal and judicial systems and the substantive changes to the latter following the judgments in *Bavli* and *Lev*. In this section I shall discuss the possibility of regarding the legal system in Israel as operating in a situation proximate to legal pluralism, i.e. a situation in which more than one form of legal regulation

6 Professor Rosen-Zvi and Professor Shifman dealt with the manner in which the judgments were accepted. See, for example: A. Rosen-Zvi, "Family Laws", *Yearbook of Law in Israel – 5752-1993* (A. Rosen-Zvi, editor, 1994), 267, 269-271; P. Shifman, "Rabbinical Courts – Where to?", 2 *Mishpat u-Mimshal* [*Law & Government*] (1995), 523 (the essay focuses on the judgment in the *Bavli* case). It is interesting to note that, for the judicial establishment too, the *Bavli* case represents a line which may be considered more radical. Thus, for example, in H.C. 2346/94 *Wellner* v. *The Chairman of the Israeli Labour Party*, 49(1) *P.D.* 758 (hereinafter: "the *Wellner* case") President Shamgar cites the *Bavli* case as an example of a judgment which some people have argued violates the *status quo*. The judgment in the *Lev* case is not mentioned there (see also a similar reference by Justice Or, *ibid.*, at 812).

applies within a single social unit. I shall show that the theory of unity which underlies the two judgments is *prima facie* contrary in substantive terms to the possible character of the Israeli legal system as a system of legal pluralism. The all-embracing preference for unity and harmony over preservation of a pluralistic situation (and contending in a different manner with the problems which it raises) sends a hard message to the social groups the interests of which would be represented in such a situation of pluralism. This preference expresses, to a certain extent, a narrow view of law as a social institution in both its aspects (i.e., as influencing and as being influenced). It also ignores the advantages which may be garnered from internalizing the pluralistic reality within the general legal order. At the same time, against the background of the following discussion of the issue of legal pluralism and the pluralist ideology, it is possible to argue that the shift was inevitable and that these judgments must be seen as an indication that the unique structure of legal pluralism in Israel is impossible.

B. *The Bavli and Lev Rulings*

1. Background

Prior to discussing the judgments in the *Bavli* and *Lev* cases, it is necessary to provide a short description of the law which applies in the various judicial institutions in the area of family law in Israel.

The legal order in the arena of family law in Israel, which originates in His Majesty's Orders-in-Council 1922-1947,[7] is characterized by division.[8] The division exists on a number of levels, both on that of law and that of adjudication, an issue which exceeds the scope of this discussion. The division of law is expressed in two ways: division between the various personal laws in accordance with the political and ethnic affiliation of the litigants, and division between the religious laws and the civil territorial laws in accordance with the substantive classification of the matter under consideration. In a nutshell, prior to the *Bavli* decision, the applicable law in "matters of personal status"[9] (in cases involving Jews), both in the civil

7 *Ḥukkei Erets-Yisrael*, Vol. 3, at p. 2738 (hereinafter: the Order-in-Council).

8 For a broader discussion, see, *inter alia*, A. Rosen-Zvi, *Family Laws in Israel – Between Holy and Profane* (1990) 26-188 (First Volume: Family Laws in Israel – A Double and Parallel System); P. Shifman, *Family Laws in Israel* (1984, Vol. I) 19-98 (Part I: Adjudication and Law).

9 The term include marriage and divorce, alimony, maintenance, and to some degree child custody.

courts and in the Rabbinical courts, was Jewish law, save if in the particular case a piece of territorial legislation existed which was also directed at the Rabbinical Courts. In such a case, both the civil courts and the Rabbinical Courts are subject to the territorial regulation. Despite this apparent unity of laws, civil and religious courts could very well reach different outcomes in similar cases, for various reasons, including the differences in rules of evidence and procedure, and the application of rules of private international law within the civil courts.

A fundamental question, which was not firmly settled prior to the *Bavli* case, was the following: which law should be applied by the Rabbinical Courts when questions arise which go beyond matters of personal status, during the course of a hearing held within the scope of their jurisdiction? The assumption was that the Rabbinical Courts would, in the natural course, apply religious law to each and every matter which arose during the course of the hearing, including matters which exceeded the scope of issues of personal status, save if the matter at hand was regulated by territorial legislation which was also specifically directed at the religious courts. In general terms it may be asserted that the judgment in the *Bavli* case overturned this assumption, so that from now on the Rabbinical Courts have to apply the civil law in every case, save in matters of personal status, which remain under the control of the religious law.

(a) The *Bavli* Case

The specific question In the *Bavli* case was the application of the rule of spouses' joint ownership of property in the Rabbinical Courts. The couple married in 1957. Throughout their marriage the husband worked as a pilot for a commercial company; the wife, on the other hand, after a certain period of time left her job as a teacher in order to devote her time to running the household and raising the couple's three children. In 1986, the husband filed a suit for divorce in the Regional Rabbinical Court, to which he joined (attached) the matter of alimony and apportionment of property. The couple possessed extensive property, including land, chattels and other substantial financial assets. The financial significance of judgment in accordance with or contrary to the principle of common property was, of course, substantial in such a case. The couple divorced in accordance with the judgment of the Rabbinical Court, which continued to deal with the apportionment of the

property after the arrangement of the divorce. The wife's claim for the apportionment of property, which was filed before the District Court, was set aside on the ground that jurisdiction to hear this question was conferred on the Rabbinical Court by virtue of the attachment. Her appeal to the Supreme Court was also dismissed, upon it being held that the attachment had been made in good faith and was lawful.[10]

The Regional Rabbinical Court rejected the central contention raised by the wife to the effect that, in the light of the presumption of common spousal property, she was entitled to half the property, holding, *inter alia*, that:

> the ruling of the Court in no way binds the Rabbinical Court and the Rabbinical Court rules exclusively in accordance with Jewish law which does not include the concept of common property, but only rights due to the wife by virtue of the conditions of the *Ketubah* and *Halakhah*.[11]

The wife petitioned the High Court of Justice for the invalidation of these judgments. Her petition was upheld. Sitting in the High Court were Supreme Court President, Justice Shamgar, the Deputy President, Justice Barak (as he then was), and Justice D. Levin. Justice Barak divided his judgment into two parts, constructed around two alternative grounds for upholding the petition.[12] The first ground was based on the Equal Rights Law whereas the second ground was based on a reformulation of the system of laws applicable within the Rabbinical Court. The strategy of equal rights is compatible with what was once, customarily, seen as the legal order in relation to the law applicable in the Rabbinical Court, as it incorporated the rule of common spousal property through a piece of territorial legislation — the Equal Rights Law, which all agreed was also applicable to the Rabbinical Court. The second strategy, as noted, was contrary to the existing order in relation to the law applicable in the Rabbinical Court. *Prima facie*, this strategy was based on overturning the "formula" which to that date had shaped the legal order in terms of the laws applying in the Rabbinical Court: the principle of common ownership applied in the Rabbinical Court as part of the general civil law which it had to apply in every matter, save for

10 For this, see below, in section C.2.

11 The *Bavli* case, *supra* n.1, at 228.

12 *Ibid.*, at 239.

matters of personal status.[13] President Shamgar adopted an approach running parallel to the second strategy of Justice Barak, and made no reference at all to the strategy of equal rights.[14] Thus, it would seem, one must refer to the second strategy as that which expresses the "rule in the *Bavli* case".

The *Bavli* holding was met with animosity and antagonism on the part of the rabbinical courts. "Emergency meetings" on how to handle the new ruling were held, and religious leaders stated that rabbinical courts would not abide by it. The *Bavli* case itself was put off by various panels in the Tel-Aviv District Rabbinical Court, each one refraining from actually deciding the case. The turning point finally came when the husband's lawyers, wary of the prospects of reaching a conclusion, exposed the existence of a written agreement between the spouses, dating back to 1980, in which they addressed the possibility of divorce and the distribution of their property in such a case. This totally unexpected development came as a relief to the Rabbinical Court. Although the agreement was not ratified according to the Spouses (Property Relations) Law, the Rabbinical Court has nonetheless regarded it as binding, and ordered the distribution of the property according to the agreement.[15] Thus, it was able to avoid the application of the civil principle of common ownership in this case, since this principle applies only when there is no valid agreement between the spouses. Ironically, then, the whole saga of the *Bavli* case could have been avoided, had the 1980 agreement not been concealed by the parties.

Other recent developments, however, make this speculation implausible. As could be expected, the *Bavli* case has not remained alone in this line of confrontations, and other cases, while not so numerous, were soon to follow. The feature common to all of them is the Rabbinical Courts' inability to abide by the *Bavli* ruling. Thus, for example, a district Rabbinical Court refused to rule according to the principle of common ownership notwithstanding the express agreement of the spouses to divide their property

13 As noted, this description refers to a literal reading of the judgment. Below, I deal with the question whether one arrives at the same conclusions following a thorough perusal of the judgment.

14 The *Bavli* case, *supra* n.1, at 254-255. The President did indeed mention the Equal Rights Law and the principle of equality. However, he did so only as a theoretical background for the development of the presumption of common ownership, together with the rules for the formation of contractual relations and rules of equity — Israel style (*ibid.*).

15 File no. 1104884-21-1 *Bavli* v. *Bavli*, decision rendered on 23.5.99, panel consisting of Rabbi Kooler, Rabbi Sheinfeld, and Rabbi Elmaliach.

according to that principle.[16] In at least two other cases, the Rabbinical Courts simply ignored the claims for equal distribution of property according to the principle of common ownership.[17] The Rabbinical Courts' tribulation with this principle is very clearly reflected in a scholarly debate between two rabbinical judges which appeared as a series of articles in a periodical of Jewish Law.[18] All these express the impossible situation in which the Rabbinical Court found itself following the *Bavli* and *Lev* rulings.

(b) The *Lev* Case

The question which had to be determined in the *Lev* case, as formulated by Justice Barak at the opening of his judgment, was what are:

> the considerations which must be taken into account when the Rabbinical Court weighs whether to grant an injunction restraining a person from leaving the country.[19]

The case revolved around a couple, parents of three minor children, who had encountered difficulties in their marriage. Among the legal proceedings instituted by the couple, the wife had filed a suit for divorce in the Rabbinical Court, and the husband had filed a claim for reconciliation. Within the context of the latter claim, the husband applied to the Rabbinical Court for an order restraining his wife from leaving the country, on the grounds that the purpose of her proposed journey was to meet another man. The Rabbinical Court granted the *ex parte* order restraining the wife and her children from leaving the country. The wife's application to rescind the order was dismissed although the Rabbinical Court set a date for a further hearing in the matter and in the interim ordered the parties "to conduct negotiations to find a suitable solution which would enable them to go abroad together or the wife to go abroad on conditions which would dispel the suspicions of the

16 File no. 349233-21-1 *Givon* v. *Givon*, decision handed down on 28.5.97. The case was eventually decided by Rabbi Dikhovsky of the Rabbinical Court of Appeals, who seems to be the only *dayan* (rabbinic judge) willing to apply the civil principle of common ownership.

17 H.C. 6334/96 *Eliyahu* v. *The Rabbinical Court of Appeals, tak-al* 99(1) 539; H.C. 2222/99 *Gabai* v. *The Rabbinical Court of Appeals* 54(5) *P.D.* 401.

18 See, e.g., Sh. Dikhovsky, ""The Principle of Common Ownership" — Is it the Law of the Land?", 18 *Techumin* (1998), 18; A. Sherman, ""The Principle of Common Ownership" in Light of Torah Law", 18 *Tehumin* (1998), 32.

19 The *Lev* case, *supra* n.1, at 497.

husband."[20] The Rabbinical Court of Appeals dismissed the application for leave to appeal filed by the wife against this decision. The High Court of Justice upheld the petition of the wife and rescinded the order restraining her from leaving the country.

At the commencement of his judgment, Justice Barak reviewed the normative framework of the question confronting him. After analyzing the origin of the inherent jurisdiction of the Rabbinical Court to determine its own procedures, he turned to a consideration of the general limitations on inherent jurisdiction of this type, namely, the duty to implement it reasonably and conduct a proper balance between various values and interests, including human rights.[21] The remainder of the hearing was devoted to identifying the proper balance between the clashing considerations, at the time of restricting the right to leave the country, bearing in mind that the latter was acknowledged to be one of the basic human rights in Israel. This balance also had to be implemented when the Rabbinical Court offered the procedural remedy restraining a person from leaving the country.[22]

In the circumstances of the case, Justice Barak reached the conclusion that the decision of the Rabbinical Court did not reflect the proper balance between the right to freedom of movement of the wife and implementation of the substantive rights of the husband through the legal proceeding,[23] and accordingly the restraining order was rescinded.

2. A Combined Reading of the Judgments in the *Bavli* and *Lev* Cases — The Theory of Unity Espoused by Justice Barak

If there were any doubts as to the impact of the *Bavli* decision, a combined reading of the two judgments together leaves no doubt at all. The broad "revolutionary" approach returns to centre stage in the light of the ruling in the *Lev* case and upon combining it with the ruling in the *Bavli* case. This approach — which may be termed "the theory of unity" — which

20 *Ibid.*, at 498.

21 *Ibid.*, at 505.

22 *Ibid.*, at 510.

23 The reasons for this, according to Justice Barak, were, first, because "according to the evidentiary foundation laid before the Rabbinical Court, the element of 'sincere and serious fear' was not proved at all", and, principally, because "the requirement was not met that the departure [of the wife — R.H.K.] from the country impede the judicial proceeding of reconciliation between the spouses, or cause it to fail."

underlies the judgment of Justice Barak in the *Bavli* case and was qualified by the judgment of President Shamgar in the same case, guided Justice Barak in the *Lev* case too, this time without any reservations. A reading of both judgments, one in the light of the other, leads me to the conclusion that the theory of unity is of crucial importance in the most profound sense. The theory of unity was not at all qualified in the *Lev* case. Thus, if we return to the practical aspect of the examination of the scope of the rule in the *Bavli* case, it is possible to state that ultimately, in view of the *Lev* judgment, the broadest reading correctly expresses the ruling in the *Bavli* case.

It will be recalled that Justice Barak, in contrast to President Shamgar, in giving his reasons in the *Bavli* judgment did not employ the terminology of infringement of property rights and inherent rights, but rather the all-embracing language of the unity of the legal system. From his point of view, his judgment in the *Bavli* case formed part of the theory of unity. A goal which perhaps could not be achieved in an absolute manner in the *Bavli* judgment was achieved in the judgment in the *Lev* case. It is against this background that one must read the all-embracing formulations around which Justice Barak shaped his ruling in the *Lev* case, formulations which in fact were not needed for the *ratio decidendi* in the *Lev* case. These formulations are the best evidence of the significance which he wished to confer on this judgment:

> Indeed, every person who litigates before the Rabbinical Courts appears before them carrying all the human rights enjoyed by every person in Israel. The system of law in Israel guarantees human rights to every man. These rights are available to him in every judicial institution. Transfer from a 'civil' to a 'religious' institution cannot lead to the loss or negation of basic human rights.[24]

It would seem that these images, which resemble images employed by Justice Barak in the *Bavli* case, are directed at the associative connection between the two cases, and are intended to draw a common picture of the two. Indeed, immediately following these comments, Justice Barak quoted his own comments in the *Bavli* case:

> It is incompatible with these basic perceptions that the transfer from a civil court to a religious court will lead to a loss or an impairment of these basic rights. One must not enable the 'abrogation' of these civil rights without an express statutory authorization which meets the requirements established by our constitutional system.[25]

24 The *Lev* case, *supra* n.1, at 505.

25 The *Bavli* case, *supra* n.1, at 248, cited in the *Lev* case, *ibid.*

In the *Lev* case, the theory of unity was implemented, in terms of human rights, at the level of the procedural activity of the judicial institution. In the judgment of Justice Barak in the *Bavli* case, the theory of unity was applied in terms of property rights. A combination of the two judgments leads to the application of the general civil law to the Rabbinical Courts in all matters, save in matters of personal status, and thus Justice Barak's theory of unity is realized. The combined reading of the two judgments requires them to be treated as the introduction of a new guideline for the approach to be taken by the civil courts to the legal and judicial issues of personal status in Israel.

C. *Alternatives to the Theory of Unity*

I have already suggested that the paths which Justice Barak chose to follow in the respective judgments were not the only routes leading to the results which he aspired to achieve. Some of the alternative approaches available in the *Bavli* case are obvious, since two of them were adopted, one by President Shamgar and the other by Justice Barak himself, in the strategy of the equality of rights in the first part of his judgment. The alternatives in the *Lev* case are less obvious; however, they do exist. Conscious preference for the approaches that were actually taken shows that behind that preference lay indeed the intention to bring about a revision in the legal and judicial system of family law in Israel. After explaining the alternative paths to the *Bavli* and *Lev* decisions themselves, I shall describe a more recent development, drawn from another set of cases, which I see as potentially offering a comprehensive alternative to Justice Barak's expansive unity approach. I believe that, before delving into the theoretical debate, as will be done in Part D below, it is important to realize that, on the positivist level, other options to that approach do exist.

1. The Strategy of Equality of Rights

To achieve the minimum effect required in the *Bavli* case, namely, application of the rule of common ownership to the Rabbinical Court, the first part of Justice Barak's judgment would have sufficed, as Justice Barak himself noted.[26] Being content with an analysis in accordance with the Equal Rights Law would have had great significance in terms of the theories of

26 The *Bavli* case, *supra* n.1, at 243.

equality in Israeli law, and would have conveyed a milder message in terms of the relations between the two legal systems — the religious and the civil — as I shall explain below. On the other hand, such a view might have left intact not only incompatibility in the law in general, but also the phenomenon of clashes in the narrow area of rights and obligations.

The process of analysis in accordance with the Equal Rights Law is astonishing in its simplicity, to the extent that one wonders why it was not carried out before. The essence of the analysis is that the substantive influence of the Equal Rights Law on the application of Jewish law in the Rabbinical Court compels the Rabbinical Court to decide every case (save, of course, in matters of prohibition and authorization of marriage and divorce[27]) in accordance with the principle of equality which is anchored in Section 1 of the Equal Rights Law. Accordingly, "the Rabbinical Court is thus not allowed to determine laws of common ownership — or non-common ownership — which are based on discrimination against the wife."[28] The rule of common ownership, which implements a régime of joint property, upholds the principle of equality. Rejection of the rule of common ownership and judgment in the spirit of a régime of separation of property, as ruled by the Rabbinical Court, is contrary to the principle of equality in that it causes substantive damage to the wife and actually leads to her status being impaired *vis-à-vis* the status of her husband. Therefore, this ruling should be regarded as running counter to the provisions of the Equal Rights Law, and destined to be revoked.[29] One should note that this does not impose the rule

27 Section 5 of the Equal Rights Law.

28 The *Bavli* case, *supra* n.1, at 241.

29 Incidentally, an implicit position is being taken here regarding the dispute between the judges of the Supreme Court concerning the manner in which the High Court of Justice should intervene in the rulings of a Rabbinical Court that has ruled otherwise than in accordance with the provisions of a law directed at it (see, for example, S.C. 1/81 *Nagar* v. *Nagar*, 38(1) *P.D.* 365 [hereinafter: "the *Nagar* case"]. Justice Barak's position in the *Bavli* case supports the opinion expressed by President Shamgar, *inter alia*, in the *Nagar* case, *ibid.*, at 410-411), that this should be regarded as exceeding the jurisdiction of the Rabbinical Court, thereby enabling the intervention of the High Court of Justice by virtue of Section 15(D)(4) of Basic Law: Judiciary, *Ṣefer Ha-Ḥukkim* [1984] 78, contrary to the opinion which regards this as a legal error, which enables the intervention of the High Court of Justice only by virtue of the general provisions of Section 15(C) of the Basic Law (see the majority opinion in the *Nagar* case, *ibid.*; C.A. 807/77 *Sobol* v. *Goldman*, 33(1) *P.D.* 789, 793-794, 799; the *Vilozhny* case, *supra* n.5, at 739; M. Shawa, "Is the Fact that a Religious Court Disregards or Deviates from a Secular Legal Provision which is Specifically Directed at it, to be Considered '*Ultra* Vires'?", 28 *Haprakliṭ* (1972-1973), 299.

30 The *Bavli* case, *supra* n.1, at 241. As we shall see immediately, the Rabbinical Court will be limited in every case to a ruling in accordance with some régime of joint ownership, as only such a property régime safeguards the principle of equality.

31 See A. Rosen-Zvi, "Family and Succession Laws", *The Yearbook of Law in Israel 1991* (edited by A. Rosen-Zvi), 184, 203.

32 It seems indisputable that such a situation will indeed arise. Most of the reactions of the *dayanim* testify to their reluctance to act in accordance with the ruling in the *Bavli* case, and we are likely to encounter much running to and fro between the respective systems, similar to what occurred in the past in relation to cases of persons not competent to be married.

of common ownership directly on the Rabbinical Court, but clarifies the duty of the court to rule on the distribution of property in some form of equal manner, whether in accordance with the actual rule of common ownership or in accordance with other rules, provided that these conform to the principle of equality between the sexes.[30]

2. Negating the Good Faith of the Attachment

In his judgment, Justice Barak cites the proposition put forward by Professor Rosen-Zvi, which will hereinafter be called: "the strategy of negating the good faith of the attachment", according to which a claim for joinder (attachment) by the husband of assets which are subject to the rule of common ownership will be considered to be made *mala fide*, and therefore the Rabbinical Court will not acquire jurisdiction.[31] The adoption of this approach would have led to an indirect solution to the limited question raised by the judgment, because the entire range of issues connected with the distribution of property between the spouses would have been removed from the jurisdiction of the Rabbinical Courts. Justice Barak rejected this proposition, primarily on specific grounds relevant to the special circumstances of the *Bavli* case. It seems, therefore, that it is possible to overcome the difficulties, both concrete and theoretical, in the light of which Justice Barak refrained from making use of this strategy in the *Bavli* case. It is likely that, in future cases where a similar situation will arise,[32] judges of the High Court of Justice will eventually solve the problem by this process of completely eliminating the issue from the jurisdiction of the Rabbinical

Court.[33]

As to the significance of taking this path of negating the good faith of the attachment, in terms of the deepest layer of the relations between the two systems, this path may, at first sight, be perceived as highly offensive, because it categorically denies the jurisdiction of the religious system in cases of monetary relations between spouses. Yet, when we examine this point more closely, denial of jurisdiction seems less offensive than direct intervention in the substantive law which the Rabbinical Court must apply. When jurisdiction *per se* is denied, there is no need to express a substantive or fundamental view as to the contents of the ruling of the Rabbinical Court. Thus, one may circumvent the delicate situation which ensued from the path that was actually chosen, which expressed the overwhelming superiority of the civil institutions over the religious system.[34]

3. An Alternative to the Ruling in the *Lev* Case — The Safety Valve Approach

Justice Barak opened his judgment in the *Lev* case by affirming the inherent jurisdiction of the Rabbinical Court to regulate the procedural matters before it. *Prima facie*, the case law regarding the independence of the Rabbinical Courts to determine their own procedures was thus strengthened.[35] In the *Lev* case it was possible to adopt a different approach, an approach which also respected the internal considerations guiding the religious procedural system, and refrain from an all-embracing subjugation of the religious system to the civil model. In the religious law procedural system a number of interests impact on the issue of the right to leaving the

33 Cf. Shifman, *supra* n.6, at 524, which regards the judgment in the *Bavli* case as "a clever and premeditated measure, which was intended to lead, at the end of the process, to a constriction of the jurisdiction of the Rabbinical Court", a constriction which would take place by this process of negating the good faith of the attachment.

34 Support for this may be found in the comments made by several *dayanim* during an emergency meeting which they had held at about the time of delivery of the judgment. It appears that among themselves, they too would have preferred this solution, which for them symbolized a release from the burden of the civil legal system.

35 See *supra* n.12 and the accompanying text.

country, which do not operate within the context of the civil system.[36] The difference stems from profound differences of view regarding the substance of the judicial proceeding and the nature of the role designated for the judicial branch. This difference was not expressed in the *Lev* case. I believe that this difference should not be disregarded or written off, and that one should aspire to respect it in so far as possible. The appropriate way to do so is not by applying the matrix of civil considerations in an all-embracing manner to the religious system. Rather, the appropriate approach is to examine the values, principles and interests expressed in the religious model and the balance drawn between them, while striving to respect them. The civil model should serve as a "safety valve" only, as a compromise solution, in extreme cases in which it is found that the purpose for which the Rabbinical Court circumscribed the right to leave the country is totally illegitimate, or that the internal balance was improperly drawn.

4. The Doctrine of Non-Recognition

The alternatives suggested thus far were directed at the *Bavli* and the *Lev* cases alone. It seems to me that upon thorough analysis of more recent case law one can discern a pattern, which is probably still not self-conscious, yet has the potential of presenting a comprehensive alternative to the unity approach. While Justice Barak's unity approach explicitly aims at unifying the laws that are to be applied in both the civil and the religious courts, the alternative approach — which I term the "doctrine of non-recognition" — can unobtrusively yield the same results. In the following pages I shall demonstrate only the central cases in which the doctrine of non-recognition may be detected.

The first case concerns issues of paternity and unwed mothers under Moslem law. Moslem law traditionally recognizes no paternal ties between a child born out of wedlock and his/her father, and thus denies the child of such an "illegitimate union" any rights deriving from this biological tie. While paternity has always been under the exclusive jurisdiction of *shari'a* courts (and thus governed by Moslem law), a 1995 case has brought about a major change in this area, through a sophisticated analysis that enabled the civil system to leave the religious jurisdiction unaltered, yet at the same time to

36 For an extensive discussion, see E. Shochetman, *Procedure in the Light of the Sources of Jewish Law, Hearing Regulations and the Decisions of the Rabbinical Courts in Israel* (1988), 412-419.

exercise its own jurisdiction over such matters and introduce civil concepts of parenthood and justice.[37] By introducing into Israeli jurisprudence the concept of "civil paternity" — namely paternity which is established upon biological-factual grounds and is not determined by the marital status of the child's parents — the Supreme Court has opened the door to ordering a father to pay child support to a child born out of wedlock. In a forceful opinion, Justice Heshin recounted the intolerable position in which an "illegitimate" Moslem child is placed. His disregard of the religious courts' exclusive jurisdiction in these matters was judiciously based upon his viewing their refusal to grant the legal consequences of paternity on the child-father relationship as a refusal to exercise jurisdiction in that matter, thus allowing the secular courts to take the case.

Throughout his judgment, Justice Heshin elaborated his approach as to the interaction between the civil and the religious legal systems within the dual system of family law Israel, which, upon careful reading, is at odds with the theory of unity. While rejecting the proposal to compel the Moslem court itself to order the child's father to support her, Justice Heshin asks:

> Is it conceivable that the legislature indeed meant to compel the Moslem court in this manner: to act not according to *shari'a* law — indeed, in *contradiction* to *shari'a* law? Can we really assume that the legislature has meant to intervene in such a manner within the jurisdiction of the *Shari'a* court and compel it to apply *in marriage issues per se* — whether directly or indirectly — laws that are against its religious doctrine?[38]

Notwithstanding the totally different context in which these sentences were written, I see them as a criticism of the theory of unity. As we have already begun to see, the theory of unity does precisely what Justice Heshin cautions the civil system not to do, i.e. compels religious courts to rule against their religious doctrines, at least from the perception of the religious system. Justice Heshin's reasoning and holding in this "civil paternity" case represent the new line of cases, leading to the formation of the doctrine of non-recognition. Under this doctrine, various issues are in fact being appropriated to the civil system, thus narrowing the jurisdiction of the religious system. This is being done by developing a comprehensive system of civil conceptions relating to issues which have traditionally been regulated by the religious system in whole. The formation of this civil system is both the cause and the effect of the religious court's non-recognition of this

37 C.A. 3077/90, *Anonymous* v. *Anonymous*, 49(2) *P.D.* 578.

38 *Ibid.*, at 624, emphasis supplied.

system. In turn, this non-recognition is what keeps the new system out of the reach of the religious system.

The concept of civil paternity developed by Justice Heshin is a central demonstration of the use of the doctrine of non-recognition. Its starting point was the Moslem courts' conceptual non-recognition of children born out of wedlock. As the Moslem court rejects the very concept of fatherhood in such cases, it is not regarded within the subject-matter of fatherhood which is under the sole jurisdiction of the Moslem court:

> Where the [Moslem] court cannot and will not exercise its jurisdiction, and consequently denies, even if indirectly, rights that a Moslem has earned according to the law of the land, namely the civil law, the Order-in-Council should not be interpreted as giving sole jurisdiction to the religious court, while denying the civil system's jurisdiction.

The civil paternity case was not alone in this construction. A similar idea was raised in a case prior to the "civil paternity" case. In H.C. 673/89 *Meshulam* v. *The Rabbinical Court of Appeals* President Shamgar held that a Rabbinical Court cannot determine whether a certain woman had been the "non-married cohabitant" of a certain man, since Rabbinical Courts do not recognize the actual legal existence of the institution of non-marital cohabitation in the first place.[39] The late Prof. Rosen-Zvi had noticed the potential inherent in Justice Shamgar's reasoning,[40] and it seems that this potential was indeed realized in the civil paternity case, although, quite curiously, the *Meshulam* holding was not even mentioned in it.

The overall construction of the doctrine of non-recognition is, at once, sophisticated yet simple: the traditional division of jurisdiction between the civil and the religious system applies as long as the terms that determine the jurisdiction relate to institutions and concepts that the religious court recognizes in principle. If the religious court does not accept their legal existence, the newly developed comprehensive civil system will apply, and these matters will be out of the reach of the religious system. If applied to the context of the *Bavli* affair, this doctrine could theoretically lead to similar outcomes, yet by a much better method. The *Bavli* decision has left the jurisdiction with the Rabbinical Court, while ordering the religious court to follow the civil rule of common ownership. The doctrine of non-recognition, on the other hand, would also lead to the application of the rule of joint property, but it would do so through the civil court, not the religious

39 H.C. 673/89 *Meshulam* v. *The Rabbinical Court of Appeals*, 45(5) *P.D.* 594.

40 See Rosen-Zvi, *supra* n.6, at 279-282.

court. This seems to be a much lighter degree of compulsion. The Rabbinical Court would not be forced to apply a rule that it does not accept.

This last point deserves further thought. In order to apply the doctrine of non-recognition we need to conclude that the Rabbinical Court in fact does not recognize the civil concept in issue. Is that indeed the case with respect to the rule of joint ownership? Can we really determine that the Rabbinical Court does not recognize that rule? As explained above, this seems to be a fair conclusion from most of the Rabbinical Courts' holdings in marital property disputes.[41] However, the minority opinion of Rabbi Dikhovsky, who, as mentioned before, strongly criticizes the general rabbinical opposition to the concept of common ownership, makes it somewhat problematic to assume total non-recognition on the Rabbinical Courts' side.[42] If Rabbi Dikhovsky's approach were accepted by others, it would prevent the application of the doctrine of non-recognition. In other words, it would hamper the appropriation of the jurisdiction over marital property disputes by the civil courts. It is indeed interesting to note that one of the reasons put by Rabbi Dikhovsky to his colleagues is the following:

> We must not forget the dangerous consequences for the status of the Rabbinical Courts that may follow our refusal to apply the common ownership rule, and the seizure of their jurisdiction over monetary matters ...[43]

Where does this leave us with respect to the determination of the Rabbinical Courts' attitude towards the rule of common ownership? It seems that since at this point Rabbi Dikhovsky is the only rabbinical authority willing to accept — indeed "recognize" — the concept of common ownership and apply it as a rule, it is fair to describe the overall rabbinical attitude towards this matter as "non-recognition". To sum up this discussion, the emerging doctrine of non-recognition represents the potential of a comprehensive alternative to the theory of unity. The significance of this potential will be understood through the following discussion, devoted to an analysis and critique of the theory of unity.

41 See *supra* notes 15-18 and accompanying text.

42 See *supra* notes 16 and 18.

43 See Sh. Dikhovsky, *supra* n.18, at 31.

D. *The Theory of Unity and Legal Pluralism*

1. The Theory of Unity

(a) The Theory of Unity Propounded by Justice Barak

Thus far I have analyzed the intricacies of the two cases, *Bavli* and *Lev*, and pointed to possible alternatives to those judgments, which would have led to different consequences within the field of religion and state relationships. I have also suggested an alternative approach to the religio-secular normative tension in the area of family law in Israel. I would like to turn now to the main part of my thesis, i.e. a legal-pluralistic reading of family law in Israel. But before I get to that, it is important to clarify the conclusion that emerges from the analysis up to this point. As I have already mentioned, the dismissal of the alternatives to the *Bavli* and *Lev* cases strengthens, in my view, the conclusion that these judgments are based on the theory of unity, and that they have introduced this theory into the system of family law in Israel. In the *Bavli* case, Justice Barak refers to the "normative coherence" that state law seeks to achieve, and asserts that "the state law strives to be perfect".[44] In the *Lev* case these observations are given clearer meaning:

> The inherent jurisdiction of a Rabbinical Court to determine procedures in general, and procedures relating to injunctions restraining a person from leaving the country in particular, is restricted by the proper balance between *the values, interests and principles that characterize Israeli law* ... it is against this background that the ruling of this Court is to be understood, according to which 'the purpose of a restraint imposed upon a person, which hinders his departure from Israel, is identical for a [civil] court and for a Rabbinical Court' (H.C. 578/82 *Naim* v. *The Regional Rabbinical Court of Jerusalem*). Upon the adoption of this yardstick, the *normative harmony and legal unity to which every legal method aspires*, will be achieved. This will ensure that the basic values and basic principles underlying our legal system, will be given protection and uniform implementation in the procedural law of all the judicial institutions in Israel.[45]

This is the ideological basis of the judgments in the *Bavli* and the *Lev* cases. Obviously, this was not the first opportunity in which Justice Barak unfolded the theory of unity. Justice Barak writes elsewhere:

44 The *Bavli* case, *supra* n.1, at 246.

45 The *Lev* case, *supra* n.1, at p.510 (emphasis supplied).

> Underlying my approach is the concept that every legal system should consist of one judicial institution that has the power to direct the development of the system, to determine the proper balance in it and secure *unity and coherence* ... a legal system is not a confederation of courts. A legal system is a structure which operates and develops gradually and in a natural manner. For this to occur, adaptation and control are needed. This role is imposed on the Supreme Court: it is the conductor of the judicial orchestra, and all players are required to obey its instructions; it has the responsibility for taking care of normative coherence, growth and progress.[46]

Elsewhere, Justice Barak prepares the ground for the *Bavli* case and the application of the theory of unity in matters of personal status:

> Notwithstanding that we are a unitary legal system, adjudication in matters of personal status introduces a quasi-federative element that impairs the uniform structure of the system. As a result, acute tension is created between various aspects of our Western tradition — especially legalism, liberalism and secularism — on the one hand, and the special status of religious law in our system, on the other. This tension is a 'time bomb' which, if not treated properly — namely, by giving consideration to the legitimate interests of all those involved — may lead to grave consequences for society and law in Israel.[47]

In his book on legislative interpretation, the theory of unity receives even more far-reaching elaboration. Justice Barak discusses the scope of Section 11 of Basic Law: Human Dignity and Liberty, which provides: "All governmental authorities are obliged to respect the rights under this Basic Law." Within the scope of the discussion of the application of this Basic Law to the judiciary, and to the Rabbinical Courts under it, Justice Barak raises the following question: "Is the development of personal law, *to the extent that it is made by them*, subject to the provisions of the Basic Law?" He answers affirmatively, and concludes: "If new legislation by the *Knesset* is subject to the Basic Law, and if a new ruling of the courts is subject to the Basic Law, *so must a new halakhic development of the religious law be made*

46 A. Barak, *Interpretation in Law: Second Volume – Interpretation of Legislation* (1993), 765-766 (emphasis supplied). Regarding the orchestra metaphor, which often appears in Justice Barak's writings on the court system and judicial activities, and which offers conceptual support for the approach of uniformity, see A. Barak, "Judicial Review and State Responsibility — the Scope of Review of the Supreme Court over the Rulings of the National Labour Tribunal", 38 *Haprakliṭ* (1988), 245, 250.

47 A. Barak, "The Legal System in Israel — its Tradition and Culture", 40 *Haprakliṭ* (1991-1993), 197, 214.

within the limits of the Basic Law."[48]

(b) The Theory of Unity as an Expression of Legal Centralism

The theory of unity is thus a main component of Justice Barak's view of the legal system in Israel. When we read some of the statements propounding the theory of unity, a feeling emerges that these statements contend with an invisible opponent. In order to fathom the significance of this theory and its implications, it seems that we must first understand this entity against which the theory of unity directs itself: who is that hidden "opponent"?

An attempt to examine Justice Barak's statements *per se*, regardless of the particular Israeli context, reveals that they contain a very acute representation of a concept which is commonly termed "legal centralism" or "state exclusivity". This concept attributes exclusivity to the sovereign state as the exclusive source of the system of normative arrangements.[49] The definition given by Professor Griffiths, who coined the term, reflects the ideological proximity between Justice Barak's theory of unity and legal centralism:

> According to what I shall call the ideology of *legal centralism*, law is and should be the law of the state, *uniform for all persons*, exclusive of all other law, and administered by a single set of state institutions.[50]

The content of the term "legal centralism" attributes exclusivity to the state, as mentioned before; accordingly, in this article, I shall use this term and the term "state exclusivity" interchangeably, as has been done by other writers in this field.[51]

48 A. Barak, *Interpretation in Law: Third Volume — Legislative Interpretation* (1994), 459 (emphasis supplied).

49 See, for example: M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", 19 *Journal of Legal Pluralism & Unofficial Law* (1981), 1; R.R. Gadacz, "Folk Law and Legal Pluralism: Issues and Directions in the Anthropology of Law in Modernizing Societies", 11 *Legal Studies Journal* (1987), 125, 126-127; H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, 1985).

50 J. Griffiths, "What is Legal Pluralism?", 24 *Journal of Legal Pluralism & Unofficial Law* (1986), 1, 3 (emphasis supplied).

51 See, for example: Galanter, *supra* n.49, at 1; P. Dane, "Maps of Sovereignty: A Meditation", 12 *Cardozo Law Review* (1991), 959, 973. Professor Dane

Justice Barak's comments seem accurately to demonstrate one of the major processes which, in Professor Berman's view, characterize law in the Western world today. This is the process by which the central and centralist mechanisms of the state take over the other legal mechanisms in the Western world, a process which, he believes, has led to the decline of one of the central characteristics of law in the West, namely, legal pluralism.[52]

The theory of legal pluralism indeed stands in opposition to the concept of state exclusivity. In the leading essay which attempted to delimit and define the boundaries for researching legal pluralism and its objectives, denial of the view of state exclusivity appears as the central objective of this field of research.[53] This is perhaps one of the few matters agreed upon by all researchers in legal pluralism. As I shall show below, disputes and uncertainties proliferate in this field. At this stage of the discussion, it is sufficient to apply a generalized and accepted definition, according to which the field of legal pluralism deals with situations in which a number of "legal systems" operate concurrently in one social unit.[54] The relevance of this definition, for upholding religious laws side by side with the general law in matters of personal status in Israel, is immediately evident.[55] Indeed, in a number of studies in this field, Israel appears as a current example of a situation of legal pluralism.[56] In fact, a major resemblance exists between the current reality in Israel and two historic contexts of legal pluralism: one which prevailed in the England of the Middle Ages, particularly in the context of the relationship between the ecclesiastical courts and the royal courts; and another which prevailed in other colonial legal systems in the eighteenth and nineteenth centuries in the context of the relationship between the colonial ruler's legal system and the indigenous law.[57] The partial resemblance to the English pluralism of the Middle Ages may be found in the struggle between religion and the state, which is common to both contexts, and which many regard as the source of legal pluralism in the Western world.[58] Even a cursory look at the history of the shaping of the activities of the parallel legal systems from the early days of the Ottoman Empire, especially through the British Mandate period, strengthens the initial impression of the existence of legal pluralism in Israel, at least in the area of personal status.[59] The questions which I shall attempt to tackle below are:

deals with the connection between the ideology of uniformity and the exclusivity of the state: "The eventual consolidation of the unitary central state helped beget state exclusivism as a justifying ideology": *ibid.*, at 975.

52 H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass., 1983), 38-39.

53 Griffiths, *supra* n.50, at 4-5; and for a more extensive discussion, see below, section D.3. It is interesting to note that Arthurs arrived at the concept of legal pluralism from another direction. In contrast to Griffiths, whose approach drew upon comparative sources, Arthurs' research is based on the local English context, and the comparison is provided by the historic perspective (Arthurs, *supra* n.49, at 2-3, 191).

54 This is the definition used by Professor Merry in her comprehensive essay which describes the development of legal pluralism. See S.E. Merry, "Legal Pluralism", 22 *Law & Society Review* (1988), 869, 870.

55 At least when reading Clause 47 of His Majesty's Order-in-Council. It is worth noting that reference here is only to the expression of legal pluralism in connection with religious laws in the area of family law in Israel, and not to the other aspects of legal pluralism, which exist, in the view of many of the advocates of this approach, in every context and in all walks of social life. For this, see for example: Merry, *ibid.*, at 873; B. De Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", 14 *Journal of Law & Society* (1987), 279.

56 See, for example: C. Weisbrod, "Family, Church and State: An Essay on Constitutionalism and Religious Authority", 26 *Journal of Family Law* (1987-1988) 741, 744 (at n.6); Dane, *supra* n.51, at 979.

57 For a fascinating discussion of the pluralist relationship which prevailed between the ecclesiastical courts and the royal courts in England during the twelfth and the sixteenth centuries, see Berman, *supra* n.52, at 160-169. The most comprehensive research on legal pluralism in the colonial era was conducted by Prof. Hooker, who reviewed pluralist legal systems in post-colonial societies in Asia and Africa: M.B. Hooker, *Legal Pluralism — An Introduction to Colonial and Neo-Colonial Laws* (Oxford, 1975). See also: Sir K.O. Roberts-Wray, *Commonwealth and Colonial Law* (London, 1966); E.A. Keay & S.S. Richardson, *The Native and Customary Courts of Nigeria* (London, 1966); R.D. Kollewijn, "Conflicts of Western and Non-Western Law", 4 *International Law Quarterly* (1951), 307; E. Vitta, "The Conflicts of Personal Laws", 5 *Israel Law Review* (1970), 170.

58 See, for example: Berman, *supra* n.52, at 10: "Legal pluralism originated in the differentiation of the ecclesiastical polity from secular polities. The church declared its freedom from secular control, its exclusive jurisdiction in some matters, and its concurrent jurisdiction in other matters"; Galanter, *supra* n.49, at 28: "In Western tradition, the theme of 'church and state' is the *locus classicus* of thinking about the multiplicity of normative orders."

As an example of the recognition of the centrality of the idea of legal pluralism in the context of religions, see Symposium, "Religious Law and Legal Pluralism", 12 *Cardozo Law Review* (1991), 707-1214.

59 Judge Silberg's well-known grounds for distinguishing between the substantive aspects of the law and its procedural aspects in connection with the application of the principle of personal law in C.A. 26/51 *Kutik* v.

does legal pluralism indeed exist in Israel? If it does, what is its nature, and what are the implications of the theory of unity for this issue?

2. On Legal Pluralism

(a) Introduction

Legal pluralism is one of the most prominent areas of research today in the fields of social and legal studies, and has even been called "the key to the post-modern concept of law".[60] Writings in this field proliferate and gain greater impetus from year to year, and as Professor Tamanaha, one of the critics in this field, has noted — albeit with a dash of sarcasm — it has even won full academic recognition through a special journal dedicated to it.[61] However, underneath this flourishing research, there is more than a little vagueness as to the boundaries, contents and objectives of this issue. The term "legal pluralism" was basically intended to describe factual situations which stemmed from research into colonial societies and continued with the transposition of the distinctions and insights acquired from that research to developed Western societies. Accordingly, one of the divisions which it is customary to make when discussing legal pluralism is between classical pluralism and the new trend.[62]

Wolfson, 5 *P.D.* 1341, 1345, provide a particularly good expression of the pluralistic point of view: "Why are matters of personal status heard in accordance with the religious law or the national law of the litigants? Because the regulation of these matters is not the same for all; because these matters are characterized by folklore and tradition, and they are different and vary with the difference in the world views — views on religion, morality, culture, tradition, customs, etc. — of the persons concerned.".

60 See, for example: G. Teubner, "The two faces of Janus: Rethinking legal pluralism", 13 *Cardozo Law Review* (1991-1992), 1443; and also the essays of one of the main writers in this field: B. De Santos, "State, Law and Community in the World System: An Introduction", 1 *Social & Legal Studies* (1992), 131; De Santos, *supra* n.55, at 297: "*Legal pluralism* is the key concept in a postmodern view of law."

61 The critic is Prof. Brian Tamanaha: see B.Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", 20 *Journal Law & Society* (1993), 192. The periodical referred to is the *Journal of Legal Pluralism* (which in 1981 replaced the *Journal of African Law Studies*).

62 The terms are taken from Prof. Merry's comprehensive essay, which describes the development of legal pluralism: see Merry, *supra* n.54, at 872-874.

Classical legal pluralism describes the initial research in this field, which, as noted, focused on the reciprocal relations between indigenous law and European law in the colonial and post-colonial eras.[63] The new trend in legal pluralism refers to developments in research which took place towards the end of the seventies, when scholars of law and society began to apply the pluralist concept to the social and legal arrangements in Western industrial societies, and especially in the United States. The scholars of the new trend focus on reviewing law and legal arrangements which are extraneous to the official legal system. They examine the "private" normative systems which have been developed for the purpose of regulating the internal affairs of communities, cells and various social groups.[64] As already mentioned, the definition of the field of research presented above is far from exhaustive or accepted by all. Being affiliated with one of the trends specified here has, in many instances, implications for the very definition of the field, as well as for other substantive issues which will be discussed below. Thus, for instance, the preliminary definition of Professor Hooker, who is one of the leading representatives of the classical trend, also refers to the existence of "multiple systems of legal obligation ... within the confines of the state";

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63 For representative sources of the classical trend of legal pluralism, see *supra* n.57.

64 As Professor Merry, *supra* n.54, at 872, summarized it: "Legal pluralism has expanded from a concept that refers to the relations between colonized and colonizer to relations between dominant groups and subordinate groups, such as religious, ethnic, or cultural minorities, immigrant groups, and unofficial forms of ordering located in social networks or institutions." One of the central research studies in this trend was conducted by Professor Moore, who examined two completely different social groups — the Chagea tribe in Mt. Kilimanjaro in Africa, and the clothing industry in New York — and developed the idea of the "semi-autonomous social field" in order to describe the multitude of regulatory structures in complex societies: S. Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", 7 *Law & Society Review* (1972-1973), 719. See also S. Henry, *Private Justice* (London, 1983); Galanter, *supra* n.49. One of the major areas researched by the new trend scholars is dispute behaviour. For a review of this issue within the specific framework of consumerism, and for many other references, see E.H. Steele, "Two Approaches to Contemporary Dispute Behavior and Consumer Problems", 11 *Law & Society Review* (1976-1977), 667. Obviously, recent developments in the field of legal pluralism take place inside the new trend. For this, see, for example: *supra* n.60.

however, he later specifies his view on the clear hierarchy which exists between two types of legal systems within the pluralist reality, and the dominant system is, of course, the state system.[65]

The multiplicity of definitions and the disputes between them convey the elusiveness of the term and the difficulty in delineating its boundaries. Professor Merry spelled it out clearly:

> Where do we stop speaking of law and find ourselves simply describing social life?[66]

The way one handles this difficulty varies in accordance with one's general approach to the entire area of research. In our context, several other basic questions of definition arise, which apparently have not yet been discussed in a direct manner.

First, is there any set of issues, in the framework of which parallel "legal" activity must take place in order for it to be considered a pluralist model, or may that "field" be wide and non-particular? The implications of this question for our issue are rather obvious. In the broad field of matters of personal status, pluralist activity indeed takes place, whereas the narrower field of "matters of marriage and divorce" is *prima facie* governed by one system only. However, this perception issues from the vantage point of the official state bodies, which ascribe importance solely to the characteristic of official validation by the state, and ignore the possibility that on the practical, realistic level, complex and elaborate parallel systems may operate. Moreover, even on the official level, a pluralist situation actually does exist, which is expressed by the familiar phenomenon of divided status.[67] Divided status serves as an ultimate example of the reality of legal pluralism. It epitomizes pluralism by its very existence. Thus, even if we choose the narrower definition in reply to the question posed here, the field here under consideration must continue to be regarded as pluralistic.

Secondly, what is this social unit in which the operation of more than one legal system transforms the legal situation therein to pluralist? Is a state

65 See Hooker, *supra* n.57, at 2, 56, 454-455.

66 Merry, *supra* n.54, at 878.

67 This phenomenon describes a situation in which the personal status of one person is not uniform, and may change in accordance with the context and forum in which it is considered. For a broader discussion of the same, see A. Levontin, *Marriage and Divorce Conducted Abroad* (1957), 7, 30-32, 51-52, 67-68; Rosen-Zvi, *supra* n.8, at 121-123, 315-316; H.C. 301/63 *Streit* v. *The Chief Rabbi of Israel*, 18(1) *P.D.* 598, 619ff., 627-628.

unit intended?[68] Is it a geographic unit? Or perhaps a narrower social unit, which is defined according to certain parameters, such as language, religion etc.? Here, too, I believe that the significance of the alternatives, for the issue under discussion, is clear: if the social unit in question is the narrow group, for example, one which is based on religious affiliation, then the Israeli reality may be considered to be outside the confines of the pluralist discourse, because apparently, in every such group, only one legal system applies, namely, the religious system. However, here again, the conceptual difficulty stems from the fact that this analysis adopts the official state vantage point, while the potential for inconsistency and detachment between this vantage point and the actual reality in the field is ignored. Further, as in the first point, on the official level too a situation of legal pluralism actually exists, with various issues being regulated by a uniform territorial arrangement which encroaches on the province of religious law, so that even officially the members of the same social religious unit are subject to more than one legal system.

In the answers given above, I have hinted at the possibility of addressing these difficulties on a level which is different from the accepted one. This is not the level of the normative system, but the level of the individual acting within it as well as outside it. The answer to the questions of definition, at this level, perceives the individual as the test and strives to determine the existence of legal pluralism or the non-existence thereof from the individual's vantage point. If the private experience consists of subordination (even if merely subjective) to more than one legal system at one and the same time, the answer to the question whether legal pluralism exists will be affirmative.

(b) Prescriptive Discourse and Descriptive Discourse in Legal Pluralism

This analysis leads us into a fundamental quandary which exists, in my view, in the area of legal pluralism, namely the conflict between the descriptive view and the prescriptive view. Thus far, all the questions of definition which I have raised within the Israeli context were formulated from the prescriptive angle. The prescriptive angle examines reality solely from a legalistic perspective, and perceives the official legal order as an essential, and an absolute, translation of events. It is as if the complex legal activity that takes place on the ground would have no meaning as legal pluralism, unless it is given official expression through the state legal system. It is therefore

68 De Santos, *supra* n.60, at 133.

necessary to define the exact range of activities of the parallel legal systems. This task, once again, can only be performed from the prescriptive angle. On the other hand, the suggestion that we actually address the individual, and examine the situation through private experiences, is formulated from the descriptive point of view. This point of view is free from the need to receive "official confirmation" of the factual reality, and focuses on a description of the reality as it is perceived by the subject in the social unit (the individual or group).[69] From this point of view, no importance at all is ascribed to the "official status" of the various legal systems to which the individual or group are subject.[70]

To a certain extent, the competition between these two points of view also accompanies the two principal research movements which were described above, classical research and the new trend. Classical studies of legal pluralism usually focus on the normative, regulatory aspects of the encounter between local legal systems and colonial legal systems. The questions raised are primarily questions belonging to the study of inter-personal law, such as the parameters for group affiliation, choice of law rules, etc.[71] This approach is of a prescriptive character, and is occupied mainly with the normative regulation of the phenomena in order to understand and document them, and perhaps even to formulate and propose new or alternative arrangements for such situations.[72] The new trend in legal pluralism deals with the empirical aspects of the phenomena, and its goal is usually descriptive only, making no effort to deal with its normative aspects, let alone to formulate an operative legal arrangement for the reality being contemplated. This descriptive approach is intended to describe the complex activity of unofficial social mechanisms which fulfill a legal function, in parallel to the official legal system of the state.[73]

The reason for the difference in the research characteristics of the respective trends is partly due to the academic orientation of the researchers. Generally speaking, we may say that the majority of the authors identified with the classical trend possess a legalistic approach, while the majority of the authors identified with the new trend possess a social science orientation.[74] And yet, as Tamanaha points out in his critique, there have been a number of researchers of the new trend who possess a legal education

69 Cf. M. Minow, "Pluralism", 21 *Connecticut Law Review* (1989), 965, 970-972; Weisbrod, *supra* n.56, at 744-746; Dane, *supra* n.51.

70 This offers an answer not only to the difficulty from the direction mentioned here — the need to have some form of official validation for the practical reality so that it may indeed be considered pluralist — but also to the difficulty from the opposite direction: the view which holds that it is actually the official validation on behalf of the state legal system which denies the existence of legal pluralism, since in this way, the other systems become *prima facie* part of the one state system. These two difficulties, or allegations, which are opposite to each other, actually represent the same basic view which ascribes crucial importance to the power of the state system.

71 For a description of the questions dealt with by the researchers in the classical trend, see Griffiths, *supra* n.50, at 7, and Merry, *supra* n.54, at 871, who review issues such as group affiliation, choice of law rules, and similar matters, all of which belong to the inter-personal law area of research, as can also be seen, for example, in the subject-matter of the essays referred to above, in note 57.

72 See Tamanaha, *supra* n.61, at 202.

73 See Merry, *supra* n.54, at 871; Teubner, *supra* n.60, at 448. For a clearer presentation of the contrast between the two paradigms, see Weisbrod, *supra* n.56, at 742.

Compare the division applied here to that suggested by Professor Englard at the beginning of his discussion concerning the relationship between different normative systems (I. Englard, "The Status of Religious Law in the Israeli Legal System", 2 *Mishpatim* (1970), 268, 284): "It seems that a considerable part of the dispute derives from the variance in the methodological approach to the issue ... We believe that the basis [of the problem — R.H.K.] lies in the contradiction between the normative level, in which the normative system appears uniform and exclusive — and the factual level, in which we encounter a plethora of normative systems. We are thus faced with two different points of departure, each of which leads to a different point of view as to the relationship between various systems."

This division appears parallel to the division between the prescriptive paradigm (Englard's normative level) and the descriptive paradigm (Englard's factual level). It is interesting to see how the division used by Professor Englard to describe the relationship between the religious legal system and the civil legal system is relevant to the current discussion in the general context of legal pluralism.

74 Griffiths, in his critique of the classical trend, identified the researchers affiliated with this trend, such as Hooker and Vanderlinden, as lawyers: see Griffiths, *supra* n.50, at 9-14. This is undoubtedly related to the fact that most of the anthropological researchers in the nineteenth century possessed legal training: see L. Pospisil, "E. Adamson Hoedel and the Anthropology of Law", 7 *Law & Society Review* (1973), 537. Writings in the new trend are primarily concentrated in interdisciplinary periodicals of sociology and law, and the majority of the authors identified with this trend are academically affiliated with departments of sociology and anthropology. See, for example, De Santos and Merry. Griffiths (*ibid.*, at 1) refers to the new trend as the "social scientific study of legal pluralism".

as well.[75] Thus, this practical explanation is not satisfactory. Perhaps, the reason is even more prosaic, and simply reflects the divergent factual realities faced by the researchers in the various periods and trends. The colonial reality usually included some type of model of recognition, on the part of the colonial government, of the local legal systems.[76] By contrast, Western reality does not embrace what would usually be considered a grant of official validity, on the part of the state, to non-state legal systems. It is my understanding, therefore, that the differences in approaches are not necessarily based on fundamental ideological differences, but rather on the different circumstances of the research. Moreover, it is important to understand that recognition, by the state, of other social-legal arrangements may take many forms. The official forms of recognition adopted in the various colonial situations are only one aspect of the "gamut of recognition". The point is that even the situations traditionally discussed by the new trend have prescriptive aspects, and these too disclose various degrees of legitimacy granted by the state.[77]

75 See Tamanaha, *supra* n.61, at 203. Tamanaha relies on this fact in the cynical description which he offers there for the process of development of the new trend of legal pluralism, and sees it as the reason, in his view unjustified, for the insistence on the use of the term "legal" (*ibid.*, at 203-205).

76 For a detailed description of a number of colonial models, see R. Halperin-Kaddari, *The Interaction Between Religious Systems of Adjudication and the Secular Legal System in the United States* (1993, Unpublished J.S.D. thesis, Yale), 138-158.

77 One of the contexts in which an understanding may be obtained of the "rating of recognition and validity" is the issue of interventionism in the internal affairs of voluntary organizations which are non-religious compared to those of religious organizations and groups. For a comprehensive review of interventionism in the internal decisions of organizations of the former kind and for a comparison between the two (in the United States), see I.M. Ellman, "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes", 69 *California Law Review* (1981), 1378. The guiding policy in this connection is judicial restraint and refraining from intervention in the affairs of private groups, particularly following recognition of the right of incorporation as a constitutional right, subject to a number of exceptions. The importance of recognizing the internal autonomy of the group — which justifies a fundamental attitude of respect and approval of internal decisions (i.e. "grant of legitimacy") on the part of the state — was recognized by Professor Chaffee in Z. Chaffee, "The Internal Affairs of Associations Not for Profit", 43 *Harvard Law Review* 993. Despite the basic attitude of respect and non-intervention in this context, the extent of th

From the above one may conclude that every pluralist discussion may be conducted on both levels: descriptive and prescriptive. Professor Teubner has already dealt with the various dichotomies comprised in the term "legal pluralism".[78] In view of the current discussion, we may also add to it the paradigmatic duality of the pluralist discourse, which can be prescriptive and descriptive at one and the same time.[79]

(c) The Dominance of the State

The present discussion also offers an answer to an accusation made against the classical research, which has been raised on more than one occasion by certain new trend scholars. The accusation is that classical legal pluralism has never detached itself, in its substance, from the concept of the exclusivity of the state, or of legal centralism, because its implied message is that the entire "law", with its various features and systems, is subject to the state law, and the source of its validity emanates exclusively from the state law.[80] By contrast, according to the theory propounded above, the respective

religious groups and their internal decisions is greater. This is not the place to detail the precise distinctions between the two and the reasons for them. In any event, they demonstrate the same differing degrees of recognition and grant of legitimacy by the state. The fact that this issue is perceived as a statement of position regarding both recognition and the grant of legitimacy by the state may be inferred from the case law which attempted to formulate a proper approach towards internal decisions reached by religious tribunals on various issues. A very clear formulation of this point may be found in one of the judgments of the Court of Appeal of the Eleventh Circuit: "... by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks "establishing" a religion." See *Crowder* v. *Southern Baptist Convention* 828 F.2d 718, 721 (11th Cir., 1987).

78 Teubner, *supra* n.60, at 1443: "It is the ambivalent, double-faced character of legal pluralism that is so attractive to postmodern jurists ... [L]egal pluralism is at the same time both: social norms *and* legal rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous. And the relations between the legal and the social in legal pluralism are highly ambiguous, almost paradoxical: separate but intertwined, autonomous but interdependent, closed but open."

79 Cf. Englard, *supra* n.73, at 287-288.

80 See Griffiths, *supra* n.50, at 8; Tamanaha, *supra* n.61, at 202; J. Vanderlinden, "Return to Legal Pluralism: Twenty Years Later", 28 *Journal Legal Pluralism & Unofficial Law* (1989), 149.

approaches are the product of differing research circumstances and of differing objectives; however, they do not express a different basic concept. Considering the two paradigms as two complementary aspects of the phenomenon of legal pluralism allows us to dismiss the possibility of regarding them as two opposites, each of which contradicts the other. The concept of legal pluralism as a duality which consists of both paradigms denies the allegation that the classical research, which is characterized as prescriptive, is not part of the pluralist discourse. For our purpose, it is possible to use both paradigms for every period and for every factual reality, and the choice between them depends on the objective one seeks to achieve. It seems that any attempt to discuss an operative legal arrangement for the phenomenon of legal pluralism, as the classical trend has usually attempted to do, entails adopting a position which gives the state legal system the centre spot. This position is imperative to the extent that the objective aspired to is the creation of a normative regulation of the pluralist reality.[81] Reference is to the recognition given to the superiority which the general system of state law possesses to a certain extent over the other systems operating within it. As evidence that recognition of state dominance is essential, one may cite researchers affiliated with the new trend, who, too, cannot escape the recognition, even if only to a minor degree, of state dominance.[82]

It is important to point out that this recognition does not in any way express the concept of state exclusivity. There is no contradiction between the concept of legal pluralism and the recognition of the centrality of state

81 Cf. Englard, *supra* n.73, at 286: "If we accept the methodological assumptions of the normative school of thought, there is no way of escaping the conclusion of legal monism: the existence of a single valid normative system only."

82 See, for example, De Santos, *supra* n.55, at 298, 304-305: "While legal officials and legal scholars assume the state monopoly of legal production, research on legal pluralism maintains the existence and circulation in society of different legal systems, the state legal system being one of them, even if the most important one ... In a polycentric legal world the centrality of the state law, though increasingly shaken, is still a decisive political factor."

See also: Merry, *supra* n.54, at 874, 879: "Further, in industrial societies, despite the apparent autonomy of nonjudicial spheres, the legal system stands in a relation of superior power to other systems of regulation as the ultimate source of coercive power ... I think it is essential to see state law as fundamentally different in that it exercises the coercive power of the state and monopolizes the symbolic power associated wi[illegible]thority."

law, since recognition of the dominance of the state system is still insufficient to determine the exclusivity of this system or deny the existence of other systems. For the purpose of this discussion, it is possible to learn lessons from the philosophical discussion on pluralism. On the philosophical level, a pluralist is defined as a person possessing independent opinions and values, but who attributes to positions contrary to his own a value which is equal to that which he attributes to his own, and who never rejects the positions of other persons.[83] Therefore, a pluralist approach does not deny preference for one position over another, so long as the result will not invalidate or deny the legitimacy of the differing position. It seems that recognition of state dominance does indeed meet this characterization, since despite the acknowledgement of the state system as being superior (a process which, on the philosophical level, is parallel to preference for a certain position), this does not necessarily entail utter negation of any other system (a process which, on the philosophical level, is parallel to the non-negation of other positions). Moreover, the primary reason for the fact that no contradiction exists is that accepting the dominance of the state does not, as mentioned above, negate *de facto* recognition of the independent sources of the parallel legal systems — that is to say, recognition that their substantive existence does not depend at all on the state system. The recognition of the dominance of state law is only for the purpose of granting normative, practical validity to the parallel systems, a process which necessarily requires the adoption of the viewpoint of the state.[84] According to the concept of state dominance, the non-state legal systems do not owe their existence to the

83 See A. Saguie, "The Jewish Religion: Tolerance and the Possibility of Pluralism", 44 *Iyun* (1995), 175. By that he differs from a tolerant person, who, actually, does not attribute any objective value to the views of others. The tolerant person is convinced that his position is the true one, and he does not attribute any objective or internal value to a position tolerated by him. As Dr. Saguie explains, *ibid.* at 180: "As the tolerant person does not attribute objective value to the views or actions of the tolerated person, it would be accurate to say that the true object of the tolerance is the tolerated person."

84 Cf. Englard, *supra* n.73, at 294: "The system of state law serves as the point of departure for our research. Therefore, we view the status of the religious law first and foremost from the perspective of state law. Our examination of the theoretical relations between the two systems [*supra* n.73 – R.H.K.] has brought us to the conclusion that, *formally speaking*, the normative validity of the religious law in the state system is dependent upon recognition by the latter" (emphasis [illegible]

state system, but only their normative validity. This is the meaning of state dominance, and it is not to be identified with the ideology of the exclusivity of the state or legal monism. The concept of state dominance has no bearing on the independent existence of the non-state systems as far as their internal aspect is concerned. The substantive basis for the characterization of reality as pluralist is the existence of independent sources for the formation and continuation of the non-state legal systems.[85] This basis is not affected at all, and is certainly not denied, by the recognition of state dominance. Therefore, one may argue that recognition of the dominance of state law is compatible with an ideology of legal pluralism.

(d) Does State Recognition *per se* Deny the Possibility of the Existence of Legal Pluralism in Israel?

The current discussion is especially relevant to the reality prevailing in Israel, in which it may be argued that there is no room for the pluralist discourse in the area of family law, because the grant of official legitimacy by state law to the various religious legal systems has transformed these systems into part of state law itself. This argument attributes tremendous power to the state, and it echoes the ideology of the exclusivity of the state.[86] It hides the assumption that the only way to observe reality is through the view of the state; defining a certain phenomenon through affiliation with a state no longer allows any other means of observing or defining that phenomenon. By contrast, the approach developed above argues that the feature in terms of which the state grants official legitimacy to the non-state legal systems does not extract the situation from the framework of the pluralist discourse. This is only one feature among many in the description of the factual reality, and it positions this reality in a certain place — perhaps at the end — of that spectrum of "grades of state recognition". Being part of the mechanism of the state legal system does not alter the pluralist reality. It does not transform non-state law into state law. The classification of state law/non-state law is not affected at all by the

85 These comments are related to the discussion below, in which I attempt to show the flaw in the assertion that the Israeli system cannot be regarded as pluralist. That assertion ignores the dimension of independent development of the non-state systems, despite its being fundamental to the pluralist discussion. This point is developed below, at the end of section D.3 and the beginning of Chapter D.4.

86 See *supra* n.70.

aspect of being part of the mechanism of state law, nor by the official recognition accorded by the state system; rather it depends on the element of the self-creation of the legal system and the continuation of its independent existence and development. This will be discussed in further detail below.[87]

3. The Ideology of Legal Pluralism

The truth is that in the same way as a lack of clarity prevails in relation to the scope of the research area, so too it is difficult to point to an orderly pattern of ideology which propels research in this area. It seems that, in this connection as well, the majority of authors rely on basic assumptions which appear to be commonly accepted, without any genuine discussion actually preceding such acceptance. In order to address the ideological guidelines, it is necessary to expose and develop these basic assumptions. For this purpose, assistance may again be found in Professor Griffiths's definitive essay, which, in this matter too, represents a lone effort to deal with definitions and boundaries.[88] Professor Griffiths presents the rejection of the ideology of state exclusivity, or the exclusivity of law, as the primary objective sought to be achieved by the concept of legal pluralism:

> A central objective of a descriptive conception of legal pluralism is therefore destructive: to break the stranglehold of the idea that what law *is*, is a single, unified, and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look.[89]

One may ask oneself, what does rejection of state exclusivity mean? One of the major messages of pluralist ideology is the plethora of vantage

87 See the discussion below, at the end of section D.3 and the beginning of section D.4.

88 Griffiths, *supra* n.50.

89 *Ibid.*, at 4-5. Another major justification referred to by Griffiths, *ibid.*, at 4, is the "factual ground", namely, the argument that the pluralist concept is imperative because it is the only concept which is factually true: "Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion." It would seem that this principle of rejecting state exclusivity is indeed accepted by all those who deal in the area of legal pluralism, as is implied, for example, in the comments of Professor De Santos, one of the leading contemporary thinkers in this field: "Legal pluralism presupposes that the state does not have the monopoly of production of law." See De Santos, *supra* n.60, at 136-137.

points, and the insistence that the state viewpoint is not absolute, and certainly not exclusive. Beyond it are other viewpoints, which, as far as their holders are concerned, are no less important than the state viewpoint, and perhaps even exceed it in their relative importance. The state is not the only source of authority existing for the individual. Indeed, it is distinguished from other sources of authority in that it exercises that coercive force which is unique to it,[90] yet from a different vantage point it is feasible that the other sources of authority, the other systems, will play a much more significant role for the individual.[91] It is also possible to consider this relativity in terms of another facet of legal pluralism, namely, recognition of the limited character of the legal discourse itself. The more commonly used term opposing legal pluralism is "legal centrality", which is usually epitomized in the term "exclusivity of the state", a phrase I have preferred so far.[92] However, both the terms "legal centrality" and "legal exclusivity" harbour that same additional aspect of legal pluralism. If, up to now, we have suggested that the pluralist position denies the exclusivity of state law, here the pluralist position is expressed in the denial of the exclusivity of law in general. The significance of pluralism in this context lies in the recognition of the fact that shaping reality in legal-normative patterns is not of fundamental importance. This aspect of legal pluralism recognizes the possibility of the existence of alternatives for the state legal narrative. Moreover, within the framework of those same alternatives for the state legal narrative, it is possible that the state as such will not enjoy any superiority or priority over other social entities. When the element of the "source of validity" of the state is neutralized — in other words, when one is severed from the need for the state to ratify the internal legal arrangements — and one recognizes that this element is only a marginal aspect of the characteristics of the pluralist reality,[93] the state no longer enjoys any inherent advantage over other social forces.

90 See the quotation from Professor Merry's comments: *supra* n.82.

91 See Galanter, *supra* n.49, at 20-21: "Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character *and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation.*" (footnotes omitted, emphasis supplied). See also Minow, *supra* n.69, esp. at 971.

92 See above, section D.1.(b).

93 See the discussion above, towards the [illegible]

These ideas are expressed in practice by according respect and equal appreciation to extra-state legal systems. Even more importantly, they are translated into the recognition of the sovereignty of other legal arrangements, which are parallel to, overlap, and in many cases even compete with, the state arrangement. As Professor Weisbrod describes it:

> The social world is described rather as ... legal pluralists describe it, as filled with competing sovereignties and sources of law.[94]

The concept of legal pluralism is what enables use to be made of the language of recognition and the attribution of autonomy, and even sovereignty, to the extra-state systems. A social system which contains such expressions of the concept of legal pluralism provides room for the multi-faceted autonomous existence of diverse human groups located within the same social system.[95] Professor Dane comments:

> Sovereignty-talk requires legal systems to step — ever so partially — outside themselves.[96]

This metaphor describes the process which takes place within the pluralist paradigm. That "stepping out of the self" is essential for the recognition of the other, acceptance of the other's viewpoint and respect for it.

The "otherness" in this context ensues from the fact that legal arrangements are formed and exist independently of the state arrangements.[97] Recognition of this fact, and as a derivative thereof recognition that the same legal arrangements continue to develop in a manner separate from the state

94 Weisbrod, *supra* n.56, at 745.

95 As, for example, Professor Goldring commented, in his review of the innovative book written by Professor Arthurs: "This wider paradigm, which Arthurs characterizes as 'legal pluralism', ... can accommodate quasi-autonomous orderings of social activity": J. Goldring, "Book Review: Without the Law (I)", 24 *Osgoode Hall Law Journal* (1986), 405, 408.

96 Dane, *supra* n.51, at 966-967.

97 Thus, for example, Arthurs based his thesis on the legal pluralism that prevailed in the English legal system and in the administrative legal system in nineteenth century England. See Professor Goldring's comments: "The dominance of a legal centralist paradigm within the growing state in the nineteenth century meant that the formal judicial machinery of the centralized state took over the activity of social ordering that *previously existed in the semi-autonomous fields of social activity, which had developed their own* [illegible]

arrangement, constitutes a central element in the pluralist concept of law.[98]

4. Expressions of Legal Pluralism in Israel

The independent internal development has been heavily emphasized in the preceding comments. It will be recalled that Justice Barak expressed a completely contrary view in relation to the continued development of Jewish law.[99] By contrast, Justice Elon may be regarded as propounding a view which is compatible with the pluralist concept as it has been described here. This, in my view, is the message which Justice Elon wished to convey in his comments in the *Vilozhny* case, when he stated that "the Rabbinical Courts draw their jurisdiction, *as far as the state legal system is concerned*, from the state law, which granted them this jurisdiction."[100] The implication here is that as far as the religious legal system is concerned, its existence has no connection at all to the state system. Like any other parallel legal system, it does not owe its existence to the state system, but only its effective validity. The dependence on the state system is required only for the creation of a normative arrangement for the pluralist reality, and the pluralist activity itself exists regardless of the state system.[101] Professor Englard dubbed this position "the religious approach", when discussing a comparable ideological confrontation in relation to the status of religious law *vis-à-vis* state law, in the context of the activities of the Council of the Chief Rabbinate.[102] In view of the comments made here, this approach is not necessarily religious, but expresses the pluralist concept.[103]

98 Professor Dane, *supra* n.51, at 983, refers to these matters in his later comments: "The last sense in which a legal order might have absolute authority is in determining its own law ... The United States might determine the effective limits of Native American and religious autonomy, but it does not authoritatively decide questions of aboriginal or religious law. And that, as much as anything, seems to be crucial, if not sufficient, evidence of its recognition of the essential sovereignty of those communities."

99 See above, towards the end of section D.1.(a).

100 The *Vilozhny* case, *supra* n.5, at 738, emphasis supplied.

101 See the earlier discussion on the dominance of the state, section D.2.(c).

102 I. Englard, "The Status of the Council of the Chief Rabbinate and the Supervisory Power of the High Court of Justice", 22 *Haprakliṭ* (1964), 68, 69-70 (critical review of H.C. 195/64 *Haḥevra Hadromit Ltd. Marbek Ltd.* v. *The Chief Rabbinate Council*, 18(2) *P.D.* 324).

103 Thus, for example, Vitta, *supra* n.57, at 193-194, described the systems of personal laws operating in various state frameworks: "... [t]he personal

I believe that a thorough understanding and acceptance of this state of affairs are responsible for the fact that the state does not dictate the identity of the law which the religious judicial system must apply.[104] The legislature, that is to say, the general system, deliberately refrains from determining the law that the religious systems should apply. This approach stems from a recognition of the independent existence of the religious systems and respect for their traditions. The fact that the legislature refrains from dictating the law in the religious system, as well as Justice Elon's remarks, cited above, on the state as the source of authority of the religious courts *in the eyes of the state*, demonstrate the implementation of the recognition of legal pluralism while concurrently maintaining the dominance of the state. These are not the only examples in our legal landscape. Their uniqueness lies in the fact that they both appear in Justice Barak's judgment.[105] However, the manner in which they are presented in that judgment is different and conveys a message contrary to the pluralist message, as I shall show below.[106]

(a) The *Rudnitzki* case and the *Kahane* case

First, it is appropriate to cite other sources which may be interpreted as recognizing what seems to be a pluralist situation, and choose to retain it. The guideline for these sources, which is compatible with the pluralist concept, is recognition of the fact that even if, in the eyes of the state, the religious system draws its legal power and normative validity from the civil system, this will still not legitimize dictating to it the substance of the law and the choice of substantive law. This is not the place to conduct an exhaustive review of the case law which to date has addressed these "confrontations"; however, we should mention at least some. H.C. 51/69 *Rudnitzki* v. *The Rabbinical Court of Appeals*,[107] which is customarily

systems may be considered autonomous only from the point of view of the State. If considered by themselves and in themselves, their rules have a legal force of their own, in no way connected with the State's recognition."

104 See above, section B.2.(a).

105 For the fact that the legislature has refrained from dictating the law in the religious system, see the *Bavli* case, *supra* n.1, at 239, 243-244, and for a quotation from Justice Elon's judgment, see *ibid.*, at 246.

106 See below, section D.4.(b).

107 24(1) *P.D.* 704 (hereinafter: "the *Rudnitzki* case"). There, the High Court of Justice ordered that a Cohen and a divorcee who had undergone a private marriage ceremony in order to circumvent the religious prohibition, be

regarded as symbolizing the exercise of judicial review in the most far-reaching manner to date,[108] demonstrates the balanced and restrained dynamics which may sometimes be attributed to the civil system in this delicate area. Notwithstanding the difficulty entailed by the all-embracing decision of Justice Landau that the part of Jewish law which deals with prohibitions does not apply in the legal system in Israel because it contradicts the principle of freedom of conscience, this decision sets the limits of intervention and review, which, it seems, has indeed been applied so far in this area. This decision is simultaneously far-reaching and restrained. It is far-reaching in the sense that it covers the application of external terms and criteria to the religious system in order to analyze and chart the religious system itself, and also in the sense that it implicitly takes a value position, and perhaps even discloses an element of condescension on the part of the civil system regarding those religious legal arrangements that were discussed in the *Rudnitzki* case. On the other hand, it is restrained in that it sets its own limits since *it does not encroach upon religious territory*. Reference is made to religious law to the extent that it is effective in the civil system, namely, in relation to the registration of marriage. Justice Landau's decision imposes qualifications on the religious law only to the extent that it has an influence on the civil level. It does not trespass into the religious level itself, and it does not purport to dictate to the religious system how and on the basis of which rules it should adjudicate. This last point is very well demonstrated in the *Rudnitzki* case and in the other judgments that accompanied it.[109] In that case, the civil system did not give the religious system any instructions or guidelines as to the manner of adjudication required of it. All that was said, at a certain stage, was that the religious system had to judge and decide on the manner at hand. When the civil court realized that the religious system did not intend, or was not able, to adjudicate as expected from it, the civil court assumed the decision making function. Thus, the comprehensive and generalized dictation and subjugation, which we witness in the *Lev* and *Bavli* cases, were avoided.

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registered as married in the Population Registry.

108 See, for example, Rosen-Zvi, *supra* n.8, at 73-74; Shifman, *supra* n.8, at 199-205.

109 See, for example, H.C. 80/63 *Ḥaḳlai* v. *The Minister of the Interior*, 17 *P.D.* 2048; H.C. 130/66 *Segev* v. *The Regional Rabbinical Court of Sefad*, 21(2) *P.D.* 505; H.C. 275/71 *Cohen* v. *The Regional Rabbinical Court of Tel-Aviv Jaffa*, 26(1) *P.D.* 227; H.C. 29/71 *Kedar & Cohen* v. *The Regional Rabbinical Court of Tel-Aviv Jaffa*, 26(1) *P.D.* 608.

The *Rudnitzki* case is cited here as an example. It is not the only case which demonstrates the fineness of the line which is being walked, in the effort made by the case law to preserve, on the one hand, what are regarded as pluralist characteristics, while safeguarding, on the other, the interests of the general system. In this context, testifying to the fact that the approach adhered to in the *Rudnitzki* case is not a thing of the past, it is worth pointing to another case which was recently heard and has still not received the attention it deserves, namely, C.A. 4590/92 *Kahane* v. *Kahane*.[110] Although at first sight this case may seem to reflect an unjustified deviation from precedents, upon deeper examination I believe that this case, like the *Rudnitzki* case and many other cases before it, walks — albeit somewhat differently — the same fine line balancing between the preservation of legal pluralism, on the one hand, and safeguarding the dominance of the state and the interests which are particularly important to it, on the other. In the *Kahane* case, President Shamgar upheld the judgment of the District Court, which obliged the husband, a *Cohen*, to pay alimony to his wife, who was a divorcee at the time they underwent a civil marriage ceremony in Cyprus. This decision was taken notwithstanding that the Rabbinical Court had already decided on a "*get* [divorce] on a strict basis". This decision is obviously in total contradiction to a series of well-known judgments, starting with C.A. 571/69 *Kahane* v. *Kahane*,[111] and culminating in C.A. 592/83 *Forer* v. *Forer*.[112] Nevertheless, in an extremely brief judgment, a major portion of which quotes, with approval, the judgment of the District Court, President Shamgar deviated from these precedents — without mentioning them at all.[113] It is difficult to understand from the judgment in the *Kahane* case whether that case possessed unique circumstances which enabled it to be distinguished from those precedents,[114] and it seems that the essence of the

110 Unpublished (hereinafter: "The *Kahane* case").

111 24(2) *P.D.* 549 (hereinafter: "The *First Kahane* case").

112 38(3) *P.D.* 561 (hereinafter: "The *Forer* case").

113 The *Forer* case was indeed mentioned in that portion of the judgment of the District Court which was quoted in the President's judgment, but it is doubtful whether this may be regarded as a reference to a precedent which has to be dealt with.

114 An allusion to this may be found in the reference to a certain agreement between the spouses, which was mentioned in the President's comments concerning the amount of the alimony payments, and it is possible that the District Court judge was referring to this when he discussed the possibility of basing the wife's right to alimony "not necessarily by virtue of the marriage but by virtue of the husband's undertaking ...". However, this

judgment resides in the sentence: "No person can rid himself, in the way which has been described, of his financial obligations towards his spouse".[115] Indisputably, in this way, President Shamgar reached a just result in the circumstances of the case. If, in the past, the Court proved ineffective in relation to these situations, and this motivated Justice Sussman at the time openly to admit that "these are the laws of personal status in Israel, but I can do naught about it"[116] — today, the problem has been rectified, although the solution seems to have been reached inadvertently, and offered in surprising disregard of the issue-laden background to the problem. At the same time, it is possible to propose a different way of reading the judgment. Disregarding the background may have been intentional. President Shamgar may have preferred to bypass the bitter confrontation between the religious and the civil systems. This confrontation might have been unavoidable if the President had admitted the tremendously problematic character of his adjudication. By disregarding these issues, President Shamgar could reach the desired outcome, and in this way the interests of the civil system, which is identified with the state, would be preserved without *prima facie* impairing in any way the integrity of the religious judicial system. In this way, the ideology of legal pluralism would be maintained.

(b) On the Utility of Subterfuges

Both the *Rudnitzki* and the *Kahane* cases, like other cases in this area, may be conceived of as "false" or even "dishonest", in the sense that the way in which the issues are presented there is incompatible with the actual significance of the judgments. Professor Calabresi's theory of subterfuges and indirection in the law comes to mind here.[117] Obviously, we may argue against the pretence and the cloak which these cases, and others like it, wrap around themselves, and object to the use of subterfuge *per se*. However, Calabresi's argument about the benefits of such subterfuges becomes even more convincing in a field as sensitive and as laden with feelings and beliefs

matter too was not developed in the judgment (see the *Kahane* case, *supra* n.110, at the beginning of Paragraph 3 and at the beginning of Paragraph 5 of President Shamgar's judgment).

115 The *Kahane* case, *ibid.*, in Paragraph 4 of President Shamgar's judgment.

116 The *First Kahane* case, *supra* n.111, at 557.

117 G. Galabresi, *A Common Law for the Age of Statutes* (Harvard, 1982), 172-177.

as the relations between the religious and the civil legal systems, and the relationship between religion and state in general. Particularly against the background of a pluralist concept of law, this approach too may prove valuable. Rhetoric, even in its negative sense, may be extremely important in this field, and we shall deal with this importance below.

The *Rudnitzki* and the *Kahane* cases were some indications of adjudication in the spirit of Israeli legal pluralism from the past. I see the doctrine of non-recognition as a more recent expression of such a line of adjudication. As will be recalled, Justice Barak adopts a contrary approach. Although he specifically addresses two of these examples in the *Bavli* case, the way in which they are presented in that case is different, and conveys a message which opposes the pluralist approach. Apparently, Justice Barak treats the structural deficiency in the activities of the religious courts as a *lacuna* which must be filled.[118] Justice Elon's comments, too, are cited in the judgment of Justice Barak, in the context of the argument for unity, as evidence of the absolute dependence of the religious law on the state law.[119] Indeed, after quoting from the *Vilozhny* case, Justice Barak denies the possibility that the legal system is a "confederation of separate systems, which are connected to each other by a fine, formal connection".[120] The religious law, in his view, is only one of the specific laws which together comprise the uniform general system, in a manner similar, for instance, to the labour laws in terms of which the labour courts adjudicate.[121] The

118 A thorough reading of Justice Barak's comments in the *Bavli* case, where he dealt with the prevailing approach regarding the law applying in the religious courts (*ibid.*, at 243-244), results in the impression that Justice Barak sought an explicit legal anchor for the existing arrangement, and did not examine other sources for anchoring that arrangement, or indeed the possibility that the legal *lacuna per se* possessed deep significance for the purpose of establishing that arrangement.

119 "... this law is exercised as part of the state law and by virtue of the directives of the state": *Bavli*, *ibid.*, at 246. Compare this determination to the concept of the exclusivity of the state, as described by Professor Dane, and to the dogmatic viewpoint as described by Professor Englard, *supra* n.73, at 290.

120 The *Bavli* case, *ibid.*

121 *Ibid.*, at 247. Indeed, Justice Barak qualifies the resemblance by commenting that "obviously, there is a substantive difference between a Labour Court and a Religious Court", but he does not specify the difference in question, and from the rest of his comments it is not clear whether that "substantive difference" indeed leads to a different approach in our context.

comparison drawn to the system of labour courts demonstrates, perhaps more than anything else, that Justice Barak believes in the concept of the exclusivity of the state and denies the idea of pluralism. This comparison is particularly offensive, since it is clear that the system of labour courts is essentially part of the civil system, and does not exist as an independent legal system *per se*, while the religious system is a separate system, which draws its existence from a totally different sphere of reality. The comparison between these two systems shows that the religious system is perceived as a sub-system, which also draws its existence from the general civil system, just like the administrative legal system and the labour courts. This view entails detaching the religious law from the system to which it belongs, and placing it within the "civil matrix", in the language of Justice Barak,[122] so that it becomes a part of the general system only, and loses its source of independent existence. At the end of this process, the religious law is no longer a sovereign system of equal value, in this respect, to the state system. To summarize: this demonstrates the implications of the theory of unity — non-recognition of the sovereign dimension of the religious law and denial of the possibility of legal pluralism entailed by it.

(c) Recent Expressions of Legal Pluralism in Israel Beyond the Area of Family Law

Thus far I have referred to expressions of family law adjudication which fit within the ideology of legal pluralism, and represent a perception of law that seems adverse to the line adopted by Justice Barak's unity theory. In recent years the Israeli legal field has seen clearer reflections of legal pluralism in areas other than family law. It is important to mention a few of them, to highlight the relevance of this theory.

Internal by-laws of a joint-association presented an interesting framework for the examination of these ideas.[123] While all the Justices recognized the by-laws as a contract and agreed that a specific clause within it was void, they differed in their reasoning. The majority held that the by-laws made a "uniform contract" which is subject to a higher degree of judicial scrutiny. Accordingly, it regarded that clause as a "depriving clause", and therefore void. The minority saw the by-laws as constituting an ordinary contract, and

122 *Ibid.*: "The civil matrix within which a specific law functions".

123 C.A. 1795/93 *Pension Fund of Members of EGGED Ltd.* v. *Yosef Ya'akov*, 51(5) *P.D.* 433.

formed the conclusion that the clause was invalid as being contrary to public policy. Professor Mautner has argued that the disagreement in that case underlies a deeper discord within the paradigm of legal pluralism.[124] Defining the by-laws as a "uniform contract" represents a much stronger state intervention within the semi-community that was created by the association. The minority opinion is in his view much more in accord with the ideology of legal pluralism, since it leaves more space and self-autonomy to the semi-community, and seriously limits state intervention.

Even more pertinent to legal pluralism, invoking the interaction between religious and civil legal systems, is the *Katz* case.[125] This case involved three separate disputes in which state Rabbinical Courts issued religious injunctions and bans against individuals who refused to adjudicate their monetary disputes before them. The religious bans caused the recalcitrant individuals to be ostracized by their communities and to suffer economic as well as emotional damages. The High Court of Justice, in a majority opinion, had accepted their appeals, ruling that the Rabbinical Courts are not authorized to issue such bans over people who reject their jurisdiction, in matters in which they do not have formal jurisdiction. Justice Tal, in a minority opinion, rejected the appeals, thus accepting the Rabbinical Courts' actions. As Issachar Rosen-Zvi has shown, the two opinions reflect polar perceptions of the place of religious legal systems within Israel and of legal pluralism in general.[126] Justice Tal's opinion supplies a comprehensive account of the history of the Rabbinical Courts since ancient times, thus placing their existence in total seclusion from the civil legal system. It can indeed be taken as a strong demonstration of legal pluralism. As I have argued elsewhere, his opinion, as well as Rosen-Zvi's review of the case, do not confront the negative consequences of this expression of legal pluralism, i.e. the damages suffered by the appellants in this case.[127] They engage in a pure descriptive analysis, completely evading the "dark side" of legal pluralism, which was very much apparent in the *Katz* case.[128] This is in fact a very good demonstration of the importance and the need to engage in both

124 M. Mautner, "Contract, Uniform Contract, Association Code and Legal Pluralism", 44 *Haprakliṭ* (1999), 293.

125 H.C. 3269/95 *Katz* v. *The Rabbinical Court of Appeals*, 50(4) *P.D.* 590.

126 I. Rosen-Zvi, "Subject, Community and Legal Pluralism", 23 *Iyunei Mishpaṭ* [Tel-Aviv University Law Review] (2000), 539.

127 R. Halperin-Kaddari, "More on Legal Pluralism in Israel", 23 *Iyunei Mishpaṭ* [Tel-Aviv University Law Review] (2000), 559.

128 See the discussion below, *infra* n.141 and accompanying text.

discourses of legal pluralism, the descriptive and the prescriptive.[129] As I argued above, these two discourses complement each other, and only through both of them together can the whole picture emerge. Furthermore, cases like the *Katz* case prove that sometimes the descriptive discourse lacks the tools even to approach the issue at hand.[130]

The *Katz* case in particular, together with the developing discourse on legal pluralism in academic circles in Israel, has prompted the Ministry of Justice to come up with an interesting proposal.[131] It proposed that the state Rabbinical Courts may acquire formal jurisdiction to rule in general monetary claims if all the parties to the case agree. In other words, the parties' agreement may grant the state Rabbinical Courts general jurisdiction in civil matters. Consequently, their judgements will be regarded not as arbitration awards, but as regular judgments of courts of law. Significantly, the proposal specifically relies upon the theory of legal pluralism in justifying the obvious expansion of the Rabbinical Courts' jurisdiction, and bases its outline on some of the ideas raised in my own earlier works in this field.[132] As could be expected, this Bill has never reached advanced stages of legislation. Politically, it would be perceived as too radical a move in changing the *status quo* of Rabbinical Courts. Thus, this move remains theoretical, but even theoretical consideration of this proposal on the part of the civil legislature is significant.

We are left, then, with some scattered expressions of legal pluralism in the cases, and the beginnings of a discussion of legal pluralism in the legislature and the academy. However, what count on the normative level are the precedent-setting cases of *Bavli* and *Lev* with their clear holdings, which, as obvious by now, are opposed to legal pluralism.

5. Another Glance at the Ideology of Legal Pluralism

One may ask what motivated Justice Barak to dismiss so categorically the idea of legal pluralism? Why did he choose the all-embracing theory of

129 See the discussion above under section D.2.(b).

130 See Halperin-Kaddari, *supra* n.127.

131 Rabbinical Courts Bill (Marriage and Divorce) (Amendment – Jurisdiction in Civil Matters) – 1998 (unpublished, on file with the author).

132 See internal memorandum concerning the Rabbinical Courts Bill (Marriage and Divorce) (Amendment – Jurisdiction in Civil Matters) – 1998, written by Moria Bakshi of the Ministry of Justice (on file with the author).

unity and not one of the alternative approaches open to him? Is it possible that the reason lies in his objection to the idea of legal pluralism in Israel? In order to tackle these questions, we must turn back to the pluralist ideology.

As a point of departure, I believe that it would benefit our discussion to distinguish between two general states of legal pluralism: legal pluralism in the context of social systems classified on the basis of unique cultural, ethnic or religious characteristics, as opposed to legal pluralism outside this context. This division is to a certain extent reminiscent of the division between the classical research and the new trend, although the latter division was primarily made on a chronological basis, and the division suggested here focuses on the characteristics which are unique to each society, regardless of its "chronological status". Thus, the two types of contexts proposed here are also found in societies which are usually represented in new trend research.[133] The following discussion will focus on the first-mentioned context, that of divided societies. The reason for developing this context is understandable, in that it is the more relevant framework for discussing legal pluralism in the area of family law in Israel. However, this is not the only reason. An additional reason relates to the discussion and dispute concerning the subject of legal pluralism in general. It will be recalled that a considerable proportion of the criticisms made against the idea of legal pluralism target what I have dubbed "the absence of boundaries". This objection, which even some of the scholars of legal pluralism recognize as justified, was raised in its sharpest form in Tamanaha's critique of this area as a whole.[134] However, at the end of that essay, one can actually discern the beginnings of a proposal for a distinction and for criteria for delimitation of boundaries, based on the distinction between:

> ... institutionalized identification and enforcement of norms, and concrete patterns of social ordering.[135]

In the first group he includes, for instance, mechanisms which exist in post-colonial situations, in which the power of the state is weak compared to the power of the indigenous institutions. In the second group he offers as an

133 These comments are related to the conclusion reached in the earlier discussion, where I noted that the two trends (the classical trend and the new trend) reflect two approaches, each of which is possible in any context. See the discussion above, towards the end of section D.2.(b).

134 See Tamanaha, *supra* n.61, esp. at 193-194, 211-212.

135 *Ibid.*, at 211.

example the clothing industry.[136] He believes that only what lies within the boundaries of the first group (regardless of the distinction between the post-colonial world and the Western world) may properly be researched as "legal pluralism". This is not the place to delve into this proposal, but it is important to point out that its development may be compatible with the division suggested above between two contexts: the first context described by Tamanaha is parallel in certain respects to the context which I wish to develop, and is appropriate and worthy of continued discussion within the framework of the concept of legal pluralism. Accordingly, we shall now turn to a discussion of the meaning of legal pluralism in the framework of the division into these two contexts.

Let us first examine the meaning of legal pluralism in the context of "undivided" societies. In general, removing the state's monopoly to create law, and recognizing the plethora of viewpoints, implies freedom of choice for the individual. The individual may enjoy extensive choice in issues such as conflict resolution, planning of activities and behaviour, etc.[137] The social group to which the individual belongs, too, wins recognition of its existence, even though, in general, the promotion of its semi-autonomous activities (as defined by Moore) is not presented as an objective *per se*, but only as a means of serving the interests of the individuals forming the group.

By contrast, in the context of divided societies, legal pluralism serves as an invaluable tool especially for the various social groups which comprise the same general social or political unit. Legal pluralism in this context actually furthers the interests of the group, which it would be more appropriate to call here a "community". The community, rather than the individual, is the main entity the interests of which are intended to be served by legal pluralism. Rejection of state exclusivity in this context conveys a substantive message regarding the meaning of the community for the individual and its status in relation to the state. In this context, legal pluralism joins the trend of promoting the community as a meaningful element in both public life and private life. It serves the community interests by providing a means for protecting minority groups and encouraging their right to preserve their traditional identity. In this sense,

136 As will be recalled, this industry was used as a model for Professor Moore's theory of "social semi-autonomous fields" (Moore, *supra* n.64).

137 See, for example, F.G. Snyder, "Anthropology, Dispute Processes and Law: A Critical Introduction", 8 *British Journal of Law & Society* (1981), 141, 156.

legal pluralism becomes a linchpin in promoting cultural pluralism.[138] Obviously, this concept requires a position to be taken on a preliminary issue concerning the legal status of the community. In other words, is the community a legal entity *per se*, to which interests may be attributed, and which can be the subject of rights and so forth?[139] It is interesting to note that even though this debate has still not been decided, the majority of the writers in the area of legal pluralism in this context do not confront this issue directly, and their 'communitarian' position — which obviously advocates considering the community as an entity *per se* — may only be inferred from their comments.

The same is true with regard to another dilemma raised by this approach, namely, the potential conflict between pluralism and liberalism. This conflict is embodied in the existing tension between the recognition of the group and its advancement, on the one hand, and the perception of the individual as the primary subject of rights and liberties, on the other. Such a conflict may materialize when the values, which are respected and furthered by the group, collide with fundamental principles, such as the principle of

138 See, for example, B.J. Flagg, "The Algebra of Pluralism: Subjective Experience as a Constitutional Variable", 47 *Vanderbilt Law Review* (1994), 273, 279; M. Rickard, "Liberalism, Multiculturalism, and Minority Protection", 20 *Social Theory & Practice* (1994), 143.

At the end of his book (*supra* n.49, at 191), Arthurs reviews the various social objectives for the furtherance of which one may turn to the paradigm of legal pluralism. The first of these objectives is the preservation of the community and community life: "First, as in the nineteenth century, we may identify residual traces of an older communal pluralism. These are typically found in ethnic or religious communities, and represent efforts by those communities to uphold established values — above all, the value of preserving the community itself ... [t]he future of communal pluralism in a world of dissolving communities is not promising. Nonetheless, those who genuinely seek a revival of community life often propose as well measures that will encourage the development of communal legal systems." The community, therefore, is the issue in this context. The community is the entity being furthered here.

139 See, for example, R. Garet, "Community and Existence: The Rights of Groups", 56 *Southern California Law Review* (1983), 1001; I.C. Lupu, "Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination", 67 *Boston University Law Review* (1987), 391; C.G. Esbeck, "Establishment Clause Limits on Governmental Interference with Religious Organizations", 41 *Washington & Lee Law Review* (1984), 347; M. Dan-Cohen, *Rights, Persons, and Organizations* (Berkeley, 1986).

equality.[140] Professor Dane called this aspect "the dark side of legal pluralism".[141] Recall the discussion of the most recent expression of this "dark side" in the Israeli context in the *Katz* case above.[142] Though some of the authors in this field do indeed refer to this "dark side", in general there is no outright confrontation of the issue or serious attempt to find a solution to it.[143] Professor Minow's essay is typical in that it presents the potential conflict in all its facets, yet emphasis continues to be placed exclusively on the community and accommodation to its internal autonomy:

> ... [a]n approach even more attentive to the claims of a private subgroup would recognize the plurality of sources of legal authority. In this approach, all sources of authority do not fit together in one united whole; the spheres of authority, in this view, are not nested in a hierarchy, with each successive level subsuming the more local and intimate ones. Instead, the sub-community provides a reference point for its members that sets them outside the structures of governmental authority.[144]

This is a call to adopt the pluralist approach out of a desire to reflect the internal self-perception of the community, which operates an independent normative-authoritative system. In many cases, this may be a self-perception of autonomy, or even sovereignty, which competes with the state on the same plane. One of the central characteristics of the group which is relevant to us — the religious community — is that same self-attribution of internal sovereignty. As Professor Weisbrod puts it:

> The central point ... is that religious communities may view themselves as a source of authority at least equal to the state, and that they may see issues of the church and state as questions involving competing systems of law.[145]

The late Professor Cover employed the term "*nomos*", and described it as "an integrated world of obligation and reality through which the rest of the world is perceived".[146] Use has been made of this term in order to describe the ethos of the religious groups which are indeed found within the state framework, but which hold the view that the state is only one element, albeit an important one, of the normative reality which they themselves create for themselves.[147] The *nomos*, Professor Cover continues, is composed of the rules of law and narratives surrounding them, in which the rules are located:

> A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a *corpus juris*, but also a language and a *mythos* — narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behavior.[148]

Even the rhetoric generated in the world outside the religious group — for instance, in the general judicial system — forms part of those narratives

140 Cf. Minow, *supra* n.69, at 977. The best known case epitomizing this type of conflict is *Santa Clara Pueblo* v. *Martinez* 436 U.S. 49 (1978). The issue under consideration there was the question of membership of the tribe (of the group, of the community). According to the Santa Barbara tribal laws, children of female tribe members who married outside the tribe would not be considered members of the Santa Barbara tribe, whereas children of men of the tribe who married outside the tribe would be considered tribe members. The Indian Civil Rights Act (1968), which allows a certain measure of federal supervision over the legal autonomy in the Indian reserves, *inter alia* applies the basic principles of due proceedings and equality before the law to the Indian tribes as well. Accordingly, the applicants in this case — a female member of the Santa Clara tribe who had married a different tribe member and her daughter — petitioned for an order invalidating the regulation determining membership in the tribe, and for an order that the daughter be included as a tribe member. The petition was dismissed, in reliance on the element of sovereignty preserved by the Indian tribes, despite the above-mentioned federal supervisory legislation. For the most comprehensive criticism of the court's approach in this case and of the way it handled the conflict between pluralism and liberalism, see J. Resnik, "Dependent Sovereigns: Indian Tribes, States and Federal Courts", 56 *University of Chicago Law Review* (1989), 671.

141 Dane, *supra* n.51, at 964, 987. In these remarks, Professor Dane referred to Professor Price's criticism of his, Professor Dane's, article: see M.E. Price, "Indian-Federal Regulations from the inside Out: A Comment on Perry Dane's Meditation", 12 *Cardozo Law Review* (1991), 1007.

142 See *supra* n.125 and accompanying text.

143 The idea of legal pluralism may be at odds with the liberal theory from another close angle as well. It may perhaps be possible to argue that the liberal theory requires the concept of the exclusivity of law or the state, and therefore the rejection of legal pluralism, because only through the attribution of exclusivity to state sovereignty is it possible to bring about the liberal concept of co-existence of various groups as one political entity. For this, see Dane, *ibid.*, at 983-985; De Santos, *supra* n.60, esp. at 132-133.

144 Minow, *supra* n.69, at 971 (footnotes omitted).

145 Weisbrod, *supra* n.56, at 745.

146 R. Cover, "Nomos and Narrative", 97 *Harvard Law Review* (1983), 4, 31.

147 *Ibid.* at 33. And see also Dane's description: "Religious groups are best conceived as separate sovereigns, analogous more to a government than to a corporation ... they are distinct normative communities": P. Dane, *The Corporation Sole and the Encounter of Law and Church* (Yale, 1991, unpublished working paper).

148 Cover, *ibid.* at 5-9.

and myths which create the *nomos*. Thus, this rhetoric becomes part of the internal values and self-determination of the religious group. Rhetoric which broadcasts recognition and respect will promote a reciprocal situation in which, as Professor Cover puts it:

> (e)ach group ... accommodate(s) in its own normative world the objective reality of the other.[149]

The rhetoric influences the internal and external world view of the community. The views of the religious community shape our basic constitutional structure just as it is shaped by the official state views. In the earlier discussion on possible expressions of a pluralist concept in Israeli case law, a suggestion was offered for a certain way of reading the rulings in the *Rudnitzki* and the *Kahane* cases, which I termed the rhetoric of "subterfuge". Now, we can appreciate the great value of that controversial rhetoric. The rhetoric of "subterfuge" possesses a double importance, on the one hand as part of the official state approach which, *inter alia*, brought about the adoption of "subterfuges", and, on the other, as a factor in formulating the approach of the religious group.

In the course of formulating their perceptions, some of the communities also develop doctrines of their own in relation to their attitude to the state.[150] Thus, for instance, the School of Canonical Law in the Catholic University of the United States published a document that defines the relationship between the church and state in the United States as relations of competing sovereigns, regulation of which must be made in a form as close as possible to the intra-American conflicts of law.[151] In Israel, too, it is possible, of course, to come across statements in this spirit, and even in more vehement tones, from the side of the religious community. As far as Jewish law is concerned, the jurisdiction of the Rabbinical Court extends to every matter, and the civil courts are perceived as "gentile courts", in which litigation is forbidden.[152] Dr. Zerah Warhaftig (then the Deputy Minister of Religion), in

149 *Ibid.*, at 28-29.

150 Cf. Galanter, *supra* n.49, at 28.

151 "Separation of Church and State in Restatement of Inter-Church-and-State Common Law", 5 *The Jurist* (1945), 73; 6 *The Jurist* (1946), 503; 7 *The Jurist* (1974), 259.

152 See S. Meron, "The Status of the Rabbinical Courts in Israel in Accordance with the Jewish Law", 22 *Torah She-Be'al Peh* (1981), 94, 97-98; File (Jerusalem) 2824/38, 11 *P.D.R.* 259, 264-274; J.A. Halevi Herzog, "Limits in the Law of the State", 7, 8 *Ha-Torah ve-Ha-Medinah* (1956-57), 9, 10. Contrast with this: Ya'akov Bazak, "The Halachic Status of The Israeli Court System", in *Crossroads: Halacha and the Modern World*, Vol. II, Zomet Institute (Alon Shvut-Gush Etzion, Israel), reproduced at http://www.jlaw.com/Articles/israelcourt.html.

one of his speeches, commented quite sharply on the self-perception of the religious judicial system in relation to the civil system:

> In my opinion, in general, the Rabbinical Courts must act as imperialistically as possible and not relinquish their powers. The Rabbinical Court of Appeals has ruled in one of its judgments that "actually, everything belongs to us, only the law removes a few matters from us".[153]

The concept of legal pluralism as presented here is capable of including expressions of independence of this type. Such a concept even allows room for what some may regard as subversive statements. A pluralist approach does not invalidate and does not suppress this dimension of the religious groups, and in this way it prevents the build-up of feelings of alienation and hostility on their part.[154] Hence the importance of the pluralist concept for the delicate fabric of any contemporary Western society, and for Israeli society in particular. In the context of analyzing Israeli society, the importance of pluralism as "the only way for a life together", has frequently been acknowledged.[155] Law, as a social institution which establishes social order, possesses great importance in shaping this complex social reality. As Professor Teubner put it, a concept of legal pluralism leads to law being "compliant" with and "adapted" to society.[156] The reference to the "adaptation" of law to the social reality is related to the thesis propounded by

153 A speech at the *dayanim* convention, Jerusalem, 1953, cited in Z. Warhaftig, *On Rabbinical Adjudication in Israel* (1956), 17.

154 For criticism of an opposite approach, which indeed leads to opposite results, see R. Shamir, "The Politics of Reasonableness: Discretion as Judicial Power", 5 *Theory and Criticism* (1994) 7, 15-17. Shamir analyses case law dealing with religion and the religious group in a context which is different from ours, and refers to "the fundamental and categorical refusal to grant any weight to the cultural 'otherness' of the orthodox public. This otherness, as far as the court is concerned, preserves a constant subversive potential that refuses to recognize the intelligent superiority of enlightened legalism and refuses to adhere to the guidelines of state law": *ibid.*, at 16.

155 See, for example, E. Schweid, "Relations Between Religious and Secular in the State of Israel", in *People and State, the Israeli Society* (ed. S. Stempler, 1989), 286, 293. See also E. Schweid, "Cultural Pluralism in Israel", *ibid.*, at 265. In the following section I shall refer to the extent to which this description is compatible with the social reality in Israel, and especially with the normative aspect of the pluralist arrangement.

156 Teubner, *supra* n.60, at 1460-1461.

Griffiths of the "scientific-factual" necessity for legal pluralism, because only through this paradigm is compatibility between the social reality and the legal system achieved.[157]

6. Renewed Examination of Justice Barak's Approach in the Light of the Unique Character of Legal Pluralism in Israel

This point allows us to tackle the issue of the existence of legal pluralism in Israel from the correct angle. Is the description of legal pluralism, as discussed above, compatible with Israeli reality?

The last point referred to legal pluralism as a necessary expression of compatibility between social reality and the law. As we have seen, a pluralist concept is compatible with the social structure in the sense that it enables self expression through the creation of "*nomos*" by any group which needs it. It is possible to employ the theoretical tools presented at the beginning of this article and argue that, in an ideal pluralist situation, the descriptive and the prescriptive levels conform to each other. The prescriptive level is supposed to express the descriptive level, and *vice versa*. Therefore, when the *prima facie* pluralist situation (i.e., the prescriptive level) does not properly reflect the true social reality (the descriptive level), the theoretical basis of the general arrangement is undermined. When there is no conformity between the internal need for the creation of a unique *nomic* identity, theoretically speaking, and the creation of a separate legal identity on the part of the state, the justification for pluralism in the prescriptive level is undermined. This, I argue, is the situation in Israel. In reality, a tremendous quantitative gap exists between the social group that seeks the creation of that *nomos*, on the one hand, and, on the other, the social group that is actually controlled — by virtue of the coercive state order — by the religious legal order.[158] A discrepancy also exists between the perception of

157 Griffiths, *supra* n.50, at 1, 4-5, 12, 38, and see the reference to this point: *supra* n.89. For a criticism of the scientific presumptuousness, see Tamanaha, *supra* n.61, at 198-199.

158 This gap has accompanied the issue from the first stages of the formation of the current arrangement. See, for example, M. Friedman, *Society and Religion* (2nd Edition, 1988), 116, 367-398. In addition to this incompatibility, there is also no full compatibility between the *nomos* which that social group, or social groups, seek to establish for themselves, and the mechanism which was created in order to cater for this need. The source of this incompatibility as well lies in the beginnings of the

reality on the part of the group that possesses the *nomos*, which continues to reflect the reality of a minority,[159] and the objective reality, in which the *nomos* of that group is *prima facie* adopted by the majority. The incompatibility that exists in Israeli reality between the descriptive and the prescriptive levels, which is created because individuals lack the freedom to choose their affiliation, results in the pluralist ideology becoming devoid of meaning in the context of Israeli law.

It is important to point out that the theory of pluralism is not emasculated by the grant of official validity to extra-state arrangements. This phenomenon, which in a way expresses the absence of separation between religion and state in Israel, also exists in other places, without this, *per se*, impairing the pluralist dimension of that system. According to the thesis I have put forward here, the fact that official validity is granted is of marginal importance, and, it will be recalled, is only one of many possibilities in the wide spectrum of approaches by the state to the other systems.[160] Pluralism was deprived of meaning by the coercive element that was added to this official recognition. The existence of choice for the individual is a cardinal condition for the crystallization of a pluralist reality. On the level of the individual, pluralism is intended to enhance freedom, to add possibilities of choice.[161] Coercing affiliation totally contradicts this.

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arrangement, in the attempt to organize the Chief Rabbinate as a religious leadership, institutionalized in a formal, bureaucratic manner, and forming part of an internal hierarchy. This attempt was in sharp contrast to the spontaneity involved in the creation of the religious leadership in Ashkenazi tradition in particular, and the practice in the "world of the *Torah*" in general. See Friedman, especially his comment, *ibid.* at 395: "The aspiration to force a religious leadership (in the full sense of the term, even though its jurisdiction emanates from the office), on the entire state, is bound to fail, *even if all the members of the state could be counted among the believers in the faith of Israel*" (emphasis supplied).

159 As is reflected, for example, in the comments made by Warhaftig, *supra* n.153.

160 See the discussion above, towards the end of section D.2.(2).

161 See, for example, the description of the future pluralist system which Arthurs raises for discussion at the end of his book (*supra* n.49, at 194), when the obvious premise is: "[I]ndividuals would be able to move from component to component, participate simultaneously in two or more components ..." See also Berman's description of Western law at its inception: Berman was of the opinion that Western law was characterized by pluralism, one of the most important implications of which for the individual was the enhancement of liberty and personal freedom, by reason

Three elements exist in the pluralist discourse: the individual, the community and the state. Legal pluralism, at least in the context which we have discussed here, is intended to promote the element of the community. It is intended to secure the continued existence of the authentic community. However, the community is comprised of individuals who belong to it. Coercing persons to become affiliated to the community impairs authenticity, and indeed even undermines it. In this way, it cuts the ground from under the ideological basis. The ideological basis is also impaired in another way. Promoting the communal element cannot be an exclusive consideration. The communal element, as stated above, is not isolated. Its promotion relies on the assumption that it is also compatible with the interests of the individuals who comprise the community. When this assumption does not materialize, the "dark side" of pluralism comes into play. The element of coercion which exists in the Israeli arrangement causes that dark side to be inherent in the system. The distortion created in the Israeli pluralism by the element of coercion causes the conflict between liberalism and pluralism to be retained in full force, in a constant manner, which cannot be ignored. Here, it is not possible to apply the same repressive approach which has been adopted elsewhere, so it seems, in relation to such a potential conflict.[162]

It seems that Justice Barak indeed sought to deal directly with this conflict. Perhaps, in his view, the prior judgments dodged the conflict and the need to decide it. The judgments in the *Bavli* case and in the *Lev* case were therefore intended to remove the lid from the distortion which exists in the Israeli reality, and expose the incompatibility of the guidelines which have so far steered the case law. Justice Barak believes that there is no justification for adopting a pluralist policy regarding one element, when another element in the puzzle does not meet the conditions of pluralism. However, another approach is also conceivable. Even if we recognize the distortion and the flaw in Israeli pluralism, our reaction does not have to be utter rejection of it and the promotion of the idea of exclusivity in its stead, as pursued by Justice Barak through the development of the theory of unity. A different reaction might strive to rectify the distortion and cause all the pieces of the puzzle to become compatible. The alternatives that were open to Justice Barak in the two judgments, and which were discussed in detail in the second part of this essay, could have furthered this line of thought. The

of the availability of a variety of choices: Berman, *supra* n.52, at 10, 269.

162 See above, section D.5.

doctrine of non-recognition still presents a similar possibility. However, this process is highly complex and also requires modifications to be made to all systems, in regard to which the judicial arm is restricted in its capabilities.

E. *Epilogue and Concluding Thoughts*

In this essay I have sought to illuminate an important aspect of the law in Israel, which, I believe, has still not received the treatment it deserves. This is the aspect of legal pluralism. Against the background of a positivist analysis of the two most important judgments delivered in the last decade in the area of family law and the relationship between the civil and the religious systems, I have pointed out the final crystallization of the uncompromising trend towards legal unity found in these two judgments, which contradicts the concept of legal pluralism. The concept of legal pluralism, I have argued, acknowledges the independent and autonomous existence of legal systems which function in parallel to the state legal system, and accordingly rejects any aspiration towards unity among the various systems. The significance of this lies in the takeover, in practice, by the state system, and suppression of the internal autonomy of the parallel systems. In trying to examine the nature of the legal system in Israel as a pluralist system, I also dealt with the paradigmatic duality (prescriptive and descriptive) of the pluralist discourse, comprehension of which is important for the issue of legal pluralism in Israel. Unearthing the basic motives underlying the trend towards legal unity led us to conduct a more thorough examination of the ideology which guides the concept of legal pluralism. At the end of this examination, a conclusion was reached as to the basic incompatibility which is inherent in the Israeli arrangement, an incompatibility which is almost capable of depriving the pluralist ideology of its meaning in the context of the Israeli system. The consideration of the two main judgments examined here, in the light of the discussion and its conclusions, demonstrated clearly and sharply their importance, power and implications for the system and for the possibilities of developing real legal pluralism in Israel. Our glimpse into some more recent accounts of legal pluralism showed both the relevance of the concept to the Israeli legal system, and the beginning of the development of a different perception of the relationship between the religious and the civil courts, which may indeed be more in harmony with the concept of legal pluralism.

It is obvious that this essay has not exhausted the discussion of legal

pluralism in Israel. The main aim in this essay was to open the discussion of legal pluralism in Israel, primarily within the area of family law. Another aim was to give a new dimension to the familiar criticism against forcing a religious legal and judicial system upon a society which, for the most part, is not willing to subject itself to the jurisdiction of religious law — a dimension which undermines the theoretical basis of an arrangement which seeks to be pluralist. This essay becomes, therefore, yet another layer in the argument against coercion.

5

THE REMEDY OF TEMPORARY SEPARATION BETWEEN A HUSBAND AND WIFE AND THE DEVELOPMENT OF THE CASE LAW OF THE RABBINICAL COURTS IN ISRAEL

by

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In addition to dealing with suits for restoration of domestic harmony on the one hand and divorce on the other, the Rabbinical Courts in Israel deal with suits for "separation".[1] These may be cases in which the husband and wife are living in the matrimonial home[2] in an absence of domestic harmony, and one of the parties asks the Rabbinical Court to obligate the other party to leave the premises and live separately; or the parties are in effect living separately, and one of them applies to the Court to prohibit the other from entering the matrimonial home; or one of the parties asks the Court to obligate the other to allow him/her to return home and the other party objects, demanding that the state of separation be maintained.

What are the halakhic foundations for the remedy of separation, and how is it dealt with in the Rabbinical Courts?

The remedy of separation that will be discussed below is not concerned with illegal marriages or certain prohibitions on sexual relations between a married couple (such as in the case of a woman who was unfaithful to her husband), in which the parties are ordered to divorce each other with a *get*,

* This article is based on a lecture delivered at the Sixth World Congress for Jewish Studies (August, 1973).

1 See also Dayanim (Fees) Regulations 1957 (*K.T.* 771, 1957, p.1580) which specify a fee for a "suit for separation" and a "separation judgment" (See Appendix, item a(3) & (4), and see also Dayanim (Fees) Regulations 1970 (*K.T.* 2551 1970, p.1515, 1516).

2 The term "matrimonial home" will be used throughout this article, even though it does not appear in the halakhic sources.