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# A FATHER'S CONSENT TO THE MARRIAGE OF HIS MINOR DAUGHTER: FEMINISM AND MULTICULTURALISM IN JEWISH LAW

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## I. INTRODUCTION

Marriage of minor daughters is a method of discrimination against women. Marriage of minor sons is rare, and marriage of minor daughters is much more frequent. Human rights organizations in various countries declare that they presently address the problem of the "marriage of minor daughters," since the victims of this practice are mostly women. Most women who are betrothed at a young age do not really consent to marriage. The marriage of minor daughters in conservative societies stems from a stereotypic outlook that a woman's place is in her home, and her main roles in life are childbearing and her contribution to the growth and education of her children. In addition, conservative societies use the marriage of minor daughters as an act of control. It is an attempt to control the sexuality of young females. Minor females are encouraged to marry at a young age, and sometimes marriage is imposed upon them in an attempt to create a safeguard against undesirable sexual relations performed outside the legitimate boundaries of marriage.<sup>1</sup>

Conservative societies do not encourage females to be active in matters outside of their traditional roles as mother and spouse. As a result, in these societies, the marriage of daughters at a young age is a common and

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<sup>1</sup> See S. Bolus, The Attempt of the Law in Israel to Address the Matter of Marriage of Minor Daughters, <http://www.acri.org.il/hebrew-acri/engine/story.asp?id=1439> (Hebrew).

desirable practice. In certain parts of the world, especially in Africa and Asia, many young daughters are married. Throughout the developing world, teenage marriages continue to prevail in many countries, in Africa and Asia in particular. In two-thirds of the Sub-Saharan African countries, at least one out of every four women aged fifteen to nineteen are married, and nearly sixty percent of twenty year-old women in these countries are married.<sup>2</sup> The practice of marriage of minor daughters is most common in Sub-Saharan Africa and South Asia, but it also occurs at high rates in parts of Latin America and the Caribbean.<sup>3</sup> In Asia, the Near East, and North Africa, the four conservative populations with the highest proportions married or in union by the age of twenty are India (Uttar Pradesh), Yemen, Indonesia, and Pakistan.<sup>4</sup> In India in 2005, there were approximately 100 million girls between the ages of ten and nineteen years old; more than half of whom were married by the time they reached the legal age of marriage, eighteen years.<sup>5</sup> Marriage of minor daughters is an accepted practice especially in families from lower socio-economic groups in society. In these families, there is a low probability that their daughters will benefit from higher education which will enable them to work in an academic profession and earn a decent income. Dominant members of these families tend to believe that the marriage of young daughters is preferable because the daughter's marriage puts an end to a financial burden imposed on the family.<sup>6</sup> In many parts of the world, the conservative outlook of the parents results in the practice of marriage of their daughters with the hopes that the marriage will benefit the family both financially and socially.<sup>7</sup>

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<sup>2</sup> THOMAS M. MCDEVITT ET AL., U.S. CENSUS BUREAU, TRENDS IN ADOLESCENT FERTILITY AND CONTRACEPTIVE USE IN THE DEVELOPING WORLD 27 (1996), available at [http://www.census.gov/ipc/prod/ipc95-1/ipc95\\_1g.pdf](http://www.census.gov/ipc/prod/ipc95-1/ipc95_1g.pdf).

<sup>3</sup> See THE INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, TOO YOUNG TO WED: EDUCATION & ACTION TOWARD ENDING CHILD MARRIAGE, CHILD MARRIAGE AND DOMESTIC VIOLENCE 2 (2005), available at [http://icrw.org/docs/2005\\_brief\\_childmarriage.pdf](http://icrw.org/docs/2005_brief_childmarriage.pdf) [hereinafter TOO YOUNG TO WED].

<sup>4</sup> See MCDEVITT, *supra* note 2.

<sup>5</sup> See Supriti Bezbaruah & Mandeep K. Janeja, UNFPA, ADOLESCENTS IN INDIA: A PROFILE 6, 10 (2000); Suneeta Krishnan, *Editorial: Adolescent Girls and Marriage Decision-Making in India: Questions of Competency, Choice and Consent*, INDIAN J. MED. ETHICS (Jan.–Mar. 2006), available at <http://www.issuesinmedicalethics.org/141ed004.html>.

<sup>6</sup> See EARLY MARRIAGE: CHILD SPOUSES, UNICEF, INNOCENTI DIGEST 6 (2001).

<sup>7</sup> See EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE—2005: A STATISTICAL EXPLORATION, UNICEF 1 (2005) [hereinafter EARLY MARRIAGE]. This statistical exploration stresses that the victims of the marriage of minors are especially women. “Young married girls are a unique [group].” *Id.* They are required to do heavy amounts of domestic work and are pressured to demonstrate fertility. *Id.* They are “responsible for raising children while they are still children themselves.” *Id.* “Married girls and child mothers face constrained decision-making and reduced life choices. Boys are also affected by child marriage, but the issue impacts girls in far larger numbers and with more intensity.” *Id.*

In actuality, however, child marriage is a violation of human rights, compromising the development of young girls and often resulting in early pregnancy, with little education and poor vocational training reinforcing the gendered nature of poverty.<sup>8</sup> Marriage at a young age goes hand in hand with curtailed education and economic opportunities, which perpetuate the gender inequalities in society.<sup>9</sup> The marriage of young females could also prevent the enhancement of the status of women in these societies as a result of increased risk of malnutrition, anemia, maternal and infant mortality, and high fertility.<sup>10</sup> In addition, child marriage can be a form of trafficking of girls.<sup>11</sup>

*Moe v. Dinkins*,<sup>12</sup> a New York federal district court case, addressed the right of a minor to marry. The court held that the requirement of parental consent as a prerequisite to the marriage of a minor was the outcome of the state's interest "in mature decision-making and in preventing unstable marriages."<sup>13</sup>

In the Indian family context, the court stated:

[A]dolescent girls are given few opportunities to make decisions, and social restrictions on mobility and limited education curtail their develop-

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<sup>8</sup> See *id.* In addition, women who married at younger ages were more likely to believe that it was a legitimate practice for a husband to beat his wife, and therefore, were more likely to experience domestic violence in their homes. See Robert Jesen & Rebecca Thornton, *Early Female Marriage in the Developing World*, in GENDER, DEVELOPMENT AND MARRIAGE 9, 14 (Caroline Sweetman ed., 2003); see also TOO YOUNG TO WED, *supra* note 3, at 3.

<sup>9</sup> See Krishnan, *supra* note 5; THE CENTER FOR DEVELOPMENT AND POPULATION ACTIVITIES, ADOLESCENT GIRLS IN INDIA CHOOSE A BETTER FUTURE: AN IMPACT ASSESSMENT 12 (2001); INTERNATIONAL INSTITUTE FOR POPULATION SCIENCES & ORC MACRO, NATIONAL FAMILY HEALTH SURVEY (NFHS-2) 1998-99 INDIA (2000).

<sup>10</sup> See John S. Santelli et al., *Guidelines for Adolescent Health Research: A Position Paper of the Society for Adolescent Medicine*, 17 J. ADOLESCENT HEALTH 270 (1995). For a discussion of socioeconomic educational attainment and other outcomes of marriage of young daughters, see Kristin A. Moore & Linda J. Waite, *Early Childbearing and Educational Attainment*, 9 FAM. PLAN. PERSP. 220, 222 (1977); J.J. Card, *Consequences of Adolescent Child Bearing for the Young Parent's Future Personal and Professional Life*, Final Report to NICHD, Contract # HD-62831 (1977); S.D. McLaughlin, *Consequences of Adolescent Childbearing for the Mother's Occupational Attainment*, Final Report to NICHD, Contract #N01-HD-62832 (1977); Kristin A. Moore, *Teenage Childbirth and Welfare Dependency*, 10 FAM. PLAN. PERSP. 233 (1978); Douglas M. & Teti, Michael E. Lamb, *Socioeconomic and Marital Outcomes of Adolescent Marriage, Adolescent Childbirth, and Their Co-Occurrence*, 51 J. MARRIAGE & FAM. 203 (1989).

<sup>11</sup> See Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U.J. GENDER SOC. POL'Y & L. 233, 266 [hereinafter *Behind the Wedding Veil*].

<sup>12</sup> 533 F. Supp. 623 (S.D.N.Y. 1981).

<sup>13</sup> See *id.* at 629 (discussing the limits of a minor to make decisions without proper guidance); see also Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger Than Sixteen and Criminalizes Parental Consent*, 37 ST. MARY'S L.J. 753, 777 (2006).

ment. However, girls also tend to take on a range of household responsibilities from an early age, gaining maturity through these experiences. Thus, we cannot assume that adolescent minor girls do not have decision-making capacity. . . . Researchers and care providers face serious ethical dilemmas related to choice, consent and competency when addressing the health needs of adolescent minors.<sup>14</sup>

Each society, culture, and religion has a unique “voice.”<sup>15</sup> The marriage of minor daughters could be an echo of the unique “voice” of a traditional society. Community customs regarding the appropriate age for marriage can exert a great deal of social pressure on parents to marry their daughters at a young age. In societies where the custom is to marry daughters as early as age nine or ten, a girl who is fifteen or sixteen may be considered by her society to be “past the marriageable age.”<sup>16</sup> Although these customs have existed for hundreds of years, it is possible to change entrenched attitudes and customs of a traditional and conservative society. However, sensitivity is essential.<sup>17</sup> Many times these attitudes and customs are justified from an internal religious perspective. The cultural and religious outlook of the population in each society is very important when internal or international norms of equality between males and females are implemented in each region. The insistence of Western countries upon a universal implementation of women’s rights in all regions of the world, without attending to the religious convictions of many individuals in other countries or cultures can be counterproductive.<sup>18</sup> Due respect to the values, culture, and religion of all individuals in the universe is very important if we wish to achieve real progress in all parts of the world.<sup>19</sup> It “is not a

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<sup>14</sup> See Krishnan, *supra* note 5.

<sup>15</sup> This “voice” was mentioned in feminist research. The “voice” of a woman is unique as its characteristics are not identical to those of a “voice” of a man. For example, in Carol Gilligan’s research on moral reasoning and development, she discovered two “voices” among her interview subjects. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 1 (1982). This “voice” could also be the “voice” of a culture, religion or tradition.

<sup>16</sup> See TOO YOUNG TO WED, *supra* note 3, at 3.

<sup>17</sup> See *Behind the Wedding Veil*, *supra* note 11, at 270.

<sup>18</sup> The insistence upon individual rights, of adults and children, without attending to the perspectives of others who might be involved, or sensitivity to their values, culture and religion, struck some of Gilligan’s interviewees as uncaring and selfish. See GILLIGAN, *supra* note 15, at 24–63. Indonesia Muslim groups opposed the marriage provisions of law the government drafted that departed from Islamic doctrine. As a result, a compromise was reached. The government agreed to delete from the draft all matters contrary to Islamic law. See Mark Cammak et al., *Legislating Social Change in an Islamic Society—Indonesia’s Marriage Law*, 44 AM. J. COMP. L. 45, 62 (1996).

<sup>19</sup> For a discussion of the disadvantages of a legal analysis that is dominated by one “voice,” that of the Anglo-American male, see KATHERINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 589–670 (2d ed. 1993).

power, something to which social events, behaviors, institutions, or processes can be casually attributed; it is a context.”<sup>20</sup>

Implementation of women’s rights in traditional and conservative societies and countries should be based upon the significance of religious laws and values in many of these societies and countries. Religious doctrine, ethics, and values guide many believers and are the basis of their ideology. Enhancement of universal adherence to internal or international law pertaining to women will be achieved through acts that can promote the legitimacy of current law in the religious population. This legitimacy, in a society of believers, can be achieved by tolerance of basic norms and sources of religious law that were originally patriarchal and reflect values of the society in the past. However, interpretation of ancient religious texts, in light of new values and ethics that are the foundations of modern law pertaining to gender, can enhance the universal implementation of international rights and norms prescribed for women. For example, the traditional practice of Sati in India, whereby a widow is pressured into immolating herself on her husband’s funeral pyre, has largely died out because of combined efforts. One of the major efforts was in the religious sphere through a new interpretation of religious law. Sati had been practiced for centuries and was justified by Hindu mythology, but its justification on religious foundations was emphatically refuted by reference to other sacred texts. This led to a decrease in the practice.<sup>21</sup>

Jews, Muslims, Christians, Hindus, and other believers, can and should join forces toward a common cultural and religious goal: enhancement of equality between men and women. Their new common agenda will be the motivating force which will lead to the interpretation of their respective laws through a modern perspective. This new outlook can enhance the universal implementation of internal and international rights and norms prescribed for women. Eventually, at the end of evolution of religious law, enactment by religious scholars can further enhance the implementation of this new agenda in religious societies and abolish the ancient patriarchal practices.

Believers can share the “internal” approach that some Muslim scholars have concerning the desirable relationship between law and religion in Muslim states. This approach stresses that the Muslim religious sources—such as the *Koran* and the *Sunnah*—can serve as a solid basis for the mod-

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<sup>20</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURE: SELECTED ESSAYS* 14 (1973).

<sup>21</sup> See Erika Sussman, Note, *Contending with Culture: An Analysis of the Genital Mutilation Act of 1996*, 31 CORNELL INT’L L.J. 193, 225–37 (1998); *Behind the Wedding Veil*, *supra* note 11, at 270.

ern concept of human rights in traditional segments of society.<sup>22</sup> Muslim scholars knew that for many Muslims, religious values were very important, and they preferred this “internal” path of interpretation of Muslim law over the “external” path, for example, the imposition of standards of rights and protections in international conventions without a new interpretation of ancient religious sources.<sup>23</sup>

The potential of the interpretation of religious law concerning the marriage of a minor daughter is evident in one conservative and traditional legal system: Jewish law. In this religious legal system, significant progress was achieved when the law was reinterpreted in an attempt to enhance the rights of the daughter. The development of this legal system in the sphere of marriage of minor daughters proves that women could benefit from the implementation of the “internal” approach, within the doctrines and discourse of religious law. Eventually, interpretation of the ancient Jewish patriarchal rules, which determined the law of marriage of a minor daughter, led to important progress and enhanced the status of women in Jewish law and society.

The new perspective was the final outcome of several stages of development of the Jewish law in this sphere. The interpreters of the Jewish law, especially in modern Jewish sources, gradually elevated the status of the Jewish daughter.<sup>24</sup> The ancient rules were interpreted in a manner that gradually enhanced, step by step, her autonomy. In the final stage of development of these rules, the status of the Jewish minor daughter improved significantly. Enactment of new Jewish rules and a new interpretation of the law in ancient sources bore good fruit. In some areas of the world, including Israel and the United States, Jewish religious scholars enacted new rules or reinterpreted the rules of Jewish law in light of a new agenda. They carefully investigated the circumstances of problematic cases of betrothal of minor daughters in an attempt to prevent the abuse of power by the father.

This Article highlights the four major stages of development of Jewish rules regarding the marriage of minor daughters. During the first stage, rules concerning the authority of the father were dominant; the father could betroth his minor daughter without her consent. In a later stage of the ancient period, however, some Jewish scholars in the *Talmud* held that, al-

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<sup>22</sup> See Maryam Elahi, *The Rights of the Child Under Islamic Law: Prohibitions of the Child Soldier*, 19 COLUM. HUM. RTS. L. REV. 259, 269–72 (1987–88) (noting the focus upon the protection prescribed for children in the classical sources of Islamic law).

<sup>23</sup> See *id.* at 261 n.10.

<sup>24</sup> See *infra* Part V.

though marriage by the father is valid, it is undesirable. They held that the father should enable his daughter to consent to the marriage when she is not a minor. In the third stage, during the medieval period, the rules became clear and well defined, but still some scholars took into consideration the special circumstances in their society and held that betrothal of the minor daughter by her father was desirable while some held it was undesirable. Finally, in the fourth stage, or the modern period, especially in recent generations, the status of women in Jewish law has become an important consideration in legal norms or verdicts of many Jewish legal scholars. Some Jewish legal scholars stressed, implicitly or explicitly, that the practice of betrothal of a minor Jewish daughter by her father should be abolished. The modern perspective of these Jewish legal scholars is important. De facto, the old rules are valid in many parts of the world. However, they were abolished in Israel, and it is evident that in other regions of the world such as the United States, many Jewish legal scholars will attempt to prevent the implementation of the traditional, ancient rules.

Values of Jewish law are a source of inspiration for many religious and traditional Jews in Israel and other parts of the world. For them, the new interpretation of Jewish law in the modern period is important. Creative interpretation of ancient law and enactment of a new rule resulted in a significant improvement of the status of Jewish women. The new interpretation of ancient Jewish texts and the new legal rules enables the enhancement of rights prescribed for women under current Jewish law.

This new trend coincides with the new perspective in Jewish thought—love for “all creatures [and] human beings.”<sup>25</sup> This perspective is very important and could be translated also into a new legal agenda in all aspects of the relationship between a Jewish father and his daughter. A father who loves his daughter wants to enhance her welfare in all spheres.

The method of creative interpretation in Jewish law and enactment of a new rule in Israel can be a model for other countries that are in a similar situation; a complex political, religious, and ethnic reality that requires a sensitive legal policy of legislators and courts and takes into consideration religious feelings and traditional ideology. The same interpretive policy or enactment of new rules can enhance adherence by many believers in the world to internal or international norms prescribed for women. All women can benefit from a creative interpretation of religious law. The welfare of all women can be promoted by a new interpretation and constant reevaluation of religious law.

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<sup>25</sup> See *infra* note 335.

A similar dilemma concerning an effective approach which can enhance the status of a minor daughter in a traditional society is presented implicitly or explicitly in Islamic legal research. The traditional policy concerning marriage of a minor in Islam was as follows:

Although Qur'an 4:6 recommends that the desired age at marriage is the age of maturity of mind (*rushd*), the majority of jurists did not hold such a view. According to Hanafi doctrine, eligibility for marriage comes with the beginning of sexual maturity (*bulugh*), the minimum ages of which are nine years for girls and twelve for boys. But the conclusion of a valid marriage contract with a minor (who is sexually immature) or between minors is allowed, even if the child in question is an infant. Such a marriage, however, must not be consummated until the minor is physically able to engage in sexual intercourse. This theoretical framework reflects the social practice of Muslim society during the crystallizing period of Islamic law . . . . Once established, these legal norms contributed to the subsequent consolidation and perpetuation of such social practices.

Islamic legal doctrine opened the way for marriages which, according to modern Western standards, would be classified as "child marriages." Such marriages, especially those involving minor girls, were, and partially still are, encouraged by social considerations. . . . [T]he younger the children are the easier it is for their families to compel them to marry the candidates chosen for them. By marrying a minor girl, her father is relieved of the economic burden of supporting her and of the need to protect her from engaging in pre-marital relations. According to a common belief, the marriage of a young girl prolongs her marital life and increases the number of her potential offspring. . . .<sup>26</sup>

Marriage between minors often caused physical and mental injuries both to a young wife and to her babies and, as a result of the immaturity of the couple, jeopardized their chance of establishing a stable marriage. . . . "[W]omen demanded the raising of the age of marriage on the ground that the marriage of a minor girl deprives her chances of receiving a proper education and developing her professional career."<sup>27</sup>

<sup>26</sup> See JUDITH E. TUCKER, *WOMEN IN NINETEENTH CENTURY EGYPT* 53 (1985); Adel Azer, *Law as an Instrument for Social Change: An Illustration from Population Policy*, in *LAW AND SOCIAL CHANGE IN CONTEMPORARY EGYPT* 66–68 (1979); G. BAER, *POPULATION AND SOCIETY IN THE ARAB EAST* 61–62, 64 (1964); ANDREA B. RUGH, *FAMILY IN CONTEMPORARY EGYPT* 107–47 (1984).

<sup>27</sup> Ron Shahan, *Custom, Islamic Law, and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Shari'a Courts*, 2 *ISLAMIC L. & SOC'Y* 258, 261–63 (1995). For supporting information on the consummation of marriage involving a minor, see REUBEN LEVY, *THE SOCIAL STRUCTURE OF ISLAM* 106–07 (1962); G. BAER, *supra* note 26, at 54; see also Nkoyo Toyo, *Revisiting Equality as a Right: the Minimum Age of Marriage Clause in the Nigerian Child Rights Act, 2003*, 7 *THIRD WORLD Q.* 1299 (2006) (taking the Minimum Age Marriage clause of the Nigerian Child Rights Act (CRA) as an entry point through which the politics of women's rights in Nigeria are ana-



The “internal” approach, within the religious law, can enhance the status of the modern Muslim women. Interpretation of ancient law and enactment of new law are practical methods which can fulfill the desires of many Muslim women. The “internal” solution to the problem of the marriage of minor daughters is also useful for those who wish to ameliorate the plight of daughters in Islamic groups in Western or in Muslim states and other religious women in traditional societies.

The “internal” interpretation of religious law is also a legal method which can promote adherence to international norms pertaining to the marriage of the minor daughter. “The right to ‘free and full’ consent to a marriage is recognized in the Universal Declaration of Human rights—with the recognition that consent cannot be ‘free and full’ when one of the parties involved is not sufficiently mature to make an informed decision about a life partner.”<sup>28</sup> Article 16(1) of the Universal Declaration of Human Rights of 1948 states, “Men and Women of *full age*, without any *limitation* due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution” (emphasis added).<sup>29</sup> Article 23 of the International Covenant on Civil and Political Rights of 1966 includes the words “men and women of marriageable age.”<sup>30</sup> Article 6(3) of the Declaration on the Elimination of all Forms of Discrimination Against Women states, “Child marriage and betrothal of young girls before puberty shall be prohibited, and effective action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”<sup>31</sup> Article 16 of the Convention on the Elimination of all Forms of Discrimination against Women of 1979 mentions the right to pro-

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lyzed). Toyo mentions a reform within Islamic law and quotes the statement of Bilikisu Yusuf, the Amira of Fomwan: “The various Islamic groups should organize seminars, workshop etc to educate the people so that they know their rights and are capable of analyzing issues and making balanced judgment on Shar’ia [Islamic law] . . . to build awareness of Muslim women on their rights under the Shar’ia.” For supporting information that marriage of a young girl prolongs her marital life and increases the number of potential offspring, see *supra* note 26. For supporting information on the impact of marriage on a minor girl’s education and professional career, see BETH BARON, *THE WOMEN’S AWAKENING IN EGYPT: CULTURE, SOCIETY, AND THE PRESS* 33, 163–65 (1994); Elizabeth H. White, *Legal Reform as an Indicator of Women’s Status in Muslim Nations*, in *WOMEN IN THE MUSLIM WORLD* 54 (Lois Beck & Nikki Keddie eds., 1978); L. Carroll, *Marriage Guardianship and Minor’s Marriage at Islamic Law*, 7 *ISLAMIC & COMP. L.Q.* 279, 292 (1987).

<sup>28</sup> See EARLY MARRIAGE, *supra* note 7.

<sup>29</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, cl. 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (emphasis added).

<sup>30</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 23 (Mar. 23, 1976).

<sup>31</sup> Declaration on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 2236, art. 6, cl. 3 (Nov. 7, 1967).

tection from child marriage. It states, “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage . . . .”<sup>32</sup> The United Nations adopted the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.<sup>33</sup> The United Nations Convention on the Rights of the Child of 1989 attempts to grant children autonomy and rights,<sup>34</sup> including the right of the minor to participate in the decision-making process concerning his or her marriage. While marriage of children is not mentioned explicitly in this convention, “child marriage is linked to other rights—such as the right of children to express their views freely, their right to protection from all forms of abuse, and their right to be protected from harmful traditional practices. It is also frequently addressed by the Committee on the Rights of the Child.”<sup>35</sup>

The scholar Abdullahi Ahmed An-Náim’s outlook concerning coexistence between current international norms and religious law could guide the interpreters of Islamic religious law and other religious legal systems. The new interpretation, proposed by Professor An-Náim, will have to be undertaken in a sensitive, legitimate manner, and time will be required for its acceptance and implementation by the population at large.<sup>36</sup> Normative universality in human rights should not be taken for granted. “Sensitivity to the impact of contextual factors and cultural considerations” on the international norms of human rights is essential.<sup>37</sup> Professor An-Náim argued that normative universality in human rights should not be achieved through “the ‘universalization’ of the norms and institutions of dominant cultures, whether at the local, regional or international levels.”<sup>38</sup> He also

<sup>32</sup> Convention on the Elimination of All Forms of Discrimination Against Women, art. 16, cl. 2, July 17, 1980, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

<sup>33</sup> See Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 232, available at <http://www.unhchr.ch/html/menu3/b/63.htm>.

<sup>34</sup> See Yehiel S. Kaplan, *The Right of the Minor in Israel to Participate in the Decision-Making Process Concerning His or Her Medical Treatment*, 25 *FORDHAM INT’L L.J.* 1085, 1103–04 (2002).

<sup>35</sup> See EARLY MARRIAGE, *supra* note 7.

<sup>36</sup> See *id.* at 17.

<sup>37</sup> See Abdullahi An-Náim, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, 8 *INT’L J.L. & FAM.* 62 (1994): “There are also bound to be significant differences between perceptions of how to raise children to uphold and live by which values, depending on the worldview and religious beliefs of parents, or the cultural norms of their societies. What would be important for Muslim parents to instill in their children is likely to differ in some significant ways from that of Buddhist, Hindu or agnostic parents. Within each religious or cultural group, economic, educational and other differentials will probably influence parents’ objectives and expectations . . . .” *Id.* at 66.

<sup>38</sup> See *id.* at 62, 69.

[T]he most effective strategy is to promote change through the transformation of *existing folk models* rather than seeking to challenge and replace them immediately. This strategy is successfully applied, for example, by Islamist groups in several Islamic countries today. . . . [T]he Islamists are, in my view, actually seeking to transform the beliefs and practices of their

stressed that “Islam, like any religious tradition, can be used to support human rights, democracy, and respect among different communities . . . . There is no inherent or inevitable ‘clash of civilizations’; all depends on the choices we all make, everywhere, Muslims and non-Muslims alike.”<sup>39</sup>

Professor An-Náim explained that religious practices and theology change constantly in all societies. Therefore, those who wish to enhance human rights in a Muslim society should use the method of dialogue with religious Muslims and focus on the aspects of religious practice and theology that can assist those in this society who wish to adhere to international principles of children’s rights.<sup>40</sup> Hence, those who enact new international human rights standards should attempt to create new standards that coincide with religious law, including the law of Islamic countries.<sup>41</sup>

## II. FEMINISM AND MULTICULTURALISM

Multiculturalism is common in many democratic liberal societies today. Individuals from different ethnic, racial, and religious groups presently reside in these societies, side by side. The ideologies, outlooks, values, and religions of members of different groups are not identical. Sometimes states or courts must balance between different, and at times contrasting, interests and values of these groups in society. Those who grant due respect to multiculturalism wish to secure recognition and representation of the variety of interests and values of all ethnic, racial, and religious groups in society.<sup>42</sup>

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constituencies in this process, that objective is skillfully hidden in the rhetoric of “continuity of tradition” and “return to the Golden Past”. In contrast, the liberal intellectuals of Islamic societies appear to be, or are presented as, challenging the folk models of their societies and seeking to replace them by alien concepts and norms.

*Id.*

<sup>39</sup> Abdullahi An-Náim, *Act Now: Islam and Human Rights*, 18 *TIKKUN* 47, 48 (2003).

<sup>40</sup> See Abdullahi A. An-Náim et al., *Cultural Transformations and Human Rights in Africa: A Preliminary Report*, 11 *EMORY INT’L L. REV.* 287, 291 (1997).

<sup>41</sup> See A. K. Brohi, *The Nature of Islamic Law and the Concept of Human Rights*, in *HUMAN RIGHTS IN ISLAM*, 43–60 (International Commission of Jurists ed., 1982); Maqbul Ilahi Malik, *The Concept of Human Rights in Islamic Jurisprudence*, 3 *HUM. RTS. Q.* 56 (1981).

<sup>42</sup> See AMY GUTMANN, Introduction to CHARLES TAYLOR, *MULTICULTURALISM AND “THE POLITICS OF RECOGNITION”* 3 (Amy Gutmann ed., 1992); see also Isaak Dore & Michael T. Carper, *Multiculturalism, Pluralism, and Pragmatism: Political Gridlock or Philosophical Impasse?*, 10 *WILLAMETTE J. INT’L L. & DISP. RESOL.* 71, 73 (2002). Regarding the value of preserving the culture of different groups, see also Martha Minow & Elisabeth V. Spelman, *In Context*, in *PRAGMATISM IN LAW AND SOCIETY* 247 (Michael Brint & William Weaver eds., 1991); Rosemary F. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 266 (D. Danielsen & K. Engle eds., 1994).

Society should protect minority groups, especially when they have special cultural or religious values. The majority should not silence the voice of the minority. But should controversial values be safeguarded? They should be safeguarded because accepting multiculturalism is fundamental in societies that attempt to accomplish the basic goal of the liberal democratic society: equal recognition and representation for all members of society. Presently, this mission has not been fully accomplished because in many liberal democratic societies there are some groups with special values. They are not the mainstream in these societies and suffer from misrepresentation or lack of representation. The goal of proponents of democratic liberal societies should be the elimination of all forms of inequality. We can achieve this goal by recognizing the unique values and ideologies of all groups.<sup>43</sup> The liberal point of view requires that all cultural groups in society will be granted equal legitimacy and should all be treated with due respect and tolerance.<sup>44</sup> We should grant each cultural group in society an equal opportunity to determine its own aspirations, customs, and values, based on its ideology. A cultural group should be able to express itself without unnecessary constraints or deprivation.<sup>45</sup>

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<sup>43</sup> See Dore & Carper, *supra* note 42, at 78. Some scholars reject the opinion discussed earlier regarding tolerance and respect for the values of different cultures. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 313 (1996). Bork questions the status granted to multiculturalism in society and law in the United States. *Id.* In his opinion, this status might cause a split within American society. *Id.* In addition, it could result in the devaluation of the central cultural values of the society in the United States. *Id.* He also expressed concern that another outcome could be the evolution of the culture of the American nation toward the undesirable characteristics of the Barbarian society. *Id.*

<sup>44</sup> STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 60–63 (1999). The author makes a distinction between two forms of multiculturalism: boutique multiculturalism and strong multiculturalism. *Id.* The first form is characterized by a sympathetic yet superficial approach towards the culture of others. *Id.* at 60. This is the multiculturalism of “boutiques,” which welcomes ethnic food of different groups in the population. *Id.* at 62. On the superficial level, it declares that it accepts the culture of others. *Id.* However, when the values or conducts of others contradict the values of the individual that claims he adheres to this form of multiculturalism, he rejects them. *Id.* Boutique multiculturalism is based upon the assumption that values of cultures of others should not be accepted when such acceptance conflicts with the values of the cultural group of those adhering to this form of multiculturalism. *Id.* In these circumstances, the beliefs and convictions of those adhering to boutique multiculturalism are superior. *Id.* The other form of multiculturalism is based upon a commitment to promote special characteristics of the culture values and customs of others, in an attempt to prevent discrimination between cultures. *Id.* at 61. However, Fish stresses that this form of multiculturalism is also not absolute. *Id.* at 62. Respect and tolerance towards the values of an intolerant culture, such as fundamentalist Islam, are problematic. *Id.* The adherent to this form of multiculturalism could probably choose the intolerant approach to the outlook of the fundamentalists in Islam on behalf of a universal perception regarding desirable values of a culture. However, when he desires to act in this manner, his policy is actually not strong multiculturalism but boutique multiculturalism.

<sup>45</sup> See Dore & Carper, *supra* note 42, at 78.

The difficulty in the process of implementing this outlook of multiculturalism arises whenever cultural claims and cultural values of different groups contradict one another. Sometimes the liberal democratic society wishes to protect the values and ideology of a conservative group or society because of its liberal humanistic outlook. However, these values and ideology may be contradictory to those of the liberal Western society.<sup>46</sup> There may be a significant tension between the desire to enhance tolerance and equal treatment of women and the perspective of multiculturalism—one that respects and tolerates the practices and ideology of all groups in society, including more traditional and religious groups, which may adhere to traditional patterns of control and authority over women.<sup>47</sup>

What is the optimal approach for those who strive to promote values of feminism in a multicultural society? What should be the desirable policy of a liberal democratic society when some ethnic groups, religious groups, or segments of society preserve or promote patriarchal power structures? Proponents of protecting multiculturalism have suggested several formulas for balancing multiculturalism and feminism. Some have held that there should be more emphasis on multiculturalism. Their commitment to multiculturalism led to their conclusion that some aspirations of the feminist movement are impossible when feminism and multiculturalism clash.<sup>48</sup>

A second solution to this dilemma is based upon the assumption that sometimes protection should be granted to cultures that treat men and women unequally, including those who preserve biased legal arrangements regarding the relationships between men and women. However, this protection should be granted to these cultures only when they are at risk of extinction.<sup>49</sup>

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<sup>46</sup> See Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 340–41 (2000–2001) [hereinafter Halperin-Kaddari, *Women*].

<sup>47</sup> See Michael Walzer, ON TOLERATION 65 (1997); see also Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism? Civil Marriage in Lebanon*, 14 YALE J.L. & FEMINISM 177, 199 (2002).

<sup>48</sup> See, e.g., Chandran Kukathas, *Is Feminism Bad for Multiculturalism?*, 15 PUB. AFF. Q. 83 (2001); Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 127 (1992); Chandran Kukathas, *Cultural Toleration*, in ETHNICITY AND GROUP RIGHTS 69, 69–104 (Ian Shapiro & Will Kymlicka eds., 1997). Kukathas held that the state should demonstrate tolerance towards a variety of cultures, despite the fact that an outcome of this policy could be tolerance towards patriarchal patterns of behavior. *Id.* at 97–99.

<sup>49</sup> See Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491 (1994). Margalit and Halbertal's position in this matter is opposed to that of scholars who supported the opinion that cultures that deny the principle of gender equality should be replaced by equal societies. *Id.* Nevertheless, some of these scholars were realistic, softened their position and supported a more moderate approach—acting in the inside—that would achieve the desirable change in the field of equality between men and women without the replacement of the ancient society. See Susan Moller

A third approach suggests it is possible and appropriate to promote both the aforementioned approaches at the same time. A reasonable balance between multiculturalism and feminism in each case is the desirable outcome.<sup>50</sup>

Scholars attempt to achieve the proper balance by asking: what is the desirable relationship between multiculturalism and feminism? Was there a sincere attempt to grant due weight to feminism and to multiculturalism? These scholars should consider that another approach might enhance and promote the desirable balance between multiculturalism and feminism. For example, they might stress that an active-dynamic internal solution within the framework of the evolution of the relevant religions may be productive. The adherents of feminism should initiate a dialogue with the spiritual leaders of cultural groups that preserve patriarchal rules and traditional practices regarding the female, in an attempt to convince them that they could and should interpret their religious law in a manner that will enhance the best interests of women.

Susan M. Okin did not adopt these suggestions because she argued they granted too much weight to multiculturalism. She believes that the ideology of the feminist movement should be important and dominant in cases of conflict between multiculturalism and feminism. Feminism is the paramount outlook coinciding with universal values, which promote respect and equality for all individuals, including women. Multiculturalism is inferior in this respect, since it preserves patriarchal principles and conduct.<sup>51</sup> Nevertheless, she argues that we can justify the protection of certain aspects of the minority culture, such as its language, and should attempt to be empathetic when cultural groups implement legitimate cultural practices and rules that are different from those of the majority culture.<sup>52</sup>

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Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 1, 9 (Joshua Cohen et al. eds., 1999).

<sup>50</sup> See Will Kymlicka, *Comments on Shachar and Spinner-Halev: An Update on the Multiculturalism Wars*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 31, 31–34 (Joshua Cohen et al. eds., 1999). Kymlicka adheres to a proper balance between different, colliding values and rights, including a possible conflict between multiculturalism and human rights. In his opinion, there are limitations imposed upon cultural rights of those who belong to minority groups, as a result of the relevance of principles such as freedom, democracy, and social justice. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 75–76 (1995).

<sup>51</sup> See Okin, *supra* note 49, at 9.

<sup>52</sup> See *id.* at 18, 23. In Okin's opinion, the liberal approach which leads to the justifications of multiculturalism should be balanced with the fear that support of multiculturalism means support of patriarchy and damage to women. Okin's basic position is shared by Leti Volpp, a feminist scholar, who believes that as a matter of principle, feminism should be the paramount consideration, which is more important than multiculturalism, when we cannot resolve the conflict between feminism and the cultural principles of certain groups of immigrants to the United States. In these groups, customs such

The approach of Ruth Halperin-Kaddari is similar to that of Okin. She contends that the fact that women choose to belong to a group that implements unequal and oppressive norms towards them does not justify their oppression and discrimination. Yet, she shares Okin's opinion that an effort should be made to promote the status of women in their group through a creative use of the group norms, including the interpretation of its rules.<sup>53</sup> Okin and Halperin-Kaddari grant more weight to feminism but do not choose the approach of direct confrontation with the traditional and religious groups and their norms. They are realistic and do not want to endanger the positive results for the feminist movement of internal activity of women who wish to belong to these groups. They grant significant weight to feminism, but they avoid the external path—a total attack on traditional groups and their patriarchal rules and practices. Their goal is an optimal solution for women who choose to belong to these groups.<sup>54</sup>

The tension between multiculturalism and feminism, as mentioned above, was presented in a manner which is relevant to many liberal democratic countries. However, there is a significant distinction between the analysis of the relationship between multiculturalism and feminism in Israel and the analysis of this issue in other countries, such as the United States and Canada. In the latter countries, the main problem consists of the patriarchal practices of minority populations. Taking multiculturalism seriously, the state should grant protection to the minority culture. The culture of the majority should not suppress or extinguish that of the minority. The legal situation is different in the state of Israel.<sup>55</sup> Recognized religious sects and their religious courts were granted sole or parallel jurisdiction in the law of the state of Israel in matters of personal status. In certain matters, such as the marriage and divorce of Jews, an exclusive jurisdiction had been granted to Jewish religious courts—the rabbinical courts. The relevant principles of Jewish law are applied in these courts and interpreted by a traditional group: the religious judges (*dayanim*) in these courts—who are trained in religious orthodox institutions and share a conservative approach

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as marriage of young girls are commonly an outcome of unequal power relations between men and women. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE L.J. & HUMAN. 89, 105 (2000); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1616 (1996).

<sup>53</sup> See Halperin-Kaddari, *Women*, *supra* note 46, at 342.

<sup>54</sup> Such "external" direct attack could result in the adoption of strict uncompromising policies in the religious community that resists what it conceives as "coercion" from the outside. The result of the adoption of these policies might be stronger opposition in the religious community to new interpretation of religious law in light of contemporary ideology of equality between male and female in modern society.

<sup>55</sup> See Halperin-Kaddari, *Women*, *supra* note 46, at 342.

to the boundaries of legitimate interpretation of Jewish law. Consequently, the process of balancing between multiculturalism and feminism in Israel should be different from that of balancing them in nations such as the United States and Canada. Indeed, the religious customs and practices of Orthodox Jews in Israel are those of a minority culture, but the culture of this group is not at risk of extinction. On the contrary, these Jews are granted enforceable legal power in rabbinical courts. These courts can coerce individuals from the minority and the majority to adhere to principles of Jewish law that are sometimes patriarchal. The state of Israel granted a conservative minority group the power to implement its ideology in one of the more significant areas of family law—marriage and divorce of Jews. Sometimes this power is granted to this group in other matters of personal status, such as custody and guardianship of children. In this regard, the majority population in Israel could be subjected to the ideology and legal practices of the minority. According to liberal ideology, this policy is controversial. It could potentially violate human rights, which are granted to all individuals living in the country. Some claim that this is unacceptable for those adhering to the liberal standpoint of the majority of Jews in Israel that do not belong to the religious group. Their conservative ideology cannot justify the price many Jews in Israel pay in the domain of human rights and liberal values in many spheres, including inequality between the sexes.<sup>56</sup>

The Israeli legislature chose to grant the status of binding rules to the religious principles of Jewish law of the minority and reaffirmed this legal practice of giving the rabbinical Jewish religious courts exclusive jurisdiction over the marriage and divorce of Jews in Israel by renewing its validity. In 1992, the Israeli House of Representatives—the *Knesset*—enacted two important constitutional laws: (1) Basic Law: Human Dignity and Freedom; and (2) Basic Law: Freedom of Occupation.<sup>57</sup> These laws preserved all the rules of laws enacted in the past, including rules that adopt, implicitly or explicitly, unequal religious law that sometimes discriminates against women. In addition, Israel's current political reality makes it unlikely that any attempt in the Israel House of Representatives—the *Knes-*

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<sup>56</sup> See Ruth Halperin-Kaddari, *Legal Pluralism in Israel and the Rabbinical Courts in Israel After the Court Verdicts of Bavli and Lev*, 20 TEL AVIV U. L. REV. 683, 745 (1997) (Hebrew); Ruth Halperin-Kaddari, *More on Legal Pluralism in Israel*, 23 TEL AVIV U. L. REV. 559, 567 (2000) (Hebrew); Leora Bilski, *Cultural Import: The Case of Feminism in Israel*, 25 TEL AVIV U. L. REV. 523, 561–62 (2002) (Hebrew).

<sup>57</sup> See Basic Law Human Dignity and Liberty (Mar. 17, 1992) (Isr.), available at <http://www.Israel.org/mfa/go.asp?MFAH00hi0>. See also Basic Law: Freedom of Occupation (Mar. 9, 1992) (Isr.), available at [26 http://www.Israel.org/mfa/go.asp?MFAH00hj0](http://www.Israel.org/mfa/go.asp?MFAH00hj0).



set—to enact new rules that will change the aforementioned foundations of family law in Israel will be successful.

Some religious Jews in Israel are feminists and claim that the implementation of the principles of Jewish law, which are not always egalitarian,<sup>58</sup> in rabbinical courts, is problematic from a feminist perspective because it results in the application of unequal rules regulating the relationship between men and women in Israel in various matters within the jurisdiction of these courts.<sup>59</sup>

In Israel's unique reality, what is the proper balance between multiculturalism and feminism? An interpretation of Jewish law that takes into consideration the special needs and aspirations of women is the more realistic alternative. The outcome of this interpretation could be an elevated legal status of Jewish women in Israel in matters that are within the jurisdiction of the rabbinical courts. It is not surprising that feminist religious scholars in Israel prefer the "internal" method—within the religious constraints of Orthodox Judaism. These scholars believe that this method can produce a desirable and effective result for those wishing to enhance the power and rights of Jewish women in rabbinical courts.<sup>60</sup>

Religious feminists, such as Israel's Jewish Orthodox women, prefer the "internal" solution because it coincides with their religious beliefs. The radical "external" approach attempts to uproot structures of power in society, religion, and culture and challenges the foundations, morals, and principles of the religious establishment and religious ideology. Religious women prefer an effort that bridges and compromises feminism and religion as much as possible. These women, including religious Jewish feminists, are aware of the fact that their mission is problematic at present. They encounter the difficulty resulting from their double fidelity in the commitment to a life of faith on the one hand, and their loyalty to humanistic values of liberty and equality on the other hand.<sup>61</sup> A religious feminist in Israel stated that Jewish religious feminist women today are faced with the following dilemma: from the feminist viewpoint, is it possible that the *Torah*-Biblical Jewish law, which displays eternal truth according to a Jew-

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<sup>58</sup> See Halperin-Kaddari, *Women*, *supra* note 46, at 352.

<sup>59</sup> See *id.* at 348–52. In the author's opinion, the division of areas of activity and roles between men and women, which is an outcome of the patriarchal family structure, is reinforced in the Israeli legal system as a result of the legal status granted to the principles of Jewish law regarding marriage and divorce. See also Halperin-Kaddari, *More on Legal Pluralism in Israel*, *supra* note 56, at 567–71. The author discusses the "dark side" of legal pluralism, the side which portrays the inherent confrontation between liberalism and pluralism.

<sup>60</sup> See Halperin-Kaddari, *Women*, *supra* note 46 at 344–45, 365.

<sup>61</sup> See Hanna Kehat, *Breaking the Patriarchal Circle*, 22 PANIM 23, 28 (2002).

ish religious perspective, lacks the egalitarian perception and the values that feminist women cherish so much today?<sup>62</sup> The religious convictions of these women lead them to conclude that it is unacceptable to regard the *Torah* as old and irrelevant to women at present. These women are believers and are committed to an ideology that the *Torah* is the eternal truth.<sup>63</sup>

Performing an “internal” act within a religious society can lead to a change that will be accepted by both the religious establishment and religious feminists. We can derive this conclusion from the struggle that led to the granting of the status of *Toa’anut rabaniyot* to women in Israel. *Toa’anut rabaniyot* are Jewish Orthodox women who are capable of implementing their knowledge of the principles of Jewish law when they represent their clients—often women—in legal proceedings in the rabbinical courts in Israel.<sup>64</sup> Originally, only men could represent clients in legal proceedings in these courts. When women wished to enter this profession and receive authorization to represent clients in the rabbinical courts, they encountered strong opposition from parts of the religious Jewish community in Israel including some religious judges—the *dayanim*.<sup>65</sup> Consequently, women had to overcome various obstacles. For instance, the scope of the requirements was expanded and the level of difficulty of the exams was heightened when women wished to obtain a license to represent clients in rabbinical courts; women preparing for these exams were not given proper information regarding the material they were required to study.<sup>66</sup> Many *Toanim Rabaniyim*—men who represent clients in rabbinical courts—refused to accept women as interns, and therefore women could not acquire the necessary experience.<sup>67</sup> Some of the rabbinical court judges—the *dayanim*—prohibited women from sitting in as spectators.<sup>68</sup> This meant women could not sufficiently learn about the practical aspects of litigation procedure and evidence that they could implement when they represented clients in the courtroom.<sup>69</sup> Nevertheless, women were successful in their

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<sup>62</sup> See Rivkah Lubitz, *The Pain of Tzlophhad’s Daughters*, 22 PANIM 129, 133 (2002) (Hebrew).

<sup>63</sup> See *id.* at 134.

<sup>64</sup> See Ronen Shamir, Michal Shtrai & Nelly Elias, *Mission, Feminism, and Professionalism: The Case and Cause of Women Rabbinical Advocates*, 38 MEGAMOT 313, 328–29 (1997); see also Halperin-Kaddari, *Women*, *supra* note 46, at 354–56; Bilski, *supra* note 56, at 561–62 (concerning the struggle of the *Toa’anut rabaniyot* for recognition of their status as a feminist struggle).

<sup>65</sup> See sources cited *supra* note 64.

<sup>66</sup> See sources cited *supra* note 64.

<sup>67</sup> See sources cited *supra* note 64.

<sup>68</sup> See sources cited *supra* note 64.

<sup>69</sup> See sources cited *supra* note 64.

struggle and eventually received the accreditation to be *Toa'anut rabaniyot*.<sup>70</sup>

This is perceived by some scholars as a feminist achievement within the “internal” boundaries set by the Jewish religious establishment. *Toa'anut rabaniyot*, women who are dedicated to their religious conviction, did not wish to undermine the religious system of the rabbinical courts. They had to operate within the limitations set by the religion and the religious establishment, and since this establishment is sometimes hostile to the feminist movement, they sometimes had to publicly claim they were not part of this movement.<sup>71</sup> In addition, they emphasized the fact that they were dedicated to a religious ideology and lifestyle.<sup>72</sup> However, their accreditation and work on behalf of women in the rabbinical courts is de facto a feminist achievement.

The rest of the world follows a similar pattern. The difficulty of Orthodox Jewish women, who wish to combine their personal outlook, that women should promote their own status in society and law as much as possible, with their religious perception, is not a unique Jewish phenomenon.

This aspiration to enhance women's rights in a traditional religious society is also evident in the writings of some Muslim women. Certain rules of Islamic law and the practices of Islamic society reflect that in several domains, the status of Muslim women is inferior. The Muslim man is in a superior position in a patriarchal society.<sup>73</sup> Therefore, it is sometimes difficult to implement a policy of compromise between feminism and Islamic ideology because it is not a simple task to convince Muslim spiritual leaders that they can and should interpret Islamic law in an attempt to enhance the status of the Muslim women. Members of fundamentalist Islam will reject “external” influences, but moderate forces within Islam may welcome an attempt to interpret Islamic law in a manner that will produce a common denominator between the feminist Western outlook and the religious perspective of Muslim law.<sup>74</sup>

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<sup>70</sup> See sources cited *supra* note 64.

<sup>71</sup> See Shamir, *supra* note 64, at 331.

<sup>72</sup> *Id.*

<sup>73</sup> See Adrian Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L. J. 149, 157–61 (1994).

<sup>74</sup> See generally Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13 (1990) [hereinafter Na'im, *Preliminary Inquiry*]; Sajeda Amin & Sara Hossain, *Religious and Cultural Rights: Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319 (1995); Aziza Al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L. L. & POL'Y 1 (1997).

Some claimed that the international standards concerning the status of women in law and society, which were adopted by the international community as a response to the initiative of Western states, contradict the basic principles of Islam, and therefore the effort to promote these standards should be conceived as an imperialistic anti-Islamic attempt to subject the Islamic society to foreign attitudes. These scholars held that judging an Islamic lifestyle through a Western prism is actually a control mechanism used by the world's powerful groups in the developed countries.<sup>75</sup> These groups oppress and suppress the traditional ideology of the Islamic countries and use their power in an attempt to silence the voice of the weaker segments of society in the world. Many Islamic countries opposed the concept of adopting new trends in Islamic law in light of the Western feminist ideology.

These Islamic countries sometimes feel that this is an external outlook of a revolution from the outside, using the enhancement of women's liberty as a justification for imposition of foreign and problematic ideas. Scholars sometimes feel that the assumption that feminism should be the dominant ideology in these circumstances is similar, to an extent, to the viewpoint of some Western women during the colonial period, who believed that colonialism was positive since it improved the legal and social status of women in the colonies. These Western women stressed that the necessary mission of colonial powers was to import the values of the Western civilization into "backward" societies.<sup>76</sup>

Presently, the objection to the importation of Western feminist ideology to Muslim societies is based upon the assumption that the goal of the feminist movement today is the imposition of "external" Western norms onto Muslim women. This opposition to feminist influences is presented as an objection to Western dominance, which is viewed as a threat to the preservation of authentic Islamic culture. The opponents claim that their objection stems from their sensitivity and respect for the values of Muslim societies that wish to preserve Muslim women's traditional lifestyle.<sup>77</sup> Additionally, a number of cases show that Western pressure of those trying to improve the status of Muslim women was counterproductive. The reaction to Western demand for significant change in the status of women in

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<sup>75</sup> See INTRODUCTION TO WOMEN, ISLAM AND THE STATE 7 (Kandiyoti Deniz ed., 1991).

<sup>76</sup> See ANTOINETTE BURTON, BURDENS OF HISTORY: BRITISH FEMINISTS, INDIAN WOMEN, AND IMPERIAL CULTURE 1865-1915 (1994); VRON WARE, BEYOND THE PALE: WHITE WOMEN, RACISM, AND HISTORY 156-67 (1992); WESTERN WOMEN AND IMPERIALISM: COMPLICITY AND RESISTANCE (Nupur Chaudhuri & Margaret Strobel eds., 1992).

<sup>77</sup> See INTRODUCTION TO WOMEN, ISLAM AND THE STATE, *supra* note 75, at 8.

Muslim societies sometimes caused the toughening of traditional standards and practices in these societies. Many times the external pressure resulted in a tendency to reject the basic foundations of the Western women's equal rights movement altogether.<sup>78</sup>

One of the opponents to the implementation of Western feminist ideology in the Muslim society was the scholar Azizah Al-Hibri. Al-Hibri investigated women's status in Islamic culture and claimed that Okin's balance between religious traditional ideologies, such as Islam, and the conflicting outlook of feminism was not appropriate.<sup>79</sup> Her criticism was that Okin did not grant due weight to traditional religious ideology. She also claimed that the weight of multiculturalism should be more significant when it is balanced against feminism. In her opinion, Okin granted too much weight to the fact that certain principles in the Islamic world and religion promoted the dominance and authority of men over women.<sup>80</sup> Al-Hibri stressed that a feminist perspective favoring reform in Muslim countries or within groups of Muslim immigrants in Western countries should always be balanced by the counter-perspective of respect for the religious and cultural principles of Muslims. She was under the impression that Okin silenced the authentic voice of Muslim women and the adoption of her policy was an infringement upon a woman's freedom of expression. According to Al-Hibri, Muslim women should be given a fair opportunity to express their original voice.<sup>81</sup> Her criticism was that Okin allowed this voice to be heard only when it coincided with the dominant concepts of Western feminism that shape policy in liberal democratic societies regarding the status and rights of women. Al-Hibri claimed that the imposition of Western feminist concepts upon Muslim countries and members of Muslim groups in Western countries was an attempt to oppress their Islamic culture. She believed that this approach stemmed from a patronizing agenda that is implemented by the world's majority and by multicultural societies upon Muslim members of minority groups.<sup>82</sup>

Some critics of the feminist perspective about religious traditional societies claimed that the attempt to impose Western principles on groups that adhere to a conservative agenda concerning the status of women is an act of

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<sup>78</sup> Regarding Muslim society's attitude toward the new agenda of women's human rights, see Shaheen Sardar Ali, *GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW—EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN?* 24–49, 220–46 (Springer 2000).

<sup>79</sup> See Aziza Al-Hibri, *Is Western Patriarchal Feminism Good for Third World Minority Women?* in *IS MULTICULTURALISM GOOD FOR WOMEN?* 42 (Joshua Cohen et al. eds., 1999).

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 41–46.

arrogance. According to these critics, the imposition of values from the outside stems from a lack of respect and tolerance for the beliefs and choices of the women belonging to these groups.<sup>83</sup> They assert that a strong paternalistic approach is a substantial danger to human freedom since it does not enable these women—who wish to act as they please in the fundamental aspects of their life, such as religion, family, parenting, and education—to live according to their own conviction.<sup>84</sup>

The tension between the desire of women to belong to a traditional patriarchal society and the attempt of the feminist movement to “save” them from the hegemony of men in their society exists, not only in regard to Muslim communities in Western countries, but also in regard to female members of other conservative communities such as ultra-Orthodox Jewish groups in the United States, including the groups *Satmar Hasidim* and *Hasidic Lubavitch*.<sup>85</sup> From the feminist perspective, women who maintain a Jewish religious patriarchal life style desire to preserve this tradition as a result of “false consciousness.”<sup>86</sup> However, men and women who choose this path have claimed that this attitude is an insult and this accusation about their mental awareness requires empirical evidence since they have adopted a religious and conservative ideology with full awareness and consciousness. They perceive their opponents’ low evaluation of their choice to adopt a traditional lifestyle as a lack of appreciation and due respect for their intelligence and point to the millions of women in all regions of the world who adhere to a religious or traditional ideology and believe it is an important and meaningful guideline for their lives.<sup>87</sup>

Several scholars claimed that Western society should take the feelings, convictions, and choices of traditional and religious women seriously. The principles of many religions today and their ideological foundations should not be utterly rejected by feminists claiming that religion oppresses women. They suggest that women’s struggles for an increase in equality and the narrowing of power gaps between men and women should be the preferable

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<sup>83</sup> See David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights, Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 171 (1995–1996).

<sup>84</sup> See *id.* at 170.

<sup>85</sup> See *id.* at 158, 163.

<sup>86</sup> See Elisabeth Schussler Fiorenza, *Public Discourse, Religion and Women’s Struggles for Justice*, 51 DEPAUL L. REV. 1077, 1088 (2002).

<sup>87</sup> *Id.* at 1084; see also CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION 151 (1989); Emily Fowler Hartigan, *Practicing and Professing Spirit in Law*, 27 TEX. TECH L. REV. 1165, 1167–68 (1996) (stating that as a Catholic woman in the United States, Hartigan encountered hostility from the feminist scholars as a result of her religious belief and approach to current society).

policy;<sup>88</sup> however, feminism should be implemented in a cautious manner. Feminists should advance their agenda but also reflect in their actions an understanding and respect for the religious culture in which many women wish to act. The feminist movement should not oppose or exclude the principles of religion, or ignore them, if it truly wishes to aid all women, including those who maintain a religious lifestyle.<sup>89</sup>

This criticism has resulted in a new approach in the feminist movement. Coexistence between feminism and religion is problematic in the Islamic society because Islamic principles are sometimes patriarchal or were interpreted as such in the past, as in the issues of polygamy or the laws of divorce. Okin, who believed that feminist ideology should be dominant, wrote that the coexistence of a feminist outlook with the principles of Islamic religion is very difficult, and she eventually preferred a pragmatic approach.<sup>90</sup> She now asserts that whenever possible, it is preferable to change the rules and practices of religions from the inside. Women with a religious outlook should try to initiate a new interpretation of the principles of their religious law in an attempt to enhance equality between the sexes in this law.<sup>91</sup>

Nevertheless, Okin was not optimistic about this process, and she often felt that religious law was rigid, and consequently the process of changing the law was problematic. She expressed her concern that the outcome would not always be the elevation of women's status in religious societies.<sup>92</sup>

The evolution of the rules of betrothal of a minor daughter in Jewish religious law proves that Okin's concern is not always justified. We should believe in the promise of interpretation of religious law. The rules of Jewish law changed gradually, stage by stage, so that eventually the status of the Jewish daughter has been elevated. A significant change is evident, especially in recent generations. This proves that when interpreters of religious law wish to elevate the status of women, they can apply an effective method of interpretation bearing good results.

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<sup>88</sup> See Fiorenza, *supra* note 86, at 1084; Farida Shaheed, *The Cultural Articulation of Patriarchy: Legal System, Islam and Woman*, 6 S. ASIA BULL. 38, 43 (1986).

<sup>89</sup> Fiorenza, *supra* note 86, at 1084.

<sup>90</sup> See Okin, *supra* note 49, at 117, 122–23.

<sup>91</sup> See *id.*

<sup>92</sup> Although Okin felt that interpretation of religious law can produce effective results, she was not very optimistic about the outcome. Okin mentioned that the problem facing women as a result of patriarchal principles in Islamic law should not be ignored. In this sphere, there are not only difficulties concerning legal principles, but also practical difficulties, with which those who wish to abolish patriarchal trends in existing Muslim law will have to cope. See *id.*

The analysis of the development of Jewish law concerning the consent of the father to the betrothal of his minor daughter, in this Article, is an attempt to prove that this approach can benefit women, especially those with strong religious convictions. Religious law, like any other legal system, develops gradually, and eventually the internal path, within religious law, can significantly elevate the status of women. It seems to be the best solution to the dilemma of the desired coexistence between multiculturalism and feminism.

### III. ANCIENT LAW

Ancient Jewish law has developed in an era of paternal authority over family members. Roman law was one of the more developed legal systems at that era, and its rules are an illustration of this trend.

#### A. ROMAN LAW

In ancient Roman law, the *patria potestas* system prevailed. This meant that the person who was the legal “father” of the family was granted authority over family members, including children in various spheres.<sup>93</sup> Roman family law was based upon the notion that each family had a *paterfamilias*, who was the head of the household.<sup>94</sup> He was the eldest living male ancestor. When the *paterfamilias* died, his eldest son would become the *paterfamilias*, each of the other sons succeeding the previous at the appropriate time.<sup>95</sup> The authority of the *paterfamilias* was called *potestas*. All legitimate descendants, of all ages, were subjected to this power of the *paterfamilias*.<sup>96</sup>

The formal release of a child from the *potestas* of the *paterfamilias* could take place when he or she came of age, requested more legal independence, and was granted the legal status of an independent child.<sup>97</sup> At this stage he or she was no longer subjected to the *potestas* of the “father” of the family and became *sui juris*.<sup>98</sup> At the first stage, the authority of the

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<sup>93</sup> See ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW, 103, 107 (1994); see also JUDITH EVANS GRUBBS, LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE’S MARRIAGE LEGISLATION 115 (1995); JANE F. GARDNER, FAMILY AND *FAMILIA* IN ROMAN LAW AND LIFE 47–55 (1998); ISRAEL Z. GILAT, THE RELATIONS BETWEEN PARENTS AND CHILDREN IN ISRAELI AND JEWISH LAW (HEBREW), 22–24 (2000) [hereinafter GILAT, THE RELATIONS].

<sup>94</sup> See BORKOWSKI, *supra* note 93.

<sup>95</sup> See *id.* at 107.

<sup>96</sup> See *id.* at 103.

<sup>97</sup> See *id.* at 103, 107.

<sup>98</sup> See *id.* at 107.



father of the family was almost unlimited and included the power to punish family members. Sometimes severe punishment was imposed. The *potestas* upon children included the power to flog them, to imprison them, or to apply the sentence of death as a form of punishment for serious misconduct.<sup>99</sup> These severe punishments were not frequent.

In the long run, this power has gradually been curtailed. Killing a child, even when there was a legitimate cause for severe punishment, could result in severe consequences for the father, such as his deportation to an island.<sup>100</sup> Gradually, law has restricted the authority of the father. Some aspects of the authority of the “father” of the family were abolished. However, the legal concept of *patria potestas* remained in a milder form. By the time of Justinian, the right of the *paterfamilias* was reduced to the power to inflict reasonable punishment.<sup>101</sup>

One of the powers (*potestas*) of the “father” in ancient Roman law was his ability to sell his child and consequently impose slavery or civil bondage upon the child.<sup>102</sup> This power was abolished completely by the time of Justinian. The *paterfamilias* could also compel his child to marry, but during the period of the Roman Republic, this power was also abolished.<sup>103</sup> At this stage the *paterfamilias* had the right to refuse his consent to the marriage of a family member. Children never owned property, since all they had belonged to the *paterfamilias*. But this restriction became more flexible by the period of Augustus and Constantine.<sup>104</sup> Gradually, a more humanistic trend limited or abolished some of the rights of the head of the family concerning family members.<sup>105</sup>

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<sup>99</sup> See *id.*

<sup>100</sup> See BORKOWSKI, *supra* note 93, at 102–04; see also GARDNER, *supra* note 93, at 121–23; REUVEN YARON, *STUDIES IN ROMAN LAW* 3–12 (1968) (Hebrew).

<sup>101</sup> See sources cited *supra* note 100.

<sup>102</sup> See sources cited *supra* note 100.

<sup>103</sup> See sources cited *supra* note 100.

<sup>104</sup> See BORKOWSKI, *supra* note 93, at 104–06.

<sup>105</sup> See JAMES HADLEY, *INTRODUCTION TO ROMAN LAW* 115–128 (1874); JAMES MUIRHEAD, *HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME* 24–36 (1886); W. W. BUCKLAND, *A MANUAL OF ROMAN PRIVATE LAW* 60–63 (1928); W. W. BUCKLAND, *MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* 56–67 (1931); FRITZ SCHULZ, *CLASSICAL ROMAN LAW* 142–61 (1951); R.W. LEAGE, *ROMAN PRIVATE LAW* 122–28 (1961); David Daube, *Dividing a Child in Antiquity*, 54 *CAL. L. REV.* 1630, 1632–34 (1966); MAX KASER, *ROMAN PRIVATE LAW*, 304–14 (Rolf Dannenbring trans., 1984).

## B. JEWISH LAW

## 1. Biblical Law

The duty to nurture children and provide for their physical needs was a basic rule in the legal relationship between parents and children in many ancient legal systems.<sup>106</sup> On the other hand, children were obliged to honor and respect their parents and to obey their commands and in some areas also had to provide for their parents and support them. Severe punishments were imposed on the child for not fulfilling this obligation.<sup>107</sup>

Biblical laws are patriarchal, providing an illustration of the power of the father in ancient Jewish law. The father had rights superior to those of the mother in the legal relationship between parents and children. According to the interpretation of some scholars, these rights were very powerful, and encompassed his relationship with all family members, including children.<sup>108</sup>

A few biblical verses mentioned rules that determine the authority of the father and his relationship with his children. The rules in these verses have led some scholars to conclude that in Biblical Jewish law, the leader of the family, the father, was granted authority over the bodies of family members.<sup>109</sup> In several additional biblical precedents, the authority of the head of the family could be considered as the authority of “life and death.”<sup>110</sup> Some precedents concern the relationship between the father and his son or daughter. Scholars based their conclusion upon the statement of Reuven, son of Jacob, that if he did not bring Benjamin back from

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<sup>106</sup> See JOSEPH FLEISHMAN, PARENT AND CHILD IN ANCIENT NEAR EAST AND THE BIBLE, 57–109 (1999) (Hebrew); see also DAVID DAUBE, SONS AND STRANGERS 1, 15, 18 (1984).

<sup>107</sup> FLEISHMAN, *supra* note 106, at 200–93.

<sup>108</sup> See BENZION SCHERESCHEWSKY, “APOTROPOS,” PRINCIPLES OF JEWISH LAW 219 (1975); see also FLEISHMAN, *supra* note 106, 263–65; Mordechai A. Rabello, *Patria Potestas in Roman and Jewish Law*, 5 DINE ISRAEL, 113–49 (1974).

<sup>109</sup> See *Genesis* 22:2–10 (Abraham was commanded to slaughter his son and was willing to fulfill this commandment of the creator of the world. He might have held that his parental authority included the right to put an end to the life of his child.); *Genesis* 38:24 (Judah held that Tamar, the widow of his oldest son, acted in an improper manner; he was head of the family, and therefore ruled that a severe punishment should be imposed upon her: capital punishment.). Scholars have held that this is a typical example of the patriarchal authority of “life and death.” *Law, Biblical Law*, ENCYCLOPEDIA BIBLICA, Tomus Quintus, 614, 617.

<sup>110</sup> See *Samuel I* 14:24–45 (Jonathan, son of King Saul, violated the vow of his father; King Saul consequently held that his son should be executed, and he had to be persuaded not to kill him.); *Samuel I* 20:30–33 (When King Saul considered his son Jonathan as a rebellious son, he threw the sword at Jonathan.).

Egypt, Jacob could kill both Reuven's sons.<sup>111</sup> When Yiftach wanted to launch a war against the nation of Amon, his vow led him to an unfortunate result: he was obligated to kill his daughter.<sup>112</sup> In other biblical precedents, the head of the family acted in a way, which according to one interpretation, could be considered as the application of his authority over the body of his "children," which was less severe than the authority of "life and death."<sup>113</sup> This power of the family leader was sometimes regarded by scholars as the power of possession, since occasionally the father could "sell" his daughter.<sup>114</sup>

However, according to Gerald Blidstein, the authority of the father in biblical law should not be considered as identical or similar to the authority of the father in Roman law, the *patria potestas* system. He wrote:

[W]e do not speak of "parental power," as in the Roman *patria potestas*. . . . Jewish Law is characteristically framed in terms of responsibility rather than right, and this distinction is especially apt here. The ethos of filial responsibility is simply not grasped if it is seen as filial adjustment to parental rights or submission to parental authority.<sup>115</sup>

Furthermore, Mordechai Rabello proved that in comparison with legal norms of other nations at the same period, the authority of the father to implement punishment was significantly restricted, and this was certainly true in relation to the power of life and death. When a child was to be punished, the punishment was implemented by the Jewish court, and not by the father.<sup>116</sup>

However, implicit legal rules in the Bible, such as the abovementioned verse about the daughter of Yiftach, which indicates the father was sometimes granted the right to kill his daughter, are an illustration of the power of the father over the daughter in Biblical law.<sup>117</sup> These rules were patriarchal, subjecting the Jewish daughter to the authority of her father. He re-

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<sup>111</sup> *Genesis* 42:36.

<sup>112</sup> See *Shoftim* 11:34–39. In the medieval period the authority of the father to kill his daughter was unconceivable since it was contrary to the rules of Jewish law at that period. Therefore, medieval Jewish commentators of the Bible, id, such as Rabbi Levi ben Greshom and Rabbi David Kimchi, explained that the Bible did not indicate that Yiftach actually could kill his daughter.

<sup>113</sup> See *Genesis* 9:7–8 (mentioning the act of Lot).

<sup>114</sup> See *Genesis* 21:7–12. In addition, the father could "sell" his daughter, and as a result she becomes a maidservant. See *Exodus* 21:7.

<sup>115</sup> GERALD BLIDSTEIN, HONOR THY FATHER AND MOTHER: FILIAL RESPONSIBILITY IN JEWISH LAW AND ETHICS xi–xii, 25(1975) ("The Bible assumes throughout that men naturally revere and honor their fathers.").

<sup>116</sup> See Rabello, *supra* note 108, 145.

<sup>117</sup> See *supra* note 112.

ceived the damage payments for injury caused to his daughter.<sup>118</sup> He could also sell his daughter, and as a result she would become a maidservant.<sup>119</sup> The father could consent to the marriage of his daughter.<sup>120</sup> When he betrothed his daughter to a man, the father was entitled to the damage payments granted to him when the husband slandered the good name of his daughter,<sup>121</sup> and when his daughter was raped or seduced, the father of the minor daughter collected the payments for shame and blemish caused to her by the rapist or seducer.<sup>122</sup>

## 2. Tanaitic and Amoraic Law

Later on, in the Jewish law of the Tanaitic Period<sup>123</sup> and the subsequent Amoraic period,<sup>124</sup> the father was granted authority over his children in various spheres.<sup>125</sup> The father's authority was significant, especially concerning his daughter.<sup>126</sup> However, this authority was restricted in the daughter's best interest. This was especially true in the Amoraic period.

<sup>118</sup> See Exodus 21:31.

<sup>119</sup> See Exodus 21:7.

<sup>120</sup> See Genesis 31:15.

<sup>121</sup> The father "gives" his daughter to her husband and as a result he collects the payment of the slanderer for shame and blemish caused to his daughter. See Deuteronomy 22:13–19, 29 (Biblical law does not mention a minimum age required for the valid betrothal of a daughter.).

<sup>122</sup> See Exodus 22:16; Deuteronomy 22:29

<sup>123</sup> The Hebrew term *Mishnah* is derived from the Hebrew root "*shanah*," meaning repeated. Repetition characterizes the way in which the Jewish law tradition was handed down orally from *Tanna*, a teacher in Hebrew, to students, generation after generation. By the second century, the Jewish scholars of this period, the *Tannaim*, had feared that the vast oral Jewish tradition would be lost if it were not committed to writing. Therefore, Yehuda Ha-Nassi completed the authoritative collection of Jewish oral law, the *Mishnah*, in early third century C.E. The scholars of this period, the Tanaitic period, are *Tannaim*.

<sup>124</sup> The Amoraic period is the period between the death of Rabbi Yehuda *Ha-Nasi*, in the early third century, and the final editing of the Babylonian Talmud, at about 500 C.E. The scholars of this period are *Amoraim*.

<sup>125</sup> For a comprehensive description of various aspects of this authority, see JACOB NEUBAUER, THE HISTORY OF MARRIAGE LAWS IN BIBLE AND TALMUD 28–29, 114–18 (1994) (Hebrew) [hereinafter NEUBAUER, THE HISTORY]; ASHER GULAK, YESODEY HAMISHNAT HA-IVRI 3, 66–68 (1967) (Hebrew); Rabello, *supra* note 108, at 85, 113–44; GILAT, THE RELATIONS, *supra* note 93, at 57–154, 249–300; ADIEL SCHREMER, JEWISH MARRIAGE IN TALMUDIC BABYLONIA, THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY, HEBREW UNIVERSITY OF JERUSALEM 41–91 (1996) (Hebrew) [hereinafter SCHREMER, JEWISH MARRIAGE]; Adiel Schremer, *The Age of Marriage of Jewish Men in the Land of Israel in the Periods of the Second Temple, Mishnah and Talmud*, 61 ZION 45–66 (1996) [hereinafter Schremer, *The Age of Marriage*]; ADIEL SCHREMER, MALE AND FEMALE HE CREATED THEM: JEWISH MARRIAGE IN THE LATE SECOND TEMPLE, MISHNAH AND TALMUD PERIODS 73–125 (2004) (Hebrew) [hereinafter SCHREMER, MALE AND FEMALE].

<sup>126</sup> See S. BARON, SOCIAL AND RELIGIOUS HISTORY OF THE JEWISH NATION 3, 67(1967); C. Z. RAYNES, MARRIAGE OF MINORS IN THE TALMUD 199 (Z. Ravid ed., Sharfstein Book 1970) (Hebrew); R. Katzof, *The Age of Marriage of Jewish Daughters in the Period of the Talmud*, 13 TEUDAH 9 (1996)

Scholars have pointed out several definitions of the concept the “minor” in ancient Jewish law from the Tanaitic and Amoraic era.<sup>127</sup> According to the most common and accepted Amoraic definition of what constitutes a minor and adult, a daughter becomes an adult at the age of twelve and a day.<sup>128</sup> A Jewish woman is defined as an adult when two facts are proven: age and signs of puberty.<sup>129</sup> The minor daughter is a *ketanah* until she reaches the age of twelve years and one day and proves she has the signs of puberty.<sup>130</sup>

The father was granted certain rights concerning his daughter when she was a *ketanah*. Some rights were very significant. Sources from the Tanaitic period state he was entitled to sell her and to impose upon her the status of a maidservant.<sup>131</sup> This legal act could result in a drastic change in the life of the daughter. Some other rights of the father had a less significant impact on the life of his minor child. In general, Jewish law scholars of this period held that a minor does not understand the implications and consequences of his or her actions, and therefore, according to the princi-

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(Hebrew); GILAT, THE RELATIONS, *supra* note 93, at 50; 249; B. SCHERESCHEWSKY, FAMILY LAW 40 (1992) [hereinafter: SCHERESCHEWSKY, FAMILY LAW].

<sup>127</sup> The Scholar Yitzhak D. Gilat wrote that the distinction between *ketanah* and *na'arah* in the Tanaitic sources was based upon physical signs of puberty. He claimed the distinction between *ketanah* and *na'arah* in light of a different age was a new development, in the subsequent Amoraic period. See Yitzhak D. Gilat, *Thirteen Year-Old: The Age of Commandments*, MEHQREI TALMUD I (TALMUDIC STUDIES) 39–53 (1990) (Hebrew); STUDIES IN THE DEVELOPMENT OF THE HALAKHA 19–31 (1992); SCHREMER, JEWISH MARRIAGE, *supra* note 125, at 91–94; SCHREMER, MALE AND FEMALE, *supra* note 125, at 74, 103 & n.2. In addition to the age of twelve, there are other stages in the daughter's life, which are significant concerning her capacity. See MISHNAH, Nidah 5:3–9. In different spheres, there are different ages of capacity. At the age of six or seven, or according to another point of view, at the age of ten, or at the ages determined by the specific intellectual capacity of each child, children can buy or sell moveable property. See MISHNAH, Gitin 5:5–7; BABYLONIAN TALMUD, Gitin 59a; MISHNEH TORAH, Sale 29:1; SHULHAN ARUKH, Choshen Mishpat 235:1. Concerning immoveable property, the age of capacity of buying or selling is the age of eighteen, or according to another point of view, the age of twenty. See: BABYLONIAN TALMUD, Bava Batra 155a; SHULCHAN ARUKH, Choshen Mishpat 235:9; see also MENACHEM ELON, JEWISH LAW 1396 (1988). Certain ancient sources convey the message that the intellectual capacity is more important than chronological age. MISHNAH, Nidah 5:6; BABYLONIAN TALMUD, Nidah 45b–46b.

<sup>128</sup> See *supra* note 127.

<sup>129</sup> See *supra* note 127.

<sup>130</sup> See *supra* note 127.

<sup>131</sup> See MISHNAH, Ketubot 3:8. However, the status of the minor daughter in this sphere was elevated in the Amoraic period. See also BABYLONIAN TALMUD, Kidushin 69a (The Biblical rule that grants the father the right to “sell” his daughter and impose upon her the status of a maidservant was restricted significantly. This Amoraic text explains that the father can act in this manner only as long the year of the jubilee is in force.); MISHNEH TORAH, Avadim 1:10 (this rule in a medieval codification of Jewish law). In the Amoraic period the rules of the law of jubilee were not observed. See BABYLONIAN TALMUD, Arakhin 12b. In the year of jubilee all the slaves were freed, and when the rules of jubilee were not observed the father could not “sell” his daughter. MISHNEH TORAH, Avadim 1:10.

ples of Jewish law, the father could perform legal acts on behalf of his minor sons and daughters.<sup>132</sup> Since the minor daughter usually had no independent legal capacity, one of the legal acts she could not perform independently was marriage. In addition, the father of a daughter was entitled to other rights while she was a *ketanah*, such as the produce of her hands—her labor, what she found, and the abrogation of her vows.<sup>133</sup> Amoraic-era Jewish legal sources explain that a minor daughter was emancipated from the patriarchal authority over her when she attained her majority. A *na'arah* was a girl who had shown signs of puberty at the age of twelve years and one day and became a *bogeret* six months later.<sup>134</sup> When she was a *na'arah*, she did not have full legal capacity.<sup>135</sup> Therefore, the father of

<sup>132</sup> See GILAT, THE RELATIONS, *supra* note 93, 57–106. There are legal limitations imposed on the legal capacity of the minor, male and female. Minors, sons and daughters alike, who have not yet reached the age of maturity (twelve for female and thirteen for male), are not granted the rights to perform certain legal acts. See *id.* 57–106. For a medieval interpretation, see COMMENTARY OF RABBI SOLOMON YITZHAKI, Kidushin 3b, s.v., Veeyma Haney Miley; TERUMAT HADESHEN #223 (1991). The age of maturity—twelve for daughters and thirteen for sons—is not the only relevant age concerning the capacity of a minor to perform legal acts. There are also other stages in the life of the child that are significant from the standpoint of legal capacity, such as the capacity of a *ketanah*, which is three years old. Compare TOSEFTA, Nashim, Ketubot 65, 59a (1967), with TOSEFTA, Ketubot 5:1, and BABYLONIAN TALMUD, Ketubot 57b. For medieval commentary, see also RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) 2, #219, #299 (1997); RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA), ATTRIBUTED TO NACHMANIDES #2, #87 (2001); RESPONSA OF RABBI YAACOV MOLIN–MAHARIL #51 (Jerusalem: 1979); SHULCHAN ARUKH, EH 155, 14; RESPONSA OF RABBI MOSES MITRANI (MABIT) 1, #71 (1862). However the most important age is twelve for girls, and thirteen for boys. In various spheres, such as his joining the group of ten required for public prayer, there are limitations imposed upon the legal capacity of a minor child. See BABYLONIAN TALMUD, Berakhot 48a; BABYLONIAN TALMUD, Kidushin 63b. For medieval commentary, see also TOSAFOT, Berakhot, s.v. Veleyt Beshem Rabenu Tam; MISHNEH TORAH, Ishut 2:22–23; RESPONSA OF RABBI YAACOV MOLIN–MAHARIL #196 (1979); RESPONSA OF RABBI SIMON BEN TZEMACH (TASHBETZ) 1, #71 (1998).

<sup>133</sup> The source of the authority of the father to annul the vow of his daughter is Biblical law. See Numbers 30:4–6. For Tanaitic sources, see TOSEFTA, Sotah 2:7 (Jacob Neusner trans. 2002) (“A man has control over his daughter and has power to betroth her . . . and he controls what she finds, the produce of her labor, and the abrogation of her vows.”). See also Sifre, Deuteronomy, c. 235, p. 273; MISHNAH, Ketubot 4:4; MISHNAH, Kidushin 3:8; MISHNEH, Sotah 3:8; BABYLONIAN TALMUD, Kidushin 3b (an Amoraic source.)

<sup>134</sup> See MISHNAH, Nidah 6:1; MISHNEH TORAH, Ishut 2:2 (medieval codification.)

<sup>135</sup> Concerning the characteristics of the different ages—a minor (*ketanah*), a maiden (*na'arah*) and an adult (*bogeret*), and the legal doctrine pertaining to each age—see BABYLONIAN TALMUD, Ketubot 39a; BABYLONIAN TALMUD, Nidah 52b, 57a. For medieval interpretations in the responsa literature, see RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) 1, #1216 (1997); RESPONSA OF RABBI YITZHAK BEN SHESHET (RIBASH) #468 (1993). For medieval codifications, see also MISHNEH TORAH, Ishut 2:2; HAGAHOT HAREMA, Yoreh Deah 234:1. Since she does not have full legal capacity when she is a *na'arah* some explained that the significant stage of legal capacity is when she reaches the age of *bogeret*. She is an adult when she reaches the age of twelve years, six months and one day. See ELON, *supra* note 127.

the *na'arah* may have approved her betrothal (*Kidushin*) on her behalf.<sup>136</sup> Once the girl became a *bogeret*, she was released from her father's authority in many spheres. Many special rights he used to possess when she was a minor (*ketanah*) and a *na'arah* were not granted to him anymore.<sup>137</sup> Therefore, a father could not betroth his daughter when she was a *bogeret* and neither was he entitled to other rights over her, such as the right to receive the produce of her hands, what she found, and the right of annulment of her vows.

A Jewish father of a minor daughter, who had not yet reached the age of *bogeret*,<sup>138</sup> was authorized to accept a marriage offer made by her appointed husband on her behalf.<sup>139</sup> At this stage the father had an exclusive right to give his minor daughter in marriage. Her consent to the marriage offer was not required.<sup>140</sup> She could not consent to her marriage or nomi-

<sup>136</sup> See MISHNAH, *Kidushin* 2:1; MEKHILTA DERABBI YISHMAEL, *Masekhta Dinzikin*, *Mishpatim* 3:254 (1970); BABYLONIAN TALMUD *Ketubot* 46b; BABYLONIAN TALMUD, *Kidushin* 41a, 79a. For medieval codifications, see MISHNEH TORAH, *Ishut* 2:2, 3:14; TUR, *Even Haezer* 37; SHULCHAN ARUKH, *Even Haezer* 37, 7.

<sup>137</sup> See BABYLONIAN TALMUD, *Ketubot* 39a. A *ketanah*, or *na'arah*, which was widowed or divorced after her marriage by her father, and her father is alive, is released from his authority, and he has no rights over his daughter. See MISHNAH, *Gitin* 5:5; MISHNAH, *Nedarim* 11:10; TOSEFTA, *Yebamot* 13:4; BABYLONIAN TALMUD, *Ketubot* 43b; BABYLONIAN TALMUD, *Nedarim* 89b. For medieval codifications, see also MISHNEH TORAH, *Ishut* 3:12; *Hafla'ah* 11:7, 11:25; TUR, *Even Haezer* 37; *Yoreh Deah* 234; SHULCHAN ARUKH, *Even Haezer* 37:3; *Yoreh Deah* 234:1, 234:11. The daughter becomes *Sui iuris* upon attaining the age of twelve years and six months or upon her marriage when she is a *ketanah* or *na'arah*. See MISHNAH, *Bava Metzia* 1:5; *Ketubot* 3:8; *Nidah* 5:7. However, if the father of the *na'arah* just performed the act of *Kidushin*, but did not complete the marriage by performing the act of *Nisuin*, the daughter remains in his authority. See MISHNAH, *Ketubot* 4:5; BABYLONIAN TALMUD, *Ketubot* 48a; see also RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) ATTRIBUTED TO NACHMANIDES #144 (2001) (medieval responsa literature.)

<sup>138</sup> According to Resh Lakish, however, it could be possible that a *na'arah* will accept a marriage offer. See BABYLONIAN TALMUD, *Kidushin* 43b.

<sup>139</sup> See MISHNAH, *Kidushin* 3:6; BABYLONIAN TALMUD, *Ketubot* 40b; BABYLONIAN TALMUD, *Kidushin* 3b. The basic rule—in MISHNAH, *Kidushin* 1:1—is as follows: a father is granted rights concerning his daughter who has not yet reached full legal independence. These rights include the right of marriage (*Kidushin*) by money, document, and cohabitation. The father had the right to: (a) keep the money received for his daughter's *Kidushin*, (b) accept the document of *Kidushin* on her behalf, or (c) give his daughter away to her future husband for *Kidushin* through cohabitation, even against her will. These rights of the father are operative as long as the girl is still a *na'arah* and has not yet reached the stage of full maturity, known as *bogeret*. See also NEUBAUER, *THE HISTORY*, *supra* note 125, at 114. Concerning the rare option when the father accepts the marriage offer made by a minor son, see NEUBAUER, *THE HISTORY*, *supra* note 125, at 115.

<sup>140</sup> The marriage (*kidushin*) of a minor girl is effective in Biblical law. See *Deuteronomy* 22:16. The Jewish sages of the Tanaitic and Amoraic period explained that this law empowers the father of a girl to marry off his daughter, when she is a minor. See Sifre, *Deuteronomy*, c.235, 273; BABYLONIAN TALMUD, *Ketubot* 40b.

If he is dead, the Jewish Sages of the ancient era enacted an enactment that empowered her mother and her adult brothers to do so. This rule is based upon the paternalistic assumption that this empowerment enhances the best interest of the daughters: it protects her from an undesirable fate. In the me-

nate an agent to negotiate regarding marriage on her behalf since at this young age she did not have the necessary legal capacity. The doctrine of the authority of the father was based upon the assumption that he was granted legal capacity to perform legal acts regarding members of his family, including the right to betroth his daughter. The father was the party with whom the groom or his family negotiated about the marriage.<sup>141</sup> A marriage contracted by the minor daughter against the will of her father was void. Due to her minority, she was incapable of performing this legal act. The father possessed the legal powers in this sphere.

The father was also entitled to other rights concerning his minor daughter, such as the right to invalidate her vows<sup>142</sup> or to receive certain payments granted to his daughter as compensation for damage caused to her.<sup>143</sup> In addition, he was the legal owner of work performed by her hands<sup>144</sup> and products of other acts performed by his daughter.<sup>145</sup>

In contrast, a mother was not granted the same rights, as she could not impose a nazarite vow upon her minor son or daughter, betroth her daughter while still a minor or maiden (*na'arah*) before puberty, sell her daughter and impose the status of a Hebrew bondswoman upon her, or acquire what her daughter found or earned.<sup>146</sup>

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dieval period Maimonides explained: "The sages did not institute marriage for a male minor, because eventually he will be able to contract full marriage for himself. Why, then, have they instituted marriage for a female minor, although she too, will eventually be able to contract full marriage for herself?—To prevent her from being used." MISHNEH TORAH, Ishut 11:6. The marriage by the mother or brothers was not considered a marriage with Biblical validity, but only marriage with rabbinic validity. Therefore, when the marriage had only rabbinic validity, she was given the right to reject or repudiate it when she reached adulthood. This repudiation is called *mi'un*. See BABYLONIAN TALMUD, Nidah 46a, 48b, 52a; see also MISHNEH TORAH, Ishut 2:9; Gerushin 11:4 (medieval codification).

<sup>141</sup> See BABYLONIAN TALMUD, Ketubot 46b; BABYLONIAN TALMUD, Kidushin 41a.

<sup>142</sup> See TOSEFTA, Sotah 2:7, *supra* note 133; see also MISHNAH Sotah 3:8; MISHNAH, Ketubot 4:4; BABYLONIAN TALMUD, Kidushin 3b-4a; Harawitz & Rabin, MEKHILTA DERABI YISHMAEL (1970); MASEKHTA DINIZIKIN, MISHPATIM 3:255.

<sup>143</sup> See sources cited *supra* note 142. The Mishnah and the Babylonian Talmud also mentioned the right of the father to collect from the rapist and the seducer payments for the damage they had inflicted on her. See MISHNAH, Ketubot 3:8; BABYLONIAN TALMUD, Ketubot 40a-40b.

<sup>144</sup> See BABYLONIAN TALMUD, Ketubot 46b; BABYLONIAN TALMUD, Kidushin 3b-4a; see also RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) 3, #143 (1997).

<sup>145</sup> See NEUBAUER, THE HISTORY, *supra* note 125, at 114-18.

<sup>146</sup> See TOSEFTA, Sotah 2:7 ("A man has control over his daughter and has power to betroth her through money, a writ, or an act of sexual relations, and he controls what she finds, the produce of her labor, and the abrogation of her vows. *This is not the case of a woman*" (emphasis added)). See also MISHNAH, Sotah 3:8; MISHNAH, Ketubot 4:4; MEKHILTA DERABI YISHMAEL, *supra* note 142; BABYLONIAN TALMUD, Sotah 23b; GILAT, THE RELATIONS, *supra* note 93, at 52-53.



The authority of the father to betroth his daughter when she was a minor or a *na'arah* was very significant during this period.<sup>147</sup> One of the options mentioned in ancient Jewish sources was the betrothal of a minor daughter, through cohabitation, to a repulsive individual afflicted with boils.<sup>148</sup> In addition, sometimes ancient sources from the Tanaitic and Amoraic period mentioned the fact that certain individuals married minor girls, and the implicit message in these texts was that marriage of minor daughters was valid and a legitimate practice. A recommendation not to betroth minor daughters was not mentioned in these sources in this context.<sup>149</sup> The Babylonian Talmud explained that the ancient rabbis legalized the marriage of minor daughters, who would in due course be able to contract a valid marriage so that people would not treat them as ownerless property.<sup>150</sup> A minor daughter in this situation received the financial benefits of a Jewish wife.<sup>151</sup> Rabbi Akiba praised fathers who betrothed their minor daughters.<sup>152</sup> The Babylonian Talmud guided husbands and fathers:

He who loves his wife as himself and honors her more than himself, and guides his children in the right path, *and marries them before they attain the status of adults*—of them the Scripture says: “And thou shalt know that thy tabernacle shall be in peace [and thou shalt visit thy habitation, and shalt not sin]”<sup>153</sup> (emphasis added).<sup>154</sup>

<sup>147</sup> See MISHNAH, Kidushin 1:1; BABYLONIAN TALMUD, Kidushin 3b–4a. He was granted the right to accept the money, or document of marriage, on behalf of his daughter, or agree, on behalf of his daughter, to her marriage through cohabitation, although sometimes this marriage was against her will.

<sup>148</sup> See BABYLONIAN TALMUD, Ketubot, 40b; COMMENTARY OF RABBI SOLOMON YITZCHAKI, s.v. Baey Masar Lah; Limnuval Umukeh Shehin (medieval commentary).

<sup>149</sup> See MISHNAH, Nedarim 11:10; BABYLONIAN TALMUD, Yebamot 106b; Rabbi Yeudah the *nasi* (the president, of the rabbis): MISHNAH, Gitin 5:5–Rabbi Yohanan Ben Godgada; TOSEFTA, Yebamot 13:4–Rabbi Yehudah Ben Baba; see also BABYLONIAN TALMUD, Ketubot 6a; BABYLONIAN TALMUD, Kidushin 81b–82a; BABYLONIAN TALMUD, Nidah 11b, 64b; MORDEKHAY, Ketubot #179 (medieval interpretation of some of these ancient texts and an attempt to justify the custom of Franco-German medieval Jewry).

<sup>150</sup> See BABYLONIAN TALMUD, Yebamot 112a.

<sup>151</sup> See *id.* at 113a.

<sup>152</sup> See THEODOR-ALBEK, BERESHIT RABAH, c.95, p.1232; BABYLONIAN TALMUD, Sanhedrin 76a. The foundation of this recommendation is the rule mentioned in BABYLONIAN TALMUD, Nidah 13a.

<sup>153</sup> Job 5:24.

<sup>154</sup> BABYLONIAN TALMUD, Yebamot 62b; BABYLONIAN TALMUD, Sanhedrin 76b (the interpretation of Rabbi Solomon Yitzchaki to the words “samukh lepirkan”); see also MISHNEH TOARH, Isurey Biah 21:24 (medieval codification of Maimonides). The translation “before they attain the status of adults” is based upon the outlook of most medieval commentators. They held this is a short period—half a year or a year—before the daughter reaches the age of *bogeret*. See COMMENTARY OF RABBI YEHUDAH ALMANDARI, in SANHEDREI GEDOLAH 2, Sanhedrin, 76b, s.v. samukh lepirkan (1969); COMMENTARY OF THE DISCIPLE OF NACHMANIDES, in SANHEDREI GEDOLAH 5, Sanhedrin 76b, s.v. samukh lepirkan, 93 (1972); COMMENTARY OF RABBI ABRAHAM MIN HAHAR, Yebamot 62b, s.v. samukh lepirkan, 230 (Moses Judah Bloy ed., 1962); see also TOSAFOT, Sanhedrin 76b, s.v. samukh;

Thus, according to this perspective in the source quoted in the Talmud, fathers should marry off their children while they are minors and before they attain puberty. Medieval commentators of this text explained that the marriage of sons and daughters before they attained puberty was desirable because it prevented the possible sin of prohibited sexual relations or prohibited thoughts.<sup>155</sup>

In general, the point of view of the scholar Gilat seems correct. He claimed that the abovementioned significant authority of the father in the Tanaitic and Amoraic era was not always in the best interest of the child.<sup>156</sup> As examples, certain aspects of this authority, such as the father's authority to betroth his minor or *na'arah* daughter to a person he chose, including a repulsive person, without her consent, or the right of the father to own certain things his minor or *na'arah* daughter earned or found, and the legal right granted to the father in certain circumstances not to maintain his children, are not necessarily in the best interest of his children.<sup>157</sup>

However, this reality was somewhat balanced by the fact that disputes regarding the implementation of the aforementioned authority of the father are evident in ancient sources. Although it is stated explicitly in sources from the Tanaitic period that the father can betroth his daughter when she is a minor, a new approach appears in sources from the Amoraic period.<sup>158</sup> Rabbi Yehudah quoted the Amora Rav, or according to another tradition, Rabbi Elazar, holding that the betrothal of a minor daughter is prohibited.

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BET HABECHIRAH, Yebamot 62b, s.v. haohev. However, Rabbi Solomon Luria held that "samukh lepirkan" is regarding a male that is between thirteen and fourteen years old. See YAM SHEL SHLOMO, Yebamot 62b, #31, s.v. tanu rabanan. Rabbi Menachem Ben Solomon Hameiri explained that the *Mishnah*, avot 5:21, stated the desirable age of marriage of males is eighteen, and, therefore, for them "samukh lepirkan" is a short or long period before the age of eighteen. See BET HABECHIRAH, Sanhedrin 76b, s.v. leolam 230 (Abraham Sofer ed.1965); BET HABECHIRAH, Yebamot 62b, s.v. meachar, 230 (Samuel Dikman ed.1962).

<sup>155</sup> See MISHNEH TOARH, Isurey Biah 21:24 (medieval codification of Maimonides). See also the Commentary of Rabbi Yehudah Almadari and Rabbi Menachem Ben Solomon Hameiri, Sanhedrin. *Id.*; see also TOSAFOT HAROSH, SANHEDRIN, in SANHEDREI GEDOLAH 3, Sanhedrin 76b, s.v. samukh lepirkan 207 (1970) (medieval commentary).

<sup>156</sup> See GILAT, THE RELATIONS, *supra* note 93, at 50–51.

<sup>157</sup> See *id.*

<sup>158</sup> An Amoraic source (BABYLONIAN TALMUD, Kidushin, 41a) interpreted a Tanaitic source (MISHNAH, Kidushin 2, 1.) The Tanaitic source stated that the father can betroth his daughter when she is a *na'arah*. This text is presented in the Amoraic text as proof that strengthens the claim of the Amora Rav or Rabbi Elazar, that marriage of a minor daughter is prohibited. See also *id.*; COMMENTARY OF RABBI SOLOMON YITZCHAKI & COMMENTARY OF RABBI YOM TOV ALASHBILI (RITBA), (medieval interpretations of this ancient text). According to this point of view there is a dispute in Tanaitic sources. Some Tanaitic sources state that the father can betroth his daughter when she is *ketanah* and the contrary source. MISHNAH, Kidushin 2:1 presents the opposite point of view.

<sup>159</sup> It is a prohibition, not simply a recommendation. The idea is evident: the father should not betroth his daughter to her husband when she is a minor. Instead, he should wait until she matures and is willing to state she desires to wed a specific individual.<sup>160</sup> However, this text does not state that the father's act is void if he violated this prohibition. The statement of the Amora Rav or Rabbi Elazar was not intended to nullify the marriage.<sup>161</sup>

This new approach of this Amora has been influential. Many Jewish legal scholars in subsequent generations explicitly or implicitly have taken this point of view into consideration.

In addition, Rabbi Yosé said that the Messiah, the son of David, will not appear in the world until all souls in a special chamber in heaven are placed into the appropriate body.<sup>162</sup> The souls that God has created, waiting for a suitable placement, are delaying the redemption, since they must be implanted into human beings who will be born. Therefore, a person should not marry minor daughters, who are too young to conceive, since by doing so he delays the Messiah's revelation.<sup>163</sup> A similar point of view is attributed to Rabbi Simon who compared a father who betrothed his minor daughter to a person who sheds blood of other human beings.<sup>164</sup>

The correct view seems to be Schremer's point of view<sup>165</sup> and that of other scholars who grant less significance to the abovementioned statements in ancient sources concerning betrothal of daughters.<sup>166</sup> Although some scholars in the ancient period held that marriage of minor daughters is prohibited or not desirable, sources from the Tanaitic and Amoraic peri-

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<sup>159</sup> See BABYLONIAN TALMUD, Kidushin 41a; cf. BABYLONIAN TALMUD, Kidushin 81b. However, in *Babylonian Talmud*, Kidushin 81b, the prohibition not to betroth minor daughters is mentioned but there are some disputes concerning this prohibition.

<sup>160</sup> See *supra* note 159.

<sup>161</sup> The medieval commentator of the Talmud, Rabbi Solomon Ben ABRAHAM, Aderet, in his Commentary to Kidushin 41 a, s.v. *Keshehi na'arah*, explained that although the Amora Rav held that betrothal of a minor daughter is prohibited, if he betroths his minor daughter, her marriage is valid.

<sup>162</sup> See BABYLONIAN TALMUD, Nidah, 13b (and the medieval interpretation in the Geonic period); OTZAR HAGEONIM #544, 219–220. For medieval Jewish perspective in subsequent generations, see COMMENTARY OF RABBI SOLOMON YITZCHAKI, s.v. *Dinisivey Ketanot*; *Shebaguf*; RESPONSA OF RABBI YITZHAK BEN SHESHET (RIBASH) #15 (1993); Abraham Grossman, *Child Marriage in Jewish society in the Middle Ages Until the Thirteenth Century*, 45 PE'AMIM 109 (1990) (Hebrew) [hereinafter Grossman, *Child Marriage*].

<sup>163</sup> See *supra* note 162.

<sup>164</sup> See AVOT DERABI NATAN 48.

<sup>165</sup> See SCHREMER, MALE AND FEMALE, *supra* note 125, at 106–07; see also Schremer, *The Age of Marriage*, *supra* note 125.

<sup>166</sup> See SCHREMER, MALE AND FEMALE, *supra* note 125, at 106 n.11.

ods state explicitly or implicitly that marriages of minor daughters were a common and probably legitimate practice during this period.<sup>167</sup>

The major shift occurred between Biblical law and the Tanaitic and Amoraic law. Later law, especially at the Amoraic period, limited and modified the power of the father in various spheres.<sup>168</sup> In the Biblical era, certain aspects of property and acquisition characterized the relationship between parents and children. During the Amoraic period some Jewish scholars stated that the father should not betroth his daughter while she was a minor. He should wait until she grows and expresses her own will to accept a marriage offer of a desirable individual.<sup>169</sup>

#### IV. MEDIEVAL LAW

##### A. INTRODUCTION

The Jewish Post-Talmudic medieval period began in approximately the fifth century with the Geonic era, after the redaction of the Babylonian Talmud, and ended at the end of the period of the Jewish scholars known as the *Rishonim*, in two big Jewish centers in Europe: the center of Franco-German Jewry and the center of Spanish-North African Jewry. The period of the *Rishonim* ended in the sixteenth century when the Sephardic Codification of Jewish Law, *Shulchan Arukh*, and the Ashkenazi amendment to this codification, the *MAPA*, also known as *Hagahot Harema*, were compiled.<sup>170</sup>

During the medieval period, there was a shift of emphasis in various legal systems and more limits were imposed on the authority of the father. The principle of enhancing the best interest of the child gradually became more evident and transparent. Eventually, the gradual decline of the status

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<sup>167</sup> The scholar Rines held, in light of facts in Mishnah, Ketubot 5:2; BABYLONIAN TALMUD, Ketubot 57b, and the medieval interpretation of Rabbi Solomon Yitzchki and the Tosafists, that the betrothal of minor daughters was a common phenomenon in the Tanaitic and Amoraic period. See RAYNES, *supra* note 126, at 192, 199. The scholar Katzof also held that in this ancient period the marriage of minor daughters was common. See Katzof, *supra* note 126.

<sup>168</sup> See Israel Lebediger, *The Minor in Jewish Law: Powers and Rights of the Father over the Minor*, 7 JEWISH Q. REV. 89, 91 (1916).

<sup>169</sup> See the perspective of Rabello, *supra* note 108, at 146. However, Israel Lebediger stressed that at this period the father had the exclusive right to consent to the marriage of his daughter. Her consent was not required. The father is the real party with whom the marriage is contracted. He possesses legal powers which enable him to consent on behalf of his daughter. Lebediger, *supra* note 168, at 93.

<sup>170</sup> See *infra* Part IV.D–E (the evolution of medieval Jewish law concerning marriage of minor daughter).

of the father, in favor of a new emphasis on the best interest of the child, resulted in the gradual elevation of the status of the child and the mother.

A similar gradual process has also been evident in the legal systems of the non-Jewish population in areas where medieval Jewish scholars used to live. One such system is the Germanic medieval law.

#### B. GERMANIC LAW

Germanic family law was originally patriarchal, and some of its characteristics were similar to those mentioned above concerning ancient Roman law. The house-lord, by virtue of his *mundium*, was granted authority over his children and over the children of his wife.<sup>171</sup> He was the absolute master of his wife and children, and this paternal authority was almost unlimited at the first stage: of ancient Germanic Law.<sup>172</sup> It included extensive authority, such as substantial authority to discipline and punish and the right of life and death of his children. He had the right to expose and consequently endanger them after birth, to enslave them, and to decide what work they would do for their livelihood.<sup>173</sup> He could also sell or kill them. The father enjoyed such authority only in certain circumstances defined by law. In addition, he was frequently required to act in cooperation with the other members of the family. The son could not sign a contract, sue, or be sued; only his father could do so on his behalf. The child was obligated to subject himself or herself to the authority of his or her parent.<sup>174</sup>

In the ancient law, the powers of the father, by virtue of his *mundium*, belonged solely to him as the house-lord.<sup>175</sup> The wife, like the children, was subjected to this *mundium* and did not share control over the children with her husband.<sup>176</sup> However, the mother did enjoy a limited authority over her children. She was required to cooperate in their physical and spiritual care and education. The main responsibility in these spheres rested *de facto*, ordinarily, upon her.<sup>177</sup> However, the limited authority of the mother did not affect the scope of her parental authority. The final decision was only that of the father.<sup>178</sup>

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<sup>171</sup> See RUDOLPH HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 657 (Francis S. Philbrick trans., 1968).

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See *id.* at 657–59; see also JEAN B. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 178–201 (Rapelje Howell trans., 1968).

<sup>175</sup> See HUEBNER, *supra* note 171, at 664–65.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

Over the course of the medieval period, the status of the mother was improved.<sup>179</sup> Gradually, especially in the modern period, the emphasis shifted. The major legal principle became that parents are obligated to enhance the best interests of their children.<sup>180</sup>

### C. COMMON LAW

In “old” common law only the father was granted rights and authority regarding his legitimate children.<sup>181</sup> These rights and authority were also in the fields of guardianship, custody, and punishment.<sup>182</sup> The father was considered the only parent who could fulfill the duties of defense and maintenance a parent has towards his legitimate child.<sup>183</sup> Therefore, he was usually considered the preferable custodian. Only in rare cases, when the acts of the father endangered his children, was it possible to deprive him of his custody rights.<sup>184</sup> The father could receive services from the children who were in his custody and punish them in order to correct their behavior.<sup>185</sup> The father was also the only parent who made typical guardianship decisions such as those pertaining to his children’s religion and secular education.<sup>186</sup>

### D. JEWISH LAW: POST-TALMUDIC LAW (*GEONIM* AND *RISHONIM*)

The general trend of the relationship between parents and children in medieval Jewish law was the gradual rise of the principle of the best interest of the child. This new trend is apparent in various spheres, including

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<sup>179</sup> Later, as a result of the influence of Christianity, the substantial authority of the father was restricted. Limits were imposed upon the authority of the father regarding his daughter in compelling her to marry a husband who was chosen by him. The father’s authority became the right to supervise his children, as long as this supervision was required. When they grew up and became independent, the period of the father’s authority ended. Eventually, as a result of the acceptance of the Roman law, a new concept has emerged. The demand made by law of nature resulted in a transformation towards parental authority. The rules of the Civil Code reflected the new idea of parental authority, in which the parents act as one unit. *See id.* at 657–59.

<sup>180</sup> After the reception of Roman law, additional developments in favor of the child occurred. The best interest of the child became a major consideration regarding decisions of parents, when they act on his or her behalf, and attempt to train their children, determine their religious faith, or appoint their guardian. *See id.* at 664–65.

<sup>181</sup> *See* W. W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE*, 39 (2d ed. 1952).

<sup>182</sup> *See id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *See id.* at 38–42.

the fields of guardianship and custody. In addition, the status of the mother improved to a certain extent during this period.

The ancient rules concerning the authority of the father were mentioned as normative Jewish law in medieval codifications of this law,<sup>187</sup> medieval responsa literature,<sup>188</sup> and other medieval Jewish sources.<sup>189</sup> However, in the medieval period, some doubts were cast over the desirable scope of the father's authority. Some Jewish scholars believed that a very wide range of authority was undesirable. They wrote that this authority should be limited to the best interest of the child. Doubts were cast especially upon one aspect of this authority, that of the authority of the father to betroth his daughter while she was a minor child or a *na'arah*.<sup>190</sup>

The first period of development of Jewish law in the medieval period was Jewish Geonic law. The Geonim: Jewish scholars who resided usually in areas governed by Muslim rulers after the fifth century gave significant weight to the view of the Amora Rav or Rabbi Elazar—that the betrothal of a minor daughter was prohibited.<sup>191</sup>

The scholar Abraham Grossman claimed there was an additional development in the Geonic period: the marriage of minor daughters was not only prohibited; if it was performed, it was void.<sup>192</sup> However, a careful examination of the texts that were the foundation of Grossman's theory proves that they could have been interpreted in a different manner.<sup>193</sup> The

<sup>187</sup> See MISHNEH TORAH, Ishut 3:11, 14; TUR, Even Haezer 37; SHULCHAN ARUKH, Even Haezer 37:1. The new attitude, the one of total prohibition of marriage of minor daughters, is evident much later, in a modern codification. See ARUKH HASHULCHAN, Even Haezer 33.

<sup>188</sup> See RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) 1, #1214; #1219 (1997); RESPONSA OF RABBI YITZHAK BEN SHESHET (RIBASH) #193; #213; #479 (1993); RESPONSA OF RABBI MOSES MINTZ, #4 (1991); RESPONSA OF RABBI SIMON BEN TZEMACH (TASHBETZ) 2, #105 (1997).

<sup>189</sup> See SEFER RA'AVAN (1905), Kidushin 41a, s.v. ein haish mekadash; SEFER MITZVOT GADOL, Kidushin, Positive Commandments 48; PISKEY HAROSH, Kidushin 1:25 (1657); MORDEKHAY, Kidushin #514, #517; HAGAHOT MAYMONIYOT, Ishut 3:8–10; ORCHOT CHAYIM (1902) Part 2:1, Hilkhhot Kidushin #6.

<sup>190</sup> See *infra* notes 199–216.

<sup>191</sup> See *infra* notes 199–216.

<sup>192</sup> Abraham Grossman based his conclusion upon two ancient texts. See CHASIDOT UMORDOT: JEWISH WOMEN IN MEDIEVAL EUROPE 67–73 (Zalman Shazar Ctr. 2003) [hereinafter GROSSMAN, CHASIDOT UMORDOT]. One was attributed to Rabbi Yehudai Gaon, the Gaon of Sura between the years 758 and 762. In this text it is stated that when the father betrothed his minor daughter, she is not married. See HALAKHOT PESUKOT (attributed to Rabbi Yehudai Gaon) 83 (Oxford ed. 1886). In another text, attributed to a Babylonian Gaon or to the Spanish Jewish Rabbi at the end of the tenth century, Rabbi Moses Ben Chanokh, the Jewish scholar stated, concerning a betrothal of a minor daughter, that “the marriage is null and void.” See TESHUVOT GEONEY MIZRACH UMAARAV #187 (1888).

<sup>193</sup> Grossman held that it is certainly possible that the abovementioned version of the first text that was the foundation of his theory was not correct. See Grossman, *Child Marriage*, *supra* note 162,

rule in these texts was that marriage of minor daughters was prohibited but might not have been void. In an additional text, the Geonic interpretation of the rule in the Talmud was as follows: an enactment of the sages stated that a husband should not marry a wife if he had not yet seen her. When a father betrothed a minor daughter to a man she had not met, he violated this enactment.<sup>194</sup>

After the Geonic period, prominent medieval Jewish scholars maintained the policy that elevated the status of the minor Jewish daughter.<sup>195</sup> Indeed, eventually some medieval Jewish law scholars, especially in Franco-German Jewry, held that Jewish fathers could betroth their minor daughters. However, these scholars also took seriously the rule of the Amora Rav or Rabbi Elazar and had to justify the deviation from this rule in their communities. They explained that the unfortunate circumstances of Jewish life in the medieval communities of Franco-German Jewry justified a new legal policy.<sup>196</sup>

At the same time in the other large Jewish center after the Geonic era—that of Spanish and North African Jewry—the adoption of the outlook of the Amora Rav or Rabbi Elazar and its medieval interpretation resulted in an improved status of minor daughters.<sup>197</sup>

In the subsequent period, after the Geonic period, Jewish legal scholars known as the *Rishonim* resided in the two major Jewish centers: the Jewish center of Spain, North Africa, and the Middle East and the Jewish center of Franco-German Jewry. Some scholars held that the marriage of Jewish minor daughters was not common in this period.<sup>198</sup> However, Grossman convincingly proved that the marriage of minor daughters was a much more common practice in Jewish society than it was commonly thought to be from the eleventh century on. Statements and facts in a vari-

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at 111; GROSSMAN, CHASIDOT UMORDOT, *supra* note 192, at 68. The second source, of the Babylonian Gaon or Rabbi Chanokh, determines the fate of the betrothal of a minor orphan by her relatives and is not a statement of policy about the betrothal of a daughter by her father. However, this text certainly conveys the message that betrothal of a minor daughter is not desirable and the performer of this act is condemned. The message of this source is that this act is prohibited. See GROSSMAN, CHASIDOT UMORDOT, *supra* note 192, at 110. However, Leo Landman held that in the Geonic period there was a custom to betroth young Jewish daughters. See Leo Landman, *Review, Maimonides' Mishneh Torah*, 65 JEWISH Q. REV., NEW SERIES, 184, 186 (1974–75).

<sup>194</sup> See OTZAR HAGEONIM, Kidushin 111 (1940).

<sup>195</sup> See *infra* notes 199–216.

<sup>196</sup> See *infra* notes 220–223; 230–232.

<sup>197</sup> See *infra* notes 199–216.

<sup>198</sup> See S.D. GOITEIN, *A Mediterranean Society*, in VOL. III: THE FAMILY, 79 (1978); Mordechai A. Friedman, *The Ethics of Medieval Jewish Marriage*, in RELIGION IN A RELIGIOUS AGE, 83 (S.D. Goitein ed., 1974).



ety of Jewish medieval sources are the basis of his conclusion. He describes the many negative ramifications of this practice.<sup>199</sup> Although the marriage of minor Jewish daughters was not a rare phenomenon in this period, medieval Jewish legal scholars sometimes stated that Jewish law recommended fathers not to betroth their daughters when they were not mature and unable to consent to their marriage.<sup>200</sup> This practice in society could be the result of special unfortunate circumstances. It does not prove that in the medieval period all Jewish legal scholars would recommend that a father should betroth his daughters when they were not mature.

In the Jewish centers in Spain, North Africa, and the Middle East, Jewish legal scholars were influenced, directly or indirectly, by the legal policy stated clearly in the writings of Maimonides. In his codification, *Mishneh Torah*, Maimonides did not use the term used in the Babylonian Talmud by the opponents of the betrothal, “prohibited”; instead, he preferred the word “commanded.”<sup>201</sup> He wrote that although Jewish law grants the father authority to betroth his daughter when she is a minor or *na’arah*, our sages “commanded” fathers not to betroth their daughters until they grew up and declared: “This person I want [to marry].”<sup>202</sup> Maimonides added that this ancient recommendation did not pertain only to the father—the husband was also “commanded” not to betroth a minor girl.<sup>203</sup>

Maimonides held that the ancient point of view of Rabbi Yehudah, quoting the legal statement of Rav, or according to another tradition, Rabbi Elazar, that it is forbidden for a father to betroth his daughter while she is a minor, and therefore, he should wait until she matures and says she desires to wed a particular person, is binding law of the ancient sages that “commanded” Jews not to betroth their minor daughters.<sup>204</sup>

However, the legal significance of the word “commanded” in the text of Maimonides is not similar to that of the word “prohibited” in the ancient text. Maimonides knew some Jewish fathers in the medieval period betrothed their minor daughters and began his rule in his codification with a statement that was an attempt to stress that legal validity is granted to the act of the father. Fathers that betrothed their minor daughters did not violate an explicit prohibition, but the rule of the Sages was guidance. It was a

<sup>199</sup> See Grossman, *Child Marriage*, *supra* note 162, at 108–25.

<sup>200</sup> See *id.*

<sup>201</sup> See BABYLONIAN TALMUD, Kidushin 41a, 81b (the ancient rule); MISHNEH TORAH, Ishut 3:19 (medieval interpretation of Maimonides); *cf.* MISHNEH TORAH, Ishut 10:16; 15:7.

<sup>202</sup> See *supra* note 201.

<sup>203</sup> See *supra* note 201.

<sup>204</sup> See *supra* note 201.

recommendation to the father not to betroth his minor daughter. Although the betrothal of minor daughters was not “prohibited,” it was not appropriate. “Commanded” could also be a moral recommendation and not a legal prohibition.<sup>205</sup>

In his responsa, Maimonides mentioned a custom of the Jews in Damascus during his period. They betrothed their minor daughters when they were eight or nine years old. He did not condemn the community in Damascus that implemented this custom.<sup>206</sup> If Maimonides had believed this custom was an evident deviation from a “prohibition” in the Talmud, he would probably have attempted to put an end to this custom or try to harmonize between the ancient rule and the new custom as much as possible in his responsa.

Maimonides also explained that the purpose of the basic ancient law, which enabled the father to betroth his daughter, was the enhancement of the daughter’s best interests:

The Sages did not institute marriage for a male minor, as eventually he will be able to contract a full marriage for himself. Why then, have they instituted a marriage for a female minor, even though she, too, will eventually be able to contract a full marriage for herself? To prevent her from being used [by people who desire to do with her as they wish].<sup>207</sup>

Medieval Jewish scholars in Spain and North Africa did not often explicitly state that the choice to use the word “commanded” rather than “prohibited” was significant.<sup>208</sup> However, the special terminology of Maimonides was implicitly taken seriously. Eventually, the rule of Maimonides has also been incorporated into the two other major codifications of Jewish medieval law of the Spanish center: *Sefer Haturim*, written by Rabbi Jacob Ben Asher, and *Shulchan Arukh*, written by Rabbi Joseph Karo. They ruled that the father can betroth his minor daughter. However, he is

<sup>205</sup> See *supra* note 201.

<sup>206</sup> See RESPONSA OF MAIMONIDES 2, #427, 705 (Mekitzey Nirdamim, Blau ed., 1960) (Hebrew).

<sup>207</sup> MISHNEH TORAH, Ishut 11:6.

<sup>208</sup> Some scholars held that the choice of Maimonides to use the word “commanded,” and not the word “prohibited,” mentioned in the ancient source—BABYLONIAN TALMUD, Kidushin 41a—is significant. See COMMENTARIES TO SHULCHAN ARUKH, Even Haezer 37:8; Beit Samuel 11; Chelkat Mechokek 14. However, there might be a similar meaning to the words “prohibited,” and “commanded.” According to the interpretation of Rabbi Solomon Ben Simon, the rationale of the word “commanded,” in the writings of Maimonides, is similar to the legal rationale of the use of the word “prohibited,” mentioned in BABYLONIAN TALMUD Kidushin 41a: The daughter should consent to marry a specific individual before her betrothal. See RESPONSA OF RABBI SOLOMON BEN SIMON (RASHBASH) #369 (1998). This reflects the outlook of Jewish medieval scholars in Spain and North Africa regarding marriage of minor daughters.

“commanded” not to betroth her before she reaches the appropriate age and can declare her consent to marry her husband.<sup>209</sup>

The emphasis on consent of the daughter to her marriage is evident in the ancient text. The Amora Rav or Rabbi Elazar stated: “One may not give his daughter in betrothal when a minor, [but must wait] until she grows up and states, ‘I want [to marry] So and So.’”<sup>210</sup> After this statement, the Babylonian Talmud analyzed the matter of nomination of an agent for the daughter who will betroth her and mentions in this context that Jewish marriage requires the consent of the daughter.

In the medieval period Maimonides stressed that the consent of the minor daughter was important. It was desirable that she would eventually state when she was not a minor: “This person I want [to marry].” Many Jewish scholars in medieval Spain and North Africa guided fathers not to betroth their daughters when they were minors and enable these daughters to give their consent to marry a husband.

A Jewish medieval Spanish scholar, Rabbi Solomon Ben Abraham Aderet, explained in his responsa, that there was a gradual development of rules in this sphere in ancient Jewish law. During the first stage, in Biblical law, the father could betroth his minor daughter to a person who was afflicted with boils.<sup>211</sup> Her consent was not required. However, the Babylonian Talmud granted due weight to the point of view of Jewish scholars that stated at a later period that the betrothal of a minor daughter by her father is prohibited.<sup>212</sup> Rabbi Solomon Ben Abraham Aderet stressed indirectly that the betrothal was prohibited by these scholars since they believed that the consent of the daughter to her marriage was an important factor.

Other Jewish law scholars in this medieval Jewish center emphasized explicitly that there is a legal requirement that the daughter will consent to

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<sup>209</sup> See TUR, Even Haezer 37; SHULCHAN ARUKH, Even Haezer 37:8.

<sup>210</sup> BABYLONIAN TALMUD, Kidushin 41a.

<sup>211</sup> See BABYLONIAN TALMUD, Ketubot 40b.

<sup>212</sup> See RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) 1, #1131 (1997), in light of BABYLONIAN TALMUD, Kidushin 41a. Rabbi Solomon Ben Abraham Aderet held that according to the abovementioned point of view, of the Amora Rav or Rabbi Elazar, the rule in Biblical law, that the father can betroth his daughter to a husband he chose for her, including an individual afflicted with boils, was abolished in the Amoraic period, in the best interest of the child. See *id.*; see also COMMENTARY TO THE BABYLONIAN TALMUD, Kidushin 41b (concerning the consent of the minor daughter). I do not share the point of view of the scholar Leo Landman, that in the Spanish medieval Jewish community scholars, such as Rabbi Solomon Ben Abraham Aderet, stated, explicitly or implicitly, that Jewish fathers should marry off their daughters. See Landman, *supra* note 193. I believe scholars in the Spanish Jewish Center granted significance to the consent of the daughter to her marriage.

her marriage. They explained that consent to getting married is important. Therefore, a minor daughter, a *na'arah*, and especially an older daughter, a *bogeret*, should express her consent to marry her husband.<sup>213</sup>

Rabbi Yitzhak Ben Sheshet explained that the policy in Spain and North Africa in the fourteenth century was as follows: many people tried to follow the guidance of the ancient sages in the Babylonian Talmud not to betroth their daughters before they reached adulthood.<sup>214</sup> However, those who did betroth their daughters before they reached the age of *bogeret*, were not considered violators of a prohibition, since there were medieval Jewish scholars who permitted the betrothal of young daughters when the circumstances, such as an attempt to ensure the marriage of the daughter to an appropriate husband, justified marriage.<sup>215</sup>

Rabbi Solomon Ben Simon also stressed that it was important that a daughter consent to her betrothal.<sup>216</sup> This is also the legal rationale of the rule of Maimonides and other medieval Jewish scholars who believe that the father is “commanded” not to betroth his minor daughter. However, the circumstances in medieval communities in Spain, North Africa, and the Middle East sometimes justified a more flexible policy concerning the betrothal of minor Jewish daughters. Therefore, the prohibition of the betrothal of minor daughters by Amora Rav or Rabbi Elazar was presented in medieval Jewish literature of scholars from these areas in a milder manner. The focus was instead on the consent of the daughter to marry a particular person.<sup>217</sup> The father was “commanded” to enable his daughter to state that she wished to marry her husband.<sup>218</sup>

The North African Jewish medieval scholar, Rabbi Solomon Duran, stated in his responsa that most Jews in North Africa betrothed their minor daughters. He explained that they adopted this practice because in Spain and North Africa, the medieval Jewish interpretation of the *prohibition* of betrothal of minor daughters by the Amora Rav or Rabbi Elazar was a *recommendation*, in light of the terminology in the codification of Maimon-

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<sup>213</sup> See RESPONSA OF RABBI YITZHAK BEN SHESHET (RIBASH) #193 (1993) (emphasis upon the consent of the mature daughter); RESPONSA OF RABBI SOLOMON BEN SIMON (RASHBASH) #339; #369 (1988) (emphasis upon the consent of the mature daughter).

<sup>214</sup> See RESPONSA OF RABBI YITZHAK BEN SHESHET (RIBASH) #193 (1993).

<sup>215</sup> See *id.*

<sup>216</sup> In the Franco-German Jewish center the emphasis upon consent of the minor daughter is evident in the writings of Rabbi Solomon Yitzhaki (Rashi), of the eleventh century. See Commentary of Rabbi Solomon Yitzhaki (Rashi), Ketubot 57b, s.v. Aval Poskin.

<sup>217</sup> See Tashbetz, 4 (Chut Hameshulash) 1, #19 (1891).

<sup>218</sup> See *id.*

ides.<sup>219</sup> The betrothal of a minor daughter by her father in this area may be justified in appropriate circumstances.<sup>220</sup> Therefore, in the generations before he wrote his responsa and during his generation, Jewish scholars in Spain and North Africa permitted the betrothal of minor daughters. The father's concern that he would not have another opportunity in the future to marry his daughter to a worthy individual was taken seriously. He also mentioned that this policy could be found in the writings of medieval Jewish law scholars of the Franco-German center. He mentioned the interpretation of Rabbi Solomon Yitzchaki, the eleventh century French scholar<sup>221</sup> and other prominent Franco-German Jewish medieval scholars, the Tosafists, which stated that in the future the father may not have the financial ability to provide an adequate dowry. These scholars believed that betrothal of minor daughters was not prohibited in their era.

A medieval Jewish custom that is an evident deviation from the rule of the Amora Rav or Rabbi Elazar was the foundation of Jewish law of medieval Franco-German Jewry in this sphere, especially since the twelfth century. The harsh reality of Jewish life in France and Germany in the period of the Tosafists led the prominent scholars of this Jewry to adopt a new legal policy. They probably agreed that it was more desirable for a daughter to be betrothed by her father after she matures and could consent to her marriage, since it was possible that a minor daughter, betrothed by her father, might not consent to marry this person when she grew up. However, they explained that in the special reality of their period a new legal policy was necessary:

At present our custom is to betroth our daughters even when they are minors. Since everyday the [harsh reality of] exile becomes a significant burden upon us; and if the father is able to provide a dowry to his daughter at present, perhaps in the future he will not be able to do so, and his daughter will remain unmarried forever.<sup>222</sup>

Two other prominent scholars of medieval Franco-German Jewry, Rabbi Peretz of Korvil, in light of the approach of Rabbi Meir of Rothenburg, and Rabenu Eliyahu, explained that the new policy was an attempt to enhance the best interests of medieval Jewish daughters. They held that the ancient law, or the prohibition of minor betrothal, is relevant when many Jews live in one place. However, the reality of medieval Franco-German

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<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> See COMMENTARY OF RABBI SOLOMON YITZCHAKI, Ketubot 57b, s.v. aval poskin.

<sup>222</sup> See TOSAFOT, Kidushin 41a, s.v. asur leadam lekadesh bito ke'shehi ketanah; see also Landman, *supra* note 193 (interpreting the above text).

Jewry was that the Jews betrothed their minor daughters because the Jewish communities during the medieval period were small, and the opportunity to betroth the daughter might be temporary.<sup>223</sup> If the father waited, another father might betroth his daughter to this person before the father of the first daughter was able to. This reality justified the betrothal of minor daughters in an attempt to ensure their marriage to a desirable husband.<sup>224</sup>

The abovementioned rationale of “harsh reality” and financial uncertainty, mentioned in sources written by prominent Jewish scholars of Franco-German Jewry during the eleventh through thirteenth centuries, might not be identical to the abovementioned rationale of the temporary opportunity to betroth the daughter. However, in both cases the unfortunate result could be that the daughter would remain unmarried forever. Therefore, it is in the daughter’s best interests that her father should betroth her when she is a minor.

However, in the thirteenth century, some doubts were cast on this legal policy in Franco-German Jewry. A Jewish source, attributed to a prominent Jewish scholar or to a poet, mentioned the rule in the Talmud that marriage of minor daughters was prohibited.<sup>225</sup> The author of *Sefer Chasidim* recommended that fathers should not betroth their minor daughters since doing so delays the Messiah’s revelation.<sup>226</sup> However, the criticism in this medieval text is milder than the criticism in the ancient source, mentioning the delay of the Messiah’s revelation in the Babylonian Talmud.<sup>227</sup> The author of *Sefer Chasidim* also mentioned a statement in the Babylonian

<sup>223</sup> For the outlook of Rabbenu Peretz in light of the point of view of Rabbi Meir of Rothenburg, see KOL BO #75, s.v. Mitzvah Sheyikeyeh; *Hagahot Rabenu Peretz*, in SEFER MITZVOT KATAN, Mitzvah 183, #8 (2005); ORCHOT CHAYIM (Shlezinger ed., 1959–1962), Kidushin #6. See also COMMENTARY OF RABBI SOLOMON YITZHAKI (RASHI), Ketubot 57b, s.v. Aval Poskin; MORDEKHAY, Ketubot # 179 (the outlook of Rabenu Eliyahu).

<sup>224</sup> The medieval custom was presented as an application of an old rationale. This rationale is evident in the *Babylonian Talmud*. Yebamot 112b; see also TERUMAT HADESHEN #208 (1991) (Rabbi Israel Iserlien, the fifteenth century Jewish scholar, focuses upon this rationale in his responsa.) In addition, Jewish scholars of the Talmudic period participated in marriage ceremonies of young daughters who did not reach the age of *bogeret*. This fact led the medieval scholar of the Franco-German center, Rabenu Barukh, to the conclusion that the rule in Talmudic law is not clear-cut, and there is a solid foundation to the custom of medieval Franco-German Jewry to betroth a daughter in appropriate circumstances, when she is a minor or a *na'arah*. See MORDEKHAY, Kidushin #149. For the decision of Rabbi Elyakim and Ra'avan concerning the validity of the acts of the mother, brother and father of a minor daughter, see MORDEKHAY, Kidushin # 514; RESPONSA OF RABBI MOSES MINTZ #4 (1991).

<sup>225</sup> This rule is mentioned in the index to the book *Even Haezer*, of Rabbi Eliezer Ben Natan, one of the prominent Jewish law scholars in Germany in the twelfth century. See *Index*, SEFER EVEN HAEZER (Albek ed., 1905). However, the author of the index might be a subsequent poet, and not Rabbi Eliezer Ben Natan.

<sup>226</sup> See SEFER CHASIDIM #1144 (Wistinetzky ed., 1891).

<sup>227</sup> See BABYLONIAN TALMUD, Nidah 13b (origin of this rationale to this rule).

Talmud in favor of the marriage of children at a young age, concluding that the father should not betroth his daughter before the beginning of her thirteenth year of life.<sup>228</sup> Although many daughters do not conceive before they are sixteen years old, some can when they are thirteen years old, and therefore marriage at such age is permitted.<sup>229</sup> Some medieval Jewish scholars held that the betrothal of minor daughters by their fathers was not appropriate.<sup>230</sup>

The opposition to betrothal of minor daughters was not a major trend in medieval Franco-German Jewry. Influential Jewish legal scholars of Franco-German Jewry at the end of the thirteenth century, such as Rabbi Meir of Rothenburg, betrothed their daughters when they were minors.<sup>231</sup> This fact was regarded as a guiding precedent in subsequent generations in Franco-German (*Ashkenazi*) medieval Jewish law.<sup>232</sup>

Eventually, some Jewish scholars of Franco-German medieval law explained that the prohibition mentioned in the Talmud against the marriage of young daughters was not accepted as normative law by all Jewish scholars in the ancient period. The Babylonian Talmud had mentioned precedents of cases that reflect the opposite rule.<sup>233</sup>

In the sixteenth century, Rabbi Moses Isserles, the author of the glosses to the *Shulchan Arukh*, stated in his remarks to the codification of medieval law by *Sephardic* Jews—who resided in North Africa, the Ottoman Empire, and other regions—that the custom of Franco-German (*Ashkenazi*) Jewry was not in spirit of the rule that “commanded” the father not to betroth his daughter.<sup>234</sup> In his glosses to *Shulchan Arukh*, he stated:

<sup>228</sup> See BABYLONIAN TALMUD, Kidushin 29b.

<sup>229</sup> See SEFER CHASIDIM #11148 (The father is “commanded” to betroth his children when they are minors.); #11150 (The father is “commanded” to betroth his children when they are mature.).

<sup>230</sup> See ORCHOT CHAYIM, Kidushin #6 (Shlezinger ed., 1959–1962).

<sup>231</sup> See SHAAREY TESHUVOT MAHARAM, Parma Manuscript #293 (1991); RESPONSA OF RABBI SOLOMON BEN ABRAHAM ADERET (RASHBA) I, #867 (1997); SHAAREY TESHUVOT MAHARAM, Manuscript #205; Amsterdam II manuscript #40; Prague Manuscript #310 (1891); RESPONSA OF RABBI MEIR OF ROTHENBURG #569 (1608); Mordekhay, Yebamot # 61; TESHUVOT MAYMONIYOT, Nashim #14; RESPONSA OF RABBI MEIR OF ROTHENBURG #286 (1557); RESPONSA OF RABBI MEIR OF ROTHENBURG #389 (1860); SHAAREY TESHUVOT MAHARAM, Parma Manuscript #430; Munich Manuscript #215; Amsterdam II Manuscript #39; Prague Manuscript #373 (1891); RESPONSA OF RABBI MEIR OF ROTHENBURG #939 (1608); RESPONSA OF RABBI MEIR OF ROTHENBURG #31 (1557); RESPONSA OF RABBI MEIR OF ROTHENBURG #355 (1860); SHAAREY TESHUVOT MAHARAM, Parma Manuscript #394; Amsterdam II Manuscript #100, #139 (1891).

<sup>232</sup> See TERUMAT HADESHEN #213 (1991). Concerning the point of view of Rabbi Meir of Rothenburg, see *supra* notes 222–231.

<sup>233</sup> See BABYLONIAN TALMUD, Kidushin 81b (Rav Chisda); BABYLONIAN TALMUD, Nidah 66a (Ravina and Rav Chaviva).

<sup>234</sup> See *Hagahot Harema to Shulchan Arukh*, Even Haezer 37:8.

And some hold that our custom at this time is that we betroth our daughters when they are minors, since we are in the Diaspora, and we are not always able to afford to pay the husband the sum of money given traditionally to him, and we are not many people and do not always find a suitable husband. And this is our custom.<sup>235</sup>

Why did the Franco-German medieval scholars deviate from the legal policy at the Geonic era that ascribed major importance to the rule of the Amora Rav or Rabbi Elazar that the betrothal of minor daughters is prohibited? Medieval Franco-German Jewish legal scholars, such as the Tosafists, explained that the circumstances in medieval Franco-German communities were unique; a father needed to betroth his minor daughter in an attempt to ensure her marriage.<sup>236</sup>

Some modern scholars explained that the customs of medieval Jews were created as a result of the influence of norms of the society of Gentiles, especially when Jews lived in areas governed by the Muslims. In these areas, the marriage of young daughters was frequent during this period. There was also a social and cultural interaction between medieval Franco-German Jewry and the Muslim society.<sup>237</sup> In addition, some medieval Jews in France and Germany were international merchants. They sometimes visited areas governed by the Muslim society and before they left home to a far destination they wished to ensure the betrothal of their daughters.<sup>238</sup> The custom in some Franco-German communities that the parents chose the groom and that the daughter did not have to consent to her marriage was also an important factor. This custom was granted due weight in the sphere of marriage of minor daughters. The prohibition of the Amora Rav or Rabbi Elazar was an attempt to ensure that Jewish daughters consent to their marriage and was relevant only when the local custom requires that the daughter should consent to her marriage.<sup>239</sup> Other modern scholars explained that the approach of Franco-German Jewry in permitting minor betrothal was an attempt to prevent sexual sins and undesirable thoughts about sexual relations by young unmarried Jewish males and females when they were adolescents.<sup>240</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> See *supra* note 222.

<sup>237</sup> See Grossman, *Child Marriage*, *supra* note 162, at 120; GROSSMAN, CHASIDOT UMORDOT, *supra* note 192, at 82.

<sup>238</sup> GROSSMAN, CHASIDOT UMORDOT, *supra* note 192, at 83.

<sup>239</sup> See *id.* at 84.

<sup>240</sup> See Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages 166–67* (Bernard Dov Cooperman trans., 1958); see also Grossman, *Child Marriage*, *supra* note 162, at 122–23.



V. JEWISH MODERN LAW (PERIOD OF THE *ACHARONIM*)

A. MAJOR TREND

In the sixteenth century, the period of the Jewish scholars known as the *Acharonim* began after the publication of the Codification of Jewish law, the *Shulchan Arukh*. At present we are at the end of this period. During the period of the Jewish scholars known as the *Acharonim*, medieval trends were the foundation of Jewish law concerning marriage of minor Jewish daughters.<sup>241</sup> However, a new agenda began emerging and became more concrete during the second half of the twentieth century. The interaction between ancient Jewish law and the law of modern Western societies during this period is evident. Since the second half of the twentieth century, the vast majority of prominent Jewish legal scholars started to focus on the best interest of the child and more equality between male and female. This new agenda is evident also in the sphere of the betrothal of the minor Jewish daughter. These scholars stressed that the betrothal of minor daughters is undesirable and prohibited. Three parallel attempts were the result of this new agenda: enactment of a new law for Jews in the Holy Land, interpretation of ancient Jewish sources in light of new trends in society, and a deliberate attempt to invalidate the marriage ceremony of individuals who claimed they betrothed their minor daughters. At present, betrothal of minor Jewish daughters is rare and condemned by many influential Jewish legal scholars.

B. DEVELOPMENT OF LAW CONCERNING BETROTHAL OF MINOR DAUGHTER

In the period of the *Acharonim*, there was an evident elevation of the status of the minor Jewish female in the *Ashkenazi* tradition by Jewish scholars in communities that continued the tradition of medieval Franco-German Jewry. The deviation of prominent modern *Ashkenazi* scholars from the custom of medieval Franco-German Jewish communities was gradual. However, some *Ashkenazi* scholars held that the medieval *Ashkenazi* point of view was a desirable policy. Eventually a new policy emerged. Many Jewish scholars who followed the *Ashkenazi* tradition, especially in the second half of the twentieth century, prohibited the marriage of minor Jewish daughters or stated that certain facts regarding their marriage ceremony could justify the verdict that their marriage was void.

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<sup>241</sup> See *infra* Part V.B.

During the seventeenth century in Poland, Rabbi Joel Sirkesh, follower of the *Ashkenazi* Franco-German medieval Jewish tradition, explained that the Amora Rav ruled that the father should not betroth his minor daughter *when she has not consented to the marriage, or was not in a mental state that enabled her to consent* (emphasis added).<sup>242</sup> However, when he had a “wise” daughter, who stated clearly that she wished to marry a certain individual, he was obligated (*mitzvah*) to betroth her when she matured, and the betrothal took place a short period before she reached the ages of *na’arah* or *bogeret*.<sup>243</sup> According to Rabbi Sirkesh, the Amora Rav stated the father should not betroth his minor daughter before adulthood because usually she has not said that she wished to betroth an individual before she has reached this age.<sup>244</sup>

During the eighteenth century in Germany, Rabbi Jacob Emden, another follower of *Ashkenazi* approach in Jewish law, explained that in his era, betrothal of minor daughters was the accepted practice in certain areas. He ruled that although the marriage of minor daughters was prohibited in other communities, if a marriage had already been performed, it was valid, even if the daughter had not consented to it.<sup>245</sup> However, in his responsa, Rabbi Emden deviated from the medieval perspective of the Tosafists, who believed when fathers betroth their minor daughters, they are pursuing the best interest of the minor daughters.<sup>246</sup> Rabbi Emden stressed that at his time and at his location the prohibition of betrothal of minors by the Amora Rav or Rabbi Elazar was binding law and explained that since the period of the Tosafists the reality of Jewish life has changed.<sup>247</sup> The rationale of the Tosafists, who permitted this kind of marriage in the medieval period, was the undesirable reality of the Jewish nation in exile, but he believed this rationale was no longer relevant at his time.

Moreover, Rabbi Emden stated that Jewish law was opposed to the betrothal of minor daughters who could not apply good judgment that enabled them to consent to their marriage.<sup>248</sup> However, if the minor daughter consented to her marriage after she evaluated in a sufficient manner all the pros and cons and declared that she wished to marry a particular individual, Rabbi Emden argued her betrothal by her father was appropriate.<sup>249</sup> Never-

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<sup>242</sup> See BAYIT CHADASH, Even Haezer 37, #6 (1964).

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

<sup>245</sup> See RESPONSA SHEILAT YAAVETZ 1, #14 (2004).

<sup>246</sup> See *supra* text accompanying note 236.

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

theless, the betrothal should be performed only after she was twelve years old.<sup>250</sup> His opposition to the betrothal of minor daughters was stronger than that of Rabbi Joel Sirkesh because Rabbi Emden was concerned that a married young daughter might die as a result of pregnancy at a young age. He believed that some young daughters required extra protection from this danger.<sup>251</sup> However, he believed young daughters less than twelve years old faced the most severe risk from pregnancy.<sup>252</sup> If the daughter is betrothed at the end of her twelfth year or later, Rabbi Emden believed that this risk to her health was not relevant and her marriage was appropriate.<sup>253</sup>

A total rejection of betrothal of minor daughters was evident in the writings of Rabbi Yechiel Mikhel Epstein. He stressed that the betrothal of minor daughters was an unknown phenomenon in *Ashkenazi* communities in Eastern Europe during his period, the end of the nineteenth century. He stated that the custom in all segments of *Ashkenzi* Jewry in his period was clear-cut: this marriage was prohibited. According to Rabbi Epstein, the medieval point of view held by the Tosafists was not relevant in his time and place.<sup>254</sup>

However, a short period afterwards, during the first half of the twentieth century, the point of view Rabbi Abraham Isaac ha-Cohen Kook, who also followed the *Ashkenazi* approach in Jewish law concerning betrothal of minor daughters, was different than the abovementioned major trend of *Ashkenazi* Jewish law at the end of the nineteenth century. He explained that in the past, the ancient sages in the Talmud and the author of the *Sefardi* codification of Jewish law, *Shulchan Arukh*, followed by those who continued the tradition of medieval Spanish and North African people, prohibited the betrothal of minor daughters. However, *Ashkenazi* glosses to this codification, *Hagahot Harema*, which stated that the custom of *Ashkenazi* Jews was that the betrothal of minor daughters was permitted.<sup>255</sup> In

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<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

<sup>254</sup> See ARUKH HASHULCHAN, Even Haezer, 33 (1970); see also S. Shtamffer, *The Social Significance of Marriage of Minors in Eastern Europe in the Nineteenth Century*, in COLLECTION OF ESSAYS ON JEWS IN POLAND 65–77(1987) (concerning the approach of nineteenth century Jewry in eastern Europe regarding betrothal of minor daughters).

<sup>255</sup> Therefore, according to the outlook of Rabbi Kook, this point of view is binding *Ashkenazi* tradition in the land of Israel at the first half of the twentieth century as well. See RESPONSA EZRAT COHEN #103 (1985). He explained that at his period it was not easy to find a suitable husband for daughters. RESPONSA EZRAT COHEN #7 (1985). He held that this problem in his era was more severe than the problem that the communities of Franco-German Jewry had been faced with in medieval periods. He also wrote there, that the policy in favor of marriage of minor daughters should be imple-

fact, he stated that all Jews in the Holy Land of Israel during his period could claim there was no prohibition against the marriage of minor daughters. While Rabbi Joseph Karo stated, indeed, that this type of marriage was not desirable, this view was the custom of the *Sefardi* Jews. Conversely, Jews who followed the *Ashkenazi* tradition held that they could betroth their minor daughters.<sup>256</sup> He held that if *Ashkenazi* Jews followed the custom of *Sephardic* Jews in this sphere, or *Sephardic* Jews followed the custom of *Ashkenazi* Jews, their custom was valid. *Sephardic* Jews were obligated to follow the ruling of Rabbi Joseph Karo in the *Shulchan Arukh* only when there was no legitimate contrary custom. He believed that Jews should avoid confrontation on this matter, and therefore the marriage of a minor daughter at his time in his place of residence should be prevented only when there was a danger that it might be a great obstacle. Rabbi Kook also stressed that although Rabbi Jacob Emden held that the rationale of the medieval Jewish scholars was not relevant in the period of the *Acharonim*, Rabbi Emden's view should not prevail in the Holy Land at his period because it is contrary to that of the *Tosafists* and Rabbi Moses Isserles in *Hagahot Harema*. Additionally, Rabbi Kook explained that Rabbi Emden also believed that the special reality of the life of Jews in each generation should be taken into consideration. Rabbi Kook concluded that in his location during the first half of the twentieth century, it was desirable to betroth daughters when they were minors and took into consideration the special reality of his period. Daughters did not always choose to marry religious husbands strict in the observance of the commandments of Jewish law. He explained that Jewish law encouraged fathers to betroth their minor daughters when it was not easy to find an adequate husband for them.<sup>257</sup>

Some Jewish legal scholars during the period of the *Acharonim* continued the *Sefardi* medieval tradition of Jewish scholars in Spain and North Africa, presenting a wide range of attitudes regarding the betrothal of mi-

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mented, in his opinion, especially when there is an emotional bond between the daughter and the individual she is going to marry.

<sup>256</sup> See SHULCHAN ARUCH, Even Haezer 37:8 (concerning the Sephardic tradition—the codification of Rabbi Joseph Karo). The point of view of the *Tosafists* was mentioned eventually in the codification of the Ashkenazi medieval Jewry. *Id.* at Hagahot Harema (glosses of Rabbi Moses Isserles to the *Shulchan Arukh*).

<sup>257</sup> Therefore, according to the outlook of Rabbi Kook, this point of view is binding Ashkenazi tradition in the land of Israel at the first half of the twentieth century as well. See RESPONSA EZRAT COHEN #103 (1985). He explained that at his period it was not easy to find a suitable husband for daughters. RESPONSA EZRAT COHEN #7 (1985). He held that this problem in his era was more severe than the problem that the communities of Franco-German Jewry had been faced with in medieval period. He also wrote there, that the policy in favor of marriage of minor daughters should be implemented, in his opinion, especially when there is an emotional bond between the daughter and the individual she is going to marry.

nor daughters in their writings. Some of the prominent *Sefardi* scholars of this period held that the father could betroth his minor daughter. They held that the recommendation of Maimonides and other *Sefardi* medieval scholars not to betroth minor daughters was not a binding rule in their period.

Rabbi Solomon Cohen, a *Sefardi* Jewish scholar in Greece at the beginning of the period of the *Acharonim* who followed the Jewish legal doctrines of Spanish and North African medieval scholars, ruled that in his time and place, fathers could betroth their minor daughters and claim their custom was that of the Tosafists.<sup>258</sup> This act would not violate a prohibition concerning betrothal of minor daughters. According to Rabbi Solomon Cohen, the unfortunate reality mentioned by the Tosafists was relevant in his community, and therefore there the marriage of a minor daughter was possible.<sup>259</sup> However, in cases in which the father was rich, the rationale of the Tosafists, the harsh reality in the Diaspora, was not relevant.<sup>260</sup>

Rabbi Moses Calfon, another Jewish scholar in the first half of the twentieth century, adhering to the *Sefardi* Jewish tradition, was asked about the betrothal of minor daughters eight or nine years of age. He explained that the Amora Rav or Rabbi Elazar prohibited the betrothal of minor daughters in an attempt to ensure the consent of the daughter to her marriage.<sup>261</sup> In Rabbi Calfon's period, most daughters and fathers preferred that the daughter be married when the daughter was young. In light of this majority point of view, it may be assumed that the daughter consented to her betrothal. Indeed, Rabbi Joel Sirkesh distinguished between a wise daughter and an unwise daughter. However, he explained this distinction was not relevant in the harsh reality of his period. In order to prevent conflicts between Jewish individuals and in an attempt to ensure the marriage of daughters, he held that Jews in his period could deviate from the rule of the Amora Rav or Rabbi Elazar because they were acting in the best interest of the daughter.<sup>262</sup>

In some regions of the world, the ancient rules of Jewish law concerning the marriage of minor daughters by their fathers have been applicable in the modern era, including the twentieth century. One such region was Yemen. Yemenite Jewry preserved marriage and divorce customs based on the rulings of sources from the ancient Amoraic period and the medieval writings of Maimonides that have been reinterpreted or replaced by new

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<sup>258</sup> See RESPONSA OF RABBI SOLOMON COHEN (MAHARSHAKH) #1, #3 (1961).

<sup>259</sup> See *id.*

<sup>260</sup> See *id.*

<sup>261</sup> See RESPONSA SHOEL VENISHAL 5, Even Haezer EH #47 (1970).

<sup>262</sup> See *id.*

enactments by some modern Jewish legal scholars and Jewish communities, especially in recent generations.<sup>263</sup> Maimonides stated that under special circumstances, marriage of minors was acceptable. He explained that the sages in the ancient period did institute marriage for a minor woman, although when she later reached the age of *bogeret*, she should consent at that stage to her marriage. He explained that marriage of the minor daughter is desirable “in order that she should not be used [by people who desire to do with her as they wish].”<sup>264</sup> Rabbi Kapach explained that special circumstances, such as those mentioned by Maimonides, justify marriage of young daughters in Yemen. The average age of marriage of females in Yemenite Jewry during this period was between eleven and fifteen years old.<sup>265</sup> The Jewish court and relatives of these minor daughters would betroth them at a young age in an attempt to avoid the practice of the gentiles in this region to force minor Jewish orphans to convert to the Muslim religion. After his or her marriage the Jewish child was considered an adult and the imposition of the Muslim faith upon him or her was impossible.<sup>266</sup> Consequently, marriage of minor Jewish daughters was common in Yemen.<sup>267</sup> Yemenite fathers married their minor daughters at an early age in an attempt to prevent their sin.<sup>268</sup> Rabbi Yosef Kafih wrote that most of the girls in San’a were married between the ages of eleven and fifteen and in isolated instances even younger.<sup>269</sup> In Haban, in southeast Yemen, it was customary for parents to marry off their daughters from the age of seven.<sup>270</sup> It was said that Rabbi Hayim Korah, a Jewish legal scholar in the nineteenth century, held “that one should not delay [in marrying] his adult daughter, but any time there is a worthy match . . . he should not decline [the suiter].”<sup>271</sup> Sometimes new enactments were the basis of the legal norm in this sphere.

In the seventeenth century, Rabbi Ephraim Cohen, an *Ashkenazi* Jewish scholar in Buda, Hungary,<sup>272</sup> mentioned an “ancient” enactment of the

<sup>263</sup> See Aharon Gaimani, *Marriage and Divorce Customs in Yemen and Eretz Israel*, 11 NASHIM: J. JEWISH WOMEN’S STUD. & GENDER ISSUES 43, 43 (2006).

<sup>264</sup> MISHNEH TORAH, Ishit 11:6.

<sup>265</sup> See Gaimani, *supra* note 263, at 76 n.15.

<sup>266</sup> See J. KAPACH, HALIKHOT TEMAN 107–08 (Ben Tzvi Inst. ed., 2002).

<sup>267</sup> See *id.*; see also A. Mizrachi, Bat Teman Hayehudiyah, The Matach Ctr. of Educ. Tech., <http://lib.cet.ac.il/pages/item.asp?item=9290>.

<sup>268</sup> See Gaimani, *supra* note 263, at 76 n.15 (to be read in light of the testimony of Brauer).

<sup>269</sup> See *id.* (to be read in light of Kapach, HALIKHOT TEMAN 107 (2002)).

<sup>270</sup> See *id.* (to be read in light of S. Matuf, Note, *The Jews of Haban in Recent Generations* 69 BAR-ILAN UNIV. (2003)).

<sup>271</sup> R. S. Korah, *Olelot*, in BO’I TEMAN 57 (1967).

<sup>272</sup> Professor Freiman held “Budon,” mentioned in the responsa, is Buda. See A.C. FREIMAN, SEDER KIDUSHIN VENISUIN 254 (1945) [hereinafter FREIMAN, SEDER].

Jews that fathers should not betroth their daughters before their eleventh year of life.<sup>273</sup> However, he stated that the leaders of the Jewish community during his period did not enforce this enactment and did not punish individuals that violated it.<sup>274</sup>

Rabbi Joseph Chayim Azulai has described the reality in *Sephardi* community in Jerusalem, the land of Israel, in the eighteenth century. According to him, most daughters were married when they were twelve years old. Some were betrothed when they were eleven years old and the consequences of the marriages were often not desirable. Therefore, in 1730, Rabbi Solomon Abdullah and his Jewish court in Jerusalem enacted a new rule that fathers should not betroth their daughters before the end of their twelfth year of life.<sup>275</sup> According to this rule, the violator of the enactment would be excommunicated. But this rule was relevant only in Jerusalem.<sup>276</sup> The reality in this period in the Holy Land was harsh, and many Jews that resided in this area during this period, from the *Sefardi* segment of Jewish society, circumvented the prohibition of this enactment and married their minor daughters outside the boundaries of Jerusalem.<sup>277</sup>

Rabbi Joseph Chayim of Baghdad, another Jewish scholar who followed the *Sefardi* approach, lived during the second half of the nineteenth century and the first half of the twentieth century and was asked at what age was the betrothal of minor daughters appropriate.<sup>278</sup> He referred to the responsas of Rabbi Joseph Chaim Azulai and Rabbi Moses Mizrachi, who mentioned an enactment in Jerusalem in 1730 which stated that the minimal age of betrothal of minor daughters was twelve years old.<sup>279</sup> Rabbi Joseph Chayim stated that the guidance of rabbis from the past was important.<sup>280</sup> He also took into consideration the medical risks resulting from marriage of minor daughters during his period. He explained that prior to his time, the females were stronger and pregnancy at an early age was less problematic.<sup>281</sup> However, the medical status of young daughters during his

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<sup>273</sup> See RESPONSA SHAAR EPHRAIM, Even Haezer #113 (1960); see also FREIMAN, SEDER, *supra* note 272.

<sup>274</sup> RESPONSA SHAAR EPHRAIM, Even Haezer #113 (1960).

<sup>275</sup> See RESPONSA YOSEF OMETZ #100 (1977). This text is also mentioned in the responsa of Rabbi Abraham Chaim Gagin. RESPONSA CHUKEY CHAYIM #14 (1843).

<sup>276</sup> See *supra* note 275.

<sup>277</sup> See RESPONSA CHUKEY CHAYIM #14 (1843) (for a discussion of the reality in the period of Rabbi Abraham Chaim Gagin); see also FREIMAN, SEDER, *supra* note 272, at 276–77.

<sup>278</sup> See *supra* note 275.

<sup>279</sup> See RESPONSA ADMAT KODESH, Even Haezer #38 (1842); RESPONSA YOSEF OMETZ #100 (1977).

<sup>280</sup> See *supra* note 275.

<sup>281</sup> See *supra* note 275.

period was different. The doctors of his era believed marriage of twelve-year-old girls was not desirable and could result in unfortunate medical consequences.<sup>282</sup> Therefore, the standards set for marriage of minor daughters in the past were not relevant. Daughters should be betrothed only after they complete thirteen years of life.<sup>283</sup> According to this responsa, in the second half of the nineteenth century, Jews in Baghdad did not adhere to an ancient enactment that limited the marriage of minor daughters.<sup>284</sup>

In the course of time, Jewish law has been influenced by new trends in the secular law in the sphere of marriage of minors. Many modern legal systems in the twentieth century prohibit the betrothal of daughters by their parents when they are under the appropriate marriage age, specified by law. Israeli law states that marriage of a daughter or son who did not reach the age of seventeen years is a criminal act.<sup>285</sup> Justice Aharon Barak of the Israel Supreme Court, explained that the rationale of this rule was that society should protect the minor daughter. Often, short-term considerations of the daughter and pressure from her parents led her to consent to marriage although she lacked the emotional and physical maturity required for the formation of a mature marital relationship and appropriate care and treatment of children.<sup>286</sup> The legal system has attempted to create new norms in society. In the twentieth century the people of Israel wished to prevent immature marriages as much as possible. The new law was the instrument used by society to change the behavior of individuals.

At the same time new norms in Jewish law were issued by the religious society in Israel in an attempt to enhance the status of the minor daughter. The new law was the tool intended to produce the desired social change.<sup>287</sup> The Chief *Ashkenazi* Rabbi of Israel, Isaac Herzog, knew that

<sup>282</sup> See *supra* note 275.

<sup>283</sup> See RESPONSA RAV PEALIM 2, SOD YESHARIM #1, fourth answer (1970).

<sup>284</sup> See FREIMAN, SEDER, *supra* note 272.

<sup>285</sup> See Marriage Age Law, 5710-1950, 4 LSI 158-59 (1949-50) (Isr.); see also SCHERESCHEWSKY, FAMILY LAW, *supra* note 126, at 42-44; P. Shifman, FAMILY LAW IN ISRAEL 228-30 (1995). Section 5 of the abovementioned law enables a court to grant a permit to marry a son or a daughter who are under seventeen years old, when special circumstances, specified by law, justify the granting of this permit.

<sup>286</sup> See CA 501/81 The Attorney General v. Plonit Uploni [1981] Isr SC 35(4) 430.

<sup>287</sup> For a discussion of Rabbi Herzog's social vision that desirable change will be achieved as a result of the enactments of the Chief Rabbinate of Israel, see Shear-Yashuv Cohen, *Chief Rabbi Herzog—Master Jurist and Gaon*, in THE HALAKHIC THOUGHT OF RABBI ISAAC HERZOG, JEWISH LAW ASSOCIATION STUDIES V 9 (B.S. Jackson ed., 1991); Zorach Warhaftig, *Rabbi Herzog and Rabbinic Legislation*, in THE HALAKHIC THOUGHT OF RABBI ISAAC HERZOG, JEWISH LAW ASSOCIATION STUDIES V 21 (B.S. Jackson ed., 1991); Eliav Schochetman, *Rabbi Isaac Herzog's Theory of Torah and State*, in THE HALAKHIC THOUGHT OF RABBI ISAAC HERZOG, JEWISH LAW ASSOCIATION STUDIES V 113 (B.S. Jackson ed., 1991).



the Israeli government proposed a law that would prohibit the marriage of minor daughters. He wanted to achieve harmony between the norm of Jewish law and the future norm of the State of Israel.<sup>288</sup> The Chief Rabbinate, enacted a few months before the new law of the Israeli legislature determining the norms pertaining to the age of marriage, was intended to pave the road for the secular legislation.<sup>289</sup>

The enactment of a convention of rabbis in Israel changed the rules of Jewish law in Israel. It prohibited the betrothal of a daughter who was under the age of sixteen years and one day.<sup>290</sup> The father was prohibited from betrothing her to her future husband at this age.<sup>291</sup> The ordinance of the Chief Rabbinate of Israel stated:

No Jewish man may betroth a woman who is younger than 16 years and one day old, since a woman younger than this age endangers herself in pregnancy, and there is risk of death for the mother and the fetus, in our times when the generations have declined and the powers have weakened; and also because these marriages are liable to lead to mishaps and to cases of desertion of wife by her husband (*igun*), as has been proven in many cases. This prohibition applies to the father of the girl, who may not betroth his daughter while she is under [the minimal] age.<sup>292</sup>

The enactors of this new rule of the Chief Rabbinate—signed by the *Ashkenazi* Chief Rabbi Yitzchak Herzog and the *Sefardi* Chief Rabbi Ben Zion Chai Uziel—stressed that this enactment was necessary because Jews came to the Holy Land from all parts of the world and it was desirable that there will be one norm in this sphere. In addition, it was not always possible to obtain a writ of divorce from husbands who married young daughters. A major consideration of the enactors was that the daughters of this period were weaker than those who lived in the past. Marriage of minor daughters could result in health risks such as undesirable pregnancy and the risk of death of the mother and her fetus.<sup>293</sup> This rationale coincides with the cur-

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<sup>288</sup> See I. A. HERZOG, *TECHUKAH LEYISRAEL AL PI HATORAH* 3, 160 (1979) [hereinafter HERZOG, *TECHUKAH*].

<sup>289</sup> The Israeli law, *supra* note 285, was enacted on Jan. 8, 1950, a few months after the enactment of the Chief Rabbinate. The norms in the religious and secular legislation are not identical. Rabbi Herzog held it is unfortunate that the Israeli legislator used the age of seventeen years, and not the age sixteen years that was adopted as the age of marriage in the enactment of the Chief Rabbinate. See HERZOG, *TECHUKAH*, *supra* note 288, at 179.

<sup>290</sup> RESPONSA HEKHAL YITZCHAK, *Even Haezer* EH 1, #5 (1960); HERZOG, *TECHUKAH*, *supra* note 288, at 168–69; see also Y. Kister, *The Ordinances of the Chief Rabbinate of Eretz Israel Regarding Family Law*, 12 *TORAH SHEBEAL PEH* 57 (1970).

<sup>291</sup> See *supra* note 290.

<sup>292</sup> See *supra* note 290.

<sup>293</sup> See HEKHAL YITZCHAK, *supra* note 290.

rent point of view that pregnancy of minor daughters poses significant physical and psychological health risks to the young mother.<sup>294</sup> In addition, the children born to these mothers suffer a higher risk of pregnancy and childbirth complications, “higher incidence of low birth weight,” and “a higher infant mortality and morbidity.”<sup>295</sup>

This new development was not an isolated phenomenon; rather, it was part of the development of the principles of Jewish law in the era of the *Acharonim*. Enactments of some Jewish communities prior to the enactment of the Chief Rabbinate of Israel prohibited the betrothal of minor daughters.<sup>296</sup> These were local enactments that were only binding on the members of these communities. Rabbi Herzog, one of the enactors of the Chief Rabbinate of Israel, explained that these enactments were one of the sources of inspiration that led to the decision to adopt the enactment of the Chief Rabbinate, which is relevant concerning all the Jews residing in Israel.<sup>297</sup>

In the modern period, the intervention of the state in family matters has increased.<sup>298</sup> The law of the state includes new norms that prevent undesirable marriage of minor daughters. This enactment is part of this trend. As a result, Jewish law in Israel adjusted itself to the new reality, and the authority of the father to betroth his minor daughter was restricted. The enactment of the new law influenced Jews that came to Israel from communities such as Yemen, which adhered to the ancient rules concerning betrothal of a Jewish daughter by her father. Rabbi Hayim Kesar, one of the

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<sup>294</sup> See Joseph D. Teicher & Jerry Jacobs, *Adolescents Who Attempt Suicide: Preliminary Findings*, 122 AM. J. PSYCHIATRY 1248, 1255 (1966); JOSEPH D. TEICHER, NATIONAL INSTITUTE OF NATIONAL HEALTH, MENTAL HEALTH PROGRAM REPORT, NO. 4, WHY ADOLESCENTS KILL THEMSELVES (1970); Judith S. Wallerstein et al., *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 ARCHIVES OF GEN. PSYCHIATRY 828 (1972); Jane Menken, *The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing*, in ADOLESCENT PREGNANCY AND CHILDBEARING: FINDINGS FROM RESEARCH 157–194 (Catherine S. Chilman et al. eds., 1980); Sara R. Millman & Gerry E. Hendershot, *Early Fertility and Lifetime Fertility*, 12 FAM. PLAN. PERS. 139 (1980); Robert F. Anda, et al., *Adverse Childhood Experiences and Risk of Paternity in Teen Pregnancy*, 100 OBSTETRICS & GYNECOLOGY 37, 42 (2002).

<sup>295</sup> 42 U.S.C. § 300z(a)(5) (1982) (congressional report findings).

<sup>296</sup> See FREIMAN, SEDER, *supra* note 272, at 276–77.

<sup>297</sup> See HERZOG, TECHUKAH, *supra* note 288, at 167, 174. Rabbi Dr. Zorach Warhaftig asked Rabbi Herzog questions concerning the correct interpretation of the enactments of the Chief Rabbinate. *See id.* at 170. He held that the enactments of Jewish communities in the period of the *Acharonim* were a source of inspiration that led to the enactment of the Chief Rabbinate. *See Z. Warhaftig, Enactments of the Chief Rabbinate*, in THE CHIEF RABBINATE OF ISRAEL: SEVENTY YEARS SINCE ITS ESTABLISHMENT 85 (2002).

<sup>298</sup> *See Rabello, supra* note 108, 146–47.

leading Jewish scholars of the Yemenite Jewish community in Israel in the years following the establishment of the state of Israel, wrote:

He who marries off his daughter while she is a minor, his iniquity is great, for he brings her into danger . . . and he does not thereby fulfill any commandment, and there is a need to warn people about this, and he who hearkens the words of our Rabbis, of blessed memory, shall dwell safely.<sup>299</sup>

Rabbi Amram Korah, the last Chief Rabbi of Yemenite Jewry in the Diaspora, immigrated to Israel with his community in 1949 and published his book *Sa'arat Teman* in 1954 after the enactment of the Chief Rabbinate of Israel. In this book, he mentioned measures the Yemenite Jews should adopt in Israel, including “outlawing the marriage of immature girls, as long as the daughter has not reached the age of maturity.”<sup>300</sup>

However, if the father in Israel violated the prohibition of the Chief Rabbinate, the marriage was still valid.<sup>301</sup> In addition, the enactments of this Chief Rabbinate of Israel did not bind Jews residing in other countries.<sup>302</sup>

The current problem concerning Jews residing outside the boundaries of Israel was evident at the end of the twentieth century. A Jewish father in Brooklyn, New York acted in a manner that led to a storm of controversy in the orthodox, more conservative, and traditional segment of the Jewish community in the United States.<sup>303</sup> His wife did not wish to resolve their divorce dispute in a rabbinical court.<sup>304</sup> In an attempt to obtain her consent to the legal proceedings in a rabbinical court at the first stage, he claimed, in a Jewish religious court in Brooklyn, that he had betrothed his then ten year-old daughter to a Jewish man “according to the laws of Moses and Israel.”<sup>305</sup> He refused to reveal the names of the groom and the two male witnesses required by Jewish law for Jewish marriage ceremonies.<sup>306</sup> However, the father’s statement should have been taken seriously since an

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<sup>299</sup> Translation of Gaimani, *supra* note 263, at 54, to R. HAYIM KESAR, *SHEM TOV COMMENTARY TO MAIMONIDES, MISHNEH TORAH* (1982) (“Laws of Ishut” 3:19).

<sup>300</sup> Gaimani, *supra* note 263, at 55 (citing R.A. KORAH, *SA'ARAT TEMAN* 92 (1954)). The marriage of minor daughters in Yemen, prior to their emigration to Israel, was valid.

<sup>301</sup> See SCHERESCHEWSKY, *FAMILY LAW*, *supra* note 126, at 452, appendix B.

<sup>302</sup> *See id.*

<sup>303</sup> See Debra Nussbaum Cohen, *Man Denies Marrying off Minor Daughter*, *JEWISH NEWS WEEKLY*, Oct. 13 1995 [hereinafter Nussbam Cohen, *Man Denies*].

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *See id.*

ancient Jewish text granted him special authority to declare that his daughter was married.<sup>307</sup>

In July 1995, a group of orthodox rabbis in New York ruled that the legal practice this father used was not valid under these circumstances.<sup>308</sup> The father married off his daughter in an attempt to promote his interests in his dispute with his wife and not in an attempt to enhance his daughter's best interest.<sup>309</sup> He was apparently trying to force his wife, who had agreed in the past to resolve their divorce dispute only in a secular civil court, to come to a rabbinical court.<sup>310</sup> Should his wife consent to litigation in rabbinical court, the husband could obtain a Jewish divorce writ and perhaps also visitation rights. The rabbis held the husband should be considered an evil person disqualified as a witness under Jewish law and consequently invalidated his testimony regarding the marriage ceremony he claimed he performed.<sup>311</sup> The verdict of the rabbis was also a response to the possible misuse of marriage of minor Jewish daughters by other fathers.<sup>312</sup> A Jewish group had distributed hundreds of copies of a booklet explaining how fathers could go about consenting to the marriage of their minor daughters.<sup>313</sup> The group of rabbis and *Dayanim* in rabbinical courts in the United States, opposed to the betrothal of minor daughters declared that fathers plotting to arrange for the marriage of their minor daughters in an attempt to force their wives to consent to litigation in rabbinical courts "should know this device does not work."<sup>314</sup>

Other rabbis in the United States in that period, such as Rabbi Menashe Klien, stressed that the practice of betrothal of minor daughters was valid at present in Jewish law. He stated that even now, in communities in the Jewish Diaspora, some *Sephardic* Jews, descendants of Jews who originally resided in Asia and Africa, betroth their minor daughters to their husbands.<sup>315</sup> In addition, Rabbi Moses Isserles stated this was the custom

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<sup>307</sup> See Mishnah, Kidushin 3:8.

<sup>308</sup> Debra Nussbaum Cohen, *Orthodox Rabbis Agree to Oppose Minor Marriage*, JEWISH NEWS WEEKLY, July 21, 1995 [hereinafter Cohen, *Orthodox Rabbis*].

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> See *id.*

<sup>312</sup> See RESPONSA VESHAV VERAFA 2, #78 (1999); Rabbi Joseph Chaim Asayag, *infra* note 325.

<sup>313</sup> Debra Nussbaum Cohen, *Halachic Ruling from the Grave Opposes Marriage of Minors*, JEWISH NEWS WEEKLY June 30, 1995, at 13 [hereinafter Cohen, *Halachic Ruling*].

<sup>314</sup> Cohen, *Orthodox Rabbis*, *supra* note 308 (quoting Carmi Schwartz, director of the Beth Din of America).

<sup>315</sup> See RESPONSA MESHANEH HALAKHOT, Even Haezer #52, 57 (1997) (concerning current trends in *Sephardic* Jewry).

in many communities of *Ashkenazi* Jewry during the fifteenth century,<sup>316</sup> and Rabbi Menashe Klien stated that this was also the custom in the *Ashkenazi* communities in the twentieth century before the World War II.<sup>317</sup> However, Rabbi Klien did not justify the act of the father in the 1995 New York case since he caused harm to his daughter.<sup>318</sup>

Other rabbis in the United States condemned the father because “his ugly and corrupt acts prevent the marriage of his minor daughter [in the future].”<sup>319</sup> They held her marriage was not valid and one of the considerations they mentioned was:

Today we do not betroth our minor daughters, and this includes fathers who act for the sake of heaven, since [the law of] all the non-Jews in the civilized world prohibits this act and imposed a severe penalty upon the offenders. A Jewish individual who violates this prohibition in order to enhance his undesirable goals acts in a manner which humiliates the dignity of Jewish law.<sup>320</sup>

The rabbis did not trust the father’s testimony concerning the betrothal of his daughter and declared she could marry whoever she desired.<sup>321</sup>

Some rabbis believed the verdict of the rabbis in New York was not sufficient. They believed it was important that other prominent rabbinic leaders, such as the Jewish world’s rabbinic leaders in Israel, also attempt to put an end to a possible misuse of marriage of minor Jewish daughters. They hoped the verdict of these prominent Jewish scholars might prevent an “avalanche” of undesirable acts of other fathers that could also attempt to marry their minor daughters.<sup>322</sup> Rabbi Shlomo Zalman Auerbach, who was considered by many as one of the foremost experts of Jewish law in the Jewish world at that time, ruled that the minor daughter was not married and could marry whomever she wished.<sup>323</sup> The daughter did not need

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<sup>316</sup> See BABYLONIAN TALMUD, Kidushin 29b.

<sup>317</sup> See MESHANEH HALAKHOT, *supra* note 315.

<sup>318</sup> See *id.* at #50-64; see also RESPONSA OF RABBI REFAEL EIFRAS, in RESPONSA VESHAV VERAFA 2, #78 (1999).

<sup>319</sup> See RESPONSA OF RABBI ELIYAHU RAMINEK, in RESPONSA VESHAV VERAFA, *supra* note 318.

<sup>320</sup> See *id.*

<sup>321</sup> See RESPONSA OF RABBIS MEIR YUST, DAVID BENJAMIN BATELMAN & EPHRAIM GREENBLAT, in RESPONSA VESHAV VERAFA; *supra* note 318; RABBI CHAIM ZEEV HALEVI, in DIVREY MISHPAT 1, #110–21 (1996). Rabbi Greenblat stressed that a father could cause major damage to his daughter. He could die after he declared she was married and consequently she will not be able to marry in the future. The father did not act in her best interest and medieval scholars, such as the Tosafists and Rabbi Moses Isserles, which were willing to accept the custom of betrothal of minor daughters in their period, were in favor of this custom since they held it was in the best interest of the daughter.

<sup>322</sup> See Cohen, *Halachic Ruling*, *supra* note 313.

<sup>323</sup> See *id.*

to obtain a Jewish divorce decree, as Rabbi Auerbach explained that the father did not produce the necessary testimony of valid witnesses to legitimize the marriage ceremony.<sup>324</sup> Two other widely respected authorities of Jewish law in Israel, Rabbi Zalman Nehemiah Goldberg and Rabbi Moshe Shterenbukh concurred with the legal position of Rabbi Auerbach.<sup>325</sup> These prominent Jewish legal scholars found a way within Jewish law to invalidate the marriage of the minor daughter.

This father in New York realized his claim that he had married his daughter was not popular. American Jewish Orthodox organizations, such as the Council of Torah Sages, of the ultra-religious group, Agudath Israel of America, issued statements strongly condemning the marriage of minor Jewish daughters.<sup>326</sup> In addition, the Brooklyn District Attorney considered whether to bring charges against the father for endangering the welfare of his child.<sup>327</sup> Therefore, eventually, the father claimed he never arranged for the marriage of his minor daughter.<sup>328</sup>

In this case, the internal approach, within the boundaries of Jewish law, elevated the status of the daughter. A creative interpretation of the circumstances, in light of the principles of Jewish law, was very beneficial. The rabbis invalidated the marriage. The reality has changed. Marriage of minor Jewish daughters is considered inappropriate in the American religious and traditional Jewish society. Although theoretically the power of the Jewish father in the United States to betroth his minor daughter was not abolished by the enactment in Israel, usually the father could not use this power because the rabbis would investigate the matter carefully and try to find flaws in the marriage that will justify their decision to invalidate it. The father also knows that all segments of Jews in the United States, including the religious and traditional segment, will condemn an act of betrothal of minor Jewish daughters by their father.

This new outlook is evidenced in the writings of a contemporary Jewish legal scholar, Rabbi Professor J. David Bleich. Rabbi Bleich held that

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<sup>324</sup> See *id.*

<sup>325</sup> See *id.*; see also Rabbi Joseph Chaim Asayag, *A Father Who Betrothed His Daughter as a Result of a Dispute in the Family*, 26 *TECHUMIN* 148–55 (2006) (a similar point of view of a Jewish Law scholar in Israel.)

<sup>326</sup> Cohen, *Halachic Ruling*, *supra* note 313.

<sup>327</sup> See *id.*

<sup>328</sup> The attorney of the mother claimed that he feared that the ruling of the prominent Rabbis in Israel did not truly free the minor girl from the bond of marriage since in the future the father “could reveal the witnesses at any time. It’s a sword of Damocles hanging over her (the minor daughter) head until the entire issue is put to rest.” Cohen, *Man Denies*, *supra* note 303. However, the father did not reveal these witnesses in the future.

the act of the father in this case was a “noxious parental abuse,”<sup>329</sup> and explained that the act of the father deprived the daughter “of capacity to enter into any future marriage so long as the first marriage is not dissolved by death or divorce.”<sup>330</sup> He further stated, “In refusing to disclose the identity of the groom unless and until his demands are satisfied the father has placed his daughter at his mercy for the rest of her life. An anonymous husband cannot be persuaded to execute a religious divorce, neither will his wife ever be able to prove her widowhood.”<sup>331</sup>

Rabbi Bleich suggested that the solution to the problem confronting the Jewish community as a result of the act of this father is a communal ban. He stated explicitly that in contemporary society marriage of minor daughters is not desirable:

A father’s right to contract a marriage on behalf of his minor daughter was designed to assure her a husband and to enhance fecundity and with it the propagation of the Jewish people. . . . A situation in which the father refuses to identify the groom defeats the very purpose for which such authority was conferred upon him . . . . Since *in our day there is no legitimate motive for child marriage* the remedy to misuse of that institution by unscrupulous fathers is pronouncement of a . . . communal ban, against any father who attempts to avail himself of that prerogative and against anyone who agrees to serve as a witness to this nefarious deed.<sup>332</sup>

### C. NEW JEWISH PERSPECTIVE: MORAL OBLIGATION TOWARD WOMEN

Sometimes the legal norms were interpreted in light of new trends in Jewish thought. The new legal agenda was the outcome of a more universalistic approach that granted due weight to the life, dignity, emotions, and aspirations of all human beings. The opinion of Justice Elon in an Israel Supreme Court case *Naiman v. Chairman of the Central Elections Committee*<sup>333</sup> was an attempt to derive the legal doctrine from the guidance of rabbis in their writings in the sphere of ethics, morality, and justice. The outlook of Justice Elon was not the only possible interpretation of the ancient texts. He acted as an educator with a vision of the appropriate development of Jewish law and used carefully selected sources of modern Jewish thought.

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<sup>329</sup> See Rabbi J. David Bleich, *K’ddushei K’taana*, [www.yu.edu/riets/torah/halacha/bleich1.htm](http://www.yu.edu/riets/torah/halacha/bleich1.htm) (last visited Feb. 7, 2009).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* (emphasis added).

<sup>333</sup> See EA 2/84 *Naiman v. Chairman, Central Elections Committee* [1985] IsrSC 39(2) 225.

The new outlook of Rabbi Abraham Isaac ha-Cohen Kook, the first *Ashkenazi* Chief Rabbi of the Land of Israel, led Justice Elon to the desired legal policy. Creative interpretation of ancient Jewish texts, in the spirit of modern Jewish thought, produced a legal agenda for the present time and the future. The new legal perspective concerning adults could be implemented concerning all individuals, including women and children.

In the *Naiman* case, Justice Elon mentioned the vision of the prophets:

The prophets of Israel and their prophecies have been and still are the prototype for sharp and uncompromising criticism of governments that abuse their power, and of individuals or communities that act corruptly. The prophets raised a cry against injustice towards the poor, oppression of widows, deprivation of individual and social rights, and deviations from both the letter and the spirit of the *Torah* and the *Halakhah*. The steadfastness of the prophets of Israel in the face of fierce and angry opposition is a source of never-failing inspiration for the present-day.<sup>334</sup>

The spirit of the prophets was a source of inspiration in this case. The legal rules Justice Elon implemented in his decision provided legal protection for those who are the weaker members in many societies at present, including women and children. They are the outcome of the emphasis in certain texts of Jewish thought in the twentieth century on principles of love and kindness to all creatures. This outlook led to an emphasis in the legal sphere upon rules, such as the prevention of abuse of power, and the injustices against and oppression of weaker members of society. The same outlook could also be the foundation of a new agenda concerning the legal rules that determine the relationship of the father and his minor daughter in a Jewish society.

In the *Naiman* case, Justice Elon mentioned sources in the writings of Rabbi Kook concerning love for human beings and God's creatures. Rabbi Kook wrote:

Love for all humankind must be alive in one's heart and soul—love for each individual separately, and love for all nations, [together with] desire for their advancement and for their spiritual and material progress . . . an inner love from the depth of one's heart and soul, to be beneficent to all nations, to add to their material wealth, and to increase their happiness . . . . The highest form of love for all creatures is love for human beings, and it must include all people. Despite the many differences of opinions, religions, and beliefs, and despite the multiplicity of races and climates, one must attempt to achieve complete understanding of the various nations and groups, and to learn as much as possible about their

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<sup>334</sup> *Id.* at 296.



traits and characteristics, in order to know how to base love for human beings on realistic foundations.<sup>335</sup>

This outlook that “inner love from the depth of one’s heart and soul—love for each individual separately” includes love to each Jewish daughter, results in the obligation to “be beneficent” to Jewish daughters and “add to their material wealth.”

Justice Elon also stated in the *Naiman* case that this outlook could be a source of inspiration in the legal sphere. He further explained:<sup>336</sup>

The views of Rabbi Kook on this subject, and on the worldview of Judaism in general, as to the relation between the “common natural ethics” of every cultured person and the ethical demands of Judaism, are particularly instructive: “Both from the perspective of the *Torah* (= Jewish law) and of common ethics, love for human beings must be carefully nurtured so that it may grow, as it should, beyond the superficial level, which is as far as love can reach when it is not wholehearted. It is as if there is an opposition or at least indifference to the love that should always fill all of the chambers of the soul.”<sup>337</sup>

In this training and education of a Jew, the *Torah* and natural ethics complement and reinforce each other: “The [religious] reverence for heaven should not repress man’s natural ethics, for then it is not true reverence for Heaven. True reverence for Heaven raises natural ethics, which is infixed in man’s very nature, towards higher levels than would have been attainable by natural ethics alone. But a ‘reverence for Heaven,’ so that more good would be done and greater benefits would be granted, both to the individual and to the public, would accrue without it, is undesirable and not real reverence for Heaven.”<sup>338</sup>

According to the outlook Of Justice Elon, the legal rules that form the attitude towards each Jewish daughter should be a result of a deep internal commitment to the abovementioned values. The details of Jewish law in the field of the marriage of the minor daughter should be an attempt made by Jewish scholars to implement this commitment.

The abovementioned new trend in Israel, in light of new trends in Jewish thought proves that a dynamic interpretation of religious law, in light of

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<sup>335</sup> Abraham Isaac ha-Kohen Kook, *Middot ha-Ra’iyah, Ahavah* §§ 5, 10, in MUSAR AVIKHA U-MIDDOT HA-RA’IYAH 94, 96 (2d ed. 1971).

<sup>336</sup> *Naiman*, *supra* note 333, at 299.

<sup>337</sup> *Middot ha-Re’iyah*, *supra* note 335, at Ahavah § 10; *see also* Abraham Isaac ha-Kohen Kook, OROT HA-KODESH 3, 318 (David Cohen ed., 1964) (concerning the value attributed to love of all mankind).

<sup>338</sup> OROT HA-KODESH 3, *supra* note 337, at 27.

new trends in society, can elevate the legal status and the rights of each individual in a traditional society, including the Jewish daughter.

## VI. CONCLUSION

Religious and traditional values are important in international law. In many countries in the world, there are widely diverse religious values and legal systems. The efforts to promote respect for Western standards of equality between male and female in all countries of the world, including countries and societies where ancient traditional and religious values are very important, will be more successful if the attempt to enhance women's rights is based upon the assumption that religion is a basic foundation of law in traditional societies. In conservative and traditional societies and countries, Western values and standards that were the basis of current principles of international human rights could remain superficial and ineffectual.<sup>339</sup> Such values and principles will be much more effective when they are promoted through religious and traditional leadership in these countries. This should be a major consideration for those who desire to interpret legal principles that enhance the legal status of women.<sup>340</sup>

In recent generations, we have witnessed a gradual rise in the legal status of the Jewish women, including the Jewish minor daughters. This is the last stage of a gradual process of development of rules in Jewish law. Creative interpretation of ancient religious law and the formation of new rules in Jewish modern law changed the norms of behavior in the current Jewish society.

At present, marriage of minor daughters is not desired in the vast majority of segments of Jewish society, including most of the orthodox and ultra-orthodox groups. This proves that interpretation of religious law can lead to a significant change in our society. A new Jewish legal policy concerning the rules determining the fate of the Jewish daughter emerged, especially in the twentieth century.

In addition, a new trend emerged in twentieth century modern Jewish thought in the writings of Rabbi Abraham Isaac ha-Cohen Kook. Due weight should be granted to the Jewish sources which stress the value of the principles of love, sensitivity, and peace. Such sources should be the

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<sup>339</sup> See Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 8 (1994) (concerning the extent to which western concepts can be applied in countries or groups that do not share the dominant ideology in the west.)

<sup>340</sup> See *Forward to THE BEST INTERESTS OF THE CHILD—RECONCILING CULTURE AND HUMAN RIGHTS* (Philip Alston ed., 1994).

guidelines for the relationship between all human beings, including the relationship between the Jewish father and his daughter.

Rabbi Kook stressed that in the future much love will be required. This love is necessary in order to achieve the desired goal: the building of the third temple. Rabbi Kook wrote: "Since the second temple was destroyed through senseless hatred, it must be rebuilt . . . through a great unconditional love."<sup>341</sup> This should be the basis for a new agenda regarding all people but especially concerning sensitive and vulnerable individuals in society, such as minor Jewish daughters.

The interpreters of Jewish law in the sphere of the relationship between parents and children should grant due weight to the modern perspective in the writings of Rabbi Kook. The rules of custody of children in Jewish law developed gradually and reflected the significance of the principle of the best interest of the child. This policy enhanced the rights of the child. The next stage of interpretation could be an attempt to implement the principles of Jewish thought from the writings of Rabbi Kook regarding the child. The outcome of these principles should be the development of rules which further enhance positive relationships between human beings. These are relationships, which promote more love and create an atmosphere of kindness, sensitivity, and generosity between all members of mankind. This legal policy could further enhance the rights of women and children in traditional societies in the future.

Professor An-Na'im held that the reconciliation between Muslim religious values and Western principles of human rights is possible,<sup>342</sup> and his Jewish religious colleague Professor Louis Henkin also stressed:

[R]eligion, and religions, have little to fear from the human rights idea and ideology, or from legal norms and political institutions that promote respect for human rights. . . . Indeed, Religion, and religions, need universal human rights. Human Rights provides protection for every human being—all six billion of them—against arbitrary, abusive political power, including protection for Religion and religions . . . .<sup>343</sup>

Professor An-Na'im offered a methodology for interpretation of human rights advocated in the Muslim world. We should reexamine the scriptural imperatives in Muslim holy ancient texts in an attempt to make the dictates of this religious law consistent with international human rights

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<sup>341</sup> OROT HA-KODESH 3, *supra* note 337, at 324.

<sup>342</sup> See Abdullahi An-Na'im, *Islam and Human Rights: Beyond the Universality Debate*, 94 AM. SOC'Y INT'L L. PROC. 95, 95 (2000).

<sup>343</sup> Louis Henkin, "Establishment" of Religion and Human Rights: Comment, 94 AM. SOC'Y INT'L L. PROC. 101, 102 (2000).

norms.<sup>344</sup> Human rights reform requires reinterpretation of ancient religious texts.<sup>345</sup> Professor An-Na'im held that "human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a [specific] society. Insofar as these standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance."<sup>346</sup>

The development of Jewish law concerning marriage of the minor daughter proves that this policy can bear good fruit. The desired process Professor An-Náim suggested, the attempt to interpret old religious texts in a manner that enhances modern human rights, is evident in Jewish law in this sphere especially in the modern period. Interpretation of religious law could enhance adherence of all mankind to international rights and norms prescribed for women.

Sensitivity is essential. Some scholars discuss the dangers of cultural imperialism toward Third World countries or traditional minority groups in Western countries.<sup>347</sup> The Western countries should refrain from imposing their values and belief on members of traditional societies. These countries should try to understand the values, religion and customs that influence legal policy in Third World countries or in conservative minority segments within their society. Fast revolutions will fail.<sup>348</sup> It is very difficult to immediately uproot cultural and religious traditions in these countries and societies.<sup>349</sup> Enhancement of women's rights in traditional societies should be a gradual process. The moderate method of new interpretation of ancient religious norms could bear good fruit in the abovementioned complex reality. Eventually, patriarchal ancient practices will be abolished or reduced as much as possible as a result of interpretation of religious law.

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<sup>344</sup> See Na'im, *Preliminary Inquiry*, *supra* note 74, at 46.

<sup>345</sup> See Na'im, *Preliminary Inquiry*, *supra* note 74, at 14.

<sup>346</sup> Na'im, *Preliminary Inquiry*, *supra* note 74, at 15.

<sup>347</sup> See generally Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985).

<sup>348</sup> See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 41 DUKE L.J. 166, 166 (1991) ("The cultural context of law both promotes and subverts efforts at legal change.").

<sup>349</sup> See Abdullahi Ahmed An-Naim, *State Responsibility Under International Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167 (1994).