HCJ 4602/13
HCJ 9780/17

Petitioner:	**A**.
	v.
Respondents in HCJ 4602/13:	**1. Haifa Regional Rabbinical Court** **2. Attorney General** **3. Israel Bar Association** **4. B.**
Respondents in HCJ 9780/17:	**1. Great Rabbinical Court** **2. Haifa Regional Rabbinical Court** **3. B.**

The Supreme Court sitting as High Court of Justice

(November 18, 2018)

Before: Justices I. Amit, D. Mintz, A. Stein

Petitions for an order nisi

Israeli Supreme Court cases cited:

[1] CA 7750/10 *Ben Giat v. Hachsharat Hayishuv Insurance Ltd.* (Aug. 11, 2011).

[2] LFA 1398/11 *A. v. B.* (Dec. 26, 2012).

[3] HCJ 8928/06 *A. v. Great Rabbinical Court of Appeals in Jerusalem*, IsrSC 63(1) 271 (2008).

[4] HCJ 1000/92 *Bavli v. Great Rabbinical Court*, IsrSC 48(2) 221 (1994).

[5] LCA 8672/00 *Abu Rumi v. Abu Rumi*, IsrSC 56(6) 175 (2002).

[6] HCJ 9812/17 *A. v. Great Rabbinical Court* (May 29, 2018).

[7] HCJ 2617/18 *A. v. Great Rabbinical Court* (April 30, 2018).

[8] HCJ 7940/17 *A. v. Netanya Regional Rabbinical Court* (Jan. 8, 2018).

[9] HCJ 609/92 *Beham v. Great Rabbinical Court of Appeals*, IsrSC 47(3) 288 (1993).

[10] LCA 8791/00 *Shalem v. Twenco Ltd*., IsrSC 62(1) 165 (2006).

[11] HCJ 202/57 *Sidis v. President and Members of the Great Rabbinical Court*, IsrSC 12(2) 1528 (1958).

[12] CA 253/65 *Bricker v. Bricker*, IsrSC 20(1) 589, 596 (1966).

[13] HCJ 185/72 *Gur v. Jerusalem Regional Rabbinical Court*, IsrSC 26(2) 765 (1972).

[14] CA 384/88 *Zisserman v. Zisserman*, IsrSC 43(3) 205 (1989).

[15] HCJ 3995/00 *A. v. Great Rabbinical Court*, IsrSC 56(6) 883 (2002).

[16] CA 264/77 *Dror v. Dror*, IsrSC 32(1) 829 (1978).

[17] CA 819/94 *Levi v Levi*, IsrSC 50(1) 300 (1996).

[18] HCJ 1135/02 *Wasgael v. Great Rabbinical Court*, IsrSC 56(6) 14 (2002).

[19] LFA 7272/10 *A. v. B.* (2014).

[20] LFA 2948/07 *A. v. B.* (April 18, 2007).

[21] CA 1915/91 *Yaacobi v. Yaacobi*, IsrSC 49(3) 529 (1995).

[22] HCJ 2642/08 *A. v. Great Rabbinical Court Jerusalem* (April 8, 2008).

[23] LFA 2045/15 *A. v. B.* (May 21, 2015).

[24] CA 300/64 *Berger v. Director of Estate Tax*, IsrSC 19(2) 240 (1965).

[25] CA 135/68 *Barelli v. Director of Estate Tax Jerusalem*, [1969] IsrSC 23(1) 393 (1969).

[26] CA 595/69 *Efta v. Efta*, IsrSC 25(1) 561(1971).

[27] HCJ 1727/07 *A. v. Great Rabbinical Court* (March 19, 2007).

[28] LFA 4545/09 *A. v. B.* (Jan. 7, 2010).

[29] LFA 10734/06 *A. v. B.* (14.3.2007).

[30] CA 8128/06 *Levinson v. Arnon* (Feb. 3, 2009).

[31] LFA 2991/13 *A. v. B.* (Aug. 21, 2013).

[32] LFA 7181/12 *A. v. B.* (Nov. 9, 2012).

[33] LFA 5939/04 *A. v. B.*, IsrSC 56(1) 664 (2004).

[34] LFA 1477/13 *A. v. B.* (Aug. 6, 2013).

[35] CA 806/93 *Hadari v. Hadari*, IsrSC 48(3) 685 (1994).

[36] CA 3002/93 *Ben-Zvi v. Siton*, IsrSC 49(3) 5 (1995).

[37] CA 741/82 *Fichtenbaum v. Fichtenbaum*, IsrSC 38(3) 22 (1984).

[38] CA 4306/12 *A. v. Bank Leumi Israel Ltd*. (July 15,2018).

[39] HCJ 9734/03 *A. v. Great Rabbinical Court*, IsrSC 59(2) 295 (2005).

[40] HCJ 1996/16 *A. v. Great Rabbinical Court* (June 21,2016).

[41] HCJ 3689/15 *A. v. Tel Aviv Regional Rabbinical Court* (May 17, 2016).

[42] HCJ 3394/18 *A. v. Great Rabbinical Court Jerusalem* (May 2, 2018).

[43] HCJ 3042/18 *A. v. Regional Rabbinical Court* (May 1, 2018).

[44] HCJ 4091/18 *A. v. Great Rabbinical Court* (March 25, 2018).

[45] HCJ 7/83 *Bayers v. Haifa Regional Rabbinical Court*, IsrSC 38(1) 673 (1984).

[46] HCJ 187/54 *Barriya v Kadi of the Sharia Moslem Court*, Akko, IsrSC 9 1193 (1955).

[47] HCJ 8638/03 *Amir v. Great Rabbinical Court Jerusalem*, IsrSC 61(1) 259 (2006).

[48] HCJ 3467/14 *A. v. Haifa Regional Rabbinical Court* (Sept. 21, 2015).

[49] HCJ 2443/15 *A. v. Great Rabbinical Court Jerusalem* (April 12, 2015).

[50] HCJ 5416/09 *A. v. B.*, IsrSC 63(3) 484 (2010).

[51] HCJ 323/81 *Vilozny v. Great Rabbinical Court Jerusalem*, IsrSC 36(2) 733 (1982).

[52] CA 630/*79 Lieberman v. Lieberman*, IsrSC 35(4) 359 (1981).

Other Israeli cases cited:

[53] FA (Tel Aviv District) 13313-12-11 *N.A.E.R. v. A.E.* (26.2.2014)

[54] FA (Haifa) 740/08 *A. v. B.* (19.11.2008)

JUDGMENT

(Nov. 18, 2018)

Justice I. Amit

The petition before us treats of the matter of specific co-ownership[1] in the residential home. The petition raises the question of whether there are grounds for intervention by this Court in the judgment of the Great Rabbinical Court in light of weight having been accorded to the alleged infidelity of the wife.

Background

1. Following is a précis of the essential facts pertaining to the case. The couple married towards the end of 1982, and they have three adult children. In February 2013, after more than thirty years of marriage, Respondent no. 3 (hereinafter: the husband or the Respondent) filed for divorce in the Rabbinical Court, and he incorporated property matters in the suit. In section 2 of the form, "Divorce Suit and Ancillary Matters," the husband specified three grounds for divorce, namely: The wife is rebellious in that she has not engaged in marital relations for *several years*; "The wife has been unfaithful *for several months* with …"; "She does not attend to cleaning nor to meals, and she is not concerned with unifying the family …" (emphasis added – I.A.).

Following a hearing held on June 26, 2013, Respondent no. 2 (hereinafter: the Regional Rabbinical Court) ordered the Petitioner to divorce. When she refused to do so, and in light of the verbal exchanges that took place in the courtroom between her attorney and the panel of judges, the Regional Rabbinical Court ordered that the Petitioner be arrested and that her attorney be dismissed, and it imposed personal costs of NIS 15,000 upon the attorney. The Petitioner filed a petition with this Court (HCJ 4602/13). Following a hearing held before me, the parties came to an agreement, and a consent decree was issued, as follows:

> **The Parties:** After having heard the Court and after having heard the comments of Adv. Jacoby, and in order to restore calm after matters digressed from appropriate proportions, and taking into account that the matter involves a couple who have been married for thirty years with three adult children, and since we wish to conduct the dispute between us in a cordial manner, we have come to the following agreements:

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[1] See para. 6 of the opinion of Justice Amit, and paras. 3-5 of the opinion of Justice Mintz for an explanation of "specific co-ownership" (trans.).

1. The wife is willing, without any implication whatsoever of an admission to the claims and the grounds raised against her in the past, to divorce.

2. The husband is prepared to accept the wife's consent, and to divorce on the basis of said consent.

3. Both parties declare in this courtroom that they are willing to divorce and to arrange a *get* [Jewish bill of divorce – ed.] in the near future in a rabbinical court. This obviates the need to impose constraints of various types on the wife.

4. The willingness of the parties to divorce, and the actual divorce itself, will have no ramifications for the subject of property, which will be adjudicated in accordance with statutory and case law.

5. In light of the divorce of the parties, and in that light only, the wife is prepared to leave the home, without this implying in any way whatsoever any waiver of her claim to rights in the home (whether by virtue of the presumption of specific co-ownership or any other claim).

6. In light of the above, and without any implication of an obligation on the part of the husband, the husband is prepared, until the end of the litigation in the property dispute, to participate in the wife's rental payments in the monthly amount of NIS 2000, as a substitute for an appropriate user fee for the home had she continued to live there.

7. The husband requests on his own initiative to cancel the protection order and the restraining order issued against the wife.

8. Each party maintains its claims in relation to the *ketubah* [Jewish marriage contract – ed.].

9. The parties will jointly enter into a process of mediation in an attempt to settle both the property matter and the entire familial relationship. The children will be asked to participate in the mediation process insofar as they agree to do so. The two parties express their will and their consent to expedite the mediation proceedings and the determination of the subject of property.

10. …

11. …

Indeed, following this agreement, the parties quickly divorced, but the question of the distribution of property was not settled, and the litigation between the parties continued.

2. On the basis of an actuarial opinion, the Petitioner was obligated to pay the husband the sum of NIS 341,000. The husband owned various real-property assets that had been acquired or that he inherited prior to the marriage, and which the parties agree belong to the husband (namely, two shops and half the rights in two apartments occupied by protected tenants). In addition, the parties own real property that was acquired jointly in the course of their marital life, and it is agreed that each of them is entitled to half the rights (a shop and three store-rooms, an additional commercial property, and an additional 25% of the ownership rights in two apartments that are leased under protected tenancies. According to the Petitioner's attorney, the assets are encumbered, such that their realized value is not high).

The main disagreement between the parties turned on the residential home. The husband brought into the marriage a plot of land that he had inherited in 1982, several months before the couple married. In 1988, the husband signed a "combination agreement" with a contractor, in the framework of which he transferred three-quarters of the plot to the contractor in exchange for the construction of a residential home on the other quarter (and an additional payment by the contractor in the amount of $30,000). The couple lived in that house for more than twenty years, until the marital breakdown in 2013.

The issue that was brought before the Regional Rabbinical Court was whether specific co-ownership of the residential home should be recognized. Several judgments have been handed down on this question by this Court, and I will mention two of them (CAA 7750/10 *Ben Giat v. Hachsharat Hayishuv Insurance Ltd.* (hereinafter: *Ben Giat* [1]); LFA 1398/11 *A. v. B.* (hereinafter: *A. v. B.* [2]).

3. In its judgment of Feb. 29, 2016, the Regional Rabbinical Court ruled that specific co-ownership in the residential home should be recognized, and the Petitioner is therefore entitled to half the value of the rights in the residential home registered in the husband's name. In its decision, the Court relied, *inter alia*, on the husband's statements in the framework of the litigation in the

aforementioned HCJ 4602/13, from which it inferred an intention of co-ownership, such as: "Since I understood that there is a problem with the house, I suggested that the house be registered in the names of the children, and I said, *Heaven protect us, the house will be there for me or for her in old age,* if we should need hospitalization, we could sell it … I raised the problem of the residence, but I am not prepared for her boyfriend to live off the *fruit of our labor* of thirty years" (emphasis added – I.A.). The Regional Rabbinical Court also attached importance to the renovations and investments that had been made in the residential home. At the end of its judgment, the Regional Rabbinical Court summarized its conclusion, as follows:

> Indeed, it appears that in the present circumstances, the conditions and the parameters specified in the above case law [the case of *A v. B.* [2] – I.A.] have been met. As stated above, the parties closed off a playroom, including painting and piping in the room, when the oldest son was a soldier, they closed off a space with a plasterboard wall, and they broke down the stairs and the pipes. The parties also replaced tiles and plumbing, and they built a kitchen at their expense. Thus, it seems that the renovation that was done was not minor and routine, and it would seem to comply with what the case law requires. It would appear that the renovation that was carried out, which from a factual point of view was agreed to by the two parties, and as described above, proves co-ownership.
>
> We would add to this the long period of time, twenty years, during which the parties lived together in the said residential home.
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> Moreover, the Rabbinical Court finds reason to assume that an atmosphere of co-ownership with respect to the home prevailed between the parties, in light of what the plaintiff said in this case, as quoted above, from which it appears that he regarded the house as a joint potential asset, as stated at that time, which would serve both parties equally. This statement appears to be an intention of co-ownership. His words, "I am not prepared for her boyfriend to live off the *fruit of our labor* of thirty years" also give a similar impression.
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> Furthermore, in the present case we are not dealing with a house that the husband owned prior to the marriage, but with a house that was built by both parties in the course of their life, and possibly at the initiative of them both and with mutual

assistance from the logistical aspect – even though it was built in a "combination deal from the land that the husband had owned previously – and therefore there is more than a reasonable chance that in building the present house, the residential home, the parties were co-owners.

In light of all the above, and in light of the latest case law on this issue of distribution of an asset registered in the name of one of the parties, the court does not find grounds, nor the possibility, for not dividing the residential home between the parties, and in light of all the above, the court has decided to deviate from section 5(a)(1) of the Spouses (Property Relations) Law, whereby an asset that was owned by one of the spouses prior to the marriage is not included in the aggregate joint property and will not be included in the balancing of resources arrangement.

Consequently, the Rabbinical Court granted the Petitioner half the rights in the residential home.

Judgment of the Great Rabbinical Court

4. The husband appealed to the Great Rabbinical Court. In its judgment of July 27, 2017, the Great Rabbinical Court (Judges Amos, Nahari and Almaliah) allowed the appeal on the decision of the Regional Rabbinical Court. According to the majority opinion, the wife was not entitled to any share, neither of the land nor of the house that was built upon it. According to the minority opinion, the wife was not entitled to a share in the land, but she was entitled to a share of only 20% of the structure (the house). Below I will review the main points of the judgment.

In his written opinion, Judge Amos emphasized that we are dealing with an asset that the Respondent had acquired prior to the marriage and which remained registered in his name. In these circumstances, in order to prove specific co-ownership in the dwelling, some additional supporting evidence was required to show an intention of co-ownership. Judge Amos referred to what I wrote in the *A. v. B.* [2] case, to the effect that some flexibility is required in this regard when co-ownership of a residential home is concerned, but he nevertheless decided that “in this case it is difficult to say that it was indeed proved that there was some extra evidentiary support, other than the fact that the parties lived together, and at very least we could not dispel the doubt as to whether

there was any additional supporting evidence." This conclusion was explained by the fact that the indications noted by the Regional Rabbinical Court to prove a specific co-ownership were not sufficiently significant: the renovation of the house was not significant, and it is doubtful whether the Petitioner participated in paying for it, since she did not work at that time; the Petitioner did not present documents supporting her claim; the utterances of the Respondent concerning "the fruit of our labor" did not necessarily refer to the dwelling in dispute; "the atmosphere of co-ownership" in itself is not sufficient proof. In addition, it was noted that the Petitioner is leaving the marriage with property and in a good economic situation as compared to the Respondent. Given the starting point in sec. 5(a)(1) of the Spouses (Property Relations) Law, 5733-1973 (hereinafter: the Property Relations Law), to which the case law concerning specific co-ownership constitutes an exception, and given that the Respondent is in possession of the house, it was ruled that the doubt that remained does not allow for recognition of the rights of the Petitioner in the house, and "how can we, on the basis of a doubt, take money away from a person who with absolute certainty owns the land which he undisputedly inherited from his forbears?"

Judge Amos did not stop there, noting:

> To this it must be added that in the present case, the wife was unfaithful to her husband, she was ordered to accept a *get*, and restraining orders were issued against her, and only after much argument did she agree to accept her *get*. In this case, the question arises: Must it be assumed that also in the case of a wife who was unfaithful, a partnership was intended….?

Judge Amos opined that this point was important for the purpose of the conclusion regarding the intention of partnership, since:

> We see that he [the spouse] had no intention to include as a partner in the property that was in his name alone the one who had harmed, destroyed and uprooted all the family life, and even if from his actions it was evident that he intended that there

be a partnership, all of this was done mistakenly, and it is an *umdana d'mukhah* [2] that he was deceived and misled, and therefore this intention is void ab initio.

Judge Amos noted the rule under Jewish law that "a person is not punished retroactively for infidelity by taking away his rights in the common property" (HCJ 8928/06 *A. v. Great Rabbinical Court of Appeals in Jerusalem* [3] (hereinafter: HCJ 8928/06), but he held that a distinction must be made between penalization "in respect of rights that had already vested in one of the parties," and consideration of the question of infidelity for the purpose of negating rights in an asset by virtue of the intention of co-ownership. In support of his position, Judge Amos referred to the judgment in FA (Tel Aviv District) 13313-12-11 *N.A.E.R. v. A.E.* [53], where the court said that "it is difficult to attribute an intention to a spouse to be partners in an 'external asset' with the other spouse, when the other does not maintain loyalty to his spouse [and] is unfaithful to her with other women."

Subsequently, and under the heading of "And now to the halakhic aspect," Judge Amos further emphasized that "the whole concept of the intention of co-ownership is contrary to the halakha," and that consideration of the intention of co-ownership is a creature of the case law, which crystallizes in accordance with the circumstances of each case. As long as this is not anchored by statute, it cannot be said that the "intention of co-ownership" is part of state custom. It was further stated that the Rabbinical Court's interpretation "is of equal value to the interpretation of any other judicial instance," and must be effected in accordance with Jewish law. Moreover, it was noted that the intention of co-ownership cannot be accorded the force of "a well-known custom" since the condition for this is the husband's knowledge of this rule, and intention on his part to be in partnership with his wife in respect of the property. In our case, this was not proved, and "when there is a doubt, the property must be deemed to belong to the one who possesses it."

However, Judge Amos drew a distinction between the land and the building that had been erected on it. With respect to the building, it was noted that "there may possibly be a lesser partnership in it," and therefore the Petitioner is entitled to 20% of its value, "since this was an

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[2] A presumption of Jewish law that, under the circumstances, it is objectively clear that the person would not have undertaken the obligation had he known the truth, see, e.g., Avishalom Westreich, *Umdena as a Ground for Marriage Annulment: Between Mistaken Transaction (Kidushey Ta'ut) and Terminative Condition*, (ed.).

dwelling that was built in the course of the marriage and in partnership with the wife in the course of the construction, and it is possible that she even invested financially in it."

Judge Nahari concurred in the conclusion of Judge Amos, and added that in his view, a narrow approach must be adopted in proving an intention of partnership, "*a fortiori* when the case also includes the ground of unfaithfulness, with respect to which an intention of co-ownership on the part of the betrayed appellant may certainly not be presumed." Judge Nahari compared the intention of co-ownership to the laws of gifts, and concluded that the serious harm to the fabric of the marriage amounts to disgraceful behavior that justifies retraction of the intention of co-ownership, even if such an intention had been proved. According to him, this also applies in the present case in which "the act of infidelity creates an intention on the part of the owner of the property not to be in partnership with the person who betrayed him."

Judge Almaliah agreed that the Petitioner had no rights in the land, since an intention of co-ownership had not been proved, but he expressed a different position regarding the Petitioner's rights in the house itself. Judge Almaliah pointed out that the house was built as part of a combination deal, so that the Respondent had in fact financed the construction. In addition, the renovation of the house does not confer rights on the Petitioner, since the money came from the Respondent's pockets. Moreover, the house was registered in his name alone, from which it may be inferred that there was no intention of co-ownership. Judge Almaliah added that he does not accept the comparison between the intention of co-ownership and the laws of gifts.

At the end of the judgment, Judge Nahari added that he retracts his position, and agrees with the conclusion that the Petitioner has no rights in the house. Judge Nahari reiterated his position that there is a similarity between the intention of co-ownership and the laws of gifts, and "it makes sense that there is no intention of co-ownership in respect of the person who betrayed the marital relationship."

It was therefore decided by majority opinion that the Petitioner is not entitled to any share of the land or the house.

The petition before us turns on this. In brief, according to the Petitioner, the Great Rabbinical Court accorded weight to the claim of infidelity, and applied religious law to the matter of specific co-ownership in the residential home, thereby acting *ultra vires*.

Deliberation and Decision

5. I will begin by saying that I find that it would be proper to intervene in the judgment of the Great Rabbinical Court in that both the content of the judgment and the rhetoric it employs take us back to the days prior to the *Bavli* decision (HCJ 1000/92 *Bavli v. Great Rabbinical Court* [4]). I will explain my conclusion below.

6. The couple married in 1982, and there is no dispute that the Property Relations Law applies to their relationship. However, the case law has recognized that the provisions of sec. 5 of the Property Relations Law do not prevent the creation of partnership in a specific asset under the general law, including an asset that was acquired or received by one of the parties prior to the marriage, and that this applies in particular to an asset that serves as the residential home of the couple (see: *A. v. B* [2], *Ben Giat* [1] and the references there).

The question of whether specific co-ownership in the residential home should apply in a particular case is a mixed question of fact and law. In the case of *A. v. B.*, I attempted to identify the markers and to understand what "additional supporting evidence" was required in order to recognize specific co-ownership in the residential home. Personally, in the present case, I would emphasize the fact that this is a first marriage with common children, the length of the marriage, harmonious relations while running a common household, at least for most of the marriage of thirty-one years, with the couple living in the residential home for twenty years, and the absence of any hint or external expression on the part of the husband, throughout all the years, that he intended to deny the application of co-ownership in the residential home. To this must be added the husband's utterances in the course of the hearing in HCJ 4602/13, as quoted in the judgment of the Regional Rabbinical Court, as well as the renovation of the home. All these, in my opinion, give rise *prima facie* to specific co-ownership in their shared residential home – "the jewel in the crown of the community property presumption" – also with respect to couples who are subject to the Property Relations Law, the tendency being to "be lenient with the spouse who claims co-ownership of the residential home when this is registered in the name of only one of them" (LCA 8672/00 *Abu Rumi v. Abu Rumi* [5], 183).

At the same time, there is a wide range of views and approaches on the subject of specific co-ownership in a residential home. There are those who are lenient, and those who are strict as to the

amount of evidence they require (see: SHAHAR LIFSHITZ, MARITAL PROPERTY, 172-82 (5776-2016) (Heb.) (hereinafter: MARITAL PROPERTY); HANOCH DAGAN, PROPERTY AT A CROSSROAD, 489 (2005) (Heb.)). The difference between the approaches can be explained by the starting point: the strict view regards the regime of co-ownership of property as based on a contractual model, whereas those who are lenient regard the co-ownership regime as based on a normative model, which for its part is based on principles and considerations of justice, fairness and equality. From this model, the path to recognition of the connective model – a model that takes into consideration the special nature of spousal relationships – as requiring broad recognition of co-ownership between spouses, including its application to assets that were brought into the marriage, is short (Shahar Lifshitz, *On Past Assets and Future Assets and the Philosophy of Marital Property Law*, 34(3) MISHPATIM 627 (2004) (Heb.) (hereinafter: Lifshitz)).

7. As stated, the Regional Rabbinical Court held that specific co-ownership of the marital home should be recognized, whereas the Great Rabbinical Court held that it should not. Normally – and although in my opinion the Regional Rabbinical Court was correct in its conclusion – I would not find grounds to intervene in the judgment of the Great Rabbinical Court. This is because this Court does not sit as a court of appeals over the rabbinical courts, and its intervention is confined to cases of *ultra vires* action, breach of the principles of natural justice, departure from the provisions of the law, or in exceptional cases in which an equitable remedy is required and the matter is not within the competence of any other court or tribunal (see, *inter alia*, HCJ 9812/17 *A. v. Great Rabbinical Court* [6] and the references there; HCJ 2617/18 *A. v. Great Rabbinical Court* [7] and the references there). This means that even if, in the opinion of this Court, there was some mistake or other in the application of the religious or secular law to a given set of facts, that would not be grounds for the intervention of this Court sitting as High Court of Justice.

In the present case, however, I have decided to intervene in the judgment of the Great Rabbinical Court. This is because a reading of the judgment in its entirety leads to the conclusion that it was the Petitioner's act of infidelity that tipped the scales against her. In this, the Great Rabbinical Court presumed to apply religious law to matters of property, contrary to the case law, and in this it acted *ultra vires.*

8. The Legal Advisor of the Rabbinical Court argued that a careful reading of the judgment reveals that, ultimately, the judgment is based upon secular law that relates to specific co-

ownership in the residential home, applying markers specified in the *A. v. B.* case, and that everything that was said about the Petitioner and religious law was simply over and above what was required.

I do not share that opinion. First, Judge Nahari based his opinion explicitly on the analogy between the intention of specific co-ownership and the laws of gifts, and on section 5(c) of the Gift Law, 5728-1968, which permits the retraction of a gift due to disgraceful behavior. And what is the disgraceful behavior? The infidelity attributed to the Petitioner! Judge Nahari's opinion, which is based entirely on the weight attached to the wife's infidelity, is sufficient in order to shatter the basis of the judgment and to justify the intervention of this Court in the judgment of the Great Rabbinical Court (in this the present case differs from HCJ 7940/17 *A. v. Netanya Regional Rabbinical Court* [8], in which the halakhic discussion was "over and above what was necessary").

I will mention that in my view, the analogy drawn by Judge Nahari between the intention of specific co-ownership and the promise to give a gift is incorrect. Indeed, in HCJ 609/92 *Beham v. Great Rabbinical Court* [9], the Court considered a gift given by the husband to his wife, which he wished to retract after finding out that she was unfaithful to him. The Great Rabbinical Court ruled that the gift was given by the husband to the wife on condition that she not be unfaithful to him, and when this condition was not fulfilled, the gift was revoked. The High Court of Justice denied the petition, with Justice Elon expressing his opinion that the Rabbinical Court was authorized to rule in accordance with Jewish law, in that "the law follows the judge." However, the judgment in *Beham* was handed down prior to the judgment in *Bavli***,** and it cannot serve as a precedent for our case. And the main thing is this: a distinction must be drawn between a commitment to give a gift, which may be retracted if certain conditions are met, and the application of the community property rule or specific co-ownership in an asset. The assumption is that community property, similar to co-ownership of a specific asset, crystallizes at a certain point over the course of married life (LCA 8791/00 *Shalem v. Twe*nco Ltd. [10], 171-173; *Ben Giat* [1], at para. 24 of my opinion; MARITAL PROPERTY, at pp. 209-219), and the rationale for recognizing co-ownership is not the intention of the spouse to grant a gift to his spouse, but something else (Lifshitz, *supra*). However, even assuming that the co-ownership regime is based on a contractual rationale, such as a contract or a gift, the gift must be regarded as completed at a certain point in the course of marital life, and it is not possible to retract a completed gift. I do not wish to elaborate on this subject, since as I mentioned above, my intervention in the judgment of the Great

Rabbinical Court does not stem only from an error in the application of the law, but also from the application of religious law to matters of property by taking the wife's infidelity into consideration.

9. In the written opinion of Judge Amos, too, we find that it was religious law that was determinant in the matter, with weight being given to the wife's infidelity. Even prior to examining the matter from the halakhic aspect, Judge Amos saw fit to give weight to the Petitioner's infidelity as negating the intention of co-ownership, and he quoted from the judgment of Judge Shohet in FA (TA) 13313-12-11 [53] that "[I]t is difficult to attribute to a spouse the intention of partnership in an external asset with the other spouse when that other spouse is not loyal to his spouse, is unfaithful to her with other women." No distinction was made between the time at which the specific co-ownership crystallized, if at all, in the course of the marriage, and the time of the infidelity. Thus we find that the Rabbinical Court regards the act of infidelity as retroactively nullifying the partnership, on the assumption that had the husband known that the Petitioner would betray him one day, he would not have agreed initially to the partnership. In my opinion, the Rabbinical Court thus punished the wife retroactively for her infidelity.

On this point, after examining the matter from the perspective of the secular law, Judge Amos embarked on a broad review of the religious law, in the framework of which he regarded, *for the purpose of the religious law*, the case law on the subject of specific co-ownership in a residential home as a "custom" which had not been proved.

Since the discussion of this subject was conducted under the heading, "And now to the halakhic aspect," it must be assumed that Judge Amos wished to emphasize that *from a halakhic perspective*, as long as no secular statute had been enacted that recognized specific co-ownership, the *halakhah* does not regard this as a custom of the land on the basis of which it is possible to take away a material asset from the person who is deemed to be its owner. However, it should be stressed here that from the *secular* perspective, too, the community property presumption is not anchored in legislation; rather, it is the creature of the case-law, and has been a feature of Israeli law for decades. I would mention that in the *Bavli* case [4], the Great Rabbinical Court distinguished between the Property Relations Law, which is grounded in statute, and the community property doctrine which originates in the case law. It ruled that "the case law of the courts does not in any way obligate the rabbinical court, and the rabbinical court decides only in accordance with Jewish law, in which the concept of co-ownership of property does not exist, and

the only rights to which a wife is entitled are by virtue of the conditions of the *ketubah* and the *halakhah*." The distinction made by the Great Rabbinical Court between a statutory provision and case law was rejected, and rightly so, by the Supreme Court in the *Bavli* case. And as stated by Professor Shifman following the judgment: "It is clear that the distinction between the word of the legislator and the word of the judge is untenable. From a secular point of view, they are regarded as one unit for the purpose of expressing the legal situation" (Pinhas Shifman, *The Rabbinical Courts - Whereto?* 2 MISHPAT UMIMSHAL 523, 527, at note 4 (5755-1995) (Heb.)). In short, for the purpose of the secular aspect, the judgments of the Supreme Court on matters of marital property do not fall within the rubric of custom that requires proof, but within the rubric of case law that obligates the parties and also obligates the rabbinical courts. I take this opportunity to reiterate and emphasize the distinction between the secular aspect and the halakhic aspect, and to clearly caution against regressing to what was said in the past and overturned in the *Bavli* case.

Religious Law and Secular Law in Family Law

10. As we know, in the arena of Israeli family law we find religious law and the rabbinical judge, the secular law and the secular court dwelling together, in the sense of "And the children struggled within her" (Genesis 25:22). Division of jurisdiction between religious law and secular law, and division of jurisdiction and the "race for jurisdiction" between the religious court and the District Court is a sensitive, complex subject, to the extent that there are those who regard family law as laws of warfare, the battle being waged between the secular and the religious judicial instances (Ruth Halperin Kaddari, *Towards Concluding Civil Family Law – Israel Style*, 17 MEHKEREI MISHPAT 105, 108 (2002) (Heb.)). Family law is therefore seen as a struggle between the religious law and the secular law (Pinhas Shifman, *Religious Language and Civil Language in Family Law*, 10 MISHPAT VE-ASAKIM 423, 426 (2009) (Heb.), and on this subject, there is abundant academic literature (and see, *inter alia*, Menashe Shawa, *On "Ancillary" and "Sincerity" – Will the "Jurisdictions Race" between the District Court and the Rabbinical Court on Matters of Maintenance End?* 2 IYUNEI MISHPAT 719 (1982) (Heb.); Pinhas Shifman, *Forty Years of Family Law – The Struggle between Religious Law and Secular Law*, 19 MISHPATIM 847 (1990) (Heb.); Shahar Lifshitz, *The Future of Secular Family Law in Israel: Classical Liberalism versus Communitarian Liberalism* 17 BAR-ILAN L. STUD. 159 (2002) (Heb.); Berachyahu Lifshitz, *The*

Garden of Delusion of "Matters of Marriage and Divorce", 2 MISHPAHA BA-MISHPAT 107 (2009) (Heb.); Shlomo Dichovsky, *The Rabbinical Courts and the Civil Courts – On the Friction Between Them in Family Matters*, 4 MOZNEI MISHPAT 261 (2005) (Heb.); Ruth Zafran, *The Jurisdictions Race is Alive and Kicking: Rabbinical Courts Gain Power over Secular Family Courts*, 43 MISHPATIM 571 (2013) (Heb.)).

Religious law is at the helm in matters of marriage and divorce, but in all matters of distribution of marital property, secular law is binding. Even prior to the enactment of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, the Israeli legislature enacted the Women's Equal Rights Law, 5711-1951. Against the backdrop of this Law, the case law intervened in unequal arrangements relating to property matters between spouses that originated in the religious law (thus, for example, in light of the provision of sec. 2 of the said law, the husband's right to the usufruct of the wife's estate was denied – HCJ 202/57 *Sidis v. President and Members of the Great Rabbinical Court* [11]; and in light of this provision, the Court recognized community property – CA 253/65 *Bricker v. Bricker* [12], 596). Against the backdrop of the provisions of that law, the case law distinguished, over the years, between matters of marriage and divorce, and matters of marital property to which the secular law must be applied, and it gradually and consistently removed the subject of property relations between spouses from the ambit of the term "matters of marriage" (HCJ 185/72 *Gur v. Jerusalem Regional Rabbinical Court* [13]; CA 384/88 *Zisserman v. Zisserman*, 207-208, at para. 6 (hereinafter: *Zisserman* [14]); Lifshitz, at 678). Prof. Shifman summarized the matter: "The rights of the husband in the wife's property have left the framework of 'matters of marriage' due to their essential rescission in the Women's Equal Rights Law, 5713-1951, as interpreted by the Supreme Court" (PINHAS SHIFMAN, FAMILY LAW IN ISRAEL vol. 1, 30-32 (1974) (Heb.)).

12. This is the situation with respect to property in general, and to the subject of partnership in property in particular, and as stated by (then) Justice Barak in the *Bavli* case [4]: "The laws of partnership in property which were developed by the Supreme Court are not derived from the act of marriage, and they are not included in matters of marriage."

The *Bavli* decision is a cornerstone of our law, and it continues to apply even after a quarter of a century. I would mention that in that case, the Rabbinical Court ruled that the judgments of the civil courts do not bind the rabbinical courts, which judge according to Jewish law, which does

not recognize the concept of co-ownership of property. The High Court of Justice set aside the judgment, and without discussing all the reasons, the bottom line is that the community property doctrine applies in the rabbinical courts as part of the general secular law, and in matters of marital property, secular law must be applied by the rabbinical courts.

> The laws of community property are the law in Israel. They are part of the law of the State. They therefore apply in every judicial tribunal in Israel. They also apply in the rabbinical courts. Make no mistake: these laws apply in the rabbinical court not because a law of the Knesset states this explicitly. These laws apply in all judicial tribunals – including religious courts – because the case law of the Supreme Court is law in Israel. In order to nullify their application in a particular judicial instance, a special legislative act that states this expressly is required. Such legislation does not exist in Israel (*Bavli*, at 246).

[As an aside: for our purposes, the narrow interpretation given to the ruling in *Bavli* and its application to the laws relating to community property is sufficient. The broad interpretation holds that a default position may be inferred from the judgment whereby the rabbinical court must apply the secular law in any matter that is not one of "personal status," as a matter of normative coherence of a uniform, comprehensive arrangement in the various courts (for an opinion supporting a broad reading of the ruling in *Bavli*, see Ruth Halperin-Kaddari, *Legal Pluralism in Israel: The High Court and the Rabbinical Courts Following Bavli and Lev*, 20 IYUNEI MISHPAT 683 (1997) (Heb.) (hereinafter: Halperin-Kaddari). For criticism of the ruling in *Bavli*, see Berachyahu Lifshitz, *Contents and Outer Shell in the Doctrine of Partnership in Property Following Bavli*, 3 HAMISHPAT 239 (1996) (Heb.) (hereinafter: Berachyahu Lifshitz). The author also observes that the *Bavli* ruling can be interpreted narrowly and broadly (*ibid*., at 240)).

The Effect of Moral Fault on the Property Dispute

13. The importance of removing the marital property dispute from matters of "marriage and divorce," while applying the secular law, manifests itself in the subject of fault. The tendency in secular law is to sever the fault of one of the spouses from the subject of distribution of property, possibly as part of the wider trend towards no-fault divorce (on the regime of no-fault divorce when the marital bond has broken down, see: Shahar Lifshitz, *I Want to Get a Divorce Now! On*

Civil Regulation of Divorce Law, 28 TEL AVIV U. LAW REV. 671 (2005) (Heb.); Shahar Lifshitz, *Changes in Family Regulation – An Analytical and Prospective Look at the Effects of the Civil Revolution in Israeli Law*, 10 L. & BUSINESS 447 (2010) (Heb.)). It seems that Amendment no. 4 to the Property Relations Law, which after many years of struggles severed the distribution of property from the termination of the marriage, only reinforces this trend. This is not so in the religious law, in which fault in general, and sexual infidelity of one of the spouses in particular, have ramifications for property matters as well. Religious law regards intimate relations outside of marriage as extremely serious, and Jewish law has invoked property rights and obligations in order to punish the one responsible for the failure of the marriage (Berachyahu Lifshitz, at 256); Yitzhak Cohen & Amal Jabarin, *Relations Outside of Marriage as a Consideration in Distribution of the Family Property – A New Look at Israeli Law*, 16 L. & BUSINESS 465 (2014) (Heb.) (hereinafter: Cohen & Jabarin). The authors support exacting an economic cost from the spouse guilty of extra-marital relations and in their article they review the situation in the United States on this subject; and see also LIOR MISHALI-SHLOMAI, MORAL JUDGMENT OF BEHAVIOR IN LAWS OF MARRIAGE AND DISMISSAL, 121-125, 211 (PhD Thesis, 2014) (Heb.)).

As stated, the trend in secular law is to sever the matter of the sexual conduct of the parties from all that concerns the property dispute between the parties, thus "saving" the parties superfluous expenses involved in hiring private investigators to prove marital infidelity. As I have had occasion to say, albeit in a different context, "naturally, the attempt to prove guilt in order to 'gain points' in the battle over maintenance and property matters entails invasive action that breaches the privacy of the spouses" (FA (Haifa) 740/08 *A. v. B.* [54]).

Deputy President E. Rivlin discussed this in HCJ 8928/06 [3], cited in the opinion of Judge Amos:

> A person should not be punished for his part in the breakdown of the relations through economic sanctions in the framework of the distribution of property between the spouses. Dissolution of the family unit is an extremely difficult, painful event. In certain cases, one of the spouses can be regarded as having greater responsibility for the breakdown of the relationship than the other spouse. However, the difficulty of the dissolution, and the fault of either of the parties, should not be addressed by way of economic sanction in the framework of distribution of the

marital property. Furthermore, it is often difficult to speak in terms of "fault" in this context. Dissolution of the marriage is the result of complex circumstances, and unfaithfulness *per se* does not place the entire fault on one spouse alone.

14. Let us be clear: I am not saying that the question of infidelity can never have ramifications for the property dispute between spouses, but that the matter must be examined from the perspective of the secular law for the purpose of determining whether there are grounds for applying the community property presumption or specific co-ownership in the asset. Thus, I do not rule out the possibility of cases in which *long-standing* infidelity will attest to the absence of a partnership between the spouses (see HCJ 3995/00 *A. v. Great Rabbinical Court* [15]. That was a case involving an extra-marital affair that had lasted for 12 of the 17 years of the marriage, and the Rabbinical Court denied the claim of the wife to specific co-ownership in the apartment that had belonged to the husband prior to the marriage; and also compare the abovementioned HCJ 7940/17 [8], in which the Rabbinical Court emphasized the "short window of time in the course of which the partnership could have been created […] At the time there were already difficulties in the marital relations"). However, in the present case, it was the husband who wrote in the divorce claim, after 31 years of marriage, that "*in recent months*" the Petitioner has another partner. The parties also agreed that the time of the break-up for the purposes of the actuarial calculation would be the year 2013, and not prior to that.

In a long line of judgments, it was held that infidelity is liable to put an end to partnership, "but one is not punished for it *retroactively* by having rights in the marital property taken away" (CA 264/77 *Dror v. Dror* [16]. And see, similarly, *Bavli* [4], at 255; *Zisserman* [14]; CA 819/94 *Levi v. Levi* [17], 304; HCJ 1135/02 *Wasgael v. Jerusalem Great Rabbinical Court* [18], 24; and also LFA 7272/10 *A. v. B.* [19], at para. 24 *per* Justice Barak-Erez, at para. 3 *per* Justice Hendel, and at para. 5 *per* Justice Melcer, which dealt with fault in the form of violent behavior on the part of the spouse, as distinct from fault in the form of an extra-marital sexual liaison). This Court reiterated this principle in the above-mentioned HCJ 8928/06, when it intervened in the judgment of the Great Rabbinical Court, which attributed weight to the infidelity of one of the spouses during the time of the marriage in order to justify departure from the rule of equal distribution of marital property as specified in the Property Relations Law.

Judge Amos mentioned the judgment in HCJ 8928/06 [3] in his opinion, citing the rule whereby "one is not punished for infidelity *retroactively* by having rights in the marital property taken away," but in his view there is a difference between penalization relating to "rights which one of the parties had already acquired," and taking into consideration the question of infidelity for the purpose of depriving rights in an asset by virtue of the intention of co-ownership. As stated, in support of his position Judge Amos referred to the judgment in LFA (TA) 13313-12-11 [53], but a careful reading of that judgment reveals that as opposed to the present case, in which the claim of infidelity relates to the last few months preceding the outbreak of the dispute, in that case the court emphasized, alongside other reasons indicating the absence of intention of co-ownership on the economic plane, that:

> …there is no dispute that the respondent had not been faithful to the appellant for years. He was unfaithful to her with other women, he was registered on dating sites, and he had relationships with other women at different periods of their life together, including during the period of the renovation of the apartment. The appellant was aware of this. She held back, came to terms and forgave. The respondent promised that he would change his ways, but he relapsed.

In these circumstances, Judge Shohet found that:

> …it is difficult to attribute to a spouse an intention of co-ownership with the other spouse in an "external asset", when that other spouse does not remain faithful to his spouse, betrays her with other women and attempts to hide from her not only external assets but also joint assets, and he breaks his promise each time anew to change his ways, despite the willingness of his wife to forgive him and accept him.

Make no mistake: we have discussed the fact that general co-ownership, as well as specific co-ownership in an asset, crystallizes at a certain point in the course of marital life. Even those who hold that weight should be attributed to the guilt of a spouse in matters of property will agree that the infidelity of the spouse takes effect from that point onward, as a point in time that attests to a crisis in the spousal relations, and therefore a distinction must be drawn between property that accumulated prior to the act of betrayal and property that accumulated from the time of the betrayal and until the actual dissolution of the marriage. A severe crisis in the relationship will put an end

to the partnership *from that time onward* and apply only to property that exists at that time" (Cohen & Jabarin, at 481, emphasis added – I.A.).

15. Thus, contrary to the judgment in HCJ 8928/06, the Great Rabbinical Court decided to invoke religious law and to explain why, in its view, the infidelity of the Petitioner affects the present issue. This would appear to illustrate that even though the Rabbinical Court paid lip service to the secular law, the deciding factor was the wife's infidelity, and after 30 years of marriage, it retroactively denied her the right to specific co-ownership in the residential home. In doing so, the Rabbinical Court introduced the element of fault into property matters through the front door, or at least, through the window, while actually rejecting, in practice, the doctrine of specific co-ownership in the residential home.

16. *A comment prior to concluding*.

As a rule, the ideal situation is one of harmony between the courts, in order to minimize, insofar as possible, what may be regarded as a brawl between the secular court and the religious court. It is this very aspiration for harmony that ought to lead to uniformity in decision-making with respect to property matters, to prevent a situation in which the substantive law in property matters is determined by the identity of the judge. This has undesirable consequences, such as dishonest incorporation of the subject of property in the divorce suit, and providing an incentive for the undesirable phenomenon of forum shopping.

The intervention of this Court in the judgments of the Great Rabbinical Court is no trivial matter. As we noted, such intervention is reserved for exceptional cases. This derives, *inter alia*, from the principle of comity between the courts. This Court is careful not to trespass on the domain of the rabbinical courts in halakhic matters. The rabbinical courts, too, ought not trespass on the domain of the secular law in matters of property.

17. Finally, if my opinion is accepted, we will reverse the judgment of the Great Rabbinical Court, which would mean that the judgment of the Regional Rabbinical Court would again stand, and the Petitioner would be entitled to half the rights in the residential home. I would again emphasize that the question facing us is not whether specific co-ownership should be applied to the residential home, since opinions may differ on this matter of fact and law (see and compare LFA 2948/07 *A. v. B.* [20], at para. 6). The relevant question here is whether the Great Rabbinical Court applied the religious law by attributing weight to the wife's infidelity on what was purely a question of

property. In my view, the answer to this is yes, and the judgment of the Great Rabbinical Court displays a clear retreat to the situation that pertained prior to the *Bavli* case. Therefore, our intervention is justified.

Finally, I would point out that I am not unaware of the claim of laches in submitting the petition. In the circumstances of the case, I do not think that there is sufficient reason for dismissing the petition *in limine*, but I would suggest that the Petitioner not be awarded costs.

And another concluding remark: at the request of the husband and for the purpose of current execution proceedings between the parties, it is hereby clarified that for the purpose of the payment of NIS 2000 per month, as provided in an agreement between the parties in HCJ 4602/13, the date of the judgment of the Regional Rabbinical Court on Feb. 29, 2016, is the date that constitutes "the end of the proceedings in the property dispute".

18. After having read the opinions of my colleagues Justices D. Mintz and A. Stein, I would add some brief comments:

a. In response to the opening comment of my colleague Justice Stein, I would explain that my judgment does not represent any erosion of the law pertaining to the scope of the intervention of this Court in the judgments of the rabbinical courts. The law remains as it was, and my judgment is merely its application to the circumstances of this particular case.

b. I completely agree with my colleague Justice Stein that the *Bavli* case did not introduce anything new with respect to the application of the community property presumption, and that its innovation lay in the fact that following that ruling, it became clear that the rabbinical courts must decide according to the secular law on property matters. I will again refer the reader to para. 12 of my opinion, where I quoted from the *Bavli* case and referred to articles addressing the question of whether the judgment should be given a narrow or a broad interpretation.

c. In para. 8 of my opinion, I mentioned the judgment in the *Beham* case. The quotation brought by my colleague from the *Bavli* case (para. 12, near the end of his opinion) only explains how then Deputy President Barak decided to deal with this case by distinguishing it, through the determination that underlying the judgment in *Beham* was the agreement of the parties, which may also be interpreted as agreement to the application of Jewish law (and see Halperin-Kaddari, at 685, note 4).

d. As I emphasized in para. 7 of my opinion, in normal circumstances, even if I thought that the Great Rabbinical Court was mistaken in its application of the law applying to specific co-ownership in the residential home, I would not tend to intervene in its judgment. However, in the present case, according to the approach of the husband, too, the alleged infidelity of the Petitioner occurred in the last months of the 31 years of their marriage. Therefore, it is hard to understand how this infidelity can be included in the basket of indicators and facts that the court examines in deciding whether specific co-ownership in the residential home had been created over the years. The weight given by the Great Rabbinical Court to the wife's infidelity in the present case (in the category of "shameful conduct", in the words of Judge Nahari), is therefore incompatible with the ruling of this Court, whereby rights cannot be nullified *retroactively***.** But this is what the Rabbinical Court did in the present case, ignoring the ruling that it is secular law that is binding in the matter of the distribution of property. In this, the Rabbinical Court acted contrary to the ruling in *Bavli*, and thus overstepped its authority.

e. There are those who hold that specific co-ownership in the residential home that was brought into the marriage is not based solely on the intention of the spouse, and I refer to the connective model mentioned in para. 6 of my opinion and Lifshitz's article mentioned there.

f. In all events, even if we analyze the doctrine of specific co-ownership from the perspective of the intention of co-ownership, I would clarify that I too am prepared to assume that in certain cases, infidelity on the part of one of the spouses could be one of the relevant facts when the court is assessing whether specific co-ownership has been created in the residential home that was brought into the marriage (see para. 14 of my opinion). Therefore, I cannot be accused of ignoring the wish of the spouse who brought the asset into the marriage that his spouse not be a partner in the asset in the event of infidelity.

Like my colleague, I too am of the opinion that as a rule, where it has been proved that the "betrayed" spouse did not intend from the outset to share his property with the "betraying" spouse (whether in general, or in the case of infidelity), this intention must be respected. On the other hand, it is not possible to carry out a "retooling" and to say that once the spouse committed an adulterous act, we must assume that the "betrayed" spouse did not intend, from the outset, to share his property with her. Such a determination is flawed in that it begs the question.

In the present case, there is no indication that the husband wished not to share his property with the Petitioner in the case of infidelity (I would mention that the Regional Rabbinical Court reached a completely different conclusion with respect to the husband's intention, as reflected in his own statements). The practical ruling of the Great Rabbinical Court is that in any case of infidelity, it may be determined that there was no intention of partnership. My colleague Justice Stein wishes to maintain neutrality in the attitude of the Court on this subject, however, the *practical* significance of his opinion is that whenever a rabbinical court deals with the issue of specific co-ownership in an asset, it will be possible to introduce the element of infidelity as proof of the lack of intention of partnership. From here, it is only a short step to the phenomenon – which even my colleague rejects – of bringing evidence about acts of infidelity and adultery of one of the spouses in the framework of a dispute concerning property, and where would this land us?!

Justice D. Mintz

Although I accept fairly substantial parts of the opinion of my colleague Justice I. Amit, I cannot concur in the result, and in my opinion the petition must be denied.

1. A study of the judgment of the Great Rabbinical Court – with its three opinions of the members of the panel – reveals that it was based on factual determinations whereby co-ownership of the asset that was the object of the petition (hereinafter: the asset) was not proved. The Great Rabbinical Court reached this conclusion due to the absence of "additional supporting evidence" to prove the partnership (*per* Judge Amos); or due to the absence of an "assessment of an intention for co-ownership or giving" (*per* Judge Nahari); or due to the absence of "any intention of co-ownership" (*per* Judge Almaliah). Indeed, the matter of the alleged infidelity of the Petitioner was manifest in the opinions of Judges Amos and Nahari, and Judge Nahari even ruled expressly that "the act of infidelity creates an intention of non-partnership of the owner of the asset vis-à-vis the person who was unfaithful to him, and from this a conclusion may be derived in respect of our matter." However, this is not sufficient in order to justify the intervention of this Court in the judgment. I will explain.

2. There is no dispute that in this case, the property relations regime that applies to the couple is that of the Spouses (Property Relations) Law, 5733-1973 (hereinafter: the Property Relations Law or the Law). According to this regime, during the course of the marriage, there is separation

between the assets of the spouses, whereas upon the termination of the marriage, the couple becomes subject to an obligation to balance the value of the assets between them, or in other words – to carry out a "balancing of resources" (CA 1915/91 *Yaacobi v. Yaacobi* [21], 550 (hereinafter: *Yaacobi*); LCA 8672/00 *Abu Rumi v. Abu Rumi* [5], 179 (hereinafter: *Abu Rumi*)).

3. Section 5(a) of the Property Relations Law provides that upon the dissolution of the marriage (including its termination due to the death of one of the spouses), each spouse is entitled to half the value of the total assets of the couple. Under sec. 8 of the Law, the court may set a different date for executing the balancing (a date which is sometimes called "the date of the breach"; and see: HCJ 2642/08 *A. v. Great Rabbinical Court Jerusalem* [22]; LFA 2045/15 *A. v. B.* [23]). However, one of the assets that is excepted from the balancing of resources under sec. 5(a)(1) of the Law is an asset that one of the spouses owned on the eve of the marriage, or that he received as a gift or as an inheritance during the marriage. Section 5(a) of the Law must be read together with sec. 4, which provides that contracting the marriage or its existence *per se* does not affect the property of the spouses by conferring upon one of them rights in the property of the other, or by imposing upon him liability for the obligations of the other (LFA 1398/11 *A. v. B.*) (hereinafter: LFA 1398/11 [2])).

4. In *Yaacobi* [21], there was disagreement in this Court on the question of whether the community property presumption applied to a couple who married after the entry into force of the Property Relations Law. The prevailing view was that just as spouses who married prior to the effective date of the Law (Jan.1, 1974) are subject to the single, special property relations regime of "the community property presumption" (which means that when a couple leads a normal life-style that reflects joint effort, the property that has accumulated in the course of the marriage will be owned jointly. This partnership is inferred from the circumstances of their life together and from the intentions attributed to the couple. The presumption relies on a contractual construction relating to an implied agreement between the parties, whereby they are equal partners in rights. And see: CA 300/64 *Berger v. Director of Estate Tax* [24]; CA 253/65 *Bricker v. Bricker* [12]; CA 135/68 *Barelli v. Director of Estate Tax Jerusalem* [25]; CA 595/69 *Efta v. Efta* [26]). Couples who married after the effective date, are governed only by the resource balancing arrangement, and the community property presumption does not apply to their affairs (HCJ 1727/07 *A. v. Great Rabbinical Court*, para. 6 (hereinafter: HCJ 1727/07 [27])). Accordingly, as a rule, a spouse who is subject to the resource balancing arrangement may not claim ownership in any of the property

of the other spouse, or in a particular asset, on the contention that the community property applies to the property or to the particular asset.

5. Notwithstanding the above, it has been ruled that the spouses are not barred from claiming ownership of assets by virtue of the general law, i.e. regular property law and contract law. For this purpose, and for the purpose of recognition of co-ownership of a particular asset, including the residential home that was brought into the marriage by one of the partners, one must bring evidence of factual circumstances additional to the very existence of extended marital life together (*Abu Rumi* [5], at 183). The question of whether the intention of specific co-ownership was proved, as stated, is a factual question which must be proved by the person claiming it, and it depends on the circumstances (LFA 4545/09 *A. v. B.* [28], para. 6; LFA 2948/07 *A. v. B.* [20]; LFA 10734/06 *A. v. B.* [29]; CA 8128/06 *Levinson v. Arnon* [30], para. 23; LFA 2991/13 *A. v. B.* [31]; LFA 7181/12 *A. v. B.* [32]; LFA 5939/04 *A. v. B.* [33]). It will be examined in accordance with an assessment of the wishes of the parties, their express or implied agreement and their life circumstances in relation to the specific asset. In this framework it was ruled that one of the considerations must be whether the asset is registered in the name of one of the spouses, and that in view of the maxim that "the burden of proof is on the claimant," the burden falls upon the other spouse to prove that he is entitled to rights in that asset. The existence of a long marriage *per se* is insufficient, and in this context one must take into account, *inter alia*, the conduct of the parties and the nature of the monetary investments of the unregistered spouse in the asset (LFA 1477/13 *A. v. B.* [34]).

6. The residential home is said to be the "jewel in the crown of the community property presumption" (CA 806/93 *Hadari v. Hadari* [35], 690), and the nature of the asset itself affects the evidentiary base that is required to ground the community property presumption (CA 3002/93 *Ben-Zvi v. Siton* [36], 13). This is true today as well, after the "community property presumption" regime has almost disappeared and we are now almost entirely under a regime of "resource balancing" under the Law. Accordingly, it has been ruled that a lesser amount of proof is required to prove co-ownership of family assets in general, and of the residential home in particular, which is the main asset of the family (CA 741/82 *Fichtenbaum v. Fichtenbaum* [37], 26; for an extended discussion, see: CA 4306/12 *A. v. Bank Leumi Israel Ltd.* [38]).

7. And now to the matter at hand. My colleague Justice Amit is also of the view that extended infidelity of either of the spouses may well attest to the lack of partnership between the two, including in their joint residential home (para. 14 of his opinion). Infidelity can constitute a circumstance that undermines the community property presumption between spouses (and see: CA 264/77 *Dror v. Dror* (hereinafter: *Dror* [16]), which is very logical. However, as my colleague pointed out, just as the crystallization of the partnership is assessed along the timeline of married life, so too, the circumstances that indicate the absence of partnership are examined along the timeline of married life, and "one is not punished for them retroactively" (see *Dror, ibid.*, at 832 and see: HCJ 9734/03 *A. v. Great Rabbinical Court* [39]). In other words, the infidelity of one of the spouses is not sufficient to nullify the partnership that crystallized in the assets, if it crystallized prior to the infidelity.

8. *Prima facie*, in the present case the spouses lived in harmony for many years, and under the law there is no justification for allowing the alleged, later infidelity of the Petitioner to nullify the partnership in assets that had crystallized previously. In this case, however, I cannot agree with the position of my colleague Justice Amit that the three Judges of the Great Rabbinical Court included infidelity among the aggregate considerations for denying co-ownership of the asset, and that it was, in fact, this consideration that tipped the scales against the Petitioner. In my view, from the words of Judges Amos and Almaliah and their reasons, we learn that this conclusion was reached independent of the infidelity. Thus, although Judge Amos discussed Jewish law, he concluded that co-ownership of the asset had not crystallized even before he discussed the Petitioner's infidelity. In his written opinion he even stressed that reference to the infidelity was *in addition to* and beyond what was required, and the discussion of the "halakhic aspect", as he defined it, was incidental. Judge Almaliah, too, ruled in accordance with the secular law, and in his opinion he makes no mention at all of the Petitioner's infidelity among his considerations for denying co-ownership of the asset. Therefore, although Judge Nahari ruled that the act of infidelity creates "an intention of non-partnership of the owner of the asset vis-à-vis the one who was unfaithful to him" (reasoning *a fortiori*), it cannot be said that the conclusion of the majority in the Rabbinical Court is tainted by the consideration of circumstances that are not relevant to the matter, or that the Rabbinical Court applied religious law to existing financial relations between the couple. Therefore, the Rabbinical Court did not act *ultra vires* in its judgment.

9. Since the Rabbinical Court did not act *ultra vires*, and given the limited scope of the intervention of this Court, when sitting as the High Court of Justice, in the decisions of the rabbinical courts (see: sections 15(c) and 15(d)(4) of Basic Law: The Judiciary; HCJ 9812/17 *A. v. Great Rabbinical Court* [6]; HCJ 2617/18 *A. v. Great Rabbinical Court* [7]; HCJ 1996/16 *A. v. Great Rabbinical Court* [40]; HCJ 3689/15 *A. v. Tel Aviv Regional Rabbinical Court* [41]; HCJ 3394/18 *A. v. Great Rabbinical Court Jerusalem* [42]; HCJ 3042/18 *A. v. Regional Rabbinical Court* [43]; HCJ 4091/18 *A. v. Great Rabbinical Court* [44]), even if I assume that the Rabbinical Court erred in its application of the law, this case does not fall within the scope of those cases that justify the intervention of this Court.

10. Parenthetically, though not necessarily of marginal importance: When Judge Amos turned to a discussion of the halakhic aspect, he ruled that the validity of the interpretation of the Rabbinical Court in relation to co-ownership of property under the Property Relations Law and the existing case law of the Court, is of equal value to that of any other judicial instance. No one, I believe, would dispute this. However, Judge Amos went on, perhaps beyond what was necessary, and ruled that the Rabbinical Court must provide substance for its interpretation according to Jewish law and not according to the general law. He would appear to be mistaken in this (see: HCJ 1000/92 *Bavli v. Great Rabbinical Court* [4]). Nevertheless, I will briefly address the position of Jewish law as discussed in the opinion of Judge Amos.

11. Under Jewish law, the financial obligation resulting from one spouse being a partner in the property of the other spouse must be based on a "known custom" by which the spouse undertook the obligation. In support of this, Judge Amos cited Maimonides (*Mishneh Torah,* Laws of Marital Relations 16:7-9), and also quoted from *Responsa of R. Eliahu Mizrahi* 16 (Constantinople, 1450-1526, also famous for his commentary on Rashi's commentary on the Bible). Due to their importance, the full text quoted by Judge Amos from the said responsum appears below:

> For it is not within the power of custom to bind someone in a monetary matter if he objects in principle to that custom. We will not compel someone to surrender money that is in his possession on the basis of a contested custom. This is in contrast to matters of ritual law, in relation to which no one can object to a valid custom, and they will be bound by that custom, regardless of their wishes on the matter …. This, as we examine whether that local custom is clear and unambiguous to all the

> residents, and then we find that the transaction was made on the condition that it would comport with local custom, and it is as if he had expressly stipulated to that effect, and he must carry out that condition, and not by reason of it being the custom observed by others. Hence, even if one of the parties now strenuously objects and says "I never had any such intention and never agreed to that", we nevertheless rule that the transaction was made in accordance with the custom, … However, if the custom in question was not clear and unambiguous to all the townspeople, then we say that he may never have heard of the custom, or had heard of it but never agreed to abide by it. Therefore we are concerned with a doubt, and we do not remove money from a person's possession on the basis of a doubt.

What this means is that if there is a custom that is well-known to all the inhabitants of the town, this custom may not be refuted, and there is a type of conclusive presumption that everyone acts in accordance with custom, and a person may be required to pay out money if the custom so demands in those circumstances. As opposed to this, in the case of a custom that is not familiar to all the people of the town, the assumption is that the person might not have heard about it, or alternatively, that he heard about it but did not act according to it. It is a matter of doubt, and we do not take away a person's money on the basis of a doubt.

12. In view of the above, Judge Amos ruled that even if we decide that money is to be taken away by virtue of "state custom," there must be a clear intention of partnership, and the burden of proof falls on the other spouse by virtue of the maxim, "the burden of proof is on the claimant." This is because state custom only raises a doubt, and where there is a doubt, the asset should be deemed to be owned by the person in possession of it. In our case, therefore, according to Judge Amos's approach, there was no justification, under Jewish law, to determine that the asset was co-owned, and to deprive Respondent 3 – the Petitioner's ex-husband – of his half of the property for her benefit.

13. First, allow me to say that from the above it may be inferred that it was not the infidelity that underlay the main thrust of the decision of Judge Amos according to Jewish law, but rather the power of "state custom" – in the form of the financial regime under the Law or under the "community property presumption" – to determine the question of ownership of the asset. Secondly, the present case is not similar to the proof that was adduced, inasmuch as the decision

in the present case is not based on "state custom," as expressed in the community property presumption, against which Judge Amos spoke out, but rather it is a decision based on the general law and an examination of the evidence on the merits.

14. As stated above, the applicable property relations regime between the Petitioner and Respondent no. 3 in the present case is that of resource balancing under the Property Relations Law. As such, co-ownership in the asset does not derive from the community property presumption, but from the general law (and see the different view of my colleague Justice Amit in CA 7750/10 *Ben Giat v. Hachsharat Hayishuv Insurance Ltd.* [45]. This, as stated above, involves determining the intention of specific co-ownership of the spouse in the asset, with the Petitioner bearing the burden of showing the existence of the partnership. In other words, according to both the general law and Jewish law, it is the Petitioner who bears the burden of proving the existence of an intention of co-ownership of the asset, and in the case of a doubt, the entire asset should be assigned to Respondent no. 3. It would be different, indeed, if the Petitioner's rights in the asset derived from the community property presumption, for then the paths of the two legal systems might diverge (on the force of civil legislation according to Jewish law, see: R. Mordekhai Eliahu, *The Attitude of Halakhah to the Law of the State*, 3 TEHUMIN 242 (5742-1982) (Heb.); R. Dr. Ron Kleinman, *Secular Law in the State – 'State Custom'?* 32 TEHUMIN 261 (5772-2012) (Heb.); R. Asher Weiss, *Are State Laws Valid by Virtue of Local Custom?* 34 TEHUMIN 171 (5774-2014) (Heb.); on the adoption of laws and regulations according to the doctrine of "The King's Law", see: *"Dina de-Malkhuta Dina" and "Community Regulations*" in IDO RECHNITZ, MEDINA KE-HALAKHAH 190 (2018) (Heb)).

15. Moreover, the above also emerges from what Maimonides writes (*Mishneh Torah,* Laws of Marital Relations 16:9), quoted by Judge Amos, as follows:

> But if this stipulation was not included in the text of the *ketubah*, but they simply married, if the husband knew of this ordinance of the Geonim, the woman may collect. If he did not, or we are unsure of it, *we deliberate at length concerning this matter*. For an ordinance of the Geonim does not have force when it was not explicitly stated in the conditions of the *ketubah…* (emphasis added – D.M.).

In other words, if there is a doubt as to whether the custom has become widespread, and as to the husband's knowledge of the custom, the rabbis "deliberate at length," i.e., they investigate the

circumstances of the case thoroughly (and see: R. ADIN EVEN ISRAEL STEINSALTZ, MAIMONIDES WITH COMMENTARY (2nd edition, 2017) (Heb.)). This is also the decided law in the general law, i.e., that the circumstances of the case are investigated thoroughly as to whether in fact, despite the apparent ownership of the disputed asset by one of the spouses, the other spouse also has rights in it. Indeed, in the case cited by Maimonides, too, the reference is to a custom of which the spouse may not be aware. However, when in the present case we refer to proving the existence of co-ownership in accordance with the general law and the laws of evidence, it would seems that Jewish law and general law lead to the same place, where the burden of proof falls upon the one who claims co-ownership of the asset that is the property of the other spouse.

I will comment, parenthetically, that Maimonides' above-cited position was not adopted in practice (*SHULHAN ARUKH*, *Even ha-Ezer* 100:1; and see *BEIT SHMUEL*, *ad loc*.).

In conclusion, therefore, I do not find that the Rabbinical Court acted *ultra vires,* or that it concluded purely on the basis of Jewish law that the Petitioner did not prove co-ownership of the asset as claimed. Therefore, if my opinion be accepted, the petition will be denied.

Justice A. Stein

1. In the disagreement between my colleagues Justices I. Amit and D. Mintz, I find myself concurring with Justice Mintz. My disagreement with the opinion of Justice Amit stems from the reasons specified below. In practice, Justice Amit is seeking to change our long-standing rule of not intervening in the judgments of the rabbinical court except in limited, defined cases, when one of the following flaws is involved: (1) *ultra vires*; (2) clear departure from provisions of law that are directed at the religious court, which can be seen as acting *ultra vires*, or as an error of law that is clear and evident on the face of the judgment, which is equivalent to acting *ultra vires* (see: HCJ 7/83 *Bayers v. Haifa Regional Rabbinical Court* [45; HCJ 187/54 *Barriya* v Kadi of the Moslem Sharia Court, Akko [46]; HCJ 202/57 *Sidis v. President and Members of the Great Rabbinical Court* [11]; and the article by the late Professor Menashe Shawa, *Is the Religious Court's Deviation from or Disregard of the Provisions of Secular Law Directed at it in Particular Equivalent to Acting "Ultra Vires"?* 25 HAPRAKLIT 299 (1972-1973) (Heb.)); (3) breach of the principles of natural justice; and (4) this Court reaches the conclusion that a Petitioner ought to be given equitable relief that is not within the authority of another court. This last norm is based on the

provision of sec. 15(d)(4) of Basic Law: The Judiciary (hereinafter: the Law), which vests in us the power "to order religious courts to hear a particular matter within their jurisdiction or to refrain from hearing or continue hearing a particular matter *not within their jurisdiction* […]", and on the provisions of sec. 15(c) of the Law, which provides that the High Court of Justice "[…] shall hear matters in which it deems it necessary to grant relief for the sake of justice […]." The supra-legislature that enacted Basic Law: The Judiciary did not grant us the power to interfere in the substance of the judgments and decisions of the religious courts, and we have reiterated this principle countless times (see, e.g., HCJ 8638/03 *Amir* v. *Great Rabbinical Court* Jerusalem [47], para. 10 and the references there; HCJ 3467/14 *A. v. Haifa Regional Rabbinical Court* [48]; HCJ 2443/15 *A. v. Great Rabbinical Court Jerusalem* [49], para. 7 and the references there; HCJ 9812/17 *A. v. Great Rabbinical Court* [6], para. 13 and the references there; and HCJ 2617/18 *A. v. Great Rabbinical Court* [7], para. 10 and the references there). This is a fundamentally important principle by which we preserve the balance sought by the legislature between the general law and the religious law on matters of marriage, divorce and their monetary ramifications. This balance should be maintained and preserved unchanged. I will already emphasize that our case turns on the two first exceptions to the rule against intervention, and therefore I will discuss them alone.

2. In my view, applying this basic rule in the present case presents no difficulty. Clearly, Respondent no. 1 in HCJ 9780/17, the Great Rabbinical Court, did not exceed its authority in deciding on the appeal of the judgment of the Haifa Regional Rabbinical Court as it saw fit in the circumstances of the case. This power was vested in the rabbinical courts – the regional courts and the Great Rabbinical Court – after the Petitioner and Respondent no. 3 in the above case before the High Court, a wife and husband who divorced by agreement (hereinafter: the wife, the husband or the couple, as relevant), agreed to settle their financial affairs in the rabbinical court (as preserved in the agreement on which this Court issued a consent decree: see the decision of March 3, 2013 given in the framework of HCJ 4602/13). Similarly, I found no clearly evident, facial legal error in the judgment of the Great Rabbinical Court (hereinafter: the Rabbinical Court) that would require our intervention.

3. The judgment of the Rabbinical Court dealt with the house in which the couple had lived with their children over the course of many years of marriage (hereinafter: the house). The plot of land and the funds to construct the house were brought into the marriage by the husband, as determined by the Rabbinical Court, and the ownership remained registered in his name alone. The wife

claimed the existence of an equal partnership in the rights in the house. The husband argued that the house was and remained entirely his, and the Rabbinical Court agreed with the husband. Among the considerations negating the existence of an equal-rights partnership in the house, the Rabbinical Court included the fact that the wife, while still married to the husband, had an affair with another man. Justice Amit believes that such a consideration represents a departure from the provisions of the law and is *ultra vires*. My opinion is different. I believe that consideration of this fact as part of the entire set of facts relevant to the question of implied partnership is not a clear, evident mistake on the face of the judgment, and it certainly does not constitute an *ultra vires* act. In the absence of an explicit agreement, the question of whether co-ownership of the asset exists in any particular case is a factual one (as explained in the opinion of my colleague Justice Mintz), and it is possible to view it as a mixed question of law and fact. In order to answer this question either positively or negatively, the judge must establish factual findings concerning the existence or absence of an equal-rights partnership between the couple in the specific asset under discussion – and we do not intervene in such findings. In the present case, the Rabbinical Court ruled as a matter of law and a matter of fact that the couple had not established an equal-rights partnership in the house. I will freely admit that I am not comfortable with this ruling, as the evidence shows that the husband and wife lived in this house for many years, raised their children in it, and that their family life was, for the most part, unremarkable (though not without friction). But the point is that my opinion on this is not what matters, since the authority to determine the facts of the case and to decide whether these establish an equal-rights partnership in relation to the house is not vested in me. Such authority lies in the hands of the Regional Rabbinical Court, as the first instance, and with the Great Rabbinical Court, as the final instance. This Court only examines whether the boundaries of this authority were breached, and once it finds that that is not the case, it must end the task assigned to it in section 15(d)(4) of Basic Law: The Judiciary. All that remains for me is to concur in the opinion of my colleague Justice Mintz, confirm the judgment of the Rabbinical Court, and deny the petition.

4. Another matter on which I do not agree with Justice Amit is the ramifications of HCJ 100/92 *Bavli v. Great Rabbinical Court* [4] (hereinafter: the *Bavli* case) for the law regulating the property relations between spouses. In my opinion, the *Bavli* case does not help the Petitioner. That ruling did not introduce any great innovation concerning the application of the community property presumption to specific assets that are not defined in the Spouses (Property Relations) Law, 5733-

1973 (hereinafter: the Property Relations Law) as being subject to balancing, and in respect of which there is no explicit agreement between the spouses. On this subject, the *Bavli* case only reiterated the principles that had already been established in several judgments (see: CA 253/65 *Bricker v. Bricker* [12] ; CA 300/64 *Berger v. Director of Estate Tax* [24]; CA 135/68 *Barelli v. Director of Estate Tax, Jerusalem* [25]). These judgments recognized the existence of an equal-rights partnership in assets by virtue of an implied agreement between the spouses, and such an agreement – like every agreement – might relate to the entire property of the spouses, or it might relate to full or partial partnership in only one asset. The Property Relations Law established its rules for balancing in relation to the property accumulated in the course of the couple's marriage, as part of their joint life's enterprise (see secs. 5-10 of the Property Relations Law). In doing so, the law limited in practice the scope of application of the community property presumption: this presumption could no longer apply to property subject to balancing, the rights in which are regulated by the law. The application of the presumption was confined, therefore, to other assets, those which could not be balanced, as long as an implied partnership agreement could be proved in respect of them. The *Bavli* case and other judgments that followed it (see LCA 8672/00 *Abu Rumi v. Abu Rumi* [5]; HCJ 5416/09 *A. v. B.* [50], para. 13 and the references there (2010); and Prof. Shahar Lifshitz's article, *Family and Property Relations: Challenges and Tasks Subsequent to the 4th Amendment of Property Relations Law*, 1 HUKIM 227 (2009) (Heb.) ratified this change in the community property presumption.

5. The great change wrought by the *Bavli* ruling was the repeal of the old rule whereby "the law follows the judge" (see: HCJ 323/81 *Vilozny v. Great Rabbinical Court Jerusalem* [51]). This rule allowed a rabbinical court to decide on property matters that were properly brought before it in accordance with religious law, disregarding the general law (see: BENZION SCHERESCHEWSKY AND MICHAEL CORINALDI, FAMILY LAW vol. 1, 426-37 (New Edition, 2015) (Heb.)). The *Bavli* ruling turned this rule on its head in establishing that it is the judge who must follow the law. Accordingly, it was ruled that the rabbinical courts must rule on property matters in accordance with the community property presumption as defined in the general law and its contractual foundations. This ruling completed the revolution in the financial regime of the laws of marriage and divorce. Prior to the *Bavli* case, significant parts of this subject were governed by the laws of the person's personal status, which dictated the financial consequences of marriage and divorce for a couple. The *Bavli* case transferred the *entire* financial aspect of the laws of marriage and divorce from a

regime of status to a regime of contract that allows a couple to act as an autonomous unit and determine the financial consequences of marriage and divorce by themselves and for themselves, subject to the protections against abuse provided in the Property Relations Law and in the general laws of contract (see secs. 5A(d), 22 and 12 of the Property Relations Law; and secs. 12, 15, 17, 18, 39, and 61(b) of the Contracts (General Part) Law, 5733-1973).

6. This transition found expression in the rules that apply in the absence of a written property agreement between couples. The first and most fundamental of these rules was laid down in sec. 4 of the Property Relations Law, according to which: "The contraction or existence of the marriage shall not by itself affect any ownership rights of the spouses, confer on one of them rights in property of the other or impose on one of them liability for debts of the other." Accordingly, sec. 5(a)(1) of the law provides that "property which they had immediately before the marriage or received by way of gift or inheritance during the marriage" will be excepted from the resource balancing that applies to property accumulated during the time of the marriage. I will call this rule the "*preservation of rights in past assets*." The second rule states that a spouse may waive the preservation of his past rights and make his spouse a partner in those assets. This rule requires the court to identify and enforce the unwritten and unarticulated agreements concerning partnership in assets that the couple formulated between themselves and on which they acted in the course of their life together. In applying this rule, the courts usually decide according to the principle that "where a positive plea is met by an uncertain one, the positive plea prevails"" (see: *TB Bava Kama* 118a): in the absence of evidence that clearly shows that the spouse in possession of the past asset agreed to include his spouse as an equal-rights partner in that asset, the asset will remain entirely in the hands of its original owner. This rule has been applied, in most cases, in relation to real property (a house or an apartment) in which the couple lived and maintained a common household until their relationship broke down, as happened in the present case. In such cases, as determined elsewhere by my colleague Justice Amit, long years of marital life in the residential home registered on the name of one of the spouses is not sufficient: the spouse who claims co-ownership of property that is not his must present evidence of the intention of partnership that constitutes "additional supporting evidence" (see: LFA 1398/11 *A. v. B.*[2]; and LFA 1477/13 *A. v. B.* [34]).

7. The transition from a regime of status to one of contract established an important principle that did not receive sufficient emphasis in the opinion of my colleague Justice Amit. I am referring to the autonomy of the spousal relationship (a value that is of prime importance, and that

sometimes clashes unavoidably with social equality: see JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 30-43, 64-65 (1984)). Spousal relationships are an individual matter, not only on the emotional and intimate plane, but also regarding property. Every spousal relationship exists by virtue of the practices and agreements that the spouses establish between themselves on the basis of their beliefs in regard to their desired way of life. Agreements between spouses concerning their individual personal property, and the extent to which the other spouse may share in that property are not, therefore, uniform. Agreements on property matters established in a relationship between one particular couple are not similar – and need not be similar – to the agreements that are formed in another couple's relationship. Couples are permitted to live their lives together in a religious, secular, patriarchal, or feminist format, or some other format that incorporates values and world views of all types. Similarly, they may adopt whatever model of conjugal relations they may desire, which may or may not include sexual freedom. All these are private matters that are not our concern. Autonomy of the relationship between couples requires us to adopt a neutral, equal attitude to all lifestyles between couples, and all property arrangements, as long as no unlawful exploitation is involved.

8. As such, the question whether the registered, sole owner of a particular asset, who brought that asset into the marriage, waived the rule concerning preservation of past assets and made his spouse an equal-rights partner in the asset, is an individual question, the answer to which (in the absence of explicit acquisition) is found in the lifestyle and the beliefs of the couple. This is, therefore, a question regarding which which it is not possible – nor desirable – to lay down comprehensive rules that are oblivious to the beliefs, values and circumstances of the intimate relations of the couple. Every couple may act in accordance with its beliefs, and it is in accordance with those beliefs that it will distribute – or not distribute – the personal property of each of the spouses. We will not replace a spouse's beliefs with our own. When considering the question of partnership, secular and rabbinical courts are therefore obliged to infer the existence or absence of an equal-rights partnership in a disputed asset from the patterns of the couple's lives and their mutual expectations. These expectations may certainly include the condition of sexual fidelity between the couple as a *sine qua non* for the agreement of one spouse to share his property equally with the other. Such a condition, insofar as it exists, must be respected and enforced by the secular and religious courts.

9. Justice Amit now suggests that we lay down a comprehensive rule according to which acts of "infidelity" cannot serve as a consideration in decisions concerning the partnership of one spouse in the property of the other. He is of the opinion that the fact that one spouse was not faithful to the marital bond and was found to engage in "infidelity" is not relevant to the question of co-ownership. Justice Amit explains that acts of "infidelity" may be taken into account only in extreme cases, when their frequency attests to the destruction of the spousal unit, which could – in other circumstances – have served as a basis for implied co-ownership of the disputed property. In his opinion, this rule is necessary so that considerations of moral guilt will not feature in decisions that are intended to settle property disputes between couples, including decisions regarding the question of co-ownership such as that which we now confront. The reason for this is simple: the "unfaithful" or "adulterous" spouse should not be punished by deprivation of his property.

10. I agree with Justice Amit that our law does not permit depriving property from a spouse who has been "unfaithful" to the other spouse. There is no dispute about this principle. For this reason, I would not permit evidence to be brought about acts of "unfaithfulness," "adultery" and so forth, in the framework of a discussion of a monetary dispute that turns on property that is recognized as being subject to balancing under the Property Relations Law. Property and rights *belonging to* either of the couple – the husband and the wife, in the present case – are his, whether he remained faithful to his spouse or whether he committed an act of "betrayal." His property cannot be taken away from him in any case, and his property includes conclusive, unconditional partnership in an asset that formerly belonged in full to his spouse. But the problem is that this is not the question that faced this Court in the present case. The question facing us turned on *giving* and not on *taking***.** The question that was decided, as it was decided by the Rabbinical Court, is only this: can one infer from the conduct of this couple in the course of their marital life that the husband agreed to make his wife a partner, unconditionally, in the rights in the house, where the plot on which it was built and the funds for its construction were brought by him into the marriage, and which remains registered in his name as owner? This is therefore a matter of examining the existence of a grant of a right that the wife did not acquire for herself due to her marriage to the husband *per se* (see, again, secs. 4 and 5(a)(1) of the Property Relations Law), and not with taking away the wife's property due to an act of "betrayal" or "adultery." Whether such a right has or has not been granted is a matter of empirical fact, and not of guilt, punishment, justice or other consideration in the realm of norms, as distinct from facts. On this matter, the intention of the spouse who owns the

asset is of the utmost importance (see CA 595/69 *Efta v. Efta* [26]; and CA 630/79 *Lieberman v. Lieberman* [52]). This intention might indicate a lack of desire to make the "betraying" spouse a partner in the asset, and we are obliged respect and enforce these intentions, too. As stated, this obligation exists by virtue of the transition to a contractual regime and the principle of autonomy of the relationship between couples, which may, as we have said, be religious, secular, patriarchal, feminist, puritan or liberal according to the couple's choice.

11. And note: a court (or rabbinical tribunal) that reaches the conclusion that the intention of partnership was nullified due to an act of "betrayal" or "adultery" of the other spouse is not punishing that other spouse. In these cases, the court decides that the intention of partnership was nullified as a matter of fact and not as a matter of guilt and punishment. In so deciding, the court is maintaining neutrality in its attitude to the different patterns of marital life and relationships as required by the principle of autonomy. The principle that Justice Amit proposes that we adopt does not maintain neutrality, for it negates the wishes of the owner of the property not to share his property with his spouse in any case of infidelity. Such a rule would accord priority to one model of faithfulness and property relations between couples over other models, and I cannot concur in this.

12. I would like to add that an implied agreement, which as we have said, is derived from the way of life chosen by the couple, may also provide that a grant of an equal-rights partnership in the property of one spouse will be void in the event of "betrayal." This transpires from the words of (then) Deputy President A. Barak in the *Bavli* case [4] (at 250-51) concerning the significance of another important judgment, handed down in HCJ 609/92 *Beham v. Great Rabbinical Court of Appeals* [9]. In that case, the husband sought to cancel half the ownership rights in the apartment that his parents had given his wife, after they bought the apartment with their money in order that the couple should live in it, and registered the other half of the rights in his name. The reason for this was the sexual relations that the wife had with another man while still married to the husband. The apartment itself was sold, and the couple used the consideration in order to purchase another apartment, which was also registered in the names of the husband and the wife in equal shares. The Great Rabbinical Court, to which the parties turned by virtue of a jurisdiction agreement, ruled in favor of the husband. The wife petitioned the High Court of Justice, and her petition was denied. This Court ruled that on the basis of an assessment of the wishes of the parties, the wife received from the husband's parents a conditional gift, and the condition was that she should be faithful to

her husband (see *ibid*. at 293-94). (Then) Deputy President Barak justified this outcome, saying as follows:

> It appears to me that underlying the *Beham* case lies the fact that the parties turned to the Rabbinical Court by agreement. […] Such agreement may possibly be interpreted as agreement to the application of Jewish law to the gift. Moreover, Justice Elon treated the entire dispute as a dispute over the interpretation of a contract, noting that under the secular law, too, the assessment of the intentions of the parties may well be interpreted as indicating a conditional gift.

13. It is time to move from the general to the specific. As my colleague Justice Mintz explained in paras. 1 and 8 of his opinion, two of the three judges of the Rabbinical Court decided against the wife on the question of co-ownership of the house, after examining the whole set of relations between the couple from the aspect of an implied agreement. This set included the act of "infidelity" of the wife as a consideration acting to negate or nullify the intention of the husband to include her as an equal-rights partner in the house, which as we have said, was built on a plot owned by the husband prior to the marriage and from funds that he brought into the marriage. For the reasons I have elaborated above, and by virtue of the rule "where a positive plea is met by an uncertain one, the positive plea prevails", the Rabbinical Court was authorized to include this matter among its considerations. I fear that the Rabbinical Court gave the matter too much weight, but this fear has no bearing, as judicial review of the judgments of the religious courts by the High Court of Justice is confined in principle to the question of competence and to correcting fundamental errors in the process. The Rabbinical Court ruled as it saw fit, within the boundaries of its authority. Its decision does not display any facial error in law, let alone a clear, evident error that would be the equivalent of acting *ultra vires*.

14. Therefore, like by colleague Justice Mintz, I am of the opinion that this petition should be denied.

Decided in accordance with the opinions of Justices D. Mintz and A. Stein, Justice I. Amit dissenting.

Given this day, 10 Kislev 5779 (Nov. 18, 2018).