

# Article

## The Reluctant Acceptance of Same-Sex Unions and Parents in Israel

Zvi Triger \*

### ABSTRACT

*Israeli marriage law is religious in nature, and makes no provision for civil marriages. It is thus remarkable that same-sex unions have been recognized, albeit to a limited extent, by Israeli courts, and that same-sex marriages performed abroad have been registered and recognized by Israeli authorities. This article explores the growing acceptance of both same-sex partners and parents in a country where personal law is based on religion. I argue that there are two main reasons for this acquiescence: (1) Israeli-Jewish culture places great emphasis on the family and on procreation, and has been characterized in the literature as pronatalist. Therefore, LGBTQ people who choose to live in long-term, monogamous relationships and have children are accepted, as they can be seen as living within Jewish culture and its familial orientation; (2) The so-called demographic problem, which is used to encourage Israeli Jews to have more children in order to outnumber Israeli Palestinians, allows Jewish LGBTQ individuals to join this national effort, thus gaining legitimacy for their families. As the article shows, none of the rights that same-sex partners and parents have under Israeli law were voluntarily awarded by the legislature. All of these entitlements were recognized by Israeli courts only*

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*after lengthy and costly litigation, oftentimes against fierce resistance on the part of Israel's Attorney General. Hence, while Jewish Israeli same-sex partners enjoy a relatively high degree of sociolegal recognition, it should nevertheless be considered a "reluctant acceptance."*

**Keywords:** *Same-Sex Marriage, Same-Sex Parents, LGBTQ Families, Family Law, Religion*



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## I. INTRODUCTION

How can one explain the acceptance of same-sex partnerships in Israel, where marriage and divorce law is religious and no civil marriages are allowed? The present article aims to address this paradox, suggesting that the recognition of same-sex partnerships in Israel is in fact possible due to the country's system of personal laws, despite the fact that it is based on a religious monopoly. Further, the unique confluence of Jewish religious law, which does not view children born out of wedlock as illegitimate; Israeli-Jewish culture, which sees procreation as a highly important value; and regional as well as international politics, paves the way for what I term the "reluctant acceptance" of LGBTQ families.

Israel takes great pride in its tolerance of LGBTQ individuals. The English-language webpage of Israel's Foreign Ministry boasts full equality for LGBTQ people in Israel, including, among other rights, "marriage recognition," "protection of gay families," and "full adoption rights . . . to gay couples."<sup>1</sup> But while the country's policies regarding LGBTQ people are relatively liberal, the website's portrayal of LGBTQ rights in Israel is far from accurate. To mention just a few discrepancies between the rosy picture painted by the Ministry of Foreign Affairs and reality: "Marriage recognition" is of same-sex marriages performed abroad. Same-sex couples cannot get married in Israel. "Protection of gay families" is an odd declaration, given that the Israeli Attorney General (AG) has been arguing in family courts against registration of the non-genetic parents of children born to gay and lesbian couples as additional legal parents because of "concerns of child trafficking" and other homophobic considerations. And finally, LGBTQ individuals have no such thing as "full adoption rights," as stated (falsely) on the website. In fact, Israeli authorities object to same-sex couples adopting children who were taken from their homes or were given up for adoption by their birth parents. Since 2008, same-sex couples may adopt only children with special needs or older children. Healthy newborns are reserved for married heterosexual couples.<sup>2</sup>

The official effort to portray Israel as a haven for LGBTQ people, in contrast to other countries in the Middle East, has been described as "pinkwashing," and an attempt to divert attention from the Israeli-Palestinian conflict and Israel's policies in the Occupied Territories.<sup>3</sup> It is thus ironic

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1. *Gay Israel* (Israel Ministry of Foreign Affairs, July 19, 2018), [https://mfa.gov.il/MFA/IsraelExperience/Pages/Gay\\_Israel.aspx](https://mfa.gov.il/MFA/IsraelExperience/Pages/Gay_Israel.aspx).

2. Zvi Triger, *The Child's Worst Interests: Socio-Legal Taboos on Same-Sex Parenting and Their Impact on Children's Well-Being*, 28 *ISR. STUD. REV.* 264, 276 (2013). For further discussion, see *infra* note 73 and accompanying text.

3. See generally Aeyal M. Gross, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 *COLUM. HUM. RTS. L. REV.* 81 (2014); Sarah Schulman, *Israel*

that while domestically the government and parliament fiercely resist legally protecting the LGBTQ family, that same government uses progressive court rulings as proof to the outside world of how accepting Israel is of LGBTQ families. Indeed, almost all LGBTQ family rights in Israel, however limited, have been achieved through legal battles in the court system, and over the AG's objections. The State of Israel has consistently objected to protecting the LGBTQ family in court, and it is the courts that have ruled in favor of these families. Legislation protecting the LGBTQ family hardly exists, even on issues that have been decided by the courts and enjoy a certain societal consensus, at least among the secular and liberal sectors of Israeli society.

The disparity between Israel's self-image as a boon for LGBTQ individuals and families and the analysis I offer in this article (which focuses on families headed by same-sex partners) is backed by empirical findings. In a recent study of LGBTQ-inclusiveness among OECD countries, Israel was ranked among the countries in the "bottom-performing tier," between Poland and Latvia.<sup>4</sup>

This article argues that, although relatively advanced in its recognition of the rights of partners in same-sex unions, Israeli law recognizes LGBTQ families only to the extent that they conform with Israeli-Jewish pronatalist culture and participate in the "demographic battle" against Palestinians. To this end, LGBTQ families must comply with the ideal of a heteronormative family, meaning an opposite-sex monogamous couple with children. This is the Israeli version of homonationalism.<sup>5</sup>

Nevertheless, LGBTQ families remain second-class families, as they need the law much more than heterosexual families in order to exist.<sup>6</sup> To be recognized as a legal parent, for example, the non-biological parent within a same-sex couple requires a judicial order. In order to obtain such an order, that parent's parental skills are examined by the court and by Child Services. With the exception of adoption, there is obviously no parallel "licensing"

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and 'Pinkwashing' (N.Y. Times, Nov. 22, 2011),

<https://www.nytimes.com/2011/11/23/opinion/pinkwashing-and-israels-use-of-gays-as-a-messaging-to-ol.html>.

4. OECD, *Over the Rainbow? The Road to LGBTI Inclusion* (OECDiLibrary, June 24, 2020), <https://doi.org/10.1787/8d2fd1a8-en>; See fig. 3.4. Legal LGBTI inclusivity is improving in all OECD countries,

[https://www.oecd-ilibrary.org/sites/8d2fd1a8-en/1/3/3/index.html?itemId=/content/publication/8d2fd1a8-en&\\_csp\\_=08ffc7de174b956fd7b0b0d5b75479ab&itemIGO=oecd&itemContentType=book#figure-d1e9771](https://www.oecd-ilibrary.org/sites/8d2fd1a8-en/1/3/3/index.html?itemId=/content/publication/8d2fd1a8-en&_csp_=08ffc7de174b956fd7b0b0d5b75479ab&itemIGO=oecd&itemContentType=book#figure-d1e9771) (last visited Feb. 18, 2021).

5. See further discussion below. The theoretical and practical implications of homonationalism have been discussed extensively in the literature, both on Israeli LGBTQ rights and other countries. This article does not purport to fully flesh out these theoretical issues, only to the extent that they can shed light on the main argument of "reluctant acceptance". For a fuller discussion, see, e.g., Gross, *supra* note 3.

6. See generally MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015).

process for heterosexual parents that subjects the would-be parent to such scrutiny. As mentioned above, and discussed in this article, the State of Israel tends to object as a matter of policy, in numerous proceedings, to the formation and recognition of LGBTQ families. Such recognition has been, to a large extent, the result of court rulings, despite the state's official stance.

The article proceeds as follows: I begin with a brief primer on Israeli family law, its historical and religious origins, and its implications for equality in the realms of marriage, gender, and sexual orientation. The next section illustrates how the progress that Israel is so proud of in the realm of the LGBTQ family has been achieved despite the state's efforts to thwart it. To the extent that LGBTQ families in Israel are now recognized and legally protected, it is because of the courts that ruled, in many cases, against the position defended by the AG. I then move on to discuss the paradoxical acceptance of same-sex unions and parents under Israeli law, despite the religious monopoly over marriage and divorce, and offer my explanations both for this seeming contradiction and for the reluctant acceptance of LGBTQ families.

## II. BASICS OF ISRAELI FAMILY LAW

The only way to get married in Israel is by having a religious ceremony according to one's religion.<sup>7</sup> The determination of a person's religion is under the sole jurisdiction of religious tribunals operating according to religious law, and is not a matter of personal choice or self-definition.<sup>8</sup> For example, a person is automatically considered a Jew under Jewish law if they were born to a Jewish mother, regardless of the religion of the father or their self-definition. Similarly, under Islam, a person is considered a Muslim if he or she was born to a Muslim father. Israeli law has outsourced religious classification to the various religions that are recognized by the State of Israel.<sup>9</sup> This section offers a brief history of the Israeli family law system, and some context on the issue of recognition in same-sex relationships and parenting under Israeli law.

### A. *The Religious Monopoly over Marriage and Divorce*

The existing religious monopoly over personal status issues in Israel

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7. Zvi Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 *ISR. STUD. REV.* 1, 5 (2012); Isaac S. Shiloh, *Marriage and Divorce in Israel*, 5 *ISR. L. REV.* 479, 479 (1970).

8. See generally Pinhas Shifman, *Religious Affiliation in Israeli Interreligious Law*, 15 *ISR. L. REV.* 1 (1980).

9. For further elaboration on religious affiliation, see, *id.*

originated during the Ottoman Empire.<sup>10</sup> The Ottomans, who ruled for four centuries over territories that included pre-State Palestine, gave the various religious communities throughout the Empire extensive autonomy concerning family issues and other intra-community affairs.<sup>11</sup> Family matters were dealt with within the religious tribunals of the communities and tribes in accordance with their own religious laws.<sup>12</sup> It would be tempting to view this as an early articulation of multiculturalist sensitivities, but the truth is that this policy was probably the result of a “divide and conquer” philosophy meant to avoid conflicts on matters that were not crucial for the stability of the regime. Interestingly, other colonial regimes also tended to adopt such policies,<sup>13</sup> although, as Alan Mikhail notes, “Christians and Jews in the Ottoman Empire . . . had more rights than other religious minorities around the world.”<sup>14</sup>

When Ottoman rule ended and the British occupied Palestine in 1917, they left the autonomous family law systems in place.<sup>15</sup> The British Mandate government, which ruled in Palestine between July 24, 1922 and May 15, 1948, continued the Ottoman policy with regard to family issues without any significant changes.<sup>16</sup> Four days after the State of Israel declared independence (on May 15, 1948), the Israeli legislature issued an ordinance which, among other things, preserved this system.<sup>17</sup> While some matters of personal status, such as inheritance law, were removed from the jurisdiction of the religious tribunals and became subject to secular law alone,<sup>18</sup> matters of marriage and divorce remained subject to religious

10. See ABIGAIL JACOBSON, FROM EMPIRE TO EMPIRE: JERUSALEM BETWEEN OTTOMAN AND BRITISH RULE 9-10 (2011).

11. See *id.*; ALAN MIKHAIL, GOD’S SHADOW: SULTAN SELIM, HIS OTTOMAN EMPIRE, AND THE MAKING OF THE MODERN WORLD 55, 178-81 (2020).

12. See Moshe Chigier, *The Rabbinical Courts in the State of Israel*, 2 ISR. L. REV. 147, 147-48 (1967).

13. See Carmel Shalev, *Freedom of Marriage and Cohabitation (Cohabitation and Marriage Outside the Religious Law)*, in WOMEN’S STATUS IN ISRAELI LAW AND SOCIETY 459, 464 (Frances Raday et al. eds., 1995) (Hebrew).

14. MIKHAIL, *supra* note 11, at 55.

15. See, e.g., Daphne Tsimhoni, *The Status of the Arab Christians under the British Mandate in Palestine*, 20 MIDDLE E. STUD. 166, 166-69 (1984).

16. See, e.g., *id.* at 166-69. From its occupation by Britain in 1917 until the establishment of the British Mandate by the League of Nations, Palestine was governed by a British military administration. See generally Yair Wallach, *Creating a Country through Currency and Stamps: State Symbols and Nation-Building in British-Ruled Palestine*, 17 NATIONS & NATIONALISM 129 (2011). All in all, the British rule in Palestine lasted thirty-one years.

17. Law and Administration Ordinance, 5708-1948, LSI 1 7 (Isr.), [http://www.knesset.gov.il/review/data/eng/law/kns0\\_govt-justice\\_eng.pdf](http://www.knesset.gov.il/review/data/eng/law/kns0_govt-justice_eng.pdf) (last visited Feb. 18, 2021). The Ordinance was enacted on 10th Iyar, 5708 (May 19, 1948), and published in the *Official Gazette*, No. 2 of the 12th Iyar, 5708 (May 21, 1948). Triger, *supra* note 7, at 15.

18. See Ariel Rosen-Zvi, *Family and Inheritance Law*, in INTRODUCTION TO THE LAW OF ISRAEL 75, 76-77 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). Some examples of this include matters of communal property, successions, wills and legacies, and the administration of property belonging to absent people.

laws.<sup>19</sup> Thus, as the late Israeli family law scholar Ariel Rosen-Zvi stated:

In the area of family law, Israel's legal system is characterized by a laminated structure of religious laws, territorial legislation unique to family law, judge-made law grafted onto religious laws and general, civil and criminal laws.<sup>20</sup>

Secular Israelis, whether Jews, Muslims, or Christians, who do not wish to marry in a religious ceremony (or to have a religious divorce) have no civil procedure or ceremony available in Israel.<sup>21</sup> They must travel abroad and get married in a country that allows non-citizens to get married on its territory.<sup>22</sup> Israelis who wish to marry in a religious ceremony are also restricted, as they may marry only according to the laws of a “recognized religious community.”<sup>23</sup> For example, Reform Judaism and Conservative Judaism are not recognized by Israel, and the only option for Israeli Jews who wish to have a religious marriage is Orthodox marriage. Protestants are also not recognized by Israeli law as a religious community.

An additional consequence of the religious monopoly on marriage and divorce is that there is no way to have interfaith or same-sex marriages in Israel. Israeli citizens who wish to get married in Israel are limited to choosing partners of the opposite sex *and* of their own religion, since most religions regard interfaith marriages and same-sex marriages as void.<sup>24</sup> One of the main reasons for not allowing civil marriage in Israel is the fear of interfaith marriages. By enshrining in law the rabbinical courts' jurisdiction over marriage, the Knesset (Israel's parliament) has used this fear to legally prohibit interfaith unions.<sup>25</sup> As for same-sex marriages, clearly they were not on the Israeli legislature's mind in the late 1940s and early 1950s, as

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19. *Id.* at 75.

20. *Id.*

21. Triger, *supra* note 7, at 5.

22. *Id.*

23. The recognized religious communities are listed in the Second Schedule – Article 2 of the Palestine Order in Council, 1922, and includes “The Eastern (Orthodox) Community. The Latin (Catholic) Community. The Gregorian Armenian Community. The Armenian (Catholic) Community. The Syrian (Catholic) Community. The Chaldean (Uniate) Community. The Jewish Community. The Greek Catholic Melkite Community. The Maronite Community. The Syrian Orthodox Community. The Vangelical Episcopal Church in Israel. The Baha'i Faith.” *Id.*

24. See Triger, *supra* note 7, at 9. A narrow exception to this principle exists in Islam, which recognizes the marriage of a Muslim man with a non-Muslim woman under certain circumstances (but not vice versa); See, e.g., Alex B. Leeman, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 IND. L.J. 743, 755-59 (2009).

25. See Zvi Triger, *Love's Dominion: Marriage and Divorce between Jews in Israel*, in TRIALS OF LOVE 173, 204-11 (Orna Ben-Naftali & Hannah Naveh eds., 2005) (Hebrew); Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, § 2, LSI No. 64 139 (Isr.), [https://www.knesset.gov.il/review/data/eng/law/kns2\\_rabbiniccourts\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns2_rabbiniccourts_eng.pdf) (last visited Feb. 18, 2021).



global legitimacy of same-sex unions had not yet emerged. The prohibition against same-sex marriage is merely a by-product of Israel's culture wars and the weaponization of marriage laws against the assimilation of Jews and Palestinians in Israel.<sup>26</sup>

### B. *Gender and Same-Sex Equality in Israel*

A major area affected by the religious monopoly over marriage and divorce is the status of women. All of the religions that are practiced in Israel are patriarchal, and therefore, religious family laws discriminate against women in various ways and to varying extents.<sup>27</sup> While Israel's Declaration of Independence promises gender equality,<sup>28</sup> the legislature has ensured that the realms governed by religious law will remain exempt from this requirement, as explained below.<sup>29</sup>

Constitutional law in Israel is comprised of the Declaration of Independence and a series of Basic Laws that have been enacted gradually over the years.<sup>30</sup> The Basic Laws enjoy superior constitutional status, and the Supreme Court has used them--in a string of controversial decisions--as tools for judicial review.<sup>31</sup> There are fourteen Basic Laws,<sup>32</sup> two of which (*Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*) secure certain human rights and civil liberties; however, neither contains the word "equality," and neither applies to previously enacted laws.<sup>33</sup> These Basic Laws lack retroactive power in part because of the religious monopoly in the area of personal status.<sup>34</sup> Had they been applied

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26. On the weaponization of marriage law against interfaith marriage in Israel see Zvi Triger, *The Gendered Racial Formation: Foreign Men, 'Our' Women, and Marriage Law*, 30 WOMEN'S RTS. L. REP. 479, 481 (2009).

27. See generally, Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459 (2004).

28. The Declaration of the Establishment of the State of Israel (1948), <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx> (last visited Feb. 18, 2021).

29. To be sure, secularism in and of itself is not necessarily committed to gender equality. See generally Seval Yildirim, *Expanding Secularism's Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901 (2004).

30. See Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT'L L.J. 345, 352-53 (2009).

31. See *id.* at 353; See also Suzie Navot, *Judicial Review of the Legislative Process*, 39 ISR. L. REV. 182 (2006); Yaniv Roznai, *Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset*, 51 VRU 415 (2018).

32. See Knesset, *Basic Laws*, <https://main.knesset.gov.il/en/activity/pages/basiclaws.aspx> (last visited Feb. 18, 2021).

33. Basic Law: Human Dignity and Liberty (Isr.), [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last visited Feb. 18, 2021); Basic Law: Freedom of Occupation (Isr.), <http://www.knesset.gov.il/laws/special/eng/basic4eng.htm> (last visited Feb. 18, 2021).

34. See generally Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The*

retroactively in the Israeli case, they would have jeopardized the entire family law system, which is based upon women's legally inferior status. This inferiority within religious systems is justified by a patriarchal worldview of the differences between men and women, and their respective roles within society in general and the family in particular. Needless to say, these religious laws do not recognize families that do not adhere to the heterosexual model.

With regard to equality in the area of sexual orientation, same-sex sexual activity was decriminalized in 1988.<sup>35</sup> With some exceptions, Israel's sodomy law had not been enforced since 1963.<sup>36</sup> In 1992, a prohibition on discrimination based on sexual orientation was incorporated into the Equal Opportunities in Employment Law.<sup>37</sup> In the following years, numerous additional provisions prohibiting discrimination based on sexual orientation were incorporated into other laws.<sup>38</sup> In 1994 the Supreme Court struck down an employer's policy that provided spousal benefits only to heterosexual partners (married or unmarried) of its employees.<sup>39</sup> These developments occurred in the late 1980s and the 1990s, leading some to call the latter the "gay decade" in Israel.<sup>40</sup> As shown below, since the 2000s the Israeli legislature has become mostly silent regarding LGBTQ rights, and those entitlements that have been recognized were the result of legal battles against the state's official stance. Indeed, the Supreme Court has read equality in general, and gender equality in particular, into the value of human dignity protected by the first Basic Law;<sup>41</sup> however, the constitutional infrastructure

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*Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581 (2001) (discussing the issue of retroactive application of Israel's Basic Laws).

35. Penal Law, 5737-1977, § 351 LSI Special Volume 4, 124, (1977) (Isr.), Amendment 22 (1988), [http://www.knesset.gov.il/review/data/eng/law/kns8\\_penallaw\\_eng.pdf](http://www.knesset.gov.il/review/data/eng/law/kns8_penallaw_eng.pdf) (last visited Feb. 18, 2021).

36. For a history of the criminalization and later on the decriminalization of same-sex sexual acts, see Yuval Yonay, *The Law Regarding Homosexuality: Between History and Sociology*, 4 MISHPAT UMIMSHAL 531(1998) (Hebrew); Yuval Yonay & Dori Spivak, *Between Silence and Damnation: The Construction of Gay Identity in the Israeli Legal Discourse 1948-1988*, 1 ISRAELI SOC. 257 (1999) (Hebrew); Alon Harel, *The Rise and Fall of the Israeli Gay Legal Revolution*, 31 COLUM. HUM. RTS. L. REV. 443 (2000).

37. Equal Opportunities in Employment Law, 5748-1988, LSI 1240 38 (Isr.).

38. See Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000, SH No. 1765 p. 58 (Isr.); Patient's Rights Act, 5756-1996, SH No. 1591 p. 327 (Isr.); Anti-Defamation Law, 5725-1965, LSI 464 240 (Isr.); Prevention of Sexual Harassment Law, 5758-1998, SH No. 1661 p. 166 (Isr.); Employment Service Law, 5719-1959, SH No. 270 p. 32 (Isr.).

39. H CJ 721/94 El Al Airlines v. Danilowitz, 48(5) PD 749 (1994) (Isr.), <https://versa.cardozo.yu.edu/opinions/el-al-israel-airlines-v-danielowitz> (last visited Feb. 18, 2021).

40. Aeyal M. Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same Sex Couples in Israeli Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 391 (Robert Wintemute & Mads Andenas eds., 2001).

41. See Judith Karp, *Basic Law: Human Dignity and Liberty-A Chronicle of Power Battles*, 1

that the Court has built through its judgments is noticeably fragile, as it does not rest on explicit legislative language but rather on interpretation.<sup>42</sup>

### C. *Civil Marriage in Israel*

As noted above, there is no civil marriage in Israel. People who wish to either marry a person of a different religion, or to exercise their freedom from religion and not marry in a religious ceremony at all, cannot get married in Israel. The result is that while Israel's secular laws do not prohibit interfaith marriage directly, the lack of civil marriage creates an indirect prohibition on such marriages.<sup>43</sup> However, as a result of the Supreme Court's landmark ruling in the 1963 *Funk-Schlesinger* case, Israeli authorities must register as married those couples who marry abroad, regardless of the religion of the spouses.<sup>44</sup> Perhaps to sweeten the pill in the eyes of the Israeli religious establishment, the *Funk-Schlesinger* ruling stated that registration of civilly married couples is carried out for statistical purposes only.<sup>45</sup> Such registration, said the Supreme Court, does not, in and of itself, prove the validity of the marriage under Israeli law. Nevertheless, legal scholars have noted that if a marriage is registered with the Israeli authorities, it is *de facto* recognized as valid.<sup>46</sup> This ruling opened the door both for Israeli interfaith couples and for Jewish couples who did not wish to be married in a religious ceremony (or cannot do so, due to various religious prohibitions that apply to them).<sup>47</sup> In 2006, the Supreme Court extended this decision further, to same-sex couples who marry outside Israel.<sup>48</sup>

While Israelis can now register civil marriages performed abroad, the

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MISHPAT UMIMSHAL 323, 345-61 (1992) (Hebrew).

42. See Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 643-48 (1999).

43. See Triger, *supra* note 26, at 481. In fact, over the years there have been several attempts by Knesset Members to pass bills that would criminalize marriages performed without recognized religious authorities, but so far these attempts have not been successful.

44. HCJ 143/62 Funk-Schlesinger v. Minister of Interior, 17(1) PD 225 (1963) (Isr.).

45. *Id.*

46. See, e.g., Eitan Levontin, *Figment of the Imagination: Funk-Schlesinger and Civil Registry Law*, 11 MISHPAT UMIMSHAL 129, 158 (2008) (Hebrew); Ayelet Blecher-Prigat & Zvi Triger, *Divorce for Everyone: The Case of Same-Sex Divorce as a Test Case*, 21 MISHPAT VEASAKIM 81 (2018) (Hebrew).

47. See *id.* For example, a man who belongs to the class of priests (Cohanim) cannot marry a divorced woman, and a married woman who has an affair with another man cannot marry him if she divorces her husband. See Marc Galanter & Jayanth Krishnan, *Personal Law Systems and Religious Conflict: A Comparison of India and Israel*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 270, 281-82 (Gerald James Larson ed., 2001). Secular modern Jews who do not observe the religious commandments do not see these ancient laws, which are enforced in contemporary Israel, as relevant to their lives. Nevertheless, they are prohibited from getting married in Israel, as religious marriage has to be performed by and with the approval of the rabbinical court; therefore, civil marriage abroad provides them with a good get around.

48. See discussion in the next section.

relevant case law has not solved the root of the problem, which is the lack of marriage equality in Israel for heterosexual couples who do not conform to the monoreligious model imposed on them by Israeli law. Moreover, having to marry abroad carries both symbolic and material detriments. It is humiliating to be excluded from the exclusive group that is eligible to marry in Israel, and it is also a costly option, as well as bureaucratically burdensome.<sup>49</sup> Furthermore, in times of international travel restrictions, due to COVID-19 for example, this option is completely unavailable.

### III. SAME-SEX RELATIONSHIPS IN ISRAEL

After this brief introduction to the origins of the religious monopoly over personal status issues in Israel, I will now discuss the roots of Israeli recognition--however limited--of same-sex unions and LGBTQ parenting. Israel has a substantial non-Jewish population (roughly 20%, consisting mostly of Arab Muslims). This article focuses on Jewish LGBTQs, since all known legal cases have been brought by Jewish parties, and Israeli family policy is overtly shaped by the Jewish majority culture. Not all cases can be accessed, since, by law, Family Court cases are not made public; consequently, only cases that judges choose to publish, after redacting personal information of the parties, are available in legal databases. However, as Israel is a common law jurisdiction, the publicly available law reflects, to a large extent, the law as practiced, as well as the general public's perception of the law, and therefore it does give us a relatively reliable picture of the legal framework governing the status of LGBTQ families.

Israel's recognition of same-sex relationships has been, for the most part, a result of legal battles *against* the state's official stance rather than an outcome of state legislation. Israel has been willing to recognize LGBTQ individual rights pertaining to employment, health care, and purchase of services. Prohibitions on anti-LGBTQ discrimination in these areas were added to relevant laws in the early 1990s.<sup>50</sup> At the same time, the state has fought challenges to its family laws brought by LGBTQ couples and parents. The following is a brief survey of these legal fights.

#### A. *Same-Sex Cohabitation*

Israel has recognized unmarried same-sex couples, although this recognition has been *de facto*, and has never been enacted into law or sanctioned by a Supreme Court decision that would serve as a binding

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49. Triger, *supra* note 7, at 5.

50. *See supra* notes 37-38 and accompanying text.

precedent. There is one notable Supreme Court case in which an unmarried same-sex couple separated, and the Court applied the same rules of equitable distribution of family property as apply to an unmarried opposite-sex couple, without ruling specifically on the issue.<sup>51</sup>

In the lower courts, however, we find conflicting rulings on whether unmarried same-sex couples are recognized under law. The definition of a couple in Article 1 of the Family Court Law of 1995 is gendered, referring to a man and a woman (married or unmarried),<sup>52</sup> which raises the question of whether we can interpret the law as applicable to same-sex partners as well. If such an interpretation is not possible, the Family Court has no jurisdiction over legal disputes between same-sex partners, or between couples and the state, and they must litigate those disputes as legal strangers, in the general court system.

In the early 2000s, the AG argued against an inclusive legal interpretation of the term “couple.” Under Israeli law, cohabiting couples may have a form of prenuptial agreement, but it must be preapproved by a Family Court judge, with the AG acting as a formal respondent in such proceedings. An unmarried same-sex couple who wished to have their agreement approved by the Court was faced with the AG’s objection. He argued that because of the gendered wording of the definition of the term “couple,” the Court has no jurisdiction over same-sex couples, and that they are not considered couples or indeed family members at all under the Family Court Law. Ruling for the petitioners and approving the agreement, the judge replied to this argument as follows:

The discrimination against same-sex couples stems solely from a conservative ideology which demands that reality conform with the law, instead of allowing the law to adapt to the changing reality. . . . The Attorney General in a democratic society is expected to work for harmonization between the law and the reality of life, to protect the rights of all members of society, whatever their sexual orientation, and to refrain from automatically promoting conservative ideologies.<sup>53</sup>

Other Family Court judges have ruled that same-sex couples are not “couples” within the meaning of the term as defined by law, and thus the

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51. FamA 2478/14 Jane Doe v. Jane Roe (Aug. 20, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

52. Family Affairs Court Law, 5755-1995, § 1 SH No. 1537 p. 393 (Isr.).

53. FamC 6960/03 K.Tz. v. Vi.M, ¶ 47-48 (Nov. 21, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.). For a similar ruling, see FamC 3140/03 R.A. v. L.M.P (Feb. 16, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

court has no jurisdiction over legal conflicts between the partners. In 2005, a Family Court judge adopted the AG's legal interpretation of the term "couple," and did not approve an agreement between two men. The judge ruled that same-sex relationships are controversial, and therefore this couple could petition a general court and seek approval of their agreement there, but not in the family court system, as the partners are not considered family members.<sup>54</sup> In another case, the court sent a same-sex partner suffering from domestic violence to seek help in the general court system, ruling, again, that he and his violent partner were not a legally recognized couple, and thus the violence should not be seen as domestic violence.<sup>55</sup>

Israel's Family Courts are at the level of (local) Magistrate's Courts, and as such, their decisions do not set binding precedents. Appeals of Family Court decisions go to the District Courts, whose decisions are also not binding but do guide the Family Courts.<sup>56</sup> Only Supreme Court decisions are binding precedents,<sup>57</sup> but second appeals are granted very rarely (as opposed to the first appeal, which is by right, not by permission). As a result, there are multiple examples of conflicting decisions regarding the jurisdiction of the Family Court over unmarried same-sex couples, with the preponderance of rulings stating that they comply with the definition of a couple under Article 1 of the Law. Thus it can be stated with some degree of confidence that, notwithstanding the law's silence and the lack of binding precedents handed down by the Supreme Court, unmarried same-sex couples are recognized nowadays as couples by the Israeli Family Court.

### B. *Same-Sex Marriage*

As discussed above, same-sex marriage is merely collateral damage in the Israeli cultural wars. It is not, in and of itself, a significant point of contention in Israeli mainstream discourse,<sup>58</sup> as no one--heterosexual or LGBTQ--can marry civilly. Since there is no civil marriage in Israel for heterosexuals as well, there is no legal infrastructure for creating same-sex marriage. However, when several Israeli same-sex couples got married in

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54. FamC 16610/04 John Doe v. the Attorney General (May 8, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

55. FamC 16310/08 John Doe v. John Roe (Apr. 27, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

56. Basic Law: The Judiciary, art. 20(a): "A rule laid down by a court shall guide any lower court", Full English text available at [https://www.knesset.gov.il/laws/special/eng/basic8\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm) (last visited Feb. 18, 2021).

57. *Id.* art. 20(b): "A rule laid down by the Supreme Court shall bind any court other than the Supreme Court."

58. There are several far-right organizations as well as a political party (which did not get enough votes to enter the Knesset) that decry the so-called "destruction of the Jewish family" caused by "alternative families" and LGBTQ rights.



Canada in 2006 and returned to Israel, the state missed the opportunity to voluntarily apply the case law regarding civil marriage performed abroad (namely, the 1963 *Funk-Schlesinger* case), and left those couples with no alternative but to petition the Supreme Court for an injunction that would order the state to register these marriages.<sup>59</sup>

The AG's objection to the registration of same-sex marriages performed abroad rested on three arguments: First, there is "no legal framework" under Israeli law for marriage other than that between a man and a woman; thus, *Funk-Schlesinger*, which involved a man and a woman who were married civilly in Cyprus, does not apply to the case of same-sex married couples. Second, comparative law does not support such registration, since many countries around the world do not allow same-sex marriage, and some have enacted specific laws which proclaim marriage to be a union between a man and a woman. Third, the AG argued that such registration should be sanctioned by the Knesset, and not ordered by the court. Such a fundamental shift in the "legal framework," he asserted, should be given to the legislature to decide.<sup>60</sup>

The Supreme Court rejected these arguments, and ruled for the petitioners. Writing for the majority, Chief Justice Aharon Barak emphasized at the conclusion of his opinion, "what it is that we are deciding today, and what it is that we are not deciding today . . .":

We are deciding that within the context of the status of the Population Registry as a recorder of statistics, and in view of the role of the registration official as a collector of statistical material for the purpose of managing the Registry, the registration official should record in the Population Registry what is implied by the public certificate that is presented to him by the petitioners, according to which the petitioners are married. *We are not deciding that marriage between persons of the same sex is recognized in Israel; we are not recognizing a new status of such marriages; we are not adopting any position with regard to recognition in Israel of marriages between persons of the same sex that take place outside Israel (whether between Israeli residents or between persons who are not Israeli residents).* The answer to these questions, to which we are giving no answer today, is difficult and complex . . . [emphasis mine].<sup>61</sup>

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59. HCJ 3045/05 Ben Ari v. The Population Administration, IsrLR 537 (2006) (Isr.), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ben-Ari%20v.%20Director%20of%20Population%20Administration.pdf> (last visited Feb. 18, 2021).

60. *Id.* opinion of Chief Justice Barak, ¶ 2.

61. *Id.* ¶ 23.

### C. *Same-Sex Parenting*

Up until about three decades ago, most lesbian or gay parents became parents within a heterosexual relationship. With the growing sociolegal recognition of LGBTQ individuals as enjoying equal rights, and the recognition of same-sex relationships, new ways of becoming parents have been created in some countries: adoption as singles or as a couple; second-parent adoption (one partner adopting the birth child of the other partner); co-parenting (an agreement between a man, usually gay, and a woman, to have a biological child together but not within a heterosexual relationship and usually without cohabitation); and the use of sperm donation by a lesbian couple, or egg donation and a surrogate by a gay couple.<sup>62</sup>

This “second generation” of LGBTQ parenting raised a new set of challenges relating not only to the parents’ sexual orientation but also to the legitimacy of same-sex relationships and to the very meaning of kinship. These new families challenged not only heterosexuality as the condition for family status, but also the notion that such ties must be genetic in order to be recognized and protected by the state.<sup>63</sup>

For example, basing their decisions on changing attitudes toward same-sex relationships, some American courts have been allowing second-parent adoptions for three decades now. In 1993 the Vermont Supreme Court allowed a second-parent adoption by a lesbian partner, thereby recognizing that a child may have two mothers, and that there is no need for the birth mother to lose any of her parental rights (as is the case with regular adoption, in which an adoptive parent replaces the birth parent of the same sex).<sup>64</sup> The Vermont Court ruled that “[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate their purposes.”<sup>65</sup>

In 2000, the Israeli Supreme Court ruled that a foreign second-parent adoption decree may be registered in Israel, basing its decision, inter alia, on the legal construct created by the *Funk-Schlesinger* case, namely, that the registration of a foreign birth certificate with two mothers is done for statistical purposes only, and does not mean that Israeli authorities recognize

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62. LEE WALTZER, GAY RIGHTS ON TRIAL 9-11 (2002); ERTMAN, *supra* note 6, at 25-64.

63. On the element of choice within LGBTQ thinking about the family, see KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1997); Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES: J. FEMINIST CULTURAL STUD. 14 (2002); Zvi Triger, *Introducing the Political Family: A New Road Map for Critical Family Law*, 13 THEORETICAL INQ. L. 361, 376 (2012).

64. Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993).

65. *Id.* 1275.



its validity.<sup>66</sup> The Supreme Court rejected the AG's argument that a birth certificate carrying the names of two mothers (the genetic mother and the adoptive one) is factually incorrect as a child cannot have two biological mothers, and therefore the refusal to register the adoption is based on fact rather than on values.

In *Yaros-Hakak* (2005), the Court ruled that a lesbian partner may adopt the birth children of her partner.<sup>67</sup> Tal Yaros and Tal Hakak, two women who had children using anonymous sperm donations and were raising them together, wanted to adopt each other's birth children. The only available legal tool for them at the time was Israeli adoption law, which allowed for adoption of children by heterosexual couples, or for second-parent adoption by an opposite-sex partner only. The AG argued that "the true purpose of the appeal is to obtain a legal status for the 'lesbian family unit,' whereas the recognition thereof is a matter that should be addressed by the legislature."<sup>68</sup> He added that the then-current interpretation of Israeli adoption law (which allows for adoptions, including second-parent adoptions, only for opposite-sex couples) did not discriminate against same-sex couples, as same-sex couples are not a recognized status under Israeli law, whereas opposite-sex couples are recognized.<sup>69</sup>

While the Supreme Court rejected the AG's position and ordered Child Services to consider the couple's adoption request on its merits, Chief Justice Barak, writing for the Court, stressed that this ruling was singular and specific to the case being decided, that it did not recognize a general right of LGBTQs to adopt, and that it also did not recognize the legal status of same-sex couples. He repeatedly noted that the decision is based on the "personal facts" and "unique circumstances" of the couple.<sup>70</sup> By splitting parenthood from couplehood, Justice Barak was presumably attempting to sidestep the minefield of same-sex relationship endorsement. Interestingly, a year later Barak ruled in the *Ben-Ari* case that the Israeli Ministry of the Interior must register same-sex marriages legally performed abroad.<sup>71</sup>

Following the *Yaros-Hakak* decision, the AG decreed in 2008 that second-parent adoptions should be allowed under Israeli adoption law provided that they are consistent with the child's best interests.<sup>72</sup> In that

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66. HCJ 1779/99 Brener-Kadish v. Interior Minister, 58(2) PD 368 (2000) (Isr.), <https://versa.cardozo.yu.edu/opinions/berner-kadish-v-minister-interior> (last visited Feb. 18, 2021).

67. CivA 10280/01 Yaros-Hakak v. the Attorney General, 59(5) PD 64 (2005) (Isr.), <https://versa.cardozo.yu.edu/opinions/yaros-hakak-v-attorney-general> (last visited Feb. 18, 2021).

68. As described by Chief Justice Barak writing for the majority, ¶ 3.

69. *Id.*

70. *Id.* ¶ 22. See also Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple—The Israeli View*, 9 GEO. J. GENDER & L. 115, 115-63 (2008).

71. *Supra* note 59.

72. Israeli Ministry of Justice, [https://www.gov.il/en/departments/ministry\\_of\\_justice](https://www.gov.il/en/departments/ministry_of_justice) (last visited

same ruling, the AG also instructed Child Services to allow same-sex couples to adopt children under the same conditions as single parents. Per the existing policy, single parents have been allowed to adopt only older children or children with special needs. Healthy newborns are reserved for married heterosexual couples only.<sup>73</sup> The underlying theory is that same-sex couples are not as stable as heterosexual couples, and thus should not be eligible to adopt healthy children through Child Services.<sup>74</sup>

In 2016, several organizations petitioned the Supreme Court to prohibit discrimination against LGBTQ couples in the context of adoption.<sup>75</sup> In his response, the AG argued that “being an adopted child already puts a burden on a child’s shoulders, thus she should not be additionally burdened by having adoptive parents of the same sex.”<sup>76</sup> The Court’s willingness to view the AG’s stance as discriminatory, and perhaps also the public outcry that followed the publication of the AG’s response, led the AG and Child Services to declare that they would reconsider their policy and seek to amend the Adoption of Children Law so as to include same-sex partners among those who are eligible to adopt children without any limitations. As a result, the Court dismissed the petition without prejudice, noting that the state had pledged to change the law.<sup>77</sup> However, as of the time of this writing (early 2021), the law has not been amended, and the discriminatory policy implemented by Child Services based on their interpretation of the law is still in place.

As stated by the AG in the *Yaros-Hakak* litigation, Israel has been reluctant to recognize same-sex parenting, in part because of its reluctance to recognize same-sex relationships. Israel’s Child Services still argue in the courts that same-sex parenting is inferior to opposite-sex parenting, since a child needs both male and female parents for them to develop in a healthy manner.<sup>78</sup> Often, they fail to rely on recent studies that show that the child’s best interests can be safeguarded by same-sex parents as well. In some cases, the AG argues that a parental order should not be given because there are concerns of child trafficking. While the child-trafficking argument is common among those who oppose surrogacy, the AG routinely makes this claim not only in surrogacy cases, but also in petitions of lesbian mothers

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Feb. 18, 2021).

73. Trigger, *supra* note 2, at 276. This policy is still valid as of the time this article is written, in early 2021.

74. *Id.* at 270.

75. HCJ 3217/16 Reform Center for Religion and State v. Ministry of Welfare and Social Services (Sep. 17, 2017), Nevo Legal Database (by subscription in Hebrew) (Isr.).

76. State’s response to petition in HCJ 3217/16 Reform Center for Religion and State v. Ministry of Welfare and Social Services (submitted July 11, 2017) (Documents on file with author).

77. *Supra* note 75.

78. Trigger, *supra* note 2, at 268; Zvi Trigger & Milli Mass, *LGBT Adoption, in* LGBT RIGHTS IN ISRAEL 437 (Alon Harel et al. eds., 2016) (Hebrew).

who jointly decide to have children and raise them using anonymous sperm donation.<sup>79</sup> In some cases, the AG has demanded that lesbian mothers declare that they are not sex offenders in order for him to agree to a parental order, and has subjected others to evaluation of their parental skills.<sup>80</sup>

In the same vein, it has been argued that Israeli surrogacy law, which in its original version allowed surrogacy only for straight couples,<sup>81</sup> is discriminatory against gay couples, and is based on the homophobic view that same-sex couples are not good enough parents. Protests and petitions against the law's heterosexual exclusivity have not helped so far. The only addition that the Knesset has made to the law's intended parents list is of single women, in 2018.<sup>82</sup> Hence, under current Israeli surrogacy law (as of early 2021) only heterosexual couples and single women may contract with a surrogate to have a child carried by her.

On February 27, 2020, the Israeli Supreme Court delivered its final decision on a petition brought by a gay couple in 2015, asking the Court to declare Israeli surrogacy law discriminatory and interpret the gendered language relating to intended parents "a man and a woman who are a couple" as applying to two men or two women as well. The Court ruled unanimously that Israeli surrogacy law, which excludes single men and gay couples, is discriminatory and violates the constitutional right to equality. The Court gave the Knesset a year to amend the law and include gay men as potential intended parents.<sup>83</sup> Once again, it is the Court, prompted by a petition filed by LGBTQ individuals and organizations, that promotes equality, and not the state, in the face of homophobic objections raised by the

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79. See, e.g., Dana Yarektzi, *The Court Denied State's Appeal on a Parentage Order for Lesbian Mothers* (Walla, June 18, 2018), <https://news.walla.co.il/item/3166712> (Hebrew).

80. Ravit Hecht, *Israel Demands That Lesbians Seeking to Adopt Children Declare They Are Not Sex Offenders* (Haaretz, Dec. 17, 2017), <https://www.haaretz.com/israel-news/.premium-israel-demands-that-lesbians-seeking-to-adopt-declare-they-aren-t-sex-offenders-1.5628905>.

81. § 1, Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 5756-1996, SH No. 1577 p. 176 (Isr.).

82. Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 5778-2018, SH No. 2748 p. 941 (as amended) (Isr.). See also The Ministry of Health website regarding the application of the law, <https://www.health.gov.il/English/Topics/fertility/Surrogacy/Pages/default.aspx> (last visited Feb. 18, 2021).

83. HCJ 781/15 Arad-Pinkas v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) Law, 5756-1996 (Feb. 27, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (2020). Preliminary decision given in that case on August 3, 2017 is <https://versa.cardozo.yu.edu/opinions/arad-pinkus-v-committee-approval-embryo-carrying-agreements-under-embryo-carrying> (last visited Feb. 18, 2021). See also Netael Bandel et al., *Israel's High Court Rules Against Surrogacy Law Excluding Single Men and Gay Couples* (Haaretz, Feb. 28, 2020), <https://www.haaretz.com/israel-news/.premium-israel-s-high-court-rules-against-surrogacy-law-excluding-single-men-and-gay-couples-1.8596231>.

AG during these proceedings.<sup>84</sup>

The aforementioned inconsistency in Family Court rulings regarding the interpretation of the term “couple,”<sup>85</sup> and whether it includes same-sex couples or not, has seeped into same-sex parenting cases. For example, in cases of gay couples who had children abroad via surrogacy, most judges used to allow genetic testing in order to prove that the babies were genetically related to an Israeli citizen and thereby entitled to Israeli citizenship. But in 2010, a Family Court judge refused to allow gay parents of babies born through a surrogacy process abroad to enter Israel.<sup>86</sup> In the transcript of one of the hearings, he was quoted as saying that “if it turns out that one of the [purported fathers] sitting here is a pedophile or serial killer, these are things that the state must examine.”<sup>87</sup> Only after appeal to the Jerusalem District Court, and as a result of a public outcry against the judge’s outright homophobia, did the Court award the requested injunction, in May 2010.<sup>88</sup> This was probably the first time a judge denied such a request; however, he was not the first Family Court judge to ignore the Supreme Court’s *Yaros-Hakak* and *Ben-Ari* decisions in other legal proceedings.<sup>89</sup>

Another unique aspect of LGBTQ parentage stems from co-parenting arrangements whereby a man and a woman who are not a couple agree to have a child together. Sometimes, one or both have partners, and the co-parenting agreements are signed between more than two parties (i.e., the genetic parents).<sup>90</sup> Since Israeli law does not allow for more than two legal parents,<sup>91</sup> the non-genetic parents remain without any legal status in relation to the children. While they do function as parents, the relationships between the non-genetic parents and their children are not protected in cases of separation or divorce. In 2019, a Family Court judge declared the female partner of a birth mother to be the third parent of a child born to them and a

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84. While surrogacy is controversial, it is legal in Israel since 1996, and here I refer to the state’s objections to including gay men within the definition of “intended parents” under this law. These objections are homophobic in nature.

85. See *supra* notes 52-55 and the accompanying text.

86. FamC 28240/09 D.G. v. Attorney General (Mar. 19, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

87. Tomer Zarchin, *Gay Father of Twins Born to Indian Surrogate Denied Permission to Bring His Sons Home* (Haaretz, May 9, 2010), <https://www.haaretz.com/1.5117649>.

88. FamA 14816-04-10 John Doe v. Israel (May 6, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

89. See case cited *supra* note 55 and accompanying text.

90. See generally, YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE: BETWEEN FAMILY LAW AND CONTRACT LAW 157 (2019).

91. Some countries allow registration of three or four parents. See, e.g., in California, USA: 274 S.B. § 7612(c) (2013); Pennsylvania, USA: *Jacob v. Shultz-jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007); Ontario, Canada: *A.A. v. B.B.*, [2007] 220 O.A.C 115 (Can.).

gay man.<sup>92</sup> The female partner was the egg donor, but the birth mother was registered as the legal mother, in accordance with Israeli law, which creates an un rebuttable presumption that the birth mother is the legal mother, regardless of genetic connection to the baby. The Court thus instructed the Registrar to register the genetic mother as an additional mother and third parent. The father and his partner appealed to the District Court, and the AG joined their appeal, arguing that Israeli law does not allow for more than two parents. The District Court reversed the Family Court's ruling, stating that the genetic mother should have a say in parental decisions regarding the child pursuant to the agreement that the parties entered into, which is binding.<sup>93</sup>

In another co-parenting case, a gay couple had a child with a single woman, and petitioned the Family Court to have the non-genetic father recognized as a legal guardian to the baby, in addition to his two legal parents. Knowing the AG's objection to the recognition of three legal parents, the parents in this case did not seek full parental rights for the non-genetic father, and were willing to settle for legal guardianship, which is more limited in its scope, not registered in the official records as parentage, and therefore less threatening to the existing order. The same Family Court judge who declared the genetic mother a third parent in the abovementioned case ruled for the petitioners here as well, and declared the non-genetic father an additional legal guardian. Once again, the AG appealed, and the District Court reversed the Family Court ruling, accepting the AG's position that more than two parents and legal guardians may be harmful for children in cases of separation or divorce, as more adults will potentially fight over custody and child support.<sup>94</sup> While co-parenting is used almost exclusively by LGBTQ individuals and couples, the AG used a slippery-slope argument (what if there are bitter divorces that involve more than two parents) to block any efforts to legally secure the relationships between children and their non-genetic parents in such family units, thus being willing to leave these relationships vulnerable.

An additional inconsistency regarding same-sex parenting can be found in cases where a genetic parent has petitioned the Family Court to revoke the parentage of their partner. In two conflicting decisions handed down in October 2020, one judge accepted such a petition and cancelled the parentage of the non-genetic parent,<sup>95</sup> while in the other case the judge

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92. FamC 39771-07-14 Jane Doe v. John Roe (Mar. 19, 2019), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

93. FamA 23848-05-19 John Doe v. Jane Roe (Apr. 2, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

94. FamA 52453-02-20 The Attorney General v. The Parents (Jan. 7, 2021), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

95. Adoption Case 25973-10-17 Jane Doe v. Jane Roe (Oct. 27, 2020), Nevo Legal Database (by

denied the petition and reprimanded the genetic mother for not distinguishing between her personal resentment toward her ex-partner and the best interests of the child.<sup>96</sup> As mentioned above, because of privacy considerations, Family Court cases are not consistently published in Israel, hence there is no way to know whether the first case or the second is representative; but to the best of my knowledge, most Family Court judges to date have refused to revoke parental orders as part of separation proceedings, and have stated that parenthood is for life and cannot be cancelled when the couple separates. Surprisingly, the AG's position in some of these cases has been that once a non-genetic parent becomes a legal parent, their parenthood should not be revoked should the couple separate, even if both parents ask the court to do so.<sup>97</sup>

In addition to the AG's often hostile approach to LGBTQ families in Family Court litigation, LGBTQ parents face various bureaucratic hurdles that heterosexual parents do not. For example, in some recent cases the Registrar refused to honor court orders regarding the parentage of the non-genetic mother in a lesbian couple, basing this refusal on the couple's delayed submission of the court order for registration, even though there is no legal basis for refusing registration of a valid parental order on such grounds.<sup>98</sup> In other cases, the Registrar has registered the baby under the last name of the genetic parent only, even though the parents have chosen to have the baby carry both their last names.<sup>99</sup>

Once again, as with the recognition of same-sex couples, same-sex parenting is vulnerable to inconsistencies and conflicting decisions in Family Court, depending on individual judges' worldviews and understanding of the law. With the exception of revocation of the parenthood of the non-genetic parent, the AG is still arguing against automatic parenthood of non-genetic parents, forcing same-sex couples and parents to endure prolonged, expensive, and invasive legal proceedings on their path to parenthood.

#### IV. "RELUCTANT ACCEPTANCE" OF LGBTQ RIGHTS IN ISRAEL: PRELIMINARY EXPLANATIONS

While the overall trend seems to be one of progress toward full

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subscription, in Hebrew) (Isr.).

96. FamC 46939-07-18 L.B.A v. A.B.A (Sep. 18, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

97. See case cited *supra* note 95.

98. Ilan Lior, *Israel defies ruling to register same-sex parents on children's birth certificates* (Haaretz, Sep. 20, 2016), <https://www.haaretz.com/israel-news/israel-won-t-register-same-sex-parents-on-kids-birth-certificates-1.5439130>.

99. Documents on file with author.



recognition of same-sex couples and parenting, Israel's acceptance of these couples and families has been reluctant at best. As described above, since the early 2000s the AG has consistently opposed legal challenges brought to the courts by LGBTQ couples and parents. He has contested the very definition of same-sex couples as family members whose petitions and lawsuits should be under the jurisdiction on the Family Court, and has opposed the recognition of LGBTQ parenthood, and specifically that of the non-genetic parent and of a third parent within co-parenting arrangements. Virtually all achievements in the realm of family law have been made through legal struggles, and were the result of court rulings, in many cases despite opposition on the part of the state.

Moreover, as noted, even the courts' rulings have sometimes been contradictory, and although most known case law has enshrined some family-related LGBTQ rights and recognized non-genetic parenthood, there is no way to see the full picture, since most family law decisions are not published for privacy concerns, and are not readily available for academic research for the same reason.<sup>100</sup> Therefore, LGBTQ individuals under Family Court jurisdiction are dependent upon the presiding judge's personal beliefs concerning the recognition of LGBTQ relationships. Furthermore, as noted above, Israel's Family Court does not issue binding precedents, and the Supreme Court accepts family cases relatively rarely. Within those appeals that the Supreme Court does hear, cases relating to LGBTQ families are extremely rare. The result is that these families are vulnerable to legal inconsistencies, in the absence of both legislation and a coherent and comprehensive body of binding precedents.

One might argue that the progress that has been made regarding same-sex couples and parents in Israel is impressive, considering its religious monopoly on marriage and divorce, and its lack of separation between church and state. In fact, such progress is not unique to same-sex couples, and dates back to the 1960s with the gradual recognition of heterosexual cohabitation, which has been viewed as paradoxical given the existing religious legal framework. In addition to the growing sociolegal legitimacy of opposite-sex unmarried couples, Israel has secured the legal rights of single-parent families.<sup>101</sup> Same-sex couples and parents, by contrast, reside within the contradictory realm of an ultra-conservative family law system, on the one hand, and a liberal commitment to individual rights and freedoms, on the other. Whereas single mothers were recognized as far back as the early 1990s, LGBTQs have had to present a family

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100. See generally Bryna Boguch et al., *Exposing Family Secrets: The Implications of Computerized Databases for the Creation of Knowledge in Family Law in Israel*, 34 TEL AVIV U.L. REV. 603 (2011) (Hebrew).

101. Single Parent Law, 5752-1992, SH No. 1390 p. 144 (1992).

structure similar to the traditional heterosexual nuclear family--a monogamous couple with children--in order to gain acceptance of both the couple and the entire family unit. In other words, while heterosexuals (or closeted individuals) did not have to conform to the ideal of the family and could be recognized as parents whether married, unmarried or single, LGBTQ families have been held to a "higher standard." Consequently, the acceptance of same-sex couples and parents has been only partial, and subject to legal battles. I believe that there are two related explanations for Israel's reluctant acceptance of same-sex relationships and parenting. The first is linked to the characterization of Jewish-Israeli culture as pronatalist, and the second to the Israeli-Palestinian conflict.

#### A. *Israeli Pronatalism*

Israel has been characterized in the legal and sociological literature as a pronatalist society.<sup>102</sup> In general, Israelis tend to marry more and divorce less.<sup>103</sup> Among OECD countries, Israel is the most familistic and has the highest total fertility rate.<sup>104</sup> Its health system is public, and while it provides generous coverage of assisted reproductive technologies for couples and individuals, it does not cover most contraceptives.<sup>105</sup> On the other hand, while most Israelis live in what can be classified as nuclear family households, the Israeli family has not escaped current trends such as late marriages, cohabitation, rising divorce rates, and new families of all kinds.<sup>106</sup> Yet the pronatalist attitudes have survived changes in family structure.

Israeli pronatalism has been explained as stemming directly from Jewish

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102. Yael Hashiloni-Dolev & Zvi Triger, *Between the Deceased's Wish and the Wishes of His Surviving Relatives: Posthumous Children, Patriarchy, Pronatalism, and the Myth of Continuity of the Seed*, 39 TEL AVIV U.L. REV. 661 (2016); Sibylle Lustenberger, *The Making of Same-Sex Parenthood in Israel*, in JUDAISM IN MOTION 233 (2020); ALONA PELEG, LESBIAN MOTHERHOOD IN ISRAEL: STORIES OF PARENTING UNDER THE BURDEN OF PROOF 30-32 (2020) (Hebrew).

103. Sylvie Fogiel-Bijaoui, *Familism, Postmodernity and the State: The Case of Israel*, 21 J. OF ISR. HIST. 38 (2002).

104. OECD, *Society at a Glance 2019*, at 76 (Mar. 27, 2019), [https://www.oecd-ilibrary.org/docserver/soc\\_glance-2019-en.pdf?expires=1612438037&id=id&accname=guest&checksum=0D5AC03FA43D1A309BEE5912AF736420](https://www.oecd-ilibrary.org/docserver/soc_glance-2019-en.pdf?expires=1612438037&id=id&accname=guest&checksum=0D5AC03FA43D1A309BEE5912AF736420).

105. Barbara Prainsack, *'Negotiating Life' the Regulation of Human Cloning and Embryonic Stem Cell Research in Israel*, 36 SOC. STUD. OF SCI. 173, 186 (2006).

106. Yael Hashiloni-Dolev & Zvi Triger, *The Invention of the Extended Family of Choice: The Rise and Fall (to Date) of Posthumous Grandparenthood in Israel*, 39 NEW GENETICS AND SOC'Y 250 (2020); Yael Hashiloni-Dolev, *The Effect of Jewish-Israeli Family Ideology on Policy Regarding Reproductive Technologies*, in BIOETHICS IN ISRAEL: SOCIO-LEGAL, POLITICAL AND EMPIRICAL ANALYSIS 119 (Hagai Boas et al. eds., 2018); Amit Kaplan & Anat Herbst, *Stratified Patterns of Divorce: Earnings, Education, and Gender*, *Demographic Research*, 32 DEMOGRAPHIC RES. 949 (2015).



law, which views procreation as the most important religious commandment.<sup>107</sup> Since the concept of illegitimacy of children does not exist in Judaism, children born out of wedlock enjoy the same status under Jewish law as children born to married parents.<sup>108</sup> Israel's pronatalism has also been viewed as closely related to Israeli Jews' perceived threat of extinction, which stems from both Jewish history, in particular the Holocaust, and contemporary military conflicts.<sup>109</sup> Thus, not surprisingly, pronatalism in Israel has also been selective. David Ben-Gurion, the country's first prime minister, commented that "any future prenatal incentive must be administered by the Jewish Agency and not the state, since the aim is to increase the number of Jews and not the population of the state [in general]."<sup>110</sup>

Against this backdrop, LGBTQ couples who have children are seen as adhering to Jewish tradition, which views the family as an enormously important social institution, while at the same time contributing to the "demographic effort" by having more Jewish children. In some studies, LGBTQ individuals have said that it was easier for their parents to accept them once the parents learned that their sons and daughters had long-term partners and were planning to have children together.<sup>111</sup> Moreover, having children has become such a norm within the LGBTQ community in Israel that some LGBTQ individuals have reported experiencing peer-pressure to become parents from their LGBTQ friends and acquaintances.<sup>112</sup>

### B. *The "Demographic Problem"*

While Jewish pronatalism is embedded in ancient Jewish history, its modern reasoning stems from the Israeli-Palestinian conflict, sometimes referred to in Israeli discourse as the "demographic problem," "the

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107. The first religious commandment in the Bible is "Be fruitful and multiply, and fill the earth and subdue it." Genesis 1:28. And the Talmud comments on this commandment that "Anyone who does not engage in producing children, it is as if he spills blood." Babylonian Talmud, Yevamot 63b.

108. With the exception of *mamzer* (literally, bastard), a child born to a married woman from a man who is not her husband. See Ruth Zafran, *Whose Child are You? The Israeli Paternity Regulation and its Flaws*, 46 HAPRAKLIT 311, 316 (2003) (Hebrew).

109. Barbara Prainsack & Ofer Firestine, *Science for Survival: Biotechnology Regulation in Israel*, 33 SCI AND PUB. POL'Y 33 (2006).

110. RHODA ANN KANAANEH, *BIRTHING THE NATION: STRATEGIES OF PALESTINIAN WOMEN IN ISRAEL* 35 (2002).

111. See, e.g., Sibylle Lustenberger, *Conceiving Judaism: The Challenges of Same-Sex Parenthood*, 28 ISR. STUD. REV. 140 (2013); Sibylle Lustenberger, *"We Are Citizens"-Vulnerability and Privilege in the Experiences of Israeli Gay Men with Surrogacy in India*, 48 J. COMP. FAM. STUD. 393 (2017); Alona Peleg & Tova Hartman, *Minority Stress in an Improved Social Environment: Lesbian Mothers and the Burden of Proof*, 15 J. GLBT FAM. STUD. 442 (2019); PELEG, *supra* note 102, at 30-31.

112. PELEG, *supra* note 102, at 32.

demographic threat,” “demographic race,” and even the “demographic demon.” These terms allude to the fear that the non-Jewish population, and specifically the Palestinians, will outnumber the Jewish population in the near future, and thereby threaten the Jewish state.<sup>113</sup>

Israeli authorities have deployed several tools to maintain the country’s Jewish majority, the chief ones being mass immigration of Jews to Israel, and encouraging a high birth rate in the Jewish population.<sup>114</sup> In the wake of the Holocaust, Israel pledged to become a haven for persecuted Jews from the Diaspora. To meet the goal of preserving Israel as a Jewish state, its immigration laws have been designed to promote immigration of Jews from around the world. On the one hand, Israeli immigration policy is very liberal in its view of “who is a Jew,” and lets in people who are not considered Jewish according to the Israeli religious establishment since, for example, they were not born to a Jewish mother. On the other hand, these laws make it very difficult for non-Jews to obtain Israeli citizenship, and those who marry Israeli citizens endure multiple bureaucratic hurdles before they are allowed to become legal residents, and later, citizens.<sup>115</sup>

The religious monopoly on marriage and divorce is an additional tool that prevents the birth of non-Jewish babies to Jewish citizens by actively discouraging interfaith marriages, and consequently, assimilation between the religious communities in Israel.<sup>116</sup> In addition, Israel is a highly segregated country. With the rare exceptions of Haifa, Akko (Acre), Jaffa, and Jerusalem, there are few mixed cities in Israel. And even in the mixed cities, many residential neighborhoods there are predominantly Jewish or Arab, with interactions limited mostly to the commercial parts of town.

In the case of Jewish LGBTQs in Israel, being in long-term, committed relationships and having children has become both a means of social acceptance and a patriotic act. From the embodiment of risk to the nation’s health and security, homonormative gay men and lesbians have become desired weapons in the national struggle. This transition, from enemy of the nation to its ally, dubbed by Puar “homonationalism,”<sup>117</sup> is a helpful lens through which to view the reluctant acceptance of same-sex unions and

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113. As of 2019, the Muslim population in Israel was 17.9% of the general population, and Christians were 2% of the population. See Central Bureau of Statistics, *The Moslem Population in Israel: Data on the Occasion of Eid al-Adha (The Feast of the Sacrifice)* (July 28, 2020), <https://www.cbs.gov.il/en/mediarelease/Pages/2020/The-Muslim-Population-in-Israel.aspx>; Central Bureau of Statistics, *Christmas 2020 – Christians in Israel* (Dec. 23, 2020), <https://www.cbs.gov.il/en/mediarelease/Pages/2020/Christmas-2020-Christians-in-Israel.aspx>.

114. Prainsack, *supra* note 105, at 185.

115. For further discussion, see Triger, *supra* note 26.

116. *Id.*

117. JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (10th anniversary expanded ed., 2018) (originally published in 2007); SARAH SCHULMAN, ISRAEL/PALESTINE AND THE QUEER INTERNATIONAL 103-04 (2012).

parenting in Israel. Writing about American society, Puar has characterized homonationalism as, among other things, “. . . a transition under way in how queer subjects are relating to nation-states, particularly the United States, from being figures of death (i.e., the AIDS epidemic) to becoming tied to ideas of life and productivity (i.e., gay marriage and families). The politics of recognition and incorporation entail that certain--but certainly not most--homosexual, gay, and queer bodies may be the temporary recipients of the ‘measures of benevolence’ that are awarded by liberal discourses of multicultural tolerance and diversity.”<sup>118</sup> Acceptance in Israel seems to be conditioned upon one’s willingness and ability to mold oneself according to the national (istic) heteronormative model of a provider of Jewish children to the nation within a family that emulates the so-called traditional nuclear family.

The gap between Israel’s official use of LGBTQ rights to improve its image abroad, and the state’s battles in court against equality for LGBTQs, is both striking and ironic. These rights are useful for PR purposes, and for showing how advanced Israeli society is compared with the Palestinians and Arab countries, yet many of these rights were awarded by the courts ruling against the state’s official stance. As Gross has written, gay rights have been appropriated by the state as a fig leaf for Israeli democracy.<sup>119</sup>

## V. CONCLUSION

This article described the paradox embedded in Israeli family law, which is based on ancient religious law but at the same time accepts, to a limited degree, same-sex unions and LGBTQ families. After surveying the relevant characteristics of family law in Israel, I analyzed the case law relating to LGBTQ families in particular, and showed how the rights of these families were carved out by the courts, over the express opposition of the state. For this reason, I have termed this recognition of same-sex unions and parents “reluctant acceptance.” While the state, represented by the Attorney General, often argues in court against LGBTQ family rights, it utilizes the court’s rulings in favor of these rights in the international arena in order to promote a liberal image of Israel.

I offered two main reasons that can explain Israel’s acceptance of LGBTQ families: (1) Jewish culture, which puts a great emphasis on the family and on procreation, and has been characterized in the literature as

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118. PUAR, *id.* at xii.

119. Gross, *supra* note 3, at 95-99; for further discussion of homonationalism in the Israeli context, see Aeyal Gross, *The Politics of LGBT Rights: Between (Homo) Normality and (Homo) Nationalism and Queer Politics*, 5 MA’ASEI MISHPAT 101 (2013) (Hebrew); Gilly Hartal & Orna Sasson-Levy, *Re-Reading Homonationalism: An Israeli Spatial Perspective*, 65 J. OF HOMOSEXUALITY 1391 (2018).

pronatalist. Therefore, LGBTQ people who choose to live in long-term, committed relationships and have children are accepted, as they can be seen as living within Jewish culture and its familial orientation; (2) the so-called demographic problem, which is used to encourage Israeli Jews to have more children in order to continue to outnumber Israeli and non-Israeli Palestinians, allows Jewish LGBTQs to join this national effort and contribute to it, thus gaining legitimacy for their families.

This legal framework, which rests mainly on individual lower court decisions rather than on law, renders LGBTQ rights in Israel somewhat tenuous. In times of catastrophe, this fragility is especially clear: For example, as a result of the devastating earthquake in Nepal in 2015, more than a dozen Israeli couples who had surrogacy babies there at the time were stranded without medical services, and were unable to take care of their newborn babies.<sup>120</sup> And more recently, the coronavirus pandemic has wreaked havoc on international surrogacy, as lockdowns around the globe have prevented many intended parents from being present at the births of their children or obtaining travel documents to return with their newborns to their home countries.<sup>121</sup>

Further, as in many countries around the world, Israel's court system is currently under attack. Right-wing politicians portray it as enforcing the values of the extreme Left, and in the current antidemocratic climate these accusations often fall on willing ears. One of the examples used by some Israeli politicians on the Right to "prove" that the court system has gone astray, according to their worldview, is the extensive case law securing LGBTQ rights. "Family values," according to various organizations, are under direct attack due to court recognition of same-sex unions and parents, and the backlash against LGBTQ rights is becoming more and more vocal. In such an atmosphere, it takes more than a webpage painting a rosy and unrealistic picture of LGBTQ rights, and a handful of lower-court decisions, to enshrine the rights of LGBTQ individuals and families.

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120. Debra Kamin, *Israel Evacuates Surrogate Babies from Nepal but Leaves the Mothers Behind* (Time, Apr. 28, 2015), <https://time.com/3838319/israel-nepal-surrogates/>.

121. Sirin Kale, *Surrogates left holding the baby as coronavirus rules strand parents* (The Guardian, May 14, 2020),

<https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy>; Lizzie Widdicombe, *The Stranded Babies of the Coronavirus Disaster* (The New Yorker, July 20, 2020),

<https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster>. While many of the couples were straight couples, some turning to international surrogacy because of its relatively lower cost compared to the cost of surrogacy in their home countries, many others resorted to international surrogacy because their countries did not allow for domestic procedures. Among those couples and individuals, were many Israeli gay men, who cannot have surrogacy babies under Israeli surrogacy law which is restricted to heterosexual couples and single women; See, e.g., Aaron Engelberg, *Coronavirus leaves one-month-old baby stranded* (The Jerusalem Post, Apr. 1, 2020), <https://www.jpost.com/israel-news/coronavirus-leaves-one-month-old-baby-stranded-623196>.

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## 以色列對於同性婚姻與家庭的承認與接受

Zvi Triger

### 摘 要

以色列婚姻法具有宗教性質，但其沒有規定公證婚姻。值得注意的是，儘管程度有限，同性婚姻在以色列得到了其法院的承認，而且在國外進行的同性婚姻也得到了以色列當局的登記和承認。本文探討了在一個法律之制定以宗教為基礎的國家中，同性伴侶和父母雙方日益接受彼此的情況。我認為這種法制上的默許有兩個主要原因：(1) 以色列猶太文化非常重視家庭和生育，並在文獻中被描述為生育主義者。因此，選擇長期生活在一夫一妻制關係中並生孩子的LGBTQ人被接受，因為他們可以被視為生活在猶太文化及其家庭取向中；(2) 所謂的人口問題，用於鼓勵以色列猶太人生育更多孩子以繼續超過以色列巴勒斯坦人，允許猶太LGBTQ個人加入這一國家努力，從而為他們的家庭獲得合法性。正如文章所示，同性伴侶和父母根據以色列法律享有的任何權利都不是由立法機構自願授予的。所有這些權利都是在經過漫長而昂貴的訴訟之後才被以色列法院承認的，而這些訴訟通常是在以色列總檢察長的激烈抵抗下進行的。因此，雖然猶太以色列同性伴侶享有相對較高的社會法律認可度，但仍應僅被視為法制上的「勉強接受」。

**關鍵詞：**同性婚姻、同性父母、LGBTQ家庭、家庭法、宗教