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The Development of the Issue of Same-Sex Couples Under Israeli Law

Yitshak Cohen*

ABSTRACT

The State of Israel determined by legislation that matters of personal status including marriage and divorce are subject to personal law, namely religious law. Since the applicable law is personal and not territorial, it varies from person to person and is not uniform as under civil law. This simply means that Israel has no separation of religion and state in matters of divorce and marriage. Religion is the only determining factor in these matters. Thus, marriages prohibited by religious law do not take place in Israel. This is true for all four major religions in Israel: Christianity, Islam, the Druze religion, and Judaism. The discussion of same-sex couples under Israeli law should have ended here: marriage and even sexual relations between same-sex partners are prohibited by the four religions in Israel. Therefore, they have no place in a state in which religious law prevails in matters of status.

However, the Israeli courts have more of a civil orientation than a religious one and look for ways to bridge the gap between religious law and reality as they understand it. In some cases, they have recognized the status of same-sex couples. The change started by providing material economic rights, such as the right to a benefit given to an employee's spouse by an employer, mutual inheritance rights, and more. The courts did not stop there but continued granting rights both on the public level and in matters of legal status. For example, same-sex couples can now be registered as a married couple in the Registry Office if they were married overseas, and they can adopt children just as heterosexual couples can. Some argue that today there is no longer any meaning to the law which states that marriage shall be determined only by the personal religious law of each individual. The decisions

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made in these matters are sharply disputed and reflect the constant prevailing tensions regarding Israel not only as a Jewish state but also as a democratic state. Although the Basic Laws stipulate that Israel is both, in practice these values conflict and often collide. This tension is clearly reflected in and may be analyzed through the issue of same-sex couples.

I. INTRODUCTION

When the State of Israel was established in 1948, it decided to adopt some of the legislation enacted by the British government, which had ruled the country prior to its independence. One such example is the King's Order in Council, 1922–1947. Article 51 of this law states, “Matters of personal status mean: lawsuits concerning marriage or divorce, alimony, maintenance, or guardianship”¹ Article 47 sets forth, “Jurisdiction in matters of personal status . . . will be according to applicable personal law.”² This Order in Council has not been cancelled.

The law in matters of personal status is personal law that varies with the individual. Personal status law is not territorial, and is not the same for everyone in Israel. It was also determined that the applicable personal law would be in accordance with the religion of the litigant, not in accordance with his citizenship nor his residency.³ Thus the law of the church applies to Christians;⁴ Jewish law is the applicable law for Jews; the Sharia law applies to Muslims; and the Druze religious law is applicable for the Druze people. These are the four major religions in Israel, and the only religions that are legally recognized.

Five years after Israel's establishment, Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, enacted in 1953, set forth more explicitly: “Marriage and divorce of Jews in Israel will take place according to Jewish religious law.”⁵ This means that Israel has

1. Article 51 of the 1922 King's Order-in-Council III Laws of Palestine, 2569.

2. Article 47 of the 1922 King's Order-in-Council III Laws of Palestine, 2580.

3. CA 26/51 Kotik v. Wallfson 5 PD 1341 (1951) (Isr.).

4. Regarding the different Christian communities in Israel, see the following Israel Ministry of Foreign Affairs website. There are approximately ten Christian denominations that as “recognized” communities are granted jurisdiction in matters of personal status: Yishai Eldar, *Focus on Israel: The Christian Communities of Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (May 1, 2014), <http://www.mfa.gov.il/mfa/aboutisrael/people/pages/focus%20on%20israel%20-%20the%20christian%20communities%20of%20isr.aspx> (last visited Feb. 29th, 2016).

5. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, § 2, 165 LSI 72 (1953) (Isr.).

no separation of religion and state in matters of personal status. The entities responsible for marriages are the religious institutions themselves. Spouses belonging to the same religion are subject to its exclusive authority, both in their marriage or in their divorce.⁶ Marriage prohibited by religion cannot take place in Israel. For example, a non-Jew cannot marry a Jew. Accordingly, a man or woman may not marry someone of the same sex because it is not permissible under all four legally recognized religions in Israel.

Ostensibly, the discussion of same-sex marriage in Israel should have stopped here. In contrast, in the United States where there is a separation of church and state, rulings and decisions can be determined by the civil courts rather than by religion. However in Israel, where the applicable law is personal religious law, same-sex couples should not be recognized as married. Surprisingly, and inconsistent with personal religious law, the courts have allowed their civil perspective to shape their decisions to recognize more legal protections for same-sex couples.

Concurrent with the authority given to religions over the institution of marriage and the prohibition of marriage between certain individuals, the Israeli courts, in contrast to the legislature, began developing alternatives to religiously-sanctioned marriage. Among these alternatives are private marriage,⁷ civil marriage,⁸ and common law marriage.⁹ Of course, nobody referred to them as such, and they became amalgamated under the umbrella term "marriage." Everything was done under the cloak of specific solutions to the plight of privacy and humanity. However, these specific solutions have created in Israel an entire area of civil law, which in certain respects is even more developed than in countries in which civil law applies. This article analyzes the development of this civil law with regard to same-sex couples.

6. See *Id.* at § 1 ("Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts."). <https://www.knesset.gov.il/review/ReviewPage2.aspx?kns=2&lng=3>

7. See, e.g., HCJ 51/69 Rodnizki v. The Supreme Rabbinical Court 24(1) PD 704 (1969) (Isr.); HCJ 80/63 Gorfinkel v. The Supreme Rabbinical Court 17 PD 2048 (1963) (Isr.).

8. See, e.g., CA 8256/99 Anonymous v. Anonymous 58(2) PD 213 (2003) (Isr.) (regulating the civil support between spouses married abroad in a civil ceremony); see also HCJ 2232/03 Anonymous v. The Supreme Rabbinical Court (Nov. 21, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (regularizing the status of spouses who were married abroad in a civil ceremony and states that they are married under the laws of Noah).

9. See, e.g., CA 52/80 Sha'ar v. Friedman 38(1) PD 443 (1980) (Isr.); CA 4385/91 Salem v. Carmi 51(1) PD 337 (1991) (Isr.).

Another way that same-sex couples have found recognition in Israel is through the Population Registry. People who are not allowed or do not want to get married according to religious law may choose to marry abroad. Upon returning to Israel, they are registered in the Population Registry as married.¹⁰ How is this registration consistent with a law stating that only religious law determines marriage? Article 3 of the Population Registry Law, enacted in 1965, provides that, "registration . . . will be prima facie evidence of the correctness of registration except for the details of nationality, religion, marital status, and spouse's name."¹¹ Thus the registration of those details is apparently meaningless. This is actually intended in order to avoid disputes concerning ideology, fundamental principles, and religion.

In my opinion, just as the boundary between bravery and foolishness is a fine line and clarity may sometimes only be achieved in retrospect, the line between naiveté and genius is also very fine. The Article 3 provision has helped Israeli law, or perhaps stated more precisely the Israeli nation, to avoid possible ideological arguments in relation to the registration of marriages forbidden by religion, such as a marriage between a Jew and a non-Jew.¹² The argument is that the registration does not in any case provide prima facie evidence of its accuracy.¹³ However, the provision of law¹⁴ also resulted in the registration of certain matters the legislature surely did not intend.¹⁵

II. THE INITIAL RECOGNITION OF SAME-SEX COUPLES

The legislature has taken some action in regards to same-sex

10. See Population Registry Law, 5725-1965, § 17, 270 LSI 85 (1965) (Isr.) (states that every resident must register any changes in status within thirty days.).

11. *Id.* at § 3.

12. HCJ 143/62 Schlesinger v. The Minister of the Interior 17 PD 225 (1963) (Isr.).

13. *Id.* at 249.

14. Population Registry Law, 5725-1965, § 3, 270 LSI 85 (1965) (Isr.).

15. See, e.g., HCJ 264/87 Shas Movement v. Director of the Population Administration 43(2) PD 723 (1987) (Isr.) (It was determined that the registration clerk has to register the conversion of a person on the basis of a document attesting to conversion by a Jewish community outside of Israel. That ruling applies even if the clerk believes that the conversion process is not valid according to religious law in Israel.). See also HCJ 2888/92 Goldstein v. The Minister of the Interior 50(5) PD 89 (1987) (Isr.) (The Supreme Court ordered the registration of a marriage held at the Brazilian Embassy in Israel, despite the fact that foreign ambassadors lack the authority to conduct marriage ceremonies in Israel). HCJ 5070/95 Na'amat v. The Minister of the Interior 56(2) PD 721 (1995) (Isr.) (The Supreme Court ordered the registration of individuals who underwent a Reform conversion in Israel or in Jewish communities outside of Israel, even though Reform conversions performed in Israel are not valid).

couples. The very few amendments made to Israeli law neither recognized same-sex couples nor granted them rights, but only tried to prevent injury or penalty. Three amendments were made to Israeli statutory provisions: in 1988, the legislature abolished the criminal prohibition against homosexual relationships;¹⁶ in 1992, the legislature banned employment discrimination at work on grounds of sexual orientation;¹⁷ and in 1993, the Army Ordinances were amended to prohibit discrimination due to sexual orientation.¹⁸

A. EL AL v. Danilovich – *Airplane Ticket*

With regard to changes in case law, the groundbreaking decision concerning same-sex couples in Israel is undoubtedly *EL AL v. Danilovich*.¹⁹ According to a flight attendant's employment agreement, the employee was entitled to airplane tickets for himself and for "his / her spouse (husband / wife)," including "the common law husband / wife of an employee." The flight attendant requested the benefit for an individual who was his same-sex spouse during the previous ten years. The employer EL AL refused.²⁰ The court ruled that a provision that confers a benefit on common law spouses but does not provide for same-sex spouses is discriminatory in light of the Equal Opportunities Act of 1988.

Justice Barak, in the majority opinion that denied the petition of EL AL also wrote:

Equality is a fundamental value in Israeli law. Today the principle of equality is established in the Basic Law: Human Dignity and Liberty.²¹ The test for equal or discriminatory treatment is a question of whether the difference in sex is relevant. The aim is to provide a benefit to the employee for the person with whom he lives

16. Penal Law, 5748–1988, § 2, 1246 LSI 62 (1992), as amended (no.22) (Isr.).

17. Equal Employment Opportunities Law, 5752–1992, § 2, 1377 LSI 37 (1992), as amended (Isr.).

18. The Army Ordinances, 1993.

19. HCJ 721/94 EL AL v. Danilovich 48(5) PD 749 (1994) (Isr.).

20. *Id.* at § 5 (the request was refused, without detailed explanation. In the Petition to the High Court of Justice, EL AL responded that its refusal to provide the Respondent with a flight ticket for his life partner is not illegal discrimination under the Equal Employment Opportunities Law. This law prohibited an additional kind of discrimination ("sexual orientation"), but did not grant rights to receive benefits to which an employee was previously not entitled.).

21. The State of Israel has no comprehensive constitution but from time to time enacts Basic Laws, which have higher normative status than ordinary law.

and from whom he separates when the employee goes out on his flights. The purpose of the benefit is not to strengthen the institution of marriage, and not to encourage traditional family life. The denial of this benefit from a same-sex spouse is irrelevant and therefore constitutes discrimination and violation of equality.²²

Justice Kedmi wrote in the minority opinion:

The linguistic concept of a spouse together with whom one forms a 'family'—reflects, in the social sphere, a joining of two individuals of different sexes as a 'couple'. 'Spouse' has since the beginning of humankind and until this day—indicated the union of two individuals of opposite sexes. So, too, as stated in the Bible, "And God created man . . . male and female he created them."²³ An essential element for two individuals becoming a 'pair,' according to the meaning of the Hebrew word, is in their ability—conceptually—to 'reproduce.' No same-sex relationship is the same unit that underlies the organizational structure of human society; When society reaches the conclusion that a same-sex couple deserves to be a basic unit of social structure, then the conceptual linguistic meaning of the words 'couple' and 'family' will change.²⁴

In light of linguistic reasons and reasons of societal structure, the dissenting judge decided that the *EL AL* employment agreement did not apply to a same-sex couple.

The ruling in *EL AL* avoided the principle discussion. Justice Barak limited the rationale to regard an employee's social rights and nothing more. However, he provided an open door for his successors. Lower courts were divided on the issue. Some tried to fend off any attempt to recognize same-sex spouses. Others followed the *EL AL* path and recognized same-sex couples. In the next two sections, I will analyze four decisions, two reflecting each approach

III. FAMILY COURTS AGAINST RIGHTS FOR SAME-SEX COUPLES

A. FA 8/94 Steiner – Survivor's Pension

Same-sex partners lived together for eight years. One partner was killed. The deceased was a military man who was killed in action. The

22. HCJ 721/94 *EL AL* at 783.

23. Genesis 1:26.

24. HCJ 721/94 *EL AL* at 770.

spouse of the deceased wished the partners to be recognized as a couple and to be given the rights granted to couples by law, such as the survivor's pension.²⁵ Magistrates' Court Justice German opened the discussion with the aspect of interpretation by quoting the relevant law. Section 1 of the Fallen Soldiers' Families Law, 1950, sets forth: "A family member of a soldier killed in action means—one who was the wife of the fallen soldier when he died, including a woman who lived with him before his death and on the day of his death was his common law wife."²⁶

The court said that one should not talk about "family" without the elements of male, female, and parenting potential. Two people of the same sex do not establish a family and are not a potential family. It is hard to include a same-sex partner in the term "family member," and in the more specific words "wife" and "husband." Therefore, the court ruled that the law does not apply to same-sex couples.

In the opinion of the court, the lawful recognition of a common law spouse as the husband or wife of an individual who passed away does not contradict the basic family unit, even though the spouses were not married, because a man and a woman can raise a family (They can have children.). In contrast, same-sex spouses cannot have children together and, therefore, cannot conceptually start a family.

The court's decision does not deal only with the formal linguistic analysis, but also addresses the issue on a substantive level: "The Soldiers' Families Act gives rights to a small group of family members related to the fallen soldiers. It narrows the circle only to family members, even if others were more closely connected to the fallen soldiers than were the actual family members."²⁷

The court decision also deals with the principle of separation of powers. The court notes that a prior bill to amend the law had proposed including same-sex couples within the definition of spouses: "or anyone who was a (male) common law spouse and was living with him at that time—as long as they did not marry."²⁸ The proposed amendment was rejected.²⁹ The court left the legislative right to the legislature for whom it was solely designed.

25. FA (TA) 8/94 *Steiner v. Compensation Officer, Israel Defense Forces*, (Aug. 13, 1995), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

26. The Fallen Soldiers' Families Law, 5710–1950, § 1, LSI 162 (1950) (Isr.).

27. FA (TA), 8/94 *Steiner* at § 4.a.1.

28. Proposed Law: The Fallen Soldiers' Families Law, (Amendment – Definition of Family Member), 5754–1994, § 1, LSI (1994) (Isr.).

29. FA 8/94 *Steiner* at § 4.1.

The court's decision also addresses the issue on a social level. According to the court, homosexual relationships do not create a family connection. There is no wisdom and no advice that goes against the law of nature.³⁰ The court also refers to how people behave. It states that they do not view and do not relate to the male couple as a family.

The court's decision also addresses the aspect of the Basic Laws of Israel. Judge German refers to a fundamental discussion between Chief Justice Aharon Barak and Deputy Chief Justice Menachem Elon. Section 1(a) of the Basic Law: Human Dignity and Liberty states that "[t]he purpose of this Basic Law is to protect human dignity and liberty in order to establish in a Basic Law the values of Israel as a Jewish and democratic state."³¹

Chief Justice Barak wrote with reference to the Basic Law:

The language of the Basic Law refers to two resources of values that the State of Israel draws upon: Judaism and democracy. In order to avoid a possible conflict between them we have to raise the value of Judaism to a high level of abstraction, so that these values will be drawn upon only on their universal abstract level.³²

Elsewhere, Chief Justice Barak stated a more moderate position balancing the values of Judaism with those of democracy and wrote:

Israel's values as a Jewish state might conflict with its values as a democratic state. The criterion of the 'enlightened public' will serve as a guide.³³ The 'enlightened community' and the 'reasonable person' are only metaphors . . . they are a personification of the proper balance among the values, the principles and the competing interests.³⁴

Justice Elon criticizes this approach:

Since we achieved the enactment of the Basic Law: Human Dignity and Liberty, it is inappropriate to introduce an element such as 'views of the enlightened public in Israel.' This Basic Law includes values that have been extensively interpreted as well as worldviews,

30. *Id.* at § 5.b.2.

31. Basic Law: Human Dignity and Liberty, 5752-1992, § 1, 1391 LSI 150, (1992) (Isr.).

32. Aharon Barak, *The Constitutional Revolution: Protected Fundamental Rights*, 1 L. & GOV'T L. REV. 9, 30 (1992).

33. The "enlightened public" means an objective test of the reasonable public. The test for acceptance of a norm is whether the enlightened public in Israel accepts it. This is an open norm that can be given broad interpretation so that the implementation of the test is problematic.

34. HCJ 7074/93 Suissa v. Attorney-General 48(2) PD 749, 781 (1994) (Isr.).

so that a vague concept such as 'enlightened' will add uncertainty. The views of the 'enlightened public' do not determine the scope, content and nature of the supreme value of 'human dignity'.³⁵

The position of Chief Justice Barak reflects an approach that tends to place the values of democracy over the values of Judaism. Deputy Chief Justice Elon fought for many years against these perceptions. Family Court Justice German holds the opinion of the deputy. To strengthen his position, he quotes Professor Procaccia:

A fundamental value of the people and the state cannot be changed. It also cannot be dependent on the opinion of others, even if the others are enlightened nations. It is important that the legal system be able to develop and to invent suitable answers to a changing society. But that includes a danger, that the change will not always be in the direction of progress and increased protection of human rights, because sometimes society is in a state of ideological regression. As long as these moral values remain in people's hearts, they will prevent the deterioration of society and the legal system.³⁶

Judge German adds to this discussion and says that prohibitions against incestuous relationships also include sexual relations between men.³⁷ According to Jewish law, it is one of the three prohibitions commanding that one should die rather than transgress. Homosexuality and Judaism are incompatible.³⁸ These relationships contradict the values of the country "as a Jewish state," and therefore, they should not be recognized as relationships that establish a family. Non-recognition of a spouse in this case does not contradict the values of Israel as a democratic state, as it does not violate an individual's right to live his personal life with his sexual orientation as he chooses.³⁹ Therefore the court denied the request.

B. Family Court 16610/04 – A Financial Agreement

In this spirit of resistance, the following judgment was given.⁴⁰ A

35. CA 506/88 Shefer v. State of Israel 48(1) PD 87, 103 (1988) (Isr.).

36. Uriel Procaccia, *Reflections on Charges of Fundamental Values in Law*, 15 TEL AVIV U. L. REV. 377, 378 (1990).

37. Leviticus 18:22.

38. FA (TA) 8/94 Steiner v. Compensation Officer, Israel Defense Forces, (Aug. 13, 1995), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

39. *Id.*

40. File No. 016610/04 Family Court, Anonymous v. Attorney-General (May. 8, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

request was submitted to grant a financial agreement between same-sex spouses the validity of a judgment. Article 1(2) of the Family Court Law of 1995 defines a man's "family member" as "his spouse, including a common-law wife."⁴¹

Family Court Justice Gaifman set forth the legislative history. The issue of same-sex couples was part of the discussion that took place in the Knesset (Israel's legislative body) before the enactment of the law. When the law was drafted, the phrase "common-law wife" was intentionally inserted to prevent a same-sex spouse from being included as "his family member."⁴² In 2003, a bill was submitted to amend "a family member" to "same-sex partner." The proposal was defeated by a vote of 34 to 12. The government explained, "Any change in the status quo in matters of religion and state will be made with the agreement of all the coalition members, and there is no agreement."⁴³ Justice Gaifman summarized his conclusions and suggested that this issue be left to the legislature. The request brought before the court in this case was denied.

My analysis of these judgments that oppose granting rights to same-sex couples shows five basic reasons for objection:

1. Linguistic-biological: The phrase "man and wife" and the term "family members" can include only couples that potentially could have children, and this is the desirable structure for a family unit.

2. Social: Same-sex relationships are not socially acceptable.

3. Separation of powers among the branches of government: It is the work of the legislature, not the courts, to create new concepts in the law.

4. Religious: The basic values of the state reject recognition of a matter that conflicts with a Jewish value.

5. Precedents: The objection is based on previous rulings that did not recognize the rights of same-sex couples.

IV. FAMILY COURT RECOGNITION OF A SAME-SEX COUPLE

Surprisingly, other courts have recognized same-sex couples using the same rationales. I will list only two major examples.

41. Family Courts Law, 5755-1995, § 2, 1537 LSI 393 (1995) (Isr.).

42. File No. 016610/04 Family Court, Anonymous at § 5.

43. *Id.* at § 7.

A. CA 3245/03, A.M. – Inheritance

In *A.M.*, two men had been living as a couple for approximately forty years.⁴⁴ The question under discussion was whether they would inherit from each other. Article 55 of the Law of Succession, 1965 states: “When a man and a woman were living a family life in a joint household, and one of them died . . . the survivor inherits the deceased as if they were married to each other.”⁴⁵

The minority opinion argued that this section is intended to provide a response for a man and a woman who are not married. The Knesset Protocols publication indicates that the phrase “man and woman” has only one interpretation.⁴⁶ The subjective desire of the legislature was to provide a response for couples that still have the potential to marry according to their personal law.

The majority opinion agreed that the purpose of Section 55 was to provide common law spouses with the inheritance rights granted to married couples.⁴⁷ However, common law couples who are unable to marry under Jewish law are the individuals primarily assisted by Article 55.⁴⁸ The majority opinion argued further that the rights of common law spouses have also been expanded in other areas. It indicated that today’s normative regime increasingly recognizes freedom of human sexual orientation.⁴⁹ This recognition is due to the combined influence of statutory amendments to Israeli legislation. Thus the interpreter is also required to examine the text according to the purpose of the law.⁵⁰

According to the majority opinion, the theory of interpretation should not focus on the meaning of the text as originally enacted by the legislature. Nearly forty years after the enactment of the Law of Succession, the interpreter must instead also focus his opinion on the general changes in Israeli law, the new perceptions, and new interpretations that were given to old expressions. If, as in the case of *EL AL*, a same-sex spouse would be entitled to the rights granted to a spouse of the opposite sex, then the determination that an individual

44. File No. 3245/03 Civil Appeals (Naz’), *A.M. v. General Custodian* (Nov. 11, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

45. Law of Succession, 5725–1965, § 63, 446 LSI 63 (1965) (Isr.).

46. Knesset Protocols, Vol. 42, p. 1012.

47. *CA 3245/03 A.M.* at § 4.

48. *Id.* at sect. 5.

49. *Id.* at sect. 8.

50. *Id.* at sect. 15.

cannot inherit from a spouse of the same sex would lead to an undesirable social outcome.⁵¹ It would also be harmful to public policy and equality and would discriminate based on sexual orientation. In accordance with these arguments,⁵² the majority opinion decided that a same-sex couple could inherit from each other.

Here one sees how the *EL AL* ruling affects the court's decision to accept the couple's request and recognize a same-sex couple. This shows that one cannot escape discussion of fundamental principles by saying that the *EL AL* decision discussed only social rights. These social rights lead to full recognition of same-sex spouses. Subsequent decisions were based on them, and created a new legal reality in Israel.

B. Family C6960/03 Z. & M. – Financial Agreement

The second example of recognition deals with a financial agreement for same-sex couples.⁵³ Same-sex spouses had been together for about 19 years. The couple reached an agreement with a woman to marry one of them and bear their children. Twins were born and the heterosexual married couple subsequently divorced. The agreement between the same-sex couple included financial arrangements, raising the children, and more.

The Family Court Justice Granit requested the position of the state. The state argued that an agreement between common law spouses, who are male and female, could be approved but an agreement between same-sex spouses could not.⁵⁴ The court rejected the state's position for the following reasons:

1. The linguistic/interpretive aspect: Article 1(2) of the Family Court Law of 1995 defines "his family member" as "his spouse, including a common-law wife." The court argued that if the legislature wanted to limit its authority only to heterosexual spouses, it had to state in Article 1(2): "the (female) spouse, including a common-law wife."⁵⁵ However, the wording of the law means that the "family" of a man is a man. The court held that the judgment in the matter of succession, discussed earlier, puts an end to the state's position. If same-

51. *Id.*

52. *Id.* (Levy, J., concurring).

53. File No. 6960/03 Family Court, Z & M (Nov. 21, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

54. *Id.* at §§ 7–8.

55. *Id.* at § 12.

sex spouses may inherit from each other, then they are entitled to court approval of their agreement.⁵⁶

2. The substantive aspect: The state asserted that the legislature did not think about creating a family composed of same-sex spouses. It further argued that Israeli law did not recognize this as a legal and social institution. Its creation involves the determination of questions of social and moral values. The court responded that this was a statement without any reasoning. Perhaps the legislature drafted the definitions in such a way that they apply—both linguistically and substantively—to all couples. The court argued that the state did not sufficiently consider today's reality not only in Israel, but also throughout the Western world.⁵⁷

3. The Basic Laws: The court stated that one can base the right of same-sex couples to equality in Section 1 of the Basic Law: Human Dignity and Liberty, which sets forth, "Fundamental human rights in Israel . . . will be respected in the spirit of the principles in the Declaration of the Establishment of the State of Israel."⁵⁸ As stated in the declaration, the State of Israel "will ensure complete equality of social and political rights for all its inhabitants irrespective of religion, race or sex." The court determined that discrimination against same-sex couples arises solely from conservative ideology that is unwilling to accept any substantive change in reality.⁵⁹ This ideology demands that reality adapt to law, instead of law adapting to reality.⁶⁰ Therefore, it was decided that same-sex spouses are relatives for the purpose of the term "family member," and their agreement should be approved.

In conclusion, in my view, the recognition of same-sex couples is also actually based on the same five parameters that were used by the opposing courts.

1. Linguistic/exegetical aspect: The interpreter is required to examine the text according to the purpose of the law.

2. Social aspect: A change in reality cannot be ignored.

3. Separation of political powers: The legislature left the matter open by choosing ambiguous language.

56. *Id.* at § 11–20.

57. *Id.* at §§ 21–24.

58. Basic Law: Human Dignity and Liberty, 5752–1992, § 1, 1391 LSI 150 (1992) (Isr.).

59. File No. 6960/03 Family Court, Z & M (Nov. 21, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.) at § 47.

60. *Id.*

4. Morality/discrimination: In accordance with fundamental values, same-sex couples have a right to equality.

5. Precedents of previous judicial decisions.

Actually, the entire difference between the decisions is due to the presiding judge and his personal worldview. Orthodox Jews gave the first two decisions that did not grant rights to same-sex couples, while non-religious Jews gave the last two decisions that granted rights to same-sex marriage. This is really a consideration of the same circumstances and the same terms in the legislation, yet the judges reach completely different conclusions. One is a supporter of social change, and the other seeks to block it. More decisions have recognized same-sex spouses than those that do not. In fact, very few judgments do not recognize same-sex spouses. This could indicate that on the economic/financial level, even religious judges do not refrain from granting social benefits to same-sex couples.

Every judge that granted rights to a same-sex couple has tried to explain that he was not changing the world order, but resolving a specific difficulty—the personal distress of individuals.⁶¹ However, in practice these small modifications resulted in a significant change in Israeli law. This change is contrary to what has been the legislature's approach, as seen in its dismissal of every bill to change the law and broaden the meaning of family member. However, the courts went further than the legislature and brought about social change.⁶²

V. THE PUBLIC ARENA

Thus far the discussion has dealt with economic and financial rights such as approval of a financial agreement, inheritance, social rights in the workplace, and more. The following section considers the public arena that in some sense is more controversial and more of a matter of principle. The analysis examines three leading cases.

61. See, e.g., HCJ 721/94 EL AL v. Danilovich 48(5) PD 749 (1994) (Isr.); File No. 3245/03 Civil Appeals (Naz'), A.M. v. General Custodian (Nov. 11, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

62. In Israel, the courts interpret the law and can actually interpret it differently from the way in which the legislature intended. The legislature can change the court's interpretation through new legislation that will clarify its intent. The legislative process is long, and certainly not as short as the process of judicial decision.

A. HCJ 1779/99 Kaddish Brenner – Adoption

Two females who had been same-sex spouses for seven years were citizens of Israel.⁶³ They resided in the state of California in the United States. One woman gave birth to a boy after sperm donation. The other spouse adopted the child based on an adoption decree granted in California. The two women requested to return to Israel and sought to register the adoption in the Israel Population Registry.

In order to clarify the following discussion, I cite the *Schlesinger* case with regard to a prohibited marriage:

It is not the duty of the registry clerk to give his opinion on the validity of the marriage. It is sufficient for the clerk if a document is submitted showing that the resident underwent a marriage ceremony. The registry clerk may refuse registration only if the inaccuracy of the document is obvious.⁶⁴

An example of a document that is obviously incorrect is a foreign public document indicating that an adult is five years old.⁶⁵ Certainly, the registry clerk would not be instructed to register it in the registry. In *Kaddish Brenner*, the registry clerk argued that the existence of two same-sex parents is biologically impossible, and therefore, he could not register them as such in the Population Registry.⁶⁶

Justice Dorner wrote in the majority opinion that the registration does not reflect the biological aspect but the legal aspect. Therefore, there was no obvious inaccuracy.⁶⁷ Moreover, Private International Law requires that an individual's personal status be recognized uniformly in all countries.⁶⁸ A different status in different countries violates public policy. Justice Dorner also noted that the registration does not constitute prima facie evidence of its correctness, and therefore there is no concern about mistakes.⁶⁹ Thus, she ordered the registry clerk to register the mother's spouse as the adoptive mother of the child.

63. HCJ 1779/99 Brenner v. The Minister of the Interior 54(2) PD 368 (2000) (Isr.).

64. HCJ 143/62 Schlesinger v. The Minister of the Interior 17 PD 225, 252 (1963) (Isr.).

65. HCJ 1779/99 *Kaddish Brenner* 54(2) at 243.

66. *Kaddish Brenner* 54(2) PD 368 at 372.

67. *Id.* at 375.

68. See CA 191/51 Skornik v. Skornik 8 PD 141 (2000) (Isr.).

69. Dissenting Judge Zoa'bi insisted that this statement was incorrect as to the details of the parents' names also constitute prima facie evidence of the correctness. See HCJ 1779/99 at 381 (Zoa'bi, J., dissenting).

B. CA 10280/01 Yarus Hakak – Adoption.

Another case in the public arena with regard to fundamental principles is *Yarus Hakak*.⁷⁰ Same-sex female spouses sought to adopt each other's children, who had been conceived by sperm donations. Section 3 of the Adoption of Children Law of 1981 sets forth: "Adoption is only by a man together with his wife."⁷¹ Section 25 states, "If the court finds that it would be in the best interests of the adopted child, it may, under special circumstances, deviate from these restrictions"⁷²

The District Court determined that same-sex couples do not meet the conditions of the law and its purpose, because being an exceptional couple would further emphasize and highlight the exceptionality in the life of the child. An adoption decree granted to a same-sex couple could result in a child having two mothers. Under these unusual circumstances, the child would be regarded as different from others. Furthermore, the granting of adoption decrees would necessarily be construed as legal recognition, in principle, of the right of same-sex couples to adopt children.⁷³

The women appealed to the Supreme Court. Justice Matza suggested in the minority opinion that it is the work of the legislature to establish an initial arrangement granting recognized legal status to same-sex spouses.⁷⁴ Furthermore, a review of Knesset Protocols shows that with the phrase "a man together with his wife" the legislature intended legally married spouses, while same-sex spouses cannot get married.⁷⁵ Justice Matza added that it was not proven that a change in the personal status of a minor, from being the child of a single mother to being the child of two mothers, would be in the best interests of the child.⁷⁶

Moreover, Justice Matza argued that granting adoption would be taking a stand in principle regarding the status of same-sex couples and the question of their right to adopt children. Among wide circles of the population, the phenomenon of same-sex couples is seen as an

70. CA 10280/01 Yarus Hakak v. The Attorney General, 59(5) PD 64 (2005) (Isr.).

71. Adoption of Children Law, 5741-1981, § 3, 1028 LSI 293 (1981) (Isr.).

72. *Id.* at § 25.

73. FA 10/99 Anonymous v. The Attorney General, Israel Defense Forces, (May, 10, 2001), Nevo Legal Database (by subscription) (Isr.).

74. CA 10280/01 *Hakak*, 59(5) PD at § 11 (Matza, J., dissenting).

75. *Id.* at § 13.

76. *Id.* at § 15.

uncommon exception to a customary social norm. Therefore, interpretation that supports the adoption is inconsistent with the purpose of the Adoption of Children Law. In contrast, the *EL AL* case dealt with social rights, while here the court was asked to establish personal status.⁷⁷

However, the opinion of Justice Matza was rejected. Chief Justice Barak wrote the majority opinion, asserting that one cannot say *a priori* that due to the same-sex spouses, adoption is not in the best interest of the adopted child.⁷⁸ Chief Justice Barak also referred to principles of interpretation of legislation. He explained that the legal question is not (a) what the Knesset members thought when the law was enacted; (b) what their abstract, subjective purpose was; or (c) what were the interpretive perceptions of the Knesset members, how they understood or interpreted a concept, or how they would solve the current legal problem.⁷⁹ Instead, the judge wanted to know the legislative history in order to understand the purpose of the legislation. Chief Justice Barak further continues the arguments set forth in his book, *Judicial Discretion*. He explains there that the legislature's psychoanalysis is not of interest but rather the analysis of the law.⁸⁰

According to these principles, Chief Justice Barak determined that in demanding "special circumstances," the legislature sought to relax the rigidity of the law in order to achieve the "best interests of the adopted child." This is not a determination of status. This is a consideration of personal factors as part of an individual determination as to the best interest of the adopted child. The court is not making determinations with respect to institutions of law. It is dealing with people in pain, live human beings, who appeared before it by law.⁸¹ Justice Barak suggests that the time has come to amend the law and instead of the "static" provisions that relate to "a man and his wife" to determine "dynamic" provisions that deal with the material circumstances justifying the granting of the right or obligation determined by law.⁸²

At the end of his opinion, Chief Justice Barak criticized the minority position, which in principle ruled out the fitness of the moth-

77. *Id.* at § 25.

78. *Id.* at § 25.

79. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2003).

80. See AHARON BARAK, *JUDICIAL DISCRETION* 289 (1987).

81. *Id.* at § 15.

82. *Id.* at § 40.

ers to adopt children simply because they are same-sex spouses. Nevertheless, the minority opinion ironically ruled that the matter should be left to the legislature.⁸³

I think Justice Barak is mistaken. The minority opinion does not require any legislative change because it already reflects the status quo. On the contrary, Chief Justice Barak is the one who instead changes the status quo with the majority opinion.

C. HC 3045/05 Ben Ari – Registration

The most famous decision of the Supreme Court of Israel on this issue, and the most recent one in the public arena is the *Ben Ari* case.⁸⁴ This case deals with five petitions of five same-sex male couples. Though the individual spouses were all Israeli citizens, they were married in civil marriage ceremonies in Canada and subsequently requested to be registered as married couples in Israel's Population Registry. Their request was denied.

In order to understand the discussion in this matter, it is necessary to refer to the *Schlesinger* case, where the court ruled that the registry clerk is not authorized to determine the validity of the marriage.⁸⁵ *Schlesinger* also ruled that the registry clerk collects statistical material as to whether or not a wedding ceremony took place. The clerk may refuse to register only if there is an "obvious inaccuracy."⁸⁶ Many judges and scholars have criticized the *Schlesinger* decision.⁸⁷ Some saw it as turning a blind eye.⁸⁸ Justice England once wrote:

If it is only a matter of statistics that lack substantive meaning, why are there continued struggles over registration? . . . The truth is, of course, that the symbol here is of the essence, and without a certain worldview there is no determination in the question of registration in the Population Registry, and there are no statistics.⁸⁹

The state's argument was that the phrase "married" in the regis-

83. *Id.* at § 31.

84. HCJ 3045/05 Ari v. Director of the Population Administration, (Nov. 21, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

85. HCJ 143/62 Schlesinger v. The Minister of the Interior 17 PD 225, 251 (1963) (Isr.).

86. *Id.* at 243.

87. Menashe Shava, *Registration and Recognition of a Foreign Adoption Order Within Lesbian Family*, 1 KIRYAT ONO L. REV. 103, 132 (2001).

88. HCJ 5070/95 Na'amat v. The Minister of the Interior 56(2) PD 764 (1995) (Isr.).

89. *Id.* at 757.

try means marriages that are consistent with the basic legal template under Israeli law regarding marriage. This format only referred to marriage between a man and a woman. Justice Barak wrote the majority opinion rejecting the state's argument:

It is not appropriate that every time there is a change in the leadership of the ministry in charge of population registration, there will also be a change in policy. These questions deserve to be decided by the people through their representatives in the *Knesset*. As long as the *Knesset* has not spoken, it is fitting that these ethical decisions do not fall within the scope of the Population Registry.⁹⁰

Justice Barak explained further that "obvious inaccuracy" referred to in the *Schlesinger* case is factual inaccuracy.⁹¹ In contrast, the state argued incorrectly that it referred to inaccuracy with respect to the law.⁹² The court determined that the state was mistaken. Justice Barak added that it was neither a question of whether same-sex couples can marry in a civil ceremony in Israel, nor a question of whether they are married. These questions should be left to the legislature. The only question that demands judgment is whether the registry clerk must register the marriage.⁹³ Justice Barak gave an instruction to register it. Five judges agreed with him.

I find it difficult to accept the position of Chief Justice Barak that it is not the Minister who should determine the Ministry's policy. In a properly functioning democratic system, the minister is chosen as the representative of the people and is responsible for determining policy. Indeed, the right to establish new policy exists every time a new minister is elected. This is the essence of democracy and the essence of the concept of the rule of the people. A judge may not say, "The legislature is silent, so I will lead the change." The silence of the legislature says something. It might say that there is no need to change the law and that the current situation is desired.

Justice Rubinstein, who sat in the "religious justice seat,"⁹⁴ argued in the minority opinion that the Population Registry is not only a sta-

90. HCJ 3045/05 Ari v. Director of the Population Administration (Nov. 21, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.) at section 14.

91. *Id.* at § 21.

92. *Id.*

93. *Id.* at § 22.

94. The State of Israel has a procedure which states that among fourteen Supreme Court justices it is important to have at least one religious judge. This is not set forth in provisions of law but determined in accordance with internal guidelines.

tistical registry but also a social and public symbol.⁹⁵ It is the “gateway” to Israeli legal reality.⁹⁶ He explained that this court must give its opinion, even regarding the question of how far it distances itself from social consensus.⁹⁷ Justice Rubinstein cites passages from two books written by Professor Barak:

The judge must consider the degree of social consensus with social values and the legal norms derived from them. It is desirable to avoid choosing an option that sharply opposes the fundamental perceptions of the public The reason for this approach lies in democratic considerations, the considerations of separation of powers and the need to ensure public trust in the judicial system⁹⁸ A judge does not have to be the flag bearer of new social consensuses. He must give expression to fundamental values recognized in his society rather than create them.⁹⁹

Justice Rubinstein referred to these citations and said that one should examine these matters not only from the perspective of individual justice, but also from the perspective of a broad common denominator which extends as much as possible among the parts of a divided Israeli society, while avoiding extremes. An issue regarding a public symbol in Israel should justifiably be determined by the legislature. The registration is an official approval of the state to create a family unit, which is recognized by only a small minority of the countries in the world.¹⁰⁰ Therefore, Justice Rubinstein suggests that the petitions should be rejected.

It is important to mention that in December 2006, Justice Rubinstein wrote in his opinion that only 6 out of 192 states recognize same-sex marriage, and therefore, the State of Israel should not lead this trend. There is no doubt that following the *Obergefell* decision¹⁰¹ this is no longer a strong argument.

95. HCJ 3045/05 *Ari*, at § 9 in Justice Rubinstein’s opinion.

96. Indeed the religious parties in Israel are fighting for the leadership of the ministry in charge of the Population Registry.

97. HCJ 3045/05 *Ari*, at § 16.

98. AHARON BARAK, JUDICIAL DISCRETION 289 (1987).

99. AHARON BARAK, THE JUDGE IN A DEMOCRACY 47 (2004).

100. HCJ 3045/05 *Ari v. Director of the Population Administration*, at § 9 (Nov. 21, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

101. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). This Supreme Court decision set a precedent in ruling that the Constitution of the United States requires allowing same-sex marriage. Therefore, all fifty states within the United States are obligated to do so.

D. Family Court 16310/08, Anonymous – Domestic Violence

In the last three decisions described above, as well as in those mentioned earlier, the Supreme Court tried to avoid the ideological discussion and therefore declared that its decisions do not recognize same-sex marriage, but rather grant specific rights. There are few judges in the lower courts that use this declaration to avoid recognition of same-sex couples in issues that haven't yet been decided by the Supreme Court. An example is the following case referred to as *Anonymous*.¹⁰²

A petition was made in which one partner requested an order under the Family Violence Prevention Laws of 1991 for the cessation of harassment by his same-sex spouse.¹⁰³ The Family Court Justice German wrote that, over the past decade, there has indeed been a trend in the courts, by way of interpretation, to recognize same-sex couples as spouses.¹⁰⁴ However the interpretation was limited to specific needs. In this connection, the concepts of a "spouse" and "the common law spouse" should be understood in plain human language, just as these concepts are understood in all the laws that constitute family law.¹⁰⁵ Thus, he determined that the Family Violence Prevention Laws do not apply to homosexual couples and denied the request.

VI. CONCLUSION

The issue of recognition of same-sex couples received a boost during the last two decades in Israel and all over the world. In the State of Israel that separates religion and state, and where marriage is governed exclusively by religion, it would not have been clearly expected to recognize same-sex couples that marry in contrast to all recognized religions in Israel. Nevertheless, Israeli law, as interpreted in the Supreme Court decisions, led to widespread recognition of the rights of same-sex couples. This transition was reviewed in detail in this article. The recognition is part of the development of Israeli civil law rather than religious law. This civil law is designed to respond to the dynamics of life and the personal distress of individual partners. It

102. FC 16310/08, *Anonymous v. Anonymous* (Apr. 16, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

103. Family Violence Prevention Law, 5751–1991, § 2, 1352 LSI 138 (1991) (Isr.).

104. FC 16310/08 *Anonymous* at § 4.1.

105. *Id.* at § 4.2.

seems that there is room to justify providing economic and social rights to those who have decided to join their lives together, even if they are of the same sex. However, the Supreme Court went a little further and also decided that the public sphere has to recognize same-sex couples, who should be allowed to adopt children and to register in the Israeli Population Registry as married couples.

In my opinion, the following is the right balance between the values of Israel as a Jewish and a democratic state. On the one hand, the individual is granted the permission or right to live his private life, with his sexual orientation, as he chooses and without discrimination. He lives his life as he pleases and is entitled to all the economic rights granted to heterosexual spouses. On the other hand, among the values of Israel "as a Jewish state" is the rejection of same-sex relationships as creating a family unit that differs from what is viewed as the natural family. The decision to change this status quo should be made by the legislature, whose members are elected by the people as their representatives. This is the essence of democracy, and this is the essence of government by the people.