LGBT FAMILY LAW
STUDY TOUR TO ISRAEL
READER

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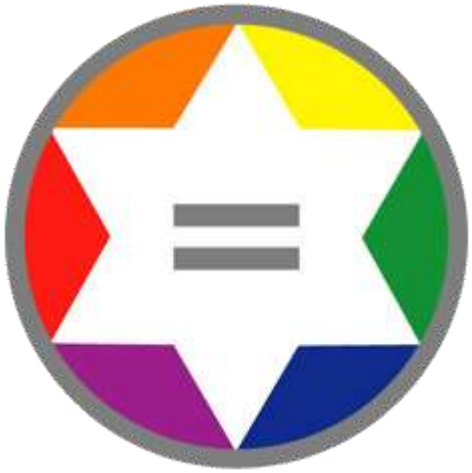

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A. The Legal Framework for Marriage and Family Law in Israel

The Israeli legal system is based on the Ottoman millet system, which granted autonomy to religious communities in religious matters. Family law, considered a religious matter, was governed by the religious law of the various religions in the Ottoman Empire. The basic millet system was continued in Israel under British mandate and preserved after Israel's independence. The governance of marriage and family matters in modern Israel is something of a maze. Individuals are subject to the laws of the religious community to which they belong, which means that five different Israeli citizens might be subject to five completely different systems of law governing marriage and family. In addition to this divide, "the legal settlement of family law matters is split between religious and civil law." Thus, while the laws of marriage and divorce are governed exclusively by religious law, most other aspects of family law (including child custody, adoption, property and inheritance) are regulated by civil law. However, the line marking the boundary between where civil law governs and where religious law governs is not always distinct. Civil and religious law can be complementary, parallel, duplicative, or contradictory. For purposes of present analysis, the key defining feature of the situation in Israel is the overlay of religious and secular law governing marriage and other family law matters.

B. The Court System in Israel

The division among the various religious groups and between religious and civil law also exists in the judicature of marriage and family law. Israel has a well-developed civil court system with municipal courts, magistrates' courts, district courts, and the Supreme Court. In addition, there is a network of tribal and religious courts recognized by the government. There are four officially-sanctioned religious court systems: Rabbinical (Jewish); Shari'a (Muslim), Christian, and Druze. Religious law, rather than an individual's actual personal beliefs, determines his or her religious affiliation or status as well as the court which has jurisdiction over the individual.

The Rabbinical courts have exclusive jurisdiction over marriage and divorce of Jewish citizens and residents. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 provides that "[m]arriages and divorces of Jews shall be performed in Israel in accordance with religious law" and that the rabbinical courts shall have exclusive jurisdiction in these matters over Jews who are residents or nationals of Israel.

Muslim religious courts have exclusive jurisdiction over marriage and divorce of Muslims (whether citizens or foreigners subject to religious courts in their home jurisdictions), including adoption and inheritance. In all other matters of personal status, the Muslim religious courts and the civil district courts have concurrent jurisdiction. There are Christian religious courts spread among ten recognized Christian denominations in Israel, which have exclusive jurisdiction over marriage, divorce, and alimony for their community members. "Under the Druze Religious Courts Law, the Druze courts were also granted exclusive jurisdiction over marriage and divorce of citizens. If granted consent by all parties, the courts also have jurisdiction over inheritance and personal status issues."

As there is no civil marriage in Israel, there is no court with specific jurisdiction over matters of marriage for individuals who belong to an unrecognized religion or to no religion at all.

C. Issues and Anomalies

Justice Barak noted that there are two primary objections to recognizing civil marriage in Israel. *1. National Identity and Unity*: The first reason is rooted in nationalism—the fear that if Israel recognizes civil marriage, Israel will lose its Jewish identity. This argument, based upon unity and national identity, has been subject to harsh criticism. For example, Daniel Friedmann has argued, "[t]he 'unity' represented by this approach is based upon two elements: compulsion and exclusion. Those who are regarded as belonging to the group are required to follow the religious rules; those who are unwilling, unable, or unqualified under religious rules to participate are excluded." The problems associated with compulsion, disqualification and exclusion are significant.

There are several categories of people who are precluded from marrying under Israeli law.These include those who (i) do not identify with any religion; (ii) belong to a religious community that is not recognized; (iii) want to enter into a mixed marriage involving spouses who belong to different religious communities (unless the personal law of both parties recognizes such marriages); or (iv) belong to a recognized religious group who do not qualify for marriage within the rules of that group.

Friedmann observes that the vast majority of Jews reside outside of Israel under systems of civil marriage. "If there is to be a split between those who live under such a system and those who recognize only religious marriage, then there must also be a schism between Jewish society in Israel and the Diaspora. Yet no one seriously maintains that there must be such a rift," Friedmann argues. Anticipating this line of argument, Justice Barak noted that in America there are liberal policies regarding civil marriage, and one result has been that most children of Jews are not raised within the faith. He cited a Rabbi who observed that while he had met many Reformed Jews, he had never met a grandchild of a Reformed Jew. So, perhaps, the concern about a loss of Jewish identity is valid.

2. Multiple Systems of Regulation: The second, related reason for opposing civil marriage is religious—if civil marriage is recognized, then with it comes recognition of civil divorce. This raises the possibility that divorce laws for religious and civil marriages will diverge, causing confusion as to when and whether an individual is still married or truly divorced. This raises particularly urgent issues with regard to the definition of illegitimacy.

Here, the arguments for a unitary approach are even more tenuous, since the existing marriage system in Israel is already what might be described as a crazy- quilt of overlapping rules and jurisdictions and exceptions to the religious marriage rules. While the laws governing marriage and divorce are governed by religious law, other aspects of family law such as maintenance, child support, adoption and succession are governed by civil law.

Even in the area of marriage and divorce, which is exclusively under the jurisdiction of religious law, a number of caveats must be noted. While the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 provides that "Marriages and divorces of Jews shall be performed in Israel

in accordance with religious law," and that the Rabbinical Courts shall have exclusive jurisdiction over marriage of Jews, a variety of exceptions have emerged.

There are several possibilities available to those who are prohibited from marrying under religious law. These include: (1) renouncing an earlier marriage and seeking another that conforms to religious law; (2) in the case of mixed marriage, converting to Orthodox Judaism or having one's partner convert; or (3) circumventing the "official" system, by one of the following means: (i) entering into a civil marriage abroad; (ii) entering into a de facto marriage; (iii) having a "private" religious ceremony in Israel; and (iv) having a non-Orthodox religious ceremony abroad.

"The Supreme Court has ruled that a couple married abroad, even if it is a mixed couple, is entitled to have its marriage registered in Israel." The route of circumvention, option three described above, is the most common, which suggests that "the 'unity' the Rabbinical Courts Jurisdiction Law was expected to create has not materialized." The legislature has responded by enacting special legislation to deal with de facto marriages, as well as legislation enabling couples who do not belong to any recognized religious community to obtain a divorce.

Thus, it is not really accurate to describe the existing system as one that is unitary or unifying. As the existing system has evolved to accommodate social realities, a number of exceptions to the rule of exclusive religious marriage have been made. One result of multiple systems of regulation is a "jurisdictional race" between spouses anxious to be the first to file suit for divorce in the court most preferable to them (usually the Rabbinical Courts for men and the Family Courts for women).

Another problematic aspect of diverging laws for marriage and divorce in the different systems is the potential for the exploitation of the woman, without provision for recourse. Professor Shahar Lifshitz of the Bar-Ilan School of Law has explained that according to Jewish law, spouses who were married in a religious ceremony are deemed married as long as they do not religiously divorce. The religious wedding ceremony requires an act of the voluntary granting of a divorce bill (*Get*) by the husband to the wife. In the instance of civil divorce, the spouses are considered, by religious law, to be married as long as a *Get* has not been given. This leads to an unacceptable situation, in which Jewish men who were married in a religious ceremony and obtain a divorce in the civil courts exploit their wives' need for a religious *get*. The husbands make their cooperation in granting the *Get* conditional upon a payment (hereinafter, purchasing a *Get* settlement).

One example of the abuses arising from the husband's sole power to issue a *get* was one husband's agreement to issue a *get* "only after receiving $15,000 and a promise that his former wife would not press assault charges against him after he broke her leg." In reference to this problem, Professor Lifshitz writes, "[s]ecular civil disregard of the religious dimension of marriages that enables this coercion is opposed to the values of autonomy and equality. In contrast, civil recognition of the validity of religious arrangements that obligate the husband to cooperate in the religious procedure will likely reduce this coercion."

Though religious courts have exclusive jurisdiction over marriage and divorce in the narrow sense, it appears that the civil courts have found it necessary to become involved in these types of disputes. Two decisions from Israeli civil courts are significant on this point. In the first, the

High Court found that the constitutional rights of two recalcitrant husbands were not violated when rabbinical courts ordered their imprisonment. The Court concluded that "[t]he petitioner holds the key to his release from prison; when he gives the *get* to his wife, he will go free." The second was a decision of the Jerusalem Family Court, in which a husband who refused to comply with the Rabbinical Court's ruling was found to be "a grave violation of the wife's autonomy and caused her emotional damage by sentencing her to a life of loneliness, lack of partnership, and sexual relations with a man."

Contemplating A Jewish Ritual Of Same-Sex Union: An Inquiry Into The Meanings Of Marriage

Steven Greenberg

The debate in the United States on same—sex marriage has become a keenly contended social and political battle. The intensity of the conflict may be a bit puzzling. Why should the freedom of a minority to marry threaten marriage for the majority or the idea of marriage itself? How is it that the passions around this issue so often seem to surpass the issue's relative social importance? In part, the explanation lies in the significant transformations already under way in regard to both homosexuality and marriage. Until very recently, both marriage and homosexuality were governed by unquestioned cultural assumptions. Homosexuality was an abominable perversity and marriage a sought—after state of happiness, security, and continuity. Over the past thirty years, in Western societies both of these cultural foundations have been shaken. Homosexuality is no longer considered an unequivocal evil nor is marriage universally deemed an unequivocal good.

Much of the heat of the debate is a function of deeply held religious convictions. Many of the underlying categories of the controversy are theological and the questions they put to us are patently religious. Is nature—or, if you like, "the original intent of the Creator"—corrupted, expanded, or affirmed by homosexuality? Does the biblical creation story define marriage exclusively as the union of one man and one woman? What are the moral and religious meanings of gender? Of sexual pleasure? Is marriage a "natural" institution or is it a sociocultural one, open to change as society changes? Is the sanctification of homosexual partnership a victory for love, an overcoming of gender by justice, or a sign of the corruption and decadence of our time? Although the legal considerations of the civil code surely do not so specify, questions of same—sex marriage are bound up in terms of sacred text and liturgy, sin and sanctity, ritual and ethics, creation and redemption.

If we are to work through the question of same—sex marriage, we will have no recourse but to explore our religious traditions more deeply in order to understand how they have already conditioned our language, how they may be insidiously and inappropriately investing government in religious tests, and how they may still be able to inform, if not govern, the definition of marriage.

In service of this aim, the purpose of this essay is to explore the idea of same—sex marriage as a religious problem and, more specifically, as a halakhic problem. In traditional Jewish circles, religious problems are framed first and foremost as legal or halakhic problems, problems of praxis. For the sake of this inquiry, we will set aside the questions of the halakhic legitimacy of gay relationships and their formalization, and focus instead on what form such ceremonies ought to take. Should we employ the existing rituals of matrimony used for heterosexual couples, and if not, what other options are available? From the perspective of the Jewish law, what ought a same—sex wedding to look like? On the surface, jumping over the question of the legitimacy of gay marriage may seem wildly presumptuous. The traditional Orthodox perspective, to date, is essentially univocal in its

condemnation of same—sex sexual expression (if somewhat more vociferously for males than for females), and representative bodies have vehemently protested the adoption of same—sex marriage.

There are even a few midrashic texts that explicitly decry same—sex marriage, the most famous being that of Rav Huna, the Babylonian rabbi who tells us that the generation of the flood was not obliterated from the world until they wrote nuptial songs for [unions between] males and [between humans and] animals. Beyond the midrashic material associating same—sex marriage with corruption and divine retribution, the rabbis explicitly prohibited such rites. In Deut. 18:3<n—>4, the Torah prohibits copying the practices and customs of the Egyptian pagans. Which practices may not be copied? Those, say the rabbis,that were given legal force from the time of the fathers and their father's fathers. "What would they do? A man would marry a man, a woman a woman, a man would marry a woman and her daughter, and a woman would be married to two men" (Sifra 9:8). The contemporary Orthodox rabbi grounding himself in the halakhah would appear to be free from any duty to delve more deeply into the question. Two factors, however, suggest otherwise.

First, the Orthodox community has begun to actually meet its own gay members. For many, their first encounter with a gay Orthodox Jew was on a movie screen. Sandi Simcha DuBowski's documentary *Trembling before G—d* (released in October 2001) documented the challenges faced by gay Orthodox Jews. *Trembling* became a cultural phenomenon when hundreds of synagogues, Jewish community centers, religious school faculties, students, and professional and community organizations screened the film and held frank postscreening conversations involving the film maker, subjects of the film, and local rabbis. Although the changes are happening slowly, for many in the Orthodox community, homosexuality is no longer theoretical but quite up close and personal. The gay visibility that has so powerfully affected the larger culture is beginning to make inroads into the Orthodox community. Gay teens are coming out of the closet in high school, couples are divorcing due to the sexual orientation of a spouse, gay parents are seeking religious schools for their children, and gay people of all sorts are sharing their stories with their families, their friends, and their rabbis.

Second, Orthodox mental health professionals have become more confident in their rejection of the characterization of homosexuality as mental illness and are becoming increasingly unwilling to attempt "reparative therapy" with patients. As rabbis come to understand that gayness is not a curable disease but instead an unchangeable feature of a person's basic makeup, they slowly begin to reconsider both their rhetoric and their policies.

Although few if any traditional rabbis will be actively conducting same— sex ceremonies in the near future, they are being asked to weigh in on such events when they occur. Orthodox rabbis are being asked whether it is permissible for family members to attend the "wedding" of a daughter or brother. And once rabbis are in the loop, they begin to ask about the content of the ceremony, and in a number of cases they have quietly contributed to the planning of a "halakhically sensitive" commitment ritual.

My hope is that by exploring the details of praxis—in this case, those of the traditional Jewish wedding—and by considering their relevance (or lack thereof) to same—sex coupling, we may be able to tease out some interesting insights in regard to both homosexuality and marriage. At the very least, by beginning with the formal and liturgical questions involved in the creation of a same—sex wedding ritual, we will be able to clarify our terms, deepen our questions, and provide a much richer frame for the consideration of same—sex marriage.[1]

Deconstructing the Dish The traditional Jewish wedding has a warm and venerable feel to it, and taking it apart in order to better understand it can be a bit demystifying. Many rabbis who conduct Jewish weddings and employ the traditional marital rituals have actively ignored their historical origins, consciously filling them with new meanings or slightly modifying them in order to make them consonant with contemporary experience. This ahistorical sleight—of—hand has helped to construct the Jewish wedding as a beautiful and unassailable black box.

Although the loss of naïveté required may be disenchanting to some, unpacking the structural and liturgical elements of these rituals will offer us an unusual opportunity to think about the possible meanings of marriage and to replace our shared confusion with a bit more understanding. In order to do this, we will first ground the conversation with a description of the structure of the traditional Jewish wedding ceremony and the basics of each ritual, and then we will return to each component and ask whether and how it might apply to same—sex couples.[2] There are two rituals and one legal document that make up a Jewish wedding. They are the espousal ceremony called *erusin*, the nuptial celebration called *nisuin*, and the marriage contract called the *ketubah*. Formally speaking, *erusin* made a woman prohibited sexually to the world and *nisuin* permitted her to her husband. Once *erusin* was contracted, no other man could preempt the husband. Initially, *erusin* and *nisuin* were distinct rituals commonly separated by a full year, during which time families devoted themselves to preparing the dowry, the wedding banquet, and the couple's future home. Sexual relations were not permitted to the espoused couple until the completion of the *nisuin*.[3] The rabbis commonly referred to the *erusin* as *kiddushin*, meaning "sanctification," and the *nisuin* as *huppah*, meaning "canopy." In the twelfth century, the time lapse between the espousal and the nuptials was removed and these two rituals were fused together into a single matrimonial ceremony.

The *ERUSIN* The *erusin* begins with two blessings: the first is the standard blessing recited upon wine and the second is the espousal blessing proper (*birkat erusin*).[4] "Blessed are you Lord, ruler of the universe, who has sanctified us by his commandments, and commanded us regarding forbidden connections and has forbidden us those who are merely espoused, but has permitted to us those lawfully married to us by *huppah* and *kiddushin*. Blessed are you, O Lord, who sanctifies his people Israel by means of *huppah* and *kiddushin*." This blessing is obviously said by or for the groom, the "us" being a collective reference to Israelite men. The blessing appears to have been instituted as a warning to couples who might otherwise have engaged in sexual relations during the original time lag

between the two ceremonies.[5] The *erusin* itself consists of an act by which the groom gives an object of value to his bride. Traditionally, he puts a ring (which he owns) on the right forefinger of the bride and recites the following statement: "Behold you are sanctified to me by this ring according to the laws of Moses and Israel." By accepting and so acquiring the ring, the bride gives to her groom exclusive access to her sexual body. She is now sexually off limits to all other men. Were the couple to recant at this point, a legal divorce would be required. Fundamentally, the marriage is enacted by this transfer. The act must be initiated by the man and responded to freely by a woman before witnesses. It is by definition a public affirmation that both parties have knowingly and voluntarily entered into a marriage contract with one another.

The legal means by which the espousal is contracted is acquisition. The word used in Deut. 22:13 for taking a wife (*kihah*) is the same word used in Gen. 23:13 for Abraham's "acquiring" the Cave of Machpelah. The Mishna introduces the tractate of *Kiddushin* by telling us that "a woman can be acquired (*kinyan*) by money, written document, or sexual intercourse."[6] Witnesses were required for all three methods. Because of the immodesty of arranging for witnesses, sexual intercourse was essentially eradicated by later authorities as a means of realizing a marriage contract. The standard marriage ceremony was initiated by the transfer of an object of value, typically a ring, from one party to another. The act is unilateral and the man is the sole initiator of the transaction. Were a woman to "take" a man by the same ritual formula (reciting the formula of "Behold you are sanctified to me . . ." and the giving of a ring), the act would have no halakhic meaning.[7] It is clear that he is buying and she is selling—but exactly what is up for sale and what is meant by ownership in this circumstance? Because, formally speaking, ownership is about rights, one might say that the husband acquires certain rights in relation to his wife's body. Following the *erusin*, he "owns" an aspect of her body (of which he cannot partake until after the *nisuin*). However, this is a very unusual sort of ownership. When one owns an object, one has the right to do with it what one wants, to restrict others from its use, to loan it to someone, or to give it away.[8] This is not the case with a wife. A wife is not like a loaf of bread that may be shared with others.[9] Moreover, the law does not permit a husband to force his wife to engage in sexual intercourse. If she refuses, he may try to seduce her, but he is not permitted to force her. Moreover, whether he has desire or not, he is obligated to satisfy his wife's sexual needs, at the very least once weekly. The ownership that *erusin* confers is neither absolute nor conventional.

Because the marital bond could not be understood as an ordinary form of chattel ownership, the rabbis appear to have associated the woman's change of status with another ritual metaphor, that of the sanctification of property—*hekdesh*. Any person was free to make a pledge to give an object or animal to the Temple by means of simple statement. Once uttered, the object becomes *hekdesh*, the sanctified property of God, and could not be used for any secular purpose. It is forbidden to the world and permitted only to the custodians of the Temple. *Kiddushin*, like *hekdesh*, is a method of transformation, a formula for the creation of something holy. By an act of *kiddushin*, a woman's sexuality becomes *hekdesh*, sanctified and therefore off limits to all men other than her husband.

Nothing about the man's body is articulated by this traditional ritual. Her status changes, his does not. He is formally free to take other wives. Adultery is only the wife's sexual disloyalty. A married man may be branded a degenerate or a cad by the community, but his extramarital affairs with unmarried women are not formally considered adultery. Originally, polygamy was permitted to those men with the means to support and sexually satisfy more than one wife. Despite the formal permission, the norm throughout Jewish history was essentially monogamous, in part due to the pragmatic difficulties of sustaining multiple wives. For example, there is no evidence of a single rabbi in either the Jerusalem or the Babylonian Talmud having had more than one wife. Later in the twelfth century, under the influence of Christian custom and around the time that the ideals of romantic love were being popularized by troubadours in France, Jewish religious authorities began to strongly discourage and then finally to prohibit the practice of polygamy.[10] Consequently, today, when a groom gives his bride a ring, he too is being formally limited to a single partner. So although the act is technically unilateral, the consequences are not. Still, the fundamental legal roots of *kiddushin,* even if they have been largely reduced to a metaphor, are deeply morally troublesome if not offensive to the egalitarian sensibilities of many in the contemporary social context.

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The *Ketubah* Following the *erusin* and before the *nisuin*, a marriage contract, called a *ketubah*, already drafted, signed, and witnessed, is given by the groom to the bride. The rabbis initiated the requirement of the *ketubah* in order to protect women from the unfettered male powers embedded in the inherited institution. Both prerogatives, that of marriage and that of divorce, were to be initiated by men. One needed a woman's consent to contract a marriage; but a divorce could be effected by a man even against a woman's will. Because few premodern women could earn a living wage, the sale of her pristine sexuality to a man who would support her for life was perhaps a woman's most fundamental power. Once her virginity was given away, a woman was particularly vulnerable to a husband's whims. Because a man was legally free to divorce his wife for any reason, a woman could easily find herself divorced, destitute, and practically without hope for remarriage. This problem so deeply concerned the rabbis that they created a disincentive for husbands to summarily divorce their wives by binding them to a contract to pay a sizable sum of money in just such a case.

The contract, called a *ketubah*, is not a marriage contract per se. It is an agreement that roughly delineates the duties of both parties in the marriage, marks the monies brought into the union by each side, and specifically obligates the husband to pay the wife prescribed sums of money in the event of divorce or of his decease. After the *ketubah* is read and handed over to the woman, the second portion of the wedding ceremony, the *nisuin*, begins.

The *NISUIN* The *nisuin* is a public accompaniment of the couple to their shared domicile, an affirmation of the beginning of their intimate life together, and a celebration of their union with family and friends. The *nisuin* is marked by seven blessings that speak of the creation of human beings in God's image, Adam and Eve brought together in the

Garden of Eden, and the future restoration of Zion in joy and delight. After the wedding blessings are recited, the groom breaks a glass to signify that the joy of the wedding does not completely erase the sadness of the destruction of Jerusalem and the Holy Temple, and with this gesture to the brokenness of life, the music, dancing, and celebration begins.

Following this ceremony, the couple is permitted and indeed enjoined to share sexual intimacy. Originally, the couple was accompanied to the groom's home or to a colorfully decorated tent symbolizing the groom's domicile, where the consummation of the marriage took place. Eventually, more delicate sensibilities determined that a symbolic nuptial chamber would be preferable and a canopy on four poles was substituted for the real thing. However, because there was still a need for a more private encounter (even if it did not include the first sexual intercourse), after the *nisuin* the couple is ushered into a private room where they can be alone together, unchaperoned, for the first time. It is a symbolic beginning of their now fully sanctioned sexual intimacy.

This is the essential format of the traditional Jewish wedding. Liberal rabbis have introduced egalitarian modifications of various sorts into the service, but despite these attempts, the fundamental legal structure of *kiddushin* has largely been retained. What elements of this service ought to be adopted by gay couples seeking a commitment ritual? In order to create an appropriate gay wedding ceremony we will need to pay attention to the appropriateness of the various liturgical elements but also to the implicit conceptual frames that give marriage substance. So, let us revisit the *erusin*, the *ketubah*, and the *nisuin* in order to imagine their relevance to gay coupling and commitment.

***Erusin* Revisited** The central legal engine of *erusin* is acquisition. Women are acquired by men through *kiddushin*, men are not acquired by women. Initially, the bride price was a serious sum of money, but eventually the real purchase became symbolic as the hefty sum was replaced with a token gift worth not less than the lowest coin of the realm. Still, the metaphoric frame of *erusin*, the idea of "buying" a wife, even if only a symbolic act, is surely disturbing for contemporary sensibilities, straight or gay. Liberal rabbis who use *kiddushin*, as well as some Modern Orthodox rabbis, make efforts to mask the origins of the rituals by adding elements to the ring ceremony. Traditionally, the man places the ring on the woman's finger and says, "By this ring be thou sanctified unto me [i.e., You are exclusively mine] according to the laws of Moses and Israel." In order to create a greater sense of mutuality, Liberal rabbis innovated an exchange of rings. Non-Orthodox rabbis have made the mutuality total by having the woman use the same language that the man uses, "Be thou sanctified unto me . . ." For Orthodox rabbis, however, the double—ring ceremony is particularly problematic because if rings are exchanged in succession, then technically speaking no *kiddushin* has occurred. No transaction, no change of status, is effected because the parties have simply traded gifts, a ring for a ring. Some Modern Orthodox rabbis have tried to retain the one—sided halakhic act of acquisition while providing a sense of mutuality by adding a second ring ceremony later in the service, during which the bride gives the groom a ring and says a beautiful, if legally inconsequential, line from the Song of Songs such as "I am my beloved's and my beloved is mine" (6:3).

Jewish feminists have challenged not only the cosmetic adjustments of Modern Orthodox rabbis, but even the adjustments of Liberal rabbis, claiming that they do not address the fundamental problem of acquisition. According to Rachel Adler, the unilateral nature of the *kiddushin* is not the only problem. The problem of *kiddushin* rests as well in its fundamental legal ground as a purchase.[11] If Adler is right, then the double—ring ceremony, well—meaning as it may be, does not solve the problem. The adding of the bride's gift of a ring to the groom only responds to the dilemma of one commodification by adding another. In Adler's view, mutual dehumanization will not heal the ritual.

Adler's critique makes a good deal of sense, especially for gay and lesbian Jews. Even if heterosexuals might want to sustain the frameworks of *kiddushin*, why should gay couples do so? Because there is no venerable tradition of same—sex union upon which to build and no gender difference to enact ritually, however benignly, why would gay couples want to adopt *kiddushin*? Given that there are no traditions in regard to same—sex unions, why not be totally free to choose a mode of effecting and elebrating our unions that has no taint of inequality or commodification? The question to ask at this point is why the sages of the Talmud employed the language of acquisition in the first place. Might the metaphor of ownership be more than a remnant of patriarchal domination? Despite the moral pitfalls of the language, it may be that marriage is bound up in ownership because, for all its uncomfortable associations, it still comes closest to what couples intend. The giving of oneself and especially one's sexual body to another in love is often articulated as a belonging. "You are mine" is what we mean when we give a ring. "I am yours" is what we mean when we let our partner place it on our finger.

Different couples imagine different sorts of relationships when they marry. They may or may not share their finances; they may or may not be able to live full—time in the same city; they may or may not have other families demanding of their time and money. But whatever couples may mean by their commitments in marriage, they are always committing to an exclusivity of a sort. Or to put it another way, although loving one person does not preclude loving another, in marriage we delineate a sort of access to our heart and to our body that cannot be shared with others outside the marital relationship.

Marrying is not like making a best friend or acquiring the perfect business partner or roommate. It is about a union that is unique and unlike all others. Although various cultures (and individuals) have marked the violation of exclusiveness at different points on a continuum from eye contact to sexual intercourse, the meaning of marriage is surely bound up in some mix of sexual and emotional exclusivity.

Marital ownership/exclusivity was once one—sided. Men "owned" women. What happens to the notion of ownership when it is mutually agreed on and mutually undertaken in love, when both "own" each other? Bilateral ownership may well transform the relationship from one of patriarchal possession and control into one of profound solidarity.

Monogamy in biblical tradition was primarily a limit in regard to female sexuality. If both parties are indeed "sanctified" to the other, then there would be no room for non—monogamous frames of marriage for either partner. Some members of the gay community

have claimed that this restriction is a feature of heterosexual marriage that ought not to be carried into gay marriage. The structure of the *kiddushin*, as focused as it is on the giving over of one's sexual body exclusively to one and only one partner, would not tolerate such notions of open marriage.

Given this understanding of *kiddushin*, gay couples committing to an exclusive relationship may be inclined to appropriate the *kiddushin* ritual and give two separate gifts of a ring, each accompanied by the formal sanctification, "Behold, you are consecrated to me by this ring according to laws of Moses and Israel." Because at present there is no widely accepted Mosaic or rabbinic rule that could be said to ground this sort of "*kiddushin*" ritual for gay couples, it may be best to exclude the latter phrase. However, this excision leaves a significant vacancy in the ritual. The phrase "according to the laws of Moses and Israel" lets us know that the words spoken and the commitments undertaken have a social context and sanction in a particular community. Marriage as an institution has little meaning unless there is a communal administration of some sort within which it makes a difference. Unfortunately, we cannot already have what we are in the process of building. Because we are only now creating the norms and the community that will take same—sex marriage seriously, we cannot now have the authority we seek. In the meantime, couples belonging to religious communities that support same—sex marriage might add "according to the custom of . . ." and add whatever synagogue or communal or religious body is the acting authority.

Another possibility is to contextualize the commitment in a much more personal way by adding the phrase "before my family, my friends, and my God." The advantage is that this works without any real communal sanction and that it rings true to many people that what is most important to them is that their commitment be honored both by their close associates and by God. Its weakness is that it is so personal that it lacks any frame of convention. Were the couple to change their minds the next morning, they could, in fact, part without a trace, having nothing but their own feelings to which to be held accountable.

This is one of the most difficult aspects of social change. It demands the capacity to act before a stage has been built, to be without any context, indeed to do in order to weave the very context that will make being possible. Dramatic social change always includes a fantasy. It demands that one behave as if the redemption has already come. Gay couples are "marrying" in order to create the very possibility of same—sex marriage as a cultural and legal reality. As such, while there is no "administration" of gay marriage, no solid ground of social or legal responsibility to which to be held accountable, the oath taken before friends, family, and God may be the closest frame to duty that can be mustered.

In the absence of an administration that defines the terms of commitment formally undertaken at a wedding and enforces them, at the very least it would seem important to ensure that both parties actually understand what they can expect from one another, what they are committing to one another before God. In this circumstance, a more specific delineation of the contracted rights and duties to which both parties have agreed would

seem to be an important part of the formal ritual. Were couples to entertain such a formulation, then there would be a need for a document drafted by both parties in advance that would address the details. Were such a document drafted, then each member of the couple in turn could place a ring on the partner's finger and say, "Behold, you are consecrated to me by this ring according to the promises I made to you."

***Ketubah* Revisited** The *ketubah* essentially accomplishes two tasks: it protects the woman from a man's power to summarily divorce his wife on a whim, and it sets out the obligations of each party. The standard *ketubah* requires the groom to promise one hundred silver pieces in the event of divorce or death. The bride is expected to bring from her family a dowry valued at one hundred silver pieces and the groom is to add to her dowry another one hundred silver pieces of his own. In total, every couple was expected to begin their lives together with two hundred silver pieces, and were he to divorce her, she would receive all three hundred silver pieces in the settlement. The protections of the *ketubah* were noble when they were enacted, but in practice contemporary U.S. divorce law exceeds these stipulations.

In addition to financial matters, duties and obligations of other sorts are recorded. He obligates himself to pay for her food and clothing and provide for her sexual needs, and she is expected to serve him and create a household according to "the custom of Jewish wives." The specific delineation of duties in the *ketubah* is highly gender role—determined and would not be typical or representative of the nature of marriage for many contemporary couples.

Historically, the *ketubah* was a template that was often modified to meet differing sorts of individual contractual interests. When the couples wished to stipulate duties and freedoms different from the norm, they were free, within certain limits, to change the language of the *ketubah*. A woman was free to ask that her *ketubah* specify that she would not do specific household chores and would instead contribute to the household income from her own resources, or she could ask for a stipulation that she be free to visit her family so many times a year and so on. These stipulations portray a male—dominant cultural norm in which a woman might easily be prevented from visiting her parents or siblings by her new husband and so might feel the need to make such interests explicit and contractually binding. Details of this sort, which helped to clarify the specifics of the particular relationship, were commonly worked out by families and by the couple in advance.

Heterosexual Orthodox couples desiring an egalitarian relationship still employ the standard *ketubah* in the interests of hallowing the rabbinic tradition. They adopt the form but not the social message. But it would make little sense for traditional gay and lesbian couples to follow suit.

Whether heterosexual couples find the patriarchal sex—role divisions problematic or not, gay couples simply do not have such gender distinctions to address, nor any long history of traditional ritual to honor. So if gay Jews choose not to use the *ketubah*, should another sort of document replace it? How should same—sex couples specify the duties and expectations of their relationships? We could just dispense with the *ketubah* and its delineation of

specifics altogether. It is common for marrying couples today to structure their own vows, which serves a similar purpose. Personal vows of love and commitment can be romantic and powerful, even if they are legally inconsequential. No one could take an ordinary wedding vow to court to prosecute for satisfaction of the terms, claiming the party of the first part did not fulfill "to have and to hold." Contemporary weddings are highly melodramatic affairs that speak grandiosely about romantic love, but whose formal commitments are vague—calling parties "to love, protect, and cherish" each other "till death do us part." The question that rarely gets answered at weddings is "What exactly are these two people committing to?" Now, it may be that vagueness is an unavoidable element, or even a necessary feature of marital commitment. Marriage is the sort of commitment that grounds itself in persons rather than in a set of well—defined contracted duties, and for good reason. The full set of obligations that will ensue over a lifetime following the "I do" can never be anticipated, much less delineated. Love commits us to duties whose specifications we cannot know in advance. However true it is that a vow of love cannot be fully quantified into a set of actions, the modern penchant for sentiment over content may still be a disingenuous way to avoid the fact that duties contracted must be fulfilled no matter what one happens to be feeling. Feelings inaugurate our commitment to action; we do not commit to feel, we commit to do. If so, then what sort of marriage contract ought we to draw up? How do we formally articulate what we mean by marriage? Of course, we may well need to invent totally new ways of contracting our love relationships. Rachel Adler has suggested the use of a legally binding relation described in the halakhah that is fully mutual and beyond gender, that of legal partnership.[12]

Partners in an economic enterprise are *shutafim* in Hebrew. They are bound to each other in a mutual fashion and can obligate themselves in specific ways as determined by their agreement. Such a contract, a *shtar shutafut*, could replace the *ketubah*. It would mark the establishment of the partnership and stipulate the duties that both enjoined upon each other. Partnership was traditionally accomplished by each party putting assets into a bag and lifting it together, symbolizing the joining together of their individual properties into a single enterprise. This ritual might be added to the giving of rings as a formal way to mark the joining of two households into one and not the adoption of a woman into the household of a man. The text would stipulate the duties and obligations of each partner to the other that emerge from their shared love. Both would sign it along with witnesses. It would provide couples an opportunity to discuss in advance many sensitive concerns and allow them to construct a partnership to fit their unique circumstances. As well, the document ought to stipulate how the relationship may be terminated and under what conditions.

Shutafut is a model of formally and legally delineating what, in fact, a union demands of each partner. It marks a full disclosure of assets and sets up a clear set of commitments for two parties to join their resources together for the purpose of creating a shared home. Interestingly, the sages considered partnership to be more than the giving over of financial resources toward a shared endeavor. A medieval halakhic authority, Rabbi Abraham ben David Zimri (referred to as the Ra'avad), uses astonishing language to describe business

partnership. Each party in a partnership, he suggests, becomes an *eved ivri*, a Jewish slave, to the other. Conceptually, Jewish slavery was a world apart from its harsh Roman counterpart or from the brutality of the European colonial slavery of Africans. For example, the halakhah obligated a master to give a slave food and lodging that was qualitatively similar to his or her own. Even so, the notion of partnership as slavery is surely jarring. However, here again, the mutuality of servitude transforms the very notion of slavery into something very different. Similar to the double—ring ceremony of *erusin*, the mutuality of slavery makes both parties slave and master, transforming a hierarchical relationship into a relationship with a profound union of rights and obligations. Each party enters into such a relationship knowing that he or she will serve and be served in love. Perhaps this is the deeper meaning of "I am my beloved's and my beloved is mine" (Song of Sol. 6:3).

It is customary in the establishment of a partnership (*shutafut*) that each party put something of value into a bag and then both lift the bag to inaugurate their joining together in a shared enterprise. This ritual marks the fact that the resources of two people are being pooled in the service of their new partnership. In order to situate this ritual in a more personal rather than merely businesslike context, it may be helpful to ask each partner to recite the line "I am my beloved's and my beloved is mine" from the Song of Sol. 6:3, which captures the ideas of partnership, mutual belonging, sexual exclusivity, and love, all in one.

The *erusin* is the decisive act of marriage. It is about the closing off of options. For some people, the choice of marriage is an act of determined ferociousness, a killing off of a myriad of potential lives in order to actually live one life. *Erusin* is the formal relinquishing of the infinite possibilities that loving one person uniquely demands. This sort of commitment entails a reckoning with mortality and a welcoming of finitude. Of course, a new—and in its own way infinite—territory is born by the decision to love one person. The joy of this new world is at the center of the *nisuin*.

***Nisuin* Revisited** Originally, the *nisuin* was the communal accompaniment of the bride to the home of the groom, the public recitation of the seven wedding blessings, the privacy of the couple (and originally the consummation), followed by the banquet. During the twelfth century, the canopy was instituted as a symbolic groom's domicile and in lieu of the couple's first consummation, the bride and groom are ushered into a private room in which they can share a few intimate moments behind a closed door before joining their guests at the banquet.

The *nisuin* is the joyous part of marriage. It is the ceremony that formally permits the bride and groom to be physically intimate with each other. If *erusin* is about sexual restriction, then *nisuin* is about sexual expression. The *erusin* moves from the public toward the private, while the *nisuin* moves from the private back to the public. The *erusin* is a segregation, the *nisuin* an inclusion, a weaving of the personal into the communal, by public acknowledgment and joyous celebration. This inauguration of the most intimate element of a couple's shared life is celebrated with family and friends amid dancing, music, and a lavish feast.

Last, the *nisuin* provides the cosmic frame for the whole affair. A wedding is about much more than the romantic joining of two lovers. It is about marking the love of two people as part of heaven's greater purposes. At the center of the *nisuin* is a story, a narrative that holds the power of what we are doing. If we are celebrating the love of two people, then a party will do. If we are tracing the lines in some grander plot in which the love of two is situated, then we have more solid ground for spiritual depth. The master story of the traditional wedding is conveyed with the seven blessings chanted under the *huppah* before family and friends. They are arguably the most beautiful part of the service.

1. Blessed are You, Lord our God, Ruler of the universe, who created the fruit of the vine.
2. Blessed are You, Lord our God, Ruler of the universe, who created everything for your glory.
3. Blessed are You, Lord our God, Ruler of the universe, shaper of humanity.
4. Blessed are You, Lord our God, Ruler of the universe, who has shaped human beings in his image, an image patterned after his likeness, and established from within it a perpetuation of itself. Blessed are You, Lord, shaper of humanity.
5. May the barren one exult and be glad as her children are joyfully gathered to her. Blessed are You, Lord, who gladdens Israel with her children.
6. Grant great joy to these loving friends as You once gladdened Your creations in the Garden of Eden. Blessed are You, Lord, who gladdens the groom and bride.
7. Blessed are You, Lord our God, Ruler of the universe, who created joy and gladness, groom and bride, merriment, song, pleasure and delight, love and harmony, peace and companionship. Lord, our God, may there soon be heard in the cities of Judah and the streets of Jerusalem the voice of joy and the voice of gladness, the voice of the groom and the voice of the bride, the rapturous voices of grooms from their bridal chambers, and of young people feasting and singing. Blessed are You, Lord, who gladdens the groom together with the bride.

The first blessing over wine is the way the tradition inaugurates joyous celebrations. The second and third blessings introduce the theme of creation. The second blessing is surprisingly apt for a same—sex wedding. It affirms that everything, perhaps even same—sex love, was created for the glory of God. The third blessing honors the creation of the human being. This blessing surely could be contextualized to apply well enough to gay weddings. However, we will soon see that the themes of creation are particularly relevant to straight weddings.

The next four blessings open up increasingly larger circles of relationship, carrying the love of two into ever more expansive frames of reference. Blessing four is about planting within the human body the power to reproduce. One of the obvious ways that marriage expands the love of two is through family. The duty to reproduce is the first commandment of the Torah. It is considered an affirmation of God's creation to participate in the refurbishment of humanity.

Blessing five is both about children and about the redemptive renewal of Zion in the end of days, when our mother Sarah, the once barren one, will rejoice in the return of her children to the land of Israel. Especially for Jews, family is the foundation of the covenantal promise. God takes Abraham outside and says, "Look up to the heavens, and count the stars if you can . . . so shall be your children" (Gen. 15:5). The Jewish people is a

chain of generations all bearing an ancient covenant with God begun with Abraham and Sarah. Jesus made disciples to carry his message; Abraham and Sarah made a baby.

Marriage extends the love of two outward, beyond the family to the community. The stability of community is aided by the fact that the disruptive power of sexual self—interest has been largely neutralized by marriage. Communities of singles are much more unstable, much more transient, and less prone to sinking roots in a particular place or building lasting institutions. Although this is surely a generalization to which there are exceptions, monogamous marriage is how sexuality can be given its due so that other socially constructive efforts can proceed more smoothly. The focus of romantic love is narrow. In its most frantic tropes, romantic passion utterly abandons the world. *Nisuin* articulates the love of two not only as a turning inward, but also as a reaching outward toward others. It is a pious custom for brides and grooms to walk down the aisle toward the *huppah* reciting psalms and praying for the needs of others. The turning away from the self at this moment is deemed so powerful that heaven cannot help but answer these prayers.

The last two blessings draw an even wider circle beyond the Jewish people to include the world. Blessing six refers to the bride and groom as loving friends. It is a beautiful expression that suggests an emotional bond quite distinct from the patriarchal role divisions of the *ketubah*.[13] The blessing continues and reminds us that every groom and bride are Adam and Eve in Eden. They reframe every straight wedding as a return to Paradise. Were the world to end and leave only the bride and groom, humanity could begin again. The wedding ritual marks every straight wedding as a reenactment of the beginnings of humanity. Mystically, to witness a wedding is to see a glimpse of Eden, the very beginning when human loneliness was healed in the union of Adam and Eve.

Blessing seven is based on the prophecy of Jeremiah following the destruction of Judea in 586 bce. Amid the ruins of the destroyed capital city, he promises that a day will come when there will again be singing and dancing in the streets of Jerusalem. He tells of wedding revelry and the sounds of children playing in the street. In Jeremiah's mythic frame, every straight wedding becomes a promise of a rebuilt Jerusalem, of a perfected world, more real and more attainable because it speaks not only of the lives present, but also of the generations to come that will be born out of this very moment. At every heterosexual wedding we are witnesses to the beginning and the end of time; we are carried back to Eden and forward to a Jerusalem rebuilt in joy and gladness, pleasure and delight, love and harmony, peace and companionship.

As beautiful and moving as these marital narratives are, they cannot be appropriated for a gay wedding because they do not constitute a gay story. The first few blessings might be salvaged, though by themselves they do not tell us what a gay wedding is, and the last four blessings do not seem right at all for same—sex weddings. Though gay couples are able to raise families, gay unions do not revisit Adam and Eve and the birth of life itself, nor do they promise the physical continuity toward the redeemed Jerusalem that Jeremiah envisioned. The linking of the generations past and future to a same—sex couple underneath the canopy is, at best, much less obvious. We must find more apt images and

metaphors for gay love and commitment, not only for the love of truth, but for the realness and power of the moment that we are celebrating. The poignancy of the moment for straight couples works because the metaphors are experientially genuine, mythically alive, and emotionally compelling. To employ them when they are not cheapens what is actually true and wondrous about same—sex marriage.

In straight marriage, God is linking the generations, connecting us all to our ancestors and to our future progeny, to Eden and Jerusalem. What is God up to in gay marriage that could be honored and celebrated? In fact, the question may be asked even more boldly: What are homosexuals here for? What larger purpose do we suppose God may have in mind for gay people? Is there an inherited sacred narrative that may frame gay love as part of God's great plan? Of course, there is no ready—made biblical narrative. A historically reviled sexuality cannot easily find its holy way. However, there is a sliver of the creation story, an interpretive midrash of the rabbis, and a mystical ritual that may offer a possibility.

In the Beginning The heterosexual focus of the creation story begins with Adam and Eve. Our starting point will be God and the origins, not of gender, but of partnership. Before creation, God alone fills existence. God's oneness is without division or separation. One is always all—powerful without needing any power—over to be so. One is stable and sure, unchanging and whole. The seed of creation is the idea of more than one. At the moment of creation, the magisterial oneness of God, according to Jewish mystics, concentrated itself to leave room for an—other. Creation begins with the possibility of two.

Two are a rickety thing, a temptation, a suspicious thing, an ecstatic, thrilling, dangerous thing. Two always have a history. The pain and pleasure of difference, the tragedy and glory of the lines that separate things, are the subtext of the first chapters of Genesis. Separation between things inaugurates creation. Light and dark, day and night, the waters below and above, the dry land and the seas are all separated. It is by these separations that creation unfolds. Much as the infant separates first physically and then psychically from its mother, little by little, the world comes to be by separations amid the chaos.

However, twos pose a problem. Separation is a birth pang that passes, but once there are two, how are they to relate? On the third day of creation, two great lights are created. The Hebrew word for lights (*meorot*) is missing a letter in the plural ending. The missing letter is not crucial for the meaning of the word, but the irregularity seems to suggest that something is wrong.

The sages explain that the pair of lights, the sun and the moon, was unstable in a way related to their being two. These twin creations became so highly problematic that God had to alter the original plan.

On the third day, we are told, God made the sun and the moon. "And God made the two great lights, the greater light to rule the day and the lesser light to rule the night, and the stars" (Gen. 1:16). Thus, after introducing the sun and the moon both as great, the text

adds that, actually, one light was great and the other was lesser. The contradiction between the verses generated a legend that is recorded in the Talmud.

"And God made the two great lights," but later it says: "the great light and the lesser light"! The moon said before the Holy One: Master of the world, is it possible for two kings to share (literally: to use) one crown? God said to her: Go and diminish yourself! She said before God: Because I asked a good question, I should diminish myself? God said: Go and rule both in day and in night. She said: What advantage is that? A candle in the daylight is useless. God said: Go and let Israel count their days and years by you. She said: They use the daylight [of the sun] to count seasonal cycles as well. . . . Seeing that she was not appeased, the Holy One said: Bring a (sacrificial) atonement for me that I diminished the moon! This is what R. Shimon ben Lakish said: What is different about the sacrifice (lit. ram) of the new moon that it is offered "for God" ["And one ram of the flock for a sin offering for God" (Num. 28:14) meaning for God's sin]? Said the Holy One: This ram shall be an atonement for me that I diminished the moon.[14] The problem of two great rulers sharing a single crown is a problem that God does not anticipate. The problem is raised by the moon, and the Creator solves the problem with a fixed hierarchy. The moon complains that she got the raw end of the deal just for asking a tough question, one that ostensibly might have been thought out in advance by the Creator. Failing to appease her, God accepts the duty to offer a sin offering on the occasion of every new moon, a monthly atonement for the lesser status he forced on her.

The moon's diminishment is understood by the sages as a sin committed against the moon for which God asks to atone. The midrash is an invitation by the rabbis to project a world of restored harmony and equality. A liturgy of sanctifying the new moon was begun in Talmudic times and embellished by later mystical traditions. If God brings a sacrificial atonement for the diminishment of the moon, then there must be some desire on high to truly repent of the wrong done to her. The laws of repentance require it. We learn that there is no forgiveness for sins between parties until the offended party has been appeased. A sacrifice alone cannot right a wrong done. Implicit in the midrash of the first century is Rabbi Isaac Luria's prayer for the moon's restoration.

Restoring the Moon: The Ritual of *Kiddush Levanah* The monthly Jewish ritual of the sanctification of the new moon, *Kiddush Levanah*, is recited during the waxing phase of the lunar cycle.[15] Commonly, the prayer is said at the conclusion of the Sabbath falling during this period. On this Saturday evening following the end of the prayer service, the congregation files outdoors and, underneath a visible moon, chants *Kiddush Levanah*. The sources of the first paragraph are biblical and rabbinic, but the messianic prayer that follows is pure Jewish mysticism: They taught in the school of Rabbi Yishmael: Were Israel able to greet their Father in heaven only once a month, it would be enough. Abaye says: For this reason it should be said standing.[16] "Who is she, coming up from the desert, leaning on her lover?" (Song of Sol. 8:5) May it be your will, O Lord, my God and the God of my fathers to fill in the darkness of the moon that she not be diminished at all? And let the light of the moon be as the light of the sun, and as the light of the seven days of creation,

just as she was before she was diminished, as it is said: "the two great lights." And may we be a fulfillment of the verse: "And they shall seek out the Lord their God and David their king." (Hosea 3:5) Amen.[17]

This tradition of the moon's diminution and its future restoration in the world to come is explicitly understood by Rashi, the most famous of medieval Jewish exegetes, as a veiled reference to women. He says that in the world to come, women will be renewed like the new moon.[18] This prayer, chanted before a waxing moon, imagines an increasing feminine light that will someday be restored to its full equality with the masculine light. If God atones for diminishing the moon and for the subjugation of Eve to Adam after the sin in the garden, then the way things are is not the way things ought to be or ultimately will be. The disharmonies that attended the banishment from Eden, the conflict between humans and the natural world, and the hierarchy of the sexes, these are just the beginning of a great drama, the last act of which will include God's joyous restoration of the moon.

Perhaps the place to end our same—sex marriage narrative is with the restoration of the moon and the healing of the hierarchy between men and women so apparent in the traditional wedding service. The ancient story of the moon's diminution and our monthly prayer for her renewal and restoration is already an established and venerable ritual introduced into Jewish custom by R. Yitzhak Luria in the sixteenth century. It is a beautiful ritual, full of dramatic imagery and power of its own. Its relationship to gay marriage is twofold.

The moon is a veiled reference to the feminine in the world, or perhaps, as mystics might say, to the feminine face of God, the *Shekhinah*. Our prayer for its restoration is our hope that we have indeed learned how two can rule with one crown, the sharing of power without hierarchy. Perhaps this is what God ought to have said to the moon in the first place, unless of course, this is the sort of knowledge that can only be acquired over time, a great deal of time, and at great cost. Only the fullest of loves makes it possible for two to rule with one crown. In this midrash we are offered an image of a love beyond gender that embodies neither submission nor domination, but equality and partnership. Might it be that gay relationships are perhaps a harbinger of the moon's restoration, a forward guard to the coming redemption? Remarkably, this text provides a narrative that also carries us back to both themes of creation and redemption. Although gay unions may not recapitulate creation and redemption in the same way that heterosexual unions do, it appears that the same two tropes are there after all. Straight unions are about the love of Adam and Eve that bears new life. Gay unions are about the flaws of the creation that we are called on to fix. Gay couples, who by definition cannot employ the scaffold of patriarchy to work out their power arrangements, have little choice but to learn how to share a single crown. Whereas straight unions offer a promise of a future redemption in flesh and blood, gay unions help to pave the way for us to heal the very problem of difference, and in a gesture no less redemptive than the rebuilding of Jerusalem, to restore the moon to her former glory.

In practice, the ritual of *Kiddush Levanah* includes the giving and receiving of peace. Under the faintest sliver of the moon's white crescent, each of those assembled blesses the new moon and then turns to one another and says, "*shalom aleichem,*" peace be unto you, to which a reverse greeting is returned, "*aleichem shalom,*" unto to you be peace. This greeting of peace is shared with three different people and often with a clasping of hands, so while one is seek ing three different people to greet, one is being greeted by others. The effect is a moment of communal bonding that is overtly mutual and about the interplay between giving and receiving. What better way to articulate the communal effect of marriage than to spread out its hope of peace and love between two toward the whole community.

The mystical prayer for the restoration of the moon serves as a foil to the degradations of the biblical creation story that unconsciously inhabit the traditional wedding. Before the first couple leaves the garden, Eve's destiny is set in both desire and subjugation: "Your urge shall be for your husband and he shall rule over you" (Gen. 3:16b). For thousands of years, the ongoing punishment of Eve has become Adam's abiding interest prettified by gowns and flowers. *Kiddush Levanah* reveals the fractures of the story, grasps them as a challenge to God's goodness that will in time be fixed, and calls on us to insure that the love we honor at a wedding will be shared with the wisdom of heart by which two can rule with a single crown.

While there are surely other creative ways to conduct a Jewish same— sex wedding, this sort of halakhic inquiry has, I hope, demonstrated how a close reading of wedding traditions can help to clarify what we mean by love, sex, gender, sanctity, and most important, marriage. Ought marriage rituals to sustain or resist the traditional gender role division? How far ought contemporaries to take their commitment to gender equality? Does marriage by definition entail a commitment to monogamy or may couples opt out of monogamy? What, if anything, does marriage have to do with children? Are there specific duties that couples undertake to perform for one another and should they be explicit? Are there understood terms of release from the marital promises and should they be spelled out? What, if any, are the extended familial, communal, and religious responsibilities entailed by marriage? And last, in what ways might gay coupling differ in any of these matters? By choosing the exclusive and monogamous structure of Jewish marriage (*kinyan*), creating new halakhic frameworks for enacting the formal relationship of couples (*shutafut*), and seeking a unique narrative to undergird and remythologize the ritual (*Kiddush Levanah*), I have not intended to resolve these questions, but rather to demonstrate how such a legal inquiry can be used to highlight what is at stake in the content of our wedding rituals, straight or gay. Whether the canopy and the rings are absolute necessities or not, a clearer understanding of what marriage means to us surely is.

For Israeli Gays, It's Not About the Ring

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A refugee lawyer, a transgender specialist, and six other people sit in a circle in an empty classroom on the second floor of Tel Aviv's Gay Center. They are here for the inauguration of Israel's first-ever LGBT legal clinic. The evening's keynote speaker is Frederick Hertz, an American legal expert who specializes in gay marriage. He describes a recent case he handled, in which a gay couple, one of them transgender, got married in Las Vegas as a man and a woman. Then they moved to California and wanted their respective healthcare benefits. "So the question," Hertz says, "was how to register that same-sex couple when they had been married as an opposite-sex couple."

The crowd stares blankly, some playing with their telephones. One attendee, wearing skinny jeans and Converse sneakers, breaks the collective yawn by quoting a New Yorker cartoon, republished in the Israeli newspaper *Haaretz*, to convey how Israelis feel about the American debate over gay marriage: "Gays and lesbians getting married — haven't they suffered enough?"

But down two flights of stairs, past a photo exhibition of Israeli drag queens and a poster for a Hebrew version of "Angels in America," a much livelier conversation is taking place in the Center's bar. Through a cloud of cigarette smoke and techno music, a group of activists is talking about what really matters to Israeli gays today: surrogacy.

Holding court at a wicker table is Michal Eden, who became Israel's first openly gay elected official when she won a seat on Tel Aviv's city council in 1998. She marvels at the fact that, while surrogacy is illegal for gay couples in Israel, an increasing number of them are paying foreign women to have their babies overseas.

"I'll tell you, I see it as a revolution," she says. "The fact that gay men from Israel can have a kid from India or from the United States and can raise it as part of a family, as a Jewish Israeli gay family."

Yuval Eggert, the Gay Center's executive director, drops by to join in the conversation. He can't stay long, since he is still on paternity leave (having just had a baby via a surrogate in India) and can barely keep his eyes open. "Ah, mazal tov!" Eden calls out.

Also shmoozing with the crowd is Itai Pinkas, a former Tel Aviv city councilman who had a child with his partner Yoav in 2010 via a surrogate from Mumbai. "A gay thirty-something man with a partner and a baby or two can definitely be considered a typical Tel Aviv specimen," he recently declared in a column for the Israeli daily *Maariv*.

But as gay men of means are increasingly willing to pay the hefty price of traveling abroad to find a surrogate, less well-off gays in Israel wonder why they are still denied the procedure at

home — which has been legal for straight couples in Israel since 1996. The problem is particularly striking in a country that touts its strong record on gay rights. Israel offers broad legal protections against discrimination based on sexual orientation, and allowed gays to serve in the military decades before the U.S. *Out Magazine* describes Tel Aviv as "the gay capital of the Middle East," and an American Airlines poll recently dubbed it the world's top gay travel destination. Indeed, Israel is so proud of its accomplishments on gay rights that it has even been accused of exploiting them internationally in order to "pinkwash" its treatment of the Palestinians.

This paradox has pushed Israeli gay activists and their allies toward making surrogacy rights their top political priority, much as marriage equality is for American gays. And like marriage, surrogacy has become a lightning-rod for controversy, touching on some of the most loaded issues facing Israel today: sexuality, gender, demography, and religion.

To a large extent, the lack of political interest in marriage equality among Israeli gays reflects a growing apathy about the official recognition of marriage in general. In Israel, all matters relating to marriage and divorce fall under the exclusive jurisdiction of religious courts — for Jews, this means the rabbinate. Israel has no institution of civil marriage, and thus can make no provisions for couples who fall outside traditional religious parameters. As a result, many straight couples in Israel do not legally marry, either because their marriages are unacceptable under religious law (such as interfaith marriages), or because they don't want to deal with the onerous process of getting the rabbinate's approval. "They have a private ceremony with the whole shebang and the wedding dress, but it's not a formal marriage, and they don't register with the Ministry of the Interior," says Victoria Gelfand, one of Israel's foremost civil rights attorneys focusing on gay family issues. "No one asks, 'Are you actually married or are you just pretending? ' Once you have a wedding band, no one asks whether you are a heterosexual or a homosexual couple."

According to a new report by Israel's Central Bureau of Statistics, the number of Jewish couples who live together without marrying is 2.5 times greater than it was a decade ago. Such couples — whether gay or straight —have been granted the status of "reputed" or common-law spouses by the Israeli Supreme Court, which gives them many of the same civil and legal rights as formally married couples. As a result, gay couples in Israel have far more rights than their counterparts in the U.S., which is part of what makes the issue of marriage equality seem less urgent. Unlike in America, moreover, getting married in Israel carries certain practical disadvantages, such as additional taxes and less paternity leave. And since all marriages performed overseas have been recognized in Israel as of 2006, gay couples who really want to get married can do so abroad.

Thus, it is not that gays are not interested in the right to marry; it is just so far from the current conception of marriage in Israel, and so many Israelis — gay and straight — have found easy ways around it. The fight for marriage equality is folded into the larger fight in Israel against religious control of the legal system, which extends far beyond the gay agenda.
So if marriage is not the Holy Grail for gays seeking equality and acceptance in Israel, what is? Increasingly the answer has to do with having children. "We Israelis chase heritage," Gelfand says. "When gay people come out of the closet here, the reaction of their parents is, 'Does this

mean you won't have children?' They're obsessed with ancestry." As one Israeli gay activist put it, "We're a country full of Jewish mothers. What do you expect?"

Religion's heavy influence on Israel society, while it limits gays' ability to marry, also makes Israeli culture "very family-oriented," says Doron Mamet, who founded a surrogacy consulting firm in Tel Aviv for gay couples. "In Israel, if you don't have your family, you don't exist. In order to be part of normative society, you need a family." The recent Central Bureau of Statistics report found that 75 percent of Israeli couples have children.

Having children in Israel carries a certain nationalist resonance, as well. Israel struggles to retain a Jewish majority in the land it controls between the Mediterranean Sea and the Jordan River. According to some estimates, however, the Arab and Jewish populations are coming precariously close to parity. This is part of the reason why Israel's policies on in-vitro fertilization (IVF) are among the world's most liberal, and why IVF is generously subsidized through the national healthcare system. (Israel leads the world in most IVF treatments administered per resident, with a ratio that is 13 times that of the United States.) "In my conversations, I hear having children described as the queer contribution to the building of the Jewish state," says Frederick Hertz. "I don't think an American gay dad would talk about having kids as building the American state."

"To be parents and reproduce, to produce Jews, is part of the Zionist ethos and very important to Israel's demographics," comments Eyal Gross, a law professor at Tel Aviv University. "You're a good gay, you brought us nice new children, many children—this is the ticket to normalization, much more than marriage."

Israel's obsession with having babies would seem to make it fertile ground for surrogacy rights. But while the religious community in Israel has been the primary driver of Israel's generous subsidies and lax regulation of IVF treatments, it was more cautious to embrace surrogacy. The unclear parentage produces complex Jewish legal issues about incest and adultery, as well as questions about whether the baby follows the religion of the surrogate or the egg donor.

Israel's ban on surrogacy – dating back to 1988 – was only challenged in 1995 by an Israeli couple, in which the wife had lost her uterus to cervical cancer. Though the Ministry of Health settled the case (making a one-time exception for the couple), the Israeli government agreed to set up a commission to investigate its surrogacy policies.

According to D. Kelly Weisberg, author of *The Birth of Surrogacy in Israel*, "This was the first committee in the history of Israel, to study issues that were related to women, that actually was composed of half-women members." This balance was further tipped when one of the two rabbis on the committee resigned after being appointed one of Israel's chief rabbis. The committee's official recommendation was to legalize surrogacy.
The report would have likely languished in the Knesset under the opposition of Israel's religious parties. But soon after its release, the Supreme Court annulled Israel's surrogacy ban in response to a case brought by a woman who was born without a uterus (and soon joined by 49 other plaintiffs). With five and a half months to enact a replacement for the ban, the Knesset adopted many of the commission's recommendations – legalizing surrogacy but within a strict regulatory framework.

The final law reflects deeper tensions within Israeli society. On the one hand, it includes many progressive elements, such as state subsidy of the process, as well as mandating that approval committees be made up equally of men and women. But in concession to the religious parties, it mandated that the surrogate be unmarried (which went against the commission's recommendation), unrelated to either of the parents, of the same religion as the parents, and that the mother's egg (not the surrogate's) and the father's sperm (not a donor's) be used – measures to mediate some of the rabbinic concerns about the process. Perhaps the most limiting condition in the new law was that the process was only legal for married couples in Israel – which, by excluding all singles, made the process out of reach for gays domestically.

With both surrogacy and adoption prohibited for gays in Israel, many gays in the late 1990s started to adopt children from foreign countries – particularly Guatemala, Russia, Ukraine, and other Eastern European countries. But in recent years, many of these countries have also prohibited gay couples from adopting. "The couples would get to the agency and fill out all the forms and things, and at the last second it would be, 'Oh, no, we can't get the child,'" Gelfand recounts. "So no one told them anything explicit, but the result was that somewhere around 2004-2005, gays could not adopt internationally anymore."

One alternative to adoption is co-parenting – finding a single woman to have a baby with one member of the gay couple, and then raising the child in coordination with her. These arrangements often end badly, however. "They expect things to be easy, and they say, 'Oh, we're with friends' but they don't necessarily agree on how to raise a child," Gelfand says. "They don't always bother to make a contract that defines their parentage: legal guardianship and custody, physical custody, visitation rights." Couples often find themselves prevented from moving too far away from the birth mother; or, if something happens to the biological father, the birth mother exercises her rights over the adoptive father.

The 2008 financial crisis, which Israel weathered relatively well, sent foreign currencies spiraling, making overseas surrogacy an increasingly affordable option for gays in Israel. "Every few days, there is some new clinic or new options in different countries," says Gelfand, as she sits in front of six oversized filing cabinets labeled "Surrogacy." A framed photograph of a gay couple holding a baby – her clients – rests on her desk. In her estimation, dozens of agencies have opened around the world in recent years, many of them targeting Israeli gays by organizing events and panels, and putting ads in gay specialty publications. Last month, the American-based support organization Men Having Babies held its first-ever international surrogacy conference in Israel, with fourteen local and international surrogacy groups co-sponsoring the event. According to the official program, the conference included a panel on the merits of religious conversion for babies born through surrogates, a *Kabbalat Shabbat* with surrogacy families, and a "Gay Parenting" exhibit, as well as break-out sessions and "speed group consults" that allowed participants to quickly interview the various clinics and agencies in attendance. According to participants, more than 200 people attended the event – which conference organizers said was the same size as similar conferences in New York and Barcelona, despite Tel Aviv's significantly smaller population.

Because the government does not regulate the practice, there are no formal statistics on Israelis

who seek surrogates overseas, but Gelfand estimates that 80 percent of them are gay couples or singles. A recent public meeting on the topic attracted more than 400 attendees, says Hertz, who had come to Israel to study marriage equality but quickly shifted his focus to the rise of surrogacy. According to John Weltman, founder and president of Circle Surrogacy in Boston, 10 percent of his clients are Israelis, and he has helped more than 50 gay Israeli couples have children.

Mamet founded his agency, Tammuz, after going through the surrogacy process himself in America. "We have our babies, healthy, happy – and expensive," he says as messengers rush in and out of his office picking up ultrasound DVDs or dropping off legal documents. He started the firm as a part-time job while he was taking care of his new infant, but in the four years since then, it has turned into a full-time occupation with five additional employees. "It started with one or two couples a year, but then it just became more and more popular, and now I see hundreds of couples a year – and I'm not the only agency," he says, scrolling down the firm's Facebook page, which is covered with pictures of his clients proudly showing off their newborns.

All of this has led to what the *Jerusalem Report* describes as "Israel's recent 'gayby' boom." Even if only a small slice of Israel's gay population has children, they have become highly visible in the gay community. One of Israel's leading cable channels just launched "Mom and Dads," about a gay couple raising a child, starring three of Israel's most popular actors. The main advertisement for last year's world-renowned Tel Aviv gay pride parade – on a massive billboard overlooking the city's Rabin Square – depicts a gay couple playing with their toddlers, both of whom were born through surrogates arranged by Mamet. "What I call the 'gay exception' for having kids is over in Israel," Hertz says. "Having kids is the new norm."

The idea of gays having children has become so common in Israel that gay men are now feeling the same pressure to reproduce as their straight counterparts. "Do you know how many times people have asked me, 'Why don't you want children?" Gross complained. "Once people see it exists, the pressure to do it is greater."

Walking down the street in Tel Aviv, Hertz is exasperated because these new trends have jammed his American-tuned "gaydar." "Straight men in Israel are much friendlier, more voluble, dress better, and have better haircuts than straight men in the U.S.," he says. "So when I see two guys pushing baby carriages, I can't tell if they are two straight guys filling in for their wives or a gay couple."

The ubiquity of babies born via overseas surrogates has jumpstarted the movement to secure surrogacy rights for Israeli gays. "Once it increases, people see it's possible, then they want it," Gross says. "Sometimes you want the idea but it seems very theoretical and far away. But once you see it exists, you say, 'Oh, it's possible!'"

Even those who can afford surrogacy are agitating for domestic rights, because the Israeli government is making it increasingly difficult for couples who use overseas surrogates to prove parenthood when the children are brought back to Israel, requiring blood tests and extensive paperwork. "They check everything with such a magnifying glass you wouldn't believe," says Gelfand, who spends much of her time guiding her clients through the convoluted process.

Mamet is in the process of contesting these requirements in the Supreme Court. The Israeli government also refuses to recognize the non-biological parent of children born through surrogacies overseas (even if they are listed on the foreign birth certificate), forcing that parent to go through an onerous adoption process when they return to Israel. “This is not like a second-parent adoption in the U.S. that takes a few weeks,” Gelfand says. “Why should people have to wait as much as three years to be legally acknowledged as parents here?” The Israeli Supreme Court recently heard two cases challenging this restriction, brought by gay couples who had babies with surrogates in Pennsylvania where both were listed as parents on the birth certificate.

A January 2013 decision by officials in India—the most common destination for Israelis seeking surrogates – limits “medical visas” for foreigners seeking surrogacy to married heterosexual couples. Numerous couples and agencies are turning to riskier options, such as Thailand, where surrogates are considered the legal mother of the child, and even genetically related fathers can only be considered a legal parent if they are married to the birth mother. Others are hiring Nepalese women to trek across the border to India to receive IVF treatments and then return to Nepal for birth, where surrogacy laws are more lax. Though activists are working to overturn the new Indian restrictions, thinning international options add to the urgency surrounding the issue of domestic surrogacy rights in Israel. More than 250 people came to a recent event that Mamet organized to discuss the implications of the India restrictions. “The topic is quite hot,” Mamet said, “and people are concerned.”

There are even religious gay groups in Israel who argue that because of the difficulty in finding Jewish surrogates overseas, legalizing surrogacy for gays in Israel would allow “Jewish eggs in Jewish mothers,” as Hertz puts it. “I speak to leaders of the modern Orthodox gay community, and now they’re saying that being gay does not exempt us from the obligation of having children.”

The issue became a flashpoint for gay activists and civil rights groups in 2010 when a Jerusalem family court judge refused to authorize a DNA test for a baby born to a gay couple via an Indian surrogate—a key step to getting Israeli citizenship for the child. “If it turns out that one of the people sitting here is a pedophile or a serial killer,” said the judge, “these are things the state has to check.” YouTube and social media sites lit up with outrage and support for the cause of surrogacy rights.

Mamet describes a “wave” of activism around the issue in recent months, led by new groups with names like “Surrogacy for Homosexuals in Israel” and “Surrogacy Rights for LGBT Parenting in Israel.” Rainbow Families, an annual convention for gay families, has also helped mobilize activists on the issue. One particularly poignant ad portrays a gay couple gleefully playing on the beach with their flaxen-haired young daughter, who is then abruptly taken away by two black-clad men in sunglasses. “Don’t let anyone take away your dream,” the subtitles read in Hebrew as piano keys strike in the background. “Surrogacy for gays is illegal in Israel. We also want a family and children.”

The ad has helped garner thousands of signatures for a petition to change Israel’s surrogacy laws. “While Western countries allow same-sex couples to have children through the process of surrogacy, Israel remains dark, depressing, and mainly, far behind,” says the petition’s

introduction. “Israeli law should allow anyone who wants to start a family, and anyone who wants to help a family, the freedom to exercise their fundamental rights.”

In 2003, a case brought by a lesbian who wanted the right to use a surrogate was sent to the Knesset by the Supreme Court. A committee was formed to explore the issue, but eventually decided not to change the law. “They said, ‘It worked so well during the 10 years that surrogacy has been legal for straight couples that we should leave it as is,’” Gelfand explains. “‘So well’ to them is that we were only having 20 births a year in the whole country via surrogacy.”
Some gay activists are heralding a new report by the Ministry of Health that recommends allowing gays the option of using an “altruistic surrogate”—someone who agrees to carry a child without receiving payment. Currently, there are no restrictions on how much straight couples can pay for surrogates. The report expressed concern that legalizing “commercial surrogacy” for gays would result in “emptying the whole market for the rest of the couples,” says Gelfand. “They say that the main users of the law are heterosexual couples with health issues, and they should remain the primary issue of concern.”

Veterans of the battle are not satisfied by the report. “I think they tried to be liberal there, but they basically did the opposite,” comments Mamet. “It’s basically saying gays cannot do it,” because it is so difficult to find altruistic surrogates. “And to say in a formal committee that they understand your need to have children, but there are people who are Class A, and you are Class B – it’s a problem.”

There is little hope, however, that the recommendations will become law, because Israel’s religious parties hold disproportionate sway in the Israel’s parliament. In an unlikely alliance, feminist groups are also mobilizing against broader legalization of surrogacy, seeing it as a form of exploitation toward women. Gay rights activists are pinning their hopes on the Supreme Court, which has traditionally been Israel’s most progressive force for civil rights. One surrogacy rights case was filed by a gay couple in 2010, but the Court convinced the plaintiffs to withdraw it while the Health Ministry committee examined the subject. Not satisfied with the final report, the couple intends to resubmit their petition soon.

There is growing optimism, however, that the disconnect between Israel’s liberal policies toward gay rights and its restrictive policies on gay surrogacy will force a reckoning sooner rather than later. “The issue has been raised too many times,” Gelfand says, “and they know they can’t neglect it and just say, ‘Don’t go there.’

Freedom From Religion In Israel: Civil Marriages And Non-Marital Cohabitation Of Israeli Jews Enter The Rabbinical Courts

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In the spring of 2007 I served as a witness in a Jewish divorce ceremony performed at the Tel Aviv District rabbinical court. The ceremony was held according to strict halachic rules: the get, the Jewish bill of divorce, was written on a sheet of parchment with a turkey's feather purchased, for the purpose of the ceremony, by the divorcing husband. The wife waited most of the time outside the courtroom, while the men – the judge, the scribe and the witnesses (all male) participated in the ancient ceremony, strictly adhering to all the rituals. The wife was called to the courtroom only for the final stage of the ceremony, in order to receive the get.

What was unusual about that ceremony was that the divorcing couple had married fourteen years earlier in the New York City Hall. Their marriage was civil, because they had not wanted to submit themselves to the rabbinical court's jurisdiction. Furthermore, just over a year earlier, in November 2006, the Israeli Supreme Court, backed by a rabbinical court opinion, ruled that although Jewish couples who married civilly were under the formal jurisdiction of the rabbinical court, in such cases the divorce procedure should be quicker and formalistic, and not a full get procedure, for these marriage are considered equivalent to marriages of non-Jews (See the full discussion below). Since then, several similar cases have come to my attention, and other instances have been reported in the media. While some judges in the rabbinical court system follow the 2006 ruling, it seems that the majority do not, and require a full religious get. Moreover, in recent years, the rabbinical court has demanded a full get ceremony in several separation cases of cohabiting couples (yedu'im be-tzibur, or 'reputed spouses'), on the grounds that there might have occurred 'betrothal by cohabitation' (kidushey bi'ah) over the course of their non-marital cohabitation period.

Strictly speaking, Jewish marriage does not have to be officiated at by an authority, nor does it have to be performed in a ceremony. The Mishnah states that "a woman is acquired in three ways... by money, by document, and by sexual intercourse [referred to here as "betrothal by cohabitation" - However, the Israeli Rabbinate promulgated in 1950 a regulation that states that only betrothal by money, officiated at by a licensed (Orthodox) rabbi is allowed in the State of Israel. This regulation does not invalidate marriage by document or by sexual intercourse, but rather renders them forbidden pursuant to the 1950 regulation, albeit with no effective legal sanction. Once they have been performed, they are valid according to Jewish law, and a get is needed in order to dissolve them.

If these recent cases represent a trend in the rabbinical court's approach to its jurisdiction over Israeli Jewish couples who seek to dissolve their relationship, it means that there is no way under current Israeli law to bypass Jewish divorce and thus, as I shall argue, Jewish religious marriage. This trend then signifies a dramatic setback from the status quo as it was for a number of years. Currently, those who wish to avoid the official rabbinical institution and its jurisdiction over their relationship have no recourse.

II. A Brief History of Israeli Family Law

A. The Legal Framework

The Ottoman Empire that ruled Palestine for four hundred years until its defeat by the British Empire in 1917, viewed family issues as religious issues. Therefore, it granted the various religious communities autonomy with regard to family law. Family matters were dealt with by the communities' own religious tribunals, according to their own religious laws.

The British Mandatory Government that ruled in Palestine between July 1922 and May 15, 1948 adopted the Ottoman arrangement with regard to family issues without any significant changes. Interestingly, while the Mandate Declaration and the Palestine Order in Council did not include any recognition in gender equality, it was included as a guiding principle in the United Nations' Partition Plan of November 29, 1947,in which the establishment of two states in Palestine, Jewish and Arab was decided. According to Section 47 of the Palestine Order in Council 1922-1947, enacted by the British Mandatory Government in Palestine, various matters of personal status, mainly issues of marriage and divorce, "continue to be judged under the personal, that is, in this context, the religious, law applying to the parties involved". When the State of Israel was founded, the Knesset preserved this system.

A few noteworthy changes were nevertheless made. It removed issues of adoption, inheritance, wills, and legacies from the list of personal status matters which are under the jurisdiction of the religious tribunals (Rosen-Zvi 1995: 76-7). Israeli family law is thus a hybrid system, "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." Over the years the extent of the applicability of religious law has been dramatically reduced. This reform was a result of a gradual enforcement of constitutional principles on the religious courts. However, marriage and divorce law still remains an area that is almost exclusively settled by religious law. Generally speaking, interventions on the part of civil law are minimal.

B. Religious Marriage and Divorce and its implications of Gender Equality

This issue has been extensively researched, debated, and written about. I do not aim to provide an exhaustive account here of the extensive literature on it, but rather to highlight several key points for the purpose of the underlying discussion in this article, which focuses on seemingly egalitarian alternatives to religious marriage.

All the religious systems that govern marriage and divorce in Israel are patriarchal. Under Jewish law, for example, marriage is a contract that creates property relations between the man and the woman. The man becomes the woman's owner, as the Hebrew word for husband, ba'al, suggests, through the transfer or acquisition of ownership. The married woman has very limited property rights under Jewish law. The husband also has complete control over the divorce, and in certain circumstances he may marry other women without divorcing his first wife.

Under these traditions, women have no legal competence and they are regarded as needing to be restrained, controlled, and protected by men.
Family law has been excused as a painful exception to the rule of gender equality in Israel, caused by the need to create unity among the various communities in the young state. The

political compromise made with the ultra-Orthodox, known as the status quo is perhaps the most venerable building block of Israeli politics. The status quo is seen as the source of the adoption of religious family law. As Nitza Berkovich has observed, for the most part what is viewed as a conflict between state and religion in Israel, in fact revolves around women's rights (Berkovich 1999: 283).

As Frances Raday has noted, the adoption of religious law inthe realm of family law has had a double effect. First, it embraced the position that women are subordinate to men, as the religious systems are traditionally patriarchal. Second,it has prevented women from participating as judges and lawyers in the religious courts' legal process (Raday 1995: 19, 26). The result was that women have been denied access to most effective participation in the construction and shaping of the law in this field. In recent years, however, there has been a change with the evolvement of a new paralegal profession, namely "rabbinical advocates." The rabbinical advocates may represent parties before the rabbinical courts (but not in the civil courts, since they are not lawyers, and have no legal education). Women are allowed to be rabbinical advocates. However, the scope of this progress is rather limited, as women are still banned from serving as judges in the rabbinical courts, and as this change applies only to the rabbinical courts, and not for other religious courts.

While civil marriage and non-marital cohabitation were originally used during the first two decades of Israel by couples who could not get married according to Jewish law (for example, because the man was a Cohen and the woman a divorcee), they were later regarded as an alternative for couples who wish to avoid the harsh consequences of religious marriage in terms of gender equality and freedom from religion. As we shall see in the following sections, to the extent that civil marriage and non-marital cohabitation have been used, at least by some Jewish couples, in order to bypass or alleviate the discriminatory consequences of Jewish law, these options now run the risk of becoming irrelevant.

III. Civil Marriage of Jews in Israel

A. Legal Recognition

As discussed above, there is no formal civil marriage option in Israel. There is one commonly practiced way of avoiding the civil marriage ban (and thus the monopoly of religion over marriage), which is to get married abroad in countries that allow civil marriage for non-citizens and non-residents. Many Israelis who choose this option flyto the nearest (and most affordable) country – Cyprus, but Prague is a popular marriage destination as well. Pursuant to the landmark 1963 Funk Schlesinger decision, Israeli authorities must register these couples upon their return as married. However, under Funk Schlesinger, registration of married couples is carried out for statistical purposes only. Such registration does not, in and of itself, prove the validity of the marriage under Israeli law. In addition to such marriages being recorded solely for statistical purposes and their validity not fully recognized by Israel, there are other disadvantages for Israelis who marry abroad.

For example, flying abroad to get married is not only cumbersome, it is available only to those middle- and upper-class Israelis who have the means to travel. For many Israelis, marriage abroad is not an option. Freedom from religion can be quite costly. It should be noted that

requiring the registration of civil marriages performed abroad was originally intended to alleviate the harsh consequences of the religious monopoly in this area for couples, both interfaith and intrafaith, who were legally forbidden to marry in Israel because of various religious requirements or prohibitions. The Supreme Court, practicing its liberal commitments, came to their aid and ordered Israeli authorities to register their foreign marriages. In recent decades, however, many Israeli coupleswho are eligible to marry under religious law have nevertheless chosen to marry abroad. Their main reasons are to protest against the religious law's monopoly over their intimate relations and a desire to be free of the jurisdiction of the religious courts, should they eventually have to seek a divorce. The rabbinical court's discriminatory approach to women, its endorsement of men's refusal to give a get, and the general notion of religious coercion are all reasons that couples wish to avoid the rabbinical court's jurisdiction.

According to various estimates, between 9.6 percent-12 percent of the registered marriages of Israelis in 2004, 2005 and 2006 were civil marriages (CBS website; Halperin-Kaddari and Karo 2009: 33). The CBS does not collect information on the reasons for civil marriages; therefore it is impossible to know how many couples who marry abroad do so because they are banned from religious marriage, and how many do so simply in order to avoid the religious establishment (Triger 2009). Furthermore, there is not legal duty to register in Israel marriages performed abroad, and therefore the figures that Israeli authorities have reflect only those couples who did register their marriages (Halperin-Kaddari and Karo 2009: 33).

B. The Rabbinical Court's Treatment of Civil Marriages of Israeli Jews

Perhaps the most underexplored aspect of civil marriages performed abroad and registered in Israel is the "freedom from religion" aspect, i.e., those Israelis who choose civil marriage abroad despite their eligibility to get married religiously in Israel. They do so in order to protest against the Israeli marriage law and to exercise what they believe is their right to freedom from religion. They believe that by doing so, they bypass the religious tribunals' jurisdiction. But they are mistaken.

According to the Israeli Ministry of the Interior, around 4,000 people married abroad in civil marriages in 1999. According to the Center for Alternative Marriages, an NGO that maintains a private registry of people who got married in civil marriages, 6400 couples married in civil marriages abroad, or made an alternative, unofficial marriage contract in Israel. This may explain the gap, since such contracts are ineligible for registration with the Ministry of the Interior, and thus are not recognized as marriage according to Israeli law (Shehori and Sheleg 2000).
In a 2006 landmark decision, one of the last written by Chief Justice Aharon Barak before his retirement, the Supreme Court rule held that the rabbinical court system has jurisdiction over the divorce of couples who married in civil ceremonies. The Court did rule, however, that such a divorce should be performed in a shorter procedure than a religious divorce, according to a principle of Jewish law known as "The Marriage of Children of Noah," which means that while marriages performed according to gentile laws are valid, their dissolution is much simpler than that of Jewish marriages.

The Court's decision was based on halachic principles, and adopted a decision by a panel of the rabbinical court, which the Supreme Court invited, in order to settle this issue with the rabbinical court's cooperation and approval. This ruling put an end to the long-held popular assumption that marrying civilly means avoiding the rabbinical court system. It was supposed to put an end also to the troubling practice of some rabbinical courts that did require full get in the dissolution of civil marriages between Israeli Jews. Rabbinical courts have since been largely ignoring this ruling by the Supreme Court. Even the rabbinical opinion underlying the Supreme Court's 2006 ruling left the door for a get procedure in cases of civil marriage open (The Law and its Decisor 2004: 9). Evidence for this troubling trend, which means that for Israeli Jews there is no way to avoid a religious divorce, even when avoiding a religious marriage, is somewhat anecdotal, but consistent.

Since there is no systematic publication of rabbinical court decisions, and since divorce cases that end with mutual consent, like the one I had served as a witness for, are not reported, we remain with a handful of case law that concern divorces of civilly married couples. Even if these cases, in which the rabbinical court requires a full get, are not representative, the bottom line is that such couples are forced to divorce in a religious tribunal, even if they are not religious and they reject religious marriage or divorce. Amihai Radzyner argues that the "Sons of Noah" ruling adopted by the Supreme Court is halachically incorrect, and that this explains why by and large rabbinical courts have continued with the practice of requiring a get even in civil marriages (Radzyner, forthcoming). The lack of a doctrine of binding precedent in the rabbinical courts further complicates matters, because despite that fact that this rabbinical ruling was submitted to the Supreme Court, and the Court adopted it, rabbinical courts do not see themselves bound by it.

An October 2010 ruling of the Netanya rabbinical court, in a divorce case of a couple that had married in Cyprus, is representative of the courts' current approach to civil marriages in reported cases. In this case, the man and the woman were eligible for religious marriage, but married in Cyprus because as secular Jews they wished to avoid religious requirements. Nevertheless, instead of performing a quick dissolution pursuant to the Supreme Court's 2006 ruling, the court required a full get, noting "this is the custom of the rabbinical courts in the country," and completely ignoring the 2006 ruling.

A June 2010 decision of the Haifa rabbinical court states that the notion that a full get is necessary in the dissolution of civil marriages is held only by a minority of the rabbis. The type of get that is required in these circumstances, according to this ruling, is only leravha demilta, for the sake of comity. Such a get, according to this ruling, can be given one-sidedly, even if the wife does not wish to divorce. The explanation for the discrepancy between these two rulings is that the common law principle of stare decisis is foreign to Jewish law, and rabbinical court judges view themselves as committed to follow only the rulings of the particular rabbi they adhere to and not necessarily those that in the civil system would be deemed as binding precedents. However, even rabbinical courts that accept the Supreme Court's framework have tried to extend their jurisdiction into a couple's dissolution process; ruling, for example, that the rabbinical court has jurisdiction not only over the dissolution of a civil marriage, but also over alimony and communal property division issues.

Family law scholars such as Professor Ruth Halperin-Kaddari and women's rights NGOs have warned against the rabbinical court's insistence on a full get procedure in the dissolution of civil marriages, noting that the result of its adoption would be more women who are chained to their marriages should their husbands refuse to give them a get or demand that they forfeit their share of the communal property and their right to alimony (quoted in Ettinger 2011). Media attention to this phenomenon is minimal.

Most Israelis are still unaware of this legal complication, and they believe that, as limited as it may be, there is still an option to avoid the religious system and practice their perceived right to freedom from religion by marrying abroad. Why did the rabbinical court opine that civil marriages should be dissolved in a quick procedure, but, when the Supreme Court adopted its approach, retreat and begin to demand a religious divorce despite the marriage being civil? What are the reasons, admitted and hidden, for this approach? And why do secular Israeli Jews still believe that when they marry abroad they escape the reach of religious law? Discussing the meaning of Jewish religious marriage and divorce, as well as religion's hegemony in this area, I will offer some explanations for these phenomena, which I call "the illusion of civil marriage in Israel."

IV. Cohabiting Couples ('Reputed Spouses')

A. Legal Recognition

According to the CBS data, in 2009 there were 62,000 cohabiting couples in Israel, 95 percent of which were Jewish. Israeli law recognizes cohabiting couples to an unusual degree. 'Reputed spouses,' or yedu'im be-tzibur, enjoy a wide array of rights, very close in their scope to those enjoyed by married couples. The 'reputed spouses' doctrine differs from the Anglo-American concept of common law marriage in the sense that the former is not a status. The Israeli Supreme Court has expressly stated that "reputed spouseship" is not common law marriage.

Unable or unwilling to marry according to the laws of the state, many couples have found themselves cohabitating without marriage, partly because there are many possible bans on marriage in Judaism. For example: a child born to a married woman from another man is labeled as a bastard (mamzer), and is not eligible to marry another Jew; a married woman who had a sexual relationship with another man is not allowed to marry the latter once her marriage is dissolved; a Cohen (a man belonging to the priestly caste) may not marry a divorced woman; a woman who has been separated from her husband for reasons beyond her control, such as war or disappearance – unfortunately, this is not a rare case in Israel – may not remarry at all. Moreover, women whose husbands refuse to divorce them are also banned from remarriage. Same-sex couples are also excluded from marriage (as well as from the 'reputed spouses' category). Interfaith marriages are not recognized either, since Judaism, Islam, and other religions impose restrictions on marriage between people of different religions, and in many cases even regard this kind of marriage as void.

The effect of awarding exclusivity to religious law in regard to marriage and divorce is, therefore, a de facto prohibition on interfaith marriage. The Supreme Court has refused to acknowledge the existence of common law marriage in a case of an interfaith couple. Naturally, 'reputed spouses' face crises and break-ups just like married couples, and all the usual problems

of division of common property, child custody, etc. The courts, beginning in the first years of the state, have developed an extensive case law that recognizes these relationships, and have gradually awarded these couples the same or similar benefits as those to which married couples are entitled. This may seem paradoxical given the religious monopoly over marriage in Israel, but as Professor Rosen-Zvi noted: The necessity to bridge the gaps between the religious law on the one hand and the prevalent world view and the reality of common practice on the other, also explains the paradox whereby a system expressing ultra-Puritanism through its marriage laws as settled under religious law, simultaneously gives normative expression to ultra-liberalism through the institution of "reputed spouses."

The extent of rights and obligations between 'reputed spouses' has triggered criticism from the liberal direction. Shahar Lifshitz, for example, has argued that by recognizing spousal rights for reputed spouses the courts and the legislature have ignored the variety of reasons that Jewish Israeli couples have for not getting married. While there is a strong case for applying rights for alimony or equitable distribution of the communal property in committed long term relationships of couple who could not get married under religious law, couples who expressly reject the marriage institution should not be part of the rights and obligations system that stems from marriage.

B. The Rabbinical Court's Jurisdiction over 'Reputed Spouses'

The Israeli Supreme Court has ruled that the dissolution of reputed spouseship is outside the jurisdiction of the rabbinical courts. In recent years, however, despite the case law, the rabbinical courts have increasingly asserted jurisdiction over such cases, amounting to demanding a get as part of the dissolution process. In other words, the rabbinical courts have concluded that the couples must get divorced even though they never married. In July 2007, the Haifa rabbinical court ruled that a get is required when a divorced couple re-cohabits after the divorce. This is because the couple might have executed betrothal by cohabitation. In another case, not involving a pre-married couple who reunited after their divorce, the Tel Aviv rabbinical court also asserted jurisdiction over a non-marital cohabitation dissolution case, accepting the framework of previous rulings requiring a full get as well.

As opposed to civil marriages, however, rabbinical courts have been very reluctant to assert jurisdiction over reputed spouses. While non-marital cohabitation is not sinful in Judaism as in Christianity (for example, children of cohabitants are fully legitimate), it is considered undesired, and somewhat immoral. Fearing to be perceived as sanctioning reputed spouseship, the rabbinical courts have not been so quick to embrace jurisdiction of cohabitants as they did with civil marriage. In the past the rabbinical court asserted jurisdiction over reputed spouses in rare cases, and has been criticized for doing so (Shochetman 1993). But this now seems to be changing. While the rabbinical court's stance concerning the first case described here (the divorced couple who got back together but did not re-marry) has some justification in Jewish law, it is nevertheless an alarming case, given the Rabbinate's own 1950 regulations concerning the exclusivity of betrothal by money which has to be performed by a licensed rabbi in the State of Israel.

Thus, it seems that freedom from religion for Jewish couples in Israel has been severely weakened by giving the rabbinical courts exclusive jurisdiction over civil marriage dissolution in the 2006 Jane Doe case. This alone undermined the possibility for couples to avoid the requirements of the rabbinical court. The rabbinical courts' growing tendency to require civilly married couples to obtain a get, has added insult to injury, and placed them in the same fragile position as religiously married couples, making women in particular vulnerable to extortion on the part of the husband in return for age). But perhaps the most alarming of these developments is the rabbinical court's imposition of a religious divorce on 'reputed spouses', who expressly chose not to get married. While they traditionally avoided jurisdiction over such couples, in recent years it seems that rabbinical courts are beginning to consider embracing such couples and undermining their intention to avoid Jewish divorce law, and, indeed, marriage and divorce law altogether, whether religious or civil. In the next section I propose some tentative explanations for these phenomena.

V. Tentative Explanations

A. Power Struggles between the Supreme Court and the Rabbinical System

Over the years, the Supreme Court has consistently strived to narrow the scope of the rabbinical courts' jurisdiction (Radzyner 2010). It ruled that on issues not related to personal status, the rabbinical court must apply Israeli civil law, and not Jewish law. It also ruled, in the 2006 Jane Doe case, that while the rabbinical courts have jurisdiction over the dissolution of civil marriages, they lack jurisdiction over all other issues related to the dissolution of the relationship (such as alimony and division of property).

While the Supreme Court is the highest authority in the Israeli system, the rabbinical courts have been more than reluctant to conform to its rulings. The lack of binding precedents in Jewish law and in the rabbinical courts could be one reason, but its treatment of both civil marriage and reputed spouseship could be interpreted as a reaction to the gradual reduction in its powers over religiously married couples. If this is true, it would not be the first time that the public pays the price for the power struggles between the dual and dueling systems of justice (Rosen-Zvi 1990: 127-130).

B. The Backlash against the Women's Rights Movements and Their Achievements

The displacement of otherwise religiously irrelevant legal institutions by the rabbinical courts can be explained in terms of the gender wars these courts have been invested in since their creation. Under Jewish law, women would undoubtedly lose due to the patriarchal nature of Jewish law. However, liberal institutions such as civil marriage and non-marital cohabitation were steadily advancing, which the rabbinical courts could not accept. Therefore, the appropriation of jurisdiction over civil marriage and non-marital cohabitation by the rabbinical courts seems to be a corrective measure meant to prevent women from choosing more egalitarian marital arrangements. As Ruth Halperin-Kaddari has argued, there is a direct link between discriminatory marriage and divorce law, and discrimination within family life: [T]he harsh discrimination against the woman and the blatant power discrepancy concerning the get influence the relationship itself, even if it does not end up in divorce.

Awareness of her legal inferiority influences also the way in which the woman perceives herself and her relationship with her spouse. Women internalize their inferiority within the relationship, and this internalization seeps into their general self-image...These notions seep into family life, and continue to construct the relationships between the genders with the children's generation. The family is the first and the basic site for social construction and for the socialization process the family's children – the boy and the girl – undergo. When this site is saturated with injustice, imbalance, abuse, and discrimination, how could they form an alternative lifestyle in the future? (Halperin-Kaddari 2001: 161-2)

We are apparently in the midst of a power struggle not only between the civil and religious court systems, but also between liberal, feminist, and egalitarian trends in parts of Israeli society, on the one hand, and the Rabbinate and the ultra-Orthodox communities on the other. Recent controversies over women's "modesty" and gender segregation attest to this powerful current within Israeli discourse on gender roles and gender equality. Raday (2003) and Gilligan & Richards (2008) believe that the patriarchal backlash against women's rights and liberation is a world-wide trend fueled by religious fundamentalism.

C. Slow Dissemination of Rabbinical Court Cases (or: Denial)

It is striking how little Israeli Jews know about religious marriage, the rabbinical court, and recognition of civil marriage and non-marital cohabitation. I have taught my family law course more than a dozen times since 2004 to hundreds of students in various institutions in Israel, and the level of ignorance concerning the consequences of various forms of marriage or non-marital cohabitation is consistently high. This means that most students believe that civil marriage or non-marital cohabitation are paths out of the grip of the rabbinical court. There is no reason to believe that the level of awareness of other Israelis, who are not law students, is significantly different. While the slow dissemination of the recent 'reputed spouses' cases is understandable, given the rarity and novelty of the cases, it is hard to explain Israelis' ignorance concerning developments regarding the dissolution of civil marriages. Rabbinical court jurisdiction has been asserted over such cases for decades, and the 2006 case only clarified the procedure (apparently not very effectively).

Perhaps this ignorance is more accurately described as denial, which is characteristic of many marrying couples of all sorts: denial of the possibility of divorce. This is the same psychological mechanism that deters many couples from signing a prenuptial agreement, believing that this will destroy romance, and the general belief that although the divorce rate is constantly on the rise, "this is not going to happen to us" and "you only get married once." Such denial mechanism could feed the notion that there is freedom from religion for those who get married abroad in a civil marriage, or choose not to get married at all, instead of taking political responsibility over the religious monopoly in the area of marriage and divorce, and committing to changing the system. As I explain below, perhaps Israeli Jews do not want to change the system, because they believe that the religion-nation nexus it too important and that, despite their own secularism, Orthodox Judaism has come to be a natural and taken-for-granted component of the Jewish-Israeli identity.

D. The Significance of Judaism in the Identity of Israeli Jews

A 2009 Central Bureau of Statistics (CBS) survey found that 62 percent of Israeli Jews over the age of 20 thought that civil marriage should be allowed in Israel. Fifty-seven percent believed that separation between state and religion should be instituted in Israel (CBS website). A 2011 survey revealed, however, that only 44 percent of Israeli Jews believe that in the case of a collision, democracy should override Judaism (Arian et al, 2011: 18). According to that survey, only 51 percent of Israeli Jews supported civil marriage (Arian et al, 2011: 16), but 80 percent answered that "it is 'important' or 'very important' to be married by a rabbi" (Arian et al 2011: 42).

Seval Yildirim has pointed out that "Secularism as an ideology and a political system was born in Christian Europe" (Yildirim 2004: 903). Secularism does not necessarily mean gender equality (Yildirim 2005: 350-1). In fact, there are reasonable grounds to believe that the current system of religious monopoly over marriage and divorce is the result of secular male interests as much as it is the result of religious lobbying (Lahav 1994; Berkovich 1999; Triger 2005). Patriarchy is not necessarily religious; it can be secular as well. In addition, patriarchal values are not necessarily male; Women can share them and enforce them (De Beauvoir 2011: 294-295).

Could it be that Israeli Jews, even those who characterize themselves as secular and committed to gender equality, choose to comply with the discriminatory patriarchal family law system because they identify with its core values? Perhaps such complicity, even if unconscious, could be attributed to some of those who marry civilly and register their marriages in Israel. But those who chose to cohabit probably do not share the notion that marriage, religion, and nationalism are related.

VI. Conclusion

This purpose of this article is to draw attention to the gradual depletion of carefully developed alternatives to Jewish marriage in Israel. Decades of case law and legislation which have recognized the rights of civilly married couples and reputed spouses are now facing the risk of becoming moot, as the rabbinical courts increasingly require a get in order to dissolve these relationships, just as if these couples had married according to halacha.

I have also offered four possible explanations for these developments, namely:

1) Power struggles between the civil and the religious courts ystems conducted on the backs of couples during their most vulnerable period in life, namely the dissolution of their relationships;

2) Part of a backlash against the improvement in women's status in general and in family law in particular, many of these championed by the Supreme Court;

3) Facilitated by the ignorance of many Israeli Jews regarding the centrality of the rabbinical courts even in the process of the dissolution of civil marriages;

4) Related to a shared set of values between religious and secular Jews in Israel, especially when it comes to women's status, the connection between marriage and religion, and between marriage, religion, and national identity.

Further investigation into these issues is needed, as the jurisdiction battles will continue to unfold and the trends sketched here will become clearer and more entrenched. What is already quite evident, even from the handful of reported cases that exist, is that Israelis' freedom from religion in the realm of marriage and divorce, and indeed Israelis' freedom from marriage in general, is under serious risk because of the rabbinical courts' increasing tendency to disrespect couples' express choices in this vitally important area

Same-Sex Marriage And Israeli Law

Dr. Ayelet Blecher-Prigat

Note: this article has not been updated in the past year – and the footnotes have been omitted for ease of reading

INTRODUCTION

The status of same-sex relationships under Israeli law is somewhat schizophrenic. On one hand, Israeli family law, and the formal laws that pertain to marriage and divorce in particular, are conservative religious laws. On the other hand, against this traditionalist legal background, the Israeli legal system has demonstrated flexibility, especially by the Supreme Court, which issued a line of cases recognizing rights, obligations, and benefits that arise from such relationships.

THE LEGAL FRAMEWORK: MARRIAGE AND DIVORCE

Israeli family law is characterized by a split in law as well as a split in jurisdiction. In terms of law, while some aspects of family law are governed by civil (and territorial) law, other aspects, defined as "matters of personal status" are governed by the "personal law" of the pertinent individual. Marriage and divorce (in the narrow sense) are considered as personal status matters, and thus no civil marriage exists in Israel and no uniform territorial law applies to marriage in Israel. Marriage is rather governed by the personal law of the relevant parties.

The personal law of Israeli citizens and residents is their religious law, provided they belong to a recognized religious community. Various religious communities are recognized in Israel: Jews, Muslims, Druze, and ten Christian denominations. For Israeli citizens who do not belong to a recognized religious community, either because they are members of a religious community not recognized under Israeli law, or because they do not belong to any religion, no applicable personal law applies (and thus no law applies under which they can get married). The personal law of non-resident foreign citizens is their law of nationality ("unless that law imports the law of their domicile, in which case the latter shall be applied").

The split between the civil and religious systems on family law matters is not only in law but in jurisdiction as well. Recognized religious communities under Israeli law operate religious courts. Here again, some aspects of family law are under the exclusive jurisdiction of the relevant religious courts, while others are under a parallel jurisdiction of the civil system of family courts and the religious system.

Marriage and divorce are under the exclusive jurisdiction of the relevant religious courts, excluding dissolution of inter-faith marriages or marriages of individuals who do not belong to a recognized religious community. Dissolution of such marriages is generally under

the jurisdiction of the (civil) family courts. Civil family courts also have jurisdiction to decide on matters of marriage and divorce of same-faith couples who belong to a recognized religious community when such matters arise incidentally to proceedings before the family court. It should be noted that religious affiliation for purposes of law and jurisdiction in Israel is independent from personal beliefs and instead relies on the relevant religious laws.

Each recognized religious community, based on its own religious law, determines whether an individual does or does not belong. Thus, even those who identify themselves as secular, atheist, or agnostic as a matter of personal belief may still be considered members of a religious community for purposes of law and jurisdiction. Conversely, individuals who see themselves as affiliated with a particular religion may not be considered as belonging to this religion for purposes of personal law if the relevant religious law does not recognize them as members/affiliated.

MARRIAGE AND ISRAELI CONSTITUTIONAL LAW

When the state of Israel was founded in 1948, it was assumed that it would adopt a constitution and a bill of rights, as it was specifically provided in Israel's Declaration of Independence. However, political controversies over the content of the future constitution made it clear that drafting a constitution that would gain broad-based support was not achievable for the time being. As a result, in 1950 a compromise known as the "Harari Resolution" was adopted, according to which the future constitution would be enacted gradually, chapter by chapter in the form of "Basic Laws," so that controversies would be addressed one by one.

Until 1992, the enacted Basic Laws addressed the structure of the State's political and legal system and the powers of its principal institutions, and did not protect human rights. Therefore, they did not provide a safeguard of substantive values. In 1992 this state of affairs changed when the Israeli Knesset enacted two Basic Laws: *Human Dignity and Liberty*[14] and *Freedom of Occupation*. Both of these laws were designed to protect human rights within their respective spheres of influence. As interpreted by the Israeli Supreme Court, these Basic Laws provide for judicial review (by any Israeli court, not just the Supreme Court) of Knesset legislation, transforming Israel from a parliament- supremacy democracy to a constitutional democracy. Nonetheless, the so-called Israeli "constitutional revolution" of 1992 has had a limited impact on family law matters in general and on the right to marry in particular.

Basic Law: *Human Dignity and Liberty* contains no express right to marry. The right to equality and freedom of religion are absent from this Basic Law as well. Legislative history suggests that the omission of these rights from the Basic Law was intentional and motivated by objections expressed by some of Israel's religious political parties. These objections stemmed from the concern that guaranteeing a right to equality, freedom of religion, and certainly an express right to marry, would bring about the eventual invalidation of existing religious family law.

Despite the absence of an express constitutional right to marry in the Basic Law, the Supreme Court has interpreted the right to Human Dignity included in the Basic Law as including a right to marry. As to the right to equality, it has also been interpreted as being included in the general right to Human Dignity, but only so far as this right is closely and objectively connected with human dignity. Under this approach, the right to equality is not recognized as an independently implied or non-enumerated constitutional right. Consequentially, not all aspects of equality are elevated to the level of constitutional rights, as they would have, had equality been recognized as a self- sustaining constitutional right. Whether or not equal access to the institution of marriage is an integral part of the right to human dignity was not resolved by the Supreme Court.

In any event, the recognition of a Basic Right to marry and the constitutionality of some aspects of the right to equality with regard to family life have very limited effect on the laws of marriage and divorce, as legislation that predated the Basic Law is immune from judicial review (as an additional "safety measure)", enshrining religious family law) Article 10 of the Basic Law *Human Dignity and Liberty* (titled "Validity of Laws") states that "This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law." The former chief Justice Barak qualified the effect of the Validity of Laws clause, holding that the interpretation of laws that predated the Basic Law is affected by it. The reasoning he provided was that "the freezing of the validity of a law is not tantamount to the freezing of its meaning." Nonetheless, this qualification also has a very limited impact on family law issues since it does not apply to religious laws which are to be interpreted according to the relevant religious authorities.

SAME-SEX FORMAL MARRIAGE UNDER ISRAELI LAW

SAME-SEX FORMAL MARRIAGE IN ISRAEL

As noted, Israeli law provides no uniform territorial law that applies to marriage and no civil marriage exists in Israel. Marriage is governed solely by the personal law of the relevant parties. Theoretically, if a relevant religious law of a recognized religious community recognized same-sex marriage, then same-sex couples could get married in Israel. As a matter of fact, however, the religious communities recognized in Israel do not recognize same-sex marriage. As a result, same sex couples cannot marry in Israel.

SAME-SEX FORMAL MARRIAGES CELEBRATED ABROAD

Same-sex couples are not the only couples who cannot get married in Israel due to the complete governance of religious laws on marriage in Israel. Therefore, since the early days of the State of Israel, couples who could not marry in Israel (or did not want a religious marriage) have looked for ways to bypass the religious restrictions on marriage in Israel. One such commonly practiced way is to get married abroad. The validity under Israeli law of a civil marriage celebrated abroad between two Israeli citizens was unclear for over 40 years. Nonetheless, regardless of their validity, civil marriages are registered in the Israeli

population registry based on the landmark decision of the Supreme Court in *Funk Shlezinger v. Minister of the Interior* handed down almost 50 years ago. The *Funk-Shlezinger* case involved a Belgian Catholic woman and an Israeli Jewish man who were married in Cyprus and asked to be registered as married in the Population Registry in Israel. The Ministry of Interior refused their request based on the argument that civil marriage of Israeli citizens is not recognized under Israeli law.

The couple filed a petition against the Minister of the Interior's decision with the High Court of Justice, and the Court accepted the petition. The majority of the Court held that the registrar must enter information regarding marital status provided by applicants and accompanied by the public record into the population registry. The Court reasoned that the registry merely collects statistical information, which could either be true or false. The records of the population registry do not have the force of evidence or proof as to the veracity of the data they contain, especially regarding marital status. According to the Court, the registration is an administrative, and not a judicial, procedure, and thus the validity of the marriage is not within the scope of issues to be considered by the registrar. The registrar may, according to the Court, refuse to enter information provided by a party when it is manifestly incorrect, such as when an individual who is clearly an adult asks to be registered as a five-year-old child. The Court emphasized, however, that it only ordered the registration of civil marriage and did not decide the issue of their validity under Israeli law.

While the *Funk-Shlezinger* decision may at first seem merely a formalistic decision (especially given the Court's emphasis that it did not address the question of validity), it in fact provided a practical solution for couples who were married in a civil ceremony outside Israel. Despite the "statistical registry only" declaration of the Court that relies on the formal status of the registry, in reality registration has broader practical implications. As a result of this decision, civilly married couples enjoy practically all economic benefits of the state as do couples who were formally married in religious marriages in Israel.

In 2006 the *Funk-Shlezinger* precedent was applied to same-sex couples who were married in a civil ceremony outside Israel. The *Ben-Ari* case involved five gay couples who were married in Canada and requested to be registered in the Population Registry as married, based on *Funk-Shlezinger*. The Ministry of Interior refused to change their registration status from "single" to "married" and an appeal was brought before the Supreme Court. The State did not challenge the *Funk-Shlezinger* decision, despite criticism over this decision in case-law and academic writing focusing on the "statistical registry only" argument that invokes the formal status of the registry but ignores the reality of the far broader implication of it. The State did, however, attempt to distinguish *Funk-Shlezinger*, arguing that same-sex marriage is a legal formation not recognized in Israel. According to the State, "marriage" within the population registry, means marriage within the basic "legal formation" in Israeli law, which is marriage between a man and a woman. *Funk-Shlezinger* concerns legal formations recognized under Israeli law (i.e. civil marriages) where only their validity is in question.

The Court rejected the State's argument since providing the registrar with the discretion to consider the existence or lack thereof of "legal formats" under Israeli law stands contrary to

current doctrine, according to which the registrar's role is an administrative and not a judicial one. It thus ordered the registrar to register the appellant couples as married. The Court stated, however, in accordance with the *Funk- Shlezinger* line of reasoning, that the registration is not indicative of whether or not Israeli law recognizes same-sex marriage. It also emphasized that its decision did not address the recognition of same-sex marriage in Israel.

The Court's emphasis that its decision does not entail the recognition of same-sex marriage should supposedly not raise an alarm, as it is in line with the *Funk-Schlezinger* precedent. As noted, the distinction between registration and recognition entailed the de- facto recognition of civil marriage (of opposite-sex couples), though a formal recognition was not provided. This reality can materialize for same-sex couples who were married abroad. There is a risk, though, that certain government agencies and other third parties that ordinarily rely on registration will adhere to the formal status of the registration in the case of same-sex marriages, and maintain that registration does not entail validity. If this is the case, same-sex couples can theoretically invoke a claim of discrimination vis-à-vis opposite-sex couples who married civilly abroad. Such a claim, however, could challenge the entire registration/recognition distinction and the "statistical registration only" argument that enabled this reality in the first place.

In this respect, it should be noted that in the dissent in *Ben-Ari*, Justice Rubinstein based his decision on the reality entailed by registration rather than on its formal status. Justice Rubinstein held that we are no longer talking about a mere statistical tool, but of a social-public symbol that has extensive practical implications for the authorities as well as for the general public. The average person, noted Rubinstein, does not distinguish between the registration and the recognition of status.

It seems, indeed, that the Israeli Supreme Court is now moving toward full recognition of civil marriages entered into abroad between two Israeli citizens, though it is doing so very slowly and step by step. For many years, the Court's position, invoked for the first time in *Funk-Shlezinger* and continued for over forty years, has been that it does not decide the question of validity of civil marriage conducted abroad under Israeli law. Nonetheless, on the same day the *Ben-Ari* decision was handed down, the Court issued an additional decision taking a step further regarding the recognition of civil marriages. In *Plonit v. The Regional Rabbinical Court Tel Aviv*, the Court held that civil marriage performed abroad between an Israeli Jewish man and an Israeli Jewish woman is valid under Israeli law, although Jewish law does not recognize the civil marriage as creating a valid matrimonial bond. In order to understand the possible implication of this decision for the question of the Israeli stance regarding same-sex marriage conducted abroad, a more detailed account of the decision is provided.

The Court's opinion, delivered by President Barak, considered three alternative approaches that were developed in case-law and scholarly writing regarding the validity of such marriages under Israeli law. The first approach ignores the fact that the marriage ceremony was conducted abroad, stating that it does not alter the applicability of (religious) personal law in matters concerning marriage, including the determination of a marriage's validity. Thus, where the relevant personal law of the parties does not recognize a civil

marriage ceremony as creating a valid matrimonial bond, the marriage is not legally valid. The second approach distinguishes between questions of form and questions of capacity to marry. Whereas questions concerning the form of the marriage are governed by the law of the place where the wedding was performed (*locus regit actum*), questions that concern substance, meaning the capacity of the parties to marry, are governed by the law of their domicile at the time of the marriage, which for Israelis refers to their personal (religious) law.

Under this approach a distinction is made between those who have the *capacity* to marry in Israel in a religious ceremony, but chose a civil ceremony abroad, and those who *could not* marry in Israel and were forced to marry abroad. Though the plight of the latter is greater, this approach would invalidate their marriage, while upholding the marriage of individuals who are able to marry under Israeli law, but choose not to for whatever reason. The third and final approach does not distinguish between form and capacity but rather considers both issues according to the law of the place where the wedding was performed. According to this approach, subject to limitations of public policy, the validity of the marriage is governed by the law of the country where the marriage ceremony took place.

Until Barak's groundbreaking ruling in the case of *Plonit v. The Regional Rabbinical Court Tel Aviv*, the Israeli Supreme Court had avoided deciding on the validity of civil weddings conducted abroad for over forty (40) years. Despite situations in which the court had sat in a special extended panel, especially for deciding on this issue, the Court continued to declare that the decision concerning the validity of civil marriage between Israelis conducted abroad was a matter for the legislature to decide.

Nonetheless, in 2006 President Barak concluded that it was time to decide on the validity of civil marriages conducted abroad. In his decision in the *Plonit v. The Regional Rabbinical Court Tel Aviv* case, President Barak rejected the first approach to marriage validity, which conditions the validity of the marriage on the personal-religious laws of the parties. In rejecting this approach, Barak's opinion relied on the constitutionalization of the right to marry as recognized in Supreme Court case-law. Since the parties in this case had the capacity to marry each other under their personal (Jewish) law, President Barak held that there was no need to determine whether to adopt the second or third approach to recognition of foreign marriages in order to resolve the case at hand. According to this decision, a civil marriage conducted abroad is considered to be legally valid in Israel at least where both parties to the marriage had the capacity to legally marry within the state of Israel. The validity of civil marriages conducted abroad between individuals who could not get married in Israel (such as same sex couples) remained open for future decision.

In a subsequent case, *Ploni v. Plonit*, the married couple belonged to different religions (the man was Jewish and the woman Christian), and thus had no capacity to marry in Israel. Justice Barak stated that he considered the third approach, according to which the validity of the marriage was to be determined by the law of the state in which the couple were married, to be the correct approach. In this case as well, the fact that this approach was most compatible with the constitutional right to marry was a central consideration for Barak. Nonetheless this was a mere dictum as Barak resolved the case, which dealt with matters of inheritance, without addressing the question of marital validity for all purposes.

It is hard to predict how these decisions will affect the status of same-sex marriage conducted abroad, under Israeli law. On the one hand, it seems that Barak's position suggests that same-sex marriage conducted abroad should be recognized for all purposes under Israeli law. On the other hand, beyond the fact that Barak's position was merely a dictum, according to *Ben-Ari* the question regarding same-sex marriage concerns not only their validity. *Ben-Ari* (at least supposedly) left open the question of whether Israeli law defines marriage as a relationship between a man and a woman, or whether it recognizes the "legal format" of same-sex marriage. In the meantime, same- sex couples who married abroad are registered as married, and enjoy most of the social-economic rights enjoyed by couples who were married in a religious ceremony in Israel, as shall be elaborated below.

DISSOLVING SAME-SEX MARRIAGES

The question regarding dissolution of a same-sex marital bond is relevant regarding same-sex couples who were married in a civil ceremony abroad (as in Israel, same-sex couples cannot get married). While the Supreme Court ordered the registration of same- sex marriage entered into outside Israel, it left open the question regarding the dissolution of such marriages. Though registration in the population registry is not indicative of validity or recognition, changes in registration require either a public certificate that testifies to the change or judicial decision determining such change. A statement of the applicant concerning the change is insufficient by itself to serve as basis for a change in registration. The question is, which court will have jurisdiction under Israeli law to dissolve the marriage?

In matters of divorce, a distinction is made regarding jurisdiction between same- faith marriages of couples who belong to a recognized legal community in Israel and marriages that do not fall under this category (inter-faith marriages, marriages of individuals who do not belong to a recognized legal community, and individuals who have no religion). Where both parties belong to the same recognized religion, then the relevant religious court allegedly has jurisdiction over divorce proceedings between the spouses. As noted at the beginning, matters of marriage and divorce are under the exclusive jurisdiction of the religious courts in Israel. In the past some doubts have been raised regarding the jurisdiction of the rabbinical courts in dissolving civil marriages entered into abroad between Jewish spouses.

In *Plonit v. The Regional Rabbinical Court Tel Aviv* the Supreme Court held that the rabbinical court has jurisdiction over dissolution of marriage between two Jewish individuals, even if they married in a civil ceremony. The Court's judgment endorsed the High Rabbinical Court's judgment in this matter and its position on civil marriage. The High Rabbinical Court stated that the Jewish law (the *Halakha*) contains rules that apply to non-Jews (Noahides),[43] and they also refer to marriage and divorce. Although Jewish Law does not recognize a civil ceremony of marriage as creating a valid Jewish marital bond, the Noahide rules recognize civil marriage at least for limited purposes, even if it was conducted between a Jewish couple. Noahide rules enable a rabbinical court to grant a divorce (which is different from the Jewish divorce – the *Get*) to Jewish couples who were married civilly. The divorce regime for Noahide marriages is a no-fault regime, and the ground for the judgment of divorce is marital breakdown when it is infeasible to reinstate marital peace.

The Supreme Court endorsed this judgment of the High Rabbinical Court but clarified that rabbinical courts have jurisdiction only on granting the divorce itself for couples who were married civilly. The monetary aspects of dissolving civil marriage shall be under the jurisdiction of the civil family courts as Jewish law had not developed a legal corpus regarding the monetary aspects of Noahide marriage.

Allegedly, based on *Plonit v. The Regional Rabbinical Court Tel Aviv*, dissolution of a marital bond between a same-sex couple who each belong to the same recognized religious community is under the jurisdiction of the relevant religious court. If this is the case, then the relevant religious court will most probably issue a judgment according to which the parties are not married (and hence their registration should be changed from "married" to "single"), since the recognized religious courts in Israel do not recognize same-sex marriage. On the one hand, it could be argued that such a ruling is not problematic, as the *Ben-Ari* case left open the question whether Israeli law recognizes the legal concept of same-sex marriage. On the other hand, precisely because the relevant religious courts do not recognize the concept of same-sex marriage, but define marriage as a bond between a man and a woman, there are grounds to assume that the Supreme Court will rule that jurisdiction over dissolution of same-sex marriages lies with the civil family courts. Prior precedents of the Supreme Court denied jurisdiction from religious courts when the relevant religious law did not recognize the legal concept or legal format that was under consideration.

The family court has jurisdiction over dissolution of same-sex marriage when it is inter-faith marriage, or when the parties do not belong to recognized legal community, or when they lack any religious affiliation. In these cases the law controlling the dissolution of the marriage is Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law. This law determines that in principle the (civil) family court has jurisdiction to dissolve the marriage in such cases. It should be noted that the Matters of Dissolution of Marriage Law defines "dissolution of marriage" as including "divorce, annulment of marriage, and declaration of a marriage as void *ab initio*." Thus, regulating the issue of jurisdiction for dissolving the marriage did not depend on recognition of their validity. The family court can dissolve the marriage by way of declaring it as void. In case the family court recognizes same-sex marriage as valid so that divorce is required to dissolve the marital bond, the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law expressly provides only one ground for granting a divorce, which is the consent of both parties to the divorce. In the absence of mutual consent, the Law does not provide grounds for divorce but instead provides choice-of-law rules listed according to priority, according to which the court should apply:

(a) the law of the common domicile of the spouses;

(b) the law of the last common domicile of the spouses;

(c) the law of the common state of citizenship of the spouses;

(d) the law of the state where the marriage took place.

The Law provides that a court cannot apply any of the aforementioned laws if it applies different laws to the spouses. Such is the case if the spouses are Israeli citizens or domiciled in

Israel and they belong to different religions, since the Israeli law applies to each of them the relevant personal law. Indeed, in most cases where the Law is applied the only relevant option is the substantive law of the state where the marriage took place. The Law further does not enable the application of a law if no divorce can be obtained under its provisions.[49]

SAME-SEX CIVIL UNIONS UNDER ISRAELI LAW

Israeli law provides no establishment of registered civil union. Same-sex civil unions entered into abroad cannot be registered in the population registry, as there is no entry for such a registration. However, as shall be explained in details below, under Israeli law, cohabitants (referred to as "reputed spouses") enjoy most of the rights and benefits (and are subject to the obligations) as married couples. It could be assumed that registered civil unions entered into abroad will be subject to the rules that apply to reputed spouses. The fact that they were registered as a civil union will make it easier for them to prove that they fulfill the requirements to be recognized as "reputed spouses" for purposes of the Israeli law.

REPUTED SPOUSES UNDER ISRAELI LAW IN GENERAL

Though Israeli law contains no formal framework for recognizing domestic partnership outside the marital framework, unmarried cohabitants, known under Israeli law as "reputed spouses", enjoy most of the rights and benefits and are under most of the obligations as married couples. The legal recognition of "reputed spouses" was originally made by the Israeli legislature beginning in the early 1950's, focusing mainly on social rights. Where Israeli legislation has been silent, the Israeli Supreme Court has continued this trend of equalization, expanding the list of rights, benefits, and obligations accorded to non-married cohabitants to match those of married couples.[5]The extensive legal recognition accorded to unmarried cohabitants under Israeli law is commonly explained as the civil system's reaction to the strict religiously-based restrictions on marriage in Israel.

The Supreme Court's ruling in *Lindorn v. Karnit* signaled this trend. In *Lindorn*, the Court interpreted the term “partner” in the Civil Wrongs Ordinance (New Version) and the Road Accident Victims Compensation Law, to include reputed spouses, despite the absence of an express reference to reputed spouses in these statutes. Until *Lindorn*, the dominant view had been that statutes that do not expressly refer to cohabitants apply only to married couples. The *Lindorn* case opened the door to interpreting all statutes that address the rights of couples to include unmarried cohabitants. Nonetheless, the Supreme Court made clear that its decision in *Lindorn* did not mean that all acts of legislation that apply to married couples apply to reputed spouses as well.

Rather, the decision is to be made on a case-by-case basis for each and every act that does not expressly refer to reputed spouses. Likewise, each right and obligation of married spouses that is case-law created should be examined separately to determine whether it should be applied to unmarried cohabitants. Despite these statements of a "case-by-case" evaluation, the

accumulated case law suggests that reputed spouses are accorded the vast majority of rights, benefits, and obligations as married couples under Israeli law are.

The extensive recognition of the rights, benefits, and obligations of reputed spouses was accompanied by a very open definition of reputed spouses and flexible criteria, which make it easier for couples to be considered reputed spouses. The essential criteria required by Israeli law are joint cohabitation and the running of a common household. Nonetheless, there is no formal requirement that the couple share a common registered address, and in some cases couples were recognized as reputed spouses while not living together in the same residential unit. In addition, most of the laws applicable to reputed spouses do not stipulate a minimum period of time for them to be recognized as such, and when they do, a relatively short time period is required (usually one year).

When legislation does not stipulate a minimum period, courts have sometimes recognized couples as reputed spouses within a very short period of time. Lastly, monogamy is not necessarily required and in several cases couples were recognized as reputed spouses, despite additional intimate relations.

SAME-SEX COUPLES AS REPUTED SPOUSES

In recent years, Israeli case law has applied many of the rights, benefits, and obligations of reputed spouses to same-sex couples. However, the Israeli Supreme Court refused to declare that the definition of reputed spouses under Israeli law includes same-sex couples. Instead, each act of legislation that refers to reputed spouses, whether expressly or by way of interpretation, and each right, benefit, and obligation that is accorded to reputed spouses is to be examined separately, on a case-by-case basis, if applied to same-sex couples as well. Next I address specific contexts in which the status of same-sex couples as reputed spouses was addressed under Israeli law.

The Family Court

The family court system in Israel was established between 1995 and 1997 in an attempt to centralize all civil family matters under one roof. The Family Court Law adopts a broad definition of "family members" that includes "reputed spouses". Nonetheless, family court judges differ on whether same-sex couples can be considered "reputed spouses" and fall under the jurisdiction of the Family Court.

These conflicting decisions have not yet been resolved, *inter alia*, due to the paucity of precedents in family matters since the establishment of the Family Court. The family courts' jurisdiction is at the lowest magistrate court level. An appeal on a family court decision can be brought as a matter of right to the District Court. A subsequent appeal to the Supreme Court requires permission, which is rarely given.[61]

Family Violence

The 1991 Prevention of Violence in the Family Law provides "protective injunctions" aimed to provide immediate protection to family members who suffer from family violence. The Law, phrased in gender-neutral language, adopts a broad definition of "family members" and refers specifically to reputed spouses. Here, again, conflicting decisions exist in family court as to whether same-sex couples are considered reputed spouses for purposes of the Prevention of Violence in the Family Law.

Family Name

Following Supreme Court cases holding that individuals have the right to change their family names to that of their reputed spouses, the Israeli Names Law was amended in 1996 to incorporate this ruling. The rules regarding reputed spouses' surnames were applied to same-sex couples who can today change or join their surnames so that they share the same surname.

Maintenance Obligations

According to the Family Law Amendment (Maintenance) Law, spousal maintenance issues are governed by the parties' religious laws. Nonetheless, in LCA 8256/99 *A v. B*,[67] the Supreme Court held that the Maintenance Law does not apply to couples who were married in a civil ceremony abroad, and to reputed spouses. Maintenance obligation among the latter couples is governed by civil-contractual principles, and the principle of good faith. The Court emphasized that this contractual obligation does not follow from the marital bond but rather from the actual relationship between the parties, and therefore applies to reputed spouses as well. Nonetheless, having a civil marriage ceremony relieves a couple from having to prove their commitment for purposes of financial support obligations, whereas unmarried cohabitants should prove that they have passed the phase of trial in their relationship and can be considered reputed spouses for this purpose.

Following LCA 8256/99 *A v. B*, several family courts have awarded temporary rehabilitative maintenance to reputed spouses following separation. To date, there has been no reported case where civil-contractual maintenance was awarded among same-sex partners. Nonetheless, it should be recalled that the concept of civil-contractual maintenance obligation is a novel concept within Israeli law, and in general there are few cases where it has thus far been applied. There is good reason to believe that civil- contractual maintenance shall apply to same-sex couples as well, as in the context of economic rights, the rights of same-sex couples were equated to those of heterosexual couples.

Property Relations

Property relations among reputed spouses are governed in Israel by the Presumption of Community Property, created by case-law. According to this presumption, as applied to reputed spouses, property accumulated during the time of marriage is considered joint property regardless of formal registration of this property.

A question may arise regarding same-sex couples who were married in a civil ceremony abroad – whether the Presumption of Community Property shall be applied to them, or the Spouse (Property Relations) Law, which applies to spouses who were married after January 1st 1974. The Spouse Property Relations Law determines a different property regime, according to which a separation of property exists during marriage, and following separation (or death), a resource-balancing arrangement applies.

Succession

Section 55 of the Succession Law grants reputed spouses rights of inheritance similar to spouses in cases of intestate death.[71] In a 2004 groundbreaking case, the District Court in Nazareth applied section 55 to same-sex couples, despite the wording of the section that refers to "a man and a woman who lived in a joint household but are not married to each other." Judge Maman used a purposive interpretation, holding that the purpose of section 55 was to guarantee the inheritance rights of couples who could not marry and that contemporary norms should be taken into consideration. Judge De-Leo Levi added that any other interpretation of section 55 would be discriminatory and contradict Israel's Basic Laws and fundamental principles.

While this case is not a precedent of the Supreme Court, the State decided not to ask for leave to appeal the district court's decision. Furthermore, following this decision, the Attorney General issued a statement according to which: "The Attorney General's principled position is that one has to distinguish, for the purpose of the recognition of same-sex couples, between monetary issues and other practical arrangements, where the attitude should be pragmatic and flexible, in the spirit of the times and the changing reality, and between issues of the creation of new statutory personal status, which requires a more careful approach, and which is usually in the domain of the legislature".

Social Rights

Same-sex couples were recognized as reputed spouses for a wide range of social rights under Israeli law: pension rights under the National Insurance Law, pension rights under the Permanent Service in the Israel Defense Forces (Pension) Law,[76] bereavement pension from Mivtachim Fund,[77] and more. The accumulated case-law suggests that for social rights purposes, same-sex couples are considered reputed spouses. In this regard it should be mentioned that Israeli law extends social rights to reputed spouses, as it does to spouses.

PARENTHOOD IN SAME-SEX FAMILIES BECOMING PARENTS

Adoption

The Israeli Adoption Law states in section 3, addressing the capacity to adopt, that "Adoption may only be done by a man and his wife together." Nonetheless, in 2008 following the Supreme Court's *Yaros-Hakak* case, allowing second-parent adoption, the Attorney General issued guidelines according to which the Adoption Law should be interpreted so as to allow reputed spouses, including same-sex couples, to adopt children. The Attorney General clarified in his guidelines that he refers merely to the capacity to adopt, and that a

decision regarding the placement of a particular child should be made in view of the child's best interest. This means that in practice, and especially given the scarcity of children being placed for adoption, same-sex couples cannot adopt children not related to either of them, as the Welfare Services give preference to heterosexual married couples as the best familial framework for children. It is most likely that the Attorney General's guidelines recognizing the capacity of same-sex couples to adopt will be applied mainly in cases such as the case of Amit Kama and Uzi Even, who took into their home a child who had been driven out of his own home after coming out of the closet.

Reproductive Technologies

Fertility treatments in Israel are fully subsidized by Israeli national health insurance. In *Vitz v. Minister of Health* the Supreme Court (with the state's consent) abolished provisions of subordinate legislation, according to which unmarried women and lesbians were required to undergo a psychiatric test, which was not required by married women, as a condition for receiving artificial insemination and in-vitro fertilization services. Today, lesbian couples have access to sperm donation, IUI and IVF treatments as married and single women.

Surrogacy, however, is limited to heterosexual couples (married or reputed spouses), according to the Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law (hereinafter: "the Surrogacy Law"). An attempt to challenge this limitation in the Supreme Court failed In 2006 the Health Ministry permitted a woman to be impregnated with an egg of her female partner fertilized in vitro by sperm from an anonymous donor.[85] The couple underwent this procedure following a medical reason that necessitated fertility treatments. However, recently, the Health Ministry approved this procedure for lesbian couples wishing to share in the process of bringing their child into the world.

BEING LEGALLY RECOGNIZED AS CO-PARENTS

The 2000 case of *Brenner-Kaddish* concerned two Israeli citizens who resided for two years in Los Angeles. While in Los Angeles, one of the women gave birth to a child through artificial insemination of donated sperm. Her partner was recognized as the child's mother through adoption by a California court. Upon their return to Israel, the women asked to both be listed as mothers in the population registry. The Ministry of Interior denied the request arguing that the listing would be "erroneous on its face" (invoking the *Funk-Schlezinger* exception) and technically impossible. The women appealed to the Supreme Court, and the Court by a majority decision granted the petition and ordered the registration of both women as the child's mothers based on the Californian adoption decree. The Court, however, explicitly avoided any substantive evaluation of dual motherhood or co-parent adoption. The State had submitted a motion for further hearing of this case, but eventually withdrew its request. In its assent to withdraw the application for further hearing, the State clarified that the judgment of the Court shall apply only to cases similar to the *Brenner-Kaddish* case, and that it understood the original judgment as applying only to the question of registration in the population registry (which is understood as merely collecting statistical information and has no bearing on questions of validity of status).

In 2005 a far more significant decision was handed down by the Supreme Court in the *Yaros-Hakak* case, where the Israeli Supreme Court interpreted the Israeli Adoption Law as enabling second parent adoption. The case concerned two women, Tal and Avital Yaros-Hakak, who had shared a long-term relationship. The women together raised three children, born through anonymous sperm donations – two of them were carried by one of them, and the third by the other. The women sought official adoption to anchor the relationship of each of them to the children conceived by her partner. The Family Court initially denied their petition, and an appeal to the District Court was denied by a majority. The Supreme Court recognized the possibility of a co-parent adoption in a same-sex family and thus the possibility of a dual motherhood or fatherhood following such an adoption. The Court remanded the case to the court of first instance to examine whether adoption would serve the children's best interest. The Family Court to which the case had been remanded issued an adoption decree.

Despite the significance of the *Yaros-Hakak* decision, it still requires the process of adoption in order for dual motherhood to be recognized. Non-biological co-mothers are still required to adopt their own children in order to be legally recognized as their parents. This state of affairs is currently being challenged by the women who split the gestational and genetic motherhood between them. Following the birth of their son, both women asked to be registered as the child's mothers, but were refused. Currently, only the birth mother is recognized as the child's legal mother. The women turned to the Family Court in order to have their dual motherhood recognized without the procedure of adoption. The Attorney General objects the petition. It remains to be seen how the Israeli law addresses this unique situation where women share the biological as well as the functional role of motherhood.

SUMMARY

Israeli law has progressed a long way since abolishing the criminal prohibition against male homosexual intercourse in 1988. Same-sex couples are recognized as reputed spouses for a wide range of purposes under Israeli law, and enjoy the vast majority of rights and benefits that heterosexual married couples enjoy; their marriages celebrated abroad are registered in the population registry, and through adoption their joint parenthood is also recognized. The Israeli Supreme Court has played a significant role in advancing the recognition of same-sex familial relationships. It seems that in some respects, same-sex couples in Israel have benefitted from the traditional legal background of family law in Israel, against which their plight for recognition of their familial relationship is shared by numerous heterosexual couples who are denied recognition by religious family laws. This is not to suggest that there is no more to be done to advance the legal status of same-sex couples under Israeli law. Although having adopted a pragmatic approach and advanced a case-by-case solution, the Supreme Court has not guaranteed same-sex families certainty and stability.

SURROGACY ISSUES

Cabinet approves 'surrogacy equality' bill for gay couples

June 1, 2014

A landmark bill to permit gay couples as well as single men and women in Israel to obtain surrogacy services overcame a major hurdle Sunday when it was approved by the cabinet, overturning an appeal by Housing Minister Uri Ariel. The legislation is set to be presented for a Knesset vote at a later date, and will likely pass into law. Members of the Jewish Home party opposed the passage of the bill, while the remaining MKs supported it. The proposed legislation would grant the same benefits afforded to heterosexual couples in Israel, and further extend surrogacy rights, allowing married women to serve as surrogate mothers.The age of eligible surrogate mothers would be raised from 36 to 38. However, the bill stipulates that individuals seeking surrogacy must be under the age of 54, and would only offer services for up to two children.

Health Minister Yael German hailed the decision, which she said paved the way for "longed-for equality in Israeli society"."We promised and we came through [on that promise]," she said. "This is a day of good tidings. The bill strikes a balance between the desire and the right of everyone to be a parent, and between the preservation of surrogacy and its rights." "This is an important step toward changing the face of Israeli society, and raising awareness," Yesh Atid MK Ofer Shelah said. "The surrogacy law is a significant process toward equality and openness, and from the moment it was presented by the health minister, we promised we would fight without compromising until it passes in the cabinet and Knesset. We kept this promise, despite a political struggle that wasn't simple, and we will continue to keep it until it becomes part of Israeli law."

The Ministerial Committee for Legislation approved the bill in March; however, due to Ariel's appeal the advancement of the bill was temporarily suspendedIsraeli restrictions on surrogacy have prompted many same-sex couples to fly abroad in order to obtain a surrogate mother, a process both costly and complicated. The prime destination for foreign surrogacy used to be India until last year, when that country made it illegal to be a surrogate for same-sex couples. Thailand was another favored location, but a recently introduced Thai law under which babies are automatically granted citizenship according to the citizenship of their birth mothers complicated matters.

Eran Pnini Koren and Avi Koren, a gay Israeli couple, with their child conceived through the surrogacy procedure in Thailand. In January, following an incident in which several same-sex couples were temporarily stuck in Thailand with their newborn or soon-to-be-born babies, a government statement instructed Israeli homosexual couples to avoid surrogacy procedures in the Asian country, and warned that as of November 30, 2014, the Israeli government would no longer provide assistance to parents of babies born there. Israel suffers from a shortage of

surrogate mothers. Between 2007 and 2012, the Walla news site reported, 313 Israelis found surrogate mothers abroad, compared to only 228 in Israel. The imbalance has become even more pronounced recently: In 2012, 126 people went through the process abroad, while only 41 did so in Israel.

Israel: Minister quashes proposed gay surrogacy law

The Israeli housing minister has appealed against a bill which would have allowed gay couples access to surrogacy, stopping it in its tracks. Uri Ariel, minister for Housing and Construction, said the bill creates "moral and ethical" questions about "what a family in Israel should look like".

The bill, first announced in January, would have stopped the need for gay Israeli couples to go abroad to adopt. Health Minister Yael German, who proposed the law, said today: "I felt they had stuck a knife in my back and heart when I heard about the appeal filed by Uri Ariel, the Housing Minister, against [my] surrogacy law."

Ariel is a member of the Jewish Home party, which is part of a broad coalition government with German's Yesh Atid and two others.
Tthe bill had narrowly gained approval from the Ministerial Committee for Legislation, which means coalition members were obligated to vote for it, if Ariel had not appealed.

According to Haaretz, German said Ariel was attempting to "bury" the law by appealing against it in cabinet, as controversial bills without agreement are rarely discussed a second time. However, she will not be deterred, saying: "I'm going to do everything that democracy and law allow to pass it."
Minister Uri Orbach, also of the Jewish Home party, said: "This bill is dangerous. Members of heterosexual couples will be hurt. Gay couples have a better chance of obtaining the necessary money and competing because they are two men and they earn more."

High Court orders Israel to recognize gay adoption of child born through surrogacy

At the same time court rejects gay adoption in case where neither man proved biological connection to child.

The High Court of Justice on Tuesday night, by a split 5-2 vote, ordered the state to recognize the gay adoption of a child born through surrogacy, including registering both the biological father and his partner as fathers of the child. Simultaneously, the High Court rejected 7-0 the request of another gay couple for recognition of their right to gay adoption. Both gay couples based their claim on a birth certificate and declaration from the US that they are the child's parents. The difference between the two cases is that the court granted the request from the gay couple after it underwent genetic testing to prove the biological connection to at least one of the men, while the couple whose request was denied did not do genetic testing. In May 2013, Attorney-General Yehuda Weinstein announced a game-changing progressive policy shift for how the state addresses homosexual parenthood of a child born through surrogate motherhood.

According to the old policy, the man from the homosexual couple who is the child's biological father must pass a paternity test, in which a sample of his genetic tissue is checked to prove he is the biological father. Subsequently, the second man in the couple – who has no biological relation to the child but is jointly involved in all of the decisions of parenting – must go through a lengthy process to legally adopt the child. Couples have complained that the adoption process for the second man can easily take up to three years. Under the new policy, although the biological father still needs to pass a paternity test, upon passing the test the family courts can immediately issue a special parenthood order. The second man will then be able to become a full-fledged trustee of the child until the adoption process concludes. Effectively, this will grant the two men full parental rights and powers at a much earlier point. The court's order implements the new policy and authority intended by Weinstein. There is a gag order on the petitioners' names to protect their identities and to protect the children involved, and all hearings were held behind closed doors.

The Right to A Civil Divorce

On October 21, 2012, the Tel Aviv Family Court decided to "dissolve" the marriage of an Israeli same sex couple who married in Canada and registered as married in Israel. Anonymous v. Ministry of Interior, Family Case 11264-09-12. Israel has only religious marriage and divorce, but case law dating to the 1960s determined that couples who married abroad should be registered in Israel's population registry as married, even if their marriage could not have been performed in Israel.

In spite of legal doubts about the implication of this "registration," de facto this allows couples who married abroad to present themselves as married in daily life and in reality have access to most if not all rights enjoyed by married couples. In Ben-Ari v. Director of the Population Registry, HCJ 3045/05, the Israeli Supreme Court applied the same logic to same-sex couples, holding that same sex couples who married in Canada should be registered in Israel as married. Ben-Ari thus opened to same-sex couples one of the two channels of alternatives to marriage, used in Israel by couples who do not want to or cannot marry religiously.

The other channel is that of gaining rights akin to that of married couples by cohabitation, which has also been extended by case law, since the 1990s, to same sex couples. The use of both channels by same sex couples in Israel illustrates the claim that same sex Israel formally has only religious marriage. When they started making legal claims for partner recognition, Israeli law already had two institutions developed as a result of pressure from different sex couples who did not or could not want to go through religious marriage. They finally developed for different sex couples as alternatives to religious marriage that was anticipated ever since Israeli same-sex couples started getting married abroad and having their marriages registered in Israel: although many countries (including some that allow same sex marriages) allow for couples to marry without posing a residency requirement, they pose such a requirement for divorce, which is a judicial proceeding.

Under Israeli law, marriage and divorce of Jewish couples is conducted by religious courts based on Jewish law, and is controlled by the orthodox-monopolized rabbinate, which does not recognize same-sex marriage. Thus, the question of divorce was looming ever since same-sex couples married abroad won their right to be registered as married in Israel. The Tel-Aviv Family Court judge framed the question before him as what is the judicial instance authorized to dissolve the marriage of two men who married in Canada and who registered in the Ministry of the Interior in Israel as married.

When the couple separated, they approached the Family Court, which approved their separation agreement, and recommended that the Ministry of Interior "delete" their registration as married, but the Ministry refused to do so. Then the couple approached the Rabbinical Court, which refused to hear the case. Considering these facts, Judge Yehzkel Eliyahu accepted the couple's argument that when the Rabbinical Court does not recognize a certain claim, based on religious law, it loses jurisdiction to deal with it. It accepted the "non-recognition thesis" advanced by Professor Ruth Halperin- Kadari, according to which when the religious court does not recognize a certain institution or relationship; it does not have the jurisdiction to deal with it. Thus, the Family Court rejected the Ministry of the Interior's argument that the couple should approach the

Rabbinical Court, holding that given the non-recognition by religious courts on one hand, and the growing recognition of same-sex couples by Israeli civil courts on the other, the Family Court was the proper and natural forum to deal with the case. The court emphasized that it would be unacceptable to keep the two men, who have separated, legally tied to each other in bonds of marriage, and that doing so would amount to violating their civil liberties, violating Israel's Basic Laws, and negating justice and equality.

The Family Court would use its "inherent jurisdiction" and order the marriage dissolved. (Existing legislation that granted the Family Court jurisdiction to dissolve marriage in some cases that may fall out of the jurisdiction of the religious courts operating in Israel, did not apply in this case, as it explicitly stated it will not apply if both partners are Jewish, as the two men are in this case).

The order issued by the Family Court that a civil family (i.e. not religious rabbinical) court ordered the dissolution of a marriage conducted between two Jews. Following the order, the Ministry of Interior agreed to change the registration of the couple in the population registry to "divorced", indicating that it probably does not plan to appeal the judgment. Some implications of the case are yet unclear: Does the dissolution order actually point to a substantive recognition (rather than mere "registration") of the same-sex marriage in Israel? Judge Eliyahu stated that his decision is the "other side of the coin" of Ben-Ari, however recall that Ben-Ari only dealt with the registration, not taking a position regarding the recognition of the marriage.

Additionally, could the judgments have any implications for opposite-sex couples as especially given that the judgment is not likely to be appealed? Although the case was published without the couple's names, the Israeli press reported that the couple in question is Professor Uzi Even and Amit Kama, both veteran gay rights activists - openly gay member of Knesset (parliament) and Even and Kama have been protagonists in a few previous gay rights precedents, sometimes separately and sometimes together as in this case. It was further reported that Professor Even sought the divorce mostly so he can marry his current partner, who is a Dutch citizen, in order to facilitate immigration issues for his partner and allow him to stay in Israel.

IMMIGRATION ISSUES

Israel Expands Law of Return to Include Interfaith Gay Couples

Non-Jews can now make aliyah with their Jewish, same-sex spouses

By Tal Kra-Oz | August 13, 2014

The intersection of Religion and State in Israel often seems permanently mired in the status quo. However untenable that status quo may seem, it usually will not budge without severe prodding. But sometimes—as in the decades-long effort to have the state recognize civil unions—even such prodding bears little fruit. That's why a decision announced yesterday by Interior Minister Gideon Sa'ar came as something of a surprise: In a letter to the Population and Immigration Authority, Sa'ar ordered that the granting of citizenship to the non-Jewish spouses of women and men who are themselves eligible for aliyah to Israel would also apply to same-sex couples.

Aliyah—immigration to the Jewish State—is governed by the Law of Return. Enacted in 1950, it is the gateway to Israeli citizenship. Though its original scope was exclusively limited to Jews, since 1970 the law has been expanded to grant aliyah rights to all children and grandchildren of Jews (implicitly eschewing the traditional stance that Judaism is matrilineal—that is, conferred only by Jewish mothers, rather than fathers), and to the spouses (or partners) of Jews.

For more than 40 years, Jewish men and women have been making aliyah with their gentile wives and husbands. Until this week, however, government policy interpreted the law as if it referred only to straight couples. It is worth noting that the drafters of the 1970 version of the law neglected to clarify whether the law was limited to heterosexual couples—most assuredly because in Golda Meir's Israel, the possibility of gay marriage did not occur to even the most liberal of Knesset members.

Cut to 44 years later. Though it stops short of actually facilitating gay marriage on its own turf, Israel recognizes such unions that were conducted abroad, and offers same-sex couples the vast majority of the benefits it affords any other couple. The body of rights afforded to members of the LGBT community has managed to grow steadily mostly without attracting the ire of the ultra-Orthodox in large part because it is limited to the civil sphere. Marriage is off the table—just as it is not an option for any Jew who wishes to marry a "non-halachic" Jew, though ostensibly all are equal citizens, Jewish enough for the Law of Return but not for the State rabbinate, which holds complete control over marriage and divorce conducted within Israel.

Minister Sa'ar's decision is somewhat unique, though, in that it goes beyond the strictly civil sphere. The Law of Return is the closest thing to an answer that Israel has to the eternal question of "who is a Jew?" By expanding its definitions—even if only via an interpretation that does not actually veer from the text of the law—Sa'ar might be playing with fire.

The decision is especially remarkable because in recent months it appeared as Sa'ar was re-inventing himself as the defender of the state's Jewish character. Though an avowed denizen of downtown Tel-Aviv, known to even moonlight on occasion as a DJ, Sa'ar alienated many of that

city's secular residents when he effectively outlawed much of the commerce that takes place in the city over Shabbat. Had Sa'ar suddenly found God? After all, he was rumored to have begun keeping the Sabbath himself.

The more likely explanation was more political than personal: Sa'ar, one of Likud's top leaders, was trying to gain popularity with the ultra-Orthodox in an attempt to eventually lead the party and the country (Prime Minister Netanyahu's relations with the Haredi parties are at an all-time low after he left them out of his current coalition). But why, then, this latest expansion of the Law of Return, which might offset any political gains from his Tel Aviv maneuvers? It could, of course, be an attempt to win back his largely secular Tel Aviv base. It might also be a preemptive measure: had the matter reached the Supreme Court, Sa'ar would have had trouble explaining why same-sex couples were heretofore excluded.

Most likely, though, is that Sa'ar is betting that he can enjoy the best of both worlds: his decision is surely beneficial to any supporters of LGBT rights, and since it touches upon one of Israel's holy of holies—the Law of Return—it appears to be a particularly bold move. But once they make aliyah, the law's new beneficiaries, like many of its veteran beneficiaries, gay and straight alike, will encounter the same schizophrenic establishment generous with the civil rights it affords them while at the same time fiercely protective of the rights that it does not—chiefly, marriage. So long as he stays away from that hot button issue, Gideon Sa'ar has little to worry about.

Citizenship Issues For Gay Partner

Author: Shimon Ifergan
Source: Mako
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The Israeli Supreme Court will soon have to determine why the Interior Ministry refuses to grant citizenship to a German citizen who married his Israeli partner.

These gay spouses married in Canada five years ago and live in Israel. They've raised four children together (including twins born from two surrogate mothers), and lead a life of a married couple in every way. After a lengthy legal process, Family Court acknowledged the adoption of their four children.

After five years of marriage, the couple turned to the Interior Ministry to regulate the German partner's citizenship, but it turns out that the Ministry of the Interior has two procedures – one for heterosexual couples and another for same-sex couples. A straight couple who gets married receives citizenship at the end of the process, whereas in the case of same-sex partners, the non-Israeli partner gets a status of permanent resident, without any of the rights of an ordinary citizen.

After the Ministry rejected the request for citizenship to the German partner, the couple filed a petition in the Supreme Court against the Ministry of the Interior with attorney Iris Shienfeld (in the photo), on the grounds that it was very severe discrimination, and that there should be one procedure that regulates both straight and homosexual couples' citizenships.

According to Shienfeld this refusal damages the fundamental rights of the petitioners and perpetuates the discrimination against the German partner in not getting the rights of the citizen like every other couple. "The right to family life is recognized by Israeli law as one of the basic human rights. The state authorities should refrain from harming this right without an appropriate reason." the petition states.

The petition stated that the couple passed all the tests and conditions of the Ministry of the Interior. It examined their relationship and therefore they should be granted full citizenship for the German partner. "This is blatant discrimination based on sexual orientation and requires a proper interpretation of the law" the petition claims. The couple insists that the Ministry may not discriminate against them. They are not willing to settle for permanent residency but only for full citizenship for the German partner.

The State Attorney's Office recently asked the court to dismiss the petition and simultaneously tried to find a compromise which was rejected by the couple and their attorney, according to which the German partner would receive citizenship without rights. "The subject of the gradual process in relation to same-sex couples who were married recently was considered by the Ministry. It was decided due to the circumstances to allow this couple to apply for citizenship". This was written in response to Deputy Attorney Yonatan Berman of the State Attorney's Office.

“We oppose this compromise suggestion,” says attorney Shienfeld. “It discriminates against the couple compared with a straight couple. We refuse citizenship without rights to the German partner, so we leave the decision to be made by the Supreme Court.” According to her, the state offers that couples apply for citizenship with all the rights, not through marriage but under another law clause of the Citizenship Law. “The country is not dealing with discrimination, but is trying to create workarounds while maintaining the discriminatory practice,” added Ms. Shienfeld.

Sex-change in Israel: Gender trap

The Health Ministry panel charged with approving sex-reassignment surgery has been slammed as non-transparent.

By Ofer Aderet | Jun. 22, 2012 | 9:48 AM

In October 1985, a well-known plastic surgeon from the Italian Hospital in Haifa operated on a 21-year-old woman named Daniella. She had been born a boy, but lived life as a female in every sense and wanted to adjust her physiological gender to her internal gender identity. The operation went badly and Daniella was left without genitalia of either gender. A decade later, she won a malpractice suit against the physician.

In the wake of that case, the Health Ministry ordered an immediate moratorium on all sex-reassignment surgery - popularly known as sex-change operations - which until then had been done privately and without supervision. Henceforth, the ministry ruled, such operations could only be performed in public hospitals and with the authorization of a special panel under their control: the Committee for Sex Reassignment, based out of Sheba Medical Center, Tel Hashomer. In the 26 years that have gone by since them, the committee has been a nontransparent monopoly, basing its decisions on unknown criteria, and refusing to publish reports or information about its activity.

Two new studies, from researchers at Tel Aviv University and the Academic College of Tel Aviv-Yafo, respectively, reveal for the first time what goes on behind the scenes of the committee. The researchers found that it has been the subject of numerous complaints for displaying an insulting and discriminatory attitude, and a condescending, disrespectful approach. This body is also accused of pathologizing and being inattentive to the special needs of those who apply to it. Moreover, its guidelines have not been updated for three decades, despite the revolution undergone by medical and academic research on the transgender phenomenon, defined by the dictionary as referring to someone who expresses a "gender identity" different from the sex he or she was born with.

A circular issued by the director general of the Health Ministry in April 1986 stipulated that the committee would consist of a senior psychiatrist, a senior plastic surgeon, a urologist and an endocrinologist. A condition for undergoing surgery was that "the candidate shall live for a period of at least two years in the opposite sexual identity - [the one] to which he wishes to belong through the operation." Individuals wishing to undergo the operation were labeled "sick" in the circular, which also misspelled the word "transsexual" twice.

At the time the committee was established, the Health Ministry director general, Prof. Dan Michaeli, explained, "There are various aspects that must be examined before the surgery is

performed, such as the psychological aspect. Is every crazy person [meshuga] who asks a doctor to perform the operation going to be operated on?"

Over the years, the panel cultivated a false image for itself, to the effect that it was established after a transgender woman tried to kill a surgeon by shooting him in a fit of insanity after a failed operation. Even the current chairman of the committee, Dr. Haim Kaplan, told TV Channel 10 in an interview half a year ago: "The Health Ministry changed the regulations in the wake of an unpleasant event in which a female patient tried to kill a doctor, because she was dissatisfied."

The first of the two new studies is by Yael Sinai, a graduate student in sociology at Tel Aviv University who is writing her master's thesis on the subject of the Sex Reassignment Committee. Sinai checked the press archives and discovered that there had been a case in which a former patient tried to kill the same surgeon who botched Daniella's operation, but that the woman involved was not a transgender patient.

"The 'chance' confusion between the stories is suggestive of the pathologizing conception of the medical establishment," Sinai says. "Instead of presenting the person under treatment as a [possible] victim of medical negligence, she is presented as being mentally disturbed and as trying in impulsive rage to harm her caregiver."

Sinai recently interviewed Dr. Dalia Gilboa, formerly the chief psychologist of the Health Ministry and currently the committee's psychologist. She asked Gilboa how she identifies those who are not fit for sex-change surgery. Gilboa told her that it is necessary to examine "whether the person is transsexual mentally; whether he really thinks so. First of all, [to determine] if he is psychotic and whether, within his psychosis, he also has this fantasy that he has to become a woman. That he was hearing voices ...." Gilboa added, "After you monitor someone for a year ... You already know him and [know] whether he is truly transsexual or it's a passing craze. Whether it was persistent, of whether the idea suddenly came to him and will go away just as easily."

The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association still recognizes what it calls "gender identity disorder" as a mental disturbance. However, the new edition of the DSM, due out next year, will replace the old term with "gender dysphoria" - the significance being that the essence of the problem is not transgender identity as such, but the distress it generates. Even physicians around the world who specialize in the field of transgender medicine maintain that transgenderism is not a mental disorder.

"The committee's current activity preserves the 'corrective' approach, which views a gender conflict as an illness originating in the mind, and holds that the medical establishment is responsible for diagnosing and curing the illness," Sinai says. In her study she quotes remarks made last year by Gilboa in a conference on the subject held in Tel Aviv: "I think I feel a very heavy responsibility ...[not] to send someone into surgery without being 100-percent certain that he is transsexual. And if I am not certain, maybe he too is not certain."

'Revolutionary' approach

Israel currently allows sex-reassignment surgery within the framework of public medicine and with state funding, as part of the so-called "health basket." The Health Ministry describes this approach as "revolutionary in its openness, even in comparison with Western countries." In response to a Haaretz query, the ministry said that "Israel is one of the most progressive countries" in this field.

In practice, as the new studies disclose, few people manage to have their cases discussed by the panel and undergo the coveted treatment.

"We do not know how many people are rejected by the committee and why they are rejected," says Nora Greenberg, a leading local transgender activist who has worked with hundreds of transgender people in treatment. "[The health authorities] have no answers, there is a communications breakdown. When I asked them for data I was astounded to see that they started to stammer. It turned out that they have no data, no records, and no follow-up - nothing. I don't understand how they purport to make rulings on the subject without having facts to back up what they say. I used to have a conspiracy theory on this subject, but today I think it's because no one there is interested."

For its part, the Health Ministry refused to provide information about the number of people who apply to the committee and how many eventually undergo sex-change surgery. The ministry also refused to specify the reasons for rejection, or the criteria by which the committee operates. It provided only a general reply: "The committee examines each request on its merits and weighs medical and professional considerations in regard to the authorization [of surgery]."

The second research paper is by Shir Reichert, who recently completed a master's in psychology at the Tel Aviv-Yafo College, writing a thesis on transgenders and the health-care system. In the wake of a number of interviews she conducted with transgender people, Reichert asserts, "They are treated with extreme insensitivity by the Sex Reassignment Committee."

Gil (not his real name), one of the interviewees, was born female and lives today as a male. Three years ago he underwent surgery in the United States. He explained to Reichert that he never even considered applying to the committee at Sheba Medical Center, Tel Hashomer because, "In Israel there is a kind of feeling that the doctors agree to treat you but don't really want to. They sometimes view you ... as mentally ill. It's like night and day compared with the situation overseas, where you have doctors who consider [conducting such surgery] a mission. It's a different experience, there is no way someone will address you in the wrong gender. In Israel ... it's appalling. You wake up after surgery and the last thing you want to do is to start correcting someone" - that is, to explain in which gender to address you in Hebrew.

Activist Greenberg is very familiar with this behavior. "I could fill quite a few books with the disturbing stories I have heard. The complaints are about unethical behavior and lack of professionalism, in some cases bordering on violation of the law," she says. However, for reasons of privacy and a desire to move on and forget the rough patch they experienced, few are willing to file an official complaint with the Health Ministry or tell their story to the media.

"The physicians' approach is very narrow and limited," Greenberg continues. "The emphasis is on recovering from the incisions, on lack of complications, and the like. Other aspects - mental and social - are not properly addressed. What's important for the doctors is for the treatment to go smoothly and for them not to be sued, and for the patient not to change his mind after the surgery is done. The truth is that the doctors view themselves as the 'gatekeepers,' who decide who enters and who does not. It's the antithesis to treatment, which is supposed to include support and follow-up. They do not see the whole picture; it doesn't interest them and they have no understanding of it."

Pricey private route

One of the possible roots of the problem is that there is only one surgeon who performs these operations in Israel: Dr. Haim Kaplan, a veteran plastic surgeon and the chairman of the Committee for Sex Reassignment. The website of his private clinic has a section of questions and answers dealing mainly with sex-reassignment surgery, which he performs on behalf of the state at Tel Hashomer. "Shimon," who gave his age as 23, used the "Q&A" section of Kaplan's wesbite to ask him about the possibility of funding for medical treatment or a sex-change operation. "I solve medical problems," replied Kaplan on the online forum, "not economic ones. Good luck" - an answer that is possibly suggestive of his approach to the subject.

Kaplan declined to be interviewed for this article. However, in October 2011 he was interviewed by Yael Sinai for her research paper. He told her frankly, "I have no desire at all to operate on more than one [transgender patient] a month. All told, I work two days a week [as a plastic surgeon] at Tel Hashomer ... If there are more [patients], I would be happier if there were more doctors who would do it. I think that would also help." Kaplan described the committee as "a kind of undesirable monopoly."

"Kaplan is not crazy about performing these operations. Apparently they do not bring him any great glory," says Dr. Ilana Berger, director of the Israeli Center for Sexuality and Sexual Identity, which specializes in counselling transgender pre-and post-surgery. To which Greenberg adds, "The other members of the committee are also physicians from Sheba Medical Center, who got stuck with the job."

Why is there only one surgeon in the country who is authorized to perform these operations? And why only at Sheba Medical Center? Again, the Health Ministry refuses to say. The direct result, in any case, is that many transgender people - a few dozen a year, according to data from the community - undergo the operation privately abroad at a cost ranging from thousands to tens of thousands of dollars, with prices varying widely according to the location of the surgery, and

complexity of the procedures required by the patient.

Berger is also upset that a minimum age limit of 21 has been imposed for the operations. "Why this discrimination?" she asks. "If 18-year-olds are legally fit to die for the country in the army, why aren't they fit for this surgery?" (Abroad, by the way, such operations are routinely performed at the age of 18.) Berger is also unhappy about the long waiting period until the operation is performed. "Everyone who comes before the committee," she says, "even if he has lived in his desired gender for 20 years and undergone a full process of change, is forced 'to live for two years in the new gender' until the operation."

The form that candidates for the operation are required to sign states that the procedure will not enable them to enjoy pleasure during sex or achieve orgasm. Greenberg finds this appalling: "It is accepted everywhere in the world that one of the required results of the operation is that it allows pleasure to be derived from sex, including orgasm. Otherwise it is a failure."

In 2008, the organization Physicians for Human Rights sent a letter to the Health Ministry stating that the existing method of dealing with persons seeking sex assignment surgery is seriously flawed, and demanding its annulment. Shortly afterward, there was a shift in the ministry's approach: It decided to set up another committee to reexamine the subject. However, the ministry refuses to entertain the possibility of abolishing the committee.

"Our position is that in every case the operation will be conditional on a committee's authorization, after it has examined the various aspects of this irreversible treatment," the ministry said in response to a query from Haaretz. "The treatment carries far-reaching consequences, such as loss of procreative ability."

Nora Greenberg was a member of the reexamination committee as the representative of the community, alongside representatives from the sex reassignment committee, the legal adviser to the Health Ministry, physicians from Sheba and from Rambam Medical Center in Haifa, and a representative of Physicians for Human Rights. After five meetings over long months, despite a few points of agreement, the discussions broke down and the committee was dissolved. "I understood that there was a clear intention to drag things out and kill the initiative with a kiss of death," Greenberg says.

A spokesperson for the Health Ministry stated that the reexamination committee "broke down because of fundamental professional disagreements. These included a demand by the [transgender] community's representative [Nora Greenberg] to allow every person "to undergo the operation without any restrictions whatsoever, and without the physician being able to consult anyone from the field of therapy."

Greenberg describes the ministry's statement as "a gross lie .... a recycling of a falsehood that is intended to cover up disgraceful behavior by the Ministry of Health."

Israel: Updating Procedure For Sex-Change

Author: Elisha Alexander / Yanir Dekel **Source:** A Wider Bridge **Published:** 2014

It all started with an email: a huge victory for the trans community in Israel, after a long process of taking part in updating the procedure for sex-change operations with the Ministry of Health (39/86).

After the elections last year, the trans organization Ma'avarim sent an email requesting help from the Minister of Health in order to revise the policy regarding sex reassignment surgeries in Israel. This policy has not been revised since 1986, and is very outdated. To the community's surprise, things started to roll. They met with the Minister of Health Yael German, with senior members of the Committee and the Ministry of Health, but didn't believe that in less than a year things would look so much better.

The policy has been significantly modified, and below is a summary of the biggest changes:

* The purpose of the Committee for Gender Change is primarily to support and accompany the applicants in the process. This will not be a committee whose sole purpose is to approve/ inspect / diagnose readiness for surgery.

* The procedures of the Committee and its criteria will now have full transparency.

* Starting now, the committee will be a national committee of the Ministry of Health, appointed by the Ministry's Director General and shall not belong to one hospital or another. Every hospital that holds an appropriate surgeon will be able to perform the surgery.

* A representative from the transgender community will be added to the members of the commission will be added, who will help in determining the procedures of the committee, and candidates will have the option to contact the representative with any problem and to consult. Contacting the representative is only an option, not mandatory, in order to protect the privacy of applicants.

* An assessment from mental health therapist is needed, not to "diagnose" one's transness, but to verify ability to give informed consent, and that person is fit to undergo this process

* The waiting period for the surgery, of "real life experience", was shortened from two years to a year. In some cases, it will be possible to shorten this year as well.

* Until now, the surgery was available only from the age of 21. Now it is from the age of 18 years (adult by Israeli law) or older.

* Requirement to sign a standard "informed consent" form before surgery, rather than a special

form.

* The committee may lift the prerequisite to take hormones in certain cases.

“We would like to thank the Health Minister MK Yael German, a true friend of the community, who has given the green light for this move,” writes trans activist Elisha Alexander and Ma’avarim founder, “to Zehorit Shorek and all the LGBT cell of “Yesh Atid,” to Nora Greenberg, who was active on this topic tirelessly for many years before we were, Dr. Ilana Berger , Dr. Ruthy Goffen and Dr. Gal Wagner from the LGBT clinic of Clalit Medical, attorney Ido Katri and Yael Sinai, Dr. Graciela Carmon , Dr. Boaz Lev, Vice Minister of Health, attorney Mira Huebner who wrote the original procedure in 1986 , to Dr. Avital Weiner Oman, Dr. Siegel Liberant-Taub , Dr. Dalia Gilboa, Head of the Committee, Professor Eyal Winkler, director of plastic surgeries at Sheba Medical Center, and Dr. Marci Bowers. Thanks to all members of the community who approached us and showed interest, consulted, and gave ideas. And a very big thanks to attorney Assaf Wiess that without him, this would not have happened.”

“It turns out that people who are very different from each other are able to sit down together and do good things.”