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## THE LGBT COMMUNITY IN ISRAEL: ACCESS TO THE SURROGACY PROCEDURE AND LEGAL RIGHT FOR EQUALITY, FAMILY LIFE AND PARENTHOOD

### I. INTRODUCTION

In Israel, the surrogacy procedure for procreation has been performed and regulated under law since 1996, in contrast to Poland where surrogacy is unregulated, and to some EU Member States who ban surrogacy. The article focuses on the right to parenthood of LGBT<sup>1</sup> people in Israel and their access to surrogacy. That LGBT people have attained rights equal to those of heterosexual people in Israel is demonstrated through the issue of surrogacy, in light of a recent Supreme Court ruling.<sup>2</sup> The President of the Supreme Court Ester Hayut determined in HCJ 781/15 that the Surrogacy Law<sup>3</sup> and the Egg Donation Law<sup>4</sup> together create the surrogacy procedure (hereinafter: ‘surrogacy arrangement’ or ‘surrogacy procedure’), harm in an unproportionable manner single men and male couples’ constitutional rights to equality

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<sup>1</sup> LGBTQ+: Lesbian, gay, bisexual, transgender, queer and the ‘plus’ is inclusive of other groups, such as asexual, intersex, queer, questioning, etc. (hereinafter: ‘LGBT’ or ‘LGBT community’, or ‘LGBT people’).

<sup>2</sup> HCJ 781/15 *Etai Arad Pinkas v Committee for Approval of Agreements of Embryo Carrying According to Embryo Carrying Agreement Law (Approval of Agreement and Status of the Newborn) 1996, and others*, partial decision 27 February 2020 (hereinafter: ‘HCJ 781/15 2020’ or ‘second partial decision’).

<sup>3</sup> Embryo Carrying Agreements Law (Approval of Agreement and Status of the Newborn), 1996, Book of Laws 1577, (17.3.1996), 176 (hereinafter: Surrogacy Law).

<sup>4</sup> Egg Donation Law 2010, Book of laws 2242 (13.6.2010) 520 (hereinafter: Egg Donation Law).

and parenthood. All judges in the panel agreed with President Hayut's ruling; however, there was diversity regarding the operative remedies provided. Justice Uzi Vogelmann, in the minority opinion, held that the correct remedy would be a provision for the nullity of the unconstitutional parts of the surrogacy arrangement, which would take effect in 12 months and allow the legislature to correct the injustice. The relationship between the legislature and the judiciary in Israel is delicate. A system of checks and balances, founded on a separation of powers, prevails in Israel. However, we suggest that nullity of the discriminatory provision should take effect immediately, without waiting for the legislature to act. We believe that the legislature is incapable at this time of taking such far-reaching action in favour of the LGBT community. The article presents arguments that support this innovative solution.

The first part of the article presents the legal status of the LGBT community in Israel. The second part describes the surrogacy arrangements in Israel and the developments that occurred over the years, and a comparative review of the different approaches to surrogacy in some countries is presented. The third part briefly describes the ruling in HCJ 781/15. The fourth part of the article contains arguments supporting the appropriate remedy for the unconstitutional provisions discriminating against LGBT people in the surrogacy arrangements.

## II. THE LEGAL STATUS OF THE LGBT COMMUNITY IN ISRAEL

Due to the unique structure of the State of Israel as a Jewish and democratic state,<sup>5</sup> LGBT people face many obstacles that prevent them from obtaining full and equal legal rights compared to heterosexual people. LGBT people face barriers arising from the language of the law and outdated definitions and perceptions of human rights; they often deal with expressions of hatred and violence.<sup>6</sup> Yotam Zeira and Barak Medina contend that discrimination against LGBT people exists in Israeli society. However, the legal defence has been expanded in various areas in favour of the LGBT community. According to them, discriminating against a person on the base of their sexual orientation and gender identity impairs their autonomy. Aeyal Gross claims that LGBT people's rights 'brand' Israel as a 'liberal democracy'.<sup>7</sup> The legal developments, together with technological and social developments, led to the formation of

<sup>5</sup> On the expansion of the legal system in Israel, see Rivlin (2012). And for a detailed discussion on the attitude of Judaism to LGBT, see Ben Nae (2016): 117–155, at 139 onwards in reference to modern times and, among other things, male intercourse.

<sup>6</sup> Zeira, Medina (2016). An example of hate speech published in the media in the past year is that of the former Minister of Education of the State of Israel, who expressed his support for conversion therapy and the 'normal' family. See Peretz (2019). Minister of Education in Media Expressions on 13/7/2019, <<https://www.ynet.co.il/articles/0,7340,L-5549427,00.html>>. And an interview Yediot Ahronoth Supplement '7 Days' on 10 January 2020, <<https://www.ynet.co.il/articles/0,7340,L-5656441,00.html>>.

<sup>7</sup> Gross (2015): 9.

the LGBT family model. However, recognition of their normative life, in terms of marriage and parenthood, is not equal to that granted to heterosexual people.<sup>8</sup> Thus, in different areas of law such as marriage, parenthood and surrogacy arrangements there is discrimination against LGBT people, and they do not receive equal consideration when compared to others.<sup>9</sup>

The principle of equality has a supreme value in Israeli society, and Israeli case law long ago anchored the principle of equality as a fundamental value in the legal system.<sup>10</sup> As Eliezer Rivlin maintains, the Basic Laws enacted are a ‘partial bill of rights’, that ensure human rights of all citizens.<sup>11</sup> To receive the rights they deserve as citizens of the State of Israel, members of the LGBT community initiate and organize actions that lead to change. Non-profits set up and supply information campaigns for various audiences alongside activities for legislative changes. The achievements of the LGBT community are a combination of efforts, as can be seen in the developments of the surrogacy process in Israel.

In Israeli society and throughout the world, there is a familiar family model in which parents are of the same sex, or in which there is one parent. Pinhas Shifman discusses the new model of the family that is well-known in society, and the law cannot ignore it.<sup>12</sup> The law recognizes the results of the new family model but has not yet explicitly stated that this model is legitimate. According to Shifman, there is legal dualism with regard to the new family, entailing that the right hand accepts and the left-hand rejects. The judicial system conveys an ambiguous message: on the one hand, there is no full recognition of new family patterns, but on the other hand, there is informal recognition. With regard to the same-sex family, the system is in a state of wonder and deliberation.<sup>13</sup> The legal rights that have been gained by LGBT people in Israel have been granted sparingly over the years, from the late 1980s onwards, through court judgments and legislative changes.<sup>14</sup>

<sup>8</sup> Gross (2015): 115.

<sup>9</sup> Zeira, Medina (2016): 159.

<sup>10</sup> HCJ 4541/94 *Alice Miller v Minister of Defense and others*, 1995 PD 49(4). Israel Law Reports [1995-6] IsrLR.1, <[https://supremedecisions.court.gov.il/Home/Download?path=English-Verdicts%5C94%5C410%5C045%5CZ01&fileName=94045410\\_Z01.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=English-Verdicts%5C94%5C410%5C045%5CZ01&fileName=94045410_Z01.txt&type=4)>. And see, e.g. HCJ 721/94 *El Al Israel Airlines Ltd v Jonathan Danilowitz*, 1994 PD 48(5) 749. There it was held that discrimination which creates feelings of deprivation and frustration contrary to the principle of equality.

<sup>11</sup> Rivlin (2015): 781–788. In Israel no constitution has been enacted, however, there are basic laws enacted by the Knesset that are the basis for a future constitution. The two basic laws that ensure basic human rights, that were enacted in 1992, are: Basic Law: Freedom of Occupation (1994), <[https://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm)>. Basic Law: Human Dignity and Liberty, <[https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm)>. The latter is relevant to our discussion about LGBT rights.

<sup>12</sup> Shifman (2005): 643–670.

<sup>13</sup> Shifman (2005): 643–970.

<sup>14</sup> In 1988 the Knesset amended the Penal Code and abolished the criminal prohibition on sex between men. See Criminal Code Ordinance 1936, Official Paper 652 (14.12.1936) 1 Supplement, 263. Sec 152 (2). See The Penal Code 1977, Prohibition of ‘unnatural intercourse’. This was cancelled in 1988: The Penal Code Amendment No. 22 (31.03.1988). And see examples of legislation prohibiting discrimination or humiliation on the basis of sexual orientation: Equal

### III. DEVELOPMENTS IN THE SURROGACY PROCEDURE IN ISRAEL

In 1978 the world's first baby was born by the IVF (in vitro fertilization) process and since then countless children have been born around the world through surrogacy and other techniques developed over the years.<sup>15</sup> In Israel, surrogacy is legal and socially accepted,<sup>16</sup> while in Poland surrogacy is unregulated,<sup>17</sup> as in The Netherlands, Belgium, Ireland, Argentina and Colombia. A concise comparative review shows that the approach to surrogacy arrangements differs from country to country. France, Germany, Italy and Switzerland have banned the use of surrogacy. Some countries do not recognize parenthood created in such a procedure conducted outside the country, and refuse to grant rights to parents and the new-born. Australia, Canada, some states in the United States, and Thailand, have regulated the use of surrogacy in altruistic proceedings only, and some countries, such as Georgia, Greece, Ukraine, Russia and some states in the United States, have regulated this in paid proceedings. Some countries, including Greece, Georgia, Russia and Thailand, restrict access to surrogacy arrangements to heterosexual couples or women only, while others, including parts of Australia, the US, and the UK, also allow same-sex couples to have access to surrogacy arrangements.<sup>18</sup>

Israel is exceptional: here surrogacy is acceptable and has been regulated under law since 1996.<sup>19</sup> Treatment assisting procreation is commonly used in Israel. IVF is available for women of all sexual orientations, irrespective of marital status, and is offered free of charge. According to Birenbaum-Carmeli, Israel has high rates of fertility which can be explained through reference to the commandment of the Bible to 'be fruitful and multiply'. Furthermore, she points to the survival need of the Jewish people following the Holocaust, and them being subject to the Zionist ideology.<sup>20</sup> Furthermore, research conducted

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Employment Opportunities Law, 1988, Book of Laws 1240 (3.3.1988) 38. Sec 2. Defamation Prohibition Act, 1965, Book of Laws 464 (30.7.1965) 240. Sec 1(4). Sexual Harassment Prohibition Law, 1998, Book of Laws 1661 (19.3.1998)166. Sec 3(a) (5). Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000, Book of Laws 1765 (21.12.2000) 58. Sec. 3 (a). Mandatory Tenders Law, 1992, Book of Laws 1387 (12.3.1992) 114. Sec 2 (b).

<sup>15</sup> HCJ 781/15 (2020) President Esther Hayut: par. 3.

<sup>16</sup> HCJ 781/15 (2020) President Esther Hayut; see review. And see in the USA 'has yet to enact a nation-wide law' Smith (2012): 98 and 99.

<sup>17</sup> Wysocka-Bar (2020).

<sup>18</sup> Trimmings, Beaumont (2016). And see Reuss (2019): 235–237; Caldwell, 863(2019)858: (2019) Palmer (2011); Thomale (2017). Recent comparative studies show that the United Kingdom, Greece, Romania and Portugal expressly allow surrogacy within the confines of strict regulation.

<sup>19</sup> The Surrogacy Law. And see Hand (2006): 111: "The only jurisdiction that has legalized surrogacy, while regulating it under a complex and comprehensive regulatory scheme, is Israel."

<sup>20</sup> Birenbaum-Carmeli (2007): 24 and 25. Procreation treatment is available to all Israeli non-Jewish women.

in Israel and the USA shows that in these countries the use of surrogacy to establish families is increasing.<sup>21</sup>

The issue of surrogacy raises moral, social, and other dilemmas which we do not elaborate upon in this article. However, these are significant and important issues. David A. Frenkel indicates issues such as: commodification of the child, questions of parenthood, the emotional situation and consent of the surrogate mother.<sup>22</sup> Additional issues are the separation of the child from the birth mother and the lack of breastfeeding, the preservation of identity, psychological effects, and more.<sup>23</sup>

The surrogacy procedure is a procedure in which a third party provides the pregnancy, in other words a surrogate carries the fetus for the intended parents. The process involves implanting a fertilized egg in the surrogate's womb. The surrogacy model under Israeli law states that there will be no genetic link between the surrogate and the fetus.

According to Zeira and Medina, the main area in which there is no equality for LGBT people is parenting and establishing a family, mainly in adoption and surrogacy. Zeira and Medina find that surrogacy, and egg and semen donation procedures, include discriminatory arrangements, especially towards homosexuals.<sup>24</sup> It seems that the discrimination in the Surrogacy Law is intentional; moreover, the State makes it unnecessarily difficult to register the overseas surrogacy of LGBT people. Pinhas Schiffman argues that in the matter of the surrogacy arrangement, the Court is under the sway of gendered perceptions, with a preference for motherhood over fatherhood. That is, the preference of women as giving birth to babies and raising children over fathers in this role.<sup>25</sup>

In Israel, the matter of the registration of a child of two parents of the same sex, conceived abroad by surrogacy, having genetic affiliation to one parent, was ruled on by the High Court of Justice in the case of *Mamet Meged*. The Court held that registration under the Population Registry Act<sup>26</sup> will be made according to public certificate, foreign judgment or foreign birth certificate and the registrar cannot refuse to register on the basis of legal or social considerations.<sup>27</sup> The best interests of the child and the credibility of the registrar according to a public certificate justify the registration of both parents and no adoption procedure is required.<sup>28</sup>

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<sup>21</sup> Birenbaum-Carmeli, Montebruno (2019): 2467.

<sup>22</sup> Frenkel (2001): 610–612.

<sup>23</sup> See Lipkin, Samma (2013). And see Margaletic (2019): 778. And see for context: UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577: 3, available at: <<https://www.refworld.org/docid/3ae6b38f0.html>> [accessed 27 December 2020]. The Convention was ratified by the state of Israel. And see Smith (2012): 90–91.

<sup>24</sup> Zeira, Medina (2016): 183–188.

<sup>25</sup> Shifman (2005): 669.

<sup>26</sup> Population Registry Law, 1965, Book of Laws 466 (1.8.1965) 270.

<sup>27</sup> HCJ 566/11 *Doron Mamet Meged v Ministry of Interior* (published in Nevo 01.28.14) Vice-president Naor: par. 29.

<sup>28</sup> After the validation of the Judicial Parenting Order in the *Mamet Meged* case many couples turned to the court to obtain a parenting order not only on overseas surrogacy. Cf. Wysocza-Bar (2020), the Supreme Administrative Court of Poland denied registration of a child accord-

In Israel, the initial regulation of the surrogacy procedure came with the Surrogacy Law of 1996.<sup>29</sup> In the original version of the law, the right to access the surrogacy procedure was granted to ‘designated parents’: a man and a woman that are a couple who engage with a mother carrying the child. According to Haim Avraham, the limited definition of parents in the Surrogacy Law is discriminatory. The narrow definition violates unreasonably and disproportionately the right to parenthood and violates the principle of equality.<sup>30</sup> The law before the 2018 amendment discriminated against single men, single women and same-sex couples.<sup>31</sup>

In 2015 *Arad Pinkas and others*<sup>32</sup> petitioned for the expansion of access to the surrogacy arrangement in Israel so that it would also apply to same-sex couples and individuals with or without genetic affinity to the new-born. The Vice President of the Supreme Court Salim Joubran determined in the first partial judgement that the existence of a genetic link between one of the parents to the new-born is a mandatory condition. The application of the surrogacy arrangement to single men or same-sex spouses remained pending, due to legislative procedure in the Knesset. Vice President Joubran recognized the harm inflicted upon the petitioner; however, he stressed the importance and value inherent in enabling the legislature to complete the ongoing legislative procedures. According to Joubran, the petition is part of a long struggle for the recognition of LGBT people’s right to become parents. The law’s distinction between LGBT people and heterosexual couples seriously harms their dignity. On the one hand, time should be given to the legislature to clarify the issue; on the other hand, the suspension violates the rights of the petitioners. Joubran maintains that the law harms the LGBT community because it does not fit today’s reality.<sup>33</sup>

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ing to a foreign birth certificate indicating two women as parents, due to public policy. And see Margaria (2020): 412–425, a recent Advisory Opinion delivered by the European Court of Human Rights on the issue of recognition in domestic law of the legal relationship between a child born through surrogacy abroad and the intended mother is in the child’s best interests, because not only biological truth but also relational and emotional aspects contribute to developing one’s private life and personal identity.

<sup>29</sup> Surrogacy Law (1996).

<sup>30</sup> Avraham (2017): 172.

<sup>31</sup> A public committee (Mor Yosef) discussed the issue of fertility and reproduction in Israel including surrogacy, see Ministry of Health Public Committee Recommendations of Examination of Legislative Arrangements for Fertility and Procreation in Israel (2012); Avraham (2017): 181. Following the recommendations of the committee, the government submitted a bill to amend the law. See Embryo Carrying Agreements Law (Approval of the Agreement and Status of the Newborn) (Amendment No.2), 2014 bill. Book of Laws 886 (23/7/2014) 916 (hereinafter: the 2014 bill), allowing access to the surrogacy procedure to single men and single women. The bill expired.

<sup>32</sup> HCJ 781/15 *Etai Arad Pinkas and others v Committee for Approval of Agreements of Embryo Carrying According to Embryo Carrying Agreement Law (Approval of Agreement and Status of the Newborn) 1996 and others*, 03.08.2017 (hereinafter: ‘HCJ 781/15 (2017)’ or ‘First partial judgement’).

<sup>33</sup> HCJ 781/15 (2017).



In 2018, the Surrogacy Law amendment was accepted in the Knesset.<sup>34</sup> The definition of ‘designated parents’ in the law was amended to include single women who, due to a medical problem, are unable to get pregnant, carry a pregnancy, or whose pregnancy could significantly endanger their lives. The change requested by the petitioners and by the Court regarding the *Arad Pinkas* case was for the circle of eligibility to access surrogacy procedures to be extended to single men and same-sex couples as well. Although the State had committed itself to the legislative process and to amending the injustice, it had not done so. However, the State had taken a welcome step. It corrected a wrong that had existed since 1996, which the Court sought to fix in 2002, extending the circle of eligibility to include single women.<sup>35</sup>

Before the amendment to the law was approved in 2018, there were heated discussions in the Knesset Committee regarding the law proposal. The discussions revolved around the fact that single men and same-sex couples were ignored and removed from the amendment to the law, despite the State’s commitment to the Court regarding the *Arad Pinkas ruling*. Moti Yogev, a Member of Knesset, argued that Israel should not be ‘leading the world deviations’.<sup>36</sup> Yogev claimed that there is no equality between genders, and that in a Jewish, normative, moral, and natural family, men have roles, and women have roles and that a ‘woman is better than man’. He claimed that surrogacy for men is unnatural and they have no right to conceive naturally, surrogacy for men is immoral, inhumane and un-Jewish.<sup>37</sup> Yogev represents the conservative approach towards LGBT people’s right to parenthood and towards the role of motherhood.<sup>38</sup>

Beyond the melee in the Knesset Committees, public discourse was awakened in anticipation of the vote on the 2018 amendment. After the approval of the bill, the largest LGBT community protest in the history of Israel broke out, calling for a stop to discrimination against the LGBT community.<sup>39</sup> The protest was accompanied by a one-day lockdown of the economy and received broad support from many commercial companies.

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<sup>34</sup> Embryo Carrying Agreements Law (Approval of Agreement and Status of Newborn) (Amendment No. 2), 2018. Book of Laws 2748 (26.7.2018) 941 (hereinafter: the 2018 amendment).

<sup>35</sup> See HCJ 2458/01 *New Family* (2002): 419. The petitioner, a single woman unable to conceive, sought permission to access the surrogacy arrangement using her eggs that were fertilized but was refused by the approval committee. It was determined by the Court that the law is discriminatory and violates the petitioner’s right to parenthood; and the Court called upon the legislator to amend the injustice.

<sup>36</sup> Labor, Welfare and Health Committee Meetings of January 22, 2018: 15. <<https://m.knesset.gov.il/Activity/committees/Pages/AllCommitteesAgenda.aspx?Tab=3&ItemID=2063860>>.

<sup>37</sup> Committee meeting of April 30, 2018: 6–25.

<sup>38</sup> Labor, Welfare and Health Committee meeting of May 29, 2018: 36. <<https://main.knesset.gov.il/Activity/committees/Pages/AllCommitteesAgenda.aspx?Tab=3&ItemID=2070637>>.

<sup>39</sup> Demonstration 22/07/2018, the report in the media <<https://www.ynet.co.il/articles/0,7340,L-5314674,00.html>>.

#### IV. HCJ 781/15 *ETAI ARAD PINKAS V COMMITTEE* FOR THE APPROVAL OF AGREEMENTS, 2020

In HCJ781/15 2020,<sup>40</sup> the President of the Supreme Court Esther Hayut reviewed the Surrogacy Law after the amendment of 2018. The surrogacy process is eligible for ‘designated parents that are spouses’, defined as a man and a woman who are spouses, and a ‘single designated mother’, being a woman without a partner, is also defined as a designated parent.<sup>41</sup> The law stipulates that the procedure will be carried out under an agreement to carry embryos approved by the approval committee. The conditions for approval are that the egg is not of the surrogate; the sperm used to fertilize is of the designated parent; in the case of a single mother – the egg is of the designated mother and fertilization has been done in a recognized department.<sup>42</sup> According to Egg Donation Law,<sup>43</sup> an egg donation to a woman will be approved when a woman has a medical problem which prevents her conceiving from her eggs, or if she has any other medical problem that justifies egg transplantation.<sup>44</sup>

President Esther Hayut refers to the first partial judgement<sup>45</sup> where Vice-President Joubran held that the law that prevents individuals and same-sex couples from realizing their right to become parents using surrogacy, while it is allowed for heterosexuals, seems discriminatory. The preference of heterosexuals ‘turns its back on the value of human dignity, which is subscribed in the Basic Laws of the State of Israel and the principle of equality is derived from it’.<sup>46</sup> Vice-President Joubran also notes that he has difficulty finding a relevant reason for distinguishing between single men and single women. The principle of equality also applies to gender differences, thus limiting procreation techniques due to gender must raise questions.

President Hayut states that the central question facing the Court is whether there is a violation of the petitioners’ fundamental right to equality and parenthood. The right to become a parent is derived from the right to family life and the right to dignity. The right extends to ‘all different medical techniques that assist procreation’<sup>47</sup> including the surrogacy procedure. The President emphasizes that the right is vested in everyone and does not depend on gender identity or sexual orientation, or on being single or being part of a couple.<sup>48</sup> Regarding the violation of the right to equality, the President

<sup>40</sup> HCJ 781/15 (2020).

<sup>41</sup> 2018 Amended, Sec. 1

<sup>42</sup> 2018 Amended, Sec. 2.

<sup>43</sup> Egg Donation Law (2010).

<sup>44</sup> Egg Donation Law (2010), sec. 11. And see Medical Director Circular Egg Donation Abroad (2005). Medical Director Circular 39/2005: Egg Donation Abroad <[https://www.health.gov.il/hoz-er/mr39\\_2005.pdf](https://www.health.gov.il/hoz-er/mr39_2005.pdf)>.

<sup>45</sup> HCJ 781/15 (2017).

<sup>46</sup> HCJ 781/15 (2017): par. 46.

<sup>47</sup> President Hayut refers to judgment: HCJ 781/15 (2017), Vice President Joubran: par. 31.

<sup>48</sup> HCJ 1078/10 *Arad Pinkas v Committee for Approval of Agreements of Embryo Carrying* (published in Nevo 28/06/2010): par. 15.



points out that Israeli law recognizes the existence of groups in Israel, including the LGBT community, which receive preliminary treatment that is a 'suspicious' discrimination. This discrimination is a violation of the 'hardcore' of the right to equality.<sup>49</sup>

President Hayut ruled that the petition seeking to allow single men to access the surrogacy process has a grip on the reality of Israeli law and is another logical step in the course of events. Any person who performed a surrogacy procedure abroad (in a country that allows such a procedure legally) will have his parenting registered in Israel subject to proof of genetic affinity.<sup>50</sup> According to the data provided, numerous applications were submitted for status in Israel for minors born in surrogacy procedures abroad, and there has been a clear upward trend over the years.<sup>51</sup> It appears there is discrimination between those who are entitled to access the surrogacy procedure in Israel compared to those who have to apply for this procedure abroad.<sup>52</sup> The High Court of Justice ruled in the past, in the case of *Moshe*, that it is inconceivable that Israeli civilians would only be able to realize their rights and dreams in other countries.<sup>53</sup> A gay female couple were denied access for treatment of procreation (egg transplant and surrogacy) in Israel because it was not according to the regulations. Israeli gay couples often go to other countries such as the United States and Colombia in order to use the surrogacy procedures.

According to the President, blocking access to the surrogacy arrangement for single men in Israel violates their right to equality and their right to parenthood. LGBT men suffer increased violation of rights because their only route to genetic parenting is through the surrogacy procedure. President Hayut ruled that the across-the-board exclusion of the LGBT men from the Surrogacy Law is condemned as 'suspicious' discrimination, conferring inferior status on this group and seriously harming and diminishing a person's dignity based on gender and sexual orientation. The President reinforces her remarks by referring to the piercing words used by various Knesset members on the inclusion of single men and same-sex couples in the scope of the law.<sup>54</sup>

In examining the remedies, the President does not consider the exclusion of men and same-sex couples as a lacuna (non-liquet) that can be completed in

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<sup>49</sup> HCJ 1078/10: par. 15 referred to Administrative Appeal 343/09 *Jerusalem Open House for Pride and Tolerance v The Jerusalem municipality* (published in Nevo 14.09.2010) (hereinafter: 'Open House'): par. 53 Judge Amit.

<sup>50</sup> HCJ 566/11 *Doron Mamet Meged* (2014).

<sup>51</sup> Exhibit 3/340 Supplementary statement (2017). Oriana Elmsi process of surrogacy in Israel and abroad cost components to Israel, Knesset, Research and Information Center (2018): 8–10. Data provided by the Population and Immigration Authority, between 2005 and 2017, approximately 1,513 applications.

<sup>52</sup> Zafran (2015).

<sup>53</sup> HCJ 5771/12 *Moshe v Committee for Approval of Agreements for the Carriage of Embryo According to the Surrogate Agreements Law (Approval of Agreements and Status of Newborn) 1996* (published in Nevo 18.09.2014; see reference HCJ 781/15 *Etai Arad Pinkas* (2020): par. 18.

<sup>54</sup> See supra. And Knesset member Yogev. Labor, Welfare and Health Committee meeting of April 30, 2018: 6–25. <<https://main.knesset.gov.il/Activity/committees/Pages/AllCommittees-Agenda.aspx?Tab=3&ItemID=2068203>>.

an interpretive way.<sup>55</sup> The preferred remedy by President Hayut is the amendment of the Surrogacy Law and the Egg Donation Law by the legislature, in a way that expresses the right to equality and parenting for single men and same-sex couples. The violation of rights is severe, and the continuation of the court proceedings since 2015 is lengthy. Therefore, President Hayut orders, that unless the laws are amended within 12 months, a supplementary judgment will be given with an operative relief. The relief of reading into the law or partial nullity of the law.<sup>56</sup>

President Hayut's ruling is revolutionary and courageous. President Hayut stated loudly and clearly that LGBT people deserve to be treated equally and took an active step in giving an ultimatum to the legislature to fix the wrong. Former Court rulings had recognized the unjust treatment towards the LGBT community; however, this was the first time the judiciary was ready to right the wrong actively. Nevertheless, Judge Vogelman, in the minority opinion, went a step further and recommended the offending clauses be nullified – an exceptional remedy that indicates the extent of the violation of equality. We believe that the minority opinion of Justice Uzi Vogelman is the preferable outcome of this ruling, as presented below.

## V. THE APPROPRIATE REMEDY OF THE UNCONSTITUTIONAL PROVISIONS OF THE SURROGACY LAW

Justice Uzi Vogelman, in the minority opinion, held that the correct remedy would be a provision for the nullity of the unconstitutional parts of the surrogacy arrangement. Justice Vogelman determined that the definition of designated parents that are spouses and designated single mother should be cancelled. Several sections of the law should be cancelled in addition to several sections of the Egg Donation Law. Judge Vogelman proposes to suspend the cancellation of the sections for 12 months after the publication of the judgment, to allow the legislature to correct the injustice in the existing law.

Judge Vogelman supports his opinion with the following arguments: First, due to the volume and severity of harm to fundamental rights of single men and male couples in the surrogacy procedure, the constitutional remedy should not be delayed.<sup>57</sup> Second, the constitutional remedy aims to give an operative

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<sup>55</sup> HCJ 781/15 (2020): par. 32. The President examines the limitation clause and concludes that the Surrogacy and Eggs Donation Law arrangement do not meet the proportionality test. The limitation clause – in a nutshell – determines that infringement of rights under the law will only be by legislation fitting the values of the State of Israel, that are for a proper purpose and to an extent not greater than required or according to legislation authorizing it explicitly. The President determines that denying the access of single men and same-sex partners to the surrogacy arrangement is unconstitutional and violates a disproportionate violation of the right to equality and parenting.

<sup>56</sup> HCJ 781/15 (2020): par. 37.

<sup>57</sup> HCJ 781/15 (2020): par. 31.

remedy to the offended party.<sup>58</sup> Therefore, if it is an unconstitutional law, the primary remedy, in this case, is the cancellation of the law.<sup>59</sup> The Court may cancel the unconstitutional parts of the law and not the law in whole. The timing of the cancellation – immediate or delayed, may also be decided by the Court.<sup>60</sup> Judge Vogelman stresses that the remedy of cancellation is a powerful remedy and the Court must grant it with caution.<sup>61</sup> He finds that due to the magnitude of harm to men in preventing their access to the surrogacy procedure, the remedy cannot be delayed.

Nevertheless, Judge Vogelman recommends a delay of the cancellation remedy. That is to allow the Knesset to amend the law. The reason for the delay is to acknowledge the importance of the dialogue between the judiciary and the legislature.<sup>62</sup> Judge Vogelman concludes that it is time to give this group (LGBT) an adequate remedy in the face of the unlawful damage to their constitutional rights.<sup>63</sup>

The relationship between the legislature and the judiciary is complex. The issue of the judicial activism of the Supreme Court is a cause of controversy in Israel. In Israel powers are separated and there is an equilibrium of checks and balances between the three powers. One power is the legislature – the Knesset; the second power is the Judiciary – the courts; and the third power is the executive – the Government. The Israeli Supreme Court has adopted the ‘American liberal approach’ Rivlin states, to interpreting the legislation of the Knesset. Thus, the Supreme Court intervenes and invalidates legislation infringing human rights determined in the Basic Laws.<sup>64</sup> The separation of powers is a fundamental and essential principle in Israel’s system. However, we find this is the appropriate case for the judiciary to act and intervene, since the legislature refrained from action.

We take another step forward in favour of the LGBT community and suggest the immediate cancellation of the discriminating provisions in the surrogacy laws and opening access to the surrogacy procedure to single men and male couples. As stated by Judge Vogelman, the Court may determine the timing of the cancellation remedy, effective immediately.

Previous events demonstrate the reasons for avoiding a delay in the cancellation of the discriminating provisions of the laws. Such was the case with *New family*.<sup>65</sup> At that time in 2002, the claim of single women for access to the surrogacy procedure was denied. The wrong was amended in 2018, and only then did single women obtain access to the surrogacy procedure. Amending the law 16 years later rendered the amendment irrelevant to the petitioner,

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<sup>58</sup> HCJ 781/15 (2020): par. 32.

<sup>59</sup> HCJ 781/15 (2020): par. 36.

<sup>60</sup> HCJ 781/15 (2020): par. 37.

<sup>61</sup> HCJ 781/15 (2020): par. 38.

<sup>62</sup> HCJ 781/15 (2020): par. 43.

<sup>63</sup> HCJ 781/15 (2020): par. 44.

<sup>64</sup> Rivlin (2012): 785.

<sup>65</sup> See HCJ 2458/01 *New Family v Committee for approval Surrogate agreements*, 2002, PD 57(1)419: note 39.

due to the long time that had passed. Although the Court had found the claim justified, it was waiting for the legislature to act and amend the law. For the petitioner, it was probably too late, and justice was not served in her case. Justice that takes so long to arrive is questionable.

Another reason in favour of the immediate remedy is the complex construction of the Israeli Knesset. It may take a long time for legislation allowing access to single men and same-sex couples to be passed, due to political reasons. Although the majority opinion in the ruling gave the legislature 12 months to amend the law, it will probably take much longer than that. Additionally, the COVID-19 pandemic renders all other matters less essential, and it may well be that the Knesset will not return to deal with the surrogacy arrangements until the pandemic is over. The immediate cancellation of the discriminatory provisions resolves all these problems and justice is served.

## VI. CONCLUDING REMARKS

The principle of equality is fundamental in the legal system of Israel, but is not fully applicable to the LGBT community. Their right to establish a family and become parents is denied in the surrogacy procedure. The procedure became accessible for single women after Court rulings that led the legislature to amend the law. For LGBT men and same-sex couples, it is not accessible and is only available outside the borders of Israel. The discrimination against LGBT men should be eliminated by the cancellation of the unconstitutional provisions of the law, effective immediately. To conclude, these are the words of the retired Supreme Court President Dorit Beinisch in *Adala* case: ‘The basic human right to choose a partner and raise a family unit within his country is part of the dignity and the essence of his personality.’<sup>66</sup>

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<sup>66</sup> HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v Interior Minister*, PD 61(2)202: par. 7.

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THE LGBT COMMUNITY IN ISRAEL:  
ACCESS TO THE SURROGACY PROCEDURE  
AND THE LEGAL RIGHT TO EQUALITY, FAMILY LIFE AND PARENTHOOD

Summary

In Israel’s legal system, equality is a fundamental principle. LGBT people in Israel suffer from discrimination due to their sexual orientation and their right to equality, parenting, and family life is impaired. Regarding the surrogacy procedure, the Supreme Court has unequivocally stated that the relevant laws discriminate against LGBT people and their fundamental rights when compared to heterosexual people. The main problem is that the statutes block the access to the surrogacy procedure of single men and male couples, harming their right to equality, right to a family life and parenting. The article suggests adopting the minority ruling of Justice Uzi Vogelmann in HCJ 781/15 and declaring the nullity of the sections in the laws that discriminate against single men and male couples. This remedy is a lawful and operative solution for the inequality rooted in the surrogacy arrangements towards homosexuals that want to establish a family and become parents. The expectation from the legislature to amend the law is unrealistic, due to the political construction of the Israeli Knesset (parliament). An innovative approach for the amendment of the inequality towards LGBT people should be the nullity of the discriminating sections of the law.

Keywords: LGBT; equality; parenthood; surrogacy

