

Same-sex family unions in Israeli law

Talia Einhorn*

1. Introduction

The legal problems encountered by same-sex couples in Israeli law are more complicated than those encountered in other democratic, developed countries. This is due to the fact that, in Israeli law, many areas of family law, first and foremost marriage and divorce, are governed by orthodox religious law, which does not recognize same-sex marriages at all and, furthermore, opposes such relationships, as well as any of their legal consequences. Nor is it possible for spouses to establish a registered partnership in Israel, since partnerships can only be established for commercial purposes.

Notwithstanding the fact that the legal system does not provide for civil marriage and divorce, a large spectrum of family unions has nonetheless developed, gaining state recognition in various respects, thanks to the liberal approach of the Israel Supreme Court.¹ However, a certain adaptation of the legal rules is also necessary for same-sex family unions to fit into this legal framework.

This article analyzes the subject from its different perspectives, along the timeline of any relationship, from the establishment of the family union to its end. It first explains the special Israeli legal framework, the understanding of which is indispensable to the appreciation of the problems encountered by same-sex spouses (Section 2). It then proceeds to analyze the establishment of same-sex family unions in Israel (Section 3); the status in Israel of same-sex family unions established by marriage abroad (Section 4); the status in Israel of same-sex registered partnerships established abroad (Section 5); the legal options regarding the choice of a family name for a same-sex family union (Section 6); same-sex spouses maintenance obligations (Section 7); same-sex spouses property relations (Section 8); child adoption by same-sex spouses (Section 9); fertility treatment/surrogate motherhood agreements (Section 10); social rights owed by the State to same-sex spouses (Section 11); dissolution in Israel of a same-sex family union (Section 12); and succession (Section 13). It concludes with a critical evaluation of the legal situation (Section 14).

* Professor of Law, Sha'arei Mishpat College of Law / Tel-Aviv University Faculty of Management (Israel), email: taliaeinhorn@gmail.com

1 The general developments in Israeli family law and international family law are discussed in T. Einhorn, 'Israeli International Family Law – the Liberalization of Israeli Substantive Family Law', in H.-E. Rasmussen-Bonne *et al.* (eds.), *Balancing of Interests – Liber Amicorum Peter Hayzum 70. Geburtstag*, 2005, pp. 141 *et seq.*; T. Einhorn, 'Family Unions in Israel – the Tensions between Religious Law and Secular Law and the Quest for Coherent Law', in T. Frantzen *et al.* (eds.), *Rett og tolerance – Festskrift til Helge Johan Thue*, 2007, pp. 697 *et seq.* Cf. also T. Einhorn, 'Israeli Private International Law, Part II, Chapter 6 – Family Law', in *International Encyclopedia of Laws – Private International Law* (looseleaf) ©. Blanpain & B. Verschraegen (eds.), 2008 (forthcoming), paras. 418 *et seq.*

2. The legal framework

Israeli family law does not apply in all matters of family law a uniform system for all Israeli citizens with respect to both the applicable law as well as jurisdiction. Instead, it is divided between two different legal systems, the religious and the secular. This state of affairs goes back to the period when the Ottoman Empire controlled the Holy Land (1517-1917). Both the British Mandate (1917-1948), which replaced the Ottoman Empire, and the State of Israel, established after the British Mandate had ended, relied to a large extent on the system adopted by the Ottoman Empire.²

Key aspects of family law, *i.e.* those defined as ‘matters of personal status’, are subject to the personal law of the persons concerned. For Israeli citizens or residents this is their religious law, if they are Jewish, Muslim, Druze, or belong to one of the other eleven recognized religions.³ For Israeli citizens, who are not members of one of the above religious communities, there is no generally applicable personal law. For non-resident foreigners, the law of their nationality applies (unless that law imports the law of their domicile, in which case the latter applies). In some matters (*e.g.*, maintenance), the law of domicile applies under Israeli legislation covering that matter specifically.

Some aspects of family law, such as adoption, succession, and matrimonial property, are regulated by secular, territorial legislation enacted by the *Knesset*.

Regarding jurisdiction, matters of marriage and divorce (with an exception regarding the dissolution of inter-faith marriages) are entrusted to the exclusive jurisdiction of the respective religious courts. Other ‘matters of personal status’ are subject to concurrent jurisdiction of the civil courts, which must, however, *ex officio* apply religious law, albeit under different rules of procedure and evidence.

The religious courts only adjudicate according to their religious law, except where a law passed by the *Knesset* is addressed to them as well.⁴ In addition, they have to take account of some Israeli constitutional law principles and basic rights acquired thereunder.⁵

To the extent that a civil court has to decide a case according to religious law, it will follow a path which is quite different than that taken by a religious court called upon to decide the same case. In principle, according to the Interpretation Ordinance, 1945 (as well as its new version of 1954, and the Interpretation Law, 5741-1981), the religious laws (written or unwritten) of all recognized religious communities are an integral part of Israeli law and, consequently, within the

2 For an extensive study *cf.* E. Vitta, *The Conflict of Laws in Matters of Personal Status in Palestine*, 1947.

3 They are: Eastern (Orthodox), Latin (Catholic), Gregorian Armenian, Armenian (Catholic), Syrian (Catholic), Chaldean (Uniate), Greek-Catholic – Melkite, Maronite, Syrian (Orthodox), Episcopal-Evangelical (since 1970) and Bahai (since 1971). The Second Schedule to the Palestine Order in Council, 1922, added by the Palestine (Amendment) Order in Council, 1939, Palestine Gazette 898, supplement 2, 459, included also the Jewish Community, which ceased to be organized as such upon the establishment of the State of Israel.

4 § 7, Women’s Equal Rights Law, 5711-1951: ‘All courts shall act in accordance with this Law; a tribunal competent to deal with matters of personal status shall likewise act in accordance therewith, unless all the parties are eighteen years of age or over and have consented before this tribunal, of their own free will, to have their case tried according to the laws of their community’; § 13(b), Spouses (Property Relations) Law, 5733-1973: ‘In a matter dealt with by the Law, a religious court shall act in accordance with the provisions of this Law unless the parties have agreed before such court to litigate in accordance with religious law.’

5 *Cf.*, *e.g.*, HCJ 1000/92 *Bavli v. The Great Rabbinical Court*, 48(2) PD (*Pisqei Din*, Collection of Judgments of the Israel Supreme Court) 221. In that case the Supreme Court held that: (1) the Rabbinical Court must take account of the equality between men and women and, consequently, it can no more apply the Jewish law rules which would have deprived the wife of most of the property acquired during the marriage; (2) Furthermore, the Rabbinical Court must recognize property rights acquired under Israeli civil law and protected under Israeli Constitutional Law, and cannot apply Jewish law to derogate from such rights. *Cf.* P. Shifman, ‘The Rabbinical Courts – Where are They Heading?’, 1994 *Mishpat Umimshal – Law and Government in Israel* 2, pp. 523 *et seq.* (in Hebrew).

judicial notice of the Court without need to be proved, as is the case with foreign law.⁶ However, the difference in application is significant.⁷ In particular, the civil courts apply different rules of procedure and evidence than those applied by the religious courts. The differences may lead to different results,⁸ including cases of a ‘split status’.⁹ In addition, whereas the civil courts may recognize the full effects of acts done outside the territory of Israel in compliance with foreign law (e.g., civil marriages performed abroad), the religious courts consider themselves free from such restrictions, regarding religious law as having universal application to all persons subject to their jurisdiction.¹⁰

In 1995, Israel established a system of Family Courts, following the enactment of the Court for Family Affairs Law, 5795-1995 (hereinafter – ‘Family Court Law’). Previously, the District Courts exercised jurisdiction in family law matters within the competence of the civil courts, and an appeal could be brought before the Israel Supreme Court as a matter of right. In contrast, the Family Courts are established in the same areas of jurisdiction as the Magistrates Courts, and their decisions are appealed to the District Courts. An appeal from the District Court to the Supreme Court is only possible after obtaining special permission from the Supreme Court. Consequently, there are fewer binding precedents of the Supreme Court, and much less harmony among court decisions handed down by different Family Court judges.

The Family Court Law applies to all familial and similar relations, regardless of whether the spouses were in fact married. There is still, however, some controversy whether the law applies to same-sex family unions, which will only be finally settled after the Supreme Court decides a case in this matter and makes a precedent binding on all other courts.¹¹

The status, rights and obligations of same-sex spouses in Israel are examined against this background.

3. Same-sex family unions established in Israel

Same-sex spouses cannot get married in Israel. Israeli law provides neither for a civil marriage nor for the establishment of a registered partnership. Non-Orthodox religious communities, such

6 In practice, however, courts occasionally require that the religious laws be proved by the parties on the basis of expert opinions. This may be done on the basis of Rule 258L(1), Civil Procedure Rules, which allows the Court to appoint an expert in family matters. Courts have accepted expert opinions as an *amicus curiae*, stating that they cannot be expected to have judicial notice of the religious laws of all religious communities – cf., e.g., CC (Civil Case) (Tel-Aviv) 778/50, 876/50 *A.B. v. M.B.*, 3 PsM (Pesaqim Mehoziim, Collection of District Court Judgments) 263 at p. 287, per Judge Zeltner, and Probate Case (Tel-Aviv) 115/54 *in re Testament of the deceased Michael Polak and re Grenzberg v. Eugenia Polak and Leib Bulein*, 12 PsM 129; Family Case (Tel-Aviv) 67250/00 *Minor v. Ploni*, tak-family electronic database 2001(1), 112 (25.2.01). Cf. I. Englard, *Religious Law in the Israel Legal System*, 1975, pp. 88 *et seq.*

7 Cf. M. Shava, ‘The Nature and Scope of Jewish Law in Israel as Applied in the Civil Courts as Compared with its Application in the Rabbinical Courts’, 1985 *The Jewish Law Annual* 5, pp. 173-194.

8 The question of how the decisions of the civil courts should relate to those made by the Rabbinical Courts has been discussed in CA 63/69 *Yossef v. Yossef*, 23(1) PD 804; Further Hearing 23/69 *Yossef v. Yossef*, 24(1) PD 792, given subsequently to the Rabbinical Court decision in the same matter: Case 4553/5713 [1953] *A. v. B.*, 1 PDR (Collection of Judgments of the Rabbinical Courts) 81. The Supreme Court held that decisions of the civil courts may be guided by decisions of the Rabbinical Courts in matters of personal status, but the latter are not binding upon them (cf. Further Hearing 23/69, at p. 810).

9 Cf. HCJ 51/69 *Rodnitzky v. The Rabbinical Court*, 24(1) PD 704. The Rabbinical Court considered the witnesses to a marriage incompetent (because, *inter alia*, they habitually desecrated the Sabbath) and, consequently, held the marriage invalid. In contrast, the Supreme Court determined the witnesses’ competence under the Evidence Ordinance applicable in the civil courts and concluded that they were competent and the marriage – valid.

10 Cf. M. Silberg, *Personal Status in Israel*, 1957, pp. 255-259. Cf., also, CA 238/53 *Cohen and Busslik v. The Attorney General*, 8 PD 4, 19, per Justice Silberg.

11 Recognition of same-sex spouses as coming within the scope of the Family Court Law was granted, e.g., in Family Case (Tel-Aviv) 6960/03 *K.Tz. v. The Attorney General*, per J. Granit (21.11.04), tak-family 2004(4), 250, Family Case (Tel-Aviv) 3140/03 *R.A. v. L.M.* (16.2.2004), tak-Family 2004(1), 637, per J. Reish-Rothschild; Family Case 8510/01, per J. Alon-Laufer (12.8.01), reported in *LawData* database. Such recognition was denied, e.g., in Family Case (Tel-Aviv) 16610/04 *Ploni v. the Attorney General* (8.5.05), per J. Geifman, faxdin 1228 (19.5.2005), 7/9.

as the Reform Jewish Community, which would marry such spouses in a religious ceremony, are not authorized to perform religious marriages in Israel. Consequently, the only kind of family union that such spouses may establish in Israel is that of extra-marital cohabitation. In Israeli law, such spouses are termed 'reputed spouses'.

Same-sex spouses are not the only type of 'reputed spouses'. In Israel there are three groups of unmarried couples who choose to live as reputed spouses: (1) those who cannot marry in Israel (inter-faith marriages, marriages prohibited by religious law); (2) those who are secular and do not wish to have a religious ceremony, or are wary of the difficulties, especially for women, of obtaining a Jewish divorce if the marriage fails; and (3) those who prefer, at least for the time being, a loose relationship, which does not impose upon them the whole set of effects which an established marriage entails.

Israeli law seems to have ignored the third, quite substantial group, and focused only on helping the first two. Accordingly, Israelis have seen an expansion of recognition of the effects of extra-marital cohabitation in Israeli secular law. To cover the cases in which spouses opted for becoming reputed spouses because they could not overcome the difficulty of obtaining the *get* (bill of divorce under Jewish law),¹² most rules have also been extended to reputed spouses who are concurrently officially married to others (with the exception of some rules, e.g. those governing succession, which are restricted to reputed spouses who are not married to another person at the time of death of their partner)¹³.

In recent years, the rules have been gradually extended by the courts to same-sex reputed spouses. This extension is still subject to controversy, reflected in conflicting decisions of the Family Courts.

However, the Supreme Court has been very consistent in emphasizing that, unlike marriage, extra-marital cohabitation confers no status.¹⁴ It is merely a contractual relationship. The contract need not be express, but may be implicitly deduced from the circumstances of living together as husband and wife in a common household. To the extent that the legislature did not define the rights of the reputed spouse specifically, those rights must be evaluated separately in every case, and for every act of legislation. Even here, however, interpretation has become rather flexible. In recent years, the court underlined that such relationships have become so common that it would be unjust to treat reputed spouses differently from married couples. Old cases in which reputed spouses had not been treated equally to lawfully married ones were therefore set aside. Although the Supreme Court is careful not to attach the word 'status' to extra-marital cohabitation, it nonetheless refers to such a relationship as an 'institution', using the same terminology that it uses for the 'institution' of marriage.

It is noteworthy that, according to Israeli law, it is possible to be entitled to the rights, and made subject to the obligations, of a reputed spouse within a very short period of time. In one case, three months of cohabitation sufficed for a woman to inherit the deceased spouse's share in the estate, despite evidence that the spouses kept their accounts and all other property separate,

12 Cf. T. Einhorn, 'Jewish Divorce in the International Arena', in J. Basedow *et al.* (eds.), *Private Law in the International Arena – Liber Amicorum Kurt Siehr*, 2000, pp. 137 *et seq.*

13 Under the proposed draft civil codification, prepared by the Codification Committee, a 'spouse' for the purpose of succession will include reputed spouses, even if married, provided that the married spouse(s) had been separated at least three years from his or her lawfully wedded spouse, and the reputed spouses had cohabited for a period of at least three years before one of them passed away. The proposed draft can be viewed (in Hebrew) on the official webpage of the Ministry of Justice: <http://www.justice.gov.il/NR/rdonlyres/7B5FF13D-B5EB-4E8E-83AE-7E47E5332948/0/yerosha.pdf>

14 E.g., CA 384/61 *State of Israel v. Fessler*, 16 PD 102, 109; CA 356/78 *Steinitz v. Eged Members Pension Fund Ltd.*, 33(3) PD 556, 558; HCJ 693/91 *Efrat v. Commissioner of the Population Registry*, 47(1) PD 749, 787; CA 2000/97 *Lindorn v. Karnit Fund for Traffic Accident Victims* (19.2.99), 55(1) PD 12.

and the woman was still registered with the Ministry of the Interior as residing in her own apartment.¹⁵

4. Same-sex family unions established by marriage in a foreign country

Religious law limits the ability of spouses to marry in Israel, whether because of religious impediments to such a marriage, or because the spouses belong to different religious faiths. Consequently, already in the early days of the State, such spouses celebrated a civil marriage abroad and sought to have it recognized in Israel.

The *Funk-Schlesinger* case was the first, landmark decision to come before the Israel Supreme Court.¹⁶ It concerned the civil marriage of an Israeli Jewish man with a Belgian Catholic woman, performed by the Belgian Consul in Cyprus. After having the marriage registered with the *registre matricule* at the Belgian embassy, the couple applied to be registered as married also in Israel. In his judgment for the majority of the Court, Justice Sussmann pointed out that:

‘any state wishing to live within the family of nations must, to that end, give up some of its substantive law rules in cases having a foreign element (...). The fact that Jewish religious law considers mixed marriages void does not, in itself, compel the secular court to reach the same conclusion when it decides the question according to a foreign law. Only if the court reaches the conclusion that the marriage is offensive to Israeli external (international) public policy, that is if such a marriage is so offensive to public policy that it should be considered void irrespective of wherever it has been celebrated, then the court should give it no effect. However, religious impediments to marriage, important as they may be, should not be decisive in such cases. The Israeli public is divided into two camps – one which observes religious law or most of its commands, and another which emphasizes the difference between a state abiding by the rule of law and a state abiding by religious law [*halakha*]. The views of these two groups are entirely at odds with each other. Israeli public policy does not dictate that the judge will compel one camp to follow the views of the other. Life demands tolerance towards the other and showing consideration for differing views. Therefore, the yardstick of the judge must be the balance of *all* views prevailing in the public.’¹⁷

This general statement notwithstanding, the Supreme Court declined to rule on the validity in general of mixed (inter-faith) marriages and confined its ruling to the pertinent question, in that case the entering of the newly acquired marital status in the Israeli population registry.

The majority of the Supreme Court held that the registrar must enter any information provided by applicants into the population registry, unless it is manifestly incorrect (*e.g.* if the official is asked to register a 20 year old man as being 5 years of age). According to the Court, the registration is an administrative procedure, not a judicial one, designed to collect statistical data. Therefore, the registrar should have entered the marriage in the population registry, regardless of Israeli substantive family law rules that do not recognize such marriages. This ruling was also extended to marriages by proxy in Mexico or Paraguay, where the spouses

¹⁵ Succession Case (Tel-Aviv) 3696/90 *Amir v. Zager*, per Judge Kling, tak-district 91(3) 997 (16.9.91).

¹⁶ *Funk-Schlesinger v. Minister of the Interior*, H CJ 143/62, 17 PD 225 (22.2.1963).

¹⁷ *Ibid.*, pp. 256-257.

remained in Israel and received their marriage certificate by post.¹⁸ The effects of such marriages, however, were left to be decided on a case by case basis. Most recently, the Supreme Court suggested that it may be time to recognize such marriages as generally valid, as soon as they were validly celebrated abroad, calling upon the *Knesset* to resolve this matter definitively.¹⁹

In 2006,²⁰ several Israeli homosexual couples who had celebrated a civil marriage in Toronto, Canada, applied to be registered as married in Israel. The State authorities declined, arguing that, to be registered as such in Israel, a 'marriage' must be between a man and a woman. Other 'forms' recognized abroad do not fit within the existing concepts of Israeli law. A same-sex relationship can only be regarded in Israel as a 'social form' having some legal consequences, but not as a 'legal form'. The Supreme Court rejected the State's linguistic and other claims, and ordered the Commissioner of the Population Registry to enter the same-sex marriages in the population registry. At the same time, the Court stated, as it had done before, that the registration is only a matter of state statistics (a pretext refuted by the single dissenting opinion). Therefore, the registration, in itself, is not indicative of whether or not Israeli law views this relationship as creating a family status. However, it does mean that Israeli law does not consider such a relationship as violating its *ordre public*. This point is of special importance in view of the series of court decisions, recognizing a variety of rights and obligations, which have been created by virtue of such a relationship.

5. Registered partnerships established in a foreign country

Under Israeli law, there are no registered partnerships. Neither does the law provide for entering such partnerships in the Population Registry. Since Israeli law has recognized most effects of marriage even with respect to reputed spouses, registered partnerships, as such, do not offend *ordre public*. Israeli law should apply its conflicts rules by analogy to decide their various legal effects. Thus, the validity of a registered partnership should be governed by the law of the state under the laws of which it was registered.

6. Family name

Each reputed spouse has a right to change his or her family name to that of the other spouse, even over the objection of the person who is lawfully married to the latter.²¹ In 1996 the Names Law was amended so as to fall in line with the case law, which had already developed in this matter. The Names Law, as amended, enables a reputed spouse to apply to have his or her surname changed to that of the other spouse. In practice, it is usually the woman who applies to change her surname.

These rules have also been applied to same-sex reputed spouses, who are entitled to have their surnames changed into that of the other spouse, or decide to use both surnames jointly (as may also be the case with lawfully wedded couples).

18 Cf. *Farkash v. Farkash*, Civil Appeal 778/77, 33(2) PD 469.

19 *Ploni v. Ploni*, HCJ 9607/03 (29.11.2006), tak-supreme 2006(4), 2765.

20 *Yossi Ben-Ari v. Commissioner of Population Registry, Ministry of the Interior*, HCJ 3045/05 (21.11.2006), tak-supreme 2006(4), 1725.

21 *Efrat v. Commissioner of Population Registry*, HCJ 693/91, 47(1) PD 749; *Nizri v. Commissioner of Population Registry*, HCJ 6086/94, 49(5) PD 693. In both cases the men were still lawfully married yet separated since years. In the first case, the marriage was closer to its end since the divorce proceedings had already been concluded and only the formal act of divorce was lacking. In the second case, the divorce proceedings were still ongoing and the wife objected to the reputed spouse changing her family name into that of her husband.

7. Maintenance obligations

Maintenance of the spouse is a matter of personal status which is determined under religious law also by civil courts. The *Knesset* has enacted a secular law – the Family Law Amendment (Maintenance) Law, 5719-1959 – to complement, on a territorial basis, the religious rules applicable to maintenance. However, this law provides specifically that its provisions apply only to spouses to whom a personal law does not apply (*i.e.*, spouses who are not Jewish, Muslim, Druze, or members of one of the other recognized religious communities in Israel).²²

7.1. Same-sex reputed spouses

According to case law, during the period of cohabitation, a duty to maintain the reputed spouse may be based upon an implied contract deduced by the court from the circumstances of the cohabitation.²³ Following separation, however, the duty is, in principle, extinguished, and there are cases in which judges rejected such claims. There are, however, also court decisions which hold that reputed spouses may be obliged, according to the circumstances of the case, to pay maintenance to their cohabitant following separation (even if the spouses had signed an agreement to the effect that their relationship will not yield any of the rights acquired and obligations owed by reputed spouses)²⁴ and that, following separation, a reputed spouse may be entitled to ‘rehabilitating’, but not to permanent maintenance.²⁵

7.2. Same-sex spouses married abroad

Persons to whom a personal law applies (the majority of the population), are supposedly subject to their religious law, under which they have no duty to pay maintenance to same-sex spouses.

The Supreme Court has emphasized that a spouse has no universal right to maintenance.²⁶ Nonetheless, case law has mitigated this result in two types of cases: (a) if the spouse is unable to provide evidence regarding the personal law of the debtor, as a result of which a needy spouse may be deprived of economic support. In such cases, the court will order spousal maintenance on the basis of the provisions of the Family Law Amendment (Maintenance) Law, since the granting of relief in the circumstances is compatible with the principles of the Basic Law: Human Dignity and Liberty;²⁷ (b) if, under his personal law, the husband owes no duty to pay maintenance to a wife whom he had married in a civil marriage, the court may nonetheless infer an agreement to pay maintenance on the basis of the support provided by that spouse prior to the breakdown of their marriage.²⁸

Spouses who want to ensure their right to maintenance must therefore make a written agreement to that effect.²⁹

²² Cf. note 3 *supra*.

²³ *Jaeger (Flink) v. Palevitz*, Civil Appeal 563/65, 20(3) PD 244.

²⁴ *Plonit v. Ploni*, Family Case (Tel-Aviv) 51940/98, per J. Schochat, tak-family 2002(3) 13 (4.8.02).

²⁵ *Ibid.*; *Magin v. Malka*, Family Case (Tel-Aviv) 63323/97, per J. Geifman, tak-family 2000(2) 21 (22.5.2000).

²⁶ *Furer v. Furer*, Civil Appeal 592/83, 38(3) PD 561.

²⁷ *Nurit Solomon v. Dr. Eli Solomon*, Civil Appeal 7038/93, 51(2) PD 577.

²⁸ *Bashbirakter v. Bashbirakter*, Family Court Case 12181/01 (Family Court, Tel-Aviv, per J. Shochat, 15.5.2002) (Nevo electronic database). In that case, the Court declined to apply the principles of the Basic Law: Human Dignity and Liberty as a basis for granting maintenance to the Jewish wife of a Moslem husband, since, according to the Court, these principles cannot substitute the personal law of the husband, under which the wife was not entitled to maintenance.

²⁹ Cf. *Yaffa Gamliel v. The Supreme Rabbinical Court of Appeals*, HCJ 10605/02, 58(2) PD 529 (30.12.03)

8. Property relations

8.1. *The spouses property relations law*

Unlike other aspects of Israeli family law, an effort was made by the Israeli legislature to regulate property relations by secular, territorial law. Accordingly, in 1973, the *Knesset* passed the Spouses (Property Relations) Law, 5733-1973 (hereafter – ‘Spouses Property Relations Law’), which applies to all ‘spouses’ domiciled in Israel. The language of the Spouses Property Relations Law (including its choice of law rules) lends itself easily to being applied to same-sex couples as well. It uses ‘spouse’ in neutral terms, and does not require the spouses to be ‘a man’ and ‘a woman’, or ‘husband’ and ‘wife’ (as is the case, *e.g.*, in the Child Adoption Law, 5741-1981 (§ 3)³⁰). Nonetheless, it is clear from the context, that the legislature had in mind only properly married spouses,³¹ *i.e.*, spouses whose marriage is recognized by Israeli law.

The law applies to all couples married after 1st January 1974, a resources-balancing arrangement of all assets acquired during the marriage, when the marriage comes to an end. This means a separation of property with division of surplus upon dissolution of the marriage, due to death or divorce. The spouses may agree in writing upon a different arrangement, which must be approved by the competent authority (§§ 1, 2).³² If the marriage breaks down, the arrangement will only be triggered by divorce (end of marriage), not beforehand.

8.2. *Same-sex reputed spouses*

Since reputed spouses are not properly married, the Spouses Property Relations Law does not apply to them. According to the case law, which had developed before the Spouses Property Relations Law came into effect, and continued to develop thereafter, there is a presumption of community property covering all assets acquired for private use and all business assets acquired through mutual efforts.³³ Even if the assets have all been registered in the name of one reputed spouse, this would not in itself rebut the presumption.³⁴ Reputed spouses may deviate from this arrangement by making a contract which may (but need not) be approved by the Family Court under § 3(c), Family Court Law, 5755-1995.³⁵

Regarding same-sex reputed spouses, some Family Court judges consider themselves competent to approve reputed spouses’ property contracts. Others, however, do not, holding that such spouses can be deemed neither ‘spouses’ nor ‘reputed spouses’, in the sense of the Family Court Law.³⁶ The Hebrew language lends some linguistic support to the latter decisions, since the term in Hebrew for a ‘reputed spouse’ is ‘she who is known in the public as his wife’. Whereas some laws use the term ‘spouse’ in a neutral way, others mention specifically ‘a man and a woman who live in a common household’ (*e.g.*, § 55, Succession Law). The Family Court Law defines ‘spouse’, as including ‘she who is known in the public as his wife’. However, legal

30 *Cf.* Section 9 *infra*.

31 CA 640/82 *Cohen v. AG*, 39(1) PD 673. Justice Barak has more recently raised the question whether this rule is still valid, or whether the provisions of the Spouses Relations Law, or at least some of them, should be extended to reputed spouses (*cf.* Application Permission to Appeal 6854/00 *AG v. Michael Zemer*, tak-Supreme 2003(2), 3132 (20.7.2003)). However, the other two justices on the Panel were of the opinion that it did not. Since, so far, the Supreme Court has not decided this issue differently, the *Cohen* precedent applies.

32 In fact, the Supreme Court has also enforced a written agreement which had not been approved by the competent authority – *Yaffa Gamliel v. The Supreme Rabbinical Court of Appeals*, HCJ 10605/02 (30.12.03).

33 *Cf.* A. Ben-Dror, *Living Together: Without Marriage*, 2003, pp. 97 *et seq.* (in Hebrew), and all cases cited there.

34 *Cf.* *Blau v. Pozsh*, Civil Appeal 1717/98, 54(4) PD 376.

35 *Zemer v. The Attorney General*, Family Appeal (Tel-Aviv) 1002/00, tak-district 2000(2) 65535, per Deputy President, J. Porat (4.7.2000).

36 *Cf.* for approval – *K.Tz. v. The Attorney General*, Family Case (Tel-Aviv) 6960/03, per J. Granit (21.11.04), tak-family 2004(4), 250, and *R.A. v. L.M.*, Family Case (Tel-Aviv) 3140/03 (16.2.2004), tak-Family 2004(1), 637, per J. Reish-Rothschild. Approval denied, *e.g.*, in *Ploni v. the Attorney General*, Family Case (Tel-Aviv) 16610/04 (8.5.05), per J. Geifman, faxdin 1228 (19.5.2005), 7/9.

interpretation is not a matter of strict grammatical fastidiousness. The Family Court itself interprets this definition as relating also to ‘he who is known in the public as her husband’, notwithstanding the exact language used. Judged by other precedents in matters of same-sex spouses, including a precedent concerning succession,³⁷ the wording of the Succession Law notwithstanding, it is submitted that the Family Court, too, cannot pretend that Israeli law does not recognize same-sex reputed spouses as coming within the scope of Israeli family law. Same-sex spouses should be considered ‘spouses’ within the meaning of the Family Courts Law, and, consequently, their rights and obligations should be determined by the Family Court, as is the case with opposite-sex spouses.

However, it may be expected that judges will continue to give conflicting decisions regarding the jurisdiction of the family court, until the matter is finally settled in a binding precedent of the Supreme Court.

8.3. Same-sex spouses married abroad

There are no reported cases concerning same-sex spouses who married abroad and were registered as married in Israel. In such cases, the Family Court will have to decide, as a preliminary matter, the question of the validity of the marriage, and whether or not such spouses are considered ‘family members’ within the meaning of this term in the Family Court Law and, consequently, subject to the jurisdiction of the Family Court, or whether such matters have to be heard by the general civil courts. However, in any case, it would be impossible to apply the resources-balancing arrangement provided by the Spouses Property Relations Law (except in the case of death), unless a divorce is obtained that would serve as a trigger to its enforcement.³⁸

8.4. Registered partnerships established abroad

Failing a choice of law made by the partners, it is submitted that the property relations of a registered partnership (or analogous family unions established abroad), should be governed by the law of the state under the laws of which it was registered. The validity of a choice of law should also be governed by such law.

9. Child adoption

9.1. Adoption under Israeli law

Child adoption is covered by a secular, territorial law, the Adoption of Children Law, 5741-1981 (hereafter – ‘the Adoption Law’). Although the Child Adoption Law, 5741-1981, does not mention ‘reputed spouses’, the Supreme Court held that a reputed spouse may adopt the daughter of her (opposite-sex) spouse.³⁹ Such an adoption order has also been made with respect to a same-sex lesbian couple.⁴⁰ There is as yet no case law authorizing the adoption in Israel by reputed spouses of children who are not related to one of them. § 3, Adoption Law, provides for adoption only by ‘a husband and his wife together’. However, in February 2008 the Attorney General

37 *E.g.*, HCJ 1779/99 *Kaddish-Brenner v. Minister of the Interior*, 54(2) PD 368 (29.5.2000), in which the Supreme Court ordered the Ministry of the Interior to register two lesbian spouses each as ‘mother’ of the child born to one of them and adopted by the other while domiciled in California, *cf.* Section 8 *infra*; CA 10280/01 *Yaros-Hakak v. The Attorney General*, 59(5) PD 64 (10.1.05), in which the Supreme Court held that a lesbian reputed spouse may adopt the child of the other spouse; CA (Nazareth) 3245/03 *A.M. v. The Attorney General*, tak-District 2004(4), 2532 (11.11.2004), awarding a same-sex reputed spouse rights in the estate of his spouse who had passed away intestate, identical to those that would have been given to opposite-sex spouses.

38 Regarding the problem of obtaining a divorce, *cf.* Section 12 *infra*.

39 *Plonit v. The Attorney General*, Civil Appeal 1165/01 (12.11.2002), 57(1) PD 69.

40 *Yaros-Hakak v. The Attorney General*, Civil Appeal 10280/01 (10.1.05), 59(5) PD 64.

determined that the Adoption Law should nonetheless be interpreted as also relating to same-sex spouses or reputed spouses.⁴¹ Accordingly, he directed the Ministry of Welfare to also accept and process adoption applications made by same-sex spouses with respect to children who are not related to them on an equal basis. The direction of the Attorney General has attracted sharp criticism from the religious political parties and Members of *Knesset*, and its implementation may still face opposition.

9.2. Recognition of a foreign adoption order

In 1999, a case concerning a lesbian couple of Israeli citizens was brought before the Israel Supreme Court.⁴² While residing for two years as students in Los Angeles, California, one of them gave birth following artificial insemination. The other spouse adopted the child. Both were entered in the Los Angeles civil register as the child's parents. Upon return to Israel, they applied to both be registered as the 'mother' of the child (the Israeli population registry admits the registration of 'father' and 'mother', but has no neutral category of 'parent', as in Los Angeles). The Commissioner of the Population Registry declined, arguing that he can enter the name of only one woman as being a child's 'mother' in the population registry. In a majority opinion, the Supreme Court accepted the application of the lesbian spouses and ordered that each be registered as the 'mother' of the child. The Court, per Justice Dorner, reasoned that the status of a person should be recognized in an identical manner in all states. Recognition of the foreign status should be denied only if it is incompatible with the *ordre public*. This is especially true with respect to a foreign adoption order, which has to be considered valid in Israel, unless annulled by an Israeli court. Justice Beinisch, on the other hand, restricted her reasoning to the duty of the Commissioner of the Population Registry to register whatever he is asked to register, since the only significance of the registration is the collection of statistical data.⁴³ According to Justice Beinisch the legal effect of the adoption order remains open, to be decided in subsequent cases that will address this question directly rather than the registration of the adoption. Justice Zu'abi, in a minority opinion, considered that registering an adoption is different from the registration of a marriage. A marriage is just a ceremony, whereas the making of an adoption order requires a judicial decision. Consequently, it is also an Israeli judicial decision which should recognize it, rather than an act of an official of the Ministry of the Interior, who has no tools to verify the validity of the foreign certificate or court decision, and must accept almost any paper presented to him, even with the benefit of doubt.⁴⁴

The criticism may be correct. However, as Israeli law is currently interpreted there is no way for a court to recognize a foreign adoption order. This situation is unacceptable, and consequently the Supreme Court did the best it could to remedy this situation in the best interests of the child.

Most recently, some doubt has been cast upon the future effects of the Supreme Court judgment in the *Kadish-Brenner* case. An application made by the Minister of the Interior in 2000 to have a Further Hearing in that case before the Israel Supreme Court has been withdrawn by the applicant in March, 2008.⁴⁵ Upon withdrawal of the application, the State made the

41 A. Zino, 'The Attorney General: Allow Regular Adoptions by Same-Sex Spouses', *Ynet*, 10 February 2008), www.ynet.co.il/articles/0,7340,L-3505039,00.html (*ynet* is an Israeli Internet daily newspaper).

42 *Kadish-Brenner v. Minister of the Interior*, HCJ 1779/99 (29.5.2000), 54(2) PD 368.

43 Cf. HCJ 143/62 *Funk Schlesinger v. Minister of the Interior*, 17 PD 229, regarding the registration in Israel of a civil marriage performed abroad; cf. Section 4 *supra*.

44 Cf. also the criticism of M. Shava, 'Registration and Recognition of a Foreign Adoption Order in a Lesbian Family: the Need to reexamine the Funk-Schlesinger Precedent and Determine its Limits', 2001 *Kiryat Ha-Mishpat* 1, pp. 103 *et seq.*

45 Further Hearing Court of Justice 4252/00 *Minister of the Interior v. Kadish-Brenner* (2.3.2008), tak-supreme 2008(1), 3883.

following two declarations: (1) that the judgment of the High Court of Justice in this case will apply only to cases similar to the *Kadish-Brenner* case; (2) that the judgment applies only to the question of registration (which, as aforementioned, is a purely administrative matter in Israeli law), rather than to that of the status of the child (which is a matter of substance). This means that, unless a law is adopted by the *Knesset*, further judgments of the Supreme Court will be necessary to clarify this matter.

Another application to the High Court of Justice, brought in 2002 by homosexual reputed spouses, concerned the recognition of the adoption in the U.S.A. by the spouses, who have dual American and Israeli citizenship, of a Cambodian child in 2000, while being domiciled in the U.S.A.. In April 2008, the State notified the Supreme Court that the child will be granted Israeli citizenship and registered in the population registry, on the basis of the American adoption order, as the son of the applicant spouses. In this case, the child was not related to either of the spouses. However, the State mentioned in its notification that its decision had been made ‘considering the special circumstances of the case and the long time that the child had been staying in Israel without legal status’.⁴⁶ The statement made by the State means that also in the future, same-sex spouses will have to bring applications in the High Court of Justice for recognition of adoption orders given abroad, with respect to children who are not related to any of the adoptive parents.

10. Fertility treatment / surrogate motherhood agreements

Upon the application of a lesbian reputed spouse, the Supreme Court avoided the regulations concerning in-vitro fertilization, to the extent that they authorized such treatment to married women but required a social worker’s opinion before treating unmarried women.⁴⁷ The Court held the regulations to be unlawfully discriminatory in favor of married couples; the pertinent Israeli legislation regarding surrogate mothers – Agreements on the Transportation of Embryos (approval of agreements and status of the newly born infant) Law, 5756-1996 – makes the implantation of embryos in the surrogate mother conditional upon an agreement entered into between a married couple, on the one hand, and the surrogate mother, on the other. In 2006, however, the Committee appointed by law to approve the agreements, allowed a lesbian reputed spouse to have the fertilized egg of her spouse implanted into her uterus via in-vitro fertilization.⁴⁸

Another problem arose in this matter with respect to the question of parenthood. Under Israeli law, no person, other than the biological parent, owes the duties and enjoys the rights of a parent towards a child. If a person, other than the biological father or mother, ‘recognizes’ a child as his or her own, such recognition is devoid of any legal effect. The only exception is adoption proper. However, another exception that seems to have emerged recently concerns the case of a lesbian couple, one of which is the biological mother, having donated the egg, and the other serving as a surrogate mother, having been impregnated through the implantation of embryo produced by the in vitro fertilization of the egg donated by her spouse. Following the birth of the child, both spouses applied to the Family Court to be declared the biological mothers of the child, however the Attorney General notified the Family Court that only the surrogate

46 The case was reported by T. Zarhin, ‘Precedent: The State recognized a child adopted by a couple of males abroad’, *Ha’aretz* daily newspaper, 25 April 2008, p. 6 (News).

47 *Dr. Tal Yaros-Hakak v. Minister of Health*, HCJ 998/96, tak-supreme 1997(1), 939 (11.2.97).

48 The information was provided by a medical doctors’ Internet forum on surrogacy (in Hebrew) – <http://www.doctors.co.il/xID-5196,xCT-44,m-Doctors,a-Article.html> (www.doctors.co.il is the leading Israeli internet database concerning health. It contains ca. 200 Discussion Forums, directed and managed by leading Israeli medical doctors and experts, among them also heads of hospital departments.)

mother, who actually gave birth to the child, is recognized by the State as the biological mother of the child.⁴⁹

11. Social rights

Reputed spouses are eligible, according to law, to collect the same pensions and social security benefits as married spouses (social security legislation defines a 'wife', as including the reputed wife, however, case law extended the rule to reputed husbands as well). Furthermore, whereas a widow who remarried is no longer eligible to collect social security benefits owed to her following the death of her first husband, the National Labor Court has held that this rule would not be applied to a widow who has, by the time of the decision, been a reputed spouse for over 20 years.⁵⁰ These rules apply also to same-sex spouses.⁵¹

12. Dissolution of a same-sex family union

Under Israeli law, the religious courts have exclusive jurisdiction in matters of divorce between spouses who are both Jewish, Muslim, or Christian belonging to one of the recognized religious communities, or Druze.

In 1969, the *Knesset* enacted Matters of Dissolution of Marriage (Jurisdiction in Special Cases), 5729-1969, to provide for the dissolution of marriages between spouses belonging to different religious communities, to unrecognized communities, or to none. 'Dissolution of marriage' includes divorce, annulment of marriage and declaration of a marriage as void *ab initio* (§ 6).

In 2005, the Law has been amended to take account of certain aspects of international jurisdiction and it is now called Matters of Dissolution of Marriage (Jurisdiction in Special Cases and International Jurisdiction), 5729-1969 (hereafter – 'Dissolution of Marriage Law'). However, the Law does not apply to spouses who are both Jews, Muslims, Druzes, or members of the same recognized Christian Community, unless one or both of them are foreigners.⁵² Consequently, by and large, matters of divorce of such couples have been left in the hands of the religious courts of their respective communities.

This means that, if the same-sex spouses both belong to one and the same religion of any of the above list, they cannot properly bring the relationship to an end, since their marriage is considered null and void, as well as devoid of any effect by religious law. Furthermore, it seems unlikely that divorce proceedings among same-sex spouses can be initiated with a religious court.

Only if the marriage is inter-faith can the Dissolution of Marriage Law apply to them. In most cases, the Family Court will be competent to decide these cases. Under this Law, the consent of both spouses is always considered good grounds for divorce (§ 5(c)). If they do not

49 The case has been reported by N. Sharvit, 'Mazuz [the Attorney General – TE] to the Court: A Couple of Lesbians Cannot Both be Registered as Biological Mothers', *Globes* daily newspaper, 6 April 2008, p. 25 (News).

50 *Social Security Institute v. Nehama Freiman*, Social Security Appeal 1407/04, per Deputy President. Barak, tak-national 2006(4), 395 (8.11.2006). In this case the woman was widowed in 1976, however in the past 20 years has been a reputed spouse (also giving birth to two children from that relationship), which prompted Social Security to attempt to stop making monthly payments due to widows, as would have been the case had she remarried. The National Labor Court decided in favor of Ms. Freiman, emphasizing that reputed spouses' relationships are generally lacking of stability.

51 A short list (in Hebrew) of social rights extended to same-sex reputed spouses has been reported by Y. Yoaz, 'Only do not apply for a family status', *Ha'aretz* daily newspaper, 17 May 2005. It can be viewed also on <http://www.tehila.org.il/tehila/121-june05.htm>. *Tehila* is a non-profit organization organized by parents of homo-lesbian persons.

52 The exceptions are listed in § 1(b) of the Dissolution of Marriages Law.

agree, the court is instructed to apply one of the following laws, listed according to priority (§ 5(a)):

- (a) The substantive law of the common domicile of the spouses;
- (b) The substantive law of the last common domicile of the spouses;
- (c) The substantive law of the common state of citizenship of the spouses;
- (d) The substantive law of the state where the marriage took place,

provided that the court will not apply a law which applies different laws to both spouses, or if, under such law, no divorce can be obtained. If none of the above laws applies, the Court may apply the substantive law of the state in which one of the spouses has his or her domicile, as may be deemed just by the court in the circumstances of the case (§ 5(b)).

If the spouses are Israeli citizens, domiciled in Israel, then the only viable option of all potentially applicable laws enumerated in § 5(a) is the substantive law of the state in which the marriage took place.⁵³ This may yield harsh results, if the law of that state only provides for divorce under certain limited circumstances, which may make it difficult for such spouses to divorce.⁵⁴

13. Succession

According to case law, a reputed spouse is entitled to the same rights as a spouse almost immediately following cohabitation, unless the deceased wrote a testament providing otherwise. A regular agreement determining the rights and obligations of the spouses will not suffice to deny a reputed spouse his or her inheritance rights. This is due to a narrow reading of § 55, Succession Law.⁵⁵ Furthermore, the surviving reputed spouse is entitled, just like a married spouse, to maintenance out of the estate. According to case law, neither an agreement nor a testament to the contrary can abrogate this right.⁵⁶ Same-sex reputed spouses are likewise entitled to succeed their deceased cohabitant.⁵⁷

14. Evaluation

Israeli law has shown much flexibility in adapting a very traditional legal framework to the exigencies of modern life. Although matters of marriage and divorce are subject to the exclusive jurisdiction of religious courts, couples may nonetheless choose from among several arrangements – to have a religious marriage in Israel, live as reputed spouses, have a civil marriage abroad, have a Jewish religious marriage abroad (unlike Orthodox Judaism, Reform Judaism provides also for same-sex marriages), have a same-sex relationship, either as reputed spouses

53 Cf., e.g., Family Case (Haifa) 38030/99 *Gofman v. Gofman*, tak-Family 2001(3), 20, concerning the marriage of a Jewish husband and a wife who is not affiliated with any religion. The case was referred to the Family Court by the President of the Supreme Court (who, prior to the most recent amendment of the Dissolution of Marriage Law, had exercised the jurisdiction to decide to whether the marriage will be dissolved by a civil court or by a religious court). Since at the time of the proceedings all spouses were domiciled in Israel, the Court decided to apply the Law of the state in which the spouses were married, i.e., Russia.

54 Cf. the very pertinent criticism of Y. Ben-Menashe, 'Matters of Dissolution of Marriage (Special Cases) Law, 5729-1969 – Interim Conclusions – Achievements, Criticism and Reform Proposals', 1990/91 *Ha-Praklit* 39, pp. 201 *et seq.* (in Hebrew).

55 *Blau v. Pozsch*, Civil Appeal 1717/98, 54(4) *PD* 376 (7.9.2000). § 55, Succession Law, entitled 'quasi-will,' reads: 'Where a man and woman though not being married to one another, have lived together as husband and wife in a common household, then, upon the death of one of them, neither being married to another person, the deceased is deemed, subject to any contrary direction expressed or implied in the will of the deceased, to have bequeathed to the survivor what the survivor would have inherited on intestacy if they had been married to one another.'

56 *Bar-Nahor v. Estate of Austerlitz*, Civil Appeal 7021/93, tak-supreme 94(3), 1512 (25.10.94).

57 *A.m. v. The Attorney General*, Civil Appeal (Nazareth) 3245/03 (11.11.2004), tak-district 2004(4), 2532.

or, following a marriage abroad, be registered as married in Israel. All forms are acceptable, have their respectable place in society, and each person can reach self-fulfillment in his or her own way.

Not surprisingly perhaps, much is still to be done. In the absence of a civil marriage or divorce, or a system of familial registered partnership, the status, as well as the rights and obligations of same-sex spouses remain in a state of flux.

Same-sex family unions have so far not been recognized as conferring status. From a legal point of view, their relationship is considered purely contractual. Consequently, as shown in this article, the rights and obligations of same-sex spouses have remained unclear with respect to maintenance obligations, property relations and succession. If the same-sex spouses belong to the same religious community and were married abroad, they have no way of dissolving their marriage in Israel. Finally, the adoption in Israel of children by such spouses, whether related or unrelated to either of them, and the recognition of foreign child adoption orders, should be regulated by the legislature with clarity as to the consequences of such adoptions with respect to status, parenthood, and all other ensuing rights and obligations. The entry in the Population Registry of family unions established abroad and foreign adoption orders, without conferring status, is an unsatisfactory solution. It creates much vagueness with respect to the rights and obligations accruing to the spouses and their children, for the duration of the same-sex relationship, as well as upon its dissolution by separation or death.

It is to the credit of the Israel Supreme Court that it has done everything within its powers to make Israeli family law adapt to modern civil society, using principles borrowed from private international law, on the one hand, while not leaving any building block of the civil law unturned in search for remedies to help spouses of all sorts, on the other. More than anything, the Supreme Court has applied a political wisdom which enabled the settlement of many outstanding problems without drawing too much opposition from the religious camp. The Court has taken special care to ensure the protection of the best interests of children, not hesitating to overcome any legal obstacle along the way.

However, such development of family law by the Court, which recognizes concepts, but does not have a coherent system to define the ensuing rights and obligations, naturally also raises problems. For any non-traditional family union to be wholly and truly accepted by the Israeli legal system, the problems presented by it must be taken care of in a wholesome, conscientious manner, a challenge that cannot be met by case-law alone. This challenge has to be met by the *Knesset*, in the best interests of all Israeli citizens and residents.