THE DEVELOPING RIGHT TO PARENTHOOD IN ISRAELI LAW

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Résumé

Depuis que l’auteur du présent chapitre s’est intéressé pour la première fois à cette question dans le Survey de 1996, la jurisprudence israélienne reconnait de plus en plus l’existence d’un véritable droit d’être parent. En plus d’une analyse de la jurisprudence concernant le droit des prisonniers de fonder une famille, l’accès aux différentes techniques de procréation assistée et le droit de l’adoption, ce texte analyse les principales recommandations du Comité public sur l’encadrement légal de la reproduction en Israël, dont le rapport a été publié en 2012. Après avoir fait état des différents développements en la matière, le texte analyse les arguments de uns qui considèrent que le droit d’être parent est interprété de manière trop généreuse en Israël et des autres qui estiment qu’il faut aller encore plus loin.

I INTRODUCTION

My contribution to the 1996 Survey of Family Law1 discussed recognition of the right to parenthood in the context of a dispute about frozen embryos in the leading case of *Nahmani v Nahmani*2 and the new Israeli Surrogacy Law of 1996. During the 17 years which have passed since then, the right to parenthood has been recognised by Israeli courts in a variety of additional contexts. In addition, many of the recommendations of the Public Committee on the Legal Regulation of Reproduction in Israel, published in 2012 (hereinafter the ‘Mor-Yosef Report’ or ‘the Report’), are expressly designed to increase realisation of the right to parenthood.3 This chapter will examine these developments and their significance.

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2 ACH 2401/95 *Nahmani v Nahmani* 50(4) PD 661.
Part II will start by discussing the source and scope of the right to parenthood in Israeli jurisprudence and then proceed to explain the various developments, categorised according to context. Parts III and IV will review and discuss briefly claims that insufficient attention has been paid to the harm caused to other important interests by an overly wide construction of the right to parenthood and, on the other hand, claims that the right is still too narrowly drawn in that it discriminates against particular groups, notably same-sex couples. Part V will draw some conclusions.

At the outset, it is necessary to point out that the right to parenthood is used in two main ways in Israeli legal discourse.4 The first refers to a right to genetic or physiological parenthood, which is effectively an a priori right to bring into the world a child bearing a person’s genetic material or to bear a child (hereinafter ‘the procreation right’). This aspect of the right is usually referred to in the context of access to methods of artificial reproduction, but is also pertinent when discussing the right to parenthood of groups in relation to whom natural procreation may only take place with permission from state authorities, such as prisoners.5 The second way in which the term is used is to refer to the right to recognition of legal parenthood (hereinafter ‘the status right’). This issue may arise inter alia in relation to the status of the ‘intended parents’ of a child born as a result of gamete donation or surrogacy and to a request to adopt a child. In most cases, the right in question seems to be an ex post facto right to be accorded the status of parenthood in relation to a child who already exists. However, ex hypothesi, in cases where the child was born through artificial reproduction, the question of the status of the ‘intended parents’, who may not be related to the child genetically or physiologically, will only arise if those persons are allowed access to that method of artificial reproduction in the first place. This chapter will refer to both aspects of the right to parenthood and will distinguish between them where necessary.

Any analysis of the developing right to parenthood in Israeli law must take into account the relevant social and cultural background. Israel enjoys the highest rate of assisted reproductive technologies (ART) intervention in the world as well as the highest rate of infertility therapy per capita coverage6 and, as will be seen below, most of these treatments are funded by the state. Various explanations have been advanced for the centrality of procreation in Israeli

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4 It is also sometimes used to refer to the right of parents to raise their child, for example in the context of termination of parental right disputes, see eg per Justice Cheshin in ACH 7015/94 Plonit v A-G 50(1) PD 48, 102.

5 Similarly, enforced sterilisation or use of contraception by persons who may lack mental capacity.

society and the corresponding pro-natalist policy. These include religious, political, historical and security reasons. Thus, the approach of the courts, legislature and others to the right to parenthood is likely to be informed, not only by human rights considerations, but also by wider policy reasons for encouraging birth of children, which may not be relevant in other jurisdictions.

II THE DEVELOPMENTS

(a) Basis, nature and scope of the right to parenthood

Israeli courts have recognised the right to parenthood as a fundamental constitutional right deriving from nature and the centrality of procreation in human life, as well as from the right to human dignity. In a much quoted passage, Justice Cheshin describes the right to parenthood as ‘at the foundation of all foundations, at the infrastructure of all infrastructures, the existence of the human race, the ambition of man’ and the basis of that right as ‘the profound need to have a child which burns in the soul … man’s instinct of survival … the necessity for continuity’. Thus, in the hierarchy of constitutional human rights, the right to parenthood and to family is very near the top, after the right to life and bodily integrity.

It is perhaps ironic that, whilst the right to parenthood is based on nature, it is usually relied upon in cases where nature has failed or in an attempt to replace nature. Whilst some would limit access to ART to those who are unable to have children for medical reasons, or at least to give preference to them, there is nothing in the way in which the right to parenthood has been defined to distinguish between such persons and others who are unable to have children.

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8 The first religious commandment in the Bible is to ‘be fruitful and multiply’ (Genesis 1:28) and the importance of reproduction is a recurring theme in the Old Testament and later Jewish sources, eg Rachel’s plea ‘Give me children, or else I die’ (Genesis 30:1) (quoted frequently in the cases concerning the right to parenthood of infertile couples) and the comment of Rabbi Yehoshua Ben Lev in the Babylonian Talmud that: ‘any person who does not have children is considered dead’ (Tractate Niddah, p 64(2)). See generally, Waldman (n 6) 70–71. Reproduction is also important in Muslim tradition, see Mor-Yosef Report (n 3) 4.
9 Zionist ideology and demographic reality require a high rate of childbirth among the Jewish population in order to ensure that there remains a Jewish majority in the Jewish state, Waldman (n 6) 73–74; Landau ‘Religiosity, Nationalism And Human Reproduction’ (n 7).
10 The need to replenish the Jewish people after the massacre of 6 million Jews in the Holocaust, Waldman (n 6) 72; Landau ibid.
11 The need to replenish those who fell in the many wars and terrorist attacks and to provide soldiers who will continue to defend Israel from those who seek its destruction, Landau ibid.
12 HCJ 2458/01 New Family v Approvals Committee for Surrogate Motherhood Agreements, Ministry of Health, 57(1) PD 419 (author’s translation).
14 See per Rothschild J in FamC 26140/07 Plonit and Ploni v State Attorney’s Department – Central District (unreported, 15 February 2010) para 50.
naturally\textsuperscript{15} because they have passed the age of natural fertility, because they are single or because of sexual tendency.\textsuperscript{16}

Despite the Israeli courts’ widespread recognition of the fundamental nature of the right to parenthood, it still treated as a relative right, which is in fact a negative freedom and so does not oblige third parties to act. In other words, it is the right to prevent others putting obstacles in the way of a person becoming a parent rather than a positive right requiring others to act to promote realisation of this right.\textsuperscript{17} However, it may not always be clear what is the nature of the right being claimed. For example, in a case in which adoptive parents challenged the maximum age limit for adopters,\textsuperscript{18} Justice Procaccia took the view that they were claiming a positive right to receive state assistance, which was necessary to complete the process of adoption. In contrast, Justice Rivlin points out that if there were no state restrictions anyone could adopt a child\textsuperscript{19} and thus the petitioners’ claim was a negative one, viz that the state not prevent them from adopting on the basis of their age.

Despite the relative and negative nature of the right to parenthood, it is widely accepted that the right should not be restricted unless there are weighty reasons for doing so.\textsuperscript{20} Accordingly the debate focuses mainly on the legitimacy and strength of alleged countervailing interests.\textsuperscript{21} Those who take the view that the right to parenthood should be interpreted narrowly consider that these countervailing interests have been perceived too narrowly and been accorded insufficient weight. On the other hand, those who favour a wide interpretation of the right to parenthood argue that the restrictions on the right to parenthood in the current law are too wide and do not ensure equality between different populations. These competing claims will be considered in Part III below.

\textsuperscript{15} Indeed, the Mor-Yosef Report (n 3) 57 takes the view that there is no reason per se to prevent the creation of parenthood which could not be created naturally. However, one of their reasons for not extending commercial surrogacy to single men and male couples is that this would prejudice women who needed to resort to surrogacy because of a medical defect (at 61).

\textsuperscript{16} Cf countries which deny access to ART to such persons, see IG Cohen ‘Regulating Reproduction: The Problem with Best Interests’ (2011) 96 Minnesota Law Review 423, 450–452.

\textsuperscript{17} This position taken in the Nachmani case (n 2) has been adopted in subsequent case-law; see eg per Cheshin J in New Family v Approvals Committee (n 12) 448–449, explaining that the petitioner is not claiming that the state is obliged to ensure that she can have a child through surrogacy, but that the state is obliged not to forbid her to do so because of her status.

\textsuperscript{18} New Family v Minister of Labour and Welfare (n 13) para 5 of Justice Rivlin’s opinion, discussed at Part II(f)(i).

\textsuperscript{19} As indeed happened in relation to intercountry adoption before it was regulated in the 1996 Amendment to the Adoption Law.

\textsuperscript{20} Eg per Justice Rubenstein in HCJ 4077/12 Ploni v Ploni, (14 November 2011) available at elyon1.court.gov.il/files/12/770/040/06/12040770.06.htm, para 27 (Hebrew) (accessed June 2013).

\textsuperscript{21} Justice Rubenstein, ibid at para 23 also explains that whether a particular consideration is defined as an interest or right does not determine whether it will override a competing consideration. Rather it is necessary to consider the relative weight of the two considerations in the particular case.
In the current context, it should be pointed out that the strength of the countervailing interests required to override the right to parenthood may vary depending on the aspect of the right to parenthood in question. In this respect, Justice Rubenstein has distinguished between the nuclear right to procreate and other peripheral rights to make choices in relation to reproduction, such as with whom to have a child. The latter rights do not protect the fundamental value of becoming a parent, but rather other values such as privacy and autonomy. Thus, although they are protected by the Basic Law: Dignity and Freedom of Man they are weaker and more easily overridden by countervailing interests.

For example, in principle the right to parenthood includes the right to have as many children as the parent wishes. However, the High Court of Justice has held that the fact that intended parents already have more than two children is a relevant factor to be taken into account when deciding whether to approve a surrogacy agreement because it changes the balance between the interests involved. Similarly, whilst the right to choose the person with whom one has a child is clearly recognised, this interest may well not override competing interests, such as the right of a sperm donor to renege.

Finally, the interests of a parent to have his legal parenthood recognised in a particular way, for example without the need for legal proceedings or by declaration or parenthood order rather than by adoption, would seem to belong to the category of peripheral rights. As will be seen below, an Israeli court has recognised the interest of intended parents to children born of foreign surrogacy to be recognised as legal parents on the basis of medical documents without the need for genetic testing and for the intended mothers of such children to have their parentage declared without having to adopt them. The reason for recognition of the intended parents’ interest in these cases seems to be that it coincides with the interests of the children, as perceived by the court, and does not violate the interest of any other person. The policy of

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22 Ibid para 29.
23 Ibid.
24 In relation to the right to choose the sex of the newborn, it should be noted that pre-implantation genetic diagnosis (PGD) is not allowed for this purpose, unless there are medical reasons, apart from in exceptional cases authorised by a multidisciplinary ethics committee according to strict guidelines, Circular of the Director of the Health Ministry 21/05 (9 May 2005).
26 HCJ 625/10 ibid.
27 Eg the Attorney-General’s guidelines on insemination (see below at Part II(c)(ii)) are based on the applicant’s right to have a child from her deceased partner.
28 See HCJ 4077/12 (n 20); see detailed discussion at Part II(d)(i).
29 Although where there is a risk that his parenthood will not be recognised at all it could be argued that the nuclear right of being numbered among the group of parents is engaged.
30 At Part II(e)(iv).
discouraging unregulated surrogacy abroad is considered insufficient to override the common interest of parents and child.\footnote{ Cf states which take the view that recognising the status of the children born abroad through surrogacy will simply encourage more such surrogacy arrangements, \textit{B Stark ‘Transnational Surrogacy and International Human Rights Law’} (2012) 18 \textit{ILSA Journal of International & Comparative Law} 369, 373.}

\subsection*{(b) Prisoners}

The issue of the right of prisoners to become parents was addressed by the High Court of Justice in the highly publicised case of Yigal Amir, who was convicted of murdering Prime Minister Yitzhak Rabin and sentenced to life imprisonment. After Amir’s request to be granted the privilege of engaging in marital relations with his new wife within prison was refused, he applied for permission for a sample of his sperm to be taken from the prison for the purpose of inseminating his wife. The granting of this request caused uproar in some quarters and two members of the Knesset (the Israeli Parliament) applied to the High Court of Justice for judicial review of this decision.\footnote{ HCJ 2245/06 \textit{MK Neta Dovrin v The Prison Service}, (20 march 2006) available at elyon1-court.gov.il/files/06450/022/R02/06022450.r02.htm (Hebrew) (accessed June 2013).}

That court upheld the decision of the prison authorities on the basis that the right to become a parent is one of the most important constitutional human rights protected by the Basic Law: Dignity of Man and Freedom.\footnote{ Ibid para 12 of opinion of Justice Procaccia.} Since human rights, other than those which are inherently intrinsic in imprisonment, do not stop at the walls of the jail, prisoners should not be denied the right to have children unless this is necessary for the public interest or some other appropriate purpose. The High Court rejected all the arguments raised against allowing Amir to become a parent. In particular, the court rejected the claim that denying the right to parenthood should be used as a means of additional punishment in the light of the severity of the offence and the prisoner’s lack of remorse.\footnote{ Ibid para 17 of opinion of Justice Procaccia.} In addition, the court held that it could not be assumed that the fact that the child would be brought up in a one-parent family would be detrimental to his welfare and so justify not allowing him to be born.\footnote{ Ibid para 10 of Justice Jubran’s opinion.} The liberal approach of the Israeli executive and judicial authorities can be compared with that of the English authorities, whose policy is only to allow artificial insemination in exceptional cases.\footnote{ R v Secretary of State for the Home Department [2001] 3 WLR 533, para 67.} The latter approach was upheld by the majority in the ECtHR case of \textit{Dickson v United Kingdom},\footnote{ \textit{Dickson v United Kingdom}, (App no 44362/04) ECHR 18 April 2006.} rejecting a petition brought by an English prisoner against the refusal of the Secretary of State to allow insemination of his wife with his sperm, inter alia on the basis of the wide discretion given to state authorities and the risk to the welfare of the resulting child.\footnote{ See discussion on the welfare of the child claim below at Part III(a)(i).}
(c) In vitro fertilisation/insemination

Even in the many cases where there is no need for gamete donation, any ART procedures which require medical intervention can be limited by state regulation. Thus, various aspects of the right to parenthood have arisen in relation to the use of IVF and insemination after death.

(i) Status of the intended parents

The Public Health Regulations 1987 provide that infertility treatment can only be given to a married person together with that person’s spouse. However, courts have given permission for IVF even where the man is still married to someone else. The majority of the Mor-Yosef Committee recommends that the marital status of the parties should not be a basis for restricting access to IVF and that there should not be any requirement to inform the spouse of a married party that she or he is receiving treatment with another partner.

(ii) Insemination after death

In 2003, the Attorney-General published guidelines governing the removal of sperm from a deceased man, or one about to die, and the use of that sperm. Under these guidelines, which were based on practice developed in a number of cases, use of sperm to inseminate the deceased’s partner, at her request, should be allowed where it could be assumed that this would be in accordance with his wishes. Use of the sperm needs to be approved by a court, after receiving a social report. The guidelines specifically refer to the right to parenthood of the deceased’s partner and to the social norm that couples wish to have children together. However, they specifically state that there is no right to have a grandchild and thus the deceased’s parents will not be allowed to make use of the sperm, in cases where he did not have a partner or that partner does not wish to use the sperm.

Nonetheless, the Krayot Family Court gave permission for use of the sperm of a deceased, who had deposited his sperm prior to undergoing chemotherapy and died without a partner, at the joint request of an unrelated single woman and the deceased’s parents. The court was satisfied from evidence given by the deceased’s parents that there was a reasonable chance that the deceased would have wished for his sperm to be used. Furthermore, weight was given to the

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40 Mor-Yosef Report (n 3) 26, In the case of a married woman seeking to have her eggs fertilised with the sperm of another man, this recommendation is subject to making arrangements that the biological father can be registered as the father of the child, which is currently not possible where the mother is married to someone else. In relation to the minority opinion, see below at Part III(b)(iv).
41 FamC 13530/08 New Family v Rambam Medical Center, Nevo 6 December 2009.
interest of the woman in having a child from a known man rather than an anonymous donor and the interest of the child in knowing his genetic origins and his paternal grandparents.

However, the majority of the Mor-Yosef Committee supports the position taken by the Attorney-General, restricting insemination after death to the wife or stable partner of the deceased. In other cases, use of the sperm should not be allowed unless the latter left express instructions for such use because it cannot be assumed that he would have wished to have children.

(d) Gamete donation

(i) Sperm donation

The use of sperm donation is regulated by Public Health Regulations of 1979 and by the Rules as to the Administration of a Sperm Bank and Guidelines for Performing Artificial Insemination issued by the Director-General of the Health Ministry. Courts have rarely been called upon to consider issues arising out of donor insemination. In particular, there has not been any decision determining the status of the husband of the mother. The Mor-Yosef Report recommends that the husband of the mother should be treated as the child’s legal father without the need to obtain a parenthood order.

A recent petition to the High Court of Justice raised expressly the scope of the right to parenthood. The case concerned a single woman who had given birth to a child after insemination by sperm from the sperm bank. She also reserved further sperm from the same donor, so that she would later be able to have another child who would be a full genetic sibling to her first child. However, in the meantime, the sperm donor, who had become religious, retracted his consent and the sperm bank refused to release the sperm. The woman’s petition for judicial review of this refusal was rejected on the basis that her interest in producing a genetically identical sibling to her child was overridden by the donor’s interest in not becoming a parent against his wishes.

Under the current regulations, all sperm donation is anonymous. The Mor-Yosef Report recommends setting up an alternative track for sperm donations, under which the child will be able to reveal the identity of the donor
when he reaches 18. However, it was decided to retain the anonymous track in order to protect against a drastic reduction in sperm donations and to preserve the right of the mother to decide whether the donor would be able to play a part in the adult life of her child.

The Report also recommends limiting the number of women who can be inseminated from the same donor to seven and setting up a central register which will enable this restriction to be enforced. However, perhaps surprisingly, there is no reference to setting up a databank which will enable a person born from donor insemination to check that he is not genetically related to his intended spouse.

(ii) Egg donation

The Egg Donation Law 2010 regulates donation of eggs in Israel. Prior to this law, eggs could only be donated by women who were themselves undergoing fertility treatment and so there was a scarcity of available eggs. This law provides for eggs to be donated to women up to the age of 54 who are in medical need of an egg and states expressly that the donee will be considered to be the mother of the child for all purposes. At the same time, the law provides that a confidential databank shall be set up to be managed by the Adoptions Registrar. At the age of 18, anyone wishing to know if he or she was born from an ovum donation will be able to inquire at the registry. The registrar will provide only a positive or negative answer regarding the use of a gamete donation without divulging the identity of the donor. Couples wishing to marry, where one of the partners was born from a donated ovum, will be able to inquire from the registrar whether there is a genetic family connection between them.

It should be noted that ironically the Egg Donation Law’s requirement that there has to be a medical need for the egg donation precludes use of egg donation by lesbian partners who want to have a child together, by implanting the fertilised egg of one in the womb of the other. Such practice was allowed in the past by the Health Ministry. In one such case, the Family Court held that both of the women were considered to be legal mothers of the child and that there was no need for the genetic mother to adopt the child, as claimed by the state. This decision was based on that women’s right to parenthood and the welfare of the child.

47 Mor-Yosef Report (n 3) 35–36.
49 As exists in relation to egg donation, see Part II(d)(ii) below.
50 Section 42.
51 A petition challenging this requirement has been submitted by a lesbian couple to the High Court of Justice, HCJ 5771/12 Liat Moshe v approvals Committee for Surrogate Motherhood Agreements, Ministry of Health (21 November 2012) available at elyon1.court.gov.il/files/12/710/057/06/12057710.s06.htm (Hebrew) (accessed June 2013).
52 FamC 60320–07 TZ and others v A-G, Nevo 4 March 2012.
53 On the basis that only the woman who gives birth to the child is the legal mother.
54 The reference is of course to her status right.
(e) Gestational surrogacy

(i) The surrogacy scheme in Israel

Israel was the first country in the world to regulate surrogacy by legislation.\(^{55}\) The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn Law) 1996 (hereinafter ‘the Surrogacy Law’) legalised gestational surrogacy agreements which fulfilled the conditions set out in the Surrogacy Law and received approval from a Statutory Committee (hereinafter ‘the Approvals Committee), set up under that law.\(^{56}\) In addition, the Law provided for the making of parenthood orders which gives the intended parents full legal parental status in relation to the child. The Surrogacy Law specifically allows for payments to be made to the surrogate mother to compensate her for her time and suffering and thus surrogacy in Israel is commercial. Whilst the payments have to be approved by the Approvals Committee, in practice this Committee does not interfere with the sums agreed which are determined by market forces. Owing to the stringent requirements of the Surrogacy Law\(^{57}\) and the Approvals Committee’s guidelines,\(^{58}\) there is a dearth of suitable surrogate mothers.

Over the years, various challenges have been made by potential intending parents to the restrictions imposed by the Surrogacy Law and by the Approvals Committee. In all these cases, the petitioners claimed that these limitations violated their right to parenthood.

(ii) Challenges to the restrictions in the Surrogacy Law

The first challenge was brought by a single woman, who wished to have her eggs, which had been fertilised by donor sperm, implanted into the womb of a surrogate mother. Her application was rejected in limine because of the statutory requirement that the intending parents be a heterosexual couple and that the sperm be that of the intending father. The High Court of Justice, whilst accepting her claim that the statutory requirements discriminated against single women, rejected her petition on the basis that a decision to allow surrogacy for single women had to be made by the legislature in the light of the novel, delicate and complex nature of surrogacy.\(^{59}\)

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\(^{55}\) For the background to this legislation see Schuz ‘The Right to Parenthood’ (n 1).


\(^{57}\) For example, that the surrogate mother is not married.

\(^{58}\) For example, that the surrogate mother has already had a baby.

More recently, a similar challenge brought by a homosexual couple was withdrawn when the setting up of the Mor-Yosef Committee was announced. Yet, this committee, whilst recognising the right of homosexuals to parenthood, recommends that they should only be able to make use of altruistic surrogacy arrangements, in order to avoid competition with infertile heterosexual couples for the limited number of suitable commercial surrogate mothers and to prevent an undesirable expansion of commercial surrogacy. In addition, it should be noted that their recommendations only provide for single men to enter into altruistic surrogacy arrangements. These men will be able to obtain a parenthood order, but their partners will still have to adopt the child.

In contrast, the Mor-Yosef Report does recommend including single women in the commercial surrogacy scheme and allowing the use of donated sperm provided that the egg is that of the intended mother. In other words, it is necessary that one of the intended parents is genetically related to the child. In order to widen the pool of suitable surrogate mothers to accommodate for this increased demand and to make altruistic surrogacy a genuine option, the Report recommends removing the restriction on married women and horizontal relatives of the couple serving as surrogates.

(iii) Challenges to the guidelines of the Approvals Committee

Two challenges have been brought to refusals of applications based on the Approval Committee’s guidelines. In the first, the refusal was based on the age of the parties, who were aged 58 (man) and 53 (woman) at that date of submission of the application, 4 years previously, in accordance with the guideline requiring the Committee to take into account the parties’ age where this is above that of natural fertility, ie 48 to 50. The Family Court held that the considerable weight which had been given to the age of the parties in this case was appropriate, balanced and in accordance with the objective of the Surrogacy Law. This decision would have been different under the

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61 Mor-Yosef Report (n 3) 60; See discussion below at Part III(a)(ii).
62 The Report does not explain why in cases of surrogacy arrangements, biological fathers need to obtain a parenthood order rather than a declaration of parenthood: see Schuz ‘Surrogacy in Israel’ (n 56).
63 Mor-Yosef Report (n 3) 63–64.
64 Ibid 64. Although a sister will not be able to be implanted with an embryo fertilised by her brother.
65 The removal of these restrictions was facilitated by the fact that, according to the Mor-Yosef Report (n 3) 24, the accepted Rabbinical view today is that the personal status under Jewish law of children born as a result of insemination or IVF is not impaired (ie they are not considered as mamzers), even where the carrying mother and the owner of sperm were forbidden to marry each other.
66 FamC 26140/07 (n 14).
67 Who had married for the first time only a few years previously and had one natural child following egg donation.
68 FamC 26140/07 (n 14) para 50.
recommendations of the Mor-Yosef Report, which propose to enact a maximum age of 54 (at time of application) for intending mothers.

The second challenge was to an in limine rejection by the Approvals Committee on the basis that the intending parents already had three joint children. The High Court of Justice accepted the petitioners’ argument that, since the Surrogacy Law did not limit the number of children of applicants, the Approvals Committee could not reject such an application in limine, even though their guidelines did state that applications from couples with two or more joint children would not be allowed. However, the court did accept the argument that the fact that the applicants already had three joint children was a relevant factor, together with all other factors, in exercising the discretion whether to give approval, after having considered all the documentation submitted. Again, the decision would be different under the recommendations of the Mor-Yosef Report to limit surrogacy to couples who do not have more than one child together and to single persons who do not have any children.

(iv) International surrogacy

During the last few years, more and more Israeli couples have turned to foreign surrogacy. Some of these couples are homosexuals who, as seen above, are unable to use the Israeli surrogacy scheme. Others are heterosexual married couples, who see foreign surrogacy as a method of saving money and the long-winded bureaucracy involved in the Israeli scheme. The most popular countries among Israelis who turn to foreign surrogacy have been India, Georgia and Armenia.

Since foreign surrogacy agreements are not governed by the Surrogacy Law, the Interior Ministry developed a practice to deal with these cases, which reflects their view as to the general principles of determining parenthood and their concern to prevent illegal trafficking in children. Under this practice, the intended parents have to produce documents evidencing the surrogacy agreement, its legality under the foreign law and the birth mother’s consent to the child’s removal to Israel.

In addition, the intended father of the child has to bring proof that he is the biological father of the child before the child can be allowed to enter the country. This involves obtaining a court order allowing paternity testing. Then, a DNA sample (usually saliva) is taken from the child in the foreign country and sent to Israel to check that it matches the DNA sample of the

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69 HCJ 625/10 (n 25).
70 Mor-Yosef Report (n 3) 64. The main reason for this seems to be to limit the demand for surrogacy in order to compensate for allowing single women to make use of surrogacy services (at 62).
72 Under the Genetic Information Law 2000, paternity testing cannot be carried out in relation to minors without a court order.
intended father. Once paternity is proven, the biological father is registered as
the parent and can bring the child to Israel. However, the father’s partner
(whether this is his wife73 or a homosexual partner) does not have any status in
relation to the child until he or she adopts him. One of the problems with this
procedure is that of time. The parent (or at least one of them) and the newborn
child have to stay in the foreign country for a few weeks until paternity is
proven. Even once the child comes into Israel, it can take more than a year for
the adoption process to be completed.

However, during the past year, a number of challenges to the Interior
Ministry’s practice have been accepted by Israeli Family Courts. In one case
involving heterosexual married parents,74 the intended mother’s claim that it
was absurd that she would have to adopt her own genetic child was accepted.
The Tel-Aviv Family Court, casting doubt on the rule that only the birth
mother is treated as the legal mother, held that the genetic mother had a
fundamental right to be treated as the legal parent of her child75 and that it was
not in the child’s best interests that he have to be adopted by his own biological
mother.76 Thus, the court held that, if DNA testing showed that the wife was
the biological mother of the child, she could automatically be treated as the
mother of the child without the need to adopt the child. Recently, the same
court has taken this approach a stage further, holding that there was no need
for adoption even where the egg had been taken from a donor.77 In the court’s
view, adoption was not the appropriate procedure because the father’s wife had
been party to planning the birth of the child. Accordingly, a court order of
parenthood should be made, as in cases to which the Surrogacy Law applies.78

Moreover, in another case,79 the same court accepted a challenge brought by
the father of twins born of surrogacy in Georgia that he should be recognized
as the parent of the twins born through surrogacy, without the need to undergo
DNA testing, on the basis of the evidence which he had provided, which
included medical documents in relation to surrogacy procedure, the Georgian
birth certificate and evidence of Georgian law. The Family Court accepted that
these documents were sufficient proof of biological parenthood. Moreover, the
welfare of the infants required that no doubt should be placed on their
biological connection with their parents and that the legal connection with the

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73 This is based on the assumption that the birth mother and not the biological mother is treated
as the legal mother of the child.
74 FamC 10509–10–11 YP and NP v A-Gl, Nevo 5 March 2012.
75 Ibid para 23. This decision appears to treat the intended mother more preferably than under
the Surrogacy Law because the court order will be a declaration of her parenthood, whereas a
parenthood order under the Surrogacy Law is constitutive.
76 Ibid para 24.
78 The court required a social services report before making the order, as under the Surrogacy
Law. After this chapter was written, on 11 May 2013, the Attorney-General announced that
until there is legislation in relation to foreign surrogacy, the homosexual partner of the genetic
parent can obtain a parenthood order from the court and does not need to adopt the child
htm#&Ch=3d385dd2dd5d4110&kpId=565984153 (Hebrew) (accessed June 2013).
79 FamC 38–12 Plonit v A-G, Nevo 9 November 2012.
intended parents should be recognised as soon as possible, so that they could be brought back to Israel and be entitled to benefit from the parents’ medical insurance. An appeal by the state is currently pending. In addition, the state is vigorously defending in the High Court of Justice a petition brought by a homosexual couple against the refusal of the state to register them both as fathers of the child on the basis of a birth certificate provided to them by US authorities in relation to a child born there through surrogacy.80

Finally, a homosexual couple successfully challenged the Interior Ministry’s refusal to allow entry of a child born to a foreign surrogate following fertilisation of an egg with the sperm of both of them on the basis that the DNA testing showed that neither of them had any genetic connection to the child,81 even though the foreign birth certificate recognised the couple as the legal parents of the child and the surrogate mother, who was not treated as the mother by the foreign law, consented to the child being brought to Israel. The Supreme Court granted the respondents’ request for permission to bring the child to Israel temporarily, on the basis that their presence was necessary for the conduct of the legal proceedings in relation to the child’s future and it was not appropriate for the child to be left abroad alone. Nonetheless, the respondents were required to deposit a large sum of money guaranteeing their undertaking to take the child out of the country if a court decision so required.82

The material presented to the Mor-Yosef Committee related not only to the issue of the status of the intended parents, which had arisen in the cases, but also evidence presented by the legal staff of the Interior Ministry relating to the exploitation of foreign surrogate women and the difficulty in relying on foreign documentation.83 The Report makes a number of recommendations designed to improve the situation, whilst recognising the need for an international convention which will regulate international surrogacy arrangements.84 The main recommendation is to set up an Inter-Departmental Committee to approve foreign surrogacy clinics which meet required standards. In relation to babies born in these clinics, the procedure for obtaining recognition in Israel would be made simpler. Thus, for example, it would no longer be necessary to obtain court authorisation for genetic testing and a parenthood order could be

81 RFamA 7414/11 A-G v Ploni, Nevo 29 November 2011.
82 Although it is difficult to believe that the court will not allow the child to stay in Israel and to be adopted by the couple because any other solution will damage his welfare. Indeed, the English courts reluctantly made a parenthood order in relation to a child born as a result of a foreign commercial surrogacy arrangements, even though such arrangements are illegal under English law, X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).
83 Mor-Yosef Report (n 3) 67–68.
obtained in the same way as under the Israeli surrogacy scheme. In addition, use of non-authorised clinics would be discouraged by making it a criminal offence to act as an agent for non-authorised clinics and by forbidding Israeli doctors from being involved in any way in these clinics.

(v) Use of eggs after death
The Mor-Yosef Report refers to a situation which might arise as a result of allowing altruistic surrogacy to single men and that is the use of eggs after the death of the woman from whom they were taken. Their recommendation that such eggs can be taken from the dead woman, fertilised by the sperm of her partner and implanted into a surrogate mother, at the request of that partner, mirrors their approach to the use of sperm after death.

(f) Adoption
(i) Age of adoptive parents
Under the guidelines of the welfare services, parents wishing to adopt a child in Israel must not be more than 43 years older than the child. Where a child is adopted from abroad, the maximum age difference is 48 years older. The High Court of Justice accepted a challenge to the latter rule, holding that there was a requirement to consider whether the case was exceptional and justified departing from the general rule. The majority did not give a definitive ruling in relation to the petitioners' claim that there is a constitutional right to adopt, but their discussion does indicate a positive answer to this question. In particular, they point out that the fact that the welfare of the child is the paramount consideration in relation to adoption does not necessarily rule out the existence of a right to adopt because many rights can be overridden by conflicting interests and considerations. However, of course this will mean that the right will be weaker. In addition, it should be noted that age limits for

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85 The Report was written before the cases cited above. Furthermore, since these cases are first instance cases, it is not clear that they represent the law.
86 The trigger for discussing this issue seems to be a case in 2011 in which a woman dying of cancer had her eggs fertilised with her husband’s sperm and asked him to use them to produce a child after her death. He persuaded the Department of Health to release the embryos and had them implanted into a foreign surrogate, Y Hashiloni-Dolev The Fertility Revolution (Ben-Shemen, Modan Publishing, 2013) (Hebrew) 106.
87 Mor-Yosef Report (n 3) 49.
88 See discussion below at Part III(b)(iii).
89 New Family v Minister of Labour and Welfare (n 13) para 42 of Justice Procaccia’s judgment.
90 Ibid.
91 Ibid; accordingly the Adoption Law should be interpreted such that the appeals procedure set up in relation to internal adoption should also apply to intercountry adoption, ibid para 8 of the opinion of President Beinish.
92 Cf Justice Procaccia ibid at para 28 who argues firmly against recognition of a right to adoption, citing in support decisions of the ECtHR and US courts and Australian legislation.
93 Ibid, para 6 of the opinion of Justice Rivlin.
adoption do not in fact bar older persons from becoming parents through adoption, but simply limit their choice of adopted child to those over a certain age.

(ii) Single-sex couples

Whilst the Adoption Law expressly restricts adoption to married couples, the Supreme Court, through a creative construction of an exception allowing a single person to adopt in certain circumstances, allowed for second parent adoption of the natural child of a same-sex partner. Following this decision, the Attorney-General issued guidelines, according to which the Adoption Law should be interpreted so as to allow single-sex partners to adopt children who were not related to either of them by means of each submitting an application as a single person in reliance on the exception in the Law, allowing such applications, where this was in the best interests of the child, and then unifying the applications. Neither the decision nor the guidelines refer to the right of single-sex couples to parenthood and the latter do state that the sexual tendency of adoptive parents is a relevant factor in determining the welfare of the child. Thus, it is perhaps not surprising that, in placing the limited number of children available for adoption, the Welfare Services give preference to heterosexual married couples as being in their view the best familial framework for children.

III ARGUMENTS IN FAVOUR OF NARROWER INTERPRETATION OF THE RIGHT TO PARENTHOOD

(a) Welfare of resulting child

(i) General

The most common argument for restricting the right to parenthood is the welfare of the resulting child. Before considering some of the contexts in which this claim is heard, a distinction should be made between those contexts in

94 CA 10280/01 Yaros-Hakak v A-G, 59(5) PD 64.
96 In this respect, the situation in Israel might be compared with that in the United Kingdom, where one of the reasons that the Adoption and Children Act 2002 forbade discrimination against same-sex couples wishing to adopt, despite opposition, was the recognition of the need to increase the number of suitable adopters: L Smith ‘Clashing symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act’ (2010) 22 Child and Family Law Quarterly 46.
97 Thus, in practice same-sex couples will only be able to adopt children with special needs, for whom it is difficult to find heterosexual couples. Israeli law does not per se place limitations on same-sex couples adopting children from abroad. However, adoptions from abroad have to satisfy the conditions for adoption under the law of the child’s country of origin. Thus, it will be possible for same-sex couples to adopt children only from countries which allow same-sex adoption and in practice most of the countries with which the Israel adoption agencies work do not allow same-sex adoption: Schuz and Blecher Prigat (n 44) 201.
which consideration of the child’s welfare is designed to ensure that the child is
born in such a way as to minimise harm to the child\textsuperscript{98} and those contexts in
which welfare of the resulting child is used as a reason to prevent the child
being born. In relation to the latter context, a difficult philosophical question
arises and that is whether it is possible to determine whether it is better for the
child to be born into the proposed situation or not to be born at all,\textsuperscript{99} since no
living person knows what non-existence is.\textsuperscript{100} Thus, there is a logical defect in
treating the welfare of the child as a basis for restricting the right to
parenthood.\textsuperscript{101}

Indeed, the Mor-Yosef Report\textsuperscript{102} rejected the so-called ‘minimalist approach’\textsuperscript{103}
under which access to ART is only refused where it would be better for the
child not to be born and instead adopts the ‘reasonable threshold approach’
under which access to ART should be refused where there is high risk of
significant harm to the child. In order to implement this approach, they
recommend inter alia that those requesting ART treatments be required to
declare any convictions for sexual offences or violence against children and
whether children have been removed from their care.\textsuperscript{104} Such cases, together
with other cases where the clinicians involved have reason to believe that there
is a risk of significant harm to the resulting child,\textsuperscript{105} will be referred to a local
committee which will decide whether to allow treatment.\textsuperscript{106}

Whilst even this minimal screening might still be alleged to constitute eugenic
selection and to be taking advantage of the fact that these parents need
recourse to ART in order to conceive,\textsuperscript{107} it can be argued that it is the
responsibility of society to prevent the birth of children who are likely to suffer
significant harm and that any consequential violation of the rights of the

\textsuperscript{98} Such as requirements relating to the mental and physical health of the surrogate mother, see
Schuz ‘Surrogacy in Israel’ (n 56).

\textsuperscript{99} This has been widely discussed in the literature. See e.g E Jackson ‘Conception and the
there.

\textsuperscript{100} P Shifman Family Law in Israel vol 2 (Jerusalem: Hebrew University Press, 1989) 156
(Hebrew), quoted with approval by Justice Rothshild in FamC 26140/07 (n 14) para 50, but her
reference to the right of the child to grow up in a warm and complete family environment, at
least until age of legal maturity, does not really solve the problem because this right is not
absolute and so it would still seem to be preferable to be born and to lose one or both parents
before the age of 18 than not to be born at all.

\textsuperscript{101} Cohen ‘Regulating Reproduction’ (n 16) 437; It should also be noted that the Israeli Supreme
Court recently rejected a wrongful life claim, on the basis that it is impossible to prove that
existence per se is harmful to a child, CA 1326/07 Hamar and others v Amit and others (28 May
(accessed June 2013). This decision reversed a 30-year-old Supreme Court decision which had
accepted such a claim.

\textsuperscript{102} Mor-Yosef Report (n 3) 19.

\textsuperscript{103} The terminology is taken from the European Society for Human Reproduction and
Embryology.

\textsuperscript{104} Mor-Yosef Report (n 3) 21.

\textsuperscript{105} Such as a background of substance abuse, Mor-Yosef Report (n 3) 21.

\textsuperscript{106} Mor-Yosef Report (n 3) 20–21.

\textsuperscript{107} See Jackson ‘Conception and the Irrelevance’ (n 99) 188.
parents is necessary and proportional. Thus, there is a relevant distinction with the situation of natural sexual reproduction, in which any attempt at preventing even the most obviously unfit parents from having children involves breach of basic rights of bodily integrity and sexual autonomy, which cannot be justified on the basis of proportionality.

On the other hand, there is no room to apply the stringent screening procedures used in selecting adoptive parents to those seeking access to ART. In relation to adoption, there is a duty to place an existing child in need of a home in the optimal conditions available; whereas there is no such duty in relation to a child who will be born as a result of ART. Thus, such an approach would indeed be eugenic selection and constitute a gross violation of the right to parenthood.

Finally, it should be noted that, whilst the Mor-Yosef Report rejected considering the welfare of the resulting child in every case, it does state that all of its recommendations about general restrictions on access to ART take into account the welfare of the child.

(ii) Non-traditional family

It is often argued that it is not in the best interests of children to be born into a single-parent family. However, this argument has been repeatedly rejected by the Israeli courts.

For example, in the Yigal Amir case, it was claimed that being born into and raised in a one-parent family was against the interests of the child who would be born to the Amir couple. However, the court rejected this claim on the basis that in modern society one-parent families are a common phenomenon and there is no evidence that this family form per se causes any significant harm to children.

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108 Inter alia because of the difficulty of assessing parental ability in a vacuum, rather than in relation to an existing child, as is done where the question of terminating parental rights arises, Mor-Yosef Report (n 3) 20; but cf UK Human Fertilisation and Embryology Act 1990, s 13(5) which requires treatment providers to take into account the welfare of the child to be born, as amended by the Human Fertilisation and Embryology Act 2007, s 14(2); for discussion of the guidelines for carrying out this screening and criticism of this requirement, see A Alghrani and J Harris ‘Reproductive Liberty: Should the Foundation of Families be Regulated’ (2001) 18 Child and Family Law Quarterly 175. The original wording of this section which referred to ‘the need of that child for a father’ has been replaced by the Human Fertilization and Embryology Act 2008, s14(2) with the phrase ‘the need for supportive parenting’; for discussion of the implications of this change, see Smith ‘Clashing symbols’(n 96).

109 Mor-Yosef Report (n 3) 18.


111 It was rejected by Justice Strasbourg-Cohen in Nachmani (n 2) and Justice Cheshin in New Family v Approvals Committee (n 12).

112 Dovrin v Prison Services (n 32) para 17 of Justice Procaccia’s decision; cf the majority opinion in ECtHR in Dickson v UK (n 37), in which the fact that the child would be born into circumstances which were less than ideal (his father was serving a prison sentence for murder...
Similarly, the Attorney-General relied on the welfare of the child when opposing an application to allow insemination after death, where the applicant was not related to the deceased.114 This seems rather incongruous in the light of the fact that the Attorney-General’s guidelines115 governing insemination after death do not even mention welfare of child, even though ex hypothesi in all such cases a child will be born into a one-parent family. The court had no difficulty in dismissing the Attorney-General’s argument on the basis that it is better for a child to be born from sperm of a known man into a family situation where the child will have loving grandparents and extended family. In any event, the logic of Attorney-General’s argument would be to prohibit use of sperm banks to single women, contrary to the decision of Israeli High Court of Justice, forbidding discrimination against such women in relation to access to artificial insemination by donor (AID).116

Similarly, the Mor-Yosef Report roundly rejects the claim that it is not in the best interests of a child to be born into a non-traditional family117 and expressly recommends that access to ART should not be restricted on the basis of the personal status of the intending parent(s), other than in relation to commercial surrogacy.118 Thus, for example, the Committee recommends that single women be eligible for surrogacy services and that altruistic surrogacy be available to same-sex couples. In addition, whilst the Committee recognises the importance of a child born of AID having access to identifying information about the donor and accordingly recommends providing an option for non-anonymous sperm donation, it does not suggest prohibiting anonymous donations.

In the current author’s view, this approach to ‘new families’ can be justified on the basis that there is no convincing evidence to support the proposition that the lives of children born into these non-traditional situations are not worth living.119 or cause them significant harm, even if one accepts the view that the conditions in which they live are not ideal.

(iii) Age of intending parents

The second context in which reference has routinely been made to the welfare of the child to support restriction of the right to parenthood is where the

114 New Family v Rambam Medical Center (n 41) discussed above at Part II(c)(ii).
115 ‘Guidelines of the Attorney General regarding Adoption by Same-Sex Couples’ (n 95).
116 HCJ 2078/96 Vitz v Minister of Health (unreported); New Family v Rambam Medical Center (n 41). data were quoted showing that in 2004, out of 320 donees of sperm at the Tel Hashomer sperm bank, 260 were single women.
117 Cf the Public-professional committee (n 3), which recommended continuing to restrict surrogacy to heterosexual couples on the grounds of the welfare of the child.
118 Mor-Yosef Report (n 3) 25.
119 Cohen ‘Regulating Reproduction’ (n 16) 472–474.
parents are above the natural age of child-bearing. Those in favour of restriction cite the potential effect on the child of parental illness and death before reaching maturity and social and psychological implications of generational difference between the parents and those of the child’s contemporaries. Against this, it is argued that even young parents may become ill or die and that the significance of age is only statistical. According to this view, it is the health of the parents rather than their chronological age which should be relevant in determining whether they should be allowed access to ART.

The Mor-Yosef Report adopts a via media recommending that the age of 54 should be the maximum age of mother for all fertility treatments, subject to possibility of allowing older women in exceptional cases. Significantly, there are two minority opinions. One takes the view that the age should be lower, between 45 and 50, because of the potential negative impact on the child of late parenthood. The other takes the view that in the light of the increased life expectancy the proposed rule is an unjustified restriction on the right to parenthood and that, if there is to be any blanket restriction based on age, it should be higher. Again, the difficulty with the restrictive view is that it is not based on any sound empirical evidence. Accordingly, it is important that comprehensive research be carried out into the impact on children of being born to older parents.

(b) Interests of others

(i) Surrogate mothers

One of the main reasons that most Western countries do not allow commercial surrogacy is in order to prevent exploitation of vulnerable women and to protect their human dignity. When enacting the Surrogacy Law, the Aloni Commission and the Israeli legislature took the view that these interests could be protected sufficiently by the safeguards provided in that Law and in particular by the need for approval of every surrogacy agreement. After more than 15 years of experience of implementing the law, it might be expected that there would now be some concrete evidence on which to assess to what extent the opposition to commercial surrogacy is justified. However, no official

120 The Mor-Yosef Report (n 3) 30.
121 FamC 26140/07 (n 14) para 16; see also the view of the American Society for Reproductive Medicine (ASRM) quoted by Cohen ‘Regulating Reproduction’ (n 16) 453.
122 Mor-Yosef Report (n 3) 30.
123 Ibid 31.
124 Ibid 32; this view seems to reflect the view of the media in Israel, in which late motherhood is portrayed in a positive light, Hashiloni-Dolev (n 86) 141. It might also be noted that the Ministry of Health’s policy of allowing and funding the freezing of eggs for women over 30 is also likely to encourage later parenthood (at 144).
125 Mor-Yosef Report (n 3) 71–74.
126 See above at Part II(c)(i).
127 This view was also expressed by the current author, Schuz ‘Surrogacy in Israel’ (n 56).
data, other than the number of applications and approvals, have been published about the operation of the scheme or about the surrogate mothers and the short and long-term impact of acting as surrogate mothers.

A report published in 2010 by Lipkin and Samama, based on field studies, brings attention to the potential harm caused to the interests of birth mothers. The authors highlight the physical and emotional risks involved for the surrogate mother. They point out that there are physical risks in pregnancy and that little is known about the long-term effects of hormone treatment. Moreover, they claim that surrogate women have to make a great emotional effort to avoid becoming attached to the baby they are carrying and often develop emotional dependency on the intended parents. Their studies also suggest, not surprisingly, that most surrogate women have a low income and that their motivation is economic. They express concern that there is no method of ensuring that surrogates are adequately compensated because there is no minimum fee and that the unequal distribution of the payments (invariably more than half is given after the birth of the child) give the undesirable impression that the payment is for the child and not for their effort and suffering. Moreover, surrogates who do not get pregnant or have a spontaneous abortion receive a minimal sum, which does not reflect their efforts and the risks to which they expose themselves.

Lipkin and Samama recommend abolishing surrogacy in Israel or at least limiting accessibility thereto. If surrogacy is retained, they make a number of practical proposals to reduce the risks to the surrogate mothers. These include providing a standard contract, prescribing a minimum fee and making available insurance against harm caused by pregnancy. In addition, they suggest developing a ‘para-financial’ model, which guarantees the surrogate mother some relationship rights and in particular the right to receive information about the progress of the children to whom they give birth and to contact with them, if both sides are interested.

Whilst Lipkin and Samama’s claims and conclusions are important, it should be noted that they do not contain any statistically valid empirical evidence. In addition, their arguments do seem to be somewhat one-sided. In particular,

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128 The figures from the coming into operation of the scheme until 2009 show a steady increase in the number of applications each year, see graph in N Lipkin and E Samama ‘Surrogacy in Israel – Status Report 2010 and Proposals for Legislative Amendment’ (2011) available at www.isha.org.il/upload/file/surrogacy_Eng00%B1%5D.pdf, 9 (accessed June 2013). Overall until 2009, there were 655 applications of which 82% were approved.
129 Ibid 4.
130 Ibid.
131 Ibid10; see also Stark ‘Transnational Surrogacy’ (n 31) 375.
133 Ibid14; cf studies in other countries referred to in Stark ‘Transnational Surrogacy’ (n 31) 376.
135 Ibid.
136 Ibid 17.
little weight is attached to benefits which may accrue to surrogate mothers. For example, might not the long-term improvements to their physical and mental health, and that of their children, as a result of the extra income, outweigh the risks involved?

Accordingly, in the current author’s view, the evidence available as to harm to the interest of surrogates is insufficient to override the right to parenthood of those who are currently eligible to use the scheme. On the other hand, the claims about potential harm to surrogate mothers do militate against any significant expansion of the current scheme, especially in view of the fact that any relaxation in the stringency with which surrogate mothers are vetted will certainly increase the risk of harm. In addition, it is necessary to make improvements, along the lines suggested by Lipkin and Samama, in order to ensure greater protection for surrogate mothers.

(ii) Women in general

It can be argued that a wide interpretation of the right to parenthood together with ready availability of fertility treatments funded by the state strengthens the message that the main role of women is to be mothers,138 which creates social pressure on women to have children,139 and in particular on women who have not succeeded in conceiving naturally to undergo fertility treatment.140 Of course, there is an element of ‘chicken and egg’ here because the attitude of the law and those who make funding decisions is influenced by cultural and social pro-natalist attitudes. However, there is reason for concern that legal approval of and widespread funding of a wide range of ART ‘confirm and perpetuate the view that a woman who fails to procreate is deeply deficient’.141 Statsman claims that this is a view which has ‘harmful psychological and social consequences’ and cites sources which bring evidence of the ‘negative physical and psychological costs’ for women of ready availability of IVF.142

This view may seem extreme, but it is important to note that there is limited knowledge as to the long-term impact on the health of women who undergo

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138 Lipkin and Samama ‘Surrogacy in Israel’ (n 128) 6. These authors also claim (ibid) that: ‘The widespread accessibility of surrogacy harms the currently existing social perceptions of the importance of the relationship between the mother and the baby in her womb, and conveys a social message that this relationship has no actual emotional and legal significance. As the use of surrogacy increases, this message will become stronger, will undermine the concept of motherhood and will have a negative impact on the status of women in relation to their children.’

139 In the context of insemination after death, it has been argued that routinely allowing this procedure is likely to result in young widows being pressurised into having a child with their deceased husbands’ sperm, which may impair their ability to recover from their loss and start a new life, C Shalev ‘Insemination After Death – Let him Rest in Peace’ (2002) 27 Refuah 96 (Hebrew) 98.

140 It should be noted that even where it is the man’s fertility which is impaired, often the choice of treatment is IVF which effectively involves treating the woman.

141 Statsman ‘The Right to Parenthood’ (n 25).

142 Ibid fn 17 and 19 and accompanying text.
fertility treatments. It is essential that proper research be carried out into the short and long-term effects of various types of fertility treatment on women of different ages.

Although it may seem paternalistic to protect women against potential harm to themselves, their consent is not informed unless they are provided with adequate information in relation to the risks. Moreover, whilst it might not be legitimate to prevent women from undergoing treatments in circumstances which involve more than a certain degree of risk, it is legitimate to remove funding in these circumstances, which will have the effect of discouraging some women and may also influence public attitudes.

(iii) Deceased

It seems to be widely accepted that respect for the dead requires that the criterion for use of gametes of a person after his death should be the consent of that person, although it can be argued that after death a person does not have any interest whether his gametes are used or not. As seen above, under current Israeli practice, approved by the Mor-Yosef Committee, it is assumed that married men or those with a fixed partner, who do not have children during their lifetime, would wish for their partner to have a child with their sperm, unless there is evidence to the contrary. Even though this assumption is not based on any scientific evidence, it does not seem unreasonable in the light of the cultural and social attitude to procreating in Israel.

On the other hand, whilst logic dictates that it is less likely that deceased men without a fixed partner would wish for their sperm to be used after their death, it is difficult to make any informed decision as to the correct policy in relation to such men without any evidence. Indeed, the dissenting opinion of Professor Casher takes the view that it can be assumed that even a man who died single would wish to have children and that therefore, subject to court approval, his parents should be allowed to find a suitable woman who is interested in becoming the mother of a child with the sperm of the deceased.

In the opinion of the current author, there is much to be said for the latter view and in any event, the door should be left open for courts to assess the wishes of the deceased. In addition, efforts should be made to bring to the attention of the public the possibility of men leaving express instructions about the use of gametes.

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143 Similarly, researchers have expressed reservations about the policy of allowing (and funding) the freezing of eggs by women over 30, in order to preserve their fertility, both because of the experimental nature of the technology and because, whilst apparently increasing the reproductive autonomy of women, it might actually limit that autonomy if it is used by employers and others as a tool to pressure women into delaying motherhood, Hashiloni-Dolev (n 86) 144.

144 Mor-Yosef Report (n 3) 30 states that the law should not interfere with the autonomy of the doctor to decide whether to give particular treatment to a particular woman.

145 At Part II(c)(ii).

146 See above at Part I.

147 Mor-Yosef Report (n 3) 46–47.
their sperm if they die. Furthermore, empirical research should be carried out in relation to the attitudes of both single and married men.

As seen above, the Mor-Yosef Committee recommends equality of treatment in relation to the use of eggs after the death of a woman. However, it seems far less clear that even a married woman would wish for her eggs to be implanted into a surrogate mother after her death, inter alia because of the controversial nature of surrogacy and because for women, bearing a child has traditionally been the hallmark of procreation. Thus, a woman may not perceive use of her eggs per se as a method of ensuring continuity. Indeed, in the light of the different functions of the sexes in reproduction, a symmetrical approach to the use of male and female gametes after death is too simplistic. Thus, it is suggested that the use of eggs after death should be limited to cases where the woman expressly consented thereto. Again, there is a need for empirical research.

(iv) Separated spouses

As seen above, the majority of the Mor-Yosef Committee recommended removing all restrictions on access of married persons to ART with their new partners. However, a minority opinion of five members of the committee took the view that in the light of the potential harm which may be caused to the spouse and sometimes to the child, court permission should be required and that the spouse be informed and entitled to put his or her position to the court.

(c) Public interests

(i) Normative

Some claim that allowing single parents and same-sex couples access to artificial reproduction techniques is against public policy as it gives legitimacy to these family forms and undermines the policy of encouraging heterosexual marriage, which they regard as the optimal family form, and which is the only family form approved by Jewish law. Accordingly, it is to be expected that the religious parties will vote against any new law, which expressly allows access to ART to single parents and same-sex couples. Indeed, the difficulty in passing legislation without the support of these parties is one of the reasons for the fact that many issues relating to ART, such as sperm donation, have been regulated by secondary legislation and administrative guidelines. Furthermore, it is clear that the only reason that the religious parties supported the Surrogacy Law was that it limited the use of surrogacy to married couples.

148 At Part II(e)(v).
149 Hashiloni-Dolev (n 86) 110 also suggests that women are less likely than men to see any value in being genetic parents without being able to bring up their children.
150 Above at Part II(c)(i).
151 Eg if the parties are Muslims, the husband will be required to support the child, Mor-Yosef Report (n 3) 27.
152 Ibid.
However, as seen above, neither the courts nor the Mor-Yosef Committee see that there is any normative reason to restrict the right to parenthood of those living in non-traditional family forms. Nevertheless, there may well be considerable public support for giving preference to heterosexual couples, where there is competition between them and new families for the limited number of local children available to be adopted or for the limited number of suitable surrogate mothers.

Public policy is also invoked by those opposing commercial surrogacy on the basis that this form of surrogacy effectively involves trafficking in surrogate mothers and children. According to this view, commercial surrogacy is morally indefensible because it treats the body of the birth mother and the resulting child as a commodity which can be purchased for a price. This is one of the reasons given for the outlawing of commercial surrogacy in the vast majority of Western countries, a fact which expressly influenced a few members of the Mor-Yosef Committee to advocate abolition in Israel.

However, others consider that this view is paternalistic and that commercial surrogacy is morally acceptable, provided that there is regulation to ensure that surrogate mothers act voluntarily and that they and the resulting child are protected.

153 For development of the commodification argument, see e.g C Fabre Whose Body is it Anyway? – Justice and the Integrity of the Person (Oxford: Oxford University Press, 2006) 196.

154 Mor-Yosef Report (n 3) 71–74. This minority opinion also drew an analogy with donation of organs for transplant. Under Israeli law, it is forbidden to sell organs for transplant and only altruistic donation (with reimbursement of expenses) is allowed. In their view, a similar scheme should apply in relation to surrogacy.

155 It should be noted that the minority opinion did express concern that the consequence of this proposal would be that more Israelis would turn to surrogacy in foreign countries, which generally provide considerably less protection for surrogate women and the children born than under the Israeli scheme. Nonetheless, they took the view that this was not a reason to allow the continuation of commercial surrogacy in Israel, but rather steps should be taken locally to discourage the use of unapproved foreign clinic and at international level to combat the abuses in other countries.

156 Schuz ‘Surrogacy in Israel’ (n 56); see also E Scott ‘Surrogacy and the Politics of Commodification’ (2009) 72 Law and Contemporary Problems 109, explaining the rise and fall of the commodification argument in the United States.
Financial

Some have questioned the massive funding of fertility treatments out of the health budget in a situation of limited economic resources and called for a reconsideration of health funding priorities.

IV ARGUMENTS IN FAVOUR OF WIDER INTERPRETATION OF THE RIGHT TO PARENTHOOD

Most of the arguments in favour of widening the right to parenthood are based on the principle of equality, according to which individuals should not be treated differently unless there is a relevant difference between them. It is argued that the current law violates the principle of equality in two main ways. First, individuals who are dependent on ART in order to become parents are subject to restrictions, which do not apply to those who can have children naturally. Indeed, the Mor-Yosef Committee states that one of its premises is to limit insofar as possible restrictions on access to ART, so as to minimise the interference with reproduction choices of those who cannot procreate naturally. Thus, for example, it proposes abolishing restrictions based on personal status of the parties, other than the restriction of commercial surrogacy to heterosexual couples or single women.

However, this latter restriction constitutes a major limitation on the right to parenthood of a whole group of the population, for whom it is the main method of realising that right, and discriminates against homosexual men on the basis of gender and sexual tendency. Some will accept the reasoning of the majority of the Mor-Yosef Committee that this restriction is necessary because otherwise the disparity between increased demand and the limited supply of

157 Under the Public Health Insurance Law 1994, Israeli women up to the age of 45 are entitled to fertility treatment until they have two children with their current partner and to help with funding an egg donation up to the age of 51 (Mor-Yosef Report (n 3) 290); The law does not limit the number of rounds of treatment available, but medical practice does not allow more than 4–6 rounds per year; ‘Information and Data on Fertility and Fertility Awareness’ (Knesset Centre for Research and Information, 7 June 2012) available at www.knesset.gov.il/committees/heb/material/data/mada2012–06–18–01.doc (Hebrew) 3.

158 In 2010, 1.4% of the health budget was spent on fertility treatments funded by the State Health Funds. This does not include sums paid out by the Funds under Complementary Insurance Schemes, ‘Information and Date on Fertility’ ibid.

159 Shalev and Goldin ‘In Vitro Fertilization in Israel’ (n 6), examine the reasons for the failure of attempts to reduce the funding of fertility treatments. These include consumer demand, pro-natalist culture and interests of the medical profession. However, as these lines are being written, there are reports of a new initiative to reduce the maximum age for entitlement to funding for IVF treatment and to reduce the number of rounds of IVF treatment available to each woman. Instead older women and those who do not get pregnant after a few rounds of treatment will be offered funding for egg donation: I Gal ‘Because of the cost, the State will limit fertility treatments’ (30 April 2013) available at, www.ynet.co.il/articles/0,7340,L-4374162,00.html (Hebrew) (accessed June 2013). It should be noted that these proposals seem to be based on economic efficiency and discouraging women from having treatments which have very small chance of success, rather than a decision that fertility treatments have lower priority.

160 Mor-Yosef Report (n 3) 6.
suitable surrogate mothers is likely to lead to a substantial increase in prices and to an undesirable expansion in the practice of commercial surrogacy,\textsuperscript{161} which was designed as a solution of last resort for a small number of infertile couples.\textsuperscript{162} It should be noted that whilst the minority approach of completely banning commercial surrogacy avoids discrimination against homosexual men, it does not provide any solution for them.

Secondly, it is claimed that there is discrimination between those who need different types of ART. For example, a single mother who can carry a baby, but has no eggs is entitled to egg donation. However, if she has eggs, but cannot carry a baby she cannot currently make use of surrogacy services.\textsuperscript{163} In addition, there are significant differences in funding available for different types of ART. Thus, whilst public funding is available to all women up to the age of 45 for IVF treatment and egg donation is subsidised up to the age of 51,\textsuperscript{164} those who need surrogacy services do not receive any assistance with funding. Similarly, it should be noted that those wishing to adopt children from abroad have to bear the costs themselves. Any argument that this selective funding is a justifiable way of influencing individuals' reproductive choices\textsuperscript{165} can be refuted on the basis that infertile couples may well not have any option as to which method to use to realise their right to parenthood.\textsuperscript{166}

Furthermore, there are differences in recognition of legal status of the intended parents according to the type of ART used. Thus, for example, the intended mother of a child born to a surrogate mother is treated as the legal mother of the child only after she obtains a parenthood order;\textsuperscript{167} whereas a mother who can give birth after egg donation is treated automatically as the legal mother of the child. One way to remove these distinctions is by adopting a scheme of legal parenthood based on consent.\textsuperscript{168}

\textsuperscript{161} In the light of the evidence that only relatively few women are able to serve as surrogates without causing harm to themselves and their children, ibid 60.
\textsuperscript{162} Ibid 57.
\textsuperscript{163} This was recognised as discriminatory in the case of \textit{New Family v Approvals Committee} (n 12) but the High Court of Justice held that any change had to be made the legislature and not by means of judicial review, see Schuz ‘Surrogacy and PAS’ (n 59).
\textsuperscript{164} Above n 156.
\textsuperscript{165} See Cohen ‘Regulating Reproduction’ (n 16).
\textsuperscript{166} More anomalously, the intended father is also treated as the legal father only after obtaining a parenthood order, even though he is the biological father of the child. It is not clear why he should not be registered as a father on production of medical documents which show that his sperm was used to fertilise the eggs which were implanted into the surrogate mother. Indeed, it could be argued that the child’s interests require that the father’s parenthood be recognised without the need for him to obtain a parenthood order.
V CONCLUSION

In Israeli judicial rhetoric, everyone has a right to parenthood, irrespective of personal status and sexual tendency. In particular, the welfare of the resulting child has not been used as a reason to restrict the right to parenthood of prisoners, single parents and same-sex couples. However, the current surrogacy legislation and social work practice in relation to local adoption still restrict the right of new families to become parents in comparison with heterosexual couples. It is likely to be only a matter of time before a challenge is made to the constitutionality of the practice of welfare authorities in giving preference to heterosexual couples when placing children for adoption. However, the courts may well avoid making a determination in relation to this sensitive issue on the basis that placement of children involves professional discretion, with which the court is not qualified to interfere.

In addition, it is to be expected that the challenge to the surrogacy legislation by a homosexual couple, which was withdrawn when the Mor-Yosef Committee was set up, will be revived, since the recommendations of the majority of that Committee still discriminate against men. If the court is not prepared to accept the argument that there is a relevant distinction between men and women in the surrogacy context, on the basis that women need surrogacy to overcome physiological defects, the solution is far from clear. Since there is no support for expanding the commercial surrogacy market, and quite rightly so, the choice is between abolishing commercial surrogacy completely or continuing ‘discrimination’.

It might be argued that this discrimination can be justified as being necessary and proportional, because it is the only way of protecting the right to parenthood of those currently entitled under the Surrogacy Law. Furthermore, the only other viable option, abolishing commercial surrogacy for everyone, would not do anything to help men to realise their right to parenthood. So, surely any change in the law which substantially restricts the rights of heterosexual couples who need surrogacy can only be justified on the basis that the current law causes real damage to countervailing interests. Yet, as seen above, there is insufficient concrete evidence of actual harm to the interests of surrogate women and the public interests arguments are equivocal. Rather, it is necessary to undertake wide-ranging methodical research into the short-term and long-term impact on surrogate mothers and their children. In the meantime, changes should be made to the practice of surrogacy in order to minimise the risks of harm which have been highlighted. The current author would agree with the conclusion reached by Elizabeth Scott that ‘well designed regulation can greatly mitigate most of the potential tangible harms of surrogacy and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists’.

169 This distinction is accepted in the Mor-Yosef Report (n 3) 61 and 71.

170 Scott ‘Surrogacy and the Politics of Commodification’ (n 156) 146 (emphasis added).
In addition, it should be pointed out that allowing altruistic surrogacy instead of commercial surrogacy is not a panacea. Although altruistic surrogacy seems to avoid most of the normative problems associated with commercial surrogacy, it is not clear that it can provide an answer to the potential damage caused to the surrogate women. Is the risk of physical harm any less for an altruistic surrogate? Furthermore, it could be argued that there is a greater risk of lack of genuine consent in the case of altruistic surrogacy. In particular, in the altruistic situation, the initiative may well come from the childless couple and the potential surrogate mother may feel that she has no choice other than to agree out of family loyalty or friendship.\footnote{There is no guarantee that what might amount to emotional blackmail will always be picked up during the approval process.} In contrast, while a commercial surrogate may be motivated by economic pressure, she is the one who initiates the process. Indeed, it might be argued that altruistic surrogacy is greater exploitation of the surrogate mother because she does not receive compensation for her efforts and the risks to which she exposes herself. Accordingly, a considerable expansion in the use of surrogacy, even if it is altruistic, is not problem-free. This is particularly so in the light of the importance of having children in Israeli society, which is likely to increase the pressure on women to agree to help to enable their friends or relatives to realise their fundamental right to parenthood.

Finally, it should be noted that whilst the premise of the Mor-Yosef Report is the right to genetic parenthood, it does also recommend widening recognition of legal parenthood (without the need to adopt), but only for partners of those who have a genetic/physiological connection with the child and usually only after obtaining a parenthood order.\footnote{Except in the case of a married woman who gives birth after donor insemination.} Some would argue that this does not go far enough in giving recognition to the intentions of the parties and still places too much emphasis on genetic parenthood. However, there is logic in requiring a genetic connection with one parent\footnote{Because otherwise the child is being created for the purposes of adoption, Mor-Yosef Report (n 3) 62.} and with requiring a court order to confer legal parenthood. The solution to the obsession with and over-sanctification of genetic parenthood is not to blur the distinction between genetic and social parenthood but to change social attitudes which treat even legally recognised social parenthood as ‘second class’ and to reduce the obstacles which face those who wish to adopt.\footnote{In relation to restrictions on intercountry adoption, see generally, E Bartholet ‘International Adoption: Thoughts on the Human Rights Issues’ (2007) 13 Buff Hum Rts L Rev 151.}