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The Role of Judiciary in Promoting Equality and Non-Discrimination for Same-Sex Couples

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Abstract

Same-sex marriage is currently the subject of a worldwide debate. The core of it is marriage equality litigation. Whatever the outcome, a new court decision is always a step forward. Thus, the main purpose of the present research is to argue that any decision made by court, whether intended to benefit or hinder marriage equality, will have a positive effect over time.

The thesis is divided into three chapters. The first chapter provides an overview of the arguments for and against same-sex marriage. The emphasis it made on the assertion that today's agenda of gay rights is social recognition and support of their relationships and families. Bearing in mind this, the evaluation of the arguments for and against marriage equality is provided. In the second chapter the case-study of the three chosen jurisdictions is made. This chapter aims to show the development of marriage equality in Austria, Israel and Massachusetts. Since each of these jurisdictions occupies a separate and distinct place on the road to full marriage equality, their comparison provides a vivid picture of the possible future developments. Finally, the last chapter reflects the role of parenting rights of same-sex couples in marriage equality.

Contents

Introduction

In the past decades constitutional law across the world has been a platform for a major controversy regarding same-sex marriage. The legal schools of thought have been divided into liberal and conservative sides in the discussion on marriage equality. The idea of restricting the right to marry has been challenged by arguments about individual freedom, equality, non-discrimination, fundamental right to marry, and privacy. Thus, in many liberal democracies the legal recognition of same-sex relations became a logical outcome of the struggle for marriage equality.

Courts' findings in favor of same-sex couples' claims are central to this issue's rise. However, there are different views about the role judiciary plays in the marriage equality recognition. On the one hand, the court can protect fundamental rights, when the law is not explicit about certain rights. Unless there is no constitutional ban on same-sex marriage,[1] one can always claim that this right is implied in the Equal Protection Clause, as in the US Constitution, or in a provision, proclaiming the right to marry and to found a family in a gender-neutral manner, as in the EU Charter of Fundamental Rights. Justice Anthony Kennedy passionately emphasized in *Lawrence v. Texas:* "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[2] On the other hand, untimely and indigested litigation may block the road to marriage equality for long, like it happened in Minnesota. Additionally, the role of the court

[1] Such ban is embodied in the form of a gender-bias definition of marriage as a union between a man and a woman, e.g. in constitutions of Eastern European countries - Bulgaria, Poland and Romania. See LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES 64–67 (Katharina Boele-Woelki & Angelika Fuchs eds., European family law series, volume 32, Intersentia, Fully revised 2nd ed. 2012).

[2] Lawrence v. Texas, 539 US 558 (2003), 578–79 (United States|US Supreme Court).

may be vague, when it uses too much discretion, like the European Court of Human Rights in *Schalk and Kopf v. Austria.*

To evaluate the role of the court in policy-making is not an easy task. In order to accomplish this successfully, one should look at a decision, analyze the strengths and weaknesses of the reasoning, check the possibilities of implementation and governmental overriding, and, finally, evaluate the actual social changes resulted from the judicial decision.

Same-sex marriage recognition is a lengthy process. In the countries where marriage equality was introduced, it preceded the years of fighting. Gay rights advocates have elaborated a great number of strategies to promote marriage equality; however, litigation has always been the most favored one. Whatever the outcome of litigation, it is always a step forward. Thus, the main purpose of the present research is to argue that any decision made by court, whether intended to benefit or hinder marriage equality, will have a positive effect over time.

The thesis is divided into three chapters. The first chapter provides an overview of the arguments for and against same-sex marriage. The emphasis it made on the assertion that today's agenda of gay rights is social recognition and support of their relationships and families. Bearing in mind this, the evaluation of the arguments for and against marriage equality is provided. In the second chapter the case-study of the three chosen jurisdictions is made. This chapter aims to show the development of marriage equality in Austria, Israel and Massachusetts. Since each of these jurisdictions occupies a separate and distinct place on the road to full marriage equality, their comparison provides a vivid picture of the possible future developments. Finally, the last chapter reflects the role of parenting rights of same-sex couples in marriage equality.

Chapter I. Natural law, liberal constitutionalism, morality, and religion – arguments for and against same-sex marriage

In this chapter I will explore the existing arguments for and against same-sex marriage, as they are mostly based on morals and religion. Awareness of these arguments is essential as they are often raised in litigation and legislation campaigns. Thus, one may claim that effectiveness of the legislation or litigation campaign on same-sex marriage recognition relies heavily on the ability to address successfully the other party's case. However, while the arguments against same-sex marriage are widely discussed in the legal literature and can be easily summarized, the question remains unclear why gay marriage is worth fighting for it? This question is important to answer as a lot of the benefits derived from marital status can be acquired by other legal means, ranging from contracts to short forms of marriage such as registered partnership or even common-law marriage.

Having started with fighting for lessening of state-promoted oppression, today gay rights activists have achieved significant success in gay rights enhancement.[3] Gay persons are no longer asking for respect of private life in issues of sexual intimacy, as well as they are not seeking only for non-discrimination on the grounds of sexual orientation at work (though these things remain principally important). Their ultimate aim, according to Carlos Ball, is to obtain social recognition and support of their relationships and families.[4] The friendly acceptance as distinct from tolerant treatment of homosexuals as an aim for the EU member states was emphasized by Ambassador Stefano Sannino: "This is about equality and is not about tolerance. Tolerance creates distance. Tolerance deepens the gap between what is

[3] See the foreword of Michael Kirby to INTERNATIONAL COMMISSION OF JURISTS (ICJ), SEXUAL ORIENTATION, GENDER IDENTITY, AND JUSTICE: A COMPARATIVE LAW CASEBOOK, at xix (2011).
[4] CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 4 (2003).

normal and what is not normal."[5] Thus, it is time to reconsider arguments for same-sex marriage from the perspectives of morality, as a "thin"[6] conception of marriage cannot pervasively answer the question why the legal recognition of same-sex marriage is important and necessary. For example, argument against the link between marriage and procreation runs counter to the gays' and lesbians' aspirations to acquire joint parental rights. The emphasis on fully positive nature of marriage and sharp distinction between civil and religious marriage is in conflict with the possible introduction of church celebration of gay marriages. In addition, a sharp denial of all moral and religious foundations of marriage can become counterproductive as it may derogate the very essence of marriage. Thus, according to Carlos Ball, "it is no longer possible to avoid normative evaluations about the value, goodness, and implications of same-gender intimate relationships and of families headed by lesbians and gay men."[7] These considerations must in no way be perceived as my opposition to marriage equality. Rather, I want to emphasize that some counterarguments on same-sex marriage opponents' rhetoric are ill-founded. Hence, I want to show this inconsistency and reformulate same-sex marriage case, where I can do it.

From the philosophical perspective the debaters over gay marriage are divided into three camps – the adherents of the natural law concept, the liberal constitutionalists and the supporters of feminist and queer theory.[8] Another group of arguments is based on religion. Although it has foundations in common with the natural law arguments, it is usually defined

[5] *Tackling sexual orientation and gender identity discrimination: next steps in EU and Member State policy making*, FRA.EUROPA.EU (Oct. 28, 2014), video available at http://fra.europa.eu/en/event/2014/tackling-sexual-orientation-and-gender-identity-discrimination-next-steps-eu-and-member/watch-live.

[6] "The thin" concept of civil marriage is an expression used by Perry Dane to describe how proponents of same-sex marriage have beveled the understanding of marriage in order to adjust it to their strategic needs. First, they draw a sharp line between the secular and the religious sides of marriage. Second, the purely positive (legal) foundation of marriage was emphasized. Finally, the substance of marriage was defined in thin terms, e.g. arguments against any link between marriage and procreation were raised. Dane suggests that these moves are useless to a defense of gay marriage. See Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO LAW REVIEW 291, 294–95 (2014).

[7] BALL, *supra* note 4, at 4.

[8] JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT 7–13 (Rowman & Littlefield Publishers 2013).

distinctively, in a separate group.[9] Additionally, the opponents of gay marriage refer to democracy and the will of majority, justifying the denial of marriage equality.

A. Natural law

Opponents of same-sex marriage in the natural law discourse argue that gay unions should be denied the opportunity to marry by the very definition of marriage as a union between a man and a woman. Jason Pierceson notes that the natural law tradition is rooted in the works of Aristotle, Catholic theologians and thinkers like Thomas Aquinas.[10] According to Aristotle, the meaning and the place of particular natural things can be understood by looking at their purpose, or *telos.*[11] This approach is applied by new natural law scholars to oppose legal recognition of same-sex relations. Their main argument, an objection based on the disability of gay unions to procreate, is built something like this: a man and a woman are complementary to each other, considering the structure of female and male genitals. Hence, it is clear that sex is naturally determined for procreation, and this can solely result from heterosexual relations. Thus, institution of marriage can be applied only to heterosexual persons, and, by nature, excludes couples of the same sex.[12]

The response on this argument is given in the Massachusetts Supreme Court's decision in same-sex marriage case. Chief Justice Marshall rejects the claim that procreation is the main purpose of marriage. She shows that marriage, as currently regulated by state and practiced, does not call for the ability to procreate. There is no requirement for heterosexual couples who intend to marry to prove "their ability […] to conceive children by coitus. Fertility is not a condition of marriage […]. People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their

[9] *Id.* at 13–18; EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 22–26 (Cambridge: Cambridge University Press, 2008).
[10] PIERCESON, *supra* note 8, at 7.
[11] MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 253–54 (Farrar, Straus and Giroux, 1st ed ed. 2009).
[12] A detailed summary of this argumentative line see Dane, *supra* note 6, at 308–12.

deathbed may marry." While the majority of married people have children, Marshall makes a conclusion that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[13]

Another natural law argument against same-sex marriage is that it can open the door to polygamous marriage [14] and incest.[15] In this case the opponents of same-sex marriage argue that if the right to marry is extended to gay couples, why not in the same way extend it to other human associations, e.g. polygamists, close relatives and non-intimate friends? In *Zablocki* case Justice Powell warned that the US Supreme Court's support for the right to marry "would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce", e.g. "bans on incest, bigamy, and homosexuality."[16] Similarly, in *Goodridge v. Department of Public Health* the Massachusetts Supreme Court emphasized that it did not have an intention to open the door to polygamous marriage, while expanding the traditional definition of marriage to include same-sex couples.[17]

This argument is well-illustrated in the show *Boston Legal*. In one of the last episodes, one of the characters, a rich founding partner of the law firm Denny Crane proposes to his non-intimate friend, an attorney Alan Shore. Crane has "more money than God" and wants to leave Shore all his wealth after the death. However, Crane does not consider a will to be an appropriate mean to deliver his fortune to his friend, as in this case a considerable amount of the devise will go to the state taxes. Thus, marriage is considered by the two men to be a good mean for avoiding the taxes. Despite being heterosexuals they apply for marriage. The gay activists sue Crane and Shore for applying for same-sex marriage when they are not gays. A

[13] Goodridge v. Department of Public Health, 440 Mass. 309, 331 (US|Massachusetts Supreme Judicial Court 2003).
[14] JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT 3 (Rowman & Littlefield Publishers 2013).
[15] Dane, *supra* note 6, at 301.
[16] Zablocki v. Redhail, 434 U.S. 374, 399 (United States|US Supreme Court 1978).
[17] *Goodridge v. Department of Public Health*, 440 Mass. n. 34.

cine judge denies the motion for injunction, finding that although "this union to be primarily based on money […]", but "[i]t is not the government's place to ask why [people marry]."[18]

The opponents of marriage equality by comparing same-sex marriage to other unions, such as unions between close relatives and practitioners of polygamy, are trying to stigmatize gay marriage in order to make it loathsome to the public. Incest and polygamy are treated mostly negatively in the western societies, while it is not true about homosexual relationships. Evan Gerstmann notes that the overwhelming majority of the scholars who address the issue of same-sex marriage in law reviews express their support to homosexual couples. However, according to Gerstmann, no one has argued in favor of legal recognition of polygamous relationships: "When academics have addressed polygamy, they have treated it with the sort of contempt or indifference that they decry when directed at other marginalized people."[19] However, same-sex marriage and polygamous relationships or incestuous marriage are not the adequate comparators from the perspective of legal consequences to which the recognition of both of them cam lead. While gay marriage would have no impact on heterosexual marriages, legalization of polygamous marriages would revise the legal status of every married individual, as suddenly any spouse would acquire the right to marry a few more persons without dissolving the existing marriage.

Concerning incest, the issue is ambiguous. From one hand, unlike homosexual sexual intercourse, incest is an unlawful act, e.g. in Austria.[20] It is often associated in the public mind with sexual exploitation of minors, and the government has a compelling interest in "protecting the physical and emotional wellbeing of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[21] Thus, arguing that gay marriage

[18] David Kelley, Boston Legal Season 5 Episodes 12 & 13 Made in China and Last Call (20th Century Fox Television for ABC) available at https://www.youtube.com/watch?v=1BFNh17JgCM.
[19] GERSTMANN, *supra* note 9, at 105–6.
[20] § 211 StGB (Strafgesetzbuch), Blutschande - JUSLINE Österreich, http://www.jusline.at/211_Blutschande_StGB.html.
[21] New York v. Ferber, 458 [1982] U.S. 747, 757 (United States|US Supreme Court).

can open the way to incest in the countries, where it is criminally prohibited, is nothing else than an attempt to stigmatize homosexual relationships and to show them in bad light. From the other hand, incest may not be treated as an offence, like in Israel, where incest between consenting adults is legal. Moreover, there is a point of view that incest is an absolutely acceptable and lawful practice, and "Oedipus is free to marry."[22] The ban on incest is generally justified by the interest in protecting of the gene pool. In response thereto, one may argue that the law does not prohibit marriage of individuals who have considerable genetic dieses[23] (in a similar fashion to the proponents' of gay marriage response on the argument about procreation as a purpose of marriage). Thus, the incest argument is easily destroyed.

B. Religion

As I have mentioned above, in the discussion on same-sex marriage one may identify a separate group of arguments, based solely on religion. In Christianity these arguments are founded on several verses from the scriptures. For example, Leviticus 18:22 allegedly warns against homosexual relations between men: "Do not have sexual relations with a man as one does with a woman; that is detestable."[24] Romans 1:26 does the same about lesbian intercourse: "Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones."[25]

It is emphasized in the legal literature that religion is one of the major barriers to legal recognition of same-sex relationships to date.[26] The opponents of marriage equality argue that there is a clash between religious freedom and gay marriage. This argument is based on the fear of religious leaders and followers that introduction of marriage equality could interfere

[22] For example, see Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, FAMILY LAW QUARTERLY, no. 3, 1984, at 257.
[23] GERSTMANN, *supra* note 9, at 112.
[24] *Bible Gateway Passage: Leviticus 18 - New International Version*, BIBLE GATEWAY.
[25] *Bible Gateway Passage: Romans 1 - New International Version*, BIBLE GATEWAY.
[26] For example, see EMILY R. GILL, AN ARGUMENT FOR SAME-SEX MARRIAGE : RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND PUBLIC EXPRESSIONS OF CIVIC EQUALITY (Religion and Politics series, Georgetown University Press 2012).

with freedom of religion by declaring religiously-based anti-homosexual practices illegal, e.g. denial of priests to conduct religious celebration of same-sex marriages.[27] An objection on the religious argument against gay marriage is based on the principle of separation of church and state. As Andrew Sullivan states, there is no propositions for the "faith communities be required to change their definitions of marriage […]. The question at hand is civil marriage […] only." He continues: "Many churches, for example, forbid divorce. But civil divorce is still legal."[28]

It is worth to notice that religious opposition to same-sex marriage is very strong and influential, as illustrated by the Iowa's example. In 2009 the Iowa Supreme Court held that same-sex marriage was implied in the state constitution and ordered to change the marriage law to include same-sex couples. The Court stated that "[c]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals."[29] The Republicans, which traditionally oppose marriage equality in the USA, leaded the outcry over this decision. They were joined by the conservative religious groups, which spent over $ 1,000,000 fighting against the justices. Eventually, three justices lost the retention elections a year after the decision in the same-sex marriage case.[30]

C. Other arguments against same-sex marriage

Jason Pierceson distinguishes a so-called "radical" group of opponents of same-sex marriage.[31] He includes there radical feminists and queer theorists, who argue that "[r]equests for inclusion to long-standing social institutions are flawed, because membership in these

[27] PIERCESON, *supra* note 8, at 15.
[28] Andrew Sullivan, *State of the Union*, 222 NEW REPUBLIC, May 8, 2000, at 20.
[29] Varnum v. Brien, 763 N.W.2d. 862, 905 (US|Iowa Supreme Court 2009).
[30] Iowans dismiss three justices | The Des Moines Register | desmoinesregister.com, http://archive.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices.
[31] See the discussion of radical critiques of gay marriage in PIERCESON, *supra* note 14, at 11–13.

institutions brings with it traditional, and oppressive, ideas about gender and sexuality."[32] However, these objections are directed against marriage on the whole. Gay marriage is not the main aim of feminists. In addition, such arguments are not used in litigation. Thus, I will not discuss them in detail.

Also the opponents of legal recognition of same-sex relationships often appeal to the popular will.[33] According to the marriage equality antagonists, judicial activism[34] should have no place in the deciding problems like this. In Austria, for example, public support in favor of homosexual marriages has historically been one of the lowest in the European Union.[35] Thus, this argument can have a vague role in this country. However, same-sex marriage supporters can challenge this argument by emphasizing that the court activism is reliable and legitimate, as it is grounded on constitutional principles. In addition, democracy is not a majority rule only; it requires recognition of the rights of minorities. Otherwise it can become a tyranny.

D. Liberal constitutionalism

As the discussion around gay marriage examined above has shown, opponents of same-sex marriage ground their arguments on philosophical, religious and other fields of knowledge. For the advocates for marriage equality, liberal constitutionalism is a basis for their case. Same-sex marriage should become a reality, as it is required by constitutional principles of individual freedom (autonomy) and equal treatment. Thus, proponents of marriage equality view as effective two elements of constitutional jurisprudence namely equal protection and fundamental rights jurisprudence. As I will show it further in the thesis, the courts are often reluctant to recognize right to same-sex marriage. Protection jurisprudence, in contrast, has proven to be more productive.

[32] *Id.* at 11.
[33] See, for example, an excerpt from the Governor of Iowa Terry Branstad's speech in *id.* at 2.
[34] This argument is mostly directed against judicial, not legal activism.
[35] David Pettinicchio, *Current Explanations for the Variation in Same-Sex Marriage Policies in Western Countries*, 11 COMPARATIVE SOCIOLOGY 526, 527 (2012).

Chapter II. The role of the courts in legal recognition of same-sex relationships in Austria, Israel and Massachusetts

It is claimed that litigation is central to marriage equality recognition in a few jurisdictions, whereas in the majority of countries worldwide it is more typical for the parliaments to have final say on this issue.[36] For example, in Austria and Israel judges grant wide deference to the legislative bodies. The firm refusal of the European Court of Human Rights in *Schalk and Kopf v. Austria* to mandate gay marriage, instead deferring to the national legislators on the issue, is a well-known example of this.

Here I argue that introduction of marriage equality should not be viewed as a single act of a legislature or a single court's ruling; rather it is a lengthy process. Bearing in mind this, it is not right to say that, for instance, in Austria recognition of same-sex relationship is entirely attributed to the legislature. Though, it is true that the registered partnership bill was enacted by the Austrian parliament, this law did not lead to marriage equality, as it was dreamed and pursued by gay marriage proponents. Registered same-sex partners did not acquire equal parenting rights which, as I will show in the next chapter, are crucial part of the marital status. Later, the Constitutional Court overruled statutory ban on medically assisted procreation for lesbian couples and restrictions on joint adoption by same-sex couples, thus considerably contributing in establishment of marriage equality in Austria. The Austrian and Israeli cases will show that the courts, while leaving wide discretion to the legislative bodies, do not stand aside of the process of marriage equality development.

[36] PIERCESON, *supra* note 8, at 52.

I have opted for discussing each of the chosen jurisdictions' legal developments in turn. The remainder of this chapter deploys in three sections. It begins with the case-study of Austria, where the main emphasis is made on discussion of the *Schalk and Kopf v. Austria* case, as the case which defines the policy of same-sex marriage recognition in the whole Europe. Although, it is not a creation of Austrian jurisdiction, however it is an essential part of it. Then the chapter proceeds to the Israeli case, where I discuss the role of the judiciary in *de facto* recognition of same-sex marriages. Next, the chapter discusses the landmark case of *Goodridge v. Department of Public Health* which has made Massachusetts the first state in the USA to open marriage to homosexual couples. There I emphasize the role of personality of the judge in same-sex relationship legal recognition.

A. Case-study of Austria

The Austrian Constitutional Court expressed its considerations on the constitutionality of the definition of marriage in a heterosexual manner for the first time in 1996 in the case,[37] which later made its road to the European Court of Human Rights.[38] The judgment *Karner v. Austria* became the first judgment of the ECtHR reflecting social and legal developments in the field of recognition of gay rights. The Court held that the Austrian Supreme Court's refusal to recognize the applicant's right to succeed the tenancy of an apartment after the death of his same-sex partner violated Article 14 and Article 8 of the Convention. The Court stated that unmarried homosexual couples must normally be granted the same rights as unmarried heterosexual couples.[39] As a result of the decision in *Karner v. Austria*, the country started to grant rights for *de facto* same-sex unions.

[37] [1996] Case no 6 Ob 2325/96x (Austria|AT Supreme Court, Dec. 5, 1996).
[38] Karner v. Austria, App. No. 40016/98 (European Court of Human Rights, Jul. 24, 2003).
[39] *Id.*

In 2009 the government enacted the registered partnership bill, introduced by the Ministry of Justice.[40] The bill was adopted by both houses of the parliament by the 18 December 2009 and entered into force in 2010. Despite being called by the scholars "separate but equal"[41], meaning that same-sex couples have the right to marry "in everything but name"[42], in fact the status of registered gay partners differed a lot from the status of heterosexual married couples. Together with introduction of registered partnership legislature expressly removed a possibility to adopt and to use medically assisted procreation by same-sex couples. Another major difference between marriage and registered partnership was the nature of parties since only gay couples could enter registered partnership.[43] While all the limitations on adoption and procreation were ruled out by the Constitutional Court,[44] the question if different-sex couples can enter into registered partnership is now pending in the ECtHR.[45] The Constitutional Court of Austria opted for maintenance of separate character of registered partnership, when in 2011 it dismissed the different-sex couple's complaint. The ECtHR stated that Article 8 of the European Convention on Human Rights in conjunction with Article 14 did not provide for registered partnership for heterosexual couples.[46]

At the same time as the same-sex partnership registry was being introduced, the ECtHR was hearing the case against Austria, where the applicants, two cohabiting same-sex partners, claimed that the country violated their right to marry by refusing to grant them

[40] Austrian government approves same-sex partnership rights | TopNews, http://www.topnews.in/austrian-government-approves-samesex-partnership-rights-2237236.
[41] LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 1, at 23.
[42] Marry Welstead, *Reshaping Marriage and the Family - the Gender Recognition Act 2004 and the Civil Partnership Act 2004*, *in* INTERNATIONAL SURVEY OF FAMILY LAW 195 (Andrew Bainham ed., 2006).
[43] FAMILY LAW: JURISDICTIONAL COMPARISONS 62 (James Stewart ed., The European Lawyer Ref Series, Sweet & Maxwell 2011).
[44] Constitutional Court Turns Down Insemination-Ban for Lesbian Couples | Austria, http://www.sexualorientationlaw.eu/11-constitutional-court-turns-down-insemination-ban-for-lesbian-couples; Constitutional Court Struck Down Joint Adoption Ban | Austria, http://www.sexualorientationlaw.eu/105-constitutional-court-struck-down-joint-adoption-ban-austria.
[45] Ratzenböck and Seydl against Austria (Statement of facts and Questions to the parties), App. No. 28475/12 (European Court of Human Rights, Mar. 3, 2015).
[46] *Id.* at 3.

access to marriage.[47] The decision in the case of *Schalk and Kopf v. Austria* has defined the further policy in the field of marriage equality not only for Austria, but for the whole Europe. Unfortunately, the Court has not reached the conclusions, expected by the proponents of marriage equality.

The applicants in the present case brought before the Court two claims, namely that Austria violated their right to marry, and an equal treatment claim. The Court rejected both. The first argument was rejected because, according to the Court, the Article 12 of the Convention was written in a sex-specific language, granting the right to marry to "men and women":

> The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.[48]

The ECtHR reaffirmed the "living instrument" doctrine, an approach which allows to expand the scope of the rights over time. However, it refused to expand the right to marry till there would be a consensus among the parties to the Convention to support such expansion.[49]

The applicants also claimed that Austria violated prohibition of discrimination, enshrined in Article 14, taken in conjunction with Article 8, which guarantees protection of the right to respect for private and family life.[50] In addressing this argument, the ECtHR made some observations in favor of applicants. First, for the Court cohabiting same-sex couples fall within the meaning of "family life" of Article 8.[51] Second, the Court stated that same-sex couples "were in a relevantly similar situation to different-sex couples."[52] Finally, making a reference to *Karner,* it noted that it had held constantly that "differences based on sex,

[47] SCHALK AND KOPF v. AUSTRIA, App. No. Application 30141/04 (European Court of Human Rights, Nov. 22, 2010) [39].
[48] *Id.* at [55].
[49] *Id.* at [58–59].
[50] *Id.* at [65].
[51] *Id.* at [94–95].
[52] *Id.* at [99].

differences based on sexual orientation require particularly serious reasons by way of justification."[53]

Despite all of the above mentioned, the Court denied the applicant's non-discrimination claim. It stated that, since Article 12 of the Convention does not imply the right to same-sex marriage, it cannot derive this right from Articles 14 and 8.[54] From this perspective, the narrow meaning of marriage in Article 12 does not allow the Court to rely on Articles 14 and 8 in order to expand right to marriage to same-sex couples. Loveday Hodson called this statement of the Court "hasty and unsatisfactory for its lack of reasoning."[55] In addition, the Court stated that Austria has a wide margin of appreciation in deciding for itself whether or not the deferential treatment of same-sex couples is justified.

As it has been mentioned already, Austria introduced registered partnership during the course of litigation in *Schalk and Kopf*. The Court, however, did not speak directly whether the states have an obligation to provide at least some marriage equality to same-sex couples by adopting the laws such as Austria's law on registered partnership.[56]

Despite its generally negative outcome for the proponents of gay marriage, the decision in *Schalk and Kopf* can be considered as another small victory on the road to marriage equality in Europe. In this judgment the Court acknowledged that it "would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex."[57] The new reading of Article 12 was influenced by the Charter of Fundamental Rights of the European Union where the right to marry is formulated in a gender-neutral manner. The ECtHR stated that in the case of *Christine Goodwin v. United Kingdom* it had already pointed out that there had been "major

[53] *Id.* at [97].
[54] *Id.* at [101].
[55] Loveday Hodson, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, 11 HUMAN RIGHTS LAW REVIEW 170, 175 (2011).
[56] *Id.*
[57] *SCHALK AND KOPF v. AUSTRIA* [61].

social changes in the institution of marriage" since the adoption of the Convention.[58] In addition, the Court noted that Article 9 of the Charter "has deliberately dropped the reference to men and women". The Court also recalled that the Explanatory Note to the Charter confirms that "Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments".[59] Thus, "[r]egard being had to Article 9 of the Charter"[60] the Court based the above mentioned assertion.

Unfortunately, by virtue of Article 9 of the Charter full marriage equality cannot be introduced in Austria. The European Union's fundamental rights may not be invoked outside the situations governed by the EU law.[61] In other words, the Court of Justice of the EU has a power to examine the compatibility of the national legislation of the member states with the Charter of Fundamental Rights of the European Union (the Charter) only within the scope of EU law.[62] The Union lacks specific competence to enact regulations on substantive family law issues,[63] e.g. matrimonial capacity, recognition and validity of registered partnerships and same sex marriages, and adoption.[64] Austria, as well as other EU member states, has its own laws on the above listed issues.

Following *Schalk and Kopf*, Austria has entered the era of pro-gay rights judicial activism. The Austrian Constitutional Court eliminated unequal treatment in the field of defining family name of same-sex couples, established the same ceremony for partnership

[58] *Id.* at [58].
[59] *Id.* at [60].
[60] *Id.* at [61].
[61] Charter of Fundamental Rights of the European Union, 2010/C 83/02, Article 51.
[62] Åklagaren v. Hans Åkerberg Fransson [2013] Case no C‑617/10 (European Union|EU.INT CJEU, Grand Chamber, Feb. 26, 2013) [19].
[63] Aude FIORINI, Which Legal Basis for Family Law? The Way Forward (European Parliament's Committee on Legal Affairs Nov. 2012).
[64] However, certain aspects of matrimonial capacity can be inferred from the Council Directives 2003/86 and 2004/38, as well as they are partly covered by the 2000 Hague Convention on the International Protection of Adults, to which a number of EU member states are parties. Interstate adoption was addressed in the European Parliament resolution of 19 January 2011 on international adoption in the EU.

registration as for marriage and overruled the bans on same-sex adoption and medically assisted procreation.[65] The last will be discussed in the next chapter.

B. Case-study of Israel

Israel provides an interesting case-study as it is a fairly progressive jurisdiction in the legal protection available to gay individuals. This protection has been gradually developed through litigation. Among democratic countries Israel remains the only state, where marriage and divorce are governed solely by religious law.[66] The issues of marriage and divorce are adjudicated by the religious courts of each of the recognized religious groups in Israel.[67] For Jewish Israelis, who constitute the majority of population of the country, the regulations on personal status are the Jewish law as it is understood by Orthodox Judaism. According to Jewish law, homosexual intercourse is "completely forbidden and [is] regarded as a sin and an abomination."[68] Thus, gay marriage is not even a forbidden under Israeli law; in fact, it is nonexistent.[69]

There is no civil marriage or civil divorce in Israel. Therefore, individuals who want to marry are obliged to do so in a religious ceremony, even if they do not have religious beliefs. People who are limited in their right to marry are not just gay couples. Under religious law mixed-faith couples (followers of different religions), persons having no recognized religious affiliation, and some other categories of people, e.g. homosexual couples, are not permitted to marry. [70]The legal system of Israel does not provide for gay couples any official alternative of marriage. Yuval Merin argues that this situation can barely be changed as marriage is viewed

[65] Constitutional Court Struck Down Joint Adoption Ban | Austria, *supra* note 44.
[66] Yuval Merin, *Anglo-American Choice of Law and the Recognition of Foreign Same-Sex Marriages in Israel - on Religious Norms and Secular Reforms*, 36:2 BROOK. J. INT'L L. 509, 510 (2011).
[67] Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASHINGTON & LEE LAW REVIEW 1565, 1627–30 (2009).
[68] Merin, *supra* note 66, at 511.
[69] *Id.*
[70] Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU JOURNAL OF PUBLIC LAW 359, 361 (2008).

as a national symbol. He adds that since religious political parties have always had a significant weight in any coalition in Israel, it is greatly unlikely that the legislature will provide for secular civil marriage, even for heterosexual couples.[71] Thus, marriage equality in Israel most probably can be achieved by successful litigation.

The Israeli Supreme Court has been playing a significant role in implementing marriage equality. Despite the fact that it keeps reaffirming in its judgments that such sensitive issues, as same-sex marriage recognition, are attributed to the Knesset's competence, many observers agree that the Court contributed a lot in *de facto* recognition of same-sex couples and their approximation to heterosexual married couples.[72] Thus, comparing to the Massachusetts Supreme Court, which has shown itself as a firm marriage equality grantor, and to the Austrian Constitutional Court, which used to be reluctant to marriage equality, the Israeli Court can be called a marriage equality diplomat. While refraining from radical changes, it bases its decisions on commonly accepted constitution values, such as dignity (an equivalent of equality in American and European traditions). I think that the tactics taken by the Israeli Court best fits to the expectations and needs of such complicated society as Israeli. In this subchapter I will discuss the gradual recognition of same-sex relationships in Israel. I argue that despite the lack of legislation and litigation, issuing marriage license to gay couples, the short form of same-sex marriage is *de facto* recognized in Israel.

In 1988 the homosexual intercourse was decriminalized in Israel. Shortly thereafter the first constitutional struggle for gay rights began. In 1992 the Knesset amended the Equal Opportunities Law to include sexual orientation as a category which cannot be targeted for discrimination. In 1994 the Israeli Supreme Court made its first judgment under the amended law. It held that same-sex couples were entitled to the same spousal benefits as unmarried

[71] Merin, *supra* note 66, at 511.
[72] For example, see Justice Rubinstein's opinion in Ben-Ari and Others v. Director of Population Administration, Ministry of Interior [2006] Case no HCJ 3045/05 (Israel|IL Supreme Court, Nov. 21, 2006).

heterosexual couples in the field of employment. The decision in *El-Al v. Danielowitz* began a movement towards marriage equality in Israel**.**

1. El-Al v. Danielowitz: the first victory

The facts of the case are the following: The respondent was an employee for the appellant, El-Al Airlines. According to the collective agreement, company's employees and their spouses are provided with a free ticket annually. As an alternative arrangement, an opportunity to receive a free ticket is provided to "a companion recognized as the husband/wife of an employee if the couple lived together in a joint household as husband and wife in every respect, but they are unable to marry lawfully."[73] El-Al denied recognizing a same-sex partner of Mr. Danielowitz as his "companion" and rejected his request of the benefit. As the Vice-President of the Supreme Court of Israel, Aharon Barak stated, the issue before the Court was "if this benefit conferred also on an employee's same-sex companion?"[74]

The Court defined two legal constructions on which Mr. Danielowitz could base his claim. Under the first construction, the "interpretive construction", Danielowitz could claim that the terms "spouse" and "companion" in the collective agreement should be correctly interpreted to include same-sex partners of El-Al's employees.[75] Chief Justice Barak denied to follow this approach, and based his reasoning on the second construction, the "statutory construction." According to it, the collective agreement granted the right at issue only to heterosexuals, thereby contradicting the Equal Opportunities Law's prohibition of discrimination on the grounds of sexual orientation.[76] The Court accepted the statutory construction and found that refusal to provide the ticket to gay partner of the employee was

[73] El-Al Israel Airlines Ltd v. Danielowitz [1994] Case no HCJ 721/94 (Israel|IL Supreme Court, Nov. 30, 1994) [1].
[74] *El-Al Israel Airlines Ltd v. Danielowitz* [1994] Case no HCJ 721/94 (Israel|IL Supreme Court, Nov. 30, 1994).
[75] *Id.* at [6].
[76] *Id.* at [8].

discriminatory, because the company was making an unjustified distinction on the grounds of sexual orientation.

The Court stated that the fact that Danielowitz was in a same-sex relationship did not justify discriminatory treatment. The goal of the company's employment benefit scheme was based on a single goal to provide a ticket as a benefit for an employee to enable him to take a trip with his or her partner. Mr. Danielowitz and his partner fully satisfied the criterion for receiving the benefit because their couple was "a firm social unit based on a life of sharing." The Court found out that sexual orientation of the employee for the only reason for denial of the benefit.[77]

Thus, we see that the Court does not actually recognize same-sex relationships in the present case. However, it has a symbolic meaning, granting at least some official recognition of same-sex relationships in the field of employment. However, the fact that *Danielowitz* was decided under the Equal Employment Opportunities Law may be regarded as limiting prohibition of discrimination on the grounds of sexual orientation not only to employment relationships.

According to Aeyal Gross, who examined subsequent application of the *Danielowitz* precedent, the Israeli courts used both narrow and broad readings of it.[78] For example, in *Steiner I* and *Steiner II*, which were heard by the appeal instances of Tel-Aviv, the narrow (in the first case) and the broad (in the second) reading of *Danielowitz* were applied to the military service relationships. Both cases involved the issue if a surviving same-sex partner could be acknowledged as the spouse of his deceased partner, a military servant, for the purpose of receiving the payments, which, under the Israeli law, were provided to the members of families of the deceased military servants. The claims, despite being analogous,

[77] *Id.* at [10].

[78] Aeyal Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israeli Law*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 401–2 (Robert Wintemute & Mads Andenæs eds., HART Publishing 2001).

were viewed by two different courts as the different statutes were at issue. In the first case, the court refused to extend the *Danielowitz* precedent to military service and found no discrimination, as "a sexual relationship between two men does not create a family link, in the absence of the necessary conceptual element of procreation, even if they have a sexual relationship and a deep friendship. Nothing can be done against the laws of nature; there is no similarity between a family and a same-sex couple."[79]

In contrast, in *Steiner II* the court applied the equality framework, established in *Danielowitz.* Thus, it extended the Supreme Court's precedent beyond the framework of employment. According to the court, equality, as defined in the case of *Danielowitz,* requires the recognition of the applicant as the "reputed spouse" of his deceased same-sex partner, because the statute at issue is aimed to provide for the family of military servant who died in service. Refusal of recognition of the applicant's status would amount to discrimination, because had the applicant been a woman he would have received the payments.[80]

The present case is of a great significance, considering, first, that the decision was made in the early 1990-s, when no state had legally recognized the marriage equality;[81] and, second, *Danielowitz* has triggered the enhancement of gay rights in Israel. Moreover, *Danielowitz* was cited in several gay rights cases outside the state of Israel, e.g. in *Fitzpatrick v. Sterling Housing Association Ltd.*, the UK's case, and in *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs*, the case, decided by the Constitutional Court of South Africa.

2. From Danielowitz to Ben-Ari

[79] *Id.* at 403.
[80] *Id.* at 409–10.
[81] When comparing this case to a similar one, the *Maruko* case, decided by the European Court of Justice, it is interesting to mention a great gap of time between the two – fourteen years.

Following *Danielowitz,* he Israeli courts and authorities have expanded recognition and protection homosexual relationships in a number of fields. For instance, gay couples were recognized as couples for the purposes of immigration and inheritance. In 2000 the Ministry of Interior granted immigration rights for gay couples, making Israel one of a few countries in the world allowing immigration for foreign same-sex partners of the country's nationals.[82] In 2004, the district court granted an elderly homosexual man the right to inherit an apartment, which was registered in the name of his cohabiting same-sex partner.[83] Subsequent legal recognition of same-sex relations in Israel was made in several gay adoption cases. In 2005, in the *Yaros-Hakak* case the issue of the possibility of a second-parent adoption was decided in favor of a lesbian couple.[84] To sum up, the partial list of rights and benefits, guaranteed to gay persons with regards to their family status, which were developed by the courts includes: 1) benefits under collective agreements which are limited to couples (decision of the Israeli Supreme Court in *El-Al Israel Airlines v. Danielowitz*); 2) surviving relatives' pension rights (decision of the Israeli National Labour Court in *Even v. Tel-Aviv* University); 3) pension rights, enshrined in the Permanent Service in the Defence Forces Law (decision in *Steiner v. IDF*); 4) memorial rights (the Supreme Court's decision in *Steiner v. Minister of* Defence); 5) recognition as a spouse for the purposes of the law on prevention of family violence and the family court regulations (decisions of the Israeli Family Court Cases); and 7) recognition as a surviving cohabitant for the purpose of inheritance (the Nazareth's District Court's decision in *A.M. v. Custodian-General*) etc.[85] Thus, the period after *Danielowitz* can be described as a successful gradual development towards gay friendly society.

[82] S. Iimay Ho & Megan E. Rolfe, *Same-Sex Partner Immigration and the Civil Rights Frame: A Comparative Study of Australia, Israel, and the USA*, INTERNATIONAL JOURNAL OF COMPARATIVE SOCIOLOGY, 1, 11 (2011).
[83] Anonymous v. The Custodian General [2004] Case no CA (Nz) 3245/03 (Israel|IL, 2004) sec. 19.
[84] *Yaros-Hakak v. Attorney General, Supreme Court of Israel (10 January 2005), in* SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE: A COMPARATIVE LAW CASEBOOK 268–71 (2011).
[85] As the law is summarized in Yossi Ben-Ari and others v. Director of Population Administration, Ministry of Interior, (2006) 2 IsrLR 283 (Supreme Court) 305.

Despite the fact that Israel has not legally recognized same-sex marriage, the country's system has developed several alternatives to evade some of the limitations, derived from the formal marriage, such as an institution of common-law marriage, and recognition of the right of Israelis who performed marriage abroad to be registered as married in Israel. *Ben-Ari and others v. Director of Population Administration and Ministry of Interior*,[86] a case on the foreign gay marriage recognition, decided in 2006 by the Israeli Supreme Court, is one of the most significant decisions on the way of legal recognition of same-sex relationships. The reasoning of the Court in this case is based on the *Funk-Schlesinger*, a well-established Israeli precedent on the registration officer's discretion. It has made possible for the Court to recognize same-sex marriage (in *Ben-Ari*) and joint adoption by gay couples (in *Brenner-Kaddish*), conducted by the Israeli citizens abroad.

3. The role of Funk-Schlesinger in recognition of same-sex marriages in Israel

The facts of the case are readily told: Mrs. Funk-Schlesinger, a Christian resident of Israel, married Mr. Schlesinger, a Jewish Israeli resident. The marriage was performed in Cyprus. Ms. Funk-Schlesinger filed an application to be registered as "married" at the official registry. The application was denied based on the consideration that under the Israeli law the spouses were not married.[87] The Supreme Court ordered the registration. The Court states that the function of the registration authorities was merely a function of collecting statistical facts for the purpose of maintaining a register of residents, and no judicial power has been given to them. Thus –

> When he registers the family status of a resident, it is not part of the job of the registration official to consider the validity of the marriage. The legislature is presumed not to have

[86] Ben-Ari and Others v. Director of Population Administration, Ministry of Interior [2006] Case no HCJ 3045/05 (Israel|IL Supreme Court, Nov. 21, 2006).

[87] As it was mentioned above, in Israeli family law marriage and divorce are subjects to religious law and religious courts' adjudication. Civil marriage as well as civil divorce does not exist in Israel. Therefore, individuals who want to marry are obliged to do so in a religious ceremony, even if they do not have religious beliefs. See Lifshitz, *supra* note 67.

> imposed on a public authority a duty that it is incapable of discharging. The official should be satisfied, for the purpose of carrying out his office and registering the family status, if he is presented with evidence that the resident underwent a marriage ceremony. The question of what is the validity of the ceremony that took place is a multi-faceted one and examining the validity of the marriage falls outside the scope of the residents' registry.[88]

The only exception from this rule is a so-called "manifestly incorrect" principle, which was articulated by Justice Y. Sussman in *Funk-Schlesinger*. There might be cases in which the inappropriateness of the details that a citizen wants to register in the registry "is manifest and is not subject to any reasonable doubt". In such cases there is no obligation to carry out the registration.

> The public official is not obliged to exercise his authority in order to be a party to an act of fraud. When a person who clearly appears from his appearance to be an adult comes before him and applies to be registered as a five year old child, what doubt can there be in such a case that the registration is false and that the act of the person is an act of fraud? In such a case the official will be justified when he refuses to register the details, and this court will certainly not exercise its power… in order to compel the official to "forge" the population register.[89]

The rule and its exception established in *Funk-Schlesinger v. Minister of Inferior* have laid down longstanding roots in Israeli case law. Since the ruling in this case, the Supreme Court has upheld it consistently.[90]

4. Ben-Ari v. Director of Population Administration

On November 21, 2006 the Israeli Supreme Court in the case of *Ben-Ari* decided that the Administration of Border Crossings, Population and Immigration are obliged to record same-sex marriages performed abroad. The petitioners, five homosexual couples, Israelis citizens, got married in Toronto, Canada, where same-sex marriage is legally recognized. After their arrival to Israel, they applied to be registered as married at the official registry. The applications were denied on the basis that "marriages of this kind are not legally recognized in

[88] Funk-Schlesinger v. Minister of Interior, (1963) 17 IsrSC 225 (Supreme Court) 252.
[89] *Id.* at 243.
[90] See, for example, HCJ 264/87 *Federation of Sefaradim Torah Guardians – SHAS Movement v. Director of Population Administration, Ministry of Interior* [1989] 43(2) IsrSC 723, where the Court held that the registration body should register the conversion of a person on the basis of documentation that testifies the conversion in a Jewish religion outside Israel.

the State of Israel, and therefore it is not possible to register them in the register."[91] This led to bringing proceedings before the Supreme Court. The applicants claimed that the rule in *Funk-Schlesinger v. Minister of Interior* and their right to family life were violated because the official was not competent to examine the validity of marriage under the Israeli laws, and the eligibility of the couple to marry. "[A]s long as no judicial decision has been made to the effect that the marriage is not valid, the registration official is obliged to register it in the population registry."[92]

The Court stated that the "scope of the dispute concerns the scope of the rule in *Funk-Schlesinger v. Minister of Interior*."[93] For the government, the rule, established in *Funk-Schlesinger*, is applied to a marital status which falls within the legal framework of Israeli law. As a term "marriage" refers only to the union between a man and a woman, the rule cannot be applied to the relationships of the petitioners.[94] The Court rejected this argument and emphasized that making decisions on validity of the family statuses was excluded from the competence of registration officials.[95] The majority held that following the rule in *Funk-Schlesinger*, according to which the purpose of the official registration of personal statuses is mostly statistical, the official is not competent to define if the marriage is valid.[96] The President of the Court Aharon Barak defined the nature of the decision in the present case. He emphasized that this judgment does not recognize same-sex marriage, but provides only for official registration. He stated: "Indeed, I accept that the question of conducting civil

[91] Yossi Ben-Ari and others v. Director of Population Administration, Ministry of Interior, (2006) 2 IsrLR 283 (Supreme Court) 287.
[92] *Id.*
[93] *Id.* at 302.
[94] *Id.* at 303–4.
[95] *Id.* at 304.
[96] *Id.* at 305–6.

marriages in Israel, including marriages between persons of the same sex, should be determined first and foremost by the legislator. This is not the question before us."[97]

Justice Rubinstein did not agree with the Chief Justice Barak's decision on the present case. According to him, registration at the registry is not only for statistical purposes; it is *de facto* same-sex marriage recognition. He emphasized the symbolic nature of the decision:

> My opinion is that we are really not dealing in this case with a mere statistical registration […], but with a social public symbol, and that is the true purpose of the petitioners. […] I therefore have doubts as to the distinction between registration and recognition in this context that my colleagues make.[98]

C. Case-study of Massachusetts

In 2003 the Massachusetts Supreme Judicial Court made a decision in *Goodridge v. Department of Public Health* on same-sex marriage, making Massachusetts the first state in the USA to issue marriage licenses to gay couples.

In the previous chapter I have briefly mentioned that one of the main arguments against marriage equality is that this question should be decided in accordance with the popular will. In fact, this argument was of a significant value in the Western countries several decades ago, when support for same-sex relationships was limited. However, an acceptance of gay relationships has been growing rapidly since then. Today even in Austria, which is known for on the lowest support of marriage equality among the European Union's states, the majority of the population sustains same-sex marriage.[99] Massachusetts is a wonderful example of a jurisdiction, where an existence of marriage equality is entirely attributed to the judicial activism. Despite the lack of popular support for same-sex marriage,[100] the Supreme

[97] *Id.* at 307.
[98] *Id.* at 310.
[99] ÖSTERREICH, EIN HAFEN DER EHE (Wiener Zeitung 2014) at http://www.wienerzeitung.at/nachrichten/oesterreich/chronik/632042_Oesterreich-ist-ein-Hafen-der-Ehe.html.
[100] Eva Cerreta, *Tying the Knot: Determining the Legality of Same-Sex Marriage and the Courts' Responsibilities in Defining the Right* 80 (2012), Honors Scholar Theses. At http://digitalcommons.uconn.edu/srhonors_theses/237

Court of Massachusetts hold that under the constitution of the state marriage equality was required.

"In the right time at the right place" – this is definitely about the Massachusetts's case. The litigation initiated by the Gay and Lesbian Advocates and Defenders (GLAD) was aimed to prevent an enactment of the proposition to ban same-sex marriage in the state.[101] The constitutional amendment, proposed in the state, received a name "super-DOMA,"[102] as it banned not only same-sex marriage, but also any benefits for gay couples.[103] In addition, the advocates for marriage equality viewed the Massachusetts courts "as a favorable forum", and eventually it turned to be true.[104]

1. Goodridge v. Department of Public Health

The facts of the case are the following: The plaintiffs, fourteen individuals, who were in long-lasting committed homosexual relationships, brought an action to challenge the authority's denial to issue them marriage licenses.[105] After the failure in the court of the first instance, the plaintiffs appealed to the Supreme Judicial Court. The plaintiffs asked the Court to declare that they have a right to marry under the law. The litigation strategy, elaborated by GLAD lawyers to represent the plaintiffs, was based on cultural value of marriage, rather than on the benefits, derived from marital status.[106]

The issue before the Court was whether under the Massachusetts Constitution the Commonwealth could deny the benefits, protections and obligations granted by marriage to

[101] Yvonne Abraham, *10 Years' Work Led to Historic Win in Court*, BOSTON GLOBE, Nov. 23, 2002, A 1.
[102] DOMA is an abbreviation of Defense of Marriage Act, a US federal law which allows states to deny recognition same-sex marriages recognized under the laws of other states. Until 2013 Section 3 of DOMA had banned gay married couples from being treated as "spouses" for federal laws' purposes, which provided federal marriage benefits. In 2013 Section 3 was ruled unconstitutional in *United States v. Windsor,* a landmark civil rights judgment of the Supreme Court.
[103] PIERCESON, *supra* note 8, at 108–9.
[104] *Id.* at 108.
[105] Goodridge v. Department of Public Health, 440 Mass. 309, 314 (US|Massachusetts Supreme Judicial Court 2003).
[106] PIERCESON, *supra* note 8, at 109.

two persons of the same sex who want to marry. Chief Justice Margaret Marshall, writing for the majority, denied applying the strict scrutiny test to the present issue, stating that the same-sex marriage ban did not meet the rational basis review for either equal protection or due process claims of the plaintiffs. Thus, because the law did not survive the rational basis review, the Court denied considering the arguments of the plaintiff that the issue merited strict scrutiny.[107]

One by one the Court rejected all the arguments of the Department of Public Health against same-sex marriage, namely that the state could legitimately limit marriage to heterosexual couples to preserve, first, "a favorable setting for procreation"; second, to guarantee "the optimal setting for child rearing", which was defined by the department as "a two-parent family with one parent of each sex"; and, finally, to safeguard scarce public and private financial resources.[108] The first, Chief Justice Marshall wrote, incorrectly asserts that the state should privilege "procreative heterosexual intercourse between married people." In fact, "[f]ertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married."[109] The Court stated that the misconception that marriage is for procreation "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."[110]

Considering the second argument of the department, the Court cited the decision in *Troxel v. Granville*, where the definition "an average American family" was reconsidered: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to

[107] *Goodridge v. Department of Public Health*, 440 Mass. at 331.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 333.

household."[111] Thus, an argument that the marriage of a man and a woman is an "optional setting for child rearing" was found by the Court irrelevant. In addition, the parties in the present case agreed that same-sex couples may be "excellent" parents.[112] The GLAD lawyers made a wonderful job in selecting the plaintiffs to bring an action in the present case. In addition to being in lasting relationships, four of seven couples were raising children together. Thus, there was no way for the Department of Public Health to argue that same-sex couples were not capable of child rearing. Moreover, the Court found that denying same-sex couples the opportunity to marry violates the rights of a child:

> Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized."[113]

Chief Justice Marshall dismissed the last argument as an unjustified generalization about the financial independence of gay partners. Likewise married heterosexual couples, gay couples raise children or have other dependents.

The Department of Public Health suggested some additional rationales for baring gay couples from marring. First, it argued that granting the right to marry to homosexual couples can destroy the institution of marriage. The Court replied that

> [r]ecognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.[114]

Marshall then referred to the history of constitutional law in the United States as "the story of the extension of constitutional rights and protections to people once ignored or excluded", citing the landmark case of the US Supreme Court, *United States v. Virginia.*[115]

As for the argument suggested by the state that legalizing of same-sex marriage could create conflict with the regulations of other states, Marshall stated that the presumed reaction

[111] Troxel v. Granville, 530 U.S. 57, 63 (United States|US Supreme Court 2000).
[112] *Goodridge v. Department of Public Health*, 440 Mass. at 334.
[113] Chief Justice Marshall quoted Justice Cordy's dissenting opinion *id.* at 335.
[114] *Id.* at 337.
[115] *Id.* at 339.

of other states to the decision in *Goodridge* should not influence the Court. She emphasized that "each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteen Amendment, each state is free to address difficult issues of individual liberty in the manner its own Constitution demands."[116]

Thus, the Court held that limiting all the benefits of civil marriage only to heterosexual couples violated the principles of individual liberty and equality enshrined in the Massachusetts Constitution, and gave the state legislator180 days to equalize the marriage law.

Goodridge v. Department of Public Health is a prominent example of judicial activism which provides for the same-sex marriage recognition. The reasoning of the majority is based on liberal constitutional arguments. Pierceson emphasizes the role of the court as an innovator: "Marshall clearly placed her court in the tradition of liberal constitutional innovation."[117]

It is interesting to consider the role which the personality of a justice plays in such kind of cases. Chief Justice of the Massachusetts Supreme Judicial Court Margaret Marshall in her youth was a leading civil rights activist, advocating for equality in South Africa, a country of her origins.[118] Marshall has been known as a liberal judge. The liberal wording of the decision in *Goodridge*, written by her, was a surprise to few. In fact, she was appointed to a position of chief justice of the state's highest court in many respects on the basis of civil rights perspective.[119] Similarly, Aharon Barak, a Chief Justice of the Israeli Supreme Court, who wrote for the majority in *Danielowitz* and *Ben-Ari*, is known as a judicial activist. "The constitutional revolution", "judicial legislation", "everything is justiciable" are only a few of

[116] *Id.* at 340–41.
[117] PIERCESON, *supra* note 8, at 110.
[118] Massachusetts Bar Association: SJC Chief Justice Margaret H. Marshall's legacy, http://www.massbar.org/publications/lawyers-journal/2010/november/sjc-chief-justice-margaret-h-marshall%E2%80%99s-legacy.
[119] PIERCESON, *supra* note 8, at 110.

the clichés, associated with his name. It was Barak, who wrote Israeli *Marbury v. Madison*, acknowledging the power of judicial review for the Supreme Court of Israel.[120] His rulings in favor of gay couples were quite predictable, considering his active judicial position while being in office.

Thus, as I have stated in the beginning of this section, the question of a successful same-sex marriage litigation outcome is the question of "the right time and place." The careful and long-lasting development of the litigation strategy usually precedes filing a concrete suit. In the USA, where the issue of legalizing same-sex marriage has divided political elites into two camps, namely Democrats, who generally sustain marriage equality, and Republicans, who would prefer to see bans on gay marriage, it is possible to predict the outcome of the litigation, taking into account political affiliation of judges. However, the division of justices in the present case was quite surprising. The vote creating the majority in 4 to 3 decision was given by Justice Judith Cowin, generally a conservative justice. Other court's conservatives dissented. The dissenting justices argued that as the rational basis review was a deferential test, the solution should have been done by a legislator: "What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts."[121] As Pierceson have mentioned, in *Goodridge* we see "a fight between modern liberals who emphasize autonomy, liberation, and freedom and neoconservatives who value social institutions that impose limits on individuals and structure social intercourse."[122]

[120] Barak once called the decision in *Bank Hamizrahi* "our Marbury v. Madison". See Yoram Rabin, *Marbury v. Madison and Its Impact on Israeli Constitutional Law*, 15 INTERNATIONAL AND COMPARATIVE LAW REVIEW 303, 310 (2007).

[121] *Goodridge v. Department of Public Health*, 440 Mass. at 350.

[122] JASON PIERCESON, COURTS LIBERALISM AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA 148 (Temple University Press 2005).

The political reaction on the ruling in *Goodridge* was predictably antagonistic. The Republican governor of the State Mitt Romney strongly criticized the opinion of the court. He together with other opponents of marriage equality was seeking the ways to circumvent the judgment. Many officials thought that under the mandate, prescribed by the court, the legislature was given Vermont-style discretion[123] in setting the remedies. However, the Supreme Judicial Court of Massachusetts, when was asked if civil unions could be an appropriate remedy, reaffirmed its position that marriage equality was required.[124]

[123] In 1999 the Vermont Supreme Court held that the prohibition on gay marriage denied the rights enshrined in the Common Benefits Clause of the state's constitution. The Court ordered the legislature to provide for equality; however it left the choice of the remedy up to the legislative body. As a result of the ruling, civil unions as a "separate but equal" to marriage institution were introduced. See *Baker v. State of Vermont*, 744 A.2d 864 (US|Vermont Supreme Court 1999).

[124] Raphael Lewis, *SJC affirms gay marriage - The Boston Globe*, http://www.boston.com/news/local/massachusetts/articles/2004/02/05/sjc_affirms_gay_marriage/.

Chapter III. Parenthood for same-sex couples – Austrian, Israeli and Massachusetts Developments

Legal recognition of same-sex relations is closely linked to granting parental rights to homosexual couples. In the European context, one can identify an ingrained temporal sequence between them. First, the legal recognition of same-sex relations occurs. After legal recognition of their relations, same-sex couples are granted parental rights.[125] Traditionally, progress for same-sex relations recognition in the Old Continent has been limited by a disinclination of policy makers to grant parenting rights to same-sex couples.[126] Looking at the examples of European countries, namely at Austria, Germany and Scandinavian states, I think that it will not be an exaggeration to conclude that his sequence is quite stable in Europe.

Unlike the European case, in the United States parenting rights were extended in a number of the states well before legal recognition of same-sex relations.[127] This is a frequent situation in many common law jurisdictions.[128] Notwithstanding the order, in which recognition of same-sex couples and granting them parenting rights take place, they serve significant triggers for each other. Thus, it is important to explore how these two processes reconcile to have a clear picture of the mechanism of same-sex relations recognition.

Another question, which is treated differently in Austria and Israel, on the one hand, and in Massachusetts, on the other, is the best interests of the child principle and its place and role in argumentation of same-sex adoption cases. In Europe the opponents of granting parental rights to homosexual couples generally base their arguments on the "best interest of the child" standard, arguing that a child should be raised in a traditional family, having both a

[125] LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 1, at 92.
[126] PIERCESON, *supra* note 8, at 54.
[127] *Id.*
[128] Nina Dethloff, *Same-Sex Parents in a Comparative Perspective*, 7 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 195 (Springer 2005).

mother and a father. In contrast, in Massachusetts the same principle is used by the courts, however, with a different purpose – to justify adoption by same-sex couples. In the USA sexual orientation of the adopters in general is not taken in account in adoption cases.

In this chapter I will show that denial parenting rights to homosexual couples is detrimental to the child's best interest.

A. Why should courts allow adoptions by same-sex couples?

The main ways for same-sex couples to acquire joint parental rights are adoption and assisted reproduction. Moreover, some jurisdictions provide for the same-sex partner the opportunity to obtain partial joint legal parental status, according to which he is granted certain rights to exercise parental responsibilities towards his spouse's/partner's child.[129]

Adoption provides gay persons and couples with a way to create new or ensure the existed family relationships. There are three categories of adoption that are opened for same-sex couples in different jurisdictions, namely, a stepchild adoption (a second-parent adoption), which allows a partner/spouse of a parent to adopt the parent's child; a joint adoption by same-sex couples, usually opened for spouses; and a single adoption in the case, when same-sex relations are not legally formalized.

Likewise legal recognition of same-sex relations, the possibility to adopt by homosexual couples varies from country to country. Very often legal recognition of same-sex relations triggers gradual acquisition of parental rights. Austrian case is a good example of gradual development from impossibility of adoption to becoming the only country in Europe, which grants homosexual couples full adoption rights, while recognizing only registered partnership.[130]

[129] LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 1, at 101–2.
[130] Constitutional Court Struck Down Joint Adoption Ban | Austria, *supra* note 44.

However, it is not possible to draw a strong sequence between same-sex relations recognition and enhancement of parental rights. One does not necessarily precede another. For example, Israel does not have any specific legislation concerning same-sex relations recognition. Nevertheless, some parental rights are successfully exercised by homosexual couples there.[131] In Israel there is the highest number of children of gay parents per capita in the world. The total number of children, whose parents are gays, range from 6 to 14 millions.[132] In addition, the Knesset makes further attempts to provide same-sex couples with various possibilities in the field of family life; for example, parenthood from surrogacy for same-sex couples.[133]

In Massachusetts same-sex couples were able to adopt even before the decision in *Goodridge* was made. As it was noted in the previous chapter, four out of seven couples, who were applicants in *Goodridge* had children. One of the Justice Marshall's rationales for granting marital status to same-sex couples was that "the task of child rearing for same-sex couples [was] made infinitely harder by their status as outliers to the marriage laws."[134]

Why gay persons in Massachusetts had been eligible to adopt even before marriage equality was established? The answer is very easy: "First and foremost, adoption is about securing the best interests of children and not about the rights of parents. No one has the right to be an adoptive parent."[135] Thus, the adoption proceeding has been always very individualized and included evaluation of a particular person as an adopter from the perspective of the child's best interests.

[131] Sibylle Lustenberger, *Conceiving Judaism: The Challenges of Same-Sex Parenthood*, 28 ISRAEL STUDIES REVIEW 140 (2013); Ruth Zafran, *More than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple-The Israeli View*, CENTER FOR THE STUDY OF LAW AND SOCIETY JURISPRUDENCE AND SOCIAL POLICY PROGRAM (2007); Israel: a Paradise for Gay Families, http://www.circlesurrogacy.com/press?year=2010.

[132] Michal Tamir, *"The Hebrew Language Has Not Created a Title for Me": A Legal and Sociolinguistic Analysis of New-Type Families*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 545, 547 (2009).

[133] Outrage in Jewish Home as "Surrogacy Bill" Passes - Inside Israel - News - Arutz Sheva, http://www.israelnationalnews.com/News/News.aspx/186681#.VOHXli7q-MI.

[134] Goodridge v. Department of Public Health, 440 Mass. 309, 335 (US|Massachusetts Supreme Judicial Court 2003).

[135] Adoption Questions & Answers 2 (LGBT Legal Advocates 2014) at http://www.glad.org/uploads/docs/publications/adoption.pdf.

To sum up, Israel does not have formal marriage equality, but same-sex couples can freely exercise their parental rights, as well as a number of other rights and benefits, derived from the marital status. Since 2010 Austria provides for gay couples the opportunity to enter into registered partnership. However, till 2014 a so-called "separate but equal" marital status was considerably less attractive than the status of Israeli same-sex cohabitants, as it did not provide any opportunity for same-sex partners to adopt jointly. As Pierceson mentions, the situation in Europe "contrasts with the situation in the United States, where parenting rights were extended in many states well before relationship recognition."[136] Thus, the proverb "Do not judge the book by its cover" never better depicts discrepancy between the form of legal recognition of same-sex relations and the scope of basic rights attributed to it.

In many European countries a second-parent adoption was over time, removing the initial exclusion of joint parental rights from registered partnerships.[137] Austrian case is a vivid example of gradual recognition of the all-inclusive parental rights.

Until recently, there was no legal setting for the same-sex couples in Austria. The changes occurred in 2010, when the Registered Partnership Act came into force. At first, a joint adoption by registered partners was expressly ruled out. Considering the importance of parenting rights, I do not agree with those authors, who attributed the 2010 registered

ADDIN ZOTERO_ITEM CSL_CITATION {"citationID":"4G89YVpK","properties":{"formattedCitation":"Adoption Questions & Answers 2 (LGBT Legal Advocates 2014)","plainCitation":"Adoption Questions & Answers 2 (LGBT Legal Advocates 2014)","suppress-trailing-punctuation":true},"citationItems":[{"id":220,"uris":["http://zotero.org/users/local/F2eqoarl/items/HTB422WZ"],"uri":["http://zotero.org/users/local/F2eqoarl/items/HTB422WZ"],"itemData":{"id":220,"type":"article","title":"Adoption Questions & Answers","publisher":"LGBT Legal Advocates","URL":"http://www.glad.org/uploads/docs/publications/adoption.pdf","issued":{"date-parts":[["2014",6]]}},"locator":"2","label":"page"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} Adoption Questions & Answers 2 (LGBT Legal Advocates 2014)[136] PIERCESON, *supra* note 8, at 54.

[137] LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 1, at 102.

partnership regime to "separate but equal" group.[138] The prohibition to adopt was successfully challenged in the ECtHR in 2013 in *X. and Others v. Austria*.[139]

The applicants in *X. and Others v. Austria* involved two gay women who had entered into a registered partnership under Austrian law. The biological mother's partner sought to adopt her partner's son, who was also a party to the present case. The applicants claimed discrimination in comparison to heterosexual couples, because step-child adoption was ruled out to gay couples in Austria. For the applicants, "the wording of Article 182 § 2 of the Civil Code […] could be understood to exclude the adoption of the child of one partner in a same-sex couple by the other partner without the relationship with the biological parent being severed".[140]

The Court found that the applicants were treated differently in comparison to unmarried heterosexual couples, since in the latter case second-parent adoption did not affect the relationship between the parent and the child. Therefore, the difference in treatment was based on the applicants' sexual orientation, and it was not justified by the government. Thus, the Court held that there was a violation of Article 14 and 8, taken in conjunction. Austria readily implemented the judgment, passing on the July 4, 2013 an amendment to the Civil Code, opening step-child adoption for same-sex couples.

In its very recent decision[141] the Austrian Constitutional Court struck down the ban on joint adoption by same-sex couples on the grounds of discrimination and violation of the best interests of the child.

The applicants, a lesbian couple in the stable registered relationship, challenged a ban, prohibiting them to adopt a child jointly. They argued discriminatory treatment, inconsistent with the provisions of Article 8 in conjunction with Article 14 of the ECHR and Paragraph 1

[138] *Id.* at 25.
[139] X. and Others v. Austria, App. No. 19010/07 (European Court of Human Rights, Grand Chamber, Feb. 19, 2013).
[140] *Id.* at para 12.
[141] [2014] Case no G 119–20/2014–12 (Austria|AT Verfassungsgerichtshof, Dec. 11, 2014).

of Article 7 of the Austria's Constitution.[142] The Court found that there was no objective and reasonable justification for the differences in treatment between same-sex partners and married heterosexual persons. In addition, the law in question violated the best interests of the child. According to the Court, each of gay parents can adopt a child individually. However, the law deprives the child the establishment of legal ties to the second parent, which leads to impossibility to receive alimony from the second parent and inherit after him. The Austrian Court here plays a role of a policy-maker, enhancing parenting rights of same-sex couples.

Comparing to the Austrian Court the Israeli Supreme Court tend to focus on narrow, mostly procedural, issues, such as the possibility to register same-sex marriage performed abroad at the official registry in Israel,[143] and avoids rulings on substantial issues like recognition of same-sex marriage. Nevertheless, the Israeli Court plays a significant role in promotion gay rights.

According to the Adoption of Children Law of Israel of 1981, the model of the family, which should secure the best interests of the child, is heterosexual.[144] Adoptions are granted through the court orders. In Israeli family law adoption is subject to both religious law and religious courts' adjudication and civil law and civil procedure.[145]

Acquiring parental rights through adoption mechanism for same-sex couples would have deemed impossible unless the activity of the Israeli Supreme Court. The role of the Israeli Court in the enhancing gay rights is so significant that one could decide that the policy of same-sex relations recognition became strongly judicialized. However, it is only partly

[142] *Id.* at para 35, 38.
[143] Funk-Schlesinger v. Minister of Interior [1963] Case no HCJ 143/62 (Israel|IL Supreme Court, 1963).
[144] Ruth Zafran, *More than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple-The Israeli View*, CENTER FOR THE STUDY OF LAW AND SOCIETY JURISPRUDENCE AND SOCIAL POLICY PROGRAM 29 (2007).
[145] Mark Goldfeder, *THE ADOPTION OF CHILDREN IN JUDAISM AND IN ISRAEL; A CONCEPTUAL AND PRACTICAL REVIEW*, 22 CARDOZO JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, 346 (2014).

true. From the one hand, the Court makes landmark decisions on recognition of certain family rights of homosexual persons;[146] on the other hand, it consistently emphasizes that

> Creating a new personal status constitutes a primary arrangement that lies within the jurisdiction of the legislature. The proper place for determining the question of recognizing a new personal status of marriage between members of the same sex is the Knesset.[147]

In *Brenner-Kaddish v. Minister of Interior*,[148] the Court considered the possibility of registration of an adoption performed by a lesbian couple abroad. The foreign decree declared that the applicant was the mother of the child born to her same-sex partner through fertilization. The Israeli authorities denied the request of the two women to be officially registered as mothers, arguing that the registration would be "erroneous on its face". However, the Court granted the petition. It based its decision on a rule that valid foreign decrees should registered without consideration of their lawfulness or meaning under Israeli law; on the private international law rules; and on the requirement to ensure consistency of status. Although the Court unambiguously denied an evaluation of substantive grounds of same-sex parenthood, it eventually recognized the same-sex adoption for registration purposes, ordering to register the two women as joint mothers in the Israeli official registry.

Mostly reluctant to exploring the substance, in 2005 the Israeli Court deviated from its usual practice. In the *Yaros-Hakak* case the Court deals with a very specific individual situation. However, this case is definitely of a great significance.

The facts of *Yaros-Hakak*[149] can be summarized as the following. Two women in a stable long-standing same-sex relationship mutually agreed that each of them would deliver a child with the help of anonymous sperm donation. They were going to raise children together, taking upon themselves full parental responsibilities. To ensure the best interests of their

[146] See Ben-Ari and Others v. Director of Population Administration, Ministry of Interior [2006] Case no HCJ 3045/05 (Israel|IL Supreme Court, Nov. 21, 2006); Brenner-Kaddish v. Minister of Interior [2000] Case no HCJ 1779/99 (Israel|IL Supreme Court, 2000) etc.
[147] *Ben-Ari and Others v. Director of Population Administration, Ministry of Interior* [2006] Case no HCJ 3045/05 (Israel|IL Supreme Court, Nov. 21, 2006) at [4].
[148] *Brenner-Kaddish v. Minister of Interior* [2000] Case no HCJ 1779/99 (Israel|IL Supreme Court, 2000).
[149] Yaros-Hakak v. Attorney General [2005] Case no CA-10280/01 (Israel|IL Supreme Court, 2005).

children, the women in due course sought, by means of adoption, to legalize each one's relationship towards the second partner's biological child. The petition was first denied in the court of the first instance; later, the District Court denied the appeal. Eventually, the Supreme Court found out that there was no reason for denying applicants' petition. It remanded the case to the first instance court. According to the Court, the state's refusal to recognize the possibility of a woman to adopt her female partner's child was not justified. The Family Court of the first instance granted petition.

Although the second-parent adoption was approved by the Israeli Supreme Court, it was done cautiously, on very narrow grounds. Thus, the Court diverged from enhancing second-parent adoption to any lesbian couple. Such cases remain to be the cases of individual concern. The Israeli statute limits adoption to married heterosexual couples.[150] So in the present case the Supreme Court relied on a provision, enabling adoption by a single person.[151] Adoption by the single parent is conditional in Israel; the child's parents must be deceased, and he must be adopted only by his unmarried relative. These conditions were not met in the present case. The Court applied a provision making possible departure from these conditions in special circumstances for the welfare of the child.[152]

Thus, the Supreme Court established the precedent, according to which adoption could be permitted in the case of existence de facto parental relationship, aiming that adoption is in the best interests of the child. For one, who may wish to refer to *Yaros-Hakak*, seeking for the petition to adopt, it is necessary to take into consideration that the necessary condition is a stable and long-lasting relation with the child.

Today in Massachusetts both a second-parent adoption and a joint adoption are available for same-sex couples. Yet, in the past Massachusetts laws forbade gay persons from being adopters, but after successful litigation in *Babets v.Governor of Massachusetts,* the state

[150] The Adoption of Children Law, ¶ 3 (1981).
[151] *Id.* ¶ 2(3).
[152] *Id.* ¶ 25(2).

changed its policies in 1991.[153] In 1993 the court in the *Adoption of Tammy* case held that it did not find anything in the provisions of the adoption laws, precluding the joint adoption of a child by two unmarried lesbian women.[154]

In *Adoption of Tammy* two unmarried lesbian women, Susan and Helen petitioned to adopt a minor, Susan's biological daughter. The Massachusetts Supreme Judicial Court held in favor of the petitioners, stating that it was in the best interests of the child:

> [A]doption will enable Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate, or Susan predeceases Helen. […] [W]hen the functional parents of children born in circumstances similar to Tammy separate or one dies, the children often remain in legal limbo for years while their future is disputed in the courts. […] Adoption serves to establish legal rights and responsibilities so that, in the event that problems arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child within the recognized framework of the law.[155]

The present judgment is also reflected in the statutory law in Massachusetts, which permits adoption by two unmarried cohabitating partners, regardless of their sexual orientation (M.G.L. c. 210).

To conclude, same-sex marriage recognition as well as guaranteeing for same-sex couples the opportunity to adopt is in the best interests of a child. As Justice Marshall emphasized, "people in same-sex couples may be "excellent" parents."[156] Sexual orientation should not be a defining factor in deciding, if a person is eligible to adopt. Moreover, marital status of the parents provides some additional guarantees for their children. If parents of a child are not married, he does not receive the same scope of rights (property rights, alimony, inheritance), comparing to children, who have two married parents.

B. The realities of assisted reproduction

[153] Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children:The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILDREN'S LEGAL RIGHTS JOURNAL 1, 1–4 (2007).
[154] Adoption of Tammy, 416 Mass. 205 (US|Massachusetts 1993).
[155] *Id.* at 214–15.
[156] Goodridge v. Department of Public Health, 440 Mass. 309, 334 (US|Massachusetts Supreme Judicial Court 2003).

Assisted reproduction is another option that can help same-sex couples to become parents. In this case gender is a defining factor of applying one or another method of assisted reproduction. For lesbian couples it is assisted fertilization services (artificial insemination with donated sperm or in vitro fertilization with a donated egg); for male gay partners – surrogacy. However, the last option in many countries, which have recognized same-sex relations, is unavailable.[157]

Until recently the ban on assisted medical procreation for lesbian couples existed in Austria. In 2013 the Austrian Constitutional Court overruled the Austria's ban on donor insemination for lesbian couples as it violated human rights.[158] The Court found no justification for the ban. The traditional family is not undermined or threatened by realizing a lesbian couple´s desire to have a child.

The facts of the case can be summarized quickly. The applicants, an Austrian citizen and a German citizen entered into a life partnership in Germany in 2008. Then they moved to Austria. The applicants mutually agreed to deliver a child with the help of assisted fertilization. However, together with the introduction of registered partnership in Austria in 2010 the ban on assisted procreation for lesbian couples was introduced.

Applicants referred to the District Court to register one of the partners' consent to the insemination. Under Austrian law it was one of the preconditions for medically assisted fertilization. The application was rejected both in the first and appellate instances. The appellate court found no violation of freedom of movement within the European Union (the applicants claimed it because there was no such ban in Germany).

The Supreme Court disagreed. It referred twice to the Constitutional Court to declare the ban unconstitutional. Eventually, another lesbian couple directly addressed the Constitutional Court with the same aim (G 44/2011).

[157] LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 1, at 115.
[158] [2013] Case no G 16/2013–16, G 44/2013–14 (Austria|AT VERFASSUNGSGERICHTSHOF, Dec. 10, 2013).

In its judgment the Constitutional Court underlined that same-sex couples are families.[159] The ban on medically assisted procreation for lesbian couples cannot be justified by the aim to protect traditional family, as same-sex partnerships do not substitute marriage, but instead complement them[160]. Also, by virtue of Article 8 of the ECHR same-sex couples enjoy right to medically assisted procreation.[161]

The option for two gay men to acquire parental rights jointly as a couple is limited to adoption in Austria. Surrogacy, as an alternative, is totally banned.[162] Under the Austrian Civil Code "the mother of a child is always the woman who gave birth to the child" (paragraph 137b). Thereby, the surrogate mother is considered to be a mother of the child, and not the contracting party of the surrogacy agreement. The child delivered by a foreign surrogate mother does not acquire Austrian citizenship from the Austrian national, contractor of the surrogacy.[163] Considering that the provision, banning surrogacy in Austria, expressed in a neutral non-discriminative manner, it seems not possible to challenge its constitutionality or legality. Thus, surrogacy for gay couples is seen in the long run.

Today in Israel assisted fertilization has become a procedure often used by lesbian women, who want to become parents alone or together with their same-sex partners. In addition, there was a case of joint motherhood reported in the Israeli media. A woman was impregnated with an ovum donated by her same-sex partner. The lesbian couple wanted to share the process of delivering the child.[164] As yet, no act of the Knesset governs the use of artificial insemination and sperm donation. However, as yet, there is no law of the Knesset, regulating the use of assisted fertilization services.[165] Apparently, there is no ban exist, which would be directed to restrict lesbians from artificial insemination procedures. Thus, assisted

[159] *Id.* at [36].
[160] *Id.* at [54].
[161] *Id.* at [50].
[162] Reproductive Medicine Act, 275 ¶¶ 2, 3 (Federal Law Gazette 1992).
[163] The Nationality Act, 311 ¶ 7 (Federal Law Gazette 1985).
[164] Zafran, *supra* note 131, at 1–2.
[165] *Id.* at 9.

reproductive technologies are widely used by same-sex couples. The legal recognition of parenthood in these cases is attributed to the family courts.[166]

In Austria and Israel there is no automatically applicable presumption of parenthood of a partner who expressed her consent on fertilization, while in Massachusetts the existence of such presumption was acknowledged by the court.

In *Della Corte v. Ramirez* the court held that children born of same-sex marriage are legitimate children of both spouses (partners).[167] The appellant in the present case, Della Corte, claimed that her former same-sex spouse Ramirez was not a legal parent of Della Corte's daughter born as a result of artificial insemination. Her main arguments were that, first, she and Ramirez were not married when conception occurred; second, that in order to be considered a legal parent of the girl, Ramirez should have adopted her; and, finally, that joint adoption was not in the best interests of the child.

The court one by one rejected all the arguments of the appellant. Regarding the first, it stated that "[t]here was no requirement that the parties be married at the time of the conception, as the statute plainly states "[a]ny child born", not "any child conceived."[168] Moreover, the court found that Ramirez "was an integral part of the couple's decision to conceive."[169]Further, the court recognized that same-sex couples are similarly situated to heterosexual couples. Thus, it read the statutory provision, establishing the presumption of parenthood of a consenting husband in the way that it includes same-sex couples. Considering the appellant's claim that Ramirez had to adopt the child, the court stated that "the need for […] second-parent adoption to […] confer legal parentage on the nonbiological parent is eliminated when the child is born of the [same-sex] marriage."[170] Finally, the court refused to conduct the best interest of the child analysis, as it was unnecessary in the present case, where

[166] *Id.* at 65–70.
[167] Della Corte v. Ramirez, 81 Mass. App. Ct. 906 (US|Massachusetts 2012).
[168] *Id.* at 907.
[169] *Id.*
[170] *Id.*

the court had to decide whether Ramirez was a legal parent. This fact, according to the court, was established by *prima facie* evidence, namely by the information in the birth certificate of the child.[171]

It is interesting to compare how different courts interpret their own finding that same-sex couples are similarly situated to heterosexual couples. In the present case it allowed the court to extend the meaning of "husband" to include same-sex partners, both male and female, while in *Schalk and Kopf* the ECtHR refused to interpret the Conventional provisions to imply the right of same-sex couples to marry.

To sum up, legal recognition of same-sex relations and granting parenting rights to same-sex couples are two processes which trigger one another. There is no rule which process should precede or prevail in order to achieve full equality for gay people. As David D. Meyer points out, "experimenting with intermediate forms of state recognition helps to shift public opinion and open pathways to further integration of same-sex families into traditional family institutions".[172]

The overview above shows that second-parent adoption is the prevalent way for same-sex couples to acquire parental rights. Assisted reproduction technologies, including surrogacy, have a future potential. Today difficult ethical issues preclude many countries of legal recognition of surrogacy as an option for male same-sex couples to have children.

[171] *Id.* at 908.
[172] David Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relations*, 58 THE AMERICAN JOURNAL OF COMPARATIVE LAW, 128 (2010).

Conclusion

Today significant success in gay rights enhancement has been reached in a number of countries worldwide. The fight for gay rights has moved to a new level. Gay persons are no longer asking only for legal recognition of their relationships. They want to obtain social recognition and support of their relationships and families. In fact, the western societies demonstrate the highest support and acceptance gay relationships ever. The judges, as members of these societies, do not stand apart of the process of gay rights enhancement.

Litigation has always been the foremost favorable strategy for marriage equality introduction. The proponents of marriage through years of practice have elaborated a great number of arguments in favor of marriage equality as well as answers on marriage antagonists' claims. As the research has shown, the most effective elements of constitutional jurisprudence in the discussed field became equal protection and individual rights jurisprudence. Among these two, protection jurisprudence has proven to be more productive. It was applied in the Israeli Supreme Court's case of *Danielowitz*, which became one of the first essential successes in marriage equality recognition in Israel. It substantively triggered gay rights protection in Israel, making it one of the most gay-friendly countries in the world. In Massachusetts equal protection arguments opened a door to same-sex marriage. Thus, Massachusetts became the first state in the USA to introduce marriage equality. The case which originated in Austria and then made it road to the ECtHR, *Karner v. Austria*, have opened a new era of gay rights protection litigation in Europe.

As I have shown in my thesis, these three jurisdictions have influenced the development of marriage equality not only locally, but also outside their boundaries.

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