



THE ISRAELI LAW PROFESSORS' FORUM FOR DEMOCRACY

Position Paper No. 37: Infringement on LGBTQ Rights as a Result of the Judicial Changes

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Summary

The Israeli Law Professors' Forum for Democracy, an ad hoc and voluntary group of experts on Israeli law and specifically Israeli public law, expresses its grave concern over the apparent intention to abolish the independence of the judiciary, to subordinate it to the government and to the partisan political considerations of the executive branch, to undermine the independent status of the attorney general and civil service legal counsels, and to violate human rights. **In this paper we address the expected harm to the rights of LGBTQ persons**, resulting from the composition of the government and the appointments it has made, from the coalition agreements, from bills proposed by members of the coalition, and from the actions and statements made by the Government and its members. We conclude that the combined actions, obligations and legislative changes, undertaken by the government and the coalition is likely to cause grave harm to the rights of all LGBTQ persons in Israel and their families. In addition they carry real potential to harm the rights of heterosexual persons in Israel, and to cause an extremely severe regression in the rights of the LGBTQ community in Israel.

Key Points:

- The combined actions, obligations and legislative changes undertaken by the government and coalition may cause a fatal damage to the rights of all LGBTQ persons in Israel and their families. In addition they carry real potential to harm the rights of heterosexual persons in Israel, and to cause an extremely severe regression in the rights of the LGBTQ community in Israel.
- The legislative changes contemplated by the coalition, to allow discrimination on religious grounds of LGBTQ persons, may, if adopted, eliminate the legal protections for the rights of LGBTQ persons to equality and liberty in the public sphere; impair their autonomy; and impair their freedom from discrimination and from violation of human dignity in all areas of life: at home, in the public sphere, in commerce and consumerism, in leisure activities and more.
- The legislative change that would permit discrimination on grounds of religion may allow any business owner to refuse LGBTQ persons access to the business, either as clients or as employees, for example in order to attract homophobic clientele.
- The weakening of the Supreme Court through politicization of the appointment of judges and through annulment of effective judicial review may harm LGBTQ. Families, parental autonomy, the right to parenthood of LGBTQ persons and the rights of their children may be adversely affected, since the legal recognition of LGBTQ families in Israel is grounded almost entirely in judicial decisions.
- The weakening of judicial independence may cause grave harm especially to the rights of persons on the transgender spectrum, since the rights of these persons in core issues such as autonomy, legal recognition, parenthood, employment, health, discrimination in services and products and access to public spaces have been recognized and protected almost entirely by judicial decision.
- Expansion of the rabbinical courts' jurisdiction is likely to cause harm to parents going through divorce following their coming out. It will also harm their children, since it will expand the reach of the law applied in rabbinical courts to additional families.
- The weakening of the Supreme Court's authority to block discriminatory legislation and offer remedy to minority groups will cause particular harm to the rights of LGBTQ persons. In addition, the government's intention to limit the activities of human rights organizations will harm the activity of civil society, which has always been an indispensable component in the campaign for equal rights for LGBTQ persons.
- The Prime Minister's claim in his speech of 23 March 2023 that LGBTQ persons' rights will not be harmed is a lie. The government's plans, and first amongst them the

political takeover of the procedures for the selection of judges, will harm the rights of LGBTQ persons.

The full position paper:

1. Introduction

Israel boasts it provides near to absolute equality for LGBTQ (Lesbians, Gays, Transgenders and Bisexuals). The Foreign Affairs Ministry website even specifically states the rights that are yet to be recognised, such as full adoption rights¹. Although the LGBTQ community in Israel may be relatively well-off compared to members of the community in various other countries in the world, the status of LGBTQ people in Israel has much to be desired, in contradiction with the way the situation is depicted by the state.

LGBTQ rights have, for the most part, not been enshrined in legislation. The two main provisions anchoring LGBTQ rights in legislation involve the prohibition of discrimination based on sexual orientation in hiring,² employment and termination of employment, and the prohibition of discrimination in services³. The Pupils' Rights Law prohibits discrimination based on sexual orientation or gender identity⁴. The Prevention of Sexual Harassment Law defines "A debasing or humiliating attitude toward a person regarding his/her gender or sexuality, including his/her sexual preferences" as sexual harassment and provides civil and criminal protections against it⁵.

Most of the protections for LGBTQ rights in Israel originated in court rulings. The state either objected to providing these rights, or was unable to bring forward legislation that would do so. Thus, for example, the state objected to rights to forming and maintaining a family (including marriage registration, recognition of same sex civil unions, parental rights of non-biological parents, and more). In two famous cases concerning discrimination in adoption and in surrogacy, the state indeed initially objected to ending the discrimination, but subsequently changed its position (based on updated professional opinions by the administrative) and declared before the supreme court its support for amending the legislation. That said, the attempt to amend the discriminatory legislation failed, due to the

¹ Israel Ministry of Foreign Affairs Gay Israel (19.7.2018)
<https://embassies.gov.il/MFA/IsraelExperience/Pages/Gay-Israel.aspx>

² Section 2 of the Employment (Equal Opportunities) Law, 1988

³ Section 3(a) of the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000

⁴Section 5(4) of the Pupils' Rights Law, 2000

⁵ Section 3(a)(5) of the Prevention of Sexual Harassment Law, 1998

objections of coalition parties' members of the Knesset (the Israeli parliament). As to surrogacy, the supreme court eventually ordered the discrimination to be corrected⁶.

As regards the transgender community in Israel, the situation is more problematic because none of the essential arrangements regarding transgender people has been set by primary or secondary legislation, nor by other forms of regulations. Legal protection of transgender and gender diverse peoples' rights were established almost exclusively on the basis of petitions to the courts. Almost all internal protocols, regulations and procedures existing today to recognise LGBTQ rights in Israel are a result of judicial decisions, formulated by the courts after initial opposition by the state. Among these are: the protocol for changing the sex clause in identification cards and other official documents, the procedure for registering transgender parenthood, the protocols for the national committee for gender reassignment appointed by national subsidized health services, relevant regulations and protocols for the national social welfare services, social workers' protocol, Ministry of Education's guidelines, Israeli Prison Services policies on holding transgender inmates - and more. Almost all of these were a result of judicial rulings.

The proposed judicial overhaul entails an extreme likelihood of real danger to all LGBTQ rights in Israel: from the few legislated ones, which may be repealed and canceled pursuant to the coalition agreements, to the rights anchored in courts' rulings, which would be endangered if the judicial appointment process were to be changed and become politicized (in order to appoint conservative judges), and if the supreme courts' authority for judicial review were to be restricted.

Moreover, similar to the proposed legislation of the judicial overhaul itself, inspired by Republican constitutional discourse in the US, once the revolutionary legislation passes, Israel may experience a process of anti-LGBTQ legislation, as promised in the coalition agreements⁷. The expected anti-LGBTQ legislation, followed by the politicization of the judicial appointments and annulment of judicial review, is inspired directly by the anti-LGBTQ legislation being passed these days in some of the states in the USA⁸.

⁶ Israeli Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law - 1996

⁷ Article 91 of the coalition agreement between the Likud party and the Shas party (representing the Sephardic Religious Orthodox sector) (28.12.22); Article 97 of the coalition agreement between the Likud party and the Religious Zionist party (28.12.22); Article 108 of the coalition agreement between the Likud party and the Yahadut HaTora party ("Torah Judaism" - representing the Ashkenazi Religious Orthodox & Ultra-Orthodox sector) (28.12.22).

⁸ See, for example, Florida: Gary Fineout, Florida GOP's 'because we can' legislative session, Politico, March 6, 2023 <https://www.politico.com/newsletters/florida-playbook/2023/03/06/florida-gops-because-we-can-legislative-session-00085588>

2. Danger of harm to the LGBT family

The LGBT family has gained a certain and relatively extensive legal recognition, even if only in part, solely on the basis of court rulings. Some of these rights and protections for the LGTB family are not established in rulings of the Supreme Court, which is the only court whose precedents are then binding on all other courts. Here is an overview of the recognized rights, at the time of writing this position paper, their legal origin and the dangers they face if the legal “reform” is passed:

2.1 Dangers to the LGBT marital status

2.1.1 Danger to the recognition of LGBT couples under the Family Court's jurisdiction and the annulment of the recognition of same sex publicly known couples (“civil unions”)

The Family Court Law defines a family member, among other things, as “his spouse, including the one known to the public as his wife...”.⁹ The applicability of the Family Court Law to LGBT couples is a question that has never been directly decided upon by a ruling of the Supreme Court.

Since the law came into effect in 1995 until the end of the previous decade, conflicting judgments were given in the family courts regarding the applicability of the law, in several cases of lawsuits for protection orders filed by spouses who suffered violence from their spouses. In several cases, the defendants requested claim abatement (the deletion of the claim) filed against them outright due to the lack of jurisdiction of the family court to hear the claim. The reasoning was that they and their spouses who sued them are not family members as defined in the Family Court Law, due to the gendered definition of a spouse.

Although there have been some judges who have believed that the Family Court Law also applies to same-sex spouses, despite the defined genders in wording (“including the one known to the public as his wife”), and rejected requests to delete the claim. On the other hand, there have been judges who believed that spouses of the same sex are not family members as defined by the law, and therefore the spouse who suffers from harassment must turn to the General Civil Court, and litigate as if they were two strangers. These cases left the spouses who requested the orders to their fate, because the procedure for issuing a protection order against a spouse is quick and comprehensive, done unilaterally and based on the understanding that domestic violence requires quick and immediate treatment.

⁹ Section 1(2)(a) of the Family Court Law, 1995.

The same goes for financial claims between spouses of the same sex. Judges who believed that the law does not apply to LGBT couples because they are not family members, denied the financially disadvantaged spouses the protection that the law grants people in their position through the presumption of community property that applies to those who are known to the public as spouses, and focuses on the joint effort of the couple, not on the calculation of the financial contribution to the accumulation of the joint property, or in the property ownership registry.

In several cases, a spouse who claimed equitable division of property in the family court was referred to the appropriate civil court according to the amount of the claim, to file a financial claim, as if it were a business dispute between strangers.

As mentioned, the question of the applicability of the Family Court Law has never reached a direct decision in the Supreme Court, however, about a decade ago, the Supreme Court began hearing requests for leave to appeal, in separation disputes between LGBTQ spouses, under the assumption that they are families, without addressing at all the question of the Family Court's jurisdiction.

In conclusion, the recognition that same-sex spouses are family members for the purposes of the Family Court's jurisdiction is fragile, as it relies on an interpretation given by family courts (which are courts at the level of a magistrate's court), as well as on the Supreme Court's indirect recognition that they are family members. The literal wording in the definition section of the Family Court Law could be interpreted strictly as applicable only to heterosexual couples, thus non-recognition of its jurisdiction could be relatively easy, if the "reform" passes.

Beyond the symbolic damage of canceling the recognition of LGBT spouses as families, there is a practical and material significance and a potential for significant harm to the disadvantaged spouses.

The Family Court is a specialized court, which has many methods of settling separation and divorce disputes in diverse ways that are not available to non-family litigants in the general civil courts. They work alongside aid units, with social workers trained to treat families in crisis; The Dispute Resolution Law includes a mechanism for mediation procedures that has been operating relatively successfully since 2017 and has helped many families avoid harmful and expensive litigation; and as mentioned, there are legal doctrines that apply to family members, such as the presumption of community property, which were designed to protect the weaker spouses in a relationship. The denial of recognition of LGBT couples as families means viewing separation disputes between spouses of the same sex as contractual disputes between strangers, with all that implies.

2.1.2 Registration of civil marriages held abroad

Israel has no civil marriage. The law applicable to marriage is the personal law, that is, the religious law, and none of the religions designated by the Israeli legislator¹⁰ recognize same-sex marriage. As a result, the lack of same-sex marriage in Israel is collateral damage to the absence of civil marriage in Israel in general, which is the main purpose of the religious monopoly over marriage and divorce,¹¹ and it is not the product of intentional discrimination against LGBT people.

Registration of civil marriages in Israel became possible following the Supreme Court ruling, as High Court of Justice, in the Funk-Schlesinger case from 1963.¹² The High Court of Justice ruled that the registrar at the Ministry of Interior is not allowed to refuse to register a civil marriage conducted in Cyprus, as long as the foreign marriage certificate is authentic and there is no reason to suspect that it is fake. The High Court of Justice also ruled that the registration of the marriage is carried out for the purpose of gathering information only, and does not recognize the validity of the marriage. Since then, civil marriages of heterosexual couples held abroad are registered in the population registry, and the distinction between registration and valid recognition has narrowed over the years. Today this distinction has no practical implications, and all the rights granted on the basis of marriage are granted to all couples registered as married in the population registry, regardless of the form of their marriage.

In 2006, the High Court of Justice expanded the Funk-Schlesinger precedent, as part of the Ben Ari ruling, also to include same-sex couples who married abroad in a civil marriage, and ruled that the refusal of the registration official in the population registry to register the foreign marriage certificates of same-sex couples who married abroad constitutes acting beyond the powers of the authority (“ultra vires”) and is prohibited discrimination on the basis of sexual orientation.¹³

The registration of civil marriages in general and civil marriages of same-sex couples in particular is carried out in Israel thanks to the ruling of the High Court of Justice, which sits in special session of The Supreme Court. The legal recognition of such marriages, despite

¹⁰ The original list of recognized religious denominations appears in the second appendix to the King's Speech in Council on the Land of Israel, 1922 to 1947. Over the years, the Knesset added additional denominations to this list. Anyone whose religion is different, even if he belongs to a significant religion (such as Buddhism or Hinduism) and even if he is a religious person, is considered irreligious according to Israeli law.

¹¹ For a historical analysis of the prevention of civil marriage in Israel see: Zvi Trigger, There is a country for love: marriage and divorce between Jews in the State of Israel, in: **sentences about love**, 173, 207-204 (Arana Ben-Naftali and Hana Naveh editors, 2005).

¹² Supreme Court case 143/62 **Funk Schlesinger v. Minister of the Interior**, Fed 17 225 (1963).

¹³ Supreme Court case 3045/05 **Ben Ari N. Director of the Population Administration at the Ministry of the Interior**, Fed SA(3) 537 (2006).

the registration validity clause created by the High Court of Justice for the first time in the Funk-Schlesinger case and subsequently adopted in the Ben Ari case, is in practice full legal recognition, and is in real danger if the legal reform passes. In the absence of primary legislation guaranteeing the right to marriage in general and civil marriage in particular, the rulings of the High Court of Justice regarding civil marriage (both of heterosexuals and of LGBTQ people) may be eliminated when the judges are replaced by conservative judges, and given that the government has a religious and LGBTQ-phobic agenda, this is a scenario that may come true. The implications of abolishing the Fun- Schlesinger and Ben Ari precedents would be the fusion two government purposes: strengthening the fundamentalist-Jewish element in the close relationship between religion and the state (of which the proposed expansion of the jurisdiction of the rabbinical courts is a part) and the regression in LGBTQ rights, including the rights to start a family and to family life.

2.2 Recognition of LGBTQ parenting

The proposed legal “reform” endangers the recognition of LGBTQ parenting. This parenting was (partially) recognized following years of legal battles, despite the state's opposition, in the rulings of the family courts (which are of the level of a magistrate's court), and finally received partial recognition in the rulings of the Supreme Court as Court of Appeals. Some aspects of the right to parenthood for LGBTQ people, such as adoption and surrogacy, were recognized by the High Court of Justice.¹⁴

The proposed politicization for the appointment of judges, the de facto abolition of judicial review, and the weakening of the judiciary, all combined, seriously endangers the existing legal recognition of LGBTQ parenthood, however partial it may be. This danger is especially palpable in light of the stated LGBTQ-phobic agenda of coalition members, and in particular the ultra-orthodox parties and The Religious Zionism party, and its various factions, which have declared war against recognition of families that do not conform to the traditional family model,

An expression of these proposed changes can be found in section 25 of the coalition agreement between the Likud party and the Noam faction (of the Religious Zionism party) and section 95 of the coalition agreement between the Likud party and the Religious Zionism party, according to which in official forms parentage will be registered under the heading Father and Mother (and not under the heading Parent 1 and Parent 2 which allows recognition of the LGBTQ family).

¹⁴ For a complete and detailed review of the legal recognition of LGBTQ parenting, see: Zvi Trigger, Parenting at double risk: threats from outside and at home to LGBTQ parenting, **Legal acts** 47-13 (2023).

2.2.1 Parenting of female couples

The legal source for parentage by two mothers is not the same for both mothers: the birth mother is the child's mother by virtue of birth. The mother who did not give birth (which could be the genetic mother, if the fetus was created from her egg, and could be a non-genetic mother), is recognized by virtue of a judicial parentage order, an institution recognized by the Family Court, with the consent of the Attorney General, only in 2015.¹⁵ This recognition also has reservations, as the Attorney General opposes issuing a judicial parentage order when one of the mothers is not an Israeli citizen.

There is no entrenchment of the legal parentage of the non-birth mother in legislation. The politicization of judges' appointments, as proposed in the "reform", along with the declared LGBTQ-phobic policies of the government and the current coalition, put the legal recognition of the parentage of the non-birth mother in tangible danger.

2.2.2 Parenting of male couples

1. **Surrogacy abroad**: The genetic father is recognized as the legal father of the child by virtue of his natural parentage, after performing a tissue examination.¹⁶ This is automatic legal paternity by virtue of procreation. The non-genetic father requires a judicial parentage order so that his legal parentage would be recognized and registered. A judicial parentage order has been issued for male couples since 2014. Similar to the fragile recognition of non-genetic mothers' parentage, described above, this institution also relies entirely on judicial rulings alone, and is therefore in real danger of being revoked, if the judges are replaced by political appointments that align with the coalition's LGBTQ-phobic positions.

2. **Surrogacy in Israel**: The Israeli Embryo Carrying Agreement Law has not been amended to allow surrogacy for male couples, and it still defines the couple of intended parents as a man and a woman who are spouses. Following the announcement by the previous Minister of Health, Nitzan Horowitz, that there is no political feasibility of amending the law, and following the High Court's ruling that the wording is discriminatory and that the Knesset must act to amend the definition of the intended parents, the Ministry of Health ordered the equal application of the law, that is, the opening of the institution of surrogacy in Israel also to intended parents who are a male couple.¹⁷

¹⁵ The Ministry of Justice, the Attorney General, is not opposed to the issuance of a judicial parentage order in order to recognize the spouse of a biological mother as an additional mother (spokesman's announcement 2/8/2015). From 2005 to 2015, recognition of the legal parentage of the non-birth mother was done in an adoption procedure by virtue of AA 10280/01 **So-and-so v. Attorney General**, Fed Nat(5) 64 (2005).

¹⁶ Appeal 1118/14 **so-and-so Ministry of Welfare and Social Services**, Paragraph 7 of Judge Handel's judgment (Nevo 1.4.2015).

¹⁷In the High Court 781/15 **Arad-Pinaks v. The Committee for Approval of Embryo Carrying Agreements according to the Embryo Carrying Agreements Law** (Nevo 11.7.2021). In early July 2022, it was announced that the first surrogacy process had begun after the Ministry of Health's announcement. Adir

Although the High Court ruled that the arrangement that excluded same-sex couples (and single men) is invalid and discriminatory, in the absence of a legislative provision for surrogacy by male couples in Israel, the implementation of this ruling depends on the support of the Health Minister. Given the anti-LGBTQ agenda of the current government and its proclaimed antagonism towards judicial review and the Supreme Court, it can easily ignore the ruling, leaving gay couples and single men without access to surrogacy in Israel. Also, this is an example of promoting equality through judicial review of legislation, which the Knesset could, according to the “reform”, override with a majority of 61 MKs (there are 120 MKs in total). Thus, the coalition could bring about the annulment of the verdict and the return of discrimination in this area.

2.2.3 Parenting of trans people

Registration of transgender parents in a way that respects their gender identity is anchored in the High Court ruling, but the legal battles on this issue have not yet been fully determined. This achievement, however partial, may be in jeopardy if the reform passes.

2.2.4 Parenting of a person who was married to a partner of the opposite sex and came out

In divorce disputes between spouses who married according to the Jewish faith, with one of the spouses coming out of the closet, often the claim of the lack of parental capacity or impaired parental capacity is raised against the parent who came out, as a justification for denying custody of the shared children or limiting it (for example, a prohibition preventing the children from meeting the new partner of the parent who came out). Such claims are sometimes heard in the rabbinical court.¹⁸

Child custody is a civil and not a religious issue. All religious tribunals that have jurisdiction over child custody disputes must apply the law of the country rather than the relevant religious law. Therefore, when the rabbinical court rules according to discriminatory Torah law instead of according to Israeli law, the party whose discriminated against has the right to petition the High Court (by virtue of Section 15(d)(4) of the Basic Law: Judiciary), with a request to invalidate the ruling of the rabbinical court due to excess of authority (“ultra vires”).¹⁹ Indeed, in several cases the High Court of Justice has overruled a discriminatory

Yanko, “The first surrogacy procedure for a male couple in Israel has begun: ‘the waiting list is long’” **Ynet** (3.7.2022).

¹⁸ In the High Court 293/00 **J. Doe v. The Great Rabbinical Court in Jerusalem**, ruling 55(3) 318 was invalidated due to exceeding the authority (“ultra vires”) of an order issued by the Rabbinical Court at the request of a man, who forbade his ex-wife from bringing their children together with her new partner. The Rabbinical Court issued the order “on the grounds that the relationship is immoral and harms their souls and the girls’ education.”

¹⁹ See position paper No. 29 of the Forum, on rabbinical courts and judicial review.

ruling by the Rabbinical Court against LGBTQ parents in the context of the question of parental responsibility, solely because of their sexual orientation.

Replacing the composition of judges in the High Court with a composition whose positions correspond to the LGBTQ-phobic positions of the coalition could harm both the rights of parents who had married a person of the opposite sex, and had come out of the closet years later, and also the best interests of their children. Also, the expansion of the jurisdiction of the religious courts may also worsen the situation of these parents and their children.²⁰

2.3 Children's rights in LGBT families

The other side of violating the rights of parents is the violation of the rights of children who have LGBTQ parents. Article 2(2) of the International Convention on the Rights of the Child from 1989 states that member states will take all appropriate measures to ensure that the child is protected from any form of discrimination or punishment based on the status, activities, views, or beliefs of the child's parents, their legal guardians, or their family members. Depriving LGBTQ parents of their rights constitutes a punishment of their children due to the status of their parents. Among the rights that children of LGBTQ people that may be harmed as a result of the judicial overhaul:

1. Absence of registration of the non-biological parent as a parent.
2. The lack of legal recognition of the parentage of one of the parents makes the children and their parents legal strangers, and therefore the relationship between them is vulnerable and subject to constant invasion by the state. A person who is not the legal parent of the child cannot raise this child, decide about the manner of their upbringing, approve or disapprove the provision of medical treatment, etc.²¹

3. Discrimination of Transgenders

Substantial arrangements concerning the lives of transgender and gender diverse people have yet to be legally regulated in Israel, with the exception of the prohibition of discrimination on the grounds of gender identity in the Pupil's Rights Law. Over the years, various courts have recognized and protected transgender rights. The High Court of Justice, for the first time has now mentioned the right of transgender and gender diverse people to equality.²² The High Court has also protected the right of transgender and gender diverse people to autonomy over their body and identity, among other things: during the hearings

²⁰ For criticism of the bill to expand the jurisdiction of the religious courts, see the letter from the women's organizations to the Minister of Justice dated January 8, 2023 (<https://drive.google.com/file/d/1K87zT2zVyi9pedm0zqHIqAyg6bGPxJLY/view>).

²¹ Legal Competence and Guardianship Act - 1962, Section 15.

²² Criminal Appeal 5833/12 J. Doe v. The State of Israel (September 12, 2013) (Appendix 5 of Judge Joubran's supplementary opinion).

on removing requirements for sterilization and castration as a condition for legal recognition;²³ recognizing the gender identity of parents who are transgender and gender diverse;²⁴ recognising gender identity in May Peleg's last will; and in maintaining the human dignity of prisoners who are transgender and gender diverse.²⁵ In this situation, it is clear that the narrowing of judicial review, subverting the independence of judges and the possible curtailment of Basic Law: Human Dignity and Liberty, will directly affect the ability of people who are transgender and gender diverse to defend themselves against the broad exclusion and discrimination to which they are exposed by both institutional and private parties.

Furthermore, the labor courts have read the prohibition of discrimination based on gender identity into the prohibition of discrimination based on sex,²⁶ and also recognised a right of access to gender reassignment health services,²⁷ and recognized that going through these procedures requires sick leave²⁸. Although in our opinion these rulings are required by the language of the law, the approval of the “reform” raises concern of harm to these arrangements for the population, which suffers from systematic and widespread discrimination in the labor and healthcare systems, if conservative judges are appointed and decide to overturn the rulings of their predecessors. The courts have protected people who are transgender and gender diverse in a variety of other contexts, among others: against defamation, from discrimination in insurance,²⁹ from police misconduct and brutality,³⁰ and also recognized their right to access gender-specific public spaces,³¹ and more. It is clear that in the current state of affairs where key areas in the lives of people who are trans and gender diverse have been more often than not established thanks to judicial rulings, and where it is the courts that have most frequently upheld the protection of their dignity and bodily integrity, the harm to the independence of the courts and judicial review is expected to have a seriously negative effect on transgender and gender diverse persons.

This danger becomes even more tangible in a comparative view. Legislation to prohibit legal recognition of the gender identity of transgender or gender diverse people was passed in Hungary as part of the emergency regulations established by the Orban administration and was recently approved in a problematic ruling by the government controlled Hungarian

²³ High Court of Justice 6035/14 Liran Shaked et al. v. Minister of the Interior et al. (12.27.2015).

²⁴ High Court of Justice 3148/18 J. Doe v. Minister of the Interior (5.5.2021).

²⁵ See, for example, Case No. 6819/14 J. Doe v. The State of Israel (February 1, 2015); High Court of Justice 5480/17 Dorin Biliya v. The Prison Service (2018).

²⁶ Appeal 23372-06-14 **Marina Mashel v. The Center for Educational Technology (2015)**.

²⁷ Appeal 59470-07-19 Sher v. Ministry of Health et al. (September 2, 2020).

²⁸ Appeal 33911-12-18 Flint v. Gan Hemed (9.9.2021).

²⁹ Civil case 19482-08-19 J. Doe v. Ayalon Insurance Company (2019).

³⁰ Criminal case 59301-12-16, Police Investigation Unit v. Avisrer (November 28, 2017).

³¹ Class action (TLV) 1967-10-14 Cohen v. Aroma Espresso Bar Ltd. (15.6.2020).

Supreme Court.³² Also, conservative elements in the US have already passed a series of laws in recent years in order to limit the rights of transgender or gender diverse people, in particular minors in the education system, in access to health services and entry to public places. A few of these laws which reached the door of the federal courts were blocked by judicial review.³³ There is a real fear that in the absence of effective judicial review these laws will also be imported to Israel.

4. Discriminating students in the education system

The coalition agreements include a commitment to expunge the education system from dealing with LGBTQ issues, including education for tolerance and acceptance, in schools. Apart from the educational defect of canceling education for tolerance, this may encourage and fuel discrimination of LGBTQ children, or children of LGBTQ parents. Also there will be no professional response for children who suffer from bullying due to their sexual orientation, gender identity or the sexual orientation of their parents. There may be encouragement to turn to conversion therapy.

Recently we witnessed attempts to expel a trans pupil from an elementary school and these were stopped only by the intervention of the court.³⁴ Reducing the possibility of administrative judicial review and replacing the judges with conservative judges who are committed to the coalition that appointed them, may leave students and parents without any possibility of protection in the face of predictable discrimination and harm.

5. Discrimination at work

LGBTQ people are particularly vulnerable to discrimination in workplaces and, without legal protections and the protection of the Labor Courts (if judges who will be appointed share the same LGBTQ-phobic positions as coalition members), they will be left without any remedy if they encounter discrimination on the basis of religious belief or LGBTQ-phobia.

For example, the National Labor Court ruled that a ban on discrimination based on sex is also a ban on discrimination based on gender identity.³⁵

³² Eszter Polgári & Tamás Dombos, *Ignorance and Evil: The Hungarian Constitutional Court on Legal Gender Recognition for Trans People*, CONSTITUTION BLOG (2023), <https://verfassungsblog.de/ignorance-and-evil/> (last visited Mar 14, 2023).

³³ For example Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586; Brandt v. Rutledge, 2022 U.S. App. LEXIS 31855, 2022 WL 16957734.

³⁴ Petition 58590-01-23 (a minor) and others v. Givat Shmuel Municipality (27.2.2023)

³⁵ Petition 23372-06-14 Marina Mashel v. The Center for Educational Technology (2015).

6. Discrimination in receiving health services

The right of LGBTQ people to health is in danger, both in terms of the quality of service and in terms of coverage in the public sponsored and subsidized “basket of medical benefits” and private insurances (for example monkeypox vaccines, HIV drugs, gender reassignment treatments for trans people, fertility treatments for female couples or single women, surrogacy for male couples, etc.) The advancement of the amendment to the bill prohibiting discrimination in products and services includes, as some politicians expressed, the possibility of refusing on the basis of religious belief to provide medical treatment. If this amendment passes, and in the absence of judicial review, the right to health of LGBTQ people will be significantly harmed, and perhaps also of their children’s (for example, if a pediatrician refuses to treat the children of same sex couples). In such a situation, if this proposed change is accepted, it will be more difficult for the ones harmed by such decisions to get protection, since if the composition of the courts is the one determined by the current coalition, they will probably be inclined to reject discrimination claims of this type.³⁶

7. Discrimination in commerce and services

In the coalition agreements between the Likud and religious Zionism, Shas, and Torah Judaism, it is stipulated that the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law will be amended so as to prevent harm to a private business that refrains from providing a service or product due to religious belief, and on the condition that it is a non-unique service or product and a similar alternative can be obtained in geographical proximity at a similar price.³⁷ The proposed law, the wording of which has already been submitted to the Knesset,³⁸ will allow businesses not to serve LGBTQ people due to religious belief, for example, refusing to rent a hotel room to an LGBTQ couple, refusing to sell or rent an apartment to LGBTQ people, refusing to

³⁶ An example of discrimination against lesbian women in access to in vitro fertilization, which was canceled due to judicial review: until 1996, in vitro fertilization procedures discriminated between married women and single women. The regulations stated that a condition for implanting a fertilized egg in the uterus of an unmarried woman is to receive an opinion from a social worker. See: Regulation 8(b)(1) of the Public Health Regulations (In Vitro Fertilization), 1987. A similar arrangement is established regarding a widow (Rule 8(b)(2)). Rule 19(b) of the rules regarding the management of a sperm bank and the guidelines for performing artificial insemination stated that single women or in a lesbian relationship will receive sperm donation subject to a psychiatric evaluation. This rule does not apply to women in a heterosexual relationship. Director of the Ministry of Health 20/07 Rules regarding the management of a sperm bank and instructions for performing artificial insemination (November 8, 2007), rule 19(b). See Ruth Zafarn “There are also two mothers - the definition of motherhood for a child born to a same-sex couple” *Din U’Dvarim* C 351, 357 (2007). The rule was declared null and void by the High Court of Justice, with the consent of the Ministry of Health. High Court of Justice 2078/96 **Weitz v. Minister of Health** (1997) (unpublished).

³⁷ Article 91 of the agreement between the Likud Party and the Shas party (28.12.22); Article 97 of the agreement between the Likud party and the religious Zionist party (28.12.22); Article 108 of the agreement between the Likud party and the Torah Judaism party (28.12.22).

³⁸ Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, (amendment - violation of religious belief), 2022 (P/222/25,12.12.2022).

provide services, etc. Moreover, from the language of the agreement and the language of the bill it appears that the owner of said businesses may refuse to sell a product or provide a service also based on the preferences of its customers. That is, the arrangement will allow any business owner to impose discrimination against LGBTQ people in his business, both as customers and as employees, in order to attract customers who are not interested in receiving service from LGBTQ people or in their presence. These proposed amendments may lead to the reversal of the rulings of the various courts in cases such as the Yad Hashamona (refusal to rent a ballroom to an LGBTQ couple)³⁹ or the colors of the rainbow (refusal to print posters with LGBTQ content)⁴⁰ and to justify discrimination based on sexual orientation.

The spirit of the expected legislative change is already taking effect, it seems, on the ground. Recently, several cases were reported in which apartment owners refused to rent them to LGBTQ people on the grounds that this goes against their religious beliefs.⁴¹

8. Violation of rights in the public space

In countries where a regime change was made, similar in character to the one currently proposed in Israel, such as in Poland and Hungary, as well as in other authoritarian countries such as Russia, many rights of the LGBTQ community in the public sphere were fatally harmed, such as freedom of expression, freedom of movement and the right to protest. LGBTQ people or those who are suspected of being LGBTQ suffer harassment from other citizens and harassment from the police. Below are some examples of this type of fatal harms in countries where a similar process of a regime change has been completed:

1. Cancellation of Pride parades;
2. **In Poland** LGBTQ-free cities have been declared, where Pride parades are not held and symbols of the LGBTQ community, such as the Rainbow flag, are not to be displayed in the public eye.⁴² There is harassment by citizens and arrests by the police of those who wave the Rainbow flag or are suspected of being LGBTQ (men or women holding hands with someone of the same sex on the streets, transgender people, etc.), although there is, for now, no legislation prohibiting LGBTQ relationships.
3. **In Hungary**: Canceling the legal recognition of transgender people, banning the distribution of "LGBTQ propaganda", banning the exposure of minors to materials about

³⁹ Civil appeal (Jerusalem) 5116-11-12 Guest house and event garden, Yad Hasmona, vs. Tal Yaakovovich (6/17/2014).

⁴⁰ Civil case (Be'er Sheva) 56315-02-17 The Association for the Protection of Individual Rights v. The Colors of the Rainbow - Laboratory for Offset and Transparent Plates Ltd. (20.4.2020)

⁴¹ Itay Gal-on, "It is against the Torah, not suitable: apartment owners refused to rent to same-sex couples" N-12, 13.3.2023 (https://www.mako.co.il/news-israel/2023_q1/Article-439683e411ad681026.htm).

⁴² Peter Foster, Polish ruling party whips up LGBTQ hatred ahead of elections amid 'gay-free' zones and Pride march attacks. The Telegraph, August 9, 2019.

tolerance for LGBTQ people, amending the constitution to prohibit the adoption of children by LGBTQ couples, and more.

4. **In Russia** Legislation was passed in 2013 prohibiting "LGBTQ propaganda",⁴³ and more.

In Poland, Hungary and Russia the government harassment of LGBTQ people has also had a negative impact on the public's attitudes towards the rights of LGBTQ people, and set back not only their formal rights, but also their social acceptance. Many studies point to a close connection between the authorities' attitude towards LGBTQ people and their legal status, and their social acceptance.⁴⁴ **In Israel**, the recently published report on the state of LGBTQ phobia by the Association for the LGBTQ Community in Israel indicates a significant increase in reports of harm to LGBTQ people during 2022, including discrimination in services and violence, so that the ideology of the current coalition and its proposed legislative amendments is already being reflected on the ground.⁴⁵

Replacing the judges with those elected by the coalition, as the Israeli "reform" is established, will make it difficult for LGBTQ people to receive any protection if their rights are harmed even without legislative amendments. Anti-LGBTQ legislative amendments will be effectively shielded from judicial review (the other key aspect of the "reform").

9. **Summary**

The judicial overhaul is designed, among other things, to allow the current government to take Israel into regression when it comes to the rights of LGBTQ people and women. This is a stated goal of some of the coalition members. The current coalition perceives the partial gender equality and the LGBTQ rights anchored in court rulings and in legislation, as western markers which are foreign to Judaism. These markers are not possible for immediate annulment today, as the existing legislation and the courts protect gender equality and equality based on sexual orientation. Curtailing the possibility of judicial review as well as the appointment of conservative anti-LGBTQ judges to all courts in Israel will facilitate a severe and extensive violation of the rights of LGBTQ people and their family members.

⁴³ The legislation was struck down by the European Court of Human Rights, but Russia has announced that it will not comply with the ruling. Sewell Chan, Russia's 'Gay Propaganda' Laws Are Illegal, European Court Rules, The New York Times, June 20, 2017.

⁴⁴ See Andrew R. Flores, Social acceptance of LGBT people in 174 countries: 1981 to 2017 (2019).

⁴⁵ The Association for the LGBT in Israel and the Israel Institute for LGBT Research, "Report on the situation of LGBT-phobia in Israel" (2023), <https://www.lgbt.org.il/lgbt-phobia>.

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