

# HEINONLINE

Citation:

Shulamit Almog; Sharon Bassan, The Politics of Pro and Non Reproduction Policies in Israel, 14 J. Health & Biomedical L. 27 (2018)

Provided by:

Princeton University Library

Content downloaded/printed from [HeinOnline](#)

Tue Oct 2 16:37:28 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at  
<https://heinonline.org/HOL/License>

- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

## THE POLITICS OF PRO AND NON- REPRODUCTION POLICIES IN ISRAEL

Shulamit Almog, Ph.D., M.A.\*  
Sharon Bassan, J.D., Ph.D†

### INTRODUCTION

The State of Israel is a fertility superpower, known for promoting birth and reproductive practices.<sup>1</sup> This paper explores the politics surrounding the regulation of reproductive practices in Israel through a unique prism, the comparison of reproductive practices promoting birth and fertility (hereinafter “pro-natal practices”) alongside practices limiting and preventing birth (hereinafter “non-natal practices”).<sup>2</sup> The common

---

\* Shulamit Almog is a Full Professor of Law at the University of Haifa, and Co-Director of the Center of Law, Gender and Policy.

† Sharon Bassan is a Bioethicist, with a JD/Ph.D (in law), whose expertise is reproductive ethics. This paper is part of her project as a Postdoctoral fellow at The Center for Gender, Law and Policy, University of Haifa, which was funded by the Israeli Ministry of Science, Technology & Space. Currently, she is a Postdoctoral Research Associate in Values and Public Policy at Princeton University, also affiliated with the Woodrow Wilson School's Office of Population Research and the Law and Public Affairs Program (Graduate Associate).

<sup>1</sup> See Daniel Sperling, *Commanding the “Be Fruitable and Multiply” Directive: Reproductive Ethics, Law, and Policy in Israel*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 363-71 (2010) (citing Israel’s religion, culture, politics, public policy, and law all encourage fertility and high birthrates); Dina Kraft, *Where Families Are Prized, Help Is Free*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html> (referencing Israel as world capital of in vitro fertilization and home to busiest fertilization clinics); Alon Tal, *Israel’s Looming Demographic Crisis*, N.Y. TIMES (July 25, 2016), <https://www.nytimes.com/2016/07/23/opinion/israels-looming-demographic-crisis.html> (noting Israel’s highest developed world birthrate stemming from patriotic duty and Holocaust reproductions).

<sup>2</sup> See Tsafi Saar, *Yes, We Are Allowed to Regret Motherhood*, HAARETZ (Jan. 30, 2016, 6:57 PM), <http://www.haaretz.com/israel-news/.premium-1.700142>. Donath points out the problematic aspect inherent in the words “without,” which refers to a lack or deprivation, and “anti,” which exists in the familiar academic concept of anti-natalism – the counterculture of non-parenthood. *Id.* Donath expresses reservations about any label that incorporates the notion of absence or lack according to which women, who do not want children, may be considered less than a ‘real

notion is that pro-natal practices are in high demand in Israel, and that there is an acceptance of any novel technology that leads to bearing children.<sup>3</sup> At the same time, the vast majority of requests to approve abortions, which are officially prohibited unless approved by a special committee, are positively answered.<sup>4</sup> Effectively, abortions are permitted, though the procedure was only recently added to the funded services covered by the National Health Insurance (“NHI”).<sup>5</sup> Both practices were generally regarded as reflecting the national ethos of reproduction as a positive value, given the special circumstances and needs in Israel.<sup>6</sup> Although abortions undermine this narrative and are officially prohibited, they are practically accepted as part of the liberal national views endorsed by the Israel Supreme Court.<sup>7</sup>

---

woman’ if they don’t become mothers. *Id.* Therefore, “non-natalism,” in the form of “non-conformism” and “non-parentism” are Donath’s preferred terms for the phenomenon, which is also the term chosen here. *Id.*

<sup>3</sup> Joseph G. Schenker, *Assisted Reproductive Technology in Israel*, 33 J. OBSTETRICS & GYNAECOLOGY RES. S1, S51-55 (2007) (exploring how Israel is leading the world in developing New Reproductive Technologies).

<sup>4</sup> See Gila Stopler, *Biopolitics and Reproductive Justice: Fertility Policies Between Women’s Rights and State and Community Interests*, 18 U. PA. J. L. & SOC. CHANGE 170, 188-91 (2015) (explaining abortions approved by Committee reasoned from danger to mother or out of wedlock); Mairav Zonszein, *Israel’s Abortion Committees*, N.Y. TIMES (June 12, 2015),

<https://www.nytimes.com/2015/06/14/opinion/sunday/israels-abortion-committees.html> (citing the committee utilizes two doctors and a social worker for approval process). Approval for abortions requires that the woman is younger than eighteen years old or over forty years old, the fetus is in danger, the mother’s mental or physical health is at risk, and the pregnancy occurs out of wedlock or is the result of rape or incest. *Id.* See also Gila Stopler, Article, *Biopolitics and Reproductive Justice: Fertility Policies Between Women’s Rights and State and Community Interests*, 18(2) U. PA. J. L. & SOC. CHANGE 1, 22 n.126 (2015) (citing Press Release, State of Israel Cent. Bureau Stat., Application for Pregnancy Termination in 2009, and Temp. Data 2010 (Sept. 20, 2011)) (listing statistics of abortion application and approval and reasoning for approval).

<sup>5</sup> See Press Release, State of Israel Cent. Bureau Stat., *supra* note 4; *Israel: Reproduction and Abortion: Law and Policy*, LIBRARY OF CONG. (Feb. 2012), <https://www.loc.gov/law/help/il-reproduction-and-abortion/israel.php> (explaining the services added and covered by the National Health Insurance Laws).

<sup>6</sup> See Sperling, *supra* note 1, at 364 (describing Israel’s unique combination of religious tradition and liberal approach to certain social issues).

<sup>7</sup> Israel Penal Law, 5737-1977, § 314, SH No. 5766 (2014) (Isr.). A gynecologist does not bear any criminal responsibility for disrupting an approved interruption of a pregnancy at a recognized medical institution. *Id.*

In recent years, there has been a shift relevant both to pro and non-natal practices. The national narrative in regards to reproduction is constantly under attack, and as a result, undermined.<sup>8</sup> Due to the erosion of the national ethos and the political strengthening of religious parties, the delicate status quo of abortions is also compromised.<sup>9</sup> For example, more research regarding the disadvantages of in vitro fertilization (“IVF”) treatments appear in the press and the public discourse.<sup>10</sup> As a result, new restrictions on abortions are introduced, such as a suggested mandatory presence of a religious entity at abortion committees, resulting in political opposition among women.

This paper is the first to distinguish two generations of discourse in both pro and non-natal practices. The first-generation scholarship followed the enactment of the NHI Law in 1994. The second-generation scholarship refers to the discourse in the last ten years, after the lessons of the first-generation discourse were analyzed and implemented in initiatives to change the pro and non-natal regulation. For each generation of discourse, we reviewed a wide range of academic critiques and extensively studied protocols taken

---

<sup>8</sup> See *Mission Statement*, COMMITTEE FOR THE RESCUE OF ISRAEL’S BABIES - EFRAT, <http://www.efrat.org.il/english/about/> (last visited Mar. 14, 2018). EFRAT is a non-profit, pro-life organization of Israel that assists and enables pregnant women to avoid seeking abortion. *Id.* EFRAT was founded in 1950 by Herschel Feigenbaum, a Holocaust survivor, and focuses on encouraging Jewish childbirth. *Id.*

<sup>9</sup> See *History of the Movement*, LIKUD NATIONAL LIBERTY PARTY, <https://www.likud.org.il/en/about-the-likud/history-of-the-movement> (last visited Mar. 14, 2018). The Likud Party was founded in 1973 and is comprised of an agreed political platform between the Herut, the Liberal Party, the Free Center, the National List, and the Labor Movement for Greater Israel. *Id.* See also *Zionist Union: Labor Party-Hatnua*, THE ISRAEL DEMOCRACY INSTITUTE, <https://en.idi.org.il/israeli-elections-and-parties/parties/zionist-union/> (last visited Mar. 1, 2018). The Zionist Union serves as the main center-left party and was founded in 2015 through the combining of the Labor Party and Hatnua. *Id.*

<sup>10</sup> Amy Klein, *Doing Fertility Treatments in Israel: Pros and Cons*, HAARETZ (Mar. 9, 2015), <https://www.haaretz.com/israel-news/culture/health/1.631674> (describing Israel’s regulatory approach to IVF). See *In Vitro Fertilization*, MAYO CLINIC (Jan. 6, 2018), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/home/ovc-20206838> (explaining that IVF in Israel may be cost effective, but cultural differences may outweigh benefits). IVF consists of extracting eggs from the ovaries, fertilizing the eggs with sperm in the laboratory, and then manually placing the embryo into the uterus. *Id.* One cycle of IVF may take two weeks and is “the most effective form of assisted reproductive technology.” *Id.*

from policy-making processes. The material was analyzed and the arguments were organized and classified according to the narratives they express. An analysis of the main arguments raised in both spheres revealed the main themes that construct the different discourse of each generation, and the change that seems to appear in the second-generation.

This paper traces the shift in the politico-legal processes in the last ten years, while providing a unique point of view by analyzing pro and non-natal practices in Israel. On the one hand, both pro and non-natal practices are becoming even more socially acceptable. On the other hand, alternative narratives that oppose the formative pro-reproduction narrative emerge in public discourse, in academic scholarship, and in social activism concerned with the policy-making process. New alerts and strategies are called for, to prevent the impediments to women's possibilities regarding their reproductive rights, bodies and health, and to preserve their freedom to decide if and how they use both practices.

The first part reviews the Israeli legal background and the political reality behind the legislation concerning reproductive technologies and abortion. The second part focuses on two generations of discourse regarding pro and non-natal practices. Narratives in the academic and the policy spheres will be analyzed for both pro and non-natal practices in each generation. This paper will demonstrate a similar direction in the discourses, going from a relatively narrow critique regarding the formative narrative and its ramifications, towards a critical rights-based discourse and a more nuanced critique.

## I. LEGAL FOUNDATION AND RÉAL POLITICS

Every socio-cultural structure may be perceived as a collection of symbols, which shapes and determines the identity of the audience and its understanding of society.<sup>11</sup> Reality organizes symbols through a shared language, by designing social motives and points of view.<sup>12</sup> The choice of specific symbols reflect cultural and social values, and evoke intellectual and emotional reactions that influence one's perception of reality.<sup>13</sup> Within such a group of symbols, formative narratives play a major part; internal meanings of a society are reflected in the way that reality is narrated.<sup>14</sup> Formative narratives are essential for any process of creating abiding norms, such as legislation and ruling, since they endow symbols with ethical and pragmatic significance.<sup>15</sup> Theoretically, awareness of such narratives lead towards a deeper understanding of what motivates people in society, and sheds light upon specific choices in any given society.<sup>16</sup> The term "generative narratives" is used to depict a theoretical framework focusing on legal narratives.<sup>17</sup>

---

<sup>11</sup> Shulamit Almog, *From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative, and Law*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4 (2002), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=983904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=983904) [hereinafter *Storytellers*] (explaining the connection between the law, cultures, societies and storytelling). Intellectual and emotional responses are stimulated by categories of narratives which separate elements of experience and understanding of society. *Id.* at 4-5.

<sup>12</sup> *Id.* at 4. Narratives give meaning to social experience and construct how such experiences are perceived and form reality. *Id.* Human experience is not conceived by a cause and effect rationale, but instead, by the understanding of story and narrative. *Id.*

<sup>13</sup> *Id.* Narratives and images, like those of stories, are how humans find reality and the discourse of human experience. *Storytellers*, *supra* note 11, at 4.

<sup>14</sup> *Id.* Self and society are given meaning through the narratives and symbols which make up their reality. *Id.*

<sup>15</sup> See Shulamit Almog, *Creating Representations of Justice in the Third Millennium: Legal Poetics in Digital Times*, 32 RUTGERS COMPUTER & TECH. L.J. 183 (2005) [hereinafter *Representations*] (elaborating on the term "generative narrative" in the legal context).

<sup>16</sup> See *Id.* See also *Storytellers*, *supra* note 11, at 5. How people make sense of things is how roles of society are formed "including those addressing law-related issues, such as race, community, gender, and the practice of law." *Id.*

<sup>17</sup> See *Storytellers*, *supra* note 11, at 6. Generative narratives refer to an area of legal practice that is "generated by words, by certain uses of language, and by the evocative power of a story." *Id.* at 7.

Corresponding with this idea, we are using the term formative narrative in order to address an even broader regime – the socio-cultural structure that shapes the field of reproduction in Israel, and the politics of policy making relating to it.<sup>18</sup>

This part focuses on formative narratives used within the policy making process, concerning pro and non-natal reproductive practices and the gradual development of an apparently harmonious equilibrium between them. As will be elaborated, both practices resonate a formative narrative that promotes reproduction, yet at the same time manages to embrace liberal values, whether those comply with or contradict the formative narrative.

#### **A. The Israeli Formative Narrative of Reproduction – Be Fruitful, for Yourself and for Your Homeland:**

In spite of cultural differences, there is no doubt that the importance of parenthood is universal.<sup>19</sup> At the same time, Assisted Reproductive Technologies (“ART”) are socio-technical products shaped by numerous technical, economic, political, and moral factors, and often raise ethical incongruity and moral ambivalence.<sup>20</sup> ART’s acceptance is deeply embedded in the context of social relations and cultural norms, and is generally justified through formative narratives that support it.<sup>21</sup>

---

<sup>18</sup> See Shulamit Almog, *Creating Representations of Justice in the Third Millennium: Legal Poetics in Digital Times*, 32 RUTGERS COMPUTER & TECH. L.J. 183 (2005) (analyzing the impact of technological advances in the legal field).

<sup>19</sup> Daphna Birenbaum-Carmeli & Marcia C. Inhorn, *Assisted Reproductive Technologies and Culture Change*, ANN. 37. REV. ANTHROPOLOGY 177, 182 (2008) (reviewing the effects of IVF in relation to parenting); Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 67 (2006) (comparing ART usage in United States and Israel with relation to parenting).

<sup>20</sup> Birenbaum-Carmeli, *supra* note 19, at 178 (Describing the different intersecting traits and characteristics of ART’S in society).

<sup>21</sup> *Id.*; Waldman, *supra* note 19, at 67.

The gist of the formative narrative of reproduction that Israeli society adheres to is that a woman should strive to be "fruitful" to meet social standards and national necessities, as well as to achieve personal happiness.<sup>22</sup> As we will demonstrate, widely accepted liberal and national values support this formative narrative.

Israel defines itself, as stated in its basic laws, as a democratic and a Jewish state.<sup>23</sup> Accordingly, the status and protection of human rights, including women's rights, is shaped by the two-sided definition.<sup>24</sup> On the one hand, inspired by its democratic and liberal values, Israel recognizes autonomous choices, a person's right over his or her body, and other human rights, as foundational principles of its legal system.<sup>25</sup> On the other hand, historical, religious, political, cultural, and social references to Israel's unique status as a Jewish state generate a clear pro-natalist vision.<sup>26</sup> There are four intersecting

---

<sup>22</sup> Elana Bloomfield, *Conceiving Motherhood: The Jewish Female Body in Israeli Reproductive Practices*, 10(2) INTERSECTIONS 227, 227-69 (2009).

<sup>23</sup> Government Decision Number 428, 9.4.67 (1967) (Hebrew).

The decision includes, among other things, the following "[s]uggestions regarding the demographic policy": The Government recognizes the need to act systematically in order to implement a demographic policy targeted at creating an atmosphere that will encourage natality, considering its importance to the future of the Jewish people. . . . For that purpose: (A) Constant advertising campaigns will be held, efforts will be made to curb economic and social barriers will be removed and incentives will be given, in the fields of education, housing, insurance and so on, within the scope of the state's ability, in order to encourage families to increase their number of children. (B) efforts will be made to curb artificial abortions will be curbed as their high rate is cause for concern, in both national demographic terms, and in terms of women's health.

*Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Basic Law: Human Dignity and Liberty, 5752, §§ 1, 1a, 4, 5. (The Knesset).

<sup>26</sup> See Gila Stopler, *Biopolitics and Reproductive Justice: Fertility Policies Between Women's Rights and State and Community Interests*, 18 U. PA. J. L. & SOC. CHANGE 169, 184 (2015) (describing the origins and rationale of Israeli pro-natalist viewpoint).

discourses of the (in)fertile body that construct the Israeli reproductive policy.<sup>27</sup> First, a traditional pro-natal discourse that compels biological parenthood.<sup>28</sup> Second, a pro-family 'discourse leading towards a convention of giving birth to 'at least' two children.<sup>29</sup> Third, a national discourse propelled by a sense of political and demographic threats related to the Jewish–Arab conflict, and to the collective memory of the annihilation of six million Jews in the Holocaust.<sup>30</sup> Last, a liberal discourse that assumes a right for happiness via the experience of parenthood.<sup>31</sup>

The Israeli formative narrative stems from different cultural sources, such as religious scripts, philosophical and political thought, and historic events. The biblical dictate "be fruitful and multiply"<sup>32</sup> echoes throughout various secular channels. The curse of female barrenness is a consistent, profound theme in several Jewish texts, in which women's yearning for children is presented as the main element in their lives.<sup>33</sup> Such stories, like Rachel's cry "give me children or else I die," or Sarah's barrenness that leads her to use her handmaid to produce a child, are still charged with contemporary meaning.<sup>34</sup> Similarly, according to the *Halacha* (Jewish law), which governs the laws of marriage and

---

<sup>27</sup> See Sigal Gooldin, *Cultural Competence and Ethical Incompetence: Notes from a Study of the New Reproductive Technologies in Israel*, 8 DIVERSITY IN HEALTH & CARE 45, 49 (2011) (explaining traditional, pro-family, national, and liberal discourse present in Israel).

<sup>28</sup> See *id.* at 49 (analyzing prevalence of pro-natal discourse as measured by above average total fertility rate in Israel).

<sup>29</sup> See *id.* (describing pro-family discourse as a normative compulsion to have multiple children).

<sup>30</sup> See *id.* (linking national discourse to historically negative events involving Jewish populations globally).

<sup>31</sup> See *id.* (describing the liberal discourse focus largely on emotional side of parenthood).

<sup>32</sup> Genesis 1:28 (King James).

<sup>33</sup> See Waldman, *supra* note 19, at 70 (emphasizing essential nature of child-bearing in Israeli culture).

<sup>34</sup> See *id.* (describing biblical stories illustrating essential nature of child-bearing). See also Genesis 30:1 (King James) (describing biblical story of distraught Rachel coming to realization she cannot have children); Genesis 16:2 (King James) (depicting biblical story of a barren Sara, illustrating importance of having children).

divorce for Jews in Israel, “[a] man who is childless is accounted as dead.”<sup>35</sup> Such a man has the right to divorce his wife if the marriage has failed to produce children over the course of ten years.<sup>36</sup> As few scholars note, these biblical references and historic sources resonate in Israeli collective consciousness and play a major role.<sup>37</sup> Furthermore, given the swing-vote power they enjoy in the Israeli parliamentary system, religious parties exert more control than their numbers, and religious values are highly visible and influential within legislative debates, expressing pro-natal messages as a general societal value.<sup>38</sup>

The religious emphasis on procreation is juxtaposed with the trauma of the Holocaust and the fear of being outnumbered by non-Jews on Israeli soil.<sup>39</sup> Such accumulation has served to promote a dominant pro-natalist regime.<sup>40</sup> Ever since Israel's establishment, generous government packages were aimed at alleviating some of the costs

<sup>35</sup> See *Nedarim* 64b, THE WILLIAM DAVIDSON TALMUD, <https://www.sefaria.org/Nedarim.64b?lang=bi> (last visited Mar. 14, 2018) (explaining the deep ramifications of failing to bear children in Israeli society).

<sup>36</sup> See Reuvan P. Bulka, *The Ten Years Issue*, CHABAD.ORG, [http://www.chabad.org/library/article\\_cdo/aid/560112/jewish/The-Ten-Years-Issue.htm](http://www.chabad.org/library/article_cdo/aid/560112/jewish/The-Ten-Years-Issue.htm) (last visited Mar. 14, 2018) (discussing reasons for divorce among Jewish couples).

<sup>37</sup> See Sigal Gooldin & Carmel Shalev, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM: A J. OF JEWISH WOMEN'S STUD. & GENDER ISSUES 151, 166 (2006) (describing how Israeli society is deeply influenced by religious texts). See also, Waldman, *supra* note 21, at 71 (describing the policies enacted through the parliament that contain societal implications as well as political).

<sup>38</sup> See Waldman, *supra* note 21, at 84 (explaining the political clout religious parties tend to have on public policy).

<sup>39</sup> See RHODA ANN KANAANEH, *BIRTHING THE NATION: STRATEGIES OF PALESTINIAN WOMEN IN ISRAEL* 45 (Univ. of Cal. Press ed., 2002) (describing the need to have children in context of the aftermath of World War II). See also D. Bitenbaum-Carmeli & M. Dirnfeld, *In Vitro Fertilisation Policy in Israel and Women's Perspectives: The More the Better?*, 16 REPROD. HEALTH MATTERS, 182, 183 (2008) (explaining the fears that stemmed from under population due to the Holocaust); see also Gooldin, *supra* note 27, at 50 (describing the mentality of increasing child-bearing to offset the costs of a low population); Rebecca Steinfield, *Wars of the Wombs: Struggles Over Abortion Policies in Israel*, 20 ISRAEL STUD. 1, 3 (2015) (elaborating on the struggles of balancing child-rearing and abortion policies in Israel).

<sup>40</sup> See KANAANEH, *supra* note 39, at 45 (describing the ideological influence on the role of fertility in Israeli society); Dirnfeld, *supra* note 39, at 183 (detailing the intermingling of politics and religion through public policy); Steinfield, *supra* note 39, at 3 (explaining the influence of pro-natalism in Israeli culture and politics).

of reproduction and child rearing.<sup>41</sup> Throughout the years, Israel's pro-natalist policy has institutionalized through multiple funds and committees, providing monetary incentives for large families, alongside social benefits for mothers and child allowances.<sup>42</sup> A "Heroine Award" was introduced in 1949 for mothers who bore at least ten children.<sup>43</sup> In 1962, Prime-Minister David Ben Gurion established a Committee for Natality Problems, whose mandate was "to acquire and to advise the government on matters concerning natality policies, and in particular to consider means by which large, deprived [Jewish] families could be assisted."<sup>44</sup> After the 1967 War, which brought one million more Palestinians under Israeli control, the Demographic Center was established, devoted to the goal of encouraging Jewish reproduction.<sup>45</sup> The government resolution stated that "the government finds it necessary to act systematically to realize a demographic policy that is directed to creating an atmosphere which encourages birth, taking into consideration that it is vital to the future of the Jewish people."<sup>46</sup> In 2002, the Israel

---

<sup>41</sup> See Waldman, *supra* note 21, at 82 (explaining the influence of pro-natalism since the end of World War II). See also SIGRID VERTOMMEN, EDITED VOLUME ON ASSISTED REPROD. IN A EUROPEAN AND GLOBALIZED PERSPECTIVE: NOTES ON THE OVERALL FRAMEWORK 1, 1 (2016) (describing how the government became more involved to lessen child-rearing costs).

<sup>42</sup> See Daphna Birenbaum-Carmeli, 'Cheaper Than a Newcomer': On the Social Production of IVF Policy in Israel, 26 SOC. OF HEALTH & ILLNESS 897, 902 (2004) (describing the policies Israel implemented through encouraging child-bearing). "The allowance for each additional child is higher than that allocated to the previous one. This provision was sponsored by the religious parties whose constituencies include a high percentage of extremely large families." *Id.* at 902 n.15.

<sup>43</sup> See Birenbaum-Carmeli & Dirnfeld, *supra* note 39, at 183. See also, Michal Raucher, *The Cultural and Legal Reproduction of Poverty: Abortion Legislation in Israel*, 30 J. FEMINIST STUD. RELIGION 147, 148 (2014). The award was discontinued when it became evident that Arab women were the consistent recipients. *Id.*

<sup>44</sup> NIRA YUVAL-DAVIS, ISRAELI WOMEN AND MEN: DIVISIONS BEHIND THE UNITY 59 (Change International Reports, 1982).

<sup>45</sup> *Id.* at 61. See DOV FRIEDLANDER & CALVIN GOLDSCHIEDER, THE POPULATION OF ISRAEL 138 (Columbia University Press, 1979) (describing the increase of the Jewish population after the war).

<sup>46</sup> LESLEY HAZELTON, ISRAELI WOMEN: THE REALITY BEHIND THE MYTH 58-61 (Simon and Schuster, 1978).

Council on Demography, whose establishment was suggested in 1979, renewed its activities aimed at encouraging population growth.<sup>47</sup> The encouragement of procreation is still the formal policy of the State of Israel.<sup>48</sup>

Continuous cultural exposure to this formative narrative may elucidate the enthusiastic acceptance of IVF in Israel.<sup>49</sup> Thus, it is not surprising that Israel's Supreme Court established back in 1982 a right to use ART to create a biological child, connected to at least one of the parents, as part of the right to personal development.<sup>50</sup> While reproductive freedoms are usually interpreted in a negative sense, for example, freedom from state intervention in individual reproductive decisions such as whether to have children, how many and when. When it comes to the right to use reproductive technologies, the need to use medical reproductive health care requires positive

---

<sup>47</sup> See SERGIO DELLA PERGOLA, JEWISH DEMOGRAPHIC POLICIES: POPULATION TRENDS AND OPTIONS IN ISRAEL AND IN THE DIASPORA 1, 270 (Barry Geltman & Rami Tal eds., 2011).

<sup>48</sup> See Daniel Sperling, *Commanding the "Be Fruiful and Multiply" Directive: Reproductive Ethics, Law, and Policy in Israel*, 19 CAMBRIDGE Q. OF HEALTHCARE ETHICS 363, 363-371 (2010) (reasoning encouraging Jewish people to procreate based on historical and religious factors). See also Penal Law, 5737-1977, § 313, § 320 (special volume) (authorized Translation from the Hebrew Prepared at the Ministry of Justice) (as amended) (Isr.).

<sup>49</sup> Joesph G. Schenker, *Human Reproduction: Jewish Perspectives*, 29 GYNECOLOGICAL ENDOCRINOLOGY 945, 945-948 (2013).

<sup>50</sup> Meir Shamgar, *Issues Concerning Reproduction and Birth*, 39 HA'PRAKLIT, 21, 31 (1982) (in Hebrew). "The right to ART, egg or sperm donation, or even the volunteering to carry the child of another deserves protection by the law within the right of every individual to free personal development". *Id.*

intervention.<sup>51</sup> The positive classification of the right to reproduce has an operative meaning regarding the state's role in supporting citizens.<sup>52</sup>

The foundation for the current Israeli legal framework of reproductive policy began in 1987, when the Minister of Health issued public health regulations that addressed the accreditation of clinics, access to IVF, egg donations, embryo storage and disposal, as well as informed consent.<sup>53</sup> In 1994, the NHI Law was enacted and set a basic basket of health services and medicine for which every citizen is entitled.<sup>54</sup> Unlimited fertility treatments of all types "for the purpose of bearing a first and second child - for couples who do not have children from their current marriage, and also for a childless woman who wishes to establish a single parent family" are included in the basket.<sup>55</sup>

---

<sup>51</sup> See *id.* See also Rachelle Fishman, *Israeli Fertilised-Egg Case to be Heard Again*, 345 LANCET 1, 1 (1995). Israeli Supreme Court President Meir Shamgar ordered a fertility case to undergo a second hearing after a panel of five justices ruled that a man, Dani Nahmani, had a right to prevent his ex-wife from using her eggs to produce "their" offspring. *Id.* Currently in the "over-age" group, she wanted to use the eggs fertilized five years earlier, but the judges decided that a man has a basic right not to be a parent, even if that means depriving a woman of her chance to be a parent. *Id.* The principal issue to be addressed on the second hearing is whether the original agreement to partake in the process validates its completion. *Id.*

<sup>52</sup> See generally Meir Shamgar, *Issues Concerning Reproduction and Birth*, 39 HA'PRAKLIT, 21, 31 (1982) (in Hebrew). See also Rachelle Fishman, *Israeli Fertilised Egg Case to be Heard Again*, 345 LANCET 1 (1995).

<sup>53</sup> THE PUBLIC HEALTH REGULATIONS (In-Vitro Fertilization)-57471987, 5035 KT 978 (Isr.). To this day, there is not one coherent regulation, but rather piecemeal regulation touching upon many reproductive technologies, such as intracytoplasmic sperm injection (ICSI), donor insemination (DI), surrogacy, egg donation, egg freezing and prenatal genetic diagnosis (PGD). *Id.*

<sup>54</sup> National Health Insurance Law, 1990-1995 (2015) (Isr.). Under the NHI Law, every Israeli citizen is entitled to health care services, and has a right to register as a member of an HMO of his or her choice. *Id.* Each citizen is entitled to receive all of the services included in the basket, at a reasonable quality level and within a reasonable period of time. *Id.*

<sup>55</sup> THE SECOND ADDENDUM TO THE NATIONAL HEALTH INSURANCE LAW, 575-41994, 1469 SH 157 § 6D1 (3) (Isr.).

Israel is the only country where IVF is almost entirely state subsidized.<sup>56</sup> This level of public funding, which is not affected by the patient's marital status, sexual orientation, or whether they have children from previous relationships, is a unique Israeli phenomenon.<sup>57</sup> The only limiting condition, age, is meant to enhance medical success.<sup>58</sup> It is no wonder that the percentage of people treated with ART in Israel is among the highest in the world.<sup>59</sup> Accordingly, IVF treatments were embraced by potential recipients, which created high demand.<sup>60</sup> The criteria for entitlement to publicly funded treatments has continuously extended, and the number of IVF treatments per capita has increased.<sup>61</sup>

When expensive and complicated reproductive treatments are funded by the state health system, the state has in fact turned reproductive freedoms into a positive legal right, including assisted reproduction through reproductive practices.<sup>62</sup> The state's pro-natalist

<sup>56</sup> See SUSAN KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 232 (Arjun Appadurai et al, 2000); see also Daphna Birenbaum-Carmeli, "Cheaper than a Newcomer": On the Social Production of IVF Policy in Israel, 26 SOC. HEALTH LIT.N. 897, 907 (2004).

<sup>57</sup> See New Family v. The Comm. for Approving Embryo Carrying Agreements, 57(1) PD 419 (Isr.). The court addressed the aspect of equality of the right to assisted reproduction when a single mother asked to use surrogacy services and was refused. *Id.* Although the court denied the access of unmarried women, it ruled that current law is discriminatory and violates the principle of equality. *Id.*

<sup>58</sup> See, e.g., *id.* The age limit for women using their own ova is forty-five. *Id.* The maximum age for women using donated ova is fifty-one. *Id.* Regulations require that the total number of treatment cycles not exceed six per year. New Family, 57(1) PD 419 (Isr.).

<sup>59</sup> See Birenbaum-Carmeli & Dirnfeld, *supra* note 39, at 1. See also, The Committee for Promotion of Women's Status, 3 (Committee protocol 44, Sept. 16, 2003); CARMEL SHALEV, REPRODUCTIVE AND GENETIC TECHNOLOGIES IN ISRAEL, 140, 163 (Gil Segal & Efrat Ram-TikTin eds., 2015); Gooldin, *supra* note 27, at 48; Waldman, *supra* note 21, at 81.

<sup>60</sup> See e.g., Daphna Birenbaum-Carmeli, *Contextualizing a Medical Breakthrough: An Overview of the Case of IVF*, 24 HEALTH CARE FOR WOMEN INT'L. 591, 593 (2003) (mentioning that in Israel IVF was implemented before having undergone full clinical testing procedures).

<sup>61</sup> See Dina Kraft, *When Families Are Prized, Help is Free*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html> (mentioning that 1,657 in vitro fertilization procedures per million per year in a 2002 report).

<sup>62</sup> See *id.* "The Health Ministry says it spends about \$3,450 per treatment, although some critics say the real cost may be higher." *Id.*

agenda, many claim, presents an environment in which babies are the pride of the state and a woman must reproduce to qualify as a woman in the state's eyes.<sup>63</sup>

### B. The Domain of Abortions – Competing Narratives and Ambiguous Law:

As this section will delineate, the policy of non-natal practices in Israel, and particularly in regard to abortions, is also affected by the theme "be fruitful and multiply."<sup>64</sup> The sources of the current legal regime of abortion derive from an 1861 British Law that was employed in Palestine during the British Mandate.<sup>65</sup> The Penal Code of 1936, Article 175 prohibited all but medically necessary abortions.<sup>66</sup> Two committees influenced changes in the Israeli policy on abortion.<sup>67</sup> The first was the Commission for Natality Problems, also known as the Beki Committee, a special committee appointed in 1961 to address the effectiveness and ethics of restricting abortion to increase fertility.<sup>68</sup> The second is the Gabai Committee, appointed in 1972, to review the restrictions on abortion.<sup>69</sup> Our description of the Israeli abortion discourse will begin in 1977, when the

<sup>63</sup> Raucher, *supra* note 43, at 149 (discussing the views of women in the eyes of the state's pro-natalist agenda).

<sup>64</sup> Daniel Sperling, *Commanding the "Be Fruity and Multiply" Directive: Reproductive Ethics, Law, and Policy in Israel*, 19 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 363-71 (2010) (discussing the policy of non-natal practices and the effects on abortions).

<sup>65</sup> Offences Against the Person Act, 1861 § 58 (1861) (explaining the British Law describing limitations of administering drugs or using instruments to procure abortion).

<sup>66</sup> See Penal Law, 5737-1977, § 312-21. Procurement of an abortion constitutes a criminal offense, even if it is performed by a gynecologist on permitting grounds and circumstances. *Id.*

<sup>67</sup> See ISA, 140/8580/3, The Report of the Commission for Natality Problems, Jerusalem, 1966 (Isr.) (Hebrew); see also DELILA AMIR & NIVA SHOSHI, "THE ISRAELI ABORTION LAW" – A GENDERED AND FEMINIST PERSPECTIVE 777, 784-85 (Daphna Barak-Erez et al, eds., 2007) (in Hebrew); *The Report of the Committee Reviewing Restrictions on Artificial Abortions*, 17 BRIUT HATSIBUR, 427 (1974); KANAANEH, *supra* note 39, at 35; Raucher, *supra* note 43; Noya Rimalt, *From Partial, Unjust Accessibility to a Just Legislation*, 39 IUNYE MISHPAT 415, 421 (2016); Steinfeld, *supra* note 39; Gila Stopler, *Biopolitics and Reproductive Justice: Fertility Policies Between Women's Rights and State and Community Interests*, 18 U. PA. J..L. & SOC. CHANGE 169, 188 (2015).

<sup>68</sup> See AMIR & SHOSHI, *supra* note 67, at 785.

<sup>69</sup> See BRIUT HATSIBUR, *supra* note 67.

recommendations of the Gabai Committee were incorporated into the first version of the current law.<sup>70</sup>

According to the 1977 Amendment, while abortions were legally restricted, the law allowed some exemptions, in which an unwanted pregnancy could warrant a planned termination-abortion-if approved by a Termination of Pregnancy Committee.<sup>71</sup> Following the exemptions recommended by the Gabai Committee, the situations in which the committee may approve performing a termination of pregnancy are based on factual circumstances such as: (1) the pregnant woman's age or marital status (under 17, over 40, or out-of-wedlock pregnancy); (2) pregnancy status (the pregnancy is a product of incest, or rape); (3) medical indications of harm to the physical or mental health of the woman or the fetus; and (4) socioeconomic indications.<sup>72</sup> The last exemption relates to situations in which the continuance of the pregnancy is likely to cause grave harm to the woman or her children due to difficult familial or social circumstances in which she finds herself or which prevail in her environment.<sup>73</sup>

While expanding the abortion criteria in 1977 facilitated legal access to some abortions that could not have been secured before, the political compromise resulted in a law that conceptualizes abortion in language devoid of rights-related-discourse.<sup>74</sup> Throughout the debate that took place, the majority of Knesset (Israeli Parliament) members from Jewish religious parties did not reject the legalization of abortion in

<sup>70</sup> See KANAANEH, *supra* note 39, at 35; AMIR & SHOSHI, *supra* note 67, at 784; Raucher, *supra* note 43; Rimalt, *supra* note 67; Steinfeld, *supra* note 39; Stopler, *supra* note 67 (elaborating on abortion regulation in Israel prior to 1977).

<sup>71</sup> See KANAANEH, *supra* note 39, at 35; AMIR & SHOSHI, *supra* note 67, at 784; Raucher, *supra* note 43; Rimalt, *Supra* note 67; Steinfeld, *supra* note 39; Stopler, *supra* note 67.

<sup>72</sup> See Penal Law, 5737-1977, § 312-21.

<sup>73</sup> See Penal Law, 5737-1977, § 312.

<sup>74</sup> See Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J.L. & FEMINISM 327, 330 (2017).

general, since most of the exemptions do not contradict religious values.<sup>75</sup> As a general rule, Jewish Law allows abortion in the first forty days of pregnancy and in cases where the mother's life is in mortal danger.<sup>76</sup> The Israeli position toward abortion differs considerably from most societies, where the rationale of abortion laws is linked to a broader socio-ethical principle, and where the state's position regarding the legitimacy of pregnancy termination and entitlement to privacy is clearly expressed.<sup>77</sup> While the religious parties did not block the law, they influenced its design in light of Jewish values.

Officially, both Sephardi and Ashkenazi, Chief Rabbis, are openly opposed to abortion.<sup>78</sup> However, one of the accepted exemptions addresses pregnancy out of wedlock.<sup>79</sup> This exemption reflects the Orthodox interest in preventing the birth of children conceived through adultery, rather than a health consideration. Such children are perceived as "bastards," or *mamzers*, under Jewish Law.<sup>80</sup> As a consequence, unmarried women were granted immediate permission to terminate a pregnancy, regardless of specific personal, social, or economic circumstances, while married women's reproductive autonomy was limited to termination of pregnancy only based on medical, criminal, and adulterous grounds.<sup>81</sup> The religious parties' main objection focused on the socio-

<sup>75</sup> See Steinfeld, *supra* note 39, at 10 (allowing abortion if one of five exemptions were met).

<sup>76</sup> Eerta Prince-Gibson, *Spurred by a Shas Lawmaker, Abortion Politics Arrives in Israel*, THE TIMES OF ISRAEL (June 19, 2012), <https://www.timesofisrael.com/spurred-by-a-shas-lawmaker-abortion-politics-arrives-in-israel/>.

<sup>77</sup> See Delila Amir & Orly Benjamin, *Defining Encounters: Who are the Women Entitled to Join the Israeli Collective?*, 20 WOMEN'S STUD. INT'L FORUM 639, 642 (1997). See also Rimalt, *supra* note 74, at 339. "Contrary to legal models formulated in other countries during that time, which acknowledge the pregnant woman (and sometimes the fetus) as possessing individual constitutional rights, In Israel, the woman (as well as the fetus) was treated as an object." *Id.*

<sup>78</sup> See Steinfeld, *supra* note 39, at 12 (sending letters in 2009 to local rabbis encouraging them to dissuade women from obtaining abortions).

<sup>79</sup> See *id.* at 8 (reflecting "the Orthodox desire to prevent the birth of children conceived adulterously").

<sup>80</sup> *Id.* (referring to children born out of wedlock).

<sup>81</sup> Rimalt, *supra* note 74, at 349 (showing the disparate treatment between married and unmarried women).

economic clause, which used to allow for abortions due to poor familial or social circumstances.<sup>82</sup> The secular and national justifications minimized objections when the law aligned with religious views, this clause was repealed in 1979.<sup>83</sup> Following this repeal, the formal scope of access to abortions for married women drastically diminished.

During the 1970s, several attempts were made to liberalize abortions by putting women's health and women's rights in center focus.<sup>84</sup> All of them failed.<sup>85</sup> Marcia Freedman, a leader of the Israeli Feminist Movement and a Member of Knesset ("MK"), submitted a liberal, extensive bill permitting abortions based on the inalienable right of every woman to control her own body, according to the woman's exclusive decision until the twelfth week.<sup>86</sup> In addition, some feminists have resisted attempts to render women's wombs as national vessels.<sup>87</sup> In 1984, there was a failed attempt to remove the need of medical committees.<sup>88</sup> The Israeli Supreme Court has also acknowledged, as part of its liberal national view, the freedom of reproduction, in which the state will interfere only in

---

<sup>82</sup> See *id.* at 348 (opposing the socioeconomic clause even after its final approval). The socioeconomic clause is the fifth ground for abortion under the original bill. *Id.* at 334. The fifth ground stated a woman could be granted access to abortion services based on socioeconomic considerations. *Id.* at 344. The concern among ultra-Orthodox parties was allowing married women access to abortions based on socioeconomic considerations, as it was viewed as a threat to the religious norm. *Id.* at 345.

<sup>83</sup> See Rimalt, *supra* note 74, at 348 (citing Penal Law, Amendment No. 8, 5740-1979, SH No. 954 p. 40 (Isr.)) (explaining socioeconomic climate surrounding repeal of clause in 1979).

<sup>84</sup> See Rimalt, *supra* note 74, at n.81 (citing Ziona Peled & Nancy Backman, *Induced Abortions in Israel: Behavioral Research on Applications to the Pregnancy Termination Committees* 5 (1978)) (proposing this claim is backed up by studies).

<sup>85</sup> See *infra* notes 86-91 and accompanying text (explaining different failed attempts to broaden abortion access).

<sup>86</sup> See AMIR & SHOSHI, *supra* note 67, at 792-93 (detailing one attempt to liberalize abortion access).

<sup>87</sup> See Marcia Freedman, *Exile in the Promised Land: A Memoir* 90 (1990) (articulating first-person account of push back against abortion restrictions). See also Rimalt, *supra* note 74, at 334 (outlining development of more restrictive abortion access).

<sup>88</sup> See Steinfeld, *supra* note 39, at 3. See also Rimalt, *supra* note 67, at 339 (discussing the objectification of women and fetuses in Israel).

order to protect the right of an individual or a major public interest.<sup>89</sup> These and other forces of change had a limited impact on the status quo.<sup>90</sup> Due to the prominent role played by American immigrants in the establishment of the Israeli feminist movement, feminism was identified as a foreign import and perceived as alien to Israel's collective values.<sup>91</sup> Additionally, in the early 1970s, women were almost completely absent from decision-making positions in the economic, political, and social spheres.

The relative lack of public controversy and the mildness of the abortion discourse in Israel stems mostly from the large gap between the restrictive language of the law and the practical reality.<sup>92</sup> The law does not allow women to make a genuinely autonomous choice without approval from a committee. Alternatively, the ban on abortion is not definite, and the Israeli abortion policy is generally considered as favorable for women. Although the reproduction narrative implies an anti-abortion policy, abortions are widely accepted in Israel and available for women who wish to take a more liberal stand. According to the Israel Central Bureau of Statistics ("ICBS"), the vast majority of abortion applications are approved, approximately 98.9% of the time.<sup>93</sup> Women do not need the consent of any male, including the father of the fetus, or the approval of parents/guardians.<sup>94</sup> At the same time, members of the Committee for Promotion of

---

<sup>89</sup> See Rimalt, *supra* note 67, at 351 (discussing an ultra-orthodox attempt to rectify the socioeconomic clause's failure to reduce abortions). See e.g., CA 80/413 Plonit v. Ploni, 35(3) PD 57 (Isr.) (illustrating the stance taken by Israeli Supreme Court).

<sup>90</sup> See generally Rimalt, *supra* note 67 (showing Israeli resistance to change).

<sup>91</sup> See Rimalt, *supra* note 74, at 341.

<sup>92</sup> *Id.* at 341, 367.

<sup>93</sup> *Applications for Pregnancy Termination in 2014*, ISRAELI CENT. BUREAU OF STATS., [http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=201605367](http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201605367) (last visited Mar. 15, 2018).

<sup>94</sup> See Rebecca Steinfeld, *Abortions in Israel: Is the Law as Liberal as They Claim?*, HAARETZ.COM (Feb. 13, 2014), <https://www.haaretz.com/jewish/.premium-is-israel-s-abortion-law-truly-liberal-1.5321888> (clarifying that women do not need a partner or guardian's consent to have an abortion).

Women's Status blocked repeated attempts to further restrict abortion.<sup>95</sup> In 2014, the procedure was added to the funded services covered by the NHI for women aged twenty to thirty-three.<sup>96</sup> According to Professor Jonathan Halevy, the head of the Health-Basket Committee and Director of Shaare Zedek Medical Center, the women set to gain from the expanded abortion benefits will be those who need it most – single women, young women unable to ask their parents for the funds, or those pregnant as a result of an extramarital affair, but financially dependent on their husbands.<sup>97</sup> Public funding for abortions strengthens the tendency to view the accessibility to abortions in Israel in positive terms.<sup>98</sup>

A juxtaposition of elements creates a seemingly harmonious picture of the Israeli situation in regard to both pro and non-natal reproductive practices.<sup>99</sup> Both practices are generally regarded as reflecting the Israeli formative narrative that praises reproduction, and at the same time is supporting of liberal values.<sup>100</sup> Access to both pro and non-natal

<sup>95</sup> Steinfeld, *supra* note 39, at 13 (explaining that the restriction in abortion is linked to the decline in total fertility rate).

<sup>96</sup> *Id.* at 14 (promoting legal abortions for women of a certain age group by funding the procedure).

<sup>97</sup> *Id.* (furthering progressive decisions relating to women's health and reproductive rights).

<sup>98</sup> See Debra Kamin, *Israel Abortion Law Now Among World's Most Liberal*, TIMES OF ISRAEL (Jan. 6, 2014), <http://www.timesofisrael.com/israels-abortion-law-now-among-worlds-most-liberal/>.

For many years, public funding was available for medically-necessary abortions to women who were victims of rape and to women under twenty or over forty years of age. *Id.* Women who did not meet these criteria had to pay for their legal abortions even when performed in a public hospital. *Id.* In private hospitals, women have always had to pay for all types of legal abortion. *Id.* In 2014, the age cutoff for publicly funded abortion was amended from twenty to thirty-three. *Id.* Consequently, a greater proportion of pregnancy terminations are now included in the "health basket" that is provided, free of charge, to all Israeli citizens in public hospitals. *Id.* The progressive development of Israel's women's rights caused a few commentators to characterize Israel's abortion law as one of the "world's most liberal." See Kamin, *supra*. See also Yair Rosenberg, *On Israel's Liberal Abortion Policies*, TABLET (June 16, 2015), <http://www.tabletmag.com/scroll/191538/on-israels-liberal-abortion-policies>.

<sup>99</sup> See *supra* notes 1-7 and accompanying text (noting that Israel has created favorable policies that benefit both pro and non-natal reproduction practices).

<sup>100</sup> See *supra* notes 1-7 and accompanying text (highlighting Israeli culture of "be fruitful and multiply," while implementing policies that support liberal views).

practices is generally available.<sup>101</sup> While pro-natal practices are officially encouraged, non-natal practices are officially restricted, though available.<sup>102</sup> Next, we will address the novel discourses that have developed around both types of practices in two arenas, the academic and that of policy making.

## II. THE SECOND-GENERATION DISCOURSE: A SHIFT TOWARDS ALTERNATIVE NARRATIVES:

In recent years, a nuanced shift appears where both pro and non-natal practices are becoming even more socially acceptable. Alternative narratives that oppose the formative reproduction narrative emerge in public discourse, in academic scholarship, and in social activism concerned with the policy-making process. The alternative narratives gradually undermine the hegemonic hold of the formative reproduction narrative.

To delineate the gradual shift, it is useful to distinguish between two generations of discourse. The first-generation scholarship followed the enactment of the NHI Law in 1994, included the coverage of “infertility diagnosis and therapy” and “artificial fertilization.” Second-generation scholars are educated in a world of gender metamorphoses: (1) in 1960 the pill was first approved for use in the United States of America; (2) in the 1970’s many countries approved legal arrangements for abortion; (3) in 1979 women’s reproductive and sexual rights, relevant to both pro and non-natalist practices, have been based in various articles of the Convention on the Elimination of All Forms of Discrimination Against Women; and (4) later recognized by the International Conference on Population and Development (“ICPD”) (1994) as key to women’s health.

---

<sup>101</sup> See *supra* note 93 and accompanying text.

<sup>102</sup> See *supra* note 46 and accompanying text. See also *supra* note 98 and accompanying text. The fact that Israel requires abortions to be approved by medical and social professionals, even though 98% of requests are approved, shows that even though the state will facilitate abortions, it does not grant a woman the freedom to make the decision herself. *Id.*

The second-generation scholarship refers to the discourse in the last ten years, after the lessons of the first-generation discourse were analyzed and implemented in initiatives to change the pro and non-natal regulation.

## 1. Reproductive Practices

This part is the result of a wide review of academic critiques, as well as protocols of the decision-making process addressing pro and non-natal practices. It is maintained that though the hegemonic formative narrative is supported through policy and decisions regarding both pro and non-natal practices in both generations, the second-generation discourse brought about voices that undermined the formative narrative and continuously eroded it.

### i. *First-Generation Discourse – Supporting the Notion of the National Mother:*

The first-generation discourse focused mainly on the positive and negative aspects of the right to assisted reproduction, i.e., the eligibility to use ART and the funding of IVF.<sup>103</sup> On more than one occasion, attempts to restrict access to ART were challenged by consumers in the Israel Supreme Court, regarding several practices such as the use of surrogacy services – prior to the Surrogacy Act<sup>104</sup> – fertilization of eggs and

---

<sup>103</sup> See *supra* note 46 and accompanying text. See also *supra* note 98 and accompanying text. The fact that Israel requires abortions to be approved by medical and social professionals, even though 98% of requests are approved, shows that even though the state will facilitate abortions, it does not grant a woman the freedom to make the decision herself. *Id.*

<sup>104</sup> HCJ 5087/94 Zabro et al v. Minister of Health, unpublished (1995) (Isr.). A number of infertile couples filed a petition challenging the validity of two provisions in the IVF regulations that doctors construed as preventing them from taking part in surrogacy arrangements. *Id.* The Ministry of Health, as respondent, conceded that the challenged provisions were ultra vires—that is, in excess of its statutory authority—in their infringement of fundamental rights, and agreed that they should be voided of legal effect. *Id.*

sperm for the purpose of implantation in a surrogate mother,<sup>105</sup> sperm donations or IVF treatments for single mothers, and state scrutiny.<sup>106</sup> In the 1994 Nahmani case, a couple filed a suit, seeking to perform fertilization in Israel to use it in a surrogacy agreement outside of Israel, due to the difference in cost.<sup>107</sup> Following this case, the Minister of Justice and the Minister of Health appointed an expert body, the Aloni Commission, whose mandate was to examine the legal, social, ethical, and religious issues raised by reproductive practices.<sup>108</sup> The report emphasized the freedom to make private decisions regarding reproduction.<sup>109</sup> The committee concluded that access to fertility treatments should be universal, and that individual rights to "privacy and intimacy in their personal lives" outweigh marital status, which is irrelevant.<sup>110</sup> The conclusions of the commission

---

<sup>105</sup> HCJ 1237/91 Nahmani v. Minister of Health (unpublished) (Isr.). The Nahmanis were seeking to enter a surrogacy agreement outside of Israel, but they wanted to perform the fertilization in Israel because of the significant difference in costs. *Id.* The case ended in an out-of-court settlement in which the Ministry of Health conceded that the IVF regulation upon which it had relied in its refusal would not withstand judicial review, and the couple was allowed to perform the medical fertilization in Israel. *Id.*

<sup>106</sup> See HCJ 998/96, 2078/96, 2444/96 Weitz et al v. Minister of Health (unpublished) (1997) (Isr.). In 1996, the Association for Civil Rights in Israel petitioned the court demanding cancellation of a Ministry regulation, under which single women were subjected to a screening procedure consisting of evaluation by a psychiatrist and a social worker to determine their "fitness" for motherhood, though no such procedure was demanded of married women. *Id.* The Court ruled that discrimination against unmarried women, whether gay or heterosexual, regarding access to artificial insemination or IVF is unlawful, as it restricts their reproductive freedom and right to parenthood. *Id.* The court ordered the Minister of Health to publish new regulations guaranteeing that the procedures be performed "in an equitable manner." *Id.* The NHI Law currently covers infertility therapy for both married and unmarried women. *Id.* See also Waldman, *supra* note 21, at 85 (on state's scrutiny with regards to sperm donation).

<sup>107</sup> HCJ 1237/91 Nahmani v. Minister of Health, *supra* note 105 (estopping husband from opposing wife's fertilization procedure by promissory estoppel).

<sup>108</sup> See Gooldin & Shalev, *supra* note 37, at 159.

<sup>109</sup> See ISRAEL MINISTRY OF JUSTICE, THE REPORT OF THE PUBLIC-PROFESSIONAL COMMISSION IN THE MATTER OF IN VITRO FERTILIZATION 12 (1994) (discussing private decisions regarding reproduction with sociological and ethical considerations).

<sup>110</sup> See *id.* at 17 (explaining the proposal for universal fertility treatments regardless of marital status).

resulted in the legislation of yet another enabling reproductive practice - the Law of Agreements to Carry Embryos ("The Surrogacy Act") in 1996.<sup>111</sup>

In the following years, the public's demand continued to increase, even as one of the health funds proposed to restrict funding to a single child.<sup>112</sup> The expert committee considered the proposal unfounded on medical grounds, since the main obstacle lies in achieving a first pregnancy, and once the infertility barrier is broken, the chances of achieving a second pregnancy improve.<sup>113</sup> Similarly, in 1998, the Minister of Health appointed another committee of medical experts to propose clinical guidelines for public funding of ART within the NHI basic basket of services.<sup>114</sup> The committee mandate was to address risks and benefits of ART, indications and counter-indications for treatment, and matters relating to the frequency of treatment cycles and the age of patients.<sup>115</sup>

As a response to Israeli consumer needs for biological parenthood, politicians, health professionals, and media agents opposed any attempt to restrict funding or eligibility to use treatments. Israeli media continuously published success stories, glorifying the domestic scientific excellence, and the perseverance of individuals who

---

<sup>111</sup> See Surrogacy Agreements Law, 5756-1996, 1577 SH 176 (amended 2010) (Isr.).

<sup>112</sup> See Gooldin & Shalev, *supra* note 37, at 172 n.14 (citing *NHI Ombuds Report 1997*) (discussing the proposition of health funds with limitations to a single child).

<sup>113</sup> See *id.* at 161. Once a woman, struggling with infertility, achieves a first pregnancy, her chances for a second pregnancy improve. *Id.* Thus, creating the debate over whether IVF intended for a second pregnancy is still a treatment for infertility, considering the woman has previously achieved conception. *Id.*

<sup>114</sup> See *id.* at 161-62 (discussing the committee's duty to develop guidelines for public funding of ART).

<sup>115</sup> See *id.* The Committee guidelines included age limits on IVF fertilization and situations, such as three consecutive treatment failures or issues regarding ovarian health, that indicate that any further treatment may be futile. See Gooldin & Shalev, *supra* note 37, at 162. The guidelines also comment on setting a numerical limit on annual treatment cycles. *Id.*

spent years in the quest for parenthood.<sup>116</sup> The common discourse voiced the agony of “barren” women and couples’ despair to start families stating, “it is an elementary natural right,”<sup>117</sup> and women expressing “if I have no child I am compared to an imperfect woman”.<sup>118</sup> The determination of women who “remained optimistic and . . . succeeded in making [their] dream come true” after twenty-five IVF cycles was praised.<sup>119</sup> One of the more drastic responses was from a prominent fertility expert who declared “[t]o create life is no less important than to preserve life in any form, even in the medical aspect . . . the barrenness disease or the infertility disease is no less fatal than cancer.”<sup>120</sup> It was then that a group of consumers formed a lobby, under the title of “[t]he Right to [genetic] Parenthood,” to pressure politicians to reject the proposed de-insuring of IVF.<sup>121</sup>

Politicians responded accordingly, acknowledging the states duty to help.<sup>122</sup> In light of the established status of the formative narrative, parenthood was presented as a

<sup>116</sup> See *id.* at 169; Birenbaum-Carmeli, *supra* note 60, at 599-600; Daphna Birenbaum-Carmeli, Yoram S. Carmeli, & Rina Cohen, *Our First ‘IVF Baby’: Israel and Canada’s Press Coverage of Procreative Technology*, 20 INT’L J. SOCIOLOGY & SOC. POL’Y 1, 4, 8 (2000) (reporting success stories of individuals and their mission to parenthood).

<sup>117</sup> See MOSHE SHLEZINGER, THE COMMITTEE FOR PROMOTION OF WOMEN’S STATUS 11 (2003) (explaining the journey to parenthood and desire to start a family is an “elementary natural right”).

<sup>118</sup> DK (2000) 20 (Isr.) (quoting Prof. Dor, a prominent fertility expert, in the public-professional committee concerning egg donation).

<sup>119</sup> Birenbaum-Carmeli & Dinfeld, *supra* note 39, at 184.

<sup>120</sup> DK (2003) 5 (Isr.) (quoting Prof. Shlomo Mashiach, fertility expert, testifying for The Committee for Promotion of Women’s Status).

<sup>121</sup> See Gooldin & Shalev, *supra* note 37, at 165 (detailing origin of lobby to reject de-insuring IVF).

<sup>122</sup> *Id.* at 162-63.

In 2001, a private member’s bill was placed on the Knesset agenda, proposing that the wording of the Law be changed to the effect that there would be no limits on the number of IVF cycles “for the purpose of delivering two live births,” rather than “two children” in the existing formulation. Since IVF often results in multiple gestation, it is quite likely for a single IVF birth to produce two (or more) children. Thus, the proposed revision was meant to extend the already unparalleled inclusive criteria of the Law to allow women to give birth

sacred right, and IVF as a highly positive, effective, and accessible tool.<sup>123</sup> Assisted reproduction has often been depicted as a dream, a value, a human right, and the embodiment of self-accomplishment.<sup>124</sup> Politicians often expressed empathy and compassion toward infertile women, indicating that the only feasible solution to their difficulties is a medical one, provided as part of the state's duty of NHI. For example, “[p]arenthood is an elementary thing, almost sacred, and a state, a central government, has to do almost anything to enable couples the maximum in order to become parents and bring a girl or a boy to the world.”<sup>125</sup> Excessive use of reproductive practices was perceived as the appropriate response to the need of Israeli patients.<sup>126</sup> Possible *Halachic* violations inherent to reproductive practices were generally ignored.<sup>127</sup>

Yet, it should be noted that even then, responses to IVF in feminist circles were mixed and certain critiques emerged.<sup>128</sup> During the late 1980s and early 1990s, some scholars have addressed the inter-connection between women's and state's interests

---

to even more children. This proposal was warmly supported by the Knesset plenary.

*Id.*

<sup>123</sup> Daphna Birenbaum-Carmeli, *Thirty-Five Years of Assisted Reproductive Technologies in Israel*, 2 REPROD. BIOMEDICINE & SOC'Y ONLINE 16, 16-25 (June 2016) (detailing reaction to limitations on IVF). “In 2014, partly in conjunction with the establishment of the new registry, moderate restrictions were placed on the provision of IVF. *Id.* at 18. Some politicians protested even against these lenient limitations as injurious to women and to Jewish reproduction.” *Id.*

<sup>124</sup> *Id.* at 22 (“[i]n this social climate, biological parenthood has become an embodiment of parent's desire, resourcefulness, and financial fortitude”).

<sup>125</sup> Ahmed Tibi, 134th Gathering of the 15th Parliament (July 19, 2000).

<sup>126</sup> See Waldman, *supra* note 19, at 82 (exemplifying unlimited fertility treatments covered under basic health insurance package).

<sup>127</sup> See *id.* at 84-85 (“Halachic” meaning Jewish laws). For example, Halachic prohibits “hotza'at zera levatalah” (masturbation) and “mamzerut” (children born out of wedlock), both of which are associated with ART techniques. *Id.* at 84.

<sup>128</sup> See Daphna Birenbaum-Carmeli, *supra* note 123, at 20-21 (commenting on homosexual couples' frustrations at being treated as second-class citizens within Israel). Homosexual couples are barred from finding gestational surrogates within Israel. *Id.* at 21 (noting “gay men have no option but to go overseas to fend for themselves . . . ”).

within the Israeli political, social, and cultural forces that led to the current pro-natalist Israeli policy.<sup>129</sup> The critique of the first-generation was dedicated, mainly, to women's and state's interest, the consequential rationing and prioritization, and power relation issues.<sup>130</sup> The prevailing voice was that of radical criticism towards the social convention in a pro-natalist state.<sup>131</sup>

Under the prevailing adamant support for the use of ART, regardless of the number of treatment cycles a woman would undergo,<sup>132</sup> several studies have critically explored the price paid for what they emphasize is an invasive procedure that entails various medical risks.<sup>133</sup> For instance, scholars argue that the culture that embraces women's right to become mothers in Israel encourages women to keep trying to become pregnant, and to go through as many IVF cycles as they can handle, no matter the consequences in terms of work, family, and health.<sup>134</sup> Others shed light on the public

---

<sup>129</sup> See *id.* at 21-22 (considering several state interests advanced by autonomy). For example, “[d]emographically, by endorsing the pro-natalist ‘imperative,’ Israelis contribute of their own free will, to enlarging the country’s Jewish population.” *Id.* at 22. Moreover, the state’s interests in protecting Zionism is advanced by ART that keeps Jewish Israelis in a closer-knit family of biological similarity. *Id.*

<sup>130</sup> See *id.* at 20 (presenting contrasting views among Israeli scholars, including feminists, about assisted reproductive technologies in Israel). Some criticisms of surrogacy were using one person’s body for the benefit of another and its restriction to heterosexual couples. See Birenbaum-Carmeli *supra* note 128 at 20. Homosexual citizens also face difficulty by their government in obtaining cross-border surrogate pregnancies. *Id.* at 21.

<sup>131</sup> See Birenbaum-Carmeli, *supra* note 60, at 600 (describing Feminist International Network of Resistance to Reproductive and Genetic Engineering (“FINRRAGE”)). FINRRAGE led the movement portraying IVF as a means for society to control women, while incidentally harming them in the process. *Id.*

<sup>132</sup> See Shaley, *supra* note 59, at 144.

<sup>133</sup> See e.g., Birenbaum-Carmeli, *supra* note 39, at 187 (observing many patients had inadequate information regarding IVF side effects). Only 16% of women could provide well-informed responses about the risks. *Id.* Over a third of women were untroubled by the possibility of side effects. *Id.* See also Gooldin, *supra* note 27, at 49 (describing risk of life-threatening hyperstimulation syndrome).

<sup>134</sup> See Ekaterina Balabanova & Frida Simonstein, *Assisted Reproduction: A Comparative Review of IVF Policies in Two Pro-Natalist Countries*, 18 HEALTH CARE ANALYSIS 188, 196-197 (2010) (discussing how women feel obligated to continue trying, regardless of disfigurement or harm to relationships).

presentation of successful narratives of IVF treatments as imposing considerable pressure on infertile individuals, in particular on women who may suffer a negative impact on their physical and emotional well-being due to the treatment.<sup>135</sup> On the other hand, studies that belong to the first-generation scholarship maintain that indigent women, lesbians, women who choose not to give birth, and infertile women who voluntarily opted out of treatment at relatively early stages were all given limited opportunities to air their views challenging the dominant family model.<sup>136</sup> Birenbaum-Carmeli and Dimfeld view Israel's unlimited funding of fertility treatments not as a generous state commitment to support its struggling citizens, but as influencing women's subjectivity, beliefs, and private wishes, to fully coincide with those declared and implied in the state policy.<sup>137</sup> Finally, feminist writing emphasizes the fact that reproductive policies are used as a way to control women's bodies.<sup>138</sup> Reproductive practices are gendered and are inherently linked with power relations.<sup>139</sup> Women are often treated to address man's deficiency, whereas the

<sup>135</sup> See Birenbaum-Carmeli, *supra* note 60, at 600 (mentioning the negative effect on the well-being of infertile women due to societal pressures); Gooldin, *supra* note 27, at 50 (discussing the political and social pressure to have kids and extend lineages of Holocaust survivors); SHALEV, *supra* note 59, at 157 (discussing the rates of infertile women).

<sup>136</sup> Birenbaum-Carmeli, *supra* note 60, at 600 (describing mixed opinions to IVF and the discourse that exists).

<sup>137</sup> Birenbaum-Carmeli & Dimfeld, *supra* note 39, at 2, 8 (comparing pro-natalist policies and changing views the public has on them). See also, Birenbaum-Carmeli, *supra* note 56 at 909 (discussing policy and public views of them and the state).

<sup>138</sup> See, Amir & Benjamin, *supra* note 77, at 639 (discussing the control of women's bodies through limitations on abortions); Delila Amir & Orly Biniamin, *Abortion Approval as a Ritual of Symbolic Control*, 3 WOMEN & CRIMINAL JUSTICE 5 (1992) (discussing abortions and women's control of their bodies); See also, Chilman, *Reproduction Norms and Social Control of Women*, THE TRAPPED WOMAN 34 (discussing social norms regarding women's reproductive choices).

<sup>139</sup> See Inhorn & Birenbaum-Carmeli, *supra* note 21, at 178, 180 (describing power relations and differences in ART procedures for men and women); Gooldin & Shalev, *supra* note 37, at 167-68 (noting the existence of power relations between men and women, Jews and Arabs, and others).

man's participation is limited to the provision of sperm. This fact positions a pro-natalist agenda in certain tension with women's interests.<sup>140</sup>

In spite of the presence and vigorousness of these voices, the first-generation discourse can be characterized as mainly academic and less evident in the activist policy making sphere. A wider and deeper range of critique can be identified in the second-generation discourse, which will be described in the next section.

### *ii. Second-Generation Discourse – Alternative Narratives of Motherhood and Reproduction:*

In the second-generation, a change took place.<sup>141</sup> Birenbaum-Carmeli was the first to note the erosion in the narrative when IVF-related tragedies occurred, and women died following treatment.<sup>142</sup> These cases also made headlines and stirred heated public debates on the subject that led the second-generation discourse to challenge reproduction as an absolute value, or at least demand to balance it with competing values.<sup>143</sup>

In the first-generation scholarship, the Israeli media was occasionally criticized for continuously publishing success narratives.<sup>144</sup> However, during the second-generation scholarship, more studies appeared in the media and in professional forums.<sup>145</sup> These studies question the long-term health effects of offspring conceived after fertility

---

<sup>140</sup> SHALEV, *supra* note 59, at 163 (discussing the high number of women seeking IVF treatments).

<sup>141</sup> See Birenbaum-Carmeli, *supra* note 60, at 600 (noting changes in views on IVF).

<sup>142</sup> *Id.* (discussing side effects of IVF treatments).

<sup>143</sup> See Birenbaum-Carmeli, *supra* note 60, at 600 (examining how IVF technology is embedded in changing sociocultural perceptions).

<sup>144</sup> See Kraft, *supra* note 62, at 1 (describing attitudes and perception regarding IVF with Israel's birth rate).

<sup>145</sup> Einat Sagi-Alfassa, *Fertility Treatments: What is the Damage for Babies?*, YNET (Nov. 21, 2014, 06:25), <http://www.ynet.co.il/articles/0,7340,L-4593666,00.html> (citing numerous studies conducted on offspring conceived after fertility treatments).

treatments, such as neurological problems in children,<sup>146</sup> childhood development problems,<sup>147</sup> autism and mental retardation,<sup>148</sup> birth defects,<sup>149</sup> etc. Additionally, the media has shown some interest in critical viewpoints.<sup>150</sup> An Israeli population-based cohort compared the risk for neoplasms among children (up to 18 years) based on mode of conception and found that children conceived after fertility treatments were at an increased risk for pediatric neoplasms.<sup>151</sup> While the correlation with IVF is not established for all health risks studied, there is much value in the investigation of a practice whose potential risks were previously not questioned.<sup>152</sup>

---

<sup>146</sup> Alexandra Sifferlin, *Study Clarifies Link Between Fertility Treatments and Neurological Problems in Kids*, TIME (March 26, 2013), <http://healthland.time.com/2013/03/26/study-clarifies-link-between-fertility-treatments-and-neurological-problems-in-kids/> (reporting longer IFV takes for pregnancy associated with 30% greater risk of mild neurological issues).

<sup>147</sup> Edwina H. Yeung et al., *Examining Infertility Treatment and Early Childhood Development in the Upstate KIDS Study*, 170 JAMA PEDIATRICS 251 (2016) (finding no evidence children's development through age 3 years old associated with infertility treatment).

<sup>148</sup> Marcelle I. Cedars, *In Vitro Fertilization and Risk of Autistic Disorder and Mental Retardation*, 310 JAMA 42 (2013) (finding IVF procedures do not boost autism or mental retardation when account for multiple births).

<sup>149</sup> Sheree L. Boulet et al., *Assisted Reproductive Technology and Birth Defects Among Liveborn Infants in Florida, Massachusetts, and Michigan, 2000-2010*, 170 JAMA PEDIATRICS (2016). Overall, infants conceived using ART showed "prevalence of 1 or more of the selected non-chromosomal defects [at] 58.59 per 10,000 for ART infants vs 47.50 per 10,000 for non-ART infants." *Id.*

<sup>150</sup> Gooldin, *supra* note 27, at 5. "For example, 'Haaretz', a widely read daily newspaper, published several articles, reports and opinion columns that voiced explicit criticism of 'the Israeli obsession' with fertility treatments." *Id.* Nevertheless, the overall public mindset in Israel is overwhelmingly supportive of IVF utilization, and lacks critical perspectives." *Id.*

<sup>151</sup> Tamar Wainstock et al., *Fertility Treatments and Pediatric Neoplasms of the Offspring: Results of a Population-Based Cohort with a Median Follow-Up Of 10 Years*, 216 AM. J. OBSTETRICS & GYNECOLOGY 314 (2017). "A population-based cohort analysis was performed that compared the risk for neoplasms among children (up to the age of 18 years) based on mode of conception" and found that "children conceived after fertility treatments are at an increased risk for pediatric neoplasms." *Id.*

<sup>152</sup> Boulet, *supra* note 149. "Assisted hatching and diagnosis of ovulation disorder were marginally associated with increased risks for non-chromosomal birth defects; however, these associations may be caused by other underlying factors." *Id.* "Variations in birth defect risks according to type of ART procedure have been noted, but findings are inconsistent" which assigns importance to the investigation of such risks. *Id.*

Additionally, in the second-generation, the social acceptance of reproductive practices continues to extend, from IVF treatments – done on the bodies of infertile patients – to the use of supporting practices, such as egg donation and surrogacy, justified by the objective of reproduction at any price.<sup>153</sup> Legal regulation expanded accordingly. In order to contextualize, the next part provides a brief background on the Israeli legal regulation of these practices, and addresses the new challenges imposed by them on the state.

In 2010, a public committee, led by Dr. Mor Yosef, was nominated to address the primary legislative regulation of reproduction and birth-related issues in Israel, whose legislation is currently fragmented and incoherent.<sup>154</sup> The report tries to balance the interests of intended parents with those of future children and assisting women, while emphasizing that reproduction is an intimate matter, which should leave vast room for individual autonomy.<sup>155</sup>

In 2010, Israel also amended its policy regarding egg donation to allow reimbursement for donation from women not undergoing fertility services.<sup>156</sup>

---

<sup>153</sup> Birenbaum-Carmeli, *supra* note 123. “The landscape of transnational egg donation reveals that Israelis endorse both approaches. Some Israelis seek ‘Jewish eggs’ despite their sky-rocketing prices [of] \$30,000–50,000.” *Id.* at 19. “Notably, both local and ‘foreign’ sperm are not state subsidized and prices are constantly increasing.” *Id.* at 18.

<sup>154</sup> MINISTRY OF HEALTH, THE REPORT OF THE PUBLIC COMMITTEE TO ADDRESS THE LEGISLATIVE REGULATION OF REPRODUCTION AND BIRTH IN ISRAEL, 4 (2012). See also Rhona Shuz, *The Developing Right to Parenthood in Israeli*, (2013), <http://weblaw.haifa.ac.il/en/JudgesAcademy/workshop4/Documents/Lecture4.pdf>. “Israel was the first country in the world to regulate surrogacy by legislation.” *Id.* at 206. “Accordingly, it is to be expected that the religious parties will vote against any new law, which expressly allows access to ART to single parents and same-sex couples.” *Id.* at 220. Indeed, the difficulty in passing legislation without the support of these parties is one of the reasons for the fact that many issues relating to ART, such as sperm donation, have been regulated by secondary legislation and administrative guidelines.” *Id.*

<sup>155</sup> *Id.* (Detailing the specifics and regulations around the process of reproductive assistance in Israel.)

<sup>156</sup> Egg Donation Act 57-702010, 2242 SH 520 (Isr.)

Originally, egg donation had been regulated as part of the 1987 legal regulation of the IVF procedure, stating that egg donations in Israel could be obtained only from women undergoing fertility treatments themselves.<sup>157</sup> Since women undergoing treatments could save their fertilized eggs by cryopreservation for later use, they had little interest in donating their eggs to others after the complicated procedure that they had gone through.<sup>158</sup> This situation created a demand for ova.<sup>159</sup> Two committees were nominated to discuss this issue.<sup>160</sup> During the first-generation scholarship, in the year 2000, a public professional committee was nominated, led by Dr. Halperin (hereinafter: the Halperin Committee), to examine the issue of egg donation.<sup>161</sup> The Halperin Committee recommended expanding egg donation to reimbursement, yet the discussion never yielded legislation. Seven years later, in 2007, a special sub-committee of the Labor, Welfare and Health Committee in the *Knesset* (hereinafter: The Knesset Committee) was assigned to discuss a bill jointly submitted by the Ministry of Health and the Ministry of Justice, and to prepare it for the legislative process. The discussion of the Egg Donation Bill in the Knesset Committee was the main stage to suggest re-consideration of the formative narrative. Having two committees, each belonging to a different regulative generation, enables us to investigate the shift in attitude throughout the decision-making process, in light of changing contexts.

---

<sup>157</sup> The Public Health Regulations (In-Vitro Fertilization) -57471987, 5035 KT 978, art. 4 (Isr.).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> The Law of Agreements to Carry Embryos, 5756-1996, 1577 SH 176 (amended 2010) (Isr.).

<sup>161</sup> See Nathan Jeffay, *Israel Creates Law to 'Solve' Infertility Crisis*, THE JEWISH CHRONICLE (Mar. 4, 2010), <https://www.thejc.com/israel-creates-law-to-solve-infertility-crisis-1.14365> (highlighting events surrounding Israeli measures to solve reproductive issues).

Surrogacy is another area where a change is apparent. The State of Israel was the first to regulate surrogacy services in 1996.<sup>162</sup> While this law enables the use of national surrogacy services, it is restricted to heterosexual couples. Same sex couples and single parents are ineligible to choose domestic surrogacy services and often use the cross-border market to purchase these services overseas. Consequently, in the second-generation period the state has been facing a problem with citizens going overseas in order to purchase surrogacy services, and coming back with a child that would have been illegal to obtain in Israel. In 2014, the government proposed a Draft Bill Amending the Law of Agreements to Carry Embryos.<sup>163</sup> The bill suggested equalizing access to domestic surrogacy services for same sex couples and single intended parents, and specifically addressed the challenges of cross-border surrogacy transactions. Many stakeholders took part in the discussions, including women's organizations, surrogacy agencies and others that brought new narratives to the table. The implications of this market have been discussed several times in different contexts and different Knesset committees. Topics addressed include surrogacy in Israel and suggestions for change, surrogacy for same sex couples, the implications of the earthquake in Thailand on Israeli citizens waiting for a passport for their children, and cross-border surrogacy transactions. They occupy a great deal of the discourse regarding reproductive rights in the second-generation.

The discourse regarding supporting practices reflects the two-directions of development. On the one hand, the expansion of the reproduction narrative further widens the already wide availability of reproductive services and on the other hand the

---

<sup>162</sup> See Law of Agreements to Carry Embryos, 5756-1996, 1577 SH 176 (amended 2010) (Isr.) (outlining groundbreaking Israeli surrogacy regulation).

<sup>163</sup> See Draft Bill Amending the Law of Agreements to Carry Embryos (No. 2), 2014, HH 916 (Isr.) (laying out proposed changes to 1996 Israeli surrogacy regulation).

risks to additional, healthy women.<sup>164</sup> First, in the second-generation discourse, although patients seek fertility services in Israel and abroad, opposing narratives challenge the state's intention to further stretch the reproduction narrative to the usage of additional procedures, which risk healthy women. For example, in a discussion regarding reimbursed egg donations from women not undergoing fertility treatments, MK Zehava Gal-On stated, "[t]his [the realization of parenthood] is an important value, but there are conflicting values. When you bring an overall proposal, you need to take into account conflicting values and find the point of balance. This law is unbalanced."<sup>165</sup> The expansion of the policy to commercial provision of reproductive services is also questioned and challenged. The description of a great demand for eggs serves the reproduction narrative and its derivative narrative of a reimbursed egg donation, because it encourages action to reduce the shortage, and thus enforces the natalist narrative. In the second-generation discourse, this narrative faces resistance in the committees, even at the price of contradicting the national ethos. Dr. Ze'ev Aronson declared,

"[t]here is no difference whether it is an egg or a kidney that you bought from her – all in the name of saving human life. On the contrary – a donor of kidney is saving lives when this is only to create a new life. . . . Life threatening risk is minimal, but it exists. Women die of these practices. . . . If it is forbidden to give a kidney, it is forbidden to give an egg. I cannot see how we are sitting here and so righteous ‘it is permitted because of the pressure, because women are suffering.’ Isn’t there pressure on those who want to give the kidney? . . . Because this an egg it is not an organ? Sorry. It’s the highest level of hypocrisy and it goes throughout this whole discussion. You have to at least be honest and say – that’s the way it is, we trade in organs.”<sup>166</sup>

<sup>164</sup> See SHARON BASSAN, WOMEN'S HUMAN RIGHTS AND THE ELIMINATION OF DISCRIMINATION ch.2 (M. Jänterä Jareborg & H. Tigroudja eds., 2016) (explaining duality of discourse surrounding reproductive subjects). Reproductive technologies that involve assisting parties leave great room for women's autonomy when it comes to their decision to commodify their reproductive capacity. *Id.* They may reflect a policy according to which reproduction is something that can be commodified, but at the same time it amplifies the concern for exploitation. *Id.*

<sup>165</sup> See DK (2008) 380, 386-92 (Isr.).

<sup>166</sup> See DK (2002) 469 (Isr.).

Second, ramifications on women are considered differently. Discussions in both egg donation committees show greater awareness to the risks involved. In the first-generation discourse, the main question discussed by the Halperin Committee was whether to permit the risk of healthy women to assist in the reproduction of others or to limit bodily intervention to women being treated themselves.<sup>167</sup> While the professional Halperin Committee succeeded in maintaining the reproduction narrative by downplaying the risks, a similar intent in the Knesset Committee faced resistance. In the second-generation discourse, many have stated that "the risk is minimal, very small,"<sup>168</sup> and the "health risks are much less than in surrogacy."<sup>169</sup> Nonetheless, this narrative was challenged by a few participants. For example, Yali Hashash, the representative of Isha L'Isha Feminist Center,<sup>170</sup> which has taken upon itself to begin a public discourse and engage in issues related to health, pointed out that

"[t]here was no serious consideration of the risk to the donor, and the risks are many. Recent Israeli studies show an association between breast cancer and egg donation. There are problems of ovarian hyper stimulation, which might be the consequence of a conflict of interest for

---

<sup>167</sup> See *The Public Professional Committee Concerning Egg Donation*, Comm. Protocol 5, 4 (June 7, 2000) (Isr.). Dr. Mordechy Halperin stated,

should the society and the Ministry of Health as a regulator allow any medical activity in a person's body, even if he is healthy and even if it endangers him, just because he has an interest and a will to do it? Or do we still think that society should limit medical activity in the body of a healthy person not for the purpose of treating himself?

*Id.*

<sup>168</sup> See *The Labor, Welfare and Health Committee*, Comm. Protocol 197, 16 (Aug. 17, 2000) (Isr.).

<sup>169</sup> See *The Labor, Welfare and Health Committee*, Comm. Protocol 380, 13 (Feb. 18, 2008) (Isr.). Dr. Elenbogen stated, "it is possible today to recruit eggs without any hormonal treatment . . . so all the side effects and the risks you have mentioned – they do not happen anymore." *Id.*

<sup>170</sup> See *Yali Hashash, THE TARRYTOWN MEETINGS*, <http://thetarrytownmeetings.org/profile/yhashash> (last visited Mar. 15, 2018) (describing Yali Hashash and her membership in the Isha L'Isha Feminist Center).

doctors who want to retrieve a large number of oocytes in the absence of supervision."<sup>171</sup>

Subsequently, the call to empirically investigate and monitor potential risks is continuously raised.<sup>172</sup> For example, Nadia Hilu, a member of the Labor, Welfare and Health Committee, said in the discussion addressing the Egg Donation Act, "[w]e are legislating a law that is supposed to address future technological developments. Therefore, monitoring and protecting is required here."<sup>173</sup> Once counter arguments were put on the table, the field responded accordingly. Women in society were hesitant to donate eggs, and the compliance to the law suggests that they doubt the "minimal risk" narrative suggested by policy makers. After the Egg Donation Bill passed in 2010, there were only four women willing to donate.<sup>174</sup> After the reimbursement rate was doubled from 10,000 to 20,000 NIS, there were seventeen more donors who found the payment worth the risk, still not enough to meet the demand.<sup>175</sup>

A similar politico-social development can be seen regarding the implications of surrogacy services. Efrat Levy-Lahad, the head of the genetics department at Shaare Zedek Medical Center, said,

[t]he health risk to a woman by getting pregnant and giving birth is significantly higher than by donating a kidney. . . . Women take this risk with the purpose of bringing a child into the world. . . . People say organ donation is irrelevant because organ donation poses a health risk and pregnancy does not. I say pregnancy is a health hazard, but we see the goal before our eyes and we say, this risk is worth it, which is a legitimate decision. . . . I will tell you frankly, the only difference is that this

<sup>171</sup> See Elly Teman, *Technological Fragmentation and Women's Empowerment: Surrogate Motherhood in Israel*, 29 WOMEN'S STUDIES QUARTERLY, 11, 14 (2001) (discussing the potentially severe health risks during pregnancy via Israel's surrogacy law).

<sup>172</sup> See *Israel: Reproduction and Abortion, Law and Policy*, *supra* note 167, at 7 (describing that written approval from a special committee for extraction by considering the risks).

<sup>173</sup> The Labor, Welfare and Health Committee, Comm. Protocol 380, 14 (Feb. 18, 2008) (Isr.).

<sup>174</sup> The Labor, Welfare and Health Committee, Comm. Protocol 258, 2 (June 25, 2014) (Isr.).

<sup>175</sup> *Id.*

concerns women, whose bodies it is legitimate to exploit in exchange of payment.<sup>176</sup>

Etti Samama, the head of the Medical Technology Policy Division, Ministry of Health, did not let the risks go unnoticed when she claimed,

[w]e all sit here with rose colored glasses and see an amazing, wonderful picture. There are many surrogacy services like that, but this is not the whole picture. I suggest that we take off the glasses. . . . We took upon ourselves a heavy responsibility. They have mentioned here before that we do not do experiments on human beings – this is a supreme lab. We perform experiments all right, and we neither follow up nor monitor.<sup>177</sup>

Once it is established that the end does not justify any means, the door is open for alternative narratives, which were previously silenced, to criticize the extensive use of reproductive practices to deal with infertility. The second-generation discourse enables stakeholders to raise a wide range of new alternative expressions that reflect a multiplicity of identities in the academic sphere and popular media. Yofi Tirosh, an academic researcher, revealed the silenced implications of the practice:

[w]omen do not talk about the side effects. They are grateful for the possibility, so they do not talk about the side effects or the damage, and their doctors are not willing to talk either. Because of the tremendous value of motherhood, each equation of cost-benefit is completely silenced.<sup>178</sup>

Orna Donath, a sociologist, published a book in 2011 called *Taking a Choice: Being Childless in Israel*,<sup>179</sup> and went on to write a doctoral thesis about women who regret having become

<sup>176</sup> The Committee for the Promotion of Women's Status, Comm. Protocol 142, 14-15, 17 (May 30, 2012) (Isr.).

<sup>177</sup> *Id.* at 19-20.

<sup>178</sup> THE LABOR, WELFARE AND HEALTH COMMITTEE, SUB-COMMITTEE FOR FOLLOW UP ON THE EGG DONATION BILL (2008).

<sup>179</sup> See Orna Donath, *TAKING A CHOICE: BEING CHILDLESS IN ISRAEL* (2010) (Hebrew). See also Shoham Smith, *Israelis Who Choose Life Without Children*, HAARETZ (Sept. 1, 2011, 9:55 AM), <http://www.haaretz.com/life/2.205/israelis-who-choose-life-without-children-1.381927>. Israel is a childbirth-promoting country, and individuals who do not wish to be parents are often met with intolerance and perceived as “taking a stand” against society. *Id.* Donath’s study examines the implications for an individual in Israeli society who decides to live a life without children. *Id.*

mothers.<sup>180</sup> The public media also publishes testimonies of women choosing the path of social parenthood through adoption, instead of undergoing endless cycles of fertility treatments.<sup>181</sup>

The criticism addresses both ends of this spectrum. On the one hand, the expansion of accessibility to supporting practices enables the creation of alternative families, such as gay couples, which challenge the hegemonic national narrative and offer an alternative one.<sup>182</sup> On the other hand, the availability of supporting practices has implications not only for patients themselves, but also for assisting female third parties (egg source and surrogates) who are exposed to medical treatment and additional risks in order to help the infertile, and require a more nuanced critical point of view. A similar development between the first and the second-generations can be seen regarding abortions, as explained next.

---

Her interview subjects discuss the strong family and social pressures they face. *Id.* Donath hopes her book will be read not only by others who feel condemned by their choice not to be parents, but also by those who feel that a life without children is “worthy of condemnation”. *Id.*

<sup>180</sup> See generally ORNA DONATH, REGRETTING MOTHERHOOD (2017) (Hebrew).

<sup>181</sup> See Nirit Tsuk, *I Have Decided to Stop Fertility Treatments and Adopt*, YNET (May 8, 2017), <http://www.ynet.co.il/articles/0,7340,L-4958874,00.html>. Journalist Aviva Rosen almost died attempting to conceive through fertilization efforts, and after numerous attempts, she decided to adopt. *Id.* She describes Israeli society as “very receptive” to adoption, but acknowledges that the option of adoption from abroad is more difficult because most of the countries are “closed”. *Id.*

<sup>182</sup> See, e.g., MK NITZAN HOROVITZ AT THE COMMITTEE FOR INTERIOR AND ENVIRONMENTAL AFFAIRS, 198, HAN. 26 (2014) (discussing policy discourse regarding surrogacy). Every person has a right to raise a family and have children, even same sex couples. *Id.* See also Iddo Vulkan, Labor Party, LGTB Circle at the Special Committee for Application of Governmental Information Accessibility and Principles of Public Transparency p. 5 (Committee’s protocol 25, Feb. 23, 2016). “Gay couples, LGTB couples, all deserve a family, the right to parenthood.” *Id.* Especially interesting are the words of Heidi Moses, an ultra-Orthodox woman and member director in the LGTB association, at the Committee for Public Inquiries, regarding the access to surrogacy services. *Id.* Moses states, “[a]s someone who comes from the ultra-Orthodox world, I have learned that there is a commandment to ‘be fruitful and multiply and fill the earth.’ We must see that this *mitzva* will take place and we stop with the burden on the gay community and on gay men in particular.” *Id.*

## 2. Abortions

### i. *First-Generation Discourse – An Equilibrium Between Demography and Welfare:*

Scholars tend to see the Israeli abortion law as echoing either religious or national narratives, or responding to the political agenda and to national socio-economic needs through the control over and implication for women's bodies and lives. The first-generation research on Israeli abortion regulation reverberates both.

Amir and Shoshi argue that the Israeli abortion regulation case reflects a constant contradiction between the demographic and potential welfare considerations that a restrictive policy might cause.<sup>183</sup> According to them, different weight is given to each consideration, at different times or towards different populations. Raucher, who analyzed the Knesset surrounding the 1960s-70s legalization of abortion in Israel, shows that those who were in favor of the abortion law in 1977, including the socio-economic clause, explicitly mentioned their desire to limit the amount of people dependent on the state for financial support.<sup>184</sup> This tension led to qualitative interests, according to which the national/religious/demographic concerns are combined with prevalent ideas regarding welfare and public interest, as many scholars agree.<sup>185</sup> The law aimed to prevent "unnecessary abortions."<sup>186</sup> The socio-economic context influenced policy makers to

---

<sup>183</sup> AMIR & SHOSHI, *supra* note 70, at 787.

<sup>184</sup> Raucher, *supra* note 43, at 151. See also, Rimalt, *supra* note 74, at 350. MKs from the conservative Likud Party, who were ambivalent about the socio-economic clause to begin with (due to national-demographic concerns), sympathized with the religious demand to abolish this clause altogether. *Id.*

<sup>185</sup> Steinfeld, *supra* note 39, at 3 (explaining the qualitative interest's relative to the welfare and public interest).

<sup>186</sup> Amir & Benjamin, *supra* note 77, at 644 (describing the intent of the law to avoid unwanted pregnancies); AMIR & SHOSHI, *supra* note 68, at 786. (discussing Goodlin's intersecting discourses that explain Israeli reproductive policy).

suggest methods of curtailing the birth rate among certain populations while encouraging other Jewish women to reproduce.<sup>187</sup> Anti-natalism was promoted amongst poor Jewish *Mizrahi* immigrants from the Middle East and North Africa,<sup>188</sup> and pro-natalism for middle class families originating in Europe.<sup>189</sup>

Pregnant women's interests were not given separate considerations, nor did the discussion address empirical facts regarding the practice. However, implications on women were addressed in the first-generation discourse through the practice itself.<sup>190</sup> Upon arrival to the hospital, the woman is referred by the committee secretary to an interview with the committee's social worker, where the process is explained to her in order for her to explore all alternative solutions. The woman may consult with the social worker regarding her decision to terminate the pregnancy and regarding additional problems associated with the situation. The authorizing committee consists of three members – an obstetrics and gynecology specialist, an additional medical specialist and a social worker, one of whom must be a woman. The applicant is entitled to speak with a physician who will explain the process of pregnancy termination, the prospects and risks involved. If the reason for requesting the termination of the pregnancy is fear of congenital defects or fear for her health, the woman may consult with additional experts or involve her personal physician. The committee's decision is usually given immediately, specifying the clause of the law by which the termination of pregnancy was approved.

---

<sup>187</sup> Raucher, *supra* note 43, at 149 (explaining the purpose to prevent unnecessary abortions by encouraging reproduction amongst only certain Jewish populations).

<sup>188</sup> Steinfeld, *supra* note 39, at 4-5 (discussing the rejection of natalism amongst poor immigrants from the Middle East and North Africa).

<sup>189</sup> *Id.* at 8 n.58 (discussing the acceptance of natalism from the middle class originating in Europe).

<sup>190</sup> *Planned Termination of Pregnancy (Abortion)*, STATE OF ISRAEL MINISTRY OF HEALTH, <https://www.health.gov.il/English/Topics/Pregnancy/Abortion/Pages/default.aspx> (last visited Mar. 15, 2018).

After the committee's approval, a date is set. Usually, termination of the pregnancy will be performed at the same hospital/clinic where the approval was given, or at another medical institution that is authorized to perform pregnancy terminations. At any stage, the woman may consult again with the physicians and/or with the social worker and/or with any other party; she may reconsider her decision, and decide not to terminate the pregnancy. She will often be offered psychological aid before and after the abortion.<sup>191</sup>

The practice is essential to the understanding of social implications of the legal order, as the first-generation scholarship exposed a silenced sub-practice surrounding it that evoked animated critiques. Amir and Benjamin, for example, maintained that many of the social workers perceive their role primarily in terms of collecting information from the abortion candidate.<sup>192</sup> Women are asked, in addition to their physical condition and the circumstances of their pregnancy, about their sexual behavior, relationships with the men involved in the pregnancy, their commitment to motherhood, and the extent to which they are determined to terminate their pregnancy. A committee member not only authorizes legal abortions, but also classifies "legitimate" ones. Thus, the four approval criteria reflect the normative expectations in the Israeli Jewish collective. Women should only choose motherhood under certain conditions, such as expectation of healthy and normal children, born to a young, functioning, legally married woman.<sup>193</sup> Additionally, the failure to use medical contraceptives, another non-natal practice, creates a situation in which women that are defined by the committees as marginal (single and childless) are in need of re-education.<sup>194</sup> Allegedly, as accessibility of contraceptives expands women's

---

<sup>191</sup> Larissa I. Remennick & Rosie Segal, *Socio-Cultural Context and Women's Experiences of Abortion: Israeli Women and Russian Immigrants Compared*, 3 CULTURE, HEALTH & SEXUALITY 49, 52 (2001).

<sup>192</sup> Amir & Benjamin, *supra* note 77, at 644.

<sup>193</sup> *Id.* at 642.

<sup>194</sup> *Id.* at 648.

options in controlling their fertility should improve. Yet, although, it has expanded during those years, paradoxically, the abortion mechanism has also created another area of control regarding the sexual and reproductive behavior of women.<sup>195</sup>

The prohibitive legal arrangement is inherently connected to the extent of control that the government has over women's bodies and its ability to control the moral order. Within the abortion law, the State was entitled with monitoring privileges over women's behavior. The political establishment calls for classification in order to approve or deny a woman's application, therefore requiring a mechanism to enforce the prohibition and to monitor the body and behavior of the pregnant woman. The mechanism of committees grants to the government's agents (doctors in this case) great power over the pregnant women regarding what is and isn't appropriate or normative. It even maintains the control of the State with regards to non-medical issues, such as the technical criteria (e.g. age, marital status, etc.), which exempt the need of a committee.<sup>196</sup> This case-by-case policy establishes norms of control over individual freedoms and private choices without public discussion. While it leaves room for flexibility, it also increases uncertainty and bureaucracy, and imposes limitation on individual rights.<sup>197</sup> Ultimately, it is the doctors who decide who can and cannot terminate their pregnancy.

The legal restrictions on access to abortion mean that women in Israel lack full reproductive autonomy and control over intimate decisions connected to their bodies.<sup>198</sup>

<sup>195</sup> See CONSTANCE NATHANSON, THE CONTRACEPTIVE ETHOS 183 (Stuart E Spicker et al eds., 1987).

<sup>196</sup> Stopler, *supra* note 70, at 190 (being unable to determine a woman is financially unable to care for a child).

<sup>197</sup> SHALEV, *supra* note 59, at 153.

<sup>198</sup> See Steinfeld, *supra* note 39, at 17. "Women in Israel do not have any reproductive autonomy—the state robbed them of this right the moment it made abortions an illegal activity." *Id.* (quoting Gal-On).

All strands within feminist theory seem to agree that the lack of reproductive choice is a central means for the oppression of women.<sup>199</sup> Amir and Shoshi criticize the law not only for not recognizing a woman's freedom to decide on her own, but also for excluding the procedure from her private intimate sphere and obligating her to appear in front of a public committee.<sup>200</sup> Women's dependency in this mechanism affects their ability to resist and to change the existing order. In the policy sphere, first-generation women were careful not to criticize a mechanism that appeared to be doing everything to support their interests in the framework of the law. For many years, the attitude of those opposing the abortion legislation reflected the old saying, "If it ain't broke – don't fix it." With the understanding that the abortion situation in Israel could be much worse, there has been a compromise over the fight for a more liberal approach.

### *ii. Second-Generation Discourse – Women's Interests and Resistance to the Formative Narrative:*

As mentioned above, first-generation criticism refers to the absence of women's rights to their body, choice, or privacy from scrutiny of their sexual behavior.<sup>201</sup> Analyzing the feminist struggle to amend the abortion law, Rimalt suggests that in light of the general marginality of the Israeli feminist movement, individual rights-based arguments for reproductive freedoms had little resonance in the public discourse of the 1977 reform of the law; fetal viability and personhood were absent as well from the Israeli discourse

---

<sup>199</sup> JACQUELINE PORTUGESE, FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER, AND NATION 9 (1998) (arguing a direct relation between reproductive rights and oppression); SHALEV, *supra* note 59, at 152; Stopler, *supra* note 70, at 181.

<sup>200</sup> Amir, *supra* note 68, at 779. See also Nitzan Rimon-Zarfaty & Alan Jotkowitz, *The Israeli Abortion Committees' Process of Decision Making: An Ethical Analysis*, 38 J. MED. ETHICS 26, 26 (Dec. 14, 2011). Amir pragmatically suggesting that it may be necessary for the committee to be required to approve what is typically a private decision, in order to placate religious and other opposition to abortion. *Id.*

<sup>201</sup> Amir, *supra* note 68, at 642; Balabanova, *supra* note 134, at 200; Steinfeld, *supra* note 39, at 13.

surrounding abortion.<sup>202</sup> According to her, the socio-economic clause was considered by the bill's sponsors to be a significant expansion of women's legal access to abortion and, therefore, a reasonable substitute for rights-talk.<sup>203</sup> In the second-generation discourse, while critiques address the same topics, the increased acknowledgement of women's rights and the change in policies concerning women internationally advance a rights-based discourse with women's (and foetus') interests at its center. Scholars and activists advocate women's autonomy, arguing that under the current regime, free choice is merely an illusion. In this spirit, Prince-Gibson maintains that women pursuing abortion are most likely holding liberal views regarding this matter, yet Israeli women are prevented from acting as independent moral agents. "By making abortion illegal, the patriarchy maintains its hold over women's bodies, but by making it available, it maintains a progressive, liberal facade."<sup>204</sup>

Similar to the discussion concerning reproductive practices, the second-generation discourse regarding abortion challenges the formative narrative and the mechanism to enforce it. The legal mechanism is being challenged for humiliating women and infringing upon their rights. Hashiloni-Dolev regards the process in front of the committee as a "ceremony of shame and guilt," in which women have to "confess their sins or explain very intimate details about themselves to total strangers."<sup>205</sup> The demand that women expose the most intimate details of their life before a committee of strangers is perceived as a severe infringement of women's fundamental right over their bodies as

<sup>202</sup> See Rimalt, *supra* note 70, at 445; Rimalt, *supra* note 74, at 329.

<sup>203</sup> See Rimalt, *supra* note 74, at 341.

<sup>204</sup> Prince-Gibson, *supra* note 76 (quoting Tal Tamir, the director general of Women and Their Bodies, a feminist health organization); Steinfeld, *supra* note 39, at 17 n.145.

<sup>205</sup> YAEL HASHILONI-DOLEV, A LIFE (UN)WORTHY OF LIVING: REPRODUCTIVE GENETICS IN ISRAEL AND GERMANY 98 (2007).

well as their fundamental rights to liberty, dignity, privacy, autonomy, and equality.<sup>206</sup> Nurit Tsur, the executive director of the Israel Women's Network, argues, "[t]here should not be a committee at all. A woman who wants to have an abortion should go to her doctor and then decide what to do. It is her life, her health and her body; therefore, it should be solely her decision."<sup>207</sup>

Empirical facts and women's interests that were insufficiently addressed in the first-generation occupy a greater share of the discussion. The second-generation discourse emphasizes informal practices that are consequently encouraged by the Israeli pseudo liberal abortion policy. Rimalt argues that a large amount of the abortions in Israel are not performed according to the law, but bypass it externally and internally. The external way leads to illegal abortions that require women to jeopardize their health and assume a financial cost considerably higher than the customary cost of pregnancy termination procedures in the public health system.<sup>208</sup> Scholars show how, due to the humiliation involved in this process, some women prefer to avoid the formal procedure and seek illegal abortions in the private medical market.<sup>209</sup> It is estimated that half of all annual abortions (approximately 40,000) are illegal, costing NIS 2,099–2,912 (\$600–830), depending on whether the pregnancy requires surgical or medical termination.<sup>210</sup>

---

<sup>206</sup> See Stopler, *supra* note 70, at 191.

<sup>207</sup> Steinfeld, *supra* note 39, at 17.

<sup>208</sup> See Rimalt, *supra* note 70, at 463 (explaining that illegal abortions tend to be riskier and more costly than legal regulated abortions).

<sup>209</sup> See Remennick & Segal, *supra* note 191, at 52 (pointing out that many women seek illicit abortions given the arduous requirements of the application). *See also* The Committee for Promotion of Women's Status, 41 Comm. Protocol 31, 3-6, (Jan. 12, 2010) (Isr.) (stating that the Committee used also used the word "humiliating" in the same context).

<sup>210</sup> See Rimalt, *supra* note 74, at 369 (estimating half of abortions are illegal); Steinfeld, *supra* note 39, at 15 (explaining the impact of Israeli policy on abortion as well as the cost and effect). *See also* Renee Ghert-Zand, *Black Market Abortions in Israel*, FORWARD - THE SISTERHOOD, (Feb. 5, 2013), <http://forward.com/sisterhood/170506/black-market-abortions-in-israel/> (discussing the difficulties and embarrassment of legally obtaining an abortion); Shosh Mula, *The Underground of*

The internal route refers to the committee's effort to honor a woman's right to choose, within the legal framework, and to support the needs of the individual patient, invoking the ethical duty to heal.<sup>211</sup> The committee's ethical considerations are both the context and the relational network (such as the family's strength and capacity), and influenced by the ethical principles of autonomy.<sup>212</sup> Rimalt shows how statistically, after the repeal of the socio-economic clause, many abortions were approved based on the mental harm clause. Subsequently, the Minister of Health's directive limited the committees' discretion regarding the mental health ground and required a clinical diagnosis of a recognized psychiatric disorder for abortion approval.<sup>213</sup> Significant decline in the mental harm grounds for abortions caused a parallel increase in the out-of-wedlock grounds for abortion. Suspicions began to rise as to whether all those pregnancies were truly the result of adultery, or whether women compromised their dignity and lied to the committee in order to qualify for a legal abortion. Within this culture of lies, women's access to abortion depends on the discretion of the abortion committees that have the sole power to decide whether to accommodate or deny the reproductive needs of women.<sup>214</sup> Being falsely considered as suffering from mental harm or as an adulterer is equally degrading and potentially harmful and can haunt women long after the abortion. For example, women may later be disadvantaged if they seek to obtain a divorce as a self-

---

*Black Abortions*, YEDIOT AHRONOT (Feb. 1, 2013) (exploring the reasons why some women opt for illegal abortions).

<sup>211</sup> Rimalt, *supra* note 70, at 465 (explaining the history of women's productive rights in Israel).

<sup>212</sup> See Rimon-Zarfaty, *supra* note 200, at 26 (understanding the ethical implications that committee members and advisors face in abortion approval). "This paper is aimed to determined which ethical methodologies are used by committee members and advisors as they face the dilemma of abortion approval due to mild to moderate possible embryopathy." *Id.*

<sup>213</sup> See Rimalt, *supra* note 67, at 479 (requiring women that is seeking an abortion to undergo mental health examination before the procedure).

<sup>214</sup> *Id.* at 369.

confessed adulterer.<sup>215</sup> While the ability of a prohibitive arrangement to control the reality is limited, the illegal practices violate women's rights for dignity, autonomy, and equality, and make them liars or outlaws.

Qualitative scrutiny is also addressed in the second-generation scholarship, manifested through a rights-based prism. If in the first-generation non-reproductive practices were used to discourage certain families, the second-generation goes one step further and addresses qualitative screening based on personal genetic qualities rather than on family background. Modern reproductive screening practices are more often used to eliminate specific fetuses with undesirable features. These are not, strictly speaking, abortions, but the practice has been referred to as negative eugenics based on similar "qualitative" interests, striving for a perfect child to validate the Israeli idealization of the "chosen body," emanating from Zionist ideology.<sup>216</sup>

In this spirit, the policy discourse on abortion in the second-generation scholarship has been raised as a response to repeated initiatives to change current legislation and demonstrates signs of change. Due to the erosion of the formative narrative and the political strengthening of religious parties trying to impose restrictions, the delicate status quo of abortions is compromised. Behind the scenes, the anti-abortion organization *Efrat*, the Committee for the Rescue of Israel's Babies, established in 1962 to increase the Jewish birthrate in Israel – actively opposes abortion, based on demographic grounds.<sup>217</sup> In 2012, huge *Efrat* billboards played up Israelis' demographic

---

<sup>215</sup> Steinfeld *supra* note 39 at 16; see Rimalt, *supra* note 74 at 368.

<sup>216</sup> See AVIAD E. RAZ & NITZAN RIMON-ZARFATY, KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS 202, 203 (Daphna Birenbaum-Carmeli & Yoram S. Carmeli eds., 2010).

<sup>217</sup> *Mission Statement*, COMMITTEE FOR THE RESCUE OF ISRAEL'S BABIES - EFRAT, <http://www.efrat.org.il/english/about/> (last visited Mar. 15, 2018).

fears, one reading, “[u]ltimately, the birth rate will determine our existence as a Jewish state,”<sup>218</sup> and the organization’s messages still constantly appear in public areas. The organization’s activities drew the attention of several *Knesset* members who raised discussions on abortion in the parliament’s committees. These discussions reflect the second-generation’s scholarship and show that the new attitude expressed in the discourse permeate the public and its elected officials’ opinion. Evident in them all, is a clear effort to focus the discussion on women’s rights.

Few discussions were held in the second-generation addressing the abortion situation among adolescents; the committee, nominated by the rabbinical institute, was tasked to reduce the number of abortions, to and challenge the mechanism of the termination of pregnancies. In 2007, a special meeting of the Committee for Promotion of Women’s Status discussed the situation among the youth following the data of the abortion report in Israel.<sup>219</sup> The main concern in this meeting was the connection between abortions and accessibility to contraceptives, as well as a black market of unsafe abortions as a result of a restrictive policy. In the conclusion of the meeting, the Chair, MK Gideon Saar, repeated the national narrative, “[i]t seems to me that there is no one, regardless of the balance of values he reaches, who does not want or does not think it is good that there are fewer abortions or more births. I did not hear any disagreements about that either.”<sup>220</sup> He mentions that the balancing of values may raise disagreement, and that the power of legislation on the matter is limited. In addition, the need for sexual education and contraceptives was mentioned as a way to reduce unwanted pregnancies.

<sup>218</sup> Steinfeld, *supra* note 39 at 12; see Judy Maltz, *After Teen Tragedy, Israeli Abortions Get Surprise Spotlight*, HAARETZ (Oct. 26, 2012, 8:51 AM), <http://www.haaretz.com/israel-news/after-teen-tragedy-israeli-abortions-get-surprise-spotlight.premium-1.472436>.

<sup>219</sup> Committee for the Status of Women and Gender Equality Comm. Protocol 1 (Dec. 25, 2007), [https://www.knesset.gov.il/committees/eng/committee\\_eng.asp?c\\_id=11](https://www.knesset.gov.il/committees/eng/committee_eng.asp?c_id=11).

<sup>220</sup> See *id.* at 15.

The media in the second-generation also addresses the issue of contraceptives, challenging the design of contraceptives as female based. A recent article questioned whether scientific difficulties or gender or commercial interests are those delaying the development of a contraceptive pill for men.<sup>221</sup> Although aspects of female subordination may be built into the practice, transformations are affecting the realm of women's rights and the implementation of reproductive technologies.<sup>222</sup>

In 2010, following data presented by the Ministry of Health, the Rabbinical Council of the Chief Rabbinate decided to nominate a special committee to reduce the number of abortions.<sup>223</sup> As a response, the Knesset Committee for Promotion of Women's Status held a special meeting.<sup>224</sup> Empirics occupy a greater share of this discussion. Nirit Pesach, Director of the Department of Social Work in the Ministry of Health, claimed that the committees' high approval rate of applications for abortions stems from the fact that many women were advised to discontinue the process when their request would not qualify for approval by law, in order to avoid payment. As a result,

---

<sup>221</sup> See Iddo Efrati, *What is Stopping the Development of a Birth Control Pill for Men?*, HAARETZ (Nov. 4, 2016), <http://www.haaretz.co.il/news/health/.premium-1.3112274>.

<sup>222</sup> See Birenbaum-Carmeli, *supra* note 60, at 592.

<sup>223</sup> See Neta Sela, *Chief Rabbinate: Abortion Hinders Redemption*, 18 YNET, 19 (Dec. 23, 2007), <https://www.ynetnews.com/articles/0,7340,L-3485939,00.html> (discussing steps taken by Israel's Chief Rabbinate to reduce the number of abortions in Israel).

<sup>224</sup> See THE COMMITTEE FOR PROMOTION OF WOMEN'S STATUS, Comm. Protocol 31, 19-25 (2010). Rabbi Yehuda Derei, the chair of the Rabbinate's Committee for Encouragement of Birth and Prevention of Abortions expressed the firm position of the rabbinate institution:

[T]he Torah says explicitly [that] abortion is murder. . . . We see the phenomenon of abortion as a real epidemic and there is nothing more important on the public agenda than encouraging birth and preventing abortions. . . . We want the legal committees to be more stringent in approving abortion; we want the State of Israel to enforce the law and prevent the offense by carrying out illegal abortions and we want to increase awareness among women about the significance of abortion.

these women may turn to illegal abortions.<sup>225</sup> This insight shed a different light on the ninety-eight percent approval rates in the committees.

The discussions in these meetings opposed many of the critiques raised in the first-generation scholarship. First, the formative narrative, according to which women's reproduction should advance the national ethos, is challenged. In the summary of both meetings, in 2007 and 2010, the moral compass is clearly set, as we have seen in MK Gideon Saar's words (*supra*). By 2010, although MK Tzipi Hotovely, the chair of the committee, restated the same national narrative, "there is no doubt, we are all pro the encouragement of natality,"<sup>226</sup> alternative voices are heard. For example, MK Orit Zoaretz declared "a woman's womb is not the solution for the demographic problems in the State of Israel."<sup>227</sup> Idit Milman, the legal counsel of the Israel Women's Network, said, "[i]t is impossible to come to a woman and tell her '[y]ou cannot have an abortion, because it is not good for the demographics."<sup>228</sup>

Second, both in 2010 and in 2016, participants showed resistance to the involvement of religious institutions in the decisions over women's bodies and lives, which are part of women's private considerations. In 2010, in light of the initiative of the Rabbinate to address the issue of abortions, MK Nitzan Horvitz argued,

[t]he Chief Rabbinate of Israel, which is a state body that receives its budget from the State of Israel, is not supposed to deal with the issue of termination of pregnancy . . . I think this is a perverse use, turning a woman's body and her private life into a political horse.<sup>229</sup>

---

<sup>225</sup> See *id.* at 9.

<sup>226</sup> THE COMMITTEE FOR PROMOTION OF WOMEN'S STATUS, Comm. protocol 31, 41 (Jan. 12, 2010).

<sup>227</sup> *Id.* at 44.

<sup>228</sup> *Id.* at 42-43.

<sup>229</sup> *Id.* at 3.

In 2016, two bills were put forth in parliament concerning the same issue. MK Chagit Yiehye and MK Yehuda Glick each suggested to add a religious official to the abortion committees.<sup>230</sup> Similarly, in 2016, participants objected to the idea of a religious official as part of the process based on professional considerations. MK Aliza Lavi criticized the idea of further religious restrictions on a bureaucratic committee that is already burdening women: "[t]o come and demand a religion official on the committee? We're going backwards."<sup>231</sup> MK Issawi Frig protested, "the religion official comes to humiliate the woman."<sup>232</sup> It was acknowledged that religious women seeking advice of a religious official do it prior to their application to the committee. Meaning, women who apply for abortion are those who have already made up their mind.<sup>233</sup>

Third, in all discussions a woman's choice was brought to the center of the discourse. MK Orit Zoaretz declared that "[t]he discussion is about women's consideration. This is our starting point, and not the Halachic one."<sup>234</sup> MK Gal-On said, "[t]he debate is not just about a religion official. The state actually monitors women's

---

<sup>230</sup> Yaarit Trebelsi, *Abortion Law – A Review*, MISHPATI (Feb. 27, 2017), <https://www.mishpati.co.il/article/13086>.

<sup>231</sup> MK Revital Swid in a Discussion Regarding Adding A Religious Entity To The Pregnancy Termination Committees: "You Are Damaging Women, Get Out of Our Uterus.", ON THE KNESSET WATCH (Jan. 2, 2017), <http://www.mishmar.org.il/page.php?p=18322>.

<sup>232</sup> *Id.* (explaining how women's reproductive choices already constrained by economic limitations). In other words, women's autonomy (including both Arab and Israeli women) already tends to be compromised by their economic positions compared to men, so that further restricting their freedom by adding a male decision-maker is unacceptable. *Id.*

<sup>233</sup> Trabelsi, *supra* note 230 (describing proposed law to reduce restrictions on obtaining abortions).

<sup>234</sup> THE COMMITTEE FOR PROMOTION OF WOMEN'S STATUS, Comm. Protocol 4, 31 (2010) (Isr.). The Committee for the Advancement of the Status of Women is a standing committee under the Knesset. See *The Work of the Knesset: Responsibilities, Roles, and Authorities*. THE KNESSET PARLIAMENT (2017), [https://www.knesset.gov.il/birthday/eng/KnessetWork\\_eng.htm](https://www.knesset.gov.il/birthday/eng/KnessetWork_eng.htm). A standing committee discusses bills after they have passed their initial stage of approval, discusses recommendations, and may consult with experts on the issue being discussed. *Id.*

uteri. The issue has become a public and political issue, not a private issue."<sup>235</sup> MK Ayelet Nahmias Verbin said, "[l]et us decide what we want. The choice will not be taken from us anymore."<sup>236</sup> MK Revital Swid declared "[y]ou are damaging women, get out of our uterus."<sup>237</sup> MK Aida Touma Suleiman stated,

"[o]nly a woman has a right to her body and to decide what she does with her body. It is time to remove the womb of all of us women from the nationalistic or religious or patriarchal struggle . . . . This house has not yet reached a stage that it will give women the option to control their bodies."<sup>238</sup>

The conclusions of the 2017 committee were that a woman has a sole right over her body and the right to decide what to do with it.<sup>239</sup> It was suggested to consider a regulative reform that is not dependent on abortion committees, at least not in the first trimester of pregnancy.

Resistance bears fruit. In the last several parliaments, bills were submitted calling to bring back the socio-economic clause in order to advance women's right over their bodies and facilitate family planning.<sup>240</sup> In the current *Knesset* seat alone, five private bills were submitted, suggesting to amend the abortion law.<sup>241</sup> During a hearing on abolishing

---

<sup>235</sup> MK Revital Suid, *supra* note 231 (opposing proposed bill requiring religious member to provide input into abortion decisions).

<sup>236</sup> *Id.* MK Ayelet Nahmias Verbin also explained the problem with having two men, who naturally never experienced the prospect of pregnancy, make private decisions that impacted what happened to a pregnant woman. *Id.*

<sup>237</sup> *Id.* (expressing additional outrage about men deciding what happens to women's bodies).

<sup>238</sup> *Id.*

<sup>239</sup> THE COMMITTEE FOR PROMOTION OF WOMEN'S STATUS (Jan. 9, 2017) (discussing the issue of requiring a member of the clergy to sit on the committee).

<sup>240</sup> See, e.g., Amendment to the Chief Rabbinate of Israel Law - Eligibility for Marriage Law, 5772-2012, H.H., No. 16, p. 4133 (Isr.); Appointment of the City Comptroller and his Salary, 5774-2014, H.H., No. 18, p. 891 (Isr.); Penal Code Amendment - The Restoration of the Social Clause, 5774-2014, H.H., No. 19, p. 93 (Isr.).

<sup>241</sup> Termination of Pregnancy Law, 5777-2017, H.H., No. 20, p. 3880 (Isr.); Penal Law Amendment - Restoring the Social Clause as Grounds for Termination of Pregnancy, 5775-2015, H.H., No. 20, p. 2475 (Isr.); The Law of Termination of Pregnancy, 5775-2015, H.H., No. 20, p. 2065 (Isr.); National Health Insurance Law, 5775-2015, H.H., No. 20, p. 1287 (Isr.); Basic Law:

the termination committees, organized by the Knesset Committee for Promotion of Women's Status in February 2014,<sup>242</sup> consensus was reached that until the 12th week, there is no need in a committee.<sup>243</sup> In 2014 even Dr. Eli Schussheim, the Director of *Efrat*, has argued in favor of abolishing the committees. At the same time, there are still efforts to formally change the regulation of abortion.<sup>244</sup>

### III. CONCLUSION

The paper has shown the power of the formative narrative, which frames the cultural perception regarding reproduction, as prevalent both to pro and non-natal reproductive practices. This paper has distinguished two generations of discourse in pro and non-natal practices, and has shown that the formative narrative is important in both. During the first-generation discourse, both pro and non-natal practices reflect the leading formative narrative of reproduction as a positive value that is nationally supported, given the special circumstances and needs in Israel. This narrative supports any auxiliary policy that increases natality. In the second-generation discourse, resistance undermines the hegemony of the formative narrative.

Our extensive study of protocols and policy-making processes in the second-generation finds significant evidence for the undermining of the formative narrative. On the one hand, the reproduction narrative, promoted by the health care system, justifies more means to realize it through support of pro-natal technologies. On the other hand,

---

Government Amendment - Shortening the Duration of the Period for Forming a Government, 5773-2013, H.H., No. 20, p. 972 (Isr.).

<sup>242</sup> Shari Eshet, *Rethinking Abortion by Committee*, THE TIMES OF ISRAEL (Feb. 16, 2014; 11:54 AM), <http://blogs.timesofisrael.com/reproductive-health-by-committee/> (discussing committee objectives).

<sup>243</sup> Steinfeld, *supra* note 39, at 19 (mentioning reforms that the committee agree upon).

<sup>244</sup> Rimalt, *supra* note 70, at 465. Rimalt proposed, along with Tali Eisenberg, a bill draft that meant to bridge the gap between reality and the law. *Id.*

new narratives have lent their voice, first in academics and then in public discourse, as well as in the public media. These voices raise resistance to extending control over women's reproductive capacities and outside interference (medical and religious) in women's reproductive autonomy.

The paper has demonstrated a similar direction in both academic and legislative discourses, beginning with a relatively narrow critique regarding the formative narrative and its ramifications, and advancing towards a critical rights-based discourse and a more nuanced critique. The subjects and tone of the critique in academic discourse have evolved between the first and the second-generations, and have become broader while adapting to current times. As a consequence, the implementation of the policies is given a more distinct, context-sensitive attention.

First-generation critiques have not matured to generate an alternative narrative; the change was not powerful enough to transform the formative narrative and replace it with another. So far, the criticism cannot thwart the expansion of the formative narrative, the second-generation discourse continuously undermines the traditional attitude towards reproductive practices, and proposes alternative voices and concerns that reject the role of the Israeli woman as a national mother and create a new, liberal woman. The erosion of the national narrative seems to indicate a shift towards granting more liberties to women, as these newer approaches are more attuned to a fuller range of women's interests. These approaches are also more sensitive to the diverse meanings that motherhood, infertility, and reproductive practices have for different women. They incorporate, alongside the formative narrative, a pragmatic aspect, be it the quest for biological motherhood, financial needs that lead women to use their reproductive freedom

as assisting third parties, or the need to terminate a pregnancy, which is practically available despite the formal prohibition.

Both practices reflect the image of modern, sexually active women; women who are liberated from the notion of being the national womb, and make their own decisions regarding their bodies and child bearing. This approach is compatible with the international image of women as seen in the cultural media. At the same time, the complex and unique Israeli social context, which includes both the unequivocal expectation of women to give birth and the relative freedom to abort, has developed new notions over time, but it is doubtful whether its substantive nature will change soon.