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CHAPTER

The Paradox of the Right to Family Life in Israeli Jurisprudence

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Abstract

This chapter argues that a paradox epitomizes the Israeli right to family life: the existence of an inverse relationship between the declarative and the operative and between the rhetorical and the practical. To wit, the higher and more pervasive the rhetoric de jure, the lower and more elusive the protection the right receives de facto—a discursive move I dub "derogation through celebration." This phenomenon is partly linked to another intriguing paradox that implicates the core of Israel's constitutional pathology: the regulation of family life has influenced the Constitution more than the Constitution has influenced the regulation of family life. Moreover, the constitutionalization of the family has seen this right take a rather conservative turn such that it primarily protects a particular type of family life—traditional, patriarchal, and infused with heteronormative values. This chapter further argues that the right to family life has not been rendered meaningful by high-profile constitutional cases but rather by the cumulative effects of minor and mundane legal moments. This ever-evolving site of social struggles, termed here Israel's "substantive-process" jurisprudence, features a mirroring of the relations between the declarative and the operative—one in which minor legal rhetoric yields momentous legal effects.

Keywords: family life, surrogacy, substantive-process, religious law, parental rights, LGBTQ rights

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I. Introduction

Israeli jurisprudence has long acknowledged that fundamental rights may exist outside of the constitutional text and that unenumerated rights are entitled to the same elevated normative status as explicit constitutional guarantees.[1] The Supreme Court has thus crafted a veritable "Magna Carta" of fundamental rights unmoored from explicit textual designations where the right to family life enjoys pride of place.[2] A direct derivative of human dignity, the right to family life has been celebrated as forming "the foundation of all foundations … the infrastructure of all infrastructures,"[3] as "the most basic freedom of the citizen to live his life as an autonomous person,"[4] as "a *sine qua non* of living life to the fullest,"[5] as second only to the right to life and "what imbues life with significance and purpose,"[6] and as "the human right to realize the meaning of life and its *raison d'être*."[7] Justice after justice has declared, with much grandiloquence, that this right is "of unsurpassed centrality,"[8] "among the first in rank,"[9] situated in "the topmost echelon of human rights,"[10] and that it is hard to ""over-exaggerate its importance"[11] or "imagine human rights that are its equal in their importance."[12]

Moreover, the right to family life has been interpreted liberally to encompass almost all aspects of intimate adult relationships and the parent–child relationship. As a testament to the impressive contours of this right, the Supreme Court declared it "a constitutional right that is protected in its entirety by the Basic Law,"[13] elucidating that it "should be interpreted generously and liberally"[14] and that it is purportedly "given to any person regardless of their gender identity, sexual orientation or choice of living alone or as part of a coupled relationship and regardless of the identity of the chosen partner."[15]

The right to family life encompasses many facets such that any person has a right to choose her or his life partner and to live with them in the same country, whether within or outside the institution of marriage. An individual also has a right to form a family unit, to choose whether or not to become a parent, and to possess decision-making authority over one's children by virtue of the parental rights to autonomy and privacy. The right to family life not only includes the right to marry and establish a family but also the right to divorce,[16] and a wide array of family-oriented rights.[17] Remarkably, this right—and its parenthood component, in particular—is often classified as a positive right enshrining an affirmative state duty to ensure, for example, the availability and even funding of reproductive technologies.[18] Indeed, the Court explicitly held that "the scope of the right to parenthood encompasses the entire range of assisted reproductive technologies."[19] The Court even entertained the possibility of adopting a constitutionally protected interest in the right to adopt a child, in marked contrast to the hegemonic view in other legal systems.[20]

However, this chapter argues that a paradox epitomizes the Israeli vision of the right to family life: the existence of an inverse relationship between the declarative and the operative and between the rhetorical and the practical. To wit, the higher and more pervasive the rhetoric *de jure*, the lower and more elusive the protection the right receives de facto—a discursive move I refer to as "derogation through celebration." Indeed, it is hard to imagine an unremunerated fundamental right that is as celebrated in Israeli constitutional discourse and yet as derogated in praxis. This phenomenon is partly linked to another intriguing paradox that implicates the core of Israel's constitutional pathology: the regulation of family life has influenced the Constitution more than the Constitution has influenced the regulation of family life. Moreover, the constitutionalization of the family has seen this right take a rather conservative turn, such that it primarily protects a particular *type* of family life—traditional, patriarchal, and infused with heteronormative values.

This chapter further argues that the right to family life has been rendered meaningful not by virtue of high-profile constitutional cases but by the cumulative effects of minor and mundane legal moments. It is this non-constitutional zone, couched in technical and minimalist vocabulary, that encapsulates some of the boldest judicial developments that have brought about a substantive revolution, disguised in proceduralist garb. This ever-evolving site of social struggles that I term Israel's "substantive-process" jurisprudence thus features a

mirroring of the relations between the declarative and the operative—one in which minor legal rhetoric yields momentous legal effects.

II. From Right to Reality, Rhetoric to Result

This section contends that the right to family life, while vociferously celebrated in Israel, is simultaneously the right that manifests perhaps the most profound schism between the declarative and the operative. Indeed, it has often been rendered a remediless right in practice—a normative anomaly that stems primarily, albeit not solely, from the paradox embedded within it: it is the very regulation of family life that has influenced the Israeli Constitution infinitely more than the Israeli Constitution has influenced the regulation of family life. Thus, unlike a panoply of constitutional democracies where the bill of rights has yielded comprehensive reforms in the regulation of the family—in some countries, family law has been the single most impacted legal field[21]—Israel's constitutional revolution has "skipped the domain of family law" almost entirely.[22]

Understanding this paradox requires a return to the origins of the Basic Law: Human Dignity and Liberty and one of its elemental structural features. For this 1992 Basic Law to be ratified, it was necessary to bargain for the consent of unsupportive religious parties that feared the invalidation of Israel's system of religious family law and the patriarchal power structure it enforced.[23] The religious parties granted their consent in exchange for both the exclusion of such fundamental values as equality and freedom of religion from the Basic Law as well as for the inclusion of a Validity of Laws Clause that shields legislation that predates the Basic Law from judicial review.[24] In this way, the religious monopoly over marriage and divorce—purportedly designed to preserve the Jewish character of the state and ensure the continuity of the Jewish people—became constitutionally immunized. Indeed, the legal reign of religion over family law is a pillar of the so-called status quo—a term which refers to a long-standing political understanding meant for keeping communal arrangements intact insofar as they pertain to religious matters.[25] In short, the field of law pertaining to family life was thus responsible for constitutive features of the Basic Law—both its limited substance and its limited reach—and led to what I refer to as a "disabled" Constitution.

The inclusion of the Validity Clause has served to preserve a personal status law system whose hallmark is the standardized violation of the most cherished elements in the constitutional catalog of familial rights. For example, under Israel's *millet*-like confessional system, the marital relationship is intrinsically a heteronormative, patriarchal, and religious institution. Thus, entry into (and exit from) marriage are an entirely religious affair.[26] All individuals who belong to one of the fourteen recognized religions in Israel—Jewish, Muslim, Druze, Baha'i, and ten different Christian denominations—are subject to its directives, irrespective of their subjective religious beliefs or lack thereof. This is because, in the Jewish state, it is not the individual who chooses religion but rather religion that "chooses" the individual.[27] This exclusive religious jurisdiction has resulted in a plurality of constitutional wrongs.

In addition to synagogue and state considerations, there are also countervailing civil interests that may curtail the right's scope and boundaries. These may include private interests, as in the case of balancing the right to be a parent against the right of another individual not to be a parent. The right to parental autonomy may conflict with the right of the other parent or with the state interest to protect children from harm. Moreover, the family's right to live together in the same country may also give way to such public interests as Israel's constitutional identity as a Jewish and democratic state or to national security interests. The following sections illustrate the limited reach of the right to family life in Israel on account of religious restrictions, in the case of intimate adult relationships, and on account of civil restrictions, in the case of parental rights.

A. Religious Restrictions on the Right to Family Life

Civil marriage and divorce are non-existent in Israel. Correspondingly, the religiously grounded family law regime—implemented through the exclusive authority of religious tribunals—introduces multitudinous impediments to marriage that would be patently unconstitutional elsewhere. Same-sex or interfaith marriages are a legal impossibility in Israel, as is marriage between individuals with an unrecognized religious affiliation or those not born into a religious community.[28] Furthermore, many marriage-seekers are blocked by *intra*-religious rules. For example, a "bastard" may only marry another bastard or a Jewish convert, and a female divorcee is disqualified from marrying certain categories of suitors.[29] Religion-resisters also face a daunting choice between their right to marry and their right to conscience. The Supreme Court has repeatedly resisted calls to bypass the Validity Clause by deploying creative interpretations or other constitutional doctrines to introduce civil marriage into Israeli law. In the last such attempt, same-sex couples urged the Court to provide them with at least a declarative remedy (à la British or Canadian law) rather than the blocked operative remedy of invalidation—that is, a mere declaration of the law's incompatibility with their fundamental right to family life and equality. Yet this most celebrated constitutional right was divorced from even this most minimal of constitutional remedies.[30]

The right to divorce enjoys even more tenuous protection. Almost all of Israel's recognized religious communities feature patriarchy as the guiding framework of the dissolution regime. Jewish law, for example, imposes strict fault-based and gender-biased requirements that severely limit women's right to marital emancipation and ultimately condition the divorce decree upon the husband's consent. Consequently, recalcitrant men may leverage their veto power over the divorce as a bargaining chip to demand property concessions, evade financial obligations to their ex-wives, and even win child custody rights.[31] Greek Orthodox Christian law, meanwhile, only allows marital dissolution that accords with a discriminatory, fault-based regime dating back to the fourteenth century—one so zealous to keep marriages intact that it considers life-threatening violence a reconcilable form of marital discord.[32] And, for Israel's various Catholic denominations, even religious divorce is not an option. Under the reign of indissoluble marriage, Catholics are denied the right to remarry and form a "more perfect" union and may enjoy marital exit only at the expense of their right to religious freedom by converting their way out of marriage.[33] Indeed, this perverse "solution" has become so rampant among Israel's Catholics that one Israeli family court went so far as to order a recalcitrant wife to undergo a "divorce conversion" or otherwise be found liable in tort.[34]

It is thus little wonder that the constitutional dimensions of Israeli family law are the least developed of all areas of state regulation: constitutional law is perceived as the province of secular rights while family law is perceived as the province of religious wrongs. It is noteworthy, however, that recent decades have witnessed an ever-growing erosion of the secular religious *status quo*. An institutional example of this relates to the 1995 establishment of a civil family court system vested with concurrent jurisdiction over all matters of personal status, except for marriage and its dissolution, and authorized to apply civil law as opposed to religious law in a growing list of domains (eg paternity, child custody, succession, and property).[35] A substantive law example relates to the unprecedented regime governing unmarried couples. While Israel has never criminalized non-marital cohabitation, Israeli cohabitation law has gone great distances over the years toward equating the status of married spouses and 'reputed' spouses such that unmarried cohabitants are entitled to the lion's share of the rights and protections concomitant with formal marriage.[36]

B. Civil Restrictions on the Right to Family Life

It is not only the Validity of Laws Clause that has helped dilute and derogate the right to family life. In fact, the majority of the Court's so-called grand constitutional cases have also contributed their share to deepening the gap between deceptive judicial rhetoric and actual constitutional practice.[37] The impetus for this gap, I argue, derives not only from the constitutionally protected place of religion in family law but also from the *civil* protection of traditional family values and heteronormative tenets. The following review of some of the Supreme Court's landmark constitutional decisions in this field dispels the conventional binary conceptualization of religion as the Achilles heel of the right to family life and the civil courts as its ultimate protectors.

For example, the right to parenthood was rendered remediless in *Plonit*, a single woman with disabilities, who was at an impasse: her medical condition made it impossible for her to become a genetic or gestational mother, and her personal status made it impossible for her to become a legal mother via either surrogacy or adoption. Seizing her only chance at motherhood, she single-handedly orchestrated the fertilization of a donated egg using donated sperm and had the embryo transplanted in a surrogate mother in India. After the Indian medical center designated her the "intended mother,"[38] she filed an application for parenthood order in Israel and grounded her application in several legal rationales, including her fundamental right to parenthood. The Campaign Headquarters for Disabled People, which asked to join as amicus curiae, similarly urged the Court to redress the anguish of people with disabilities whose right to parenthood is often harmed under Israeli law by virtue of both their medical condition and their social difficulties. The Court cursorily dismissed the constitutional claim and held that recognizing a new model of contractual parenthood is a matter best reserved for the legislature, especially in light of the appointment of a committee charged with reviewing fertility policy in Israel. The Court merely declared that the state has a constitutional duty to "consider, in the near future, the unique situation of people with disabilities in these contexts, and act to have the relevant laws in [the] matter 'accommodate'" their plight.[39] The judicial call was no more than hollow rhetoric to the applicant, however; the baby was placed for adoption.

The Court also failed to endow with constitutional teeth a single woman's right to decide with whom to have a child. *Plonit v Ministry of Health*[40] involved a woman who, in her quest to ensure fully genetic offspring, paid a sperm bank to guarantee it would reserve the same sperm sample used to conceive her daughter for any subsequent children. She petitioned the Supreme Court to order the Ministry of Health to allow her access to the sample after the anonymous sperm donor retracted his consent. In response, the Court introduced a distinction between the "nuclear" substance of a right and its peripheral unprotected zones, concluding that:

> [t]he curtailment of the petitioner's right to parenthood with a specific person or her right to an offspring which carries specific genetic material is not a curtailment of the right to parenthood since it does not touch upon the nuclear right to parenthood—the practical ability to be admitted to the "parent grouping" and to conceive a child.

For the Court, what was at stake here was little more than an autonomy "interest" rather than a "right," and this was constitutionally inadequate against the anonymous donor's overriding right *not* to be a genetic parent.[41] This constituted a clear manifestation of the failure to protect parental rights when they do not comport with heteronormative values. As one commentator observed:

> Sperm donation challenges the heteronormative model by its very nature, and this challenge is intensified by the fact that the donor will not be part of any parental relationship with the child who carries his genes. Under such circumstances, the mother's rights are suspect rights, rights that need to be justified, and rights which could be violated readily. A mother who deviates from the heteronormative model has no way of ensuring her rights in advance, and she is subject to the sperm donor's arbitrary whims.[42]

Echoing this approach, the Supreme Court denied a petition in which the parents of a deceased adult son sought to inseminate a woman of their choosing with his sperm, after his widow had refused to give permission for her own insemination or that of a third party. The Court refused the invitation to recognize an independent right to grandparenthood, stressing that it is only the permanent partner's—rather than any other woman's—right to motherhood that may sanctify the use of sperm posthumously. According to the majority opinion, "the right to parenthood is … granted specifically to couples, and we are thus concerned with *the partners*' joint right to conceive offspring."[43] The Court's intrinsically conservative reasoning thus signals that constitutional protection is the exclusive province of family forms that comport with heteronormative marital family norms.[44]

Another line of decisions that protect traditional family values relates to the Israeli surrogacy regime, which strictly reserved the right to become a parent via surrogacy to heterosexual couples.[45] In *New Family*, a single woman who sought surrogacy services after a hysterectomy petitioned the Supreme Court to declare the discriminatory law unconstitutional but found no recourse.[46] In a peculiar decision replete with elevated rhetoric celebrating the right to parenthood,[47] the Court shied away from invalidating the law or providing any other operative remedy. Despite labeling the case an "intolerable and unwarranted discrimination"[48] that smacked of invidious singlism and dismissing all state arguments to the contrary as unpersuasive, the Court settled for a call to Parliament to address the parental rights of *femes sole*, thereby driving a wedge between declarative and operative justice.[49]

The *Liat Moshe* case constituted another building block in the heteronormative jurisprudence that constructs single-parent and same-sex families as "suspect" and renders the right to a family in such cases remediless. The case involved a lesbian couple who sought to become parents to a child who would be genetically and gestationally related to both (by implanting one partner's fertilized ovum in the other's womb). After the Ministry of Health refused to approve this so-called Reciprocal IVF/Partner-Assisted Reproduction, the couple petitioned the Supreme Court and challenged the constitutionality of several provisions in the surrogacy law and the Egg Donation Law that criminalized their joint reproductive enterprise. The majority opted for judicial restraint, puzzlingly citing an anticipated legislative reform that would still fall short of permitting the petitioners their envisioned partner-assisted reproduction model, as the Court itself acknowledged.[50] The majority also noted that the couple possessed an option to "travel overseas to resolve their plight" as a reason not to intervene, notwithstanding the Court being "ill at ease with the State referring its citizens to realize their dreams and rights in other countries."[51] The minority considered the legislation an unconstitutional violation of the rights to family life, parenthood, and autonomy. One of the dissenting justices, however, sought to protect the lesbian couple's right to parenthood by implying a hierarchical order of families in which single-parent families were lower down on the acceptability scale—even lower than dyadic same-sex configurations.[52]

The legal trilogy of *Arad-Pinkus* constitutes another chapter in the story of the right to family life as a remediless right, this time involving a homosexual couple who challenged their disqualification from using surrogacy services. Their petition was dismissed consensually in light of the much-heralded establishment of the aforementioned committee, which was charged with revisiting the statutory regulation of reproduction.[53] The couple re-petitioned the Court a few years later, after the commission had concluded its work, but the law remained resistant. Joining their petition were infertile single women questioning the constitutionality of the requirement for a genetic link between the intended mother and the resulting child in the surrogacy process. The Court acknowledged the "ongoing weighty" violation of the petitioners' fundamental right to parenthood, a violation that had continued unabated for two decades.[54] Nonetheless, yet again, it unanimously decided *not* to decide due to a pending legislative initiative. It opted instead for a six-month suspension during which the state would keep the Court apprised of the status of the legislative process. This hands-off approach is particularly troubling given that the pending bill, even if eventually passed, would do nothing to vindicate the

couple's right to parenthood and would continue to exclude it from the ambit of family forms eligible for surrogacy services.[55]

While the Court refrained from ruling on the merits of the couple's claim, it did rule (and dismissed) the single women's petition. It held that the generous scope of parental rights extends to all the various assisted reproductive technologies and that the genetic link requirement constituted an undeniable affront to fundamental rights, but one that passed the constitutional muster of the Limitations Clause—the Israeli version of strict scrutiny.

Arad-Pinkus petitioned the Court for the third time after the amended law continued to discriminate against gay couples. The Court agreed that the surrogacy law indefensibly abridged their equal right to become parents but nonetheless stopped short of providing an effective relief that would leave no gap between right and remedy. It opted instead to grant the legislature twelve months to amend the constitutional injuries. Only one justice called on the Court to invalidate the law, insisting in dissent that "given the magnitude and gravity of the fundamental rights violation … there is no cause to once again delay the provision of a constitutional remedy."[56]

Finally, the identifiable schism between the rhetorical and the practical and between the declarative and the operative does not only affect the right to parenthood but also the very right to family life itself. Indeed, *Adalah* —the seminal case that most explicitly recognized the constitutional stature of this right for the first time[57]—gave rise to the syndrome of celebrating the right while derogating the scope of its protection. The so-called family reunification cases involved "among the gravest laws"[58] on Israel's statute book—the 2003 Nationality and Entry into Israel Law (Temporary Provision)—which presented Israeli citizens with a daunting choice between family and country, on national security grounds. This provisional legislative measure established an irrefutable presumption of dangerousness with respect to Palestinian residents of the Occupied Territories, one that cast them as a security risk and imposed a blanket prohibition on all Palestinians of certain ages from entering Israel.[59] As a result, Israeli citizens—almost invariably Arab Palestinian—are all but categorically barred from realizing their right to live together as a family with their Palestinian spouses and parents within Israeli territory.[60]

The case's outcome manifests the Janus-faced nature of the Israeli right to family life in its duality between the declarative and the operative. The petitions were turned down even though a majority of six to five justices considered the law flagrantly unconstitutional, given the combined and aggregated violation of the rights to both family life and ethno-national equality. Justice Levy, while concurring that the law was unconstitutional,[61] decided nonetheless to reject the petitions—due, in large part, to the legislation's temporary nature. Hence, while all the justices acknowledged the fundamental status of the right to family life, and a majority of justices deemed the law to be constitutionally doomed, the operative outcome was that some Israeli citizens did not have the right to exercise that right within their own country. Moreover, some justices specifically defined the right in heteronormative terms as originating from God and the laws of nature, pivoting around "a covenant between a man and a woman"—a decidedly traditionalist approach to family life that "may act as our guide in determining the boundaries of human dignity."[62]

The so-called Temporary Measure law was revisited several years later, in *Gal-On*, after the legislature introduced changes designed to address the Court's constitutional concerns. Good intentions went awry, however; as Justice Levy concluded, among other justices, the revised law dealt "a mortal blow to fundamental rights of the highest order"[63] since the bulk of the amendments aggravated, rather than attenuated, the infringement of human rights.[64] For example, the restriction on family reunification was extended to include nationals and residents of Iran, Lebanon, Syria, and Iraq, in addition to Palestinian residents. Moreover, while the law was specifically enacted as a temporary order designed to expire within a year, it has already been extended on twelve occasions, to date, so what was presented as a short-term measure metamorphosed into a permanent obstruction. The majority, however, upheld the amended law while distinguishing between the

nucleus of a right and its periphery and between recognition of a right and the ability to realize the right on Israeli soil.[65] One of the minority justices in dissent eloquently took the majority to task for draining the right to family life of both meaning and substance, stating that a state's recognition of a right has no meaning if it cannot be effectively exercised "within the boundaries of that state."[66]

By sending Israeli citizens to realize their fundamental rights elsewhere, the Court rendered the right to family life yet again a remediless right—paradoxically in the very case that celebrated the constitutionalization of the family in the first place.[67]

III. Limits to the Limits on the Right to Family Life

This section argues that while constitutional litigation has rendered the right to family life rather life-less, it is the non-constitutional and seemingly mundane and procedural legal moments that have most effectively vindicated it. Consider the classic example of a series of rulings that are arguably comparable to the so-called interpretive oxymoron of American substantive due-process jurisprudence: just as the United States Supreme Court rendered a clause avowedly procedural in orientation—substantive in operation, the Israeli Supreme Court likewise attained substantive results on procedural grounds. While both judicial doctrines were deployed primarily to vindicate family-oriented rights, it is here that the resemblance begins and ends: whereas substantive due process constitutes a creative constitutional doctrine that represents judicial activism, the cases presented below revolve around an administrative-bureaucratic doctrine that represents judicial restraint. Yet, as this section shows, "judicial restraint is but another form of judicial activism."[68]

I argue that what I term Israeli "substantive-process" jurisprudence—whose building blocks are *Funk-Schlesinger* and its progeny—features a different type of inverse relationship between the declarative and the operative, one in which a radical result is couched in minimalist rhetoric. Starting in the 1960s, the Supreme Court devised a procedural legal methodology to ensure that the state effectively recognized civil marriage—as long as it was performed abroad.[69] *Funk-Schlesinger* involved an interfaith marriage between a Belgian Christian woman and an Israeli Jewish man conducted abroad in a civil ceremony. When Israel's Minister of the Interior refused to register the marriage in the official Population Registry on the grounds that Israeli law prohibited interfaith unions, the wife sought relief from the Israeli Supreme Court. The Court held that the Registrar was not authorized to examine the validity of marriages and that their administrative power was limited to registering any items of information supported by authenticated public certificates, unless they were manifestly false.[70]

While this purportedly bureaucratic and procedural act does not attest to the substantive validity of the marriage—it is a matter of statistics, not of status, as the Court phrased it—registration effectively provides "registered couples" with just about the entire range of civil benefits and burdens concomitant with an official Israeli marriage license.[71] Registration *de jure* therefore resulted in recognition de facto and stoked a substantive reform in procedural clothing.[72] It is the bureaucratization, not the constitutionalization, of the family, then, that vindicated familial rights and righted religious wrongs.[73]

The revolutionary impact of *Funk-Schlesinger*'s procedural mechanism has never been more pronounced than in the case of the family rights of same-sex couples. In *Ben-Ari*, the Supreme Court followed *Funk-Schlesinger* to order the registration of same-sex marriages performed abroad at a time when only 3 percent of jurisdictions around the globe recognized these unions.[74] *Ben-Ari* concerned five Israeli gay couples who had married in Canada and challenged the Israeli legal system to extend the reach of *Funk-Schlesinger* to same-sex marriage.[75] The newlyweds petitioned the Supreme Court after the Registrar refused their applications for marriage registration, arguing that these were manifestly false because same-sex marriage is not a recognized "legal framework" in Israeli law and because it is a matter better reserved for the legislature. The Court ordered the Registrar to register the couples as married with rhetoric that reiterated the modest nature and limited reach of

what was, in fact, a watershed decision. For the Court, "[i]t [was] not right" to contest the right to family life "in the field of registration"[76] since its decision neither recognized a new personal status nor ruled on the substantive validity of same-sex conjugality:

> Let us reemphasize what it is that we are deciding today, and what it is that we are not deciding today … We are not deciding that marriage between persons of the same sex is recognized in Israel; we are not recognizing a new status of such marriages; we are not adopting any position with regard to recognition in Israel of marriages between persons of the same sex that take place outside Israel.… The answer to these questions, to which we are giving no answer today, is difficult and complex.[77]

The Supreme Court had thus ingeniously effaced the value-laden dimensions of its decision and skirted the legally and politically thorny question of the substantive validity of out-of-state same-sex marriages under conflict-of-law rules. Rhetorical minimalism notwithstanding, *Ben-Ari* rendered Israel the only country to treat same-sex marriages as null and void if executed domestically but valid de facto if solemnized outside the country.[78]

Israeli substantive-process jurisprudence has also brought about a nascent development of *civil* divorce law in Israel's otherwise religious monopoly over marriage and its dissolution. The introduction of a judge-made civil divorce regime transpired after a "registered" homosexual Jewish couple who married abroad and registered the marriage in Israel sought to divorce. Israel's Ministry of the Interior refused to change their marital status in the Population Registry to "divorced" without a public certificate of a foreign divorce order or a local court decision. The Rabbinical Court—the instance that enjoys exclusive jurisdictional powers over divorce for Jews—refused to hear their case, since, for them, homosexual marriage is an obscenity in the guise of affinity. The couple eventually asked the civil family court to hear the case and vindicate their right to marital exit.[79] Cognizant of the constitutional flaw of permitting a couple to become registered as married but precluding them from becoming registered as divorced, the family court assumed a newfound authority to liberate them from the jurisdictional clutches of the religious court.[80] Conceptualizing marital dissolution as "nothing more than the other side of the *Ben-Ari* coin,"[81] the court took pains to explain that marriage and divorce registration is "concerned with the declarative and technical component," and wholly devoid of substantive validity or legal recognition.[82]

By employing the familiar rhetorical economy that emphasizes procedure over substance, the family court effectively recognized the right to a speedy no-fault divorce for "registered" LGBTQ couples.[83] The paradoxical result of the substantive-process jurisprudence is that same-sex, same-religion couples have won a unique privilege—the civil dissolution of marriage—bestowed upon no other form of union in Israel.[84]

The same formalist—administrative technique that sets apart substance from procedure and pretext from subtext was also extended to protect the parental rights of same-sex couples. In *Brener-Kadish*, the Registrar refused to register an Israeli lesbian as the second mother of her lesbian life-partner's child despite an adoption decree issued by a California court—where the son was born and the family resided. In another manifestation of judicial understatement, the Court rejected the Registrar's argument that registration in this case would be prima facie "manifestly and unquestionably" incorrect since it is biologically impossible to have two mothers. By distinguishing between the procedural issues of registration and the substantive issues of recognition, the Court circumvented complex doctrines of private international law and thereby protected the lesbian family, setting an international precedent by effectively recognizing same-sex adoption formalized elsewhere and impossible on Israeli soil.[85] The state's reaction offers a compelling illustration of the substantive value of registration and the major effects of a seemingly minor legal decision: it not only filed a request for the rare procedure of a Further Hearing—where the case is re-heard by an expanded panel of Supreme Court justices[86]—but it also took the Ministry of the Interior two years to accede to the 2000 order and register the child as having two mothers. Moreover, when the Further Hearing finally took place in December 2007, the Supreme Court not only sided with the couple but also reprimanded the Ministry of the Interior for having failed to

register the subsequent children who were born in the interim as part of the family and lawfully adopted abroad by the non-biological mother.[87]

Mamat-Magad concerned the registration of same-sex couples in the Population Registry as the parents of children born via a surrogacy procedure conducted in the United States. The Registrar apparently confused procedure with substance and status with statistics: he refused to register parenthood based on an American birth certificate and a Pennsylvania court order, since registration "bears substantive and fateful meanings of parenthood determination."[88] The Court once again ruled that the remit of the Registrar extends no further than registration: while the petitioners had to conduct a genetic test to prove a biological connection between either one of them and the child for the sake of Israeli citizenship, the non-genetic father could not be forced to adopt the child as a condition for his registration as the parent. Nor could the state oblige same-sex couples to apply for the granting of a "judicial parenthood order" in the family court as a prerequisite for registering parenthood.[89] Interestingly, while the petitioners located their arguments within a rights rhetoric that urged the Court to protect their fundamental guarantee to family life and respect new forms of parenthood, the Court refrained from a constitutional analysis and opted to highlight the limited power of procedural registration rather than reify substantive rights.[90] This is yet another milestone in the jurisprudential trajectory of the right to family life—a right that receives maximal protection by way of rhetorical minimalism.

Finally, the COVID-19 pandemic has introduced new challenges to substantive-process jurisprudence. In an era of closed borders, Israeli LGBTQ couples have begun to "Zoom" their way into marriage by employing the State of Utah's online marriage certification services. Armed with their remotely issued American certificates, several such couples sought to have their virtual marriages recorded in the Israeli Population Registry, only to have their applications denied. Drawing on the lessons of *Funk-Shlesinger*, which demonstrated that claims against the state are not necessarily best formulated in the language of rights, these couples have couched their grievances in administrative terms. At the time of writing, their petitions were granted such as to vindicate familial pluralism and form yet another momentous threshold in the history of the right to family life under Israeli jurisprudence.[91]

In sum, the procedural act of registration protects many substantive aspects of the right to family life—it constitutes an official public recognition of the family unit; it signals that the coupled relationship and family life of the individual are deserving of equal regard and respect, and it entails a wide array of social and economic rights to support the family and its members.

IV. Conclusion

The regulation of family life has influenced the Israeli Constitution to a much greater extent than vice versa. This unique phenomenon has, in turn, given rise to what I call a "disabled Constitution"—a higher law whose normative power can only be activated prospectively. The result is a stark dichotomy guarded by impermeable boundaries between the "secular" rights of constitutional law and the religious "wrongs" of family law. Moreover, the constitutionalization of the family is plagued by a discursive dynamic I dub "derogation through celebration," a schism between declarative rhetoric and operative outcome that has often rendered this most celebrated of unenumerated fundamental rights remediless. Quite unexpectedly, minor and mundane "substantive-process" cases have succeeded where major and grandiloquent constitutional cases have failed, and what has broadened the contours of the right to family life is, ironically, a narrow process-based discourse rather than an expansive rights-based rhetoric. Still, regardless of whether it is approached through constitutional or substantive-process jurisprudence, however, or whether it concerns family reunification, civil marriage, or the parental rights of same-sex couples, the right to family life is largely recognized inside Israel conditional upon its being exercised *outside* Israel. Indeed, the right to family life—as celebrated as it is simultaneously derogated—occupies a paradoxical space in Israeli jurisprudence.

Notes

1 Aharon Barak, "The Constitutional Revolution—Protected Fundamental Rights" (1992) 1 Mishpat U'mimshal 9; Aharon Barak, "Human Dignity as a Constitutional Right" (1994) 41 Hapraklit 271.

2 HCJ 2481/93 *Dayan v Commander of Jerusalem District* IsrSC 48(2) 456, 470 (1993) (Isr); Aharon Barak, *Interpretation in Law: Constitutional Interpretation* vol 3 (Nevo Publishing 1994) 423–26; Ruth Halperin-Kaddari, *Women in Israel: A State of Their Own* (University of Pennsylvania Press 2004) 25.

3 *Dayan* (n 2) [32] (J Cheshin).

4 HCJ 7052/03 *Adalah v Minister of the Interior*, para [7] of J Joubran's opinion (Nevo May 14, 2006).

5 HCJ 7444/03 *Daqqah v Minister of the Interior*, para [15] (Nevo February 22, 2010).

6 HCJ 2245/06 *Dobrin v Israel Prison Service* (Nevo June 13, 2006).

7 Adalah (n 4) [6]; HCJ 5771/12 *Liat Moshe v The Board of Approval for Surrogacy Agreements*, para [25] of J Hayut's opinion (Nevo September 18, 2014).

8 FDC 1892/11 *A-G of Israel v Anon Woman*, para [4] of J Arbel's Opinion (Nevo May 22, 2011).

9 *Adalah* (n 4) 400.

10 *Daqqah* (n 5); ibid [6] (J Procaccia).

11 *Liat Moshe* (n 7) [25] (J Hayut).

12 LFA 377/05 *A v Biological Parents*, para [6] of J Procaccia's opinion (Nevo April 21, 2005).

13 *Adalah* (n 4) [8] (J Joubran).

14 ibid [6] (J Rivlin).

15 HCJ 781/15 *Arad-Pinkus v The Board of Approval for Surrogacy Agreements*, para [15] of CJ Hayut's opinion (Nevo February 27, 2020).

16 HCJ 2123/08 *Anon Man v Anon Woman*, IsrSC 62(4) 678, para [17] of J Arbel's opinion (2008) (Isr); Karin Carmit Yefet, "Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom" (2009) 20 Yale Law Journal and Feminism 441.

17 See eg CA 5587/93 *Nahamani v Nahamani*, 49(1) IsrSC 485, 500 (1995) (Isr); for a detailed analysis of relevant case law, see Aharon Barak, "Family Constitution: Constitutional Aspects of Family Law" (2013) 16 Law and Business Review 13.

18 See Barak, "Family Constitution" (n 17) 32–36; HCJ 2458/01 *New Family v The Board of Approval for Surrogacy Agreements* PD 57(1) 419, 444 (2002) (Isr); SCJ 4077/12 *Anon Woman v Health Dept* 66(1) IsrSC 274, para 27 of Justice Rubinstein's opinion and para [26] of J Amit's opinion (2013) (Isr); *Liat Moshe* (n 7) [39] (J Rubinstein); Ruth Zafran, "The Equal Right to Be a Parent? Resort to Surrogacy in Israel" (2015) 8 Hebrew University Law Review Online 1; Ayelet Blecher-Prigat and Ruth Zafran, "'Children are a Blessing'—Assisted Reproductive Technologies and Parenthood by Same-Sex Couples" in Einav H. Morgenstern, Yaniv Lushinsky, and Alon Harel (eds), *LGBTQ Rights in Israel: Gender Identity, Sexual Orientation and the Law* (Sacher Institute Hebrew University 2016).

19 *Arad-Pinkus* (n 15) [31] (J Joubran).

20 HCJ 4293/01 *New Family v Minister of Labor and Welfare*, para 4 of Justice Beinisch's opinion (Nevo March 24, 2009) (Isr) (considering the maximum age difference rule that bars adoption whenever the difference between adopter and adoptee exceeds forty-eight years). See also Barak, "Family Constitution" (n 17) in 35.

21 For a comparative overview, see Barak, "Family Constitution" (n 17) 28.

22 ibid 15; Ayelet Blecher-Prigat, "A Basic Right to Marry: Israeli Style" (2014) 47 Israel Law Review 433, 436.

23 See DK (Divrei Haknesset) 3782–83 (5752-1992). See also Barak, "Family Constitution" (n 17) 51.

24 Yefet, "Unchaining the Agunot" (n 16).

25 Avishalom Westreich and Pinhas Shifman, *A Civil Legal Framework for Marriage and Divorce in Israel* (Metzilah – Center for Zionist, Jewish, Liberal and Humanist Thought 2013) 18.

26 For the Ottoman (and later British) origins of the *millet* system and subsequent developments, see Yüksel Sezgin, "The Israeli Millet System: Examining Legal Pluralism Through Lenses of Nation-Building and Human Rights" (2010) 43 Israel Law Review 631, 631–32; Gal Amir, "What We Talk About When We Talk About the Millet" (2016) 30 Mechkarei Mishpat 677.

27 Karin Carmit Yefet, "Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction" (2016) University of Illinois Law Review 1505.

28 In 2010, Israeli law crafted a special form of a civil legal union that was only available if both partners were religiously unaffiliated. This union is called a "covenant partnership" since the monopoly of "marriage" is strictly reserved to religiously sanctioned unions in Israel. Covenant Partnership for the Religionless Law 5770–2010, SH no 2235.

29 CA 1354/92 *A-G of Israel v X* 48 (1) PD 711 (1994) (Isr); Marc Galanter and Jayanth Krishnan, "Personal Law and Human Rights in India and Israel" (2000) 34 Israel Law Review 101, 122–23; Akiva Miller, "The Policing of Religious Marriage Prohibitions in Israel: Religion, State and Information Technology" (2014) 31 The John Marshall J Information Technology and Privacy Law 23, 25.

30 HCJ 7393/15 *The Association for LGBTQ Equality in Israel v Ministry of the Interior* (Nevo January 9, 2017) (Isr).

31 Yefet, "Unchaining the Agunot" (n 16); Yefet, "Israeli Family Law as a Civil-Religious Hybrid" (n 27).

32 Shirin Batshon, "The Ecclesiastical Courts in Israel: Gender Outlook" (Kian—Feminist Organization 2012) 9–11, 13–14.

33 Karin Carmit Yefet and Ido Shahar, "Divorced from Citizenship: Palestinian-Christian Women Between the Church and the Jewish State" (2023) 48 Law and Social Inquiry 89–129.

34 FC (Hi) 14177-03-09 *H v H* (Nevo January 17, 2013) (Isr). This decision was summarily overruled on appeal by mutual consent. See FA (Hi) 45532-02-13 *Anon Woman v Anon Man* (Nevo June 20, 2013) (Isr).

35 Yefet, "Israeli Family Law as a Civil-Religious Hybrid" (n 27).

36 Shahar Lifshitz, *Cohabitation Law in Israel from the Perspective of a Civil Law Theory of the Family* (Nevo Publishing 2005) (Hebrew).

37 For a notable exception in the context of prisoners' rights, see HCJ 2245/06 *Dobrin v Israel Prison Service* (Nevo June 13, 2006). But see also HCJ 6314/17 *Namnam v Government of Israel* (Nevo June 4, 2019) (Isr) (visitation is not a prisoner's right but a privilege).

38 ARF 1118/14 *Anon Woman v Ministry of Social Affairs and Social Services* (Nevo April 1, 2015) (Isr).

39 ibid [3], [6] (Justice Meltzer).

40 *Anon Woman* (n 18) [27] (J Rubinstein).

41 ibid [33] (Justice Rubinstein).

42 Hagai Kalai, "Suspect Parents—Legal Scrutiny and Control of Non-Heteronormative Families Following High Court of Justice Case 566/11 Mamat-Magad v Minister of the Interior" (2014) 28 Insights, Hebrew University Law Review Online: Human Rights 5 <http://zola.colman.ac.il/wp-content/uploads/2017/11/28_june_2014_3_kalai.pdf> accessed September 22, 2024.

43 CA 7141/15 *Anon v Anon*, para 27b(2)(b) of Justice Meltzer's opinion criticizing Justices Danzinger and Mazuz, and paras 10–12 of Justice Danzinger's opinion (Nevo December 22, 2016) (Isr).

44 ibid.

45 The 1996 Embryo-Carrying Agreements (Agreement Authorization and Status of the Newborn Child) Law (hereinafter "the surrogacy law"). Addressing the overriding rights of surrogate women is beyond the scope of this chapter; suffice it to say that once the law extended heterosexual couples a right to parenthood via surrogacy—the exclusion of single individuals and LGBTQ couples violates constitutional principles of both equality and parental rights at the same time.

46 *New Family* (n 18) [42], [53] (J Cheshin), [9] (J Strasberg-Cohen).

47 ibid [32] (J Cheshin).

48 ibid 455.

49 ibid.

50 ibid [45]–[46] (J Rubinstein).

51 ibid [53] (J Rubinstein).

52 ibid [23] (J Arbel).

53 HCJ 1078/10 *Arad Pinkus v The Board for Approval of Surrogacy Agreements* (Nevo June 28, 2010) (Isr).

54 *Arad-Pinkus* (n 15) [18] (J Joubran).

55 ibid [16] (J Joubran).

56 ibid [31] (J Fogelman).

57 Yaacov Ben-Shemesh, "Constitutional Rights, Immigration, and Demography" (2006) 10 Haifa University Law Review 47, 52.

58 Gal Davidov and others, "State or Family? The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003" (2005) 8 Haifa University Law Review 643, 645.

59 The law included extremely limited exceptions such as a provision that limits the age groups affected (men and women at least thirty-five years old and twenty-five years old, respectively).

60 *Adalah* (n 4).

61 ibid [7] (J Levy).

62 ibid [46] (J Cheshin).

63 HCJ 466/07 *Galon v A-G of Israel*, IsrSC 65(2) 44, para 2 of Justice Levy's opinion (2012) (Isr).

64 ibid [43] (J Levy), [26] (J Arbel), [7] (J Beinisch), [2] (CJ Hayut).

65 This stance was most clearly endorsed by J Cheshin, J Naor, J Grunis, J Rubinstein, and J Meltzer.

66 *Galon* (n 63) [9] (J Arbel).

67 For the most recent example of this pattern, see HCJ 4300/20 *The Association for the Protection of Individual Rights v The Knesset* (Nevo December 16, 2020) (Isr).

68 Laurence Tribe, *American Constitutional Law*, vol 3) 3rd edn, West Academic Publishing 2000) xvi.

69 The first case to develop this strategy in the context of interfaith marriage is HCJ 143/62 *Funk-Schlesinger v Ministry of the Interior* 17(1) IsrSC 225 (1963) (Isr).

70 Ibid 243; HCJ 58/6808 *Shalit v Minister of the Interior*, 23(2) IsrSC 477, 506–08 (1969) (Isr).

71 Halperin-Kaddari (n 2) 244.

72 See Rivka Weill, "Israel. The Power of Understatement in Judicial Decisions" (2014) 30 Annuaire International de Justice

Constitutionnelle 125, 127–28, 130 (observing that the force of the decision stems from the fact that the justices were able to successfully veil its revolutionary impact). Recently, however, the Court went further by suggesting that civil marriages conducted abroad may be valid under certain circumstances. Remarkably, these cases are also characterized by the almost complete lack of a rights rhetoric. See Blecher-Prigat, "A Basic Right to Marry" (n 22).

73 See also HCJ *Goldstein v Minister of the Interior*, PD 50(5) 89 (1994) (authorizing the registration of "consular marriage" of an interfaith couple) (Isr).

74 HCJ 3045/05 *Ben-Ari v Director of Population Administration, Ministry of the Interior* 61 (3) IsrSC 537, para 10 of Justice Rubinstein's Opinion (2006) (describing the status of same-sex marriage around the world) (Isr).

75 See Dan Yakir and Yonathan Berman, "Same-Sex Marriages: Is it Really Necessary? Is It Really Desirable?" (2008) 1 Law and Social Change 169, 172 (2008) (the authors represented two of the homosexual couples).

76 Ben-Ari (n 74) 20.

77 ibid [23] (CJ Emeritus Barak).

78 ibid, see [22] (CJ Emeritus Barak).

79 These were the facts in FC (Tel Aviv) 11264-09-12 *The Plaintiffs v Ministry of the Interior* (Nevo November 21, 2012) (Isr).

80 When a religious tribunal fails to recognize the very concept of same-sex marriage, the court held, the religious tribunal ipso facto forfeits its authority to preside over the marriage's dissolution which then transfers to the family court. See ibid.

81 ibid [33] (J Eliyahu).

82 MDC (Tel Aviv) 52224-11-13 *In the Matter of Anon Petitioners*, paras 30–32 (Nevo December 8, 2013).

83 In ibid, the court considered the possibility of adopting "irretrievable breakdown of the marriage" as a no-fault divorce ground as an *obiter dictum*. To date, this is only one of two family court decisions that have ordered the granting of a "registered" divorce by virtue of the couple's mutual consent.

84 As of 2010, marriage-ineligibles with no recognized religious community may engage in a special form of legal union, "covenant partnership," and enjoy civil "dissolution." Covenant Partnership for the Religionless Law 5770-2010, SH No. 2235, 428 (Isr).

85 HCJ 1779/99 *Brener-Kadish v Ministry of The Interior*, 54 IsrSC 368 (2000) (Isr).

86 See FH 4252/00 *Ministry of Interior v Brener-Kadish* (Nevo March 2, 2008).

87 ACRI, "Foreign Adoption Registration by Same-Sex Couples" (November 22, 2008) <https://law.acri.org.il/he/451> accessed March 14, 2021.

88 HCJ 566/11 *Mamat-Magad v Ministry of the Interior*, para 30 of Justice Naor's opinion (Nevo January 28, 2014).

89 ibid.

90 Justice Joubran alone stated that a constitutional analysis was due and that this case should be read as part of a series of procedures and processes relating to same-sex parenthood. See ibid [5]–[10] (Justice Joubran).

91 AAM 7368/22 *Ministry of Interior v Brill* (Nevo March 7, 2023) (Isr).