THE POWER OF UNDERSTATEMENT IN JUDICIAL DECISIONS

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Israel's Jewish and democratic character has always posed a great challenge to those seeking to protect and advance secular life in Israel.[1] During the founding period, the legislature enacted to require state authorities to register nationality and religion in the Population Registration database,[2] grant only Jews and their relatives the right to immigrate to Israel[3] and entrust the Orthodox establishment of the various religions with the exclusive jurisdiction to determine marriage and divorce matters.[4] These enactments challenged secular Zionists to design creative ways to promote freedom of conscience and freedom *from* religion within the context of a Jewish and democratic state. The struggle over the meaning of status in the contexts of nationality, religion, and marriage is as old as the State itself.[5] Ironically, Israel's systematic intermingling of church and state has led to its need to downplay the meaning of traditional symbols, such as status. The Court oftentimes declared that it was not recognizing the existence of new statuses while *de facto* the implications of its decisions time and again were recognition of the existence of new statuses in contexts of commonlaw marriage, civil marriage, nationality, and religion. In all these matters, the Court was creating secular statuses that could sidestep the monopoly of Jewish-Orthodox law. The power of these judicial decisions lies in the very fact that they understate their practical meaning.

This in turn made the struggle by same-sex couples for official recognition of their status as a union less difficult. They could follow the path of previous social activists that

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[1] Already the Israeli Declaration of independence identifies the State as Jewish and democratic. *See* The Declaration of the Establishment of the State of Israel, available at: http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx.

[2] Population Registration Law, 1965, S.H. 270 (Isr.) replacing an earlier Ordinance of similar effect.

[3] The Law of Return, 1950 SH 159 (Isr.).

[4] *See e.g.* Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953, S.H. 165 §§ 1-2 (Isr.) (granting the Orthodox-Jewish establishment exclusive jurisdiction over marriage and divorce of Jewish people).

[5] Status is used to define a group of people as distinguished from others in terms of rights, duties and legal capacities. Even if a person has discretion whether to enter or exit the status, he does not control the legal implications that the state attributes to the status. Oftentimes, the person must have the cooperation of the state to enter or exit the relationship. Status is effective not just between both sides to the relationship but also affects their relationships with third parties. *See* SHARON SHAKARGY, CHOICE OF LAW IN MATTERS OF MARRIAGE AND DIVORCE IN LIGHT OF CHANGES IN SUBSTANTIVE LAW 96-97 (2015) (in Hebrew). It should be noted that some less modern definitions require as precondition for recognizing the existence of status that it affects all fields of law and regarding the relationships with all possible parties.

sought recognition for personal statuses that did not align with Jewish Orthodox law. In this way, same-sex couples' struggle for recognition would be easier, but the movement might lose its unique character as a challenge to traditional concepts of marriage. It would risk becoming part of the wider phenomenon of secular challenges against the hegemony of Orthodox Jewish law over status in Israel. Thus, while same-sex couples fight in other parts of the world for recognition equivalent to that of a heterosexual marriage, in Israel they had a well-worn path to follow to achieve marital status equal to other non-Orthodox Jewish couples sharing a commonlaw marriage, married civilly abroad, or married at the consulate.[6] While all these unions fall short of full official formal marriage in Israel, they do come very close to achieving all the benefits and duties resulting from a "real" marriage.[7] Same-sex couples suffer comparable problems of discrimination and enjoy similar solutions as the general secular community that is incapable or unwilling to accept the hegemony of the Orthodox establishment. In that sense, the Israeli story regarding recognition of same-sex marriage is unique in comparative terms.

A. The Helpless Basic Law

Israel's *United Mizrahi Bank* judicial decision enjoys world fame as the one in which the Israeli Supreme Court "discovered" that Israel has a formal Constitution in the form of Basic Laws and it enjoys the power of judicial review over primary legislation.[8] The opportunity to make this judicial move came with the enactment, in 1992, of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, which include limitation clauses requiring state authorities to act proportionally in infringing the rights enumerated in them.[9] Till 1992, Israel's Basic Laws dealt primarily with separation of powers rather than individual rights.[10] Those supporting the decision justify it primarily in terms of enhancing the protection of individual rights by granting them constitutional status. Those opposing the decision argue

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[6] See Aeyal Gross, *The Politics of LGBT Rights: Between (Homo) Normativity and (Homo) Nationalism and Queer Politics*, LAW & SOCIAL CHANGE 101, 105-106 (2013).

[7] *See* SHAHAR LIFSHITZ, COHABITATION LAW IN ISRAEL IN LIGHT OF A CIVIL LAW THEORY OF THE FAMILY (2005) (in Hebrew).

[8] CA 6821/*93 United Mizrahi Bank Ltd. v. Migdal Collective Vill*., 49 (4) PD 221 [1995] (Isr.). It was partially translated in 31 ISR. L. REV. 764 (1997); *see also* full translation at 1995-2 ISR. L. REPORTS 1, *available at* http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf. By formal Constitution, I mean a Constitution that enjoys the following three characteristics: identification, supremacy, and entrenchment. Identification means that it is relatively easy to identify the various parts of the Constitution. There is a commonly accepted document or set of documents that citizens and elites alike refer to as the country's Constitution. Supremacy means that the legal system includes a hierarchy that defines the Constitution as supreme over regular law. Thus, a statute should not infringe on a constitutional provision, and, if it does, the courts in many countries are authorized to exercise judicial review to protect the supremacy of the Constitution. Entrenchment means that the constitutional amendment process is more arduous than is the process of amendment of regular law. Obviously, different countries offer a spectrum of these characteristics and the fulfillment of the requirements is often a matter of degree rather than of kind.

[9] Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 8 (Isr.); Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 4 (Isr.) (Basic Law: Freedom of Occupation originally enacted in 1992, replaced in 1994**)**.

[10] For discussion of Israel's pre-1992 constitutional law, see Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457 (2012).

primarily that the Court aggrandized its power vis-à-vis the elected branches since there was no conscious public decision to give the Basic Laws constitutional status.[11] The Court in *United Mizrahi Bank* debated, in hundreds of pages, whether Israel's Basic Laws amount to its formal Constitution. It used a strong rhetoric establishing the existence of the power of judicial review over primary legislation, yet it upheld the statute's constitutionality in the matter at stake. In the twenty years since the *United Mizrahi Bank* decision, the Court has struck down over a dozen statutes as unconstitutional.

Alas, the Basic Law: Human Dignity and Liberty includes an explicit provision that protects the laws preceding its enactment from being invalidated.[12] This provision was intended *inter alia* to protect legal enactments related to religion and state security from being constitutionally scrutinized by the Court. If not for this provision, the Basic Law would not have been enacted.[13] One of the most oppressive statutes preserved by this Basic Law is the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law enacted in 1953, which requires Jewish people to marry by the Orthodox establishment according to Jewish Orthodox law.[14] Thus, the law prevents Jewish people from marrying under Israeli law in ways other than Jewish Orthodox law. As such, this law severely violates fundamental constitutional rights to liberty, equality, personal dignity, and autonomy. The Court rejected a petition against the validity of this statute in the early 1970s, even while acknowledging that this statute runs against freedom of conscience and freedom from religion.[15] As mentioned above, the Basic Law: Human Dignity and Liberty preserved the validity of this statute.

B. The Revolutionary Funk-Schlesinger Decision

United Mizrahi Bank could not thus serve as the primary means by which to circumvent the monopoly of religious-Orthodox law over marriage and divorce in Israel.[16] Registering in Israel the marriages of same-sex couples, who obtained legitimate licenses under laws outside the country, did not rely on *United Mizrahi Bank.* Instead, a much less known and definitely less celebrated decision named *Funk-Schlesinger* decided in the 1960s, served to support those registrations.[17] Yet, the power of *Funk-Schlesinger* lies in the Court's choice to downplay the meaning of its decision, a strategy that stands in sharp contrast to the naked revolution pronounced clearly in *United MIzrahi Bank*.

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[11] For an argument that the public discussion focused on the wrong question of whether Israel has a formal Constitution rather than the question of what kind of a formal Constitution is forming in Israel, see Rivka Weill*, Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349 (2012).

[12] Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 10 (Isr.).

[13] Judith Karp, *Basic Law: Human Dignity and Liberty: A Biography of Power Struggles,* 1 L. & GOV'T 323 (1993).

[14] Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953, S.H. 165 §§ 1-2 (Isr.).

[15] CA 450/70 *Rogozinsky v. State of Israel*, 26 PD 129 (1971) (Isr.).

[16] The Basic Laws may serve as a complementary road. *See* Rivka Weill, *Did the Lawmaker Shoot a Cannon to Hit a Fly? On Proportionality in Law*, 15 LAW & BUS. 337, 409-411 (2012) (suggesting ways to limit the implications of the preservation of old law).

[17] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*, 17 PD 230 (1963) (Isr.).

In 1962, a Christian woman named Funk requested the Israeli Minister of Interior to register her in the official Population Registration database managed by the State as a married woman carrying her husband's name Schlesinger. She married a Jewish-Israeli citizen in Cyprus in a civil marriage ceremony, since Israeli law did not permit interfaith marriage of this kind to be conducted in Israel.[18] The Registrar denied her request, explaining that Israeli law did not recognize her marriage as valid. She petitioned the Court.

The Court in a majority decision granted her request and ordered the Minister of Interior to register her marriage. The minority opinion held that by registering an invalid marriage, the Registrar would be certifying false information. In contrast, the majority held that the Registrar enjoys only administrative, and not judicial, power. He has no power to decide the validity of marriage. It is enough that the citizens or inhabitants seeking registration provide official documents testifying that they are married, as Mrs. Funk-Schlesinger did when submitting her marriage certificate from Cyprus. The Court held that the Population Registrar does not decide status issues, nor does the registration testify to the validity of the status written within. Rather, according to the majority, the Population Registration database only collects and provides statistical data.[19] The information contained within it cannot be relied upon as correct and does not grant any substantive rights. The Registrar may refuse to register information, according to the Court, only when the falsity of the information is so clear that there is no reasonable doubt about its lack of legitimacy. Otherwise, the Registrar must register the information.[20]

But, Mrs. Funk-Schlesinger's interest in the registration was not for the sake of registration alone. She came to Israel as a tourist after her marriage and, based on it, sought to become a permanent resident. Her petition to the Court prompted the Minister to grant her permanent resident status, and thus the Court did not have to rule on the merits of her request. Thus, even in the context of the *Funk-Schlesinger* decision itself, the holding that registration pertains to statistics alone was not true. Mrs. Funk-Schlesinger sought registration to achieve substantive ends.

The Court in *Funk-Schlesinger* held that its decision had a merely formal, rather than substantive, impact. But, *de facto* the Court created a very powerful precedent that subsequent courts were eager to follow in their struggle to enable secular life in Israel. *Funk-Schlesinger* became the primary mechanism by which the Court *de facto* recognizes various non-Orthodox statuses in Israel without ever explicitly recognizing, and often times even explicitly denying, that this was the meaning of the judicial decisions. The Court has successfully veiled the revolutionary nature of its decisions.

C. The New Population Registration Law of 1965

Within two years after the *Funk-Schlesinger* decision, the Knesset (Israel's legislature) replaced the Population Registration Law with a new one, which clarified that the registration of nationality, religion, personal status (single/married/divorcee/widower), and

[18] Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953, S.H. 165 (Isr.).
[19] *Funk-Schlesinger, supra* note 17, at 244 (Zusman J.).
[20] *Funk-Schlesinger, supra* note 17, at 243 (Zusman J.).

name of spouse will not serve even as *prima facie* evidence of the accuracy of this information. [21]

The Knesset enacted the Law in 1965, except for the provisions concerning the authority of the Registrar, about which there was hot legislative debate. The legislators extensively discussed the *Funk-Schlesinger* decision. They differentiated between *Funk-Schlesinger* and another decision, issued during the same time period: *Gurfinkel and Haklai v. Minister of Interior*.[22] In *Gurfinkel and Haklai*, the Court in a majority opinion refused to order the Minister of Interior to register private marriage conducted between a man and a woman, who were both Israeli citizens and inhabitants. The petitioners had a private ceremony because the official Jewish Orthodox establishment, which was in charge of Jewish marriages, had reservations about whether they were allowed to marry each other under Jewish Orthodox Law. The Court found that the Registrar may insist on a public certificate by an official authority prior to registering the couple as married.[23]

Not until 1967 did the Knesset amend the new Population Registration Law to delineate the exact authority of the Registrar to refuse to register information provided by inhabitants. The law authorizes the Registrar to refuse to register information for which reasonable basis exists to suspect the information is false, but only if the information is provided by the notification of the applicant alone. If there is a public certificate--even from a foreign country--that supports the information, the Registrar must register the information. Regarding requests to change personal status based on the notification of the inhabitant alone, the Registrar may refuse to register only if the information is contrary to other information contained in the registration or to a public certificate on the matter.[24] The Knesset made it clear that it intended to require the Registrar to register all foreign official marriages, to enable Jewish people from the diaspora deciding to immigrate to Israel (*making Aliya*) to be registered as married, even in the case of interfaith marriages between Jews and non-Jews.[25]

D. The Power of Understatement

The *Funk-Schlesinger* precedent stands for the proposition that the Population Registration database merely amasses statistics and affects no substantive rights, and the Registrar must therefore register the information submitted in the application if it is accompanied by a public certificate.[26] The Court decided that the new Population

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[21] Population Registration Law, 1965, S.H. 270 § 3 (Isr.).
[22] HCJ 80/63 *Gurfinkel and Haklai v. Minister of Interior*, 17 PD 2048 (1963) (Isr.).
[23] The woman was divorced and there was doubt whether the man was a Cohen and thus not allowed to marry her under Jewish-Orthodox law. Today, it may be possible to register a private marriage between a Cohen and a divorcee. *See e.g.* HCJ 51/69 *Rodnitzky vs. The Rabbinical High Court of Appeals*, 24 PD 704 (1970).
[24] Population Registration Law, 1965, S.H. 270 §19b (Isr.)
[25] *See* 49 DK 2960-2967 (1967).
[26] The Population Registration Law differentiates between first registration and amendment to an existing registration. First registration requires a public certificate and in its absence a notification by the applicant. If the registration is based on notification alone, the Registrar may refuse to register if he has reasonable basis to suppose that the notification is not true. But regarding personal status, the Registrar may refuse only if the notification contradicts a different registration or a public certificate

Registration Law of 1965 had no impact on the validity of the *Funk-Schlesinger* decision, and some Justices even treated the Act as an explicit affirmation of the precedential nature of the decision.[27] *Funk-Schlesinger* 's fundamental impact on the rights of various minority groups--and even on the rights of those belonging to the majority that reject the Orthodox-religious establishment—has been no less than a revolution. The pretext was that the Court was deciding "nothing," but the subtext was judicial recognition *de facto* of various personal statuses in Israel, that do not conform to Jewish Orthodox Law.

More broadly, Israel has specific laws that deal with the collection of population statistics.[28] It does not need the Population Registration Law to serve that purpose. Israeli authorities use the data provided in the Population Registration when contemplating substantive rights or even to criminalize bigamy or to decide questions about labor requirements on the Sabbath.[29] Moreover, the Knesset was fully aware during discussions on the Population Registration Law that the registration does affect substantive rights, such as issues of taxation.[30] Thus, a gap exists between what the authorities are supposed to do under the line drawn by *Funk-Schlesinger* decisions (*not rely on the Population Registration*) and what they actually do (*rely on the Population Registration*).

The *Funk-Schlesinger* route became a way of circumventing the dominance of Jewish Orthodox Law over personal life in Israel. The Court widened the precedent set by *Funk-Schlesinger* to apply not just in the context of marriage, but also in contexts of religion, nationhood, adoption, parenthood, and same-sex marriage. The Court typically decides these cases by majority opinions, with religious or traditional Justices writing minority opinions.

Based on *Funk-Schlesinger*, the Court in 1970, by a majority of five–to-four, ordered the Minister of Interior to register the Children of Shalit as Jewish in nationality despite the fact that only their father was Jewish. This contrasted sharply with Jewish-Orthodox religious law, which determines the nationality of the child by the nationality of the mother. The minority of Justices did not treat the Population Registration as a matter of mere statistics, but rather as a kind of public certificate itself.[31] In fact, the Court viewed this decision as so important, it was the first time the Court sat in an expanded panel of nine Justices. The Justices heard arguments for more than a year, and the 130-page decision set a new record for length. During the trial, CJ Agranat, in the name of the entire panel, asked the Attorney General to propose that the government initiate an amendment to the law omitting the category of nationality from the registry altogether. This request was designed to excuse the Court of the need to decide on the merits of the case. The government refused due to

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on the matter. An amendment to an existing registration requires a public certificate. Population Registration Law, 1965, S.H. 270 §§19b-19c (Isr.)

[27] *See e.g*. HCJ 58/68 *Shalit v. Minister of Interior*, 23 PD 477, 507 (1970) (Zusman J.).

[28] The Statistics Ordinance [New Version], 1972 *Dinei Medinat Yisrael (Nusach Chadash)* No. 24, 25th of Nisan, 5732 (9th of April, 1972), p. 500 replacing the Ordinance of 1947.

[29] *See* Eitan Levontin, *A Tower Floating in the Air: Funk-Schlesinger and the Law of the Population Register*, 11 LAW & GOV. 129 (2007).

[30] 41 DK 654 (1964) (Deputy Minister of Interior Ben Meir); 49 DK 2964 (1967) (MK Klinghoffer).

[31] Shalit, *supra* note 27, at 526 (Landau J.).

national security interests.[32] This request reflects how much the decision weighed on the Justices. Deputy CJ Zilberg opened his opinion writing that the question before the Court was "the most important ever decided by the Court."[33] It dealt with the very basic definition of the Jewish people. Thus, a sharp contrast exists between the *reasoning* of the Court that registration was merely statistical, and the *outcome* of the decision, which expands the notion of who is Jewish for the purposes of secular life in Israel.

Shortly after the *Shalit* case, the Knesset amended the Law of Return, as well as the Population Registration Law, to clarify that a "Jew" means only a person born to a Jewish mother or one who converted, and he must not belong to a different religion.[34] With these amendments, the Knesset intended to overrule the *Shalit* decision.[35] But, despite the legislative amendments, the Court held that *Funk-Schlesinger* continues to apply to the registration of nationality and religion. The Court, in a majority opinion in 1989, used *Funk-Schlesinger* to require the Registrar to register converts as Jews both in terms of religion and nationality, when the conversions were conducted outside of Israel, even if the Conservative or Reform Communities conducted those conversions.[36] These non-Orthodox Jewish conversions are obviously not recognized by Israel's Orthodox establishment, which oversees conversions in Israel.[37] Later, the Court expanded this holding by requiring the Registrar to register even those converted in Israeli Conservative or Reform Communities.[38]

Likewise, in 1994, the Court ordered the Registrar to register a consular marriage conducted in Israel in the Brazilian embassy between a non-Jewish Brazilian woman and an Israeli Jew who held double citizenship with Brazil. As is the other cases described above, this couple could not have married under Israeli Jewish Orthodox law. The Court clarified that it was deciding registration standards, not the validity of the marriage.[39] However, this deemphasizes the substantive meaning of such registrations. In fact, often the claimants themselves argue that registration has substantive impact, and thus it is crucial that they register according to their notification to the Registrar.[40]

E. Same-Sex Couples

Same sex couples, like some of the interfaith couples or others who wish to marry outside their religious establishment, cannot marry in Israel.[41] In that sense, they suffer no

[32] DK 1970 725.
[33] Shalit, *supra* note 27, at 492.
[34] The Law of Return (Amendment No. 2), 1970 SH 34 (Isr.). In the amendments, the Knesset ordered the Registrar not to register a person as Jewish in terms of both nationality and religion if it contradicts a notification given under the Population Registration Law, or a different registration or a public certificate, unless the courts decide otherwise.
[35] DK 1970 725 (Minister of Justice Shapira).
[36] HCJ 264/87 *Shas Movement v. The Director of Population Registration in the Minister of Interior*, 43 (2) PD 723 (1989) (Isr.).
[37] The Religious Community (Conversion) Ordinance, 2 ISL 1269 (Heb), 1294 (Eng) grants the Chief Rabbis the power to decide the legal validity of conversion to Judaism.
[38] HCJ 5070/95 Na'amat-Movement of Working Women and Volunteers v. Minister of Interior, 56 PD 721 (2002).
[39] HCJ 2888/92 Goldstein v. Minister of Interior, 50 PD 89 (1994).
[40] *See infra* Parts E & F.
[41] Some religions enable interfaith marriage, but Jewish Orthodox law prohibits it.

unique discrimination that is different from that experienced by those who do not or cannot accept the Orthodox-religious establishment. Same-sex couples suffer comparable difficulties and enjoy similar solutions as the general secular community that is incapable or unwilling to accept the monopoly of the Orthodox establishment.

Beginning in the mid-1990s with the *Danielowitz* decision, the Court recognized same-sex couples as having a commonlaw marriage and entitled to rights and benefits similar to heterosexual couples [42] In that case, the Court ordered the El-Al Israeli Airlines Company to grant a flight attendant, who was cohabitating with another man, the same benefits the company awards to heterosexual couples. This decision paved the way for state authorities to gradually grant same-sex couples social and economic benefits similar to those available to commonlaw heterosexual couples.[43]

Israeli same-sex couples struggle to achieve equality not just in substantive terms but also in registering their status. In a groundbreaking precedent, *Brener-Kadish,* a lesbian couple requested the Registrar to register their child as having two mothers based on an adoption decision of a California Court and the child's California birth certificate. [44] The Registrar refused, arguing that the falsity of this request was apparent on its face, because biologically a child cannot have two mothers. The Court in a majority opinion ordered the Registrar to register the child as having two mothers. The Court clarified that it was not recognizing the validity of the adoption. Rather, based on *Funk-Schlesinger,* it was not in the Registrar's purview to determine the validity of the adoption. He must process the registration based on the foreign public certificates provided by the couple. The minority opinion distinguished this case from *Funk-Schlesinger*. The registration of parents--in sharp contrast to the registration of details such as marriage, nationality, or religion--does serve as *prima facie* evidence under the Population Registration Law.[45] The minority opinion also emphasized that registration was no mere formality; it does in fact grant substantive rights, as the petitioners themselves asserted.[46]

The next important milestone was the *Ben-Ari* decision. [47] Five homosexual couples, all Israeli inhabitants and citizens, petitioned the High Court of Justice to order the Registrar to register their official civil marriage, based on the certificate of their marriage from Toronto,

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[42] HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz*, 48(5) PD 749 (1994). An English translation is available at: http://elyon1.court.gov.il/files_eng/94/210/007/Z01/94007210.z01.htm.

[43] *See infra* note 49. Commonlaw marriage is not registered in Israel and thus the couples must prove their relationship to authorities each time they seek various benefits. Nonetheless, commonlaw marriage is a recognized status such that, even if the parties contract to regard their relationship as not a marriage and not cohabitation, the Court may disregard this agreement based on the facts, and it may impose on the parties the rights and duties applicable to cohabitation under Israeli law. CA 7021/93 Bar-Nahor v. Estate of Osterlitz (deceased) (October 25, 1994), Nevo Legal Database (by subscription) (Isr.).

[44] HCJ 1779/99 Brener-Kadish v. Minister of interior, 54 PD 368 (2000).

[45] Brener-Kadish, *supra* note 44, at 380 (Zuabi J.). See also: Population Registration Law, 1965, S.H. 270, § 3 (Isr.).

[46] Brener-Kadish, *supra* note 44, at 384 (Zuabi J.).

[47] HCJ 3045/05 Ben-Ari v. Director of Population Administration, Ministry of Interior, [2006] (2) ISrLR 283. An English translation is available at the Israeli Supreme Court's website: http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.pdf.

Canada. The Minister of Interior refused, based on the following three considerations: First, marriage under Israeli law is an institution designed for a union between a man and a woman. Second, the overwhelming majority of the countries do not recognize same-sex marriage. Third, the question whether to recognize same-sex marriages is a matter for the legislature, rather than the Court, to decide.

Rather than acknowledge the precedential nature of the decision, the majority of the Court held that it was merely applying *Funk-Schlesinger* to the case at hand. Since the same-sex couples brought an official foreign marriage certificate, the Registrar must register the couples as married. The Court emphasized that its decision should not be read as recognition of the validity of same-sex marriage,[48] which was consistent with its past decisions employing the *Funk-Schlesinger* precedent ruling that registration does not validate the underlying personal status of the registrants. The minority opinion held that same-sex couples should be granted economic and social rights, like other couples, as in fact is the law in Israel. [49] But, marriage registries are *public* symbols rather than *individual* rights, and as such should be decided by the legislature. The minority noted this should be especially the case in light of the fact that only three percent of the countries worldwide recognize the possibility of same-sex marriage as of 2006.[50] Since the *Ben-Ari* decision, the Israeli family courts have enabled same-sex couples registered as married to dissolve their relationships, when both parties to the relationship agreed to such dissolution.[51] However, some of these courts have declared in doing so that they did not recognize the validity of the marriage to begin with.[52]

F. Epilogue

As expected of a decision of this caliber, the *Ben-Ari* decision did not satisfy either camp. Those promoting same-sex couples' rights expressed disappointment that the decision was formalistic and included no language of a celebration of rights. In addition, the need to fly to far-flung places like Toronto in order to be registered in Israel is discriminatory and imposes a heavy financial burden on same-sex couples. It was no coincidence that only men petitioned the Court in Ben-Ari. Women earn less money and find the financial burden of this discrimination more challenging.[53] It should be noted, however, that since the *Ben-Ari*

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[48] Ben Ari, *supra* note 47, at para 23 of CJ Barak's opinion.

[49] The majority opinion enumerates the various rights same-sex couples already enjoy in Israel as of 2006: the right to work benefits, social security, inheritance, pension, etc. *See* Ben Ari, supra note 47, at para 19 of CJ Barak's opinion. However, same-sex couples do not enjoy all the rights available to heterosexual ones. Primarily, they, like single people, cannot have children by surrogacy in Israel. *See* HCJ 5771/12 *Liat Moshe v. The Board for Approval of Surrogacy Agreements* (September 18, 2014), Nevo Legal Database (by subscription) (Isr.).

[50] Ben Ari, supra note 47, at para 10 of J. Rubinstein's opinion.

[51] *See* FC (TA) 11264-09-12 *Johns Doe v. Minister of Interior* (Nov. 21, 2012), Nevo Legal Database (by subscription) (Isr.).

[52] *See* DCM 52224-11-13 *Johns Doe* (Dec. 8, 2013). Nevo Legal Database (by subscription) (Isr.).

[53] *See* Dan Yakir & Yonathan Berman, *Same-Sex Marriages: Is it Really Necessary? Is It Really Desirable?*, 1 LAW & SOCIAL CHANGE 169 (2008) (the authors represented the petitioners). For criticism that registration does not amount to recognition, see: Michal Tamir & Dalia Cahana-Amitay, *"The Hebrew Language Has Not Created a Title for Me": A Legal and Sociolinguistic Analysis of New-Type Families*, 17 AM. U. J. GENDER SOC. POL'Y & L. 545, 561-568 (2009); Yuval Merin, *Recognizing Foreign*

decision, the Court has ordered the Registrar to register couples married by proxy in El-Salvador, again without acknowledging the validity of marriage.[54] Thus, this route will supposedly be open also to same-sex couples. One may also argue that the current state of affairs is unsatisfactory, since the State might decide at any point in time to stop relying on the registration in making substantive decisions. Leaving the applicants at "the mercy of the State" is unwarranted.[55] The limited nature of the *Ben-Ari* decision becomes more apparent in light of the ground-breaking *Obergefell v. Hodges* decision of the US Supreme Court, which recognizes the constitutional right of same-sex couples to marry.[56] Others have argued that the Court does not understand that registration does accord substantive rights and is not mere statistics. Thus, there is a need to abandon the *Funk-Schlesinger* line of decisions and require the legislature and the Court to decide on the merits of the issues.[57] Some have also suggested that the legislature, rather than the Court, should decide such issues as marriage, nationality, and religion.[58]

My argument in this article is different. I suggest that the Court has always been aware that registration is not simply a matter of statistics, notwithstanding its reasoning to the contrary. It could not be otherwise. Both third parties and state authorities rely on registration when making substantive judgments regarding individual rights. The minority of Justices in the various decisions have repeatedly acknowledged this reality. [59] The petitioners, most noticeably in the same-sex marriage case, explicitly acknowledged this reality in support of their petition.[60] The State, as respondent, opposed registration on this very ground.[61] Most recently, that family courts are declaring the dissolution of registered same-sex couples' relationships is proof that their relationships are recognized by the State--both at the entry and the exit stages. The courts treat the couple's internal relationship as governed by commonlaw marriage principles.

The Court instead has repeatedly self-consciously downplayed the significance of its decisions, because acknowledging the reality may have undercut its authority to promote

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Marriages of Couples Ineligible for Religious Marriage in Israel-A New Perspective on Choice of Law and Public Policy 51 HAPRAKLIT 513 (2012).

[54] HCJ 4916/04 Zlasky v. Minister of Interior (June 19, 2011), Nevo Legal Database (by subscription) (Isr.).

[55] *See* ALON HAREL, WHY LAW MATTERS (2014) (discussing the importance of imposing constitutional duties on the state).

[56] *Obergefell v. Hodges*, 576 US (2015), available at: http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf. In fact, the Aguda-the Israeli National LGBT Task Force wrote letters to the Attorney General, the Chair of the Knesset, the Knesset's Legal Advisor and the Director of the Justice Ministry requiring them to enact a statute allowing same-sex marriage in Israel least they petition the Court to achieve a judicial decision equivalent to Obergefell. *See* Ilan Lior, *Agudat LGBT: We Will Petition the HCJ to Authorize Marriage to Same-Sex Couples*, HA'ARETZ, June 30, 2015, available at: http://www.haaretz.co.il/news/education/.premium-1.2671797.

[57] *See e.g.* Levontin, *supra* note 29, at 186.

[58] *See* Shahar Lifshitz and Gideon Sapir, *Who Shall Decide Who is a Jew? – On the Proper Role of the Judiciary in a Democratic State*, 22 BAR-ILAN L. STUD. 269 (2007) (focusing their criticism especially on the question of who is a Jew).

[59] *See supra* Part D. & E.

[60] *See* http://www.gogay.co.il/uploadfiles/media/article/BGZ_021105.rtf

[61] *See e.g.* Na'amat, *supra* note 38, at 731.

individual rights through these mechanisms. Were the Court to openly acknowledge the results of its decisions, arguably it would not have been able to issue them, given the explicit legislative grant of hegemony to the religious establishment in all substantive aspects of marriage, nationality, and religion.[62] Thus, the *Funk-Schlesinger* line of decisions enabled the Court to carve out a sphere for secular life in Israel, where freedom of conscience and freedom from religion is possible by pretending otherwise. Secular life in Israel prospers within this gentle gap between the Court's stated reasoning and what the Court actually does. One could criticize the Court for its lack of candor and thus bearing no accountability for its decisions. But, then again, one may argue that this game of make-believe serves all the parties involved, both religious and secular, and is the cornerstone of social tolerance within Israel. One day Israeli society will mature enough to outgrow this game and embrace the reality in the open.

[62] On the eve of his retirement, CJ Barak handed a precedential decision that recognized the validity of a civil marriage conducted abroad of a Jewish heterosexual couple, who were Israeli citizens and residents that were competent to marry under Jewish law. He further authorized the Rabbinical Courts to issue them divorce (rather than a Jewish *Get*). HCJ 2232/03 *A. v. Tel-Aviv-Jaffa Regional Rabbinical Court*, [2006] (2) IsrLR 245. An English translation is available at the Israeli Supreme Court's website: http://elyon1.court.gov.il/files_eng/03/320/022/a16/03022320.a16.htm. During the same time period, in an obiter, in a different decision, CJ Barak expressed his opinion that he would have recognized the validity of interfaith civil marriage abroad, in cases similar in facts to *Funk-Schlesinger*. CFAM 9607/03 *John Doe v. Jane Doe* (Nov. 29, 2006), Nevo Legal Database (by subscription) (Isr.).