

# Iterations of the Family: Parents, Children and Mixed-Status Families

Tally Kritzman-Amir\*

## I. INTRODUCTION

Every society has some fundamental socio-legal concepts which are iterated, in Derrida's terms,<sup>1</sup> in a process in which meaning is endowed, expanded, refined or reconstructed. The content of these concepts is constructed in a dialogic process, through which they are exposed to slow change over time, but, most of the time, most people understand and support the meaning of the concept.

Societies are penetrable to social "others" to some extent, and are unable to shut themselves off from external influences. National political communities currently contain various kinds of "others" with partial, incomplete membership, such as immigrants, persons under occupation, and more.<sup>2</sup> As Benhabib

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\* Associate Professor in immigrations law, labor law and international law, The Academic Center for Law and Business; Polonsky Fellow at the Van Leer Jerusalem Institute. I would like to thank my colleagues, Yonatan Berman, Sari Bashi, Avinoam Cohen, Keren Isaac-Amgor, Tali Schaefer, Elad Peled, Ruth Zaafran, Noam Peleg, and Adriana Kemp for commenting on early drafts of this article. I would also like to express my gratitude to Oded Feller for the extensive help he gave me during the course of the research, writing and thinking about the article, and to Daphna Hacker and Yuval Livnat for their advice. My appreciation also goes to the members of the Israel Sociological Association, participants in the departmental seminar at The Academic Center for Law and Business and to the participants in the seminar at the Department for Public Policy at Tel Aviv University for their helpful comments. I thank Ms. Mali Davidian, in charge of Freedom of Information at the Ministry of the Interior for her devoted attention to my request (which did not receive a formal response but was partially answered orally at our meeting). Finally, I would like to thank Noa Arad-Krinsky and Shiran Altman-Butler for their assistance with the research.

1. See Jacques Derrida, *Signature, Event, Context*, in A DERRIDA READER: BETWEEN THE BLINDS, 90 ff. (Peggy Kamuf ed. 1982).

2. See, e.g., Sarah Willen, Citizens, Real Others and Other Others: Governmentality, Biopolitics and Deportation of Undocumented Migrants from Tel Aviv, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE AND FREEDOM OF MOVEMENT 262–294 (Nicholas De Genova & Nathalie Peutz eds.

describes it, membership and citizenship are being reshaped and losing their formerly all-or-nothing approach to rights, just as the tension between sovereignty and hospitality is being attenuated.<sup>3</sup> Benhabib argues that, over time, since the fundamental societal concepts apply to non-members, institutions will undergo democratic iterations which will mitigate the international (human rights and other) commitments and the particularistic social and legal principles of each society, through an introspective process during which the society looks at its desired character. While defensively embracing some of the “original” meanings of social concepts, international and cosmopolitan concepts are also considered.<sup>4</sup>

I argue that the presence of “others” in the society – the existence of those who fall outside the social order (such as immigrants, occupied populations, etc.) expedites the iterations of fundamental concepts – unveils the inconsistencies which are incorporated in them, and sheds new light on the assumptions behind the meanings of the legal terms. We see such iterations in different concepts, ranging from the concept of the “employee” (which organizes the employment market), the concept of “border” (which organizes the political space), the concept of participation (which organizes the decision-making community and the “belonging”) to the concept of sovereignty (which organizes the concept of authority).

The present study follows my previous research in which I investigated the relations between immigration law and other basic social concepts.<sup>5</sup> The paper examines the iteration of the concept of family. Families have undergone significant changes due to globalization, and at the same time, the migration of families and family members has also changed the face of transnational migration and the reactions to it and regulation of it by states. I examine the iteration of the concept of the family by looking at its construction in regard to mixed-status families which are made up of a parent with no legal status and a child who has legal status. The issues brought up with respect to those families are in the grey zone between civil

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2010).

3. See Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 45–47 (2004).

4. *Id.*

5. See, e.g., my article examining the connection between immigration and privatization: Tally Kritzman-Amir, *Privatization and Delegation of State Authority in Asylum Systems*, 5 *LAW & ETHICS OF HUM. RTS* 194 (2011).

rights and immigrants' rights, and between the rights of "outsiders" and "insiders" as they touch on the rights of citizens as well as those of non-citizens. Such families constitute a real challenge to sovereign states, since it is difficult to exclude them. These families are regulated in the intersection between family law and immigration law, but, as I demonstrate, quite often immigration law considerations outweigh and trump family law considerations. The peripheral location of those mixed families on the margins of society shed light on questions such as: When do we encourage, protect and support families? Are all nuclear families equal? How and when do ethno-demographic political considerations influence our perceptions of family and family-related rights? Are we always able to consistently defend the rights of parents and the best interests of the child? Do we see the different members of those families as bearers of rights and, where applicable, status? I have dealt with the peripheral areas and the difficult distinctions that lie within them in previous papers.<sup>6</sup>

The article examines the fundamental perception of family life within the context of mixed families, using the specific test case of mixed-status families in Israel. Israel makes an interesting test case since it is one of the most pro-natalist societies, and provides exceptional support to families, yet it has one of the most perplexing immigration regimes. In recent years, non-Jewish immigration to Israel has increased and with it has come family-related matters. Mixed-status families are those in which the children have legal status, but one or both parents do not have status, but would like to obtain status to stay with the child. Typically (though not always) such families are formed when an immigrant and a citizen or resident have a child together. The child acquires status as a result of being born to a parent with status, but the immigrant parent does not. I emphasize here that these applications for status change are not based on any spousal relationship between the parents but on the parental relationship with the children who hold Israeli status; in most cases there is no longer any spousal

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6. See for example my doctoral dissertation in which I examined the grey area between migrant workers and refugees – that area in which we find those people whom I call socio-economic refugees.

Tally Kritzman-Amir, *Socioeconomic Refugees* (2008) (unpublished Ph.D. dissertation, Tel Aviv University). See also the study on states' duty to people presenting themselves at the state's border. Tally Kritzman-Amir & Thomas Spijkerbauer, *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1 (2013).

relationship between the parents.

While the general rule is that parents are not granted status in order to be able to stay in Israel with their children, dozens of court decisions at variance with this have dealt with the issue, resulting in contradictory outcomes. In practice, the rules applying to foreign parents desiring to acquire status on the basis of their parenthood of an Israeli citizen are not consistent with the policy adopted in Israel for promoting childbearing and support for parents, and for protecting the right to family life and parenthood. In addition, these rules are not in line with the legal culture which views the principle of the best interest of the child as a guiding principle for judicial decision making about children. This raises the concern that children of foreign parents receive inferior legal protection of their rights in comparison to foreign couples<sup>7</sup> and to children of parents who are citizens. Despite their being citizens, ethno-demographic considerations about the make-up of the desired population<sup>8</sup> in the state play a role in determining the legal

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7. Another implication of this rule that only in exceptional cases will status be granted to foreign parents of Israeli children is that an equivalent approach is not taken with regard to applications by foreign couples for family unification and with regard to applications for family unification by parents of children who are citizens. The lenient approach to granting status to a foreign spouse of an Israeli stemming from a spousal relationship is dramatically different from the approach to the foreign parent of an Israeli child whose application for status is based on his parental connection. See Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and its Implementation in the State of Israel*, 28 B.C. INT'L & COMP. L. REV. 79 (2005).

8. In the Israeli contest the main ethno-demographic consideration attempts to act to preserve the Jewish majority in the state. I do not wish to take a position about the necessity for this consideration for the preservation of the State of Israel as a Jewish and democratic state or about its morality. Many before me have expressed themselves on this question. See, e.g., Haim Ganz, *From Richard Wagner to the Right of Return: A Philosophical Analysis of Israel Public Problems* (2006) [Hebrew]. Compare Amnon Rubinstein and Liav Orgad, *Human Rights, State Security and a Jewish Majority: A Case of Immigration for Marriage*, 48 HAPRAKLIT 315,344 (2006) [Hebrew], with Yaffa Zilberschatz, *Citizenship: What is It and What Will It Be?* in *LAW IN ISRAEL – LOOKING AT THE FUTURE* 123,123-161, 174-176 (Yedidia Stern, Yaffa Zilberschatz and Itay Lifshitz, eds., 2003) [Hebrew]. The difficulty the article refers to is the precedence of this consideration above that of the best interest of the child and the right to family life. In this regard, see HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior, 61(2) 202, paragraph 14 in the opinion of Justice Procaccia and paragraph 24 in the opinion of Justice Jubran [2006] (Isr.) [hereinafter *Adalah*]. In general I shall only comment that the main legal means that facilitates the realization of the ethnic-demographic interest is the Law of Return that grants automatic status to Jews and their relatives. See: The Law of Return. It should be noted that this Law of Return, along with the

ruling and its administration.

#### A. METHODOLOGY

In this article I distill the legal rules that apply to mixed-status families and critique them. The legal ruling can be located by looking at the legislation, procedures and regulations governing this matter that I shall examine in light of the legal perception of the concept of family in Israel in the broad sense. I shall locate this legal rule by in-depth analysis of thirty-six court opinions and rulings handed down between 2000 and January 2012, in which there is a real discussion on the status of foreign parents of children who are citizens.<sup>9</sup> These opinions examine the applications of twenty foreign mothers and nine foreign fathers wishing to acquire status in the State of Israel.<sup>10</sup> Twenty-five of the opinions were handed down in administrative courts, while the remaining ones were from the Supreme Court usually sitting as the High Court of Justice.<sup>11</sup> Two of the opinions examine the constitutional

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immigration of Jews to Israel, also enabled the immigration of their family members who are not Jewish according to Halakhic law. Studies conducted on the arrangement raised doubts whether the law intended this or whether this was an unintended consequence, or whether the law wished to add to the state a population which, it is assumed, associated itself with the Jewish public and would constitute a counter-weight to the Palestinian public in Israel. See for example, Yfaat Weiss, *The Golem and Its Creator, or How the Law of Return Changed Israel into a Multi-Ethnic State*, 19 THEORY AND CRITICISM, 45 (2001)[Hebrew].

9. Similarly, during the course of preparing this article, dozens of court opinions were read in which there was no real discussion about the granting of status to foreign parents of child citizens. These opinions are, of course, important, but it is difficult to draw conclusions from them that contribute to this matter. Nevertheless, it is important to remember that there is not necessarily an essential difference between the matters that ended with a reasoned opinion and those which were granted only a laconic opinion.

10. In two cases in which the application dealt with parents wishing to receive temporary status in Israel so as to complete emergency medical treatment for their child, both parents were foreign. AdminA 10993/08 John Doe v. Ministry of the Interior (Oct. 3, 2010), Nevo Legal Database (by subscription) (Isr.); AdminC (TA) 1727/04 Adshina v. Ministry of Interior, (Aug. 17, 2004), Nevo Legal Database (by subscription) (Isr.).

11. In three cases there were opinions and interim opinions by the Supreme Court sitting as an administrative appeals court. John Doe 10993/08; AdminA 775/12 John Doe v. Ministry of the Interior (Jan. 27, 2012), Nevo Legal Database (by subscription) (Isr.); AdminA 660/12 Jane Doe v. Ministry of the Interior (Jan. 23, 2012), Nevo Legal Database (by subscription) (Isr.). Furthermore, in one of the cases, a petition was filed for a further hearing. See AdminA 8916/02 Dimitrov v. Ministry of the Interior – Population

validity of the specific legal order regarding family unification and find the law valid.<sup>12</sup> In eight of those opinions, the court ultimately granted a status to the foreign parent that would allow him to remain in Israel temporarily.<sup>13</sup> In eight instances, the court accepted the petition and returned it for a further hearing in the Humanitarian Committee of the Ministry of the Interior giving instructions about how to deliberate on the case.<sup>14</sup> In five of the cases the court was not required to respond to the petition because it became redundant before being heard.<sup>15</sup> In twelve of the instances the petition was rejected,

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Administration (July 6, 2003), Nevo Legal Database (by subscription) (Isr.).

12. Adalah 7052/03; HCJ 466/07 Galon v. Attorney General (Jan. 1, 2012), Nevo Legal Database (by subscription) (Isr.).

13. AdminC (TA) 3111/08 Salmova v. Ministry of the Interior (June 12, 2011), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 707/07 Muskara v. Minister of the Interior (Dec. 21, 2009), Nevo Legal Database (by subscription) (Isr.); AdminC (TA) 2981/04 Situtao v. Minister of the Interior (Feb. 1, 2007), Nevo Legal Database (by subscription) (Isr.); HCJ 1905/03 Akal v. Minister of the Interior (Dec. 12, 2010), Nevo Legal Database (by subscription) (Isr.); John Doe 10993/08; AdminC (Jer) 673/02 Anonymous Woman v. Minister of Internal Security (Jan. 28, 2004), Nevo Legal Database (by subscription) (Isr.); AdminC (TA) 1136/03 M.W. v. State of Israel (Nov. 2, 2004), Nevo Legal Database (by subscription) (Isr.); AdminC (BS) 22597-02-11 Winter-Gerasimov v. Ministry of the Interior Population Administration (Mar. 30, 2011), Nevo Legal Database (by subscription) (Isr.).

14. This is a technique applied by Israeli courts in order to refrain from intervening directly in matters which are considered to be a part of the discretion of the administrative. The Court accepts or denies the petition, but refers the matter at hand back to the authorized administrative body for review, while directing its attention to certain considerations or specific merits of the case. AdminC (Jer) 37903-03-11 John Doe v. Ministry of the Interior (June 12, 2011), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 202/05 Asraa v. Ministry of the Interior (Oct. 31, 2005), Nevo Legal Database (by subscription) (Isr.); AdminC (TA) 2454/04 Okchuko Obi v. Ministry of the Interior (Mar. 6, 2007), Nevo Legal Database (unpublished) (Isr.); AdminC (Jer) 1204/99 Kahiga v. Ministry of the Interior (Jan. 26, 2010), Nevo Legal Database (unpublished) (Isr.); AdminC (BS) 313/06 Physicians for Human Rights v. Ministry of the Interior (Dec. 24, 2006), Nevo Legal Database (by subscription) (Isr.); AdminC (Haifa) 1295/03 Shevtzov v. Ministry of the Interior (Mar. 8, 2005), Nevo Legal Database (by subscription) (Isr.); AdminC (TA) 3134/04 Mariano v. Ministry of the Interior (May 25, 2005), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 8799/08 Abu Lama v. Ministry of the Interior (June 12, 2011), Nevo Legal Database (by subscription) (Isr.).

15. AdminC (Jer) 281/06 Antawi v. Ministry of the Interior (Nov. 12, 2006), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 205/07 Roi v. Ministry of the Interior (Nov. 11, 2007), Nevo Legal Database (by subscription) (Isr.); HCJ 4042/04 Kazantzev v. Population Administration - Ministry of the Interior (Oct. 31, 2005), Nevo Legal Database (by subscription) (Isr.); HCJ 2745/00 Alami v. Ministry of the Interior (Nov. 22, 2000), Nevo Legal Database (by subscription) (Isr.); Adshina 1727/04.

and the foreign parent's application for status in Israel was denied.<sup>16</sup> These opinions with their contradictory results reveal much about the law's attitude – and the attitude of the authorities – toward those families. From these inconsistent norms, this paper reveals a rationale which explains them. As I shall show hereafter, the variation in the results of the court opinions stems from the various family circumstances, but also from value perceptions of the Israeli immigration rationale and from divergences in the implementation of the vague legal rules that apply to these cases.

Only a minority of the cases on these matters ever reaches the courts, and reasoned opinions are few, so it should not be assumed that these opinions are representative of reality. In order to understand the everyday practices adopted by the Population and Immigration Authority, I submitted a request for information to the Ministry of the Interior in accordance with the Freedom of Information Act. This request did not receive an official response, but representatives of the Ministry of the Interior initiated a meeting with me to explain the method of addressing the applications of foreign parents to acquire status in Israel.

## B. STRUCTURE OF THE ARTICLE

Part II of the article discusses the term “iteration” and the way in which it operates in a society in which there are both immigrants and other people who do not belong to the collective

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16. Included in these cases are two temporary orders in which the temporary relief did not allow the foreign parent to remain in Israel, since the appeal had little chance of succeeding. Therefore, indirectly, for all practical purposes, the application was denied. John Doe 10993/08; AdminC (TA) 1971/07 Valimalva v. Minister of the Interior (May 22, 2008), Nevo Legal Database (by subscription) (Isr.); HCJ 4156/01 Dimitrov v. Ministry of the Interior 56(6) PD 289 [2002] (Isr.); Dimitrov 8916/02; AdminC (TA) 1882/05 Albatina v. Ministry of the Interior (Nov. 27, 2006), Nevo Legal Database (by subscription) (Isr.); AdminC (TA) 1509/04 Michlin v. Ministry of the Interior (Oct. 27, 2004), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 757/03 Kassem v. Ministry of the Interior (Sept. 6, 2006), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 32513-11-09 Eimash v. Ministry of the Interior (Apr. 22, 2010), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 1175/03 Mahamid v. Ministry of the Interior (July. 9, 2003), Nevo Legal Database (by subscription) (Isr.); John Doe 775/12; AdminC (Jer) 27315-08-11 Jane Doe v. Ministry of the Interior (Jan. 3, 2012), Nevo Legal Database (by subscription) (Isr.); AdminC (Jer) 529/02 Burana v. Ministry of the Interior (Aug 26, 2002), Nevo Legal Database (by subscription) (Isr.).

and who do not have the wherewithal for full political participation.

Part III of the article addresses, in general terms, the relationship between globalization and trans-national immigration, on the one hand, and the concept of the family, on the other hand.

Part IV explains the situation of Israeli families whose members have mixed status. The rules affecting them make it almost impossible for foreign parents to acquire status based on their children's status in Israel. I argue that this affects the lives of these families in such a way that they threaten the family unit and the relationships between its members.

In Part V of the article, I shall investigate the construct of the child in the iteration of the concept of family as it relates to the mixed-status family. Is it really the case, as the court rulings instruct, that the rule applicable in Israel is that children do not grant their parents status but are granted this status by them? I shall point out the problematics of this rule and its implementability.

Part VI of the article looks at the connection between the iteration of the concept of the family that is formed in the context of those mixed-status families and the narrative and terminology employed in the discourse of the families in the courts and the administrative authorities dealing with this matter.

In Part VII of the article, I sum up the conflict arising between families, parenting and childhood and the globalization and legal arrangements that apply to immigrants.

## II. ITERATIONS

"Iteration" is a term used to describe a process of repeating a term or concept. No repetition is ever identical to the original. It always includes a change, a refinement, an added meaning or an enrichment of the substantive content of the concept or term.<sup>17</sup> This is true even when the change is subtle or seems intangible. An underlying assumption of the analysis of iteration of concepts and terms is that concepts do not have an original meaning or an intrinsic or embedded meaning. Instead, the assumption is that concepts have a meaning that is assigned to them and, to some extent, is constantly in a state

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17. See Derrida, *supra* note 1.



of flux.<sup>18</sup>

With respect to legal concepts, we often attribute some original or inherent meaning to them.<sup>19</sup> This is due, among other things, to the need to have an accurate source from which the authoritative force of a term derives, so that the power of the authorities is restrained.<sup>20</sup> But even when legal concepts or terms are coined, the original intent of those who framed them regarding their meaning often (if not always) does not cover all possible contexts in which a term or a concept is later going to be applied; not all the possible hidden meanings can be foreseen and their scope is often debatable.<sup>21</sup> So, the original meaning can never be complete, and always requires further clarification and changes through its application in various contexts.<sup>22</sup> Subsequent applications of legal terms and concepts are iterations, as they require interpretation, adaptation to changing circumstances, and a re-enforcement of authority and what it stands for. In Benhabib's terms:

Democratic iterations are such linguistic, legal, cultural, and political repetitions-in-transformation, invocations which are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent.<sup>23</sup>

Iterations are linguistic, political, legal, cultural and social, and therefore occur in numerous loci.<sup>24</sup> It is not completely possible to isolate any one locus for the sake of a discussion of the iteration of a particular concept or term, since iterations of terms and concepts occur in a disorganized manner in the different loci, in parallel, and in a manner which bears impact

18. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe ed. 1953).

19. JACK N. RAKOVE, *ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION*, 3–22 (1997).

20. *Marbury v. Madison*, 5 U.S. 137 (1803).

21. See Aharon Barak, *Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia*, *THE FULBRIGHT CONVENTION* (Jan. 29, 2006), [http://www.fulbright.org.il/fileadmin/fulbright/editor/images/news/Documents\\_for\\_news/Barak\\_50th\\_symposium\\_speech.doc](http://www.fulbright.org.il/fileadmin/fulbright/editor/images/news/Documents_for_news/Barak_50th_symposium_speech.doc).

22. *Id.*

23. Benhabib, *supra* note 3 at 180.

24. *Id.* at 179.

on the other loci. Socio-legal concepts are iterated in the courts, parliaments, and government offices, but also in public discourse, cultural affairs, private entities (corporations, law firms, unions, NGOs, press), etc. All of these may have authoritative force upon their iteration, so their iterations may indeed have practical meaning. Nevertheless, it is of great importance to pay special attention to iterations which take place in the legal system because they both reflect the social and political understanding of terms and produce authoritative understandings of these terms. In addition, iterations which occur in the legal system quite often reflect areas of social tension, as legal struggles occur around areas of controversy. Indeed, Benhabib points out the fact that "democratic majorities *re-iterate* [ . . . ] principles and incorporate them into democratic will-formation processes through argument, contestation, revision and rejection."<sup>25</sup>

One form of iteration which is interesting to examine is the process of iteration of concepts *by* the democratic majority *in light of* the existence of others who are not a part of the demos. Benhabib argues that "rights claims which frame democratic politics, on the one hand, must be viewed as transcending the specific enactments of democratic majorities under specific circumstances . . . ." <sup>26</sup> She views the iteration processes which deal with non-members of the democratic majority as mitigating between the local norms, perceptions and interests and the universalistic principles and international law norms, which endow them with new meaning.<sup>27</sup>

Such meaning-granting processes occur with respect to different fundamental concepts. Benhabib deals with the iteration of the concepts of membership, freedom of religion and conscience and birthright citizenship.<sup>28</sup> In this paper, I deal with the iteration of the concept of family.

### III. SOME PRELIMINARY BASIC ASSUMPTIONS ABOUT IMMIGRATION, SOVEREIGNTY AND FAMILY UNIFICATION

This article assumes that states are not obligated to permit

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25. *Id.* at 181.

26. *Id.*

27. *See, e.g., id.* at 198.

28. *Id.* at 181-212.

immigration and that they take steps to manage this immigration.<sup>29</sup> They have the ability to restrict the right of those who are not their citizens and residents to stay in them, using diverse considerations. This right of the states stems from their sovereign power from which is derived their authority to rule over their (physical) borders and their (civil) boundaries, including their ability to select whom to include and whom to exclude. The sovereign right of the state is fundamental for the existing state order and is closely intertwined with the responsibilities and the obligations each state takes upon itself in relation to its citizens and residents. Among those obligations of the state towards its residents is the delineation of the character of the state and the determining of the personal characteristics and identity of those belonging to it, as derived from this delineation. This determining is undertaken, among other things, in the light of considerations of economics, security, demographics, culture, etc.<sup>30</sup> Based on the premise that “belonging” to a country is a type of good that can be distributed, using different considerations, the state must decide how this good will be distributed. This is always a political determination and rests upon world views about the desired character of the state and is given precedence over other possibilities that seem less desirable.<sup>31</sup> This determination is made possible by the negative facet of that same responsibility and obligation of the state towards its citizens and residents, resulting in a lack of responsibility and duty towards anyone not belonging to the state collective.

As globalization became stronger, the states of the world – including the isolated ones – ceased to be closed and sealed off from immigration.<sup>32</sup> So, despite the political preference for including certain people and excluding others, the practical

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29. On this subject, see, for example, Adriana Kemp, *Managing Migration, Reprioritizing National Citizenship: Undocumented Migrant Workers' Children and Policy Reforms in Israel*, 8 THEORETICAL INQUIRIES IN L. 663, 663 (2007).

30. See, e.g., Daphne Barak-Erez, *Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT'L J. CONST. L. 184, 184–89 (2008).

31. See, e.g., Triadafilos Triadafilopoulos, *Reviews*, 34 CAN. J. POL.SCI. 661, 661–63 (2001) (reviewing STEPHEN CASTLES & ALASTAIR DAVISON, *CITIZENSHIP AND MIGRATION: GLOBALIZATION AND THE POLITICS OF BELONGING* (2000)).

32. See, e.g., CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 208–09 (1999).

ability of states to restrict immigration became limited. All the states of the world maintain interdependent relations with other states which find expression in movements of capital, merchandise and people, from it and into it. Thus migration is an inseparable part and, to a large extent, an unavoidable part of the equation. For this reason, it is accepted practice by the states of the world to allow certain types of immigrants to acquire status (temporary or permanent) though they deny this to other types of immigrants. Of course, attempts to categorize immigrants are doomed to failure because the categories, by their nature, are always rough and under or over-inclusive, and in practice there will always be a partial overlap between the categories. Nonetheless, there are accepted categories of migrants in existence, and these include, i.e., migrant workers, forced migrants (or refugees) and family unification migrants; often each of these groups has a distinct arrangement in the immigration statutes of the different countries.<sup>33</sup>

The norms and policy applied to migration for family unification purposes are particularly sensitively drawn, because family unification migration is one of the locations which challenges the distinction between “immigration policy” (as a matter for governing the interests of the state vis-a-vis the rights of those outside the state collective) and “civil rights” (the rights of those belonging to the collective). This is the intersection at which the distinction between internal and external crumbles, for in the natural course of things, whatever the immigration laws are, they will have a decisive effect on the rights of the citizens who have an interest in the immigration of their family members. To put it another way, when it comes to family migration, it is not possible to police the exterior without ordering the interior, and vice versa.

Moreover, family unification law stands at the doctrinal junction between family law and migration law. These two legal systems order the status of individuals – one deals with the personal and the other with the civil – and, in this way, assign a central place for the state to make fundamental determinations about identity and meaning in relation to the

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33. The way in which world immigration is analyzed and segmented can be seen in OECD's *International Migration Outlook*. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], INTERNATIONAL MIGRATION OUTLOOK: SOPEMI 2011, (2011), available at [http://dx.doi.org/10.1787/migr\\_outlook-2011-en](http://dx.doi.org/10.1787/migr_outlook-2011-en).

rights of those subject to its laws. The development of the legal code on family unification law is the outcome of, as well as evidence for, globalization, and particularly how migration has transformed the content of the concept of the family and parent-child relationships from a once relatively unitarian concepts to multi-faceted concepts.<sup>34</sup> More than ever, it is possible in our day for families to be composed of people of different origins, with various types of citizenship and varying civil status in the given state with all the complexity implied therein.<sup>35</sup> The family is directly and indirectly affected by globalization and migration. Among other things, new, transnational concepts are evolving about parenthood, fertility, identity, relationships, gender, rights of women and children, and more.

States experience a need to regulate the family life of new types of families and the challenges they bring, including the challenges of phenomena such as: transnational motherhood, split households, left-behind children, parachute children, anchor children, etc. Those processes of change which the concept of family is undergoing happen in parallel to a growing tendency to acknowledge the existence and regulate families such as single parent families, same sex partnerships, families created through the use of ART (alternative reproductive technologies), etc.

Family unification is not only the location in which globalization influences the family but is also the location in which the family has an effect on globalization, and especially on migration. Migration for the purpose of family unification has become the main legitimate channel (quantitatively and qualitatively) for global migration.<sup>36</sup> Even when states outlawed various types of migration, in most states there was a continued recognition of migration for the purposes of family

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34. See, e.g., Venetia Evergeti & Louise Ryan, *Negotiating Transnational Caring Practices Among Migrant Families*, in GENDER, GENERATIONS AND THE FAMILY IN INTERNATIONAL MIGRATION 335 (Albert Kraler et al. eds., 2011).

35. BAHIRA TRASK, GLOBALIZATION AND FAMILIES: ACCELERATED SYSTEMATIC SOCIAL CHANGE 61 (2010).

36. Family unification migration has become the most extensive migration channel in Europe. See, e.g., ALBERT KRALER, Civic Stratification, Gender and Family Migration Policies in Europe, INTERNATIONAL CENTRE FOR MIGRATION POLICY DEVELOPMENT [ICMPD] (2010), available at [http://research.icmpd.org/fileadmin/ResearchWebsite/Test\\_content/FINAL\\_Report\\_Family\\_Migration\\_Policies\\_Online\\_FINAL.pdf](http://research.icmpd.org/fileadmin/ResearchWebsite/Test_content/FINAL_Report_Family_Migration_Policies_Online_FINAL.pdf).

unification as a legitimate form of migration. All this arose from the presumption that the boundaries of the family ought not to be breached by geo-political boundaries. That is to say that, to the extent possible, there should be an overlap between the boundaries of the family and civil boundaries. Moreover, states have allowed migration for family unification out of an acknowledgement that the family has the power to aid integration of immigrants into society.<sup>37</sup> This is also the source of the conundrum presented by family members holding different civic status.

The changes in the family in the wake of globalization as well as of globalization in the wake of the family are not confined to the Western world.<sup>38</sup> However, this article confines itself to examining some of the cases of family unification that have occurred in Israel as a test case for a complex phenomenon.

#### IV. THE ISRAELI TEST CASE

##### A. GENERAL

It is of particular interest to examine the iteration of the concept of family as a test case in Israeli law. This is because of the special interest Israel displays in the concept of the family, and because of its unique immigration policy. Israeli society encourages parenthood and childbearing more than other societies do.<sup>39</sup> This facilitates an overview of the norms that regulate family life from which the strong pro-natalist perception is derived. The debate on the perception of family in Israeli law presumes that preoccupation with anything connected to parenthood, childbearing and establishing family

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37. One of the prominent scholars expressing this view is Hiroshi Motomura. See, e.g., Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103 (2006); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511 (1995).

38. See, e.g., Rhacel Salazar Parrenas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy*, in GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 54 (Barbara Ehrenreich and Arlie Russell Hochschild eds., 2006).

39. See, e.g., Sigal Goldin, *The Management of Fertility in a Nation that Encourages Childbearing*, in CITIZENSHIP GAPS: IMMIGRATION, FERTILITY, AND IDENTITY IN ISRAEL 167 (Yossi Yonah and Adriana Kemp eds., 2008).

units is not only an individual matter backed by the local and universal discourse on rights, but is also a political matter.<sup>40</sup> The choice to bear children, to enter into a spousal relationship and to become pregnant are significant choices in the constitution of individual identity but are also influenced by and have an influence on the collective “we” of society as well as on the formation of the “other” who does not belong to the collective. That is why the demographic discourse is currently so pervasive – the discourse that attempts to manage and control the population, its increase and choices in these spheres, at times employing ethno-demographic considerations. In the specific context of Israeli society, the overwhelming ethno-demographic consideration is the notion of preserving the Jewish majority in the state, based on a perception, first of all, that Israel must remain a Jewish state (even though we do not perceive the structural contradiction between that and the desire to be democratic), and, second, because maintaining a Jewish majority in the State of Israel is a necessary precondition for the Jewish character of the State to be preserved.

The following are the ways in which the legal rules give expression to support for the family unit:

### 1. The Right to a Family

In many court opinions, Israeli law has recognized the right to a family and the rights derived from that. This includes a person’s right to parenthood, a person’s right to live in proximity to his family members, the right of a child to have a relationship with both his parents, and so on. In this, Israeli law has adopted accepted ideas from the universal discourse on rights which views the family as “the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>41</sup> and protects it from being harmed by the state. However, besides the protection, which the family enjoys stemming from human and universal rights, it also enjoys the protection of local law if this is perceived as advancing the ethno-demographic interests of the state.<sup>42</sup> The reverse,

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40. Compare Giorgio Agamben, *Homo Sacer - Sovereign Power and Bare Life* in *TECHNOLOGY OF JUSTICE: LAW, SCIENCE AND SOCIETY*, 395,405 (Shai Lavi, ed. 2003) [Hebrew].

41. Universal Declaration of Human Rights, G.A. Res. 127 (III) A, U.N. DOC. A/RES/217(III), at 16 (Dec. 10, 1948).

42. See Goldin, *supra* note **Error! Bookmark not defined.**

however, is also true: As I shall show, protection of the family is weakened in order to advance other ethno-demographic interests.

## 2. Encouragement of childbearing

Israel is a state that promotes parenthood and childbearing. The birth rate, which is among the highest in the Western world,<sup>43</sup> is attributed to the fact that, for various reasons,<sup>44</sup> many practices have been undertaken to promote childbearing and support for parents wishing to expand their families. The examples of encouraging parenthood and childbearing are many and varied: the large amount of funding given for physical examinations linked to childbearing, supervision of abortion,<sup>45</sup> funding of coverage for complications during pregnancy<sup>46</sup> and granting the option of being absent from work and military reserves for the purposes of undergoing tests and treatments,<sup>47</sup> allowing cost-free childbirth in hospitals and giving a grant for childbirth to those wishing to receive it, concessions at work for pregnant women,<sup>48</sup> and financial backing for extensive use of new fertility technology.<sup>49</sup>

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43. See, e.g., International Woman's Day, CENTRAL BUREAU OF STATISTICS (Mar. 6, 2013), [http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=201311056](http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201311056); see also Israeli Society Report No. 4, Central Bureau of Statistics (Oct. 2011), [http://www.cbs.gov.il/publications11/rep\\_04/pdf/5box1\\_h.pdf](http://www.cbs.gov.il/publications11/rep_04/pdf/5box1_h.pdf).

44. See generally Daniel Sperling, *Commanding the "Be Fruitful and Multiply" Directive: Reproductive Ethics, Law and Policy in Israel*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 363 (2010) (highlighting the explanations for promoting the desire to become parents include religious reasons, among which is the commandment to "Be fruitful and multiply", historical reasons – mainly the memories of the Holocaust, and demographic-security rationales. By and large, these explanations relate to promotion of childbearing as linked to values that aspire to preserve the Jewish collective and the Jewish majority in Israel. These explanations are consistent with assertions that state regulation of fertility advances which is perceived as ethno-demographic interests).

45. See generally YAEL HASHILONI-DOLEV, *A LIFE (UN)WORTHY OF LIVING: REPRODUCTIVE GENETICS IN ISRAEL AND GERMANY* 83–104 (David N. Weisstub, Vol. 34 2007).

46. National Insurance Law (Consolidated Version), 5755-1995, art. 5 (1995).

47. Employment of Women Law, 5714-1954, art. 7 (1954) [hereinafter Employment Law]; Sick Pay (Absence because of a child's sickness) Law, 5753-1993, art. 1 (1993) [hereinafter Sick Pay Law].

48. See Employment Law, *supra* note 47, at 1, 2, & 10.

49. See Goldin, *supra* note **Error! Bookmark not defined.** (highlighting



### 3. Assistance given to parents of children

Parents are given assistance in all matters dealing with child care. A child, at least one of whose parents is a resident or citizen of Israel, at birth has the right to be registered in the Population Registry and to acquire status in Israel. As a person holding such status he is included in the Israeli welfare state and entitled to all that derives from this immediately after birth. Among other rights, there is the right to paid maternity leave and additional unpaid leave for the mother and the father,<sup>50</sup> the right to resign and receive severance pay in order to care for a child close to the time of birth or adoption,<sup>51</sup> the right to receive payment for sick leave, including children's illness,<sup>52</sup> and the right to a shorter work day under certain conditions to ease the integration of parents into the workforce and to allow them to remain with their children.<sup>53</sup> Also, benefits provided by the state to assist with raising children are paid in such a way as to particularly favor families with many children.<sup>54</sup>

### 4. Protection of parental relationship in family units that have dissolved

The relationship between a parent and child is supported and ordered even when there is no spousal connection between the parents or the spousal relationship has been severed. Underpinning this protection is the perception that the connection between both parents and their child is

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that fertility treatments receive substantial subsidies and there are relatively few restrictions on them. Attempts by the Ministry of Finance to reduce public funding allocated to fertility treatments have aroused many tensions and disputes); *see also* Sperling, *supra* note 44, at 364 (discussing assisted reproductive technology); *see generally* Rachel Tz'islvic, *Surrogacy in Combination with Egg Donation: Halachic and Legal Aspects*, 39 FORENSIC MED.: MED. & L. ISSUE 82 (2008), *available at* [http://www.health.gov.il/hozer/mk20\\_2007.pdf](http://www.health.gov.il/hozer/mk20_2007.pdf) (detailing the regulations on managing a sperm bank and instructions for performing artificial insemination).

50. *See* Employment Law, *supra* note 47, at 6; *see also* Insurance Law, *supra* note 46 at Ch. 3 art. 3; *see also* Sick Pay Law, *supra* note 47.

51. *See* Severance Pay Law, 5723-1963, art. 7 (1963) [hereinafter Severance Law].

52. *See* Sick Pay Law, 5736-1976, art. 2 (1976) [hereinafter Sick Pay].

53. *See* Employment Law, *supra* note 47, at art. 7.

54. *See* National Insurance Law, *supra* note 46, at ch. 4 art. 2.

fundamental, natural, and deep and is separate from the relationship (or lack thereof) between the parents. This relationship is perceived as vital to the emotional development of the child and it is thought that in its absence the child may feel abandoned. Although legislation gives priority to custody by the mother in certain circumstances,<sup>55</sup> the legal system nevertheless also recognizes, as a preferred option, joint custody. With joint custody, both parents bear the burden of raising their children and also maintain the possibility of visitation arrangements. In any event, any arrangement between the parents that determines the division of responsibility between them in regard to their child requires court approval.<sup>56</sup> In general, an arrangement that allows the child to maintain a real and ongoing relationship with both his parents will be given preference.<sup>57</sup> However, such decisions will have implications on family life that have yet to be realized. Of course, the approach that enshrines the continued relationship of the child with both his parents in the event of their separation affects the nature of the relationships in the family as long as there is a spousal relationship between the parents.<sup>58</sup>

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55. See generally Capacity and Guardianship Act, 5722-1962 (1962) [hereinafter Guardianship Act] (defining the relationship between parents and their children in terms of guardianship and determining the presumption of tender years with the assumption that children up to the age of six stay with their mother if there is no reason to order otherwise); see also G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter Convention Child] (criticizing this presumption as gender biased and preference should be given to the perception of parental responsibility).

56. See Guardianship Act, *supra* note 55, at 24-25 (showing that in the absence of such an agreement between the parents, the court will determine the custodial parent as it sees fit, taking into account the best interest of the child. The term "best interest of the child" is abstractly implemented in a problematic way).

57. See Convention Child, *supra* note 55, at art. 18 (recognizing the importance of both parents taking responsibility towards their child, stating that "Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." Likewise, if a parent does not maintain a relationship with his child, it is still possible, from a legal standpoint, to compel him to take care of his economic wellbeing by making him pay child support).

58. See generally Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625 (1988) (explaining the way the legal rules function in the background).

## B. MIGRATION AND FAMILY UNIFICATION IN ISRAEL

The State of Israel does not view itself as an immigration state nor does it wish to be such. This arises partly from the fact that Israel wishes to be a Jewish state. For many years, the majority of immigration to Israel was Jewish and their arrival in Israel was viewed positively, as “return” or “*aliyah*” and not as immigration. However, in recent years, immigrants from the three categories mentioned above – migrant workers, forced immigrants, and family unification immigrants – arrived in Israel in considerable numbers (more than two hundred thousand).<sup>59</sup> It was under these conditions that laws and the institutions for implementing them, in particular for excluding the migrants from each of the three categories, began to take shape. This information must be taken into account in comparing Israel’s immigration policy with that of other states both in general terms and in the context of the family in which a parent is an immigrant and the children have status in the State.<sup>60</sup> Israeli law has determined general procedures for ordering the status of immigrants based upon family unification. It should be noted that, in contrast to other Western countries, the arrangements on this subject – just as in the general sphere of immigration – are not codified but are scattered between diverse normative sources with changing normative status. Criticism of this has been voiced both by the Courts and by scholars of the field.<sup>61</sup>

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59. *Compare Labor Migration-Selected Data*, THE CENTRAL BUREAU OF STATISTICS (2012) <http://www.cbs.gov.il/www/publications/alia/t2.pdf> (last visited Feb. 12, 2015); *with Statistics on Foreigners in Israel*, POPULATION AND IMMIGRATION ADMINISTRATION DEPARTMENT FOR POLICY PLANNING (2013), <http://www.piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/oct2013.pdf> (last visited Feb 12, 2015) (showing that the data on the number of migrants from the various categories is partial, assumed and contradictory).

60. *See, e.g.*, *Application of Amoury*, 307 F.Supp 213, 215 (S.D.N.Y. 1969); *see also Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (showing that if the rule on foreign parents of children is compared with citizenship in mixed-status families in the United States, the situation of foreign parents of child citizens is relatively common, because citizenship is granted to anyone born in its territory even in regard to undocumented workers’ children. The law in the United States is that the parent of a child citizen does not have the vested right to acquire status by virtue of his parenthood. The separation of the parent from the child or the possibility that the child will be compelled to leave the United States is not a consideration in and of itself).

61. *See generally* Amnon Rubinstein & Liav Orgad, *Human rights, State Security, and a Jewish Majority: the Case of Migration for the Purposes of Marriage*, 48 HAPRAKLIT 315 (2004) (providing an overview of laws on

Some of these arrangements have been established by legislation. Such is the arrangement that defines the *jus sanguinis* arrangement for the acquisition of citizenship. Whereas in some other countries there is a *jus solis* regime, under which those born within the territory acquire citizenship, in Israel this is available only to descendants of citizens or of potential citizens.<sup>62</sup> Article 4A(a) of the Law of Return 1950 (amended 1970) states that

The rights of a Jew under this Law and the rights of an *oleh* [immigrant] under the Nationality Law, 5712-1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.<sup>63</sup>

In this way, it has been possible, under the aegis of the Law of Return, for accompanying relatives of Jews to immigrate (children, grandchildren and spouses of all these including those that are not Jewish). Other cases regulating nationalization of relatives who are not Jewish arriving together with immigrants who have rights according to the Law of Return are to be found in Articles 5 and 7 of the Nationality Law 1952. These articles lay out a series of conditions, which, if fulfilled, make it possible for foreigners to become naturalized in Israel.<sup>64</sup> If a desire to become a citizen is based on the desire to unify families such naturalization will be possible even if all the strict requirements of these conditions are not met.<sup>65</sup> This all stems from a lenient approach towards those wishing to maintain family life. This approach has been

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family unification and comparative law in the field).

62. See generally Nationality Law, 5712-1952 (1953) available at <http://www.refworld.org/docid/3ae6b4ec20.html> [hereinafter Nationality Law].

63. The Law of Return, 51 SH 159, at art. 4 (1950), [http://www.jewishvirtuallibrary.org/jsource/Politics/Other\\_Law\\_Law\\_of\\_Return.html](http://www.jewishvirtuallibrary.org/jsource/Politics/Other_Law_Law_of_Return.html) [hereinafter Law Return].

64. See Nationality Law, *supra* note 62 (detailing the conditions for foreigners to become naturalized).

65. See *id.*, at art. 7 ("The spouse of a person who is an Israel national or who has applied for Israel nationality and meets or is exempt from the requirements of section 5 (a) may obtain Israel nationality by naturalization even if she or he is a minor or does not meet the requirements of section 5 (a).").

given support by decisions of the Supreme Court on this matter.<sup>66</sup> In their wake, the Ministry of the Interior developed a procedure for a graduated process of acquiring status in Israel, whose aim was to examine the sincerity and stability of the spousal relations and after the examination to grant the spouses the status of residents.<sup>67</sup> It should be noted that this arrangement eases the naturalization of spouses but is silent on the subject of those applying for family unification for the purposes of remaining with their children or their parents.<sup>68</sup>

Contrary to these arrangements is the Citizenship and Entry into Israel Law (Temporary Order) 2003. This Law, whose provisions are renewed every six months and whose constitutionality is scrutinized by the High Court of Justice, almost entirely<sup>69</sup> prevents family unification of Israelis with Palestinians and citizens of hostile countries.<sup>70</sup> It was in the framework of these exceptions to the arrangement that the possibility of granting to minor children status or permission to stay in Israel in order to prevent them from being separated from their custodial parent was introduced.<sup>71</sup>

Another directive concerning family unification is defined in the Entry into Israel Regulations 1974. Article 12 of these regulations states

A child who was born in Israel, but to whom section 4 of the Law of Return 5710-1950 does not apply, his Israeli status shall be the same as the status of his parents; should the parents not share one status the child shall

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66. HCJ 2355/98 Stemka v. Minister of the Interior 53(2) 728 [1999] (Isr.).

67. See The Procedure for Granting Status to a Foreign Spouse Married to an Israeli Citizen, Population, Immigration and Border Crossings Authority (May 2, 2008) available at <http://piba.gov.il/Regulations/5.2.0008.pdf>.

68. See Marin, *supra* note **Error! Bookmark not defined.**, at 703–04 (discussing the discrepancy between the policy that allows ‘relatively speaking’ spouses to undertake family unification and the policy that restricts parents from unifying families in order to stay close to their child).

69. See The Nationality and Entry into Israel Law (Temporary Order), 5763-2003, at art. 3A1 (2003) [hereinafter Entry Law] (showing that in the wake of comments about Adallah, the law was amended to permit unification of spouses of specific ages- article 3 permits family unification for a Palestinian woman of 25 years of age and above and for a Palestinian man of 35 years and above. Similarly, the law also creates a mechanism for dealing with applications having special humanitarian grounds).

70. See *id.* at schedule (naming the four hostile countries: Lebanon, Syria, Iraq, and Iran).

71. See *id.* at 3a.

receive the status of his father or of his guardian unless the second parent objects to this in writing; should the second parent object, the child shall receive the status of one of the parents, as shall be determined by the Minister.<sup>72</sup>

Aside from the above, there are procedures allowing parents lacking status to acquire status by virtue of their parenthood of an Israeli citizen in rare and exceptional cases.<sup>73</sup> A current addition is the Government Resolution on the granting of status to the children of undocumented migrant workers who meet additional conditions, the main thrust of which is the proof of the children's and their families' having become integrated in Israel.<sup>74</sup>

### C. BACKGROUND NORMS OF A FAMILY WITH AN IMMIGRANT PARENT AS CONTRASTED WITH THE PERCEPTION OF FAMILY IN ISRAELI LAW

Some of the steps taken to support, aid and encourage family units are also taken in the context of the families that include migrants. It is evident that the pro-natalist stance prevalent in Israel is also expressed in the context of the family in which one parent is undocumented, though to a lesser extent and inconsistently. Specific policy steps for encouragement and support can be identified, and families of which not all members are citizens also enjoy these. Alongside this, there are other specific policy steps, which are distinct in their logic, and which negatively affect the ability to live full family lives.

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72. Regulations on Entry into Israel, 5734-1974, at art. 12 (1974) [hereinafter Regulations].

73. See, e.g., Procedure for dealing with the granting of status to an elderly single parent of an Israeli citizen, 2011, Procedures of the Authority for Population, Immigration, and Border Crossings 5.2.0033 (Isr.) [hereinafter Status Elderly]; see also Procedure for the granting of status to the parents of soldiers, 2009, Procedures of the Authority for Population, Immigration, and Border Crossings 5.2.0036 (Isr.) [hereinafter Status Soldier].

74. See Resolution No. 156, Gov't 31 (2006) available at <http://www.pmo.gov.il/Secretary/GovDecisions/2006/Pages/des156.aspx> (detailing an arrangement for children of illegal migrants who reside in Israel).

## 1. Pregnancy and childbirth

Foreign women having employee status, whether documented or undocumented, are entitled to the protection of the labor laws. This includes protections for pregnant women, fertility treatments and childbirth and entitles them to a birth grant. Moreover, the national Labor Court required that health services providers

fund fertility treatments for a foreign woman who is neither a resident [nor] a citizen and her partner who is a citizen and a resident in circumstances in which the male citizen partner had fertility problems. This is because the duty of the insurer is to cover the expenses for required medical treatment as part of the entitlement of the insured . . . and this obtains even though the treatment involves carrying out medical procedures on his female partner who is not insured.<sup>75</sup>

The court treats the spouses as one body for the treatment and its financing.<sup>76</sup> Conversely, in other matters, when the case was about two undocumented foreign spouses who wanted permission to remain in Israel in order to complete fertility treatments, the court did not agree to delay their deportation from Israel to complete the treatments except for a short period.<sup>77</sup>

## 2. The right to remain near children and care for them

In certain contexts, the court has protected this right even when the parents were migrants,<sup>78</sup> viewing this right as

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75. File No.141/07 Labor Court Appeal (National), John Doe v. Clalit Health Services (Nov. 4, 2008), Nevo Legal Database (by subscription) (Isr.).

76. *Id.* at 55.

77. It seems that the Court did not get the impression that the spouses were acting intensively to complete the treatment and was concerned about the fact that only after many years of undocumented residence in Israel did they begin the treatments. *See* File No. 2054/04 Administrative Petition (Tel Aviv), Ashmi Shibaria v. Minister of the Interior (Sep. 12, 2004), Nevo Legal Database (by subscription) (Isr.).

78. This right has been recognized in the context of a mixed-status couple with no children consisting of a recognized refugee in Israel and his foreign partner. *See* File No. 8717/08 Administrative Petition (Jerusalem), Bayo v. Minister of the Interior (Jul. 9, 2009), Nevo Legal Database (by subscription)

inalienable, independent and not linked to citizenship or residency, at least in those cases where a documented migrant was concerned. Such a decision was reached as the court recently abolished<sup>79</sup> the procedure for “Treatment of a pregnant foreign worker, and for a foreign worker who gave birth in Israel”<sup>80</sup>. In its decision, the court reviewed the conditions set in the procedure for renewing the residence permit and work permit of a migrant worker who became pregnant and gave birth in Israel, which were that she must leave the country with her child and return without it. The main aim of the procedure was to prevent foreign workers from settling permanently in Israel.<sup>81</sup> The court’s decision was that the migrant workers enjoy constitutional rights including the right to family life and the right to parenthood in all circumstance since it is a right interwoven into the humanity of all people.<sup>82</sup>

### 3. Registration and granting status to children with one foreign and one Israeli parent

The regulations made it more difficult to register and to obtain status for the children because they required significant proof of paternity in cases where the father is the Israeli citizen or resident and the mother is the foreign parent. Among other things, an expensive genetic test was required to prove paternity in these cases. The Court has attempted to make the process of registering the child easier, but has viewed the requirement for proof of paternity in the matter of granting status as reflecting a reasonable balance between the interests of the minors and the fear of fraudulent declarations of paternity stemming from the substantial advantage to do so.<sup>83</sup>

The policy of encouraging and supporting mixed-status

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(Isr.).

79. *Id.*

80. Treatment of a pregnant foreign worker, and of a foreign worker who gave birth in Israel, 2012, Procedures of the Population and Immigration Authority 5.3.0023 (Isr.) [hereinafter Procedure for the treatment of a pregnant foreign worker].

81. File No. 11437/05 High Court of Justice (Jerusalem), Kav La’Oved v. Ministry of the Interior (Apr. 13, 2011), Nevo Legal Database (by subscription) (Isr.).

82. *Id.*

83. File No. 10533/04 High Court of Justice (Jerusalem), Weiss v. Minister of the Interior (Jun. 28, 2011), Nevo Legal Database (by subscription) (Isr.).



families that include members who are not Israeli citizens or residents is partially put into consideration, however, the extent of the encouragement, protection and support enjoyed by these families is less than that received by families composed of citizens and residents. It seems that this reflects the balance between the interests of the immigration policy and the right of family life. This favoritism toward families of citizens and residents is problematic for the following reasons: first, rights are supposed to trump interests;<sup>84</sup> second, the policy of encouragement and support is not consistent even in relation to families composed of migrants;<sup>85</sup> third, in regard to mixed-status families, Israeli citizens are also being harmed by the desire to restrict immigration and among these are minors.<sup>86</sup>

It seems to me that because Israeli society is so pro-natal and reveres the family unit, any deviation from this should be exercised only in extreme and exceptional cases. For example, it can be stated that if the undocumented migrant himself is a security risk to the state or the public order, the state is entitled to restrict the right to family life and to prevent immigration or to limit its support for the family unit of which he is a member.<sup>87</sup>

#### D. LEGAL PRECEPTS APPLYING TO MIXED-STATUS FAMILIES

Above I have addressed the general context, in other words the extent to which the state wishes to promote the right to family life with all its derivatives and, specifically, the extent to which this right is protected in families whose members are migrants. Now I shall explore the norms regarding the domain of the immigration laws that regulate the civil status of those foreigners belonging to families with child citizens and at least one foreign parent.

The leading precedent on the issue of granting status to

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84. See *infra* Part 5.b.

85. See *infra* Part 1.d.

86. See *infra* Part 4.

87. It is possible to think of additional restrictions such as a limit on the number of permits granted for family unification; this will result in suspending the practical possibility of realizing the right to family life in Israel and harming it temporarily, but, on the other hand, would realize the interest of restricting immigration into Israel. I am not certain that a restriction of this kind necessarily reflects the appropriate balance between the conflicting interests, but the scope of this article does not allow me to elaborate on this.

parents on the basis of the status of their children is the High Court of Justice decision in *Dimitrov*.<sup>88</sup> The *Dimitrov* case concerned a male foreign citizen who married an Israeli female citizen, and the couple had a daughter. The father began the naturalization process in Israel<sup>89</sup> based on his spousal relationship with the citizen mother. But after a few years, the relationship between the two began to break down and the mother applied to the Ministry of the Interior asking to stop the proceeding because she intended to divorce.<sup>90</sup> The Ministry of the Interior decided to extend the foreign parent's residence permit until the date of the divorce, but he petitioned the Court to grant him citizenship and to prevent his deportation.<sup>91</sup> Supreme Court President Barak rejected the father's claims which asserted that he should be granted citizenship based on his daughter's status as a citizen.<sup>92</sup> The state of the relationship between the father and daughter is not fully elucidated in Barak's decision, and perhaps it is not possible to reveal in the brief framework of a court decision.<sup>93</sup> All we know about the relationship is that it is "good and warm,"<sup>94</sup> on the one hand, and, on the other hand, "the daughter is with her mother. The petitioner is not raising his child. The petitioner has the option of visiting the daughter."<sup>95</sup> These were the circumstances under which President Barak rejected the father's petition, stating that there was no justification for granting him status so that he can remain in Israel in proximity to his daughter:

The position of the respondent is that only in exceptional cases, in which there are exceptional humanitarian circumstances, should the foreign parenthood of a minor who is an Israeli citizen justify granting him the status of permanent resident . . . The respondent's opinion is that these special circumstances

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88. HCJ 4156/01 *Dimitrov v. Ministry of the Interior* 56(6) PD 289 [2002](Isr.).

89. The graduated process was created, in the wake of *Stemka* and its purpose was to put in place a gradual procedure in which the spouses acquire an increasing level of status in Israel after a certain period. See HCJ 2355/98 *Stemka v. Minister of the Interior*, 53(2) PD 728 [1999] (Isr.).

90. *Dimitrov*, 56(6) PD at 291.

91. *Id.*

92. *Id.* at 296.

93. *Id.* at 298.

94. *Id.* at 296.

95. *Id.*

do not obtain in the case before us. Nevertheless, the respondent is willing to allow the petitioner, if he so desires, generous visitation visas in order to visit his daughter from time to time. Is this in accordance with the law? In my opinion, the answer is affirmative. . . . [T]he place of the minor is with his parents. Wherever they reside, there shall he reside too, and not the reverse. A minor is dependent on his parents, and his parents are not dependent on him . . . Therefore, . . . the citizenship of the daughter cannot grant the status of permanent resident to her foreign father, although there might, of course, be humanitarian cases that necessitate divergence from this principle. I am satisfied that in the case before us, these special facts do not obtain.<sup>96</sup>

An appeal was filed against this decision of President Barak's requesting a further hearing.<sup>97</sup> Justice Matza rejected the petition for a hearing but made the following statement:

Beyond what is required, I add that the respondent would do well to formulate guidelines for examining the best interest of the child in the context of making determinations about the application of a foreign parent to obtain status in Israel. Thus, among other things, it should be possible to define criteria that take into account the age of the child, the question of which of the parents has custody, the length of separation between the parents, whether there are welfare reports that have examined his situation, and so on . . . If, indeed, such a forum is appointed [to make determinations about such petitions, T. K-A], it ought to express an opinion for the purposes of formulating guidelines to take into consideration the best interest of the Israeli children of a foreign parent. The National Council for the Child that wanted to have a say in this petition, would be able to state its position in such a forum.<sup>98</sup>

And, indeed, in the wake of the petition in the matter of

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96. *Id.* at 298.

97. File No. 8916/02 Supreme Court (Jerusalem), *Dimitrov v. Ministry of the Interior* (Jul. 6, 2003), Nevo Legal Database (by subscription) (Isr.).

98. *Id.* at 6.

Administrative Appeal 8569/02, towards the end of 2003, the Ministry of the Interior formulated regulations on the granting of status to the parents of Israeli minors. In the latter part of 2004, additional regulations were added regarding the procedure for welfare officials' formulating opinions for the purposes of the hearing on the parents' applications. The main thrust of these procedures is found in the "Procedure for dealing with cessation of the proceedings to settle the status of spouses of Israelis."<sup>99</sup> The regulation states that an application by a parent to obtain status by virtue of his parenthood of a child who is a citizen will be deliberated in an inter-ministerial committee for granting status on humanitarian grounds.<sup>100</sup> According to this regulation too, the rule is that status will not be granted – and status granted in the past will even be revoked – to a parent of a citizen child, except in rare and exceptional cases. The committee will deliberate on granting status to the parents of Israeli children only if the following conditions are met. In most cases these conditions are not met:

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99. It should be noted that the regulation is phrased negatively; in other words, it is a regulation for cessation of the status of parents whose spousal relationship is in stages of being dismantled and not a regulation for granting status to parents of child citizens. *See* Kritzman-Amir, *supra* note **Error! Bookmark not defined.**

100. Regarding the inter-ministerial committee, *see* ODED FELLER, THE MINISTRY: INFRINGEMENT OF HUMAN RIGHTS BY THE POPULATION ADMINISTRATION (2004) [hereinafter Feller – The Ministry], *available at* <http://www.acri.org.il/pdf/TheMinistry.pdf>.

1. The spouse was married in a genuine marriage and the marriage was registered in the Population Registry and he received a type A/5 residence permit in Israel in terms of the graduated process [in other words, the procedure for obtaining status by virtue of a marital relationship with an Israeli spouse which has since expired, T.K-A].
2. The spouse has already undergone more than half of the graduated process.
3. The couple has children in common who are in the custody of the foreign spouse, or the foreign spouse maintains a close and continuous relationship with them and takes care of their support and their needs, and a professional report by a welfare officer from the public service has determined that deportation of the foreign parent will harm the children.<sup>101</sup>

These rules are prerequisites for transferring the matter of the parents requesting status by virtue of their parenthood to the committee which will consider their application to acquire status in Israel according to the determination in the matter of Dimitrov. The result is that, by and large, status will not be granted to the parent unless exceptional conditions of two kinds apply: conditions associated with the spousal relationship with the Israeli spouse, and conditions associated with the quality of the relationship with his Israeli child. These rules are, of course, flexible since they are stated in the regulation. However, in general, whoever does not meet the conditions will not have his case heard by the committee, while whoever does meet them will have his situation determined at the discretion of the committee which investigates his application without any clear criteria for making the ruling, and, as the high proportion of rejections clearly shows, employs an exclusionary approach.

In dozens of court decisions handed down between the decision in the matter of Dimitrov and until the abovementioned regulation, or since the regulation was fixed, the application of the regulation and the case law in individual

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101. Procedures of the Population and Immigration Authority, 2012, 5.3.0023 (Isr.).

cases has been deliberated, with mixed results as described above.

#### E. INTERIM CONCLUSIONS

In general, the concept of family in Israel has been understood in such a way that indicates support and encouragement for the family unit. This concept has been undergoing iterations due to the encounter between the family and globalization. The underlying rules that operate on family units affected by globalization are, as I have shown above, vaguer and more ambiguous rules which display inconsistent support for the family. The iteration that the concept of family has undergone in light of the mixed-status family includes a reduction in the protection offered to the family. In certain aspects, the state takes action to allow the parents in these families to realize their right to bear children, but in other aspects, it does not really encourage their right to fulfill their parental relationship. The defining boundaries between the situations in which the state supports parenthood for mixed-status families and encourages them and the situations in which it refrains from supporting them are not distinguishable, predictable or clear, and it is difficult to draw a logical (bio)political connecting line between them.

The rulings stating that a foreign parent will not be granted status by virtue of his parenthood of a child with Israeli citizenship do not support an Israel citizen desiring to expand his family and to be a parent together with a foreign spouse. Even if the ethno-demographic considerations are not explicitly stated in most cases, they exist in the background and come up from time to time.<sup>102</sup> Incidentally, the judicial opinions<sup>103</sup> and information provided to me by the Ministry of the Interior indicate that most of the applications of parents to obtain status by virtue of their parenthood of Israeli children come from mothers.<sup>104</sup> This means that the children referred to are not Jewish in the halakhic sense, for Judaism asserts that religion is inherited through the mother of the child only.

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102. See HCJ 7052/03 Adallah The Legal Center for the Rights of the Arab Minority in Israel v. Minister of the Interior, High Court of Justice 61(2) PD 202 [2006] (Isr.).

103. See *supra* note 11–15.

104. Meeting with representatives of the Ministry of the Interior, PIBA (Feb. 6, 2012).

Therefore, it is possible that the obscurity of the ruling formulated in this matter stems, among other things, from the fact that their remaining in Israel is not perceived as part of the ethno-demographic interest of the state, and even more so, the iteration of the concept of family as a less protected concept is defensive – it aims to protect the state from developing a non-Jewish population within it. Nevertheless, this policy is also applied to fathers wishing to obtain Israeli status in order to remain near their children.<sup>105</sup>

The main significance of the iteration of the family as a less protected institution in the context of mixed-status families is that these families expose themselves to risk; if the spousal relationship with the foreign partner does not work out well, family members could find themselves without the wherewithal to raise their child with the foreign partner and might even find themselves in the situation in which the foreign partner will be forced to leave the country taking the child with him. Furthermore, those desiring to establish a family with a foreigner put a third party at risk, for they are liable for condemning their children to life in a single-parent family with all the emotional and financial problems associated with that.

Now that I have described the complexity of the legal regulations and the problematic relations between them and the rules that construct the perception of the family, I shall offer a critical analysis of the legal reasoning underpinning these regulations. I shall address both the judicial basis for the reasoning and the perception about the best interest of the child that the reasoning reflects.

## V. THE PLACE OF THE CHILD IN A MIXED-STATUS FAMILY

Before discussing the character of the process of iteration that the concept of the family is undergoing in the wake of the discussion about mixed-status families, a few remarks about

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105. Due to the general policy of excluding non-Jewish immigrants, it can be reasoned that since in the vast majority of cases the applications come from the mothers, a policy directed at advancing the ethno-demographic interest of the State would be willing to pay the “price” of harming the limited number of Jewish children (in cases where the fathers are the ones requesting status) so as to “benefit” from enforcing this policy in the reverse case and not being considered discriminatory.

the place of the child in the legal argumentation may prove helpful. In the overwhelming majority of judicial opinions about this matter, the courts refer to a statement according to which “the place of the minor is with his parents. Wherever they reside, there shall he reside too, and not the reverse. A minor is dependent on his parents, and his parents are not dependent on him. As guardians they determine his place of residence and not he their place of residence.”<sup>106</sup> But is this really the case? It is evident that there are situations in which the law allows the parent to follow the child, while in other situations the child’s ability to follow the parent is not necessarily possible.

There are situations in Israeli law in which parents receive status by virtue of their parenthood of Israeli citizens. One of these situations is fixed in the government resolution on granting status to the children of undocumented migrants. These decisions grant status to children – along with their parents and siblings – as long as they met certain conditions, even if their parents are undocumented. This was to prevent the uprooting of the children from Israel where they had become assimilated and integrated into the society and education system. Status was granted to the parents and siblings of these children so as to prevent the family members from being split up; all this is derived from the status granted to the child.<sup>107</sup> This approach seems to me to be fitting, since it recognizes the need of the child to live together with both his parents, a need that is just as powerful when the parents of the child are undocumented. Unfortunately, this is supported by only two decisions and is not the general norm.<sup>108</sup>

There are also other contexts in which the parents are granted status by virtue of their parenthood of citizens. For example, status is granted to a single elderly parent of an

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106. HCJ 758/88 Kandel v. Minister of the Interior 46(4) PD 505 [1992] (Isr.). This approach seems to be following the decision in paragraph 15 of The Legal Capacity and Guardianship Act which states that the parent is responsible for determining his child’s place of residence.

107. See Regulations on Entry into Israel, 1974 (Isr.).

108. It can be assumed that the recognition of foreigners’ need to remain near their families is easier for the state as a one-time or two-time gesture than as a general norm, just as it is easier to accept the desire of parents to be near their children when the matter is defined as exceptional and humanitarian, than it is to grapple with the matter in a more general way. See below, my remarks about the “humanitarian exception.”



Israeli citizen<sup>109</sup> and to the parents of Israeli soldiers.<sup>110</sup> Presumably, the rationale for the first procedure is to allow Israeli citizens to support their elderly parents in their old age, while the rationale for the second procedure is to give special benefits to those serving in the army. There are many potential justifications for granting status to parents of Israeli minor children, among which would be the desire to allow the children to live together with both parents in the state where they hold citizenship (including the foreign parent in situations in which one of the parents is a citizen and the other is not) and the desire not to force them to emigrate to a country they do not know and to cut them off from the country in which they have put down roots (in situations where the children have really become integrated into Israeli life and under conditions whereby not granting status to the foreign parent would have the consequence of that parent having to leave the country with the child).

To put it another way, the rule that a child should go with his parent is not all-encompassing. Looking at all the procedures and decisions on this issue, a strange pattern emerges: minor children of undocumented migrant workers are usually granted status, not only for themselves but also for their families, whereas children with citizenship are not usually granted status for their parents. This situation, in which the child with citizenship has fewer rights than the child who is being naturalized, reflects a lack of coherence in the laws that regulate the matters of status and immigration in Israel. The problem of arbitrariness and lack of a guiding hand in the Israeli immigration laws, as well as the need to regularize them into coherent immigration legislation has been addressed previously.

Another question that should be addressed is whether the best interests of these children are being weighed heavily enough to protect their rights. Before discussing this, I shall note that the term “best interest of the child” is “flexible, broad and undefined, and has been filled with content by the court according to the evidence before it and at its judicial

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109. See, e.g., Procedure for dealing with the granting of status to an elderly single parent of an Israeli citizen, 2011, Procedures of the Authority for Population, Immigration, and Border Crossings 5.2.0033 (Isr.).

110. Procedure for the granting of status to the parents of soldiers, 2009, Procedures of the Authority for Population, Immigration, and Border Crossings 5.2.0036 (Isr.).

discretion”<sup>111</sup> but, in general, it guides the court in weighing the needs, rights, desires and interests of the child in the making of judicial decisions about him. This is the main guiding principle for questions of determining parental responsibility for the child. In practice, in many of the disagreements between the parents about the fate of their child in the wake of their separation, we can see the court attempting to find a solution that ensures stability in the child’s life with the custodial parent while maintaining a continuous relationship with the other parent. In general, the presumption is that frequent and continuous meetings of the child with both his parents serve his best interest unless this is found to be otherwise. In order to achieve this, it is important to assess the parental capacity of the parents and there is a crucial need to observe the type of relationship existing between the parent and his child.

Treating the child as someone who follows his parent reflects a perception of the child as one lacking in legal capacity and not enjoying independent rights in society and family. Hence, the question of the citizenship of the child has no special legal relevance, for the child is not perceived as carrying the objectification of the right to citizenship. The proof of this is that, in general, we do not present individuals with the choice between citizenship, or settling in their country, and their family for this is perceived as an unfair choice<sup>112</sup> and for that reason, most countries of the world have formulated practices for family unification. But here, in the legal rule that states that the child must follow his foreign parent, the child is not perceived as a rights bearing individual or an individual that bears its citizenship in a meaningful and authentic manner. This view of the child contradicts the perception that the International Convention on the Rights of the Child has tried to promulgate; the innovation of this convention lies in its perception of the child as a full subject deserving of rights. According to this perception, the parents’ responsibility is to ensure that their children’s rights are put into effect based on their perception of the children as bearers of rights in their own right and with no connection to the rights of the parents. Viewing the child as someone who trails behind his parents also contradicts the expressions about the rights of the child in

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111. CA 2266/93 *Minor v. John Doe* 49(1) PD 221 [1995] (Isr.).

112. For an in-depth discussion of the subject of choice and immigration, see Kritzman- Amir, *supra* note **Error! Bookmark not defined.**

Israeli judicial opinions.<sup>113</sup>

It must be mentioned that when the child is looked upon as one who has no independent rights, the discrepancy between the extensive protection given to applications for family union for the purposes of spousal relationships and the lesser protection enjoyed by applications for family union for the purposes of remaining in proximity to a child becomes clear. This is because, in the first instance, the Israeli spouse is perceived as a bearer of rights whereas in the second instance that is not the case. Moreover, since the child is not considered to have rights associated in any way with his foreign parent, his opinion is not heard during the procedures of the Ministry of the Interior's Population, Immigration and Border Authority and by the courts, which are conducted between the parents and their legal counsel and the officials of the Ministry of the Interior, welfare officials and judges.<sup>114</sup>

Also, it is not clear whether the child can always accompany his parent. An example of this is in cases where the Family Court, in compliance with the petition of the Israeli parent, has issued an order preventing the departure of the child from the country with the aim of preventing a situation in which their common child would leave Israel.<sup>115</sup> This is so even when the foreign parent has custody. In these cases, the custodial parent and the child are in a trap: the child is prevented from leaving the country, yet the custodial parent is prevented from staying. The Ministry of the Interior, for its part, does not consider these circumstances as justifying granting a status to the foreign parent,<sup>116</sup> even though this

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113. A minor is not an object to be tossed about from hand to hand like an instrument of someone's desires. A minor is a person, he is a human being, he is a man, even if he is small. And a man, even a small man, deserves all the rights of a big man. CA 6106/92 Jane Doe v. Attorney General 48(4) PD 221, 235 [1994] (Isr.).

114. The absence of the child's voice is notable in the judicial opinions. In my meeting with the representatives of the Ministry of the Interior on 6.2.2012, I was informed that no hearing is given to the child in the framework of the procedures for granting status to his parent. Conversely, a hearing is given to the Israeli parent despite the problems involved in this -- particularly so given the fact that the parents are often in stages of separation or divorce which are at times characterized by feelings of vengeance and aggression.

115. See File No. 202/05 Administrative Petition (Jerusalem), Asraa v. Ministry of the Interior (Oct. 31, 2005), Nevo Legal Database (by subscription) (Isr.).

116. See *id.*

would force him to abandon his child and to leave a minor without the supervision of his custodial parent.<sup>117</sup> My conversation with the Ministry of the Interior representatives revealed that they acted through the State Prosecutor to cancel several cases of orders prohibiting exiting from the country, but despite their failure in this, they refrained from granting status to the foreign parent in these situations.<sup>118</sup> In general, the courts do not take a stand on this matter at all.

An exception to this is the judicial opinion issued in the matter of *Doctors for Human Rights*.<sup>119</sup> This was a case concerning a foreign mother who entered into a bigamous marriage with an Israeli father who was violent towards her. Her application for Israeli status was refused, both because this was an unregistered bigamous marriage and because the foreign mother had not started on the graduated process until after the dissolution of the relationship. Justice Alon does not presume that the four common daughters of the couple would follow their mother, but rather that they would remain in Israel where they hold citizenship,<sup>120</sup> and he expressed surprise that the Ministry of the Interior had not checked the implications of their remaining in Israel without their mother obtaining status. In effect, from the tone of the opinion it seems that the Justice considers the possibility that the girls would leave with their mother for the Palestinian Authority as unreasonable. This is how Justice Alon puts it in paragraph 6 of his opinion:

The meaning of the decision to refuse the petitioner's application immediately raises the question of the fate of the four small daughters [the youngest of them is 5 years old] who are in her custody. Deporting the mother

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117. See File No. 313/06 Administrative Petition (Jerusalem), *Doctors for Human Rights v. Minister of the Interior* (Dec. 24, 2005), Nevo Legal Database (by subscription) (Isr.).

118. I was told that in these situations the deportation of the foreign parent is not executed. Meeting with representatives of the Ministry of the Interior, PIBA (Feb. 6, 2012).

119. File No. 313/06 Administrative Petition (Jerusalem), *Doctors for Human Rights v. Minister of the Interior* (Dec. 24, 2005), Nevo Legal Database (by subscription) (Isr.).

120. It is possible that the court assumed that the children would stay in Israel in the custody of their father because in conflictual divorces in the Bedouin sector, it is accepted to leave children with the father. Whatever Justice Alon's presumptions were, they were not explicitly stated in his opinion.

of the four girls out of the borders of Israel would leave the four minor girls without a custodial parent to raise them. From the rejection decision, it is not clear nor is it clear in the respondent's arguments in the written response, what will become of the four young children in these years, since they are, as mentioned, Israeli citizens. Will their father be willing to raise them? And if so, is he able and fit to raise them? And if the father of the girls is not willing or able to do this, is there a regulated framework that can manage to do this? Is it even right to decide to deport the mother from Israel while the four young girls are left in an extra-familial framework? Should the Authority investigating the petitioner's application for a residence permit not also investigate whether this decision also has immediate repercussions and results for the lives of the four little girls, their fate, their souls, and their future? Or perhaps as the counsel for the respondents claimed in oral arguments, is the proposed solution in this case that the four little girls – Israeli citizens – should follow their mother who is being deported from Israel to her city of birth, Hebron in the Palestinian Authority?<sup>121</sup>

Furthermore, in assuming that the child will follow his parent, the courts refrain from investigating the possibility that the immigration laws of the country where the parent holds citizenship may restrict the child from acquiring status, or even from getting an entrance visa to that state. There might be situations in which the country where the parent has citizenship would demand that various conditions be met before agreeing to grant the child status or allowing him to enter; these might not be complied with in every situation. Just as Israel has the sovereign right to restrict the parents from acquiring status in order to stay in it with their children, so do the sovereign states of the world restrict the ability of the children to acquire status in the country of their parents' citizenship. In some states, status will not be granted to a person unless he renounces his other citizenship.<sup>122</sup> In granting

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121. File No. 313/06 Administrative Petition (Jerusalem), *Doctors for Human Rights v. Minister of the Interior* (Dec. 24, 2005), Nevo Legal Database (by subscription) (Isr.).

122. In many countries holding dual citizenship is not permitted, such as

foreign citizenship to the child, he may be required to renounce his Israeli citizenship and this would necessitate the cooperation of both the Ministry of the Interior and the Israeli parent and this cannot be taken for granted.

This problem has been addressed in only one judicial opinion. The case of *Grasimov*<sup>123</sup> dealt with a custodial mother of a two-year-old Israeli-citizen son. She did not manage to obtain Israeli status and so left Israel with her son to her country of citizenship, Russia. There, the child was given tourist status for one month only, and thereafter, as far as can be ascertained from reading the opinion, the child was left undocumented for four years. As such, the child was not entitled to the medical care he needed, and the mother and child returned to Israel.

The *Grasimov* case shows us, that there could be practical difficulties in the attempt by the child to follow his parents. These difficulties should be given a priori consideration not ex post facto. Then, if the Ministry of the Interior claims that there is no justification for granting the foreign parent status in Israel because the child can leave the country with him, the Ministry should ensure that the child really has the legal option of obtaining an entrance visa and a residence permit in his parent's country, and that he can practically acquire permanent status. Likewise, it would be desirable to examine the ramifications of the move to his foreign parent's country for the child's basic rights.<sup>124</sup> It should also be taken into account

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Singapore and Nepal. There are other countries that permit dual citizenship only in a few isolated exceptional cases, such as Lithuania, or there are other countries that permit dual citizenship of particular countries in addition to their own, such as Pakistan.

123. File No. 22597-02-11 Administrative Petition (Beersheva), *Winter-Gerasimov v. Ministry of the Interior Population Administration* (Mar. 30, 2011), Nevo Legal Database (by subscription) (Isr.).

124. This consideration that touches, for example, on the quality of medical care the child can get in the country to which he relocated with his foreign parent, is sometimes exercised. *See* Minister for Internal Security, *supra* note **Error! Bookmark not defined.** In that particular case, the subject was a mother who had arrived in Israel as a victim of trafficking and had become pregnant. Her son was born suffering from brain damage, paralyzed lower limbs and epilepsy and he was hospitalized from the day of his birth. The mother also claimed that her life and that of her son would be in danger if they were to be sent back to her country because of her involvement in trafficking. The latter claim was rejected by the court which considered that in Israel, too, the two of them were in similar danger. It should be noted that in making its determination, the court did not investigate the gaps between the preventive abilities of the law-enforcement authorities in Israel and in the

that the child can only follow one of his parents at most if they live in different countries, although, as a rule, both parents<sup>125</sup> have the right to determine his place of residence and despite the broad acknowledgement of the importance for the child of his relationship with his parents for the sake of his proper emotional development.<sup>126</sup>

If the child relocates with a foreign parent to his country, the Israeli parent will want to visit that country to see him, and this is not always possible. The ability of a parent to visit his child in the country in which he is residing depends on his ability to leave Israel,<sup>127</sup> his ability to obtain a visa to the other country, and on his economic ability to bear the expenses related to it. Even if the child remains in Israel with his Israeli parent, the ability of the foreign parent to visit him depends on the willingness of the Ministry of the Interior to grant him a visa and the extent of its generosity in doing so. The frequency of the visits is also a function of the foreign parent's economic ability to finance travel expenses, to absent himself from his job and to temporarily disconnect himself from his daily routine and his obligations in his country of residence. It is doubtful that visits make a worthy substitute for the living with a parent full-time. It should be noted that in some of the cases, the Ministry of the Interior assured the court that it would provide the foreign parent with generous visas for visits<sup>128</sup> but this willingness did not get translated into concrete terms.

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mother's country of origin. Nevertheless, owing to the child's difficult medical condition, the court granted him and his mother permission to stay in Israel when it was convinced that he would not be able to obtain the necessary medical care in his mother's country. *See also* Asraa, *supra* note **Error! Bookmark not defined.** That case raised was the notion of the quality of education the child citizens would be able to get if they left Israel with the foreign parent (the foreign mother is secular, and in her country of origin there was only religious education) and their access to medical services would be harmed by this. In this case, the matter was returned to the humanitarian committee for further consideration.

125. Capacity and Guardianship Law ¶ 15, 5772-2012 16 LSI 106 (1961-62).

126. RONNIE LIBERZON, *THE PROCEDURAL PROMISE OF THE CONNECTIVE APPROACH* 67 (2011).

127. In a number of cases, the Israeli parent was in prison. In these judicial opinions, the court did not refer to the connection between the imprisoned parent's visits with his children as an important matter that needed to be preserved but only to entry permits for visitation. *See* Kassem, *supra* note **Error! Bookmark not defined.**, at ¶ 7 ((Aidel, J, opinion) and Mahamid, *supra* note 16, at ¶ 11 (Lindenstrauss J., opinion).

128. *See e.g.*, Dimitrov, *supra* note **Error! Bookmark not defined.**; Mariano, *supra* note **Error! Bookmark not defined.**

Furthermore, in this context, it must be taken into account that in this situation, in which the two parents are in separate countries, there are practical difficulties that thwart the option of joint custody.

Above all, the expectation that the child would relocate with his foreign parent reflects an attitude to him as one who is not in his own country despite his being a citizen. In the vast majority of the cases, there is no doubt that it would be in the best interest of the child to stay in the place in which he has the best chance of maintaining an ongoing relationship that is meaningful and frequent with both his parents, and in most cases, this means that his interest would be served best by his staying in Israel. But, in practice, the considerations of the best interest of the child, in this case, take a back seat to an extent in the face of the considerations of immigration policy, which implies the desire to refrain from granting status to the foreign parent. It seems to me that the iteration of the concept of family in relation to the mixed-status family is associated with the iteration of the concept of citizenship (as something of little value in the case of the children of that family) and of the rights of the child (which have no meaning as long as they refer to those children).

Now, I shall investigate the way in which the concept of family has undergone iteration by the court and administrative authorities. During this examination, I shall look at the narrative, terminology and rhetoric by means of which the court has developed its reasoning.

## VI. THE LEGAL RULES GOVERNING THE NARRATIVE, TERMINOLOGY AND RHETORIC AND THEIR IMPLEMENTATION

### A. THE NARRATIVE ABOUT THE FOREIGN PARENT, "THE DETACHED FOREIGNER", AND ALTERNATIVE NARRATIVES: "THE FOREIGNER AS THE OBJECT OF FULFILLING THE ENDS OF THE OTHER" OR "THE FOREIGNER AS A BEARER OF RIGHTS"

Initially, I would like to deal with the narrative that the administrative authorities and the legal system adopt towards the foreign parent applying for status as it is elucidated in the judicial opinions themselves. In my opinion, the narrative created by the authoritative documents of the legal system



reflects and constructs moral positions among the public and the administrative authorities even if they do not affect the practical result or even the judicial ruling.<sup>129</sup> In effect, it can be argued that this narrative is a meaningful part of the formation of the iterations of the concept of family in regard to the mixed-status family.

The matter of the mixed-status family is raised at first before an inter-ministerial committee on humanitarian matters of the Ministry of the Interior. In the past, criticism has been leveled at its activity<sup>130</sup> most of which consisted of assertions that the committee operates in obscurity and does not permit people to appear before it<sup>131</sup> and that, at times, people do not know that they *can* apply to it; that their work was not ordered according to clear criteria; that their timetable for dealing with applications was not clear and often that there was a delay in dealing with applications, and so on.

A perusal of the opinions that deal with the applications of foreign parents to acquire status by virtue of their parenthood of Israeli children reveals a harsh picture of improper handling by the committee. Among other things, the committee sometimes did not give consideration to all aspects of the matter and did not take into account all the documents and opinions that were presented to it,<sup>132</sup> it ignored important

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129. See Tally Kritzman-Amir, *Narratives and Social Change in the Opinions of the Supreme Court on the Matter of Visas as Applied to Migrant Workers in Israel: From the Binding High Court of Justice to the High Court of Justice on the Pregnant Migrant Worker*, LAW AND BUSINESS [Hebrew] (forthcoming).

130. Feller, *supra* note 100.

131. Permission to appear before the committee is granted only in special cases that are sensitive and especially complex. See DC (Hi) 1042/05 Kreizler v. State of Israel/Ministry of the Interior, Administrative Petition ¶ 6 (2005) (Ginat J., opinion), Nevo Legal Database (by subscription).

132. See Ministry of the Interior, *supra* note **Error! Bookmark not defined.**, ¶ 7 (Marzel, J., opinion). In this case the opinion of the inter-ministerial committee was that the foreign parent did not have an ongoing relationship with his daughter even though the social worker's expert opinion portrayed a different picture according to which there was a warm, good relationship between the two, the daughter met her father and enjoyed that very much, and that the recommendation was to expand the visitation arrangements of the father so as to allow him to spend more time with her. See also Abu Lama, *supra* note **Error! Bookmark not defined.** In that case the committee also decided that the father and his son did not maintain a relationship even though the reports of the social workers painted a different picture in which there was a relationship between the two. See also Okchuko, *supra* note **Error! Bookmark not defined.** There it was determined that the committee ignored the special family circumstances of the case.

humanitarian considerations,<sup>133</sup> refrained from responding to applications for many months and even for years<sup>134</sup> and more.

The decisions of the Ministry of Interior authorities are cited in full in some of the judicial opinions, the majority of which are very laconic. For example, in the case of M.W.,<sup>135</sup> the Ministry of the Interior's decision to reject the mother's application to obtain status by virtue of the status of her daughters, the victims of domestic violence (both on the part of their father and on the part of the spouse of one of them who herself became a mother at an early age) is summed up in a brief statement: "The case is not humanitarian. It deals with adult daughters and an independent woman."<sup>136</sup> In other cases, applications were turned down with the assertion that they do not meet the criteria and even after the courts intervened and returned these applications for family unification a second and a third time to the Ministry of the Interior, these applications produced repeated laconic rejections.<sup>137</sup> These decisions tend to

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133. See M.W., *supra* note **Error! Bookmark not defined.** In that case Justice Rubinstein decided that "deporting the mother . . . had very serious humanitarian ramifications . . . In my view, the respondent's decision is extremely unreasonable given the circumstances before me . . . and the humanitarian consideration should take precedence over the administrative ruling."

134. See Abu Lama, *supra* note **Error! Bookmark not defined.** That case dealt with a mother who separated from her spouse due to his violence towards her. She requested status by virtue of her parenthood of an Israeli child and only after two and a half years did she receive a rejection, even though she sent several reminders. Thereafter, the mother submitted an appeal attacking the Ministry of the Interior's decision whereupon the court returned her matter to the committee for a second decision. The committee again rejected her application for status after another year and a half after several reminders and a contempt of court action. See also Asraa, *supra* note **Error! Bookmark not defined.** There the application submitted by the foreign mother to the committee did not get any response until she requested relief from the court; her application too was rejected only a year and a half after it was submitted, while the appeal was pending. In my conversation with the representatives of the Ministry of the Interior, PIBA, they also told me that the foreign parents' applications took at least several months to deal with for it necessitated a welfare officer's report and a hearing for both parents, and summary and preparation of the file for discussion in the committee.

135. M.W., *supra* note **Error! Bookmark not defined.**

136. *Id.* at ¶ 1 (Rubinstein, J., opinion).

137. See Muskara, *supra* note **Error! Bookmark not defined.**, at ¶ 7, and ¶ 24. In this case the first application was rejected because it did not meet the criteria and further applications submitted after an appeal was filed were rejected on the grounds that "the humanitarian framework in cases of this type determined that status on humanitarian grounds for the parent of a minor child who is an Israeli citizen will be granted only in cases where the parent has undergone half of the graduated process (with his Israeli spouse,

be laconic both because of the real difficulty in describing such complicated family life and because of the statutory exemption from the obligation to provide reasons in these cases.<sup>138</sup>

Conversely, prior to presenting their decisions on the relief they consider appropriate to be accorded to the petitioning family, the courts do present us with the story of the family. Ironically in most of the cases the relief consists of returning the matter of the family for further review of the committee.<sup>139</sup> Similarly, in many of the opinions, the factual evidence

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the parent of the children). In the case before us, the petitioner never received status in Israel and therefore does not meet this condition. Despite the description in the report before us concerning the relationship between the petitioner and her children, I am not convinced that there are additional grounds that distinguish this case from many others in which a petition is filed for granting status to the parent by virtue of his child and that justifies deviation from the accepted policy. Therefore, I have not found grounds for approving status in Israel for the petitioner.”

138. Law on Amending Administrative Arrangements, ¶ 9(b) (Decisions and Substantiation) 1958, LSI 264. In the matter of the scope of discretion and judicial review in cases lacking obligatory substantiation, see Kandel, *supra* note **Error! Bookmark not defined.** (Cheshin, J., opinion).

139. An examination of all the judicial opinions reveals a picture of systematic and repeated referrals back to the humanitarian committee which has minimal benefit whereas the harm liable to be caused is great. Returning the application to the humanitarian committee results in prolonging the procedures. This prolonging has several notable implications: the passage of time contributes, practically speaking, to additional integration of the child in Israel, and this would make his leaving, if it becomes necessary, even more traumatic. It seems that the passage of time should be advantageous for the foreign parent, since the more integrated his child is in Israel, the less likely is the expectation that he will follow his foreign parent to his country, and the likelihood that the Ministry of the Interior would decide against granting him status, would decrease. Nonetheless, the passage of time sentences the foreign parent and his child to a period of waiting that has severe ramifications. During this period, the parent has difficulty in planning his future and that of his child. The foreign parent has no status in this period and therefore cannot work in a documented job to support himself and his child, so he needs stipends in order to do so. The passage of time also has implications for the custody of the child. Under these conditions he will be hard pressed to comply with the regulation of the Ministry of the Interior that determines the matter of financial support and child support for the child as one of the considerations taken into account by the humanitarian committee in deciding the granting of status to the foreign parent. So he and his child are in a legal limbo which has practical and psychological implications. It should be mentioned that in some of the cases it is clear that the foreign parents have delayed submitting an application for acquiring status in Israel. These cases present the authorities in the Ministry of the Interior and the courts with a difficult dilemma, for, on the one hand it is clear that behind this delay lies the aspiration to force the authorities to grant status to the asylum seeker, a coercion that is hard to accept, and on the other hand, the difficult outcome of deportation from Israel is born mainly by the child citizen.

presented includes both many facts that are superfluous in terms of their relevance to the normative framework that applies to the case (although possibly not from the point of view of the ethno-demographic narrative that emerges from between the lines), and a dearth of meaningful facts needed to make the decision that takes into account the best interest of the child and the protection of the family unit.

### 1. Superfluous facts

In many of its opinions, the court found it appropriate, in the framework of the facts supporting the case, to give details of the religion of the citizen parent (meaning whether he is Jewish or not<sup>140</sup>), even though the matter of the Jewishness or non-Jewishness of the citizen parent has no influence at all on the rights of the foreign parent or the foreign child. The question of Jewishness arises in connection with the laws on immigration and citizenship only in reference to the Law of Return, which grants preference to Jews in immigration to Israel, and in none of the cases does the question of rights according to the Law of Return arise. A child, one of whose parents is an Israeli citizen, is entitled to citizenship by virtue of his birth, unrelated to his parent's religion,<sup>141</sup> and not by virtue of the Law of Return, whereas the foreign parent who is not Jewish is not basing his application for status on the Law of Return. Similarly, we are often told in the opinion how the parent who is a citizen acquired that citizenship – whether it was through the Law of Return (by immigrating to Israel), by birth, or through family unification.<sup>142</sup> This fact, too, is not relevant since no legal conclusions can be drawn from it.

We further learn from many of the opinions about the circumstances of the foreign parent's arrival in Israel,<sup>143</sup> in other words, whether he arrived here to work,<sup>144</sup> as a tourist,<sup>145</sup>

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140. This is the case in six of the opinions. See M.W., *supra* note **Error! Bookmark not defined.**; Michlin, *supra* note **Error! Bookmark not defined.**; Albatina, *supra* **Error! Bookmark not defined.**; Shevtzov *supra* note **Error! Bookmark not defined.**, and more.

141. *Supra* note 62, at art. 4, 5712-1952 6 ISL 50 (1951-952) (sometimes referred to as the Citizenship Law).

142. M.W., *supra* note **Error! Bookmark not defined.**; Abu Lama, *supra* note **Error! Bookmark not defined.**

143. This applies in twelve of the opinions as detailed below.

144. Abu Lama, *supra* note **Error! Bookmark not defined.**; Valimalva, *supra* note **Error! Bookmark not defined.**

as a victim of human trafficking,<sup>146</sup> or reached here with the a priori aim of remaining with his family.<sup>147</sup> Likewise, some of the opinions note whether the foreign parent spent time in Israel as an undocumented alien<sup>148</sup> or whether he regularized his status during his stay in Israel. There is no doubt that the circumstances of the foreign parent's residence in Israel would be important in regard to the question of granting him status if these were the basis for his application for status (in other words, if the foreign parent were applying for status, not by virtue of his parenthood, but as a worker, tourist, victim of trafficking, etc.). But even if these circumstances were relevant in the past, they have changed. Often, people migrate for one purpose or under certain circumstances, and, over time, the purpose of their stay in the target country changes. At that time, when the status is requested for the purpose of staying near to the child, it is not clear what relevance these circumstances have.

Moreover, many of the judicial opinions focus on presenting the general context of immigration to Israel when examining the concrete petition before them. The court views those foreign parents, who are applying for status so as to remain near their child, as part of a wider phenomenon that must be curbed even though this is a distinct group of migrants, consisting of only a few individuals. This was the

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145. Antawi, *supra* note **Error! Bookmark not defined.**; Okchuko, *supra* note **Error! Bookmark not defined.**; Muskara, *supra* note **Error! Bookmark not defined.**; Kazantzev, *supra* note **Error! Bookmark not defined.**

146. Minister of Internal Security, *supra* note **Error! Bookmark not defined.**

147. Michlin, *supra* note **Error! Bookmark not defined.**; Kassem, *supra* note **Error! Bookmark not defined.**; Doctors for Human Rights, *supra* note **Error! Bookmark not defined.**; the matter of Shevtzov, *supra* note **Error! Bookmark not defined.**; Mariano, *supra* note **Error! Bookmark not defined.**

148. Valimalva, *supra* note **Error! Bookmark not defined.**; Antawi, *supra* note **Error! Bookmark not defined.**; Muskara, *supra* note **Error! Bookmark not defined.**; Albatina, *supra* note **Error! Bookmark not defined.** Cf. Okchuko, *supra* note **Error! Bookmark not defined.** In that case the court rejected the consideration of extended undocumented residence of the father in Israel, saying that it was not relevant to the matter at hand. *But see*, Ministry of the Interior, *supra* note **Error! Bookmark not defined.** In that recent case the court determined that the undocumented stay in Israel of the parent should not be taken into account as creating a connection between him and Israel.

case in the matter of Kovalski<sup>149</sup> when Judge Shidlowsky-Or stated that “owing to the large immigration from the former Soviet Union and the spread of the practice of employing foreign workers, the number of those knocking on the gates of the state in order to enter and build their life here has increased, but they have no legal right to demand to be absorbed into the country.”<sup>150</sup>

Similarly, Deputy President of the District Court Ezra Kamma, in indicating the appropriate balance between clashing rights and interests in the case of Gerim-Burana,<sup>151</sup> noted that “considered against the interest of the child to live in the country where both his parents are, so that *both* of them would be able to meet their obligation to raise him, to educate him, to nurture him and to set him on his feet, are the public interests of the state and its consideration – the security of the state, public safety, maintaining public order, preserving the character and culture of the state, its identity as a Jewish and democratic state, and even considerations of immigration policy that are fundamental to economic and labor force policy, that would encourage exploitation of workers who are Israeli citizens and residents, and for essential needs would “import” foreign workers. All of these are considerations that ought to guide and counsel the respondent in implementing immigration policy.”<sup>152</sup>

Furthermore, Judge Kamma described the parents as “suspects” wanting to acquire status and trying to profit (via acquiring status) from their very parenthood. “They are grabbing on to the fruit of their marriage which has come to an end and seeking their salvation in it. So long as the marriage lasted, it was the main rationale for obtaining a permanent resident permit and citizenship. When the marriage ceased, their child became the main reason for pursuing the graduated procedure that leads to the granting of citizenship.”<sup>153</sup>

A similar suspicion was expressed by the representatives of the Ministry of the Interior who argued that most of the foreign parents are mothers who got pregnant on purpose with the idea that with the birth of their Israeli child it would be

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149. DC (Jer) 659/02 Kovalski (minor) v. Kinzarski, Administrative petition (2002) Nevo Legal Database (by subscription).

150. *Id.* ¶ 14 (Shidlowsky-Or, J., opinion).

151. Burana, *supra* note **Error! Bookmark not defined.**

152. *Id.* at ¶ 31 (Kamma, J., opinion (emphasis in the original)).

153. *Id.* at ¶ 25–26 (Kamma, J., opinion).

impossible to deport them, and they mentioned to me women from specific countries who had a particular appearance as having a strong tendency to behave in this manner.<sup>154</sup> This shows the Ministry of the Interior's approach toward these parents: they suspect them of an instrumental use of their fertility, and later of their children, in order to acquire status, and the ministry seems to believe that it is possible to identify them by certain ethnic characteristics that are known in advance. These suspicions of the Ministry of the Interior are not expressed in the written works cited in the judicial opinions but are mentioned directly in some of the opinions by a few of the judges. In my opinion, these suspicions about the strategic behavior of the migrants are founded only on conjecture. The decision to bring children into the world is complicated and it is irrational to bear children just as a means of obtaining status.<sup>155</sup>

The story the courts tell is directed at preserving Israel's

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154. Interview with Representatives of the Ministry of the Interior, Population Immigration and Border Authority (Feb. 6, 2012).

155. On the face of things, it could be considered that some people are liable to make a rational decision to emigrate and to bear children in a country in which their socio-economic situation would be better if the legal situation in that country would allow them to acquire citizenship status in that country based on their parental relationship with the child who was born there. This is generally true and perhaps particularly so in the case of Israel, in which parents seem to receive support and encouragement in the framework of their families. It seems to me that when there is an attempt to exploit the system it is marginal in scope. Claims in this spirit about exploitation of rights are expressed in connection with welfare allocations (according to which people are liable to rationally decide not to work but to live off the welfare system). Nonetheless, it seems that the most far-reaching decisions like the decision to bear a child or to refrain from working (decisions which have serious identity, psychological, sociological, economic, religious and physiological ramifications) are not made in such a one-dimensional way. In any case, even if we assume that there are persons who migrate and plan to bear their children in a target country in order to acquire status, they must weigh up the chance that they will meet a partner who has local citizenship; the likelihood that the chosen partner will be willing to establish a family unit; the likelihood that they will succeed in doing so given the economic, physiological, cultural and religious impediments. Cf. Katherine Pettit, *Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons To Keep Birthright Citizenship Intact*, 15 TUL. J. INT'L & COMP. L. 265, 276-77 (2006). It should be noted that usually migrants are not aware of the normative milieu prevailing in their target countries nor are they expert in the mysteries of its immigration laws. In any case, contemporary theories of immigration do not dangle the incentive of immigration as a rational economic choice (either in general or exclusively). See D. Massey, J. Arango, G. Hugo, A. Kouaouci, A. Pellegrino, J. E. Taylor "Theories of International Migration: A Review and Appraisal" 19 (3) POP. & DE. REV. 431, 431-62 (1993).

restrictive immigration policy. Hence, this narrative relates to Judaism as a relevant element that cannot be ignored when recounting the immigration story (even when it lacks legal relevance).<sup>156</sup> This story is directed at preserving the State of Israel as a state of aliyah (Jewish “return”), not of immigration, and in order to achieve this it wishes to expose all those without entitlement applying to obtain status here for work while harming security and so on. Hence the foreign parent is presented mainly by relating to his foreignness, his otherness, and his fragile status: It is usually noted where he came from, when he migrated, for what purpose, and what his status was at every point in time. In other words, the foreign parent is firstly foreign and only after that is he a parent.

Furthermore, the opinions describe in detail the progression of the relationship between the Israeli parent and the foreign parent. The procedure whereby a foreign parent can obtain status applies to foreigners who were married to Israelis under certain circumstances.<sup>157</sup> From the interview I conducted with the representatives of the Ministry of the Interior, it appears that other questions related to the quality of the relationship and the joint lifestyle of the couple are considered relevant even though they are not explicitly mentioned in the procedure; among these are the duration of the acquaintance between the spouses, their manner of meeting and the age difference between them.<sup>158</sup>

Nevertheless, one can wonder about the reasoning behind the requirements about the couple-hood as laid down in the procedure itself and in the additional examinations that the Ministry of the Interior carries out. For several reasons, it is doubtful whether the nature of the relationship between the Israeli parent and the foreign parent are the grounds that should be weighed in the context of granting status to the

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156. One could point out other cases in which the courts deal with the question of the Jewishness of the parties in the proceedings without their being any legal relevance. For example, in the case of E.M. that deals with the right of single-sex partners to inherit one another's assets, the court noted that both of the partners were “Jewish men, living together as a couple, maintaining a common home and a romantic relationship,” and this was despite the fact that one of them was not Jewish at all. *See* CA (Nz) 3245/03 E.M. inheriting from the late S.R. v. The Administrator General 721(2) (2004).

157. Procedure for dealing with halting the procedure regularizing the status of spouses of Israelis, *see* Marin, *supra* note **Error! Bookmark not defined.**

158. Interview with representatives of the Ministry of the Interior, PIBA (Feb. 6, 2012).



foreign parent by virtue of his parenthood of an Israeli child.

First, the spousal relationship is not the basis for the petition for status for the foreign parent at the present time. Second, even if the spousal relationship were the basis on which the parents petition the Ministry of the Interior to grant status, the right to acquire status has been recognized for common-law couples too<sup>159</sup> and not only for married couples, although the procedure refers only to them. This is important because marriage laws in Israel are controlled by religious laws, and this is a problem for families who want to marry in Israel, but whose members are from different religions. Third – and most importantly – if the decisive consideration about granting the foreign parent status or not is the consideration of the best interest of the child, then in any case the duration of the relationship between the parents and the way it is ordered are not of special relevance to his interests.

As a practical matter, it seems as though the weight of this condition is small and that they do not really block the path of the foreign parent from requesting status under these circumstances. Even though several of the opinions remarked on the lack of fulfillment of those conditions that relate to the spousal relationship as justification for granting status to the foreign parent,<sup>160</sup> in other cases the court demanded that the Ministry of the Interior should give material weighting to the applications that did not meet these requirements.<sup>161</sup>

In my conversation with the representatives of the

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159. Oren, *supra* note **Error! Bookmark not defined.**

160. See Valimalva, *supra* note **Error! Bookmark not defined.** This case dealt with a foreign mother who became pregnant by an Israeli father but did not marry him. The court did not find that the procedure should be applied to her.

161. See Doctors for Human Rights, *supra* note **Error! Bookmark not defined.** This case dealt with a foreign mother who married an Israeli father in a bigamous marriage, but the marriage was not recorded and the mother did not succeed in acquiring status in Israel due to the character of the marriage. In this case, the court assumed that if the mother was not granted status she would leave her daughters with their father and they would be left without a custodial parent. Hence, the court demanded that the Ministry of the Interior consider the ramifications for the daughters of not granting status to the mother, including the parental capacity of the father. See also Mariano, *supra* note **Error! Bookmark not defined.** at 5. There the court stated that “mentioning the process is a means for calculating the duration of the marital relationship, and this should not be considered a necessary and sufficient condition” and ordered the Ministry of the Interior to consider the foreign father’s application for Israeli status even though half of the period of the graduated process had not yet elapsed.

Ministry of the Interior, I was informed that the questions of the duration of time that the couple was in the graduated process provided them with an indication about the extent of the foreign parent's putting down roots in Israel. If this is the purpose of the examination, alternative examinations could be thought up, like, for example, investigating the duration of the foreign parent's stay in Israel and in any case it is not these matters but rather the best interest of the child that are the main issue.

## 2. Missing Facts

Alongside the superfluous facts found in the judicial opinions, in my view, there are significant facts missing. These are facts important to the question of the best interest of the child. The absence of these facts in the narrative that the courts generate leads me to suspect that the best interest of the child is not being considered in the appropriate encompassing manner, as I noted above.

As noted, along with the judicial opinions' preoccupation with the question of the nature of the parents' relationship, it is rarely that the opinions deal with the nature of the relationship between the parents and their children despite the obvious relevance of this issue.<sup>162</sup> In the High Court of Justice opinion

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162. See Mariano, *supra* note **Error! Bookmark not defined.** The opinion in that case represents the exception to this rule, which proves the rule. The opinion recounts the story of a Canadian father who married an Israeli woman, and after their relationship broke up, the mother and their common children relocated to Israel. The father moved from Canada to Israel in an attempt to rehabilitate his spousal relationship and in order to remain an active parent with his children, but when the marriage did not succeed (and in the wake of complaints of domestic violence, which the opinion seems to indicate were false) the graduated process of granting status to him in Israel by virtue of his spousal relationship with the mother of his children was halted. Instead, he requested status by virtue of his fatherhood of Israeli children. In this case, the court made a special point of saying that this was not a case of a migrant worker but of someone who came to Israel to be near his family. The court states it thus: "There is no doubt about the devotion of the petitioner to his children. This is a father who chose to leave the country of his citizenship, his established job and his environment, and was willing to start his life anew in a new country that is foreign to him, all this in order to be near his children. The welfare officers' reports show that the petitioner takes care of his children, requests information about them so as to provide the appropriate response to their physical and emotional needs, and wants to be fully involved in their education and upbringing; all of this is not easy for him since he is not permitted to work legally in Israel." Although it is difficult to point this out clearly, it is hard not to suspect that the opinion of the court

in the matter of Dimitrov, which is the most cited and precedent-setting of all opinions of this nature, there is almost no description of the parenthood of the foreign parent: all we know about the quality of the parental relationship is summarized in three short sentences that state that “the daughter is with her mother. The petitioner is not raising his daughter. The petitioner has the option of visiting his daughter.”<sup>163</sup> This is despite that fact that the court thinks that the considerations of the best interest of the daughter are what the Minister of the Interior should weigh up in making a decision about the matter of the petitioner,<sup>164</sup> and there is no doubt that the nature of the family relationship is linked to the question of the best interest of the daughter. In this matter, as in many others, we do not know the nature of the relationship of the foreign parent with his child; whether he pays child support; whether he visits the child frequently; if he plays an active role in decisions about his life; if he is involved in raising the child; if he is interested in maintaining a relationship with the child in the future, and so on. This is particularly true in opinions that were handed down prior to the formulation of the Procedure for Dealing with Halting the Process for Regularizing the Status of Spouses of Israelis, whereas in some of the later opinions the welfare officials’ reports are cited. It can be assumed that earlier opinions were also supported by documents, affidavits and other evidence about the nature of the relationship of the foreign parent applying for status by virtue of his parental relationship with his Israeli citizen child. In the opinions in which the court does go into detail about the nature of the parental relationship, mainly by looking at the welfare officers’ reports, and finds that the parents maintain a close relationship with their child or at least wish to do so in the future, usually the status is granted.<sup>165</sup> The latter fact is

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is influenced by the fact that the father’s country of origin is Canada; for in other cases when foreign parents left their country (which was, for example, one of the countries of the former Soviet Union or the Palestinian Authority) to follow their spouse with Israeli citizenship or who became an Israeli citizen after a while, the family story of parental devotion and proximity was not recounted.

163. Dimitrov, *supra* note 15, at ¶ 9 (Barak, J., opinion).

164. Dimitrov Further hearing, *supra* note **Error! Bookmark not defined.**, at ¶ 8 (Matza, J., opinion).

165. Compare Muskara, *supra* note 13; Situtao, *supra* note 13; the matter of John Doe, *supra* note 10; John Doe, *supra* note 14; Asraa, *supra* note 14; Mariano, *supra* note 14; Abu Lama, *supra* note 14 (in these eight petitions, the opinion of the welfare officer was submitted and the petitions were granted),

consistent with the well-known inclination of the courts to base their opinions on the “scientific” opinions of mental health experts despite their limited ability to provide these opinions<sup>166</sup> and despite the stereotypical biases in them.<sup>167</sup>

It should be noted that in other contexts associated with the question of custody and the care of minor children, the courts seem to address the nature of the relationship of the parents to their children extensively and in depth, viewing this question as relevant. Criticism has at times been leveled at this matter as being afflicted with gender bias expressed in assumptions about the perceptions of the emotional and physical roles of mothers and fathers.<sup>168</sup> However, it is interesting that these gender biases seem almost completely absent from the opinions about the parenthood of foreign parents. The only aspect in which there is gender bias is the assumption, in the cases in which the foreign parent is a mother, that the child would emigrate with the mother if she is not granted status. The incidence of this assumption was not high when the foreign parent was the father. I also found gender biases of this kind in my conversation with the representatives of the Ministry of the Interior, PIBA, who stated that foreign fathers’ relationships with their children are weak at best, whereas the foreign mothers do maintain a caring relationship with the children.

### 3. Narratives and Alternative Narratives

What can we learn from all the information cited in the judicial opinions about the foreign parent? That he has come from elsewhere, that his arrival in Israel was his purpose, and that he often exists on the margins of the law and that his status is not regularized. The connections and the relationships that the foreign parent creates are not described as important – particularly when the spousal relationship in Israel has

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*with supra Jane Doe, supra note 16 (finding that there was no relationship between the citizen parent and the child, the court thought that there was no justification for granting status to the foreign parent).*

166. Dan Schnitt, *Reciprocal Relations between Behavioral Science Experts and the Legal System*, 32 HAPRAKLIT 365 (1978).

167. See Orna Cohen & Dorit Segal-Engelchin, *Suzi and Mr. S.: Gender Roles Stereotyping in Social Workers’ Court Report in Custody Access Cases*, 70 SMITH C. STUD. SOC. WORK 475, 475 (2000).

168. See Daphna Hacker & Ronen Shamir, *Motherhood, Fatherhood, Family: Between Intuition and Authoritative Law*, 5(2) SOCIOLOGIA YISRAELIT 333 (2003) [Hebrew].

disintegrated – and his foreignness supersedes them, and that is why his relationship with his children is often not mentioned.

This presentation of the foreign parent is consistent with the overall perception of migrants in Israel as “detached foreigners” that is, people whose main identity is in their foreignness and not in their relationships and integration in Israel. This perception is reflected, for example, in the widespread use of the term “foreign workers” to describe those migrants who were brought to Israel to work in the labor force. This perception is also expressed in the judicial opinions and in the regulations of the Ministry of the Interior in other contexts. Conversely, when the court goes into the relationship between the parents and the children, in other words, when the foreign parent is concretely portrayed as a person with ties, as a family man, the humanitarian considerations come to the fore.

The description of the detached foreigner used in this connection is not uncommon in judicial opinions.<sup>169</sup> The foreign worker is presented as having no ties, other than work relations with his employer, as against the Israeli who has various ties that create a temptation for him to maintain relationships and a personal life.<sup>170</sup> The conceptualization of the detached foreigner is also given expression in the various regulations of the Ministry of the Interior which condition the possibility of acquiring status in Israel on whether family

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169. One of the most notable cases that served to construct the foreigner in Israel as lacking ties is that which appears *Axelrad v. Tzur Shamir Insurance Company Ltd.*, 3375/99 Civil Appeal, 54PD (4)450 (2000) [hereinafter in the matter of *Axelrad*]. The opinion deals with a claim for damages of a person, hurt in a road accident, who required nursing care due to his injuries. One of the claims voiced by the insurance company was that the injured party did not meet the burden of reducing the damage because he was employing Israeli nursing assistants and not foreigners even though it is cheaper to employ foreigners. In this connection, the court said, “It should be noted in this matter, that a foreign worker comes to Israel with the purpose of assisting the injured person. He lives in his house, and the permit for his stay in Israel is for this aim only. By the nature of things, close relationships are formed between the injured person and the foreign worker. In contrast to an Israeli employee who usually has a family in Israel and who always has the temptation to stay near them, this is not so for the foreign worker. Indeed, the many cases of employment of foreign workers speak for themselves and are a testament to the advantage of employing them rather than Israeli workers.” (*Id.* at ¶6 (h) in the opinion of Justice Or).

170. This basic assumption underlies the form of employment of migrant workers in nursing care; they are obliged to live with their employers.

members of the migrant reside in Israel.<sup>171</sup>

This perception assumes as a fact a situation that is not consistent with reality. Migrants to Israel have various ties depending on their personality, the circumstances of their life, their choices, opportunities they have encountered in their lives and during their stay here. They do not only live in Israel (documented or undocumented) or work in Israel but they conduct their lives in the country just like any human being, even if it is for a short or limited period. An attempt to eradicate these ties and to preserve them as people whose foreignness is the essence of their existence is not convincing even if the court uses it as a rhetorical tool in some of the cases. This is even more so when we are referring to the parents of Israeli children. The parental tie is one of the most important ties that people can have, and ignoring it certainly does not reflect reality; nor does it help in properly examining the question of granting status to a foreign parent by virtue of his parenthood of an Israeli child.

In the feminist discourse of the ethics of care,<sup>172</sup> this perception of the detached foreigner is a masculine one that sees the foreign person, either male or female, as a foreigner, as an autonomous, atomic individual, lacking ties, and standing alone and not one shaped by his relationships. The state has a confrontational relationship with this detached foreigner that places him outside the liberal rights discourse. The detached foreigner is located there because he is external to the state which rationally knew that he would be there temporarily and would at most have utilitarian value. The opposing perception, that of the ethics of care, is aware that individuals have significant interpersonal connections that are formative for

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171. This is the regulation of the Population and Immigration Authority with regard to the Procedure for bringing in a foreign worker in the field of nursing + extension of Visa B/1 nursing" that states, for example, in paragraph A.4 that "the entry of first degree family members encourages settlement in Israel." See <http://www.piba.gov.il/Regulations/94.pdf> (retrieved 27.12.2013). This is even true in the case of the Regulation about the treatment of a pregnant foreign worker and a foreign worker who gave birth in Israel recently abolished by the High Court of Justice but replaced by a similar regulation. See also the article by Yuval Livnat, Permanent Status for Refugees, in *Refugees and Asylum Seekers in Israel: Social and Legal Aspects* (Tally Kritzman-Amir ed., unpublished manuscripts) (on file with author).

172. See generally, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Harvard Univ. Press ed., 1982) ; GRACE CLEMENT, *CARE, AUTONOMY, AND JUSTICE: FEMINISM AND THE ETHIC OF CARE* (Westview Press ed., 1996).

them, in which the treatment, care and prevention of harm to the other are decisive, whatever form they take. This perception, which recognizes mutual interdependence, emotional attitude, and vulnerability as typical conditions of human existence, can better explain and describe the need for the foreign parent to remain close to his Israeli citizen child. In my view, it is preferable to employ the language of connective autonomy that presumes that every person, despite having independence and control over his own life, is embedded in his environment and maintains a significant, formative and influential relationship with those around him that is characterized by mutual dependence and responsibility in perpetuity.<sup>173</sup>

It should be noted that the narrative of the detached foreigner is not the only narrative to be found in the judicial opinions; there are contrasting narratives from which it becomes apparent that Israeli law does recognize foreign people's ties to the local population in Israel. First, there is the narrative which we shall call "the foreigner as the object of the rights of the other."<sup>174</sup> The idea here is that Israeli law recognizes the existence of Israeli interests in having foreign migrants remain in Israel. In these cases, the foreigners are not perceived as having the right to stay in Israel for their own sakes, but for the fulfillment of the right or interest of an Israeli citizen or resident. The ties of the foreigners to those who have an interest in their stay is not perceived as being of value to the foreigner but as stemming from the Israeli interest.<sup>175</sup>

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173. See LIBERZON, *supra* note 126 at pp. 17–22 and the references therein.

174. See, Oded Feller, *Objects of the Rights of Others*, LAISSEZ PASSER BLOG (Nov. 14, 2008) [http://www.mehagrim.org/2008/11/blog-post\\_14.html](http://www.mehagrim.org/2008/11/blog-post_14.html) (last visited Mar. 8, 2012).

See e.g., The matter of Adallah, *supra* note 12; and the matter of Galon, *supra* note 12. The majority of justices recognized that the Citizenship and Entry into Israel Law (Temporary Order) 2003 impinges on the right of an Israeli citizen to maintain the family life which he has chosen, even without recognizing the rights of the foreign citizen who has become the object of the other's rights. Likewise, despite the state's desire to prevent non-Jewish immigrants from settling here, it is permissible to grant status to caregivers even for extended periods of several years under circumstances in which "cessation of the employment of the foreign worker in nursing care to that same patient would cause severe harm to the patient" (§3a(b)(2) in the Entry into Israel Law) and also in the case of special humanitarian reasons (paragraph 3a(b1) in the Entry into Israel Law. Furthermore, it is possible to extend the visas of migrant workers "if there are special and exceptional circumstances for a foreign worker to contribute to the economy or to society

The courts could have framed the story as a story focusing on the contribution to the welfare of the citizen child, describing the parent and his child as one indivisible unit for the purposes of rights and obligations. But in many of the judicial opinions it was not the narrative of “the foreigner as an object of the rights of the other” that was used, but rather the opposing narrative of “the detached foreigner.” And, indeed, in some of the opinions, particularly those in which social workers’ reports on the relationships within the family were introduced, we find the appearance of this narrative, if only briefly, about the importance of an ongoing, steady and meaningful relationship<sup>176</sup> between the foreign parent and his child.<sup>177</sup>

A third possible narrative is one which views the foreign parent’s stay as justified by the acknowledgement of the linked rights of the foreign parent and his family. This perception views the discourse on rights as an instrument that expresses the needs and demands and expresses the desire to acknowledge the humanness of the subject and his relationship with the community in which he is embedded.<sup>178</sup> This type of reasoning does not base itself on the rights derived from Israelis but views migrant workers as having rights in and of themselves, and, by implication, sees constitutional rights as rights that are not necessarily applicable only to citizens. Of course, these rights must be weighed against the rights and interests with which they clash, and they must be put into effect taking into consideration the extent to which the individual is embedded in the community and maintains relationships with it. Some of the important opinions relating to protection of the rights of migrant workers are based on this narrative.<sup>179</sup>

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(¶3a(c1c) in the Entry into Israel Law. Another context in which the foreign person has been recognized as the object of the rights of others is in the context of fertility treatments carried out on the person of a female foreigner who is the partner of an Israeli man. In this context, as noted above, the court determined that the responsibility for financing the treatments was on the Israeli Health Maintenance Organization because it viewed the couple as one unit for the purposes of fertility treatments (Clalit Health Services, *supra* note 56).

176. See above the explanation for why the relationship based on periodical visitation by the foreign parent in Israel is not of this type.

177. See *supra* note 118.

178. LIBERZON, *supra* note 126.

179. See, e.g., In the matter of Kav La’Oved, *supra* note 81. In the judicial opinion that decided the unconstitutionality of the visa regulatory system



It was not without reason that the perception of the foreigner as the possessor of rights arose in full force in the context of the right to family life. This context serves as fertile ground for implementing the “relational discourse”<sup>180</sup> which derives insights from the “ethics of care” and from the liberal rights discourse. The scope of this article does not permit me to give a comprehensive description of the relational discourse, which has been elucidated elsewhere.<sup>181</sup> I shall briefly mention that the relational discourse introduces into the basic concepts of the liberal discourse – rights, autonomy, and equality – contents derived from the social context in which responsibility, compassion, and care for others co-exist. This discourse is critical of the opposing, neutral perception of the liberal discourse which deals with conceptualization of rights and the balance between them using pre-defined formulae in a competitive manner, so that the right of one is measured against the right of the other. The relational discourse does not abandon the liberal concepts, but does attempt to assign the concepts a meaning that is contextual, relative, suited to the human circumstances of relationships characterized by mutual dependence, profound connections, responsibility, and attachment.

It seems that the relational discourse is the more accurate one and is more suited to the human situation at hand, which associates questions related to freedom of choice of the migrant parent with questions of parental responsibility (Where will the

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employed in the past, the restrictive rule. This rule permitted migrant workers to work with only one specific employer to whom he was assigned, and anyone who worked for someone else was considered to have infringed the conditions of his visa and lost his legal standing. This visa system was determined by the Supreme Court to be harmful to the human dignity of the migrant worker and to the rights derived from that – his autonomy, his freedom of choice, his contractual freedom, and his freedom to choose his employer. Further, the court left as requiring further investigation, the question whether the arrangement impinged upon the right of the migrant worker to freedom of occupation and decided that his interest in continuing to be employed in Israel was negatively affected as were his rights afforded to him by international conventions. Even the High Court of Justice opinion on the procedure covering a pregnant foreign worker mentioned above was based on recognition of this nature of the right of foreign worker to conduct her family life and economic interests by staying on in Israel.

180. In this connections see, for example, RUTH ZAFRAN, “The relational discourse as the basis for decision making in family matters,” in *SENTENCES OF LOVE*, 605 (Erna Ben Naftali & Hanna Naveh eds., 2005).

181. See LIBERZON, *supra* note 126; GILLIGAN, *supra* note 172; and CLEMENT, *supra* note 172.

children be raised? What will be the extent of his involvement with them? What is involved in his right and the right of his children to family life?) and invites us to formulate insights about the perception of the desired family in society, within the framework of these family units. From within this discourse, the debate about the question of the rights of the child or of the rights of the parent misses the point, since the fabric of rights must be derived from the entirety of the relationships and ties in which the parties find themselves, and should not be discussed in the abstract and detached manner. It is my opinion that the relational discourse ought to be included in any iteration of the family, for this is the discourse that most accurately pinpoints the delicate texture of the relationships within it. I also consider that an appropriate decision about families in which one parent is foreign ought to give precedence to the question of the best interest of the child, and, thereafter, weight should be given to the questions of freedom of choice of the parent and his rights, based on the assumption that these are usually integrally connected. Thus, if the consideration of the best interest of the child leads to the conclusion that it would be best for the child not to have frequent interaction with the foreign parent, that is what should be decided even at the expense of negatively affecting the parent's involvement in his life. It can be presumed that the cases in which the foreign parent's rights clash with the best interest of the child are few and far between.

#### B. BETWEEN RHETORIC AND TERMINOLOGY: INDIVIDUAL RIGHTS, STATE INTERESTS AND THE HUMANITARIAN EXCEPTION

Since the foreign person is not portrayed in judicial opinions as someone who has rights but rather as one who is detached and lacking ties, the question of granting status to the foreign parent is presented in some of the opinions (though not all) as a question that necessitates establishing a balance with the state's sovereign power in determining its immigration policy. This balance usually means that the interests of immigration policy will take precedence, since the foreign person does not have a right to obtain status in Israel, except in unusual cases with special humanitarian circumstances. For example, Judge Kobo expressed this clash in the matter of Mariano, using the terms "rights" and

“interest” interchangeably as though they were synonymous.<sup>182</sup>

As against the interest of the petitioner to live in Israel alongside his children, we must give consideration to not opening the door to the entry of many other foreigners who are also knocking on the gates of the state and asking to be let in; something that is liable to place a heavy burden on the state and its residents. So the important and basic right of the parent to fulfill his relationship with his children cannot be detached from the legitimate right of the state to take care of its own needs so as to realize those interests that are important to it. A policy that is in keeping with preserving the unique character of the state, ensuring its economic growth and concern for the welfare of its citizens is a desirable policy and even one that is necessary for the continued existence, development and prosperity of the State of Israel.<sup>183</sup>

In a similar vein, deputy president Judge E. Kamma expressed himself in the matter of Gerim-Burana thus:

The question before us is not whether the parents or one of them are entitled to or even obliged to raise the child, to educate him, support him, love him and to set him on his own feet until he is a young man, an adult and a man, but whether this right takes precedence over *the right of the state not to allow a foreign parent to receive permanent residence permits and Israeli citizenship*, in terms of the law, policy, and rulings, but by virtue of his parental ties. My answer to that is negative.<sup>184</sup>

It should be noted that the balance that the courts assert in those opinions is between the *right* of the state to decide its immigration policy, and as a derivative of that to decide to whom to grant status and from whom to deny status, and the *interest or the right* of the foreign parent to raise his child. In some of the cases the conclusion is that this balance places the

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182. In the matter of Mariano, *supra* note 14.

183. *Id.* at 6 [emphasis added – T.K-A].

184. In the matter of Burana, *supra* note 16, at ¶27 in the opinion [emphasis added].

foreign parent in an inferior position.

The iterations that the court implements diminish the value of the family life as a right. In a minority of opinions, the court has used terminological inversion using the term “right” when it should have been referring to “interests” and vice versa – the term “interest” should have been replaced by “right”. Conceptualizing immigration policy as something that is “the right of the state” to determine is erroneous conceptualization. Of course, the state indubitably has the interest and the authority to restrict immigration but it must be noted that an interest is not a vested right.<sup>185</sup> It should be emphasized that this is not a right that can be converted into the terminology of human rights.<sup>186</sup>

On the other hand, the foreign parent and his citizen child have more than an interest in acquiring status in Israel for the foreign parent and in the raising of the child by the foreign parent. This is a right for the foreign parent and his citizen child, derived from the right to family life. This right has been accorded wide recognition in adjudication as a derivative of the social interest in maintaining the family as a primary social unit. The court has grounded this right broadly as a right

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185. *Contra* Ganimat v. State of Israel, 2316/95 Further Criminal Hearing PD44(4) 589, ¶5–7 in the opinion of Justice Dorner (1995) [hereinafter the matter of Ganimat].

186. For the purposes of comparison, I shall mention that in the matter of Ganimat, *id.*, a dispute arose about whether detention in order to prevent property crimes serves the interest of the public by preventing such crimes or whether it protects property rights; in the matter of Kirsch the question was posed whether the state’s appropriation of broadcasting time in case of a missile attack protects the public interest of defending the public or perhaps protects the right to life and to bodily integrity. *See*, Kirsch v. Chief of General Staff of the Israel Defense Forces, 2753/03 High Court of Justice PD 57(6) 359 (2003); in the matters of Adallah and of Galon the question was posed whether preventing family unification with Palestinians protects the public interest by maintaining state security or whether it protects the constitutional right to life. *See*, in the matter of Adallah, *supra* note 7 ; in the matter of Galon, *supra* note 11. In relation to the application of a foreign parent for Israeli status by virtue of his parenthood of an Israeli child, it is difficult to conceptualize the public interest as being connected to refraining from granting him status in terms of infringing on the public’s civil, economic or social rights. In any case, it is usually not possible to conceptualize the public interest in terms of harm liable to be inflicted on the holder of a distinct, specific right, identified and defined with a high level of certainty, owing to the granting of status to the foreign parent. *See*, in this connection, Oren Gezal-Eyal and Amnon Reichman, *Public interests as constitutional rights*, MISHPATIM 41(97) (2011).

applicable to the individual in many opinions.<sup>187</sup> Among other things, Chief Justice Barak interpreted the right to family life as inclusive of “the right of an Israeli parent to have his minor children raised with him in Israel and the right of an Israeli child to grow up in Israel together with his parents.”<sup>188</sup> Moreover, in some contexts, the right to family life has been located in natural law, in other words, having precedence over the law of the state and therefore broad and restricted by itself.<sup>189</sup>

It seems as though the court, in those few opinions, makes use of the rights discourse as a persuasive strategy while diminishing the right to family life, on the one hand, and sanctifying the state’s interest in consolidating restrictive immigration policy, on the other. Others before me have already dealt with the rhetorical force of rights claims and how they are a trump card.<sup>190</sup>

Even in cases where the court eventually gave instructions that the foreign parent should be granted status, as well as in cases where the court instructed the Ministry of the Interior to reconsider the granting of status, the matter was not decided because of the supremacy of the right to family life. The status is granted to the foreign parent owing to his being an “exceptional humanitarian case.”<sup>191</sup> But are these really

187. The matter of Adallah, *supra* note 7, ¶ 24–28 in the opinion of Chief Justice Barak. It should be noted that contrary to what is stated in the matter of Kahiga, *supra* note 13, by Judge Marzel, the right to family life was not first fixed in the matter of Adallah; it was recognized before that and even Chief Justice Barak, whose discussion of the right in his opinion was the most extensive, does not attempt to claim that he was inventing anything in the field. *See*, the matter of Galon, *supra* note 11.

188. The matter of Adallah, *supra* note 12, ¶ 28 in the opinion of Chief Justice Barak.

189. John Doe v. Jane Doe, 3798/94 Civil appeal, PD50(3) 133, 163–66.

190. *See* Ronald Dworkin *Rights as Trumps*, in *THEORIES OF RIGHTS*, 153 (Jeremy Waldron ed., 1984).

191. It is worth noting that, by and large, it is not clear what status is being debated. In judicial opinions, the court orders that the foreign parent should be given residential rights, but it does not elaborate whether it is referring to permanent or temporary residence, for how long, and whether the Ministry of the Interior must extend the status of the foreign parent from time to time (for example, in the matter of Salmova, footnote 12 above). In the matter of Muskara, *supra* note 12, the court issued an order giving the foreign mother the status of temporary resident for two years, at the end of which that mother could submit an application to renew her status or upgrade it, in accordance with the regulations of the Ministry of the Interior. In other cases, the court does not clarify whether the status is to be granted to the foreign parent even when his child turns eighteen.

exceptional or humanitarian cases? The court pointed to exceptional humanitarian reasons in ordinary cases, it seems. This was done, for example, in the matter of Salmova<sup>192</sup> in which the court ordered status to be granted to the mother of a six-year-old boy, whose citizen father maintained low frequency contacts with him.<sup>193</sup> This was the case in the matter of Muskara<sup>194</sup> too, in which the court ordered status to be granted to a foreign mother of two children aged six and seven, because they were attached to both their father and their mother, and because, if she did not get status, they would have to be cut off from their mother or from their father and grandmother and relocate to a country with which they were completely unfamiliar. In the matter of Situtao,<sup>195</sup> the court ordered status to be granted to the foreign father because he had been in Israel for ten years and was the father of two child citizens, one of whom was born in Israel. The court's opinion was that there was a good emotional connection between the father and his children, and his presence as a father figure in their lives was needed for building their identity. The court even considered that cutting the father off from the children would be traumatic for them, emotionally and economically.<sup>196</sup>

In other cases, the court instructed the Ministry of the Interior to reconsider the application because it found that not all the considerations in the matter had been weighed including those that could reverse the application into one that displays, at least on the face of things, special humanitarian aspects. For example, in the matter of the Ministry of the Interior<sup>197</sup> it was found that the Ministry's committee did not give weight to the fact that the foreign father maintained warm, continuous contact with his daughter. In the matter of Asraa<sup>198</sup> the Ministry of Interior was required to weigh the

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192. Salmova, *supra* note 13.

193. *Id.* at ¶7 of the opinion of Judge Agmon-Gonen states, "Under the circumstances of this case, we cannot sentence a person to life without a father, when the father is in touch with him." The court opinion states that the child has special needs and goes to a special needs nursery school, but the decision seemed not to be based on this consideration.

194. The matter of Muskara, *supra* note 13.

195. Situtao, *supra* note 13.

196. In other cases the court raised exceptional circumstances such as the severe handicap of the child (the matter of the Minister of Internal Security, *supra* note 13); the severe illness of the child (John Doe, *supra* note 10); or domestic violence (the matter of M.W., *supra* note 12 ).

197. Ministry of the Interior, *supra* note 13.

198. Asraa, *supra* note 14.

claim that father would be legally unable to visit his daughters if they relocated with their foreign mother to her country. In the matter of Gerasimov,<sup>199</sup> the court ordered the application of the foreign mother for status in Israel to be returned to the committee so that it could consider the harm that would be inflicted on the child who had put down roots in Israel, was a part of the education system and needed the medical care in Israel, as well as his young age.

It is apparent that the cases which the court found to be special humanitarian exceptions in the circumstances of family life are not necessarily exceptional. The mixed-status family underwent iteration in the wake of which it took refuge as a humanitarian exception, and the rule became the exception to the rule. Indeed, in most cases, the child maintains ties with both his parents, and that connection is very much influenced by the question of the status of the foreign parent. Even in situations in which, at the point of considering the application of the foreign parent for status, the child does not have contact with him or with the other parent, this does not exclude the possibility that a connection of this type could develop in the future, and the court addressed this in some cases.<sup>200</sup> It can even be supposed that an appropriate legal policy would be to create optimal conditions for enabling the relationship between the child and both his parents. Likewise, in many cases, if the child is required to leave with the foreign parent, this will have emotional, economic and educational effects on him, and will negatively affect his relationships with his extended family in Israel and with his friends and acquaintances. In effect, it seems that only in rare and exceptional cases would the decision not to grant status to the foreign parent be for the best interest of the child (for example, when the foreign parent lacks parental capacity or is violent towards him) or would affect him only slightly.

Furthermore, it is not clear at all why such cases are defined as humanitarian. The defining of cases like this as humanitarian frames them as cases which do not have legal standing but at most have moral aspects. I think that it is not a humanitarian matter which underpins the decision to grant the foreign parent status or not, but as noted above, the matter is

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199. Gerasimov, *supra* note 12.

200. *Id.* The court stated that the ties between the child and his father, that had not fully developed because the father was married to a woman who was not the child's mother, might develop in the future.

intimately connected to the right to family life and the principle of the best interest of the child. Therefore, the debate on granting status to the parent should not be rooted in the humanitarian discourse but should be located at the heart of the discourse on human rights and should be conducted according to the principles of this discourse. Claims to rights of this type establish the state's legal obligation to act to protect that right, or at the very least, to refrain from harming it.<sup>201</sup>

The very formulation of the legal rule as negating the status of the foreign parent, in principle, and permitting the granting of his status only in exceptional and rare cases, means that the burden of proof, demonstrating that the exceptional humanitarian circumstances exist, lies with the foreign parent applying for status. This burden hangs over the parent even though all he really has to show is that there is a typical relationship in his family that is accepted in most families in which the best interest of the child requires that he be allowed to maintain ties with both his parents, and that he should not be uprooted from his milieu, his extended family, his education framework and from his social connections. The burden placed on the authorities should be to show the reverse: that no harm will be inflicted on the Israeli child if his parent is not granted status. In other words, the rule has become the exception to the rule, and the burden of proof has been placed on the applicant to demonstrate the rule and not the exception to it.

So, in order to shoulder the burden of proof the foreign parent has to tell a story that will turn his child into a victim in a future situation in which he is not given status and must describe extraordinary harm that will befall him under those circumstances.<sup>202</sup> The matter of the parent and of the child becomes a matter in which the most relevant concept for handling it is the concept of compassion. The main tool that the foreign parent has in order to grapple with the burden of proof that he is an exceptional humanitarian case is the report of the

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201. For a general discussion of justifications based on human rights and justifications based on humanitarianism and the political uses made of the various types of justifications, see generally, Deborah M. Weissman *The Human Rights Dilemma: Rethinking the Humanitarian Project* 35 HUM. RTS. L. REV. 259 (2003).

202. See, e.g., Catherine Dauvergne *Citizenship with a Vengeance*, 8 THEO. INQ. L. 489, 494 (2007) for references of Catherine Dauvergne to the place of the humanitarian discourse in immigration laws. See also, Catherine Dauvergne *Amorality and Humanitarianism in Immigration Law*, 37 OSG. HALL L. J. 597 (1999).



welfare officer's impression of his family. So the burden of proof can only be shouldered by means of indirect evidence about the impression of his family life, because usually the foreign parent and his child are not given the right to appear before the committee.<sup>203</sup>

Without taking a stand on the matter, I wish to say that it could be considered that the process of turning a rule into an exception and transferring the burden of proof to the foreign parent could be justified in numerical terms. If the number of parents applying for status by virtue of their parenthood of children were high, then placing the burden on the state could involve great administrative costs. But, precise data about the number of applications for status of this type is not available, and in my conversation with the representatives of the Ministry of the Interior, PIBA, they estimated that the applications numbered just a few dozen each year. It seems unlikely that dealing with this number of applications would place a heavy burden on the representatives of the Ministry of the Interior, even if the burden were reversed.

## VII. SUMMARY AND CONCLUSIONS

The shape of the family is changing and the concept in the present time is not unitary and static but dynamic, changing and influenced by various social practices just as it influences; this includes the phenomenon of globalization. This article examines the rules affecting the possibility of maintaining family life in Israel within a mixed-status family in which there is a difference in civilian status of its members which shapes this possibility. Applications for status by foreign parents in these families, based on family relationships with their children who have status, are not common. The number of these is small enough to make it possible to examine comprehensively the normative and authoritative texts that deal with them in general and to understand how the reformulation of the concept of family has occurred in relation

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203. In the matter of Asraa, the court ordered the mother to be given the right to appear in person before the committee as an exceptional case, because of the special sensitivity of the case. It should be mentioned that in my conversation with the Ministry of the Interior (6.2.2012), I was told that even in the stages of preparing the file for discussion in the committee, no hearing was given to the minor child so that his version is never brought before the Ministry of the Interior directly but only by means of a welfare report. Asraa, *supra* note 14.

to them. It is precisely this seemingly esoteric phenomenon of families that are not standard (and perhaps even those in which there have been pathological events) that is the exception that proves the rule.

From these applications, we learn that the massive advances that the institution of the family has enjoyed are not absolute but relative, and that the iteration is differential: certain families benefit from more support, protection and encouragement from the state than others, as a function of the considerations of the state's immigration policy and ethno-demographic interests. The legal strategy of including the new family units whose existence has become possible under the aegis of globalization is, therefore, a strategy of varying inclusion. Thus it is that certain children enjoy vast protection of their good and their rights, whereas for others – those who have at least one foreign parent – the protection is less important than immigration considerations. This logic is reflected in (or is created in the wake of) the selective narrative that is portrayed in the judicial opinions on the matter of the foreign parents and the family units they maintain – a narrative that diminishes the importance of the rights of some while exaggerating the importance of the interests that are in opposition to those rights, making deficient use of the rights discourse. Thus, these foreign parents and often their parents too are doomed to a liminal existence between the legal system and the bureaucratic system and between the state in which the foreign parent holds citizenship and the State of Israel, such that they often do not obtain relief, in other words, a place in which they can maintain family life, in either one of them. The State of Israel does not give some of them any status, not even a civil status inferior to the status of citizenship, such as residence or a different residence permit, for this purpose.

A scrutiny of the basic concepts that are so charged with values like the concepts of family, parenthood and childhood seen through the prism of immigration considerations distorts the meaning of those concepts. In effect, it seems that these concepts have no intrinsic value in our society, but that their meaning is differential. In future it will be interesting to examine, on the one hand, the influence of immigration considerations on other basic concepts in society, while, on the other hand, to look at the way in which globalization and legal arrangements affect the meaning of basic concepts of the family, parenthood and childhood in contexts other than that of immigration.

Finally, this test case has taught us about the crucial need to formulate a policy and immigration laws in a codified and comprehensive manner, as a primary arrangement. Whether this is desirable or not, non-Jewish immigration to Israel of substantial scope is taking place, and it ought to be addressed as such. This move to formulate the necessary policy and immigration laws as we see here is required for three reasons: First, and perhaps most importantly, this will be an opportunity to think broadly and thoroughly about a set of values that are worthy to be the basis for our immigration policy. In this way, it will become possible to carry out iteration of the policy and the legal rules coherently and based on values, and after understanding the ideological basis for those values, it will be possible to give thought to the precise balance that we wish to create between conflicting principles and the compromises in values that we must make. In and of itself, I maintain that in establishing an immigration policy and immigration laws, the appropriate weight must be given to considerations of human rights as they are expressed in the accepted constitutional values in Israeli society and in international human rights conventions that Israel is a party to, in preference to the ethno-demographic considerations which are currently given precedence. Second, this step will facilitate the creation of a transparent, clear system of laws that the public and the Ministry of the Interior could become familiar with and that would allow people to plan their lives accordingly. Third, this step will relieve the courts of the heavy burden currently incurred by them, enabling them to develop immigration laws casuistically.