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Love Suspended: Demography, Comparative Law, and Palestinian Couples in the Israeli Supreme Court

Abstract

This article considers a recent decision by the Supreme Court of Israel dealing with the right to family unification of Palestinian citizens of Israel (PCI). By situating the decision in the broader debate on Israel's constitutional definition as a Jewish and democratic state, the article examines patterns where the definition plays an important role in defining the nature of the citizenship held by PCI, and the limits of their rights. This examination focuses on three main issues that arose in the case: the scope of the protection of the right to family life, the comparative method used by some of the Justices to limit that right, and statements about the legitimacy of demographic considerations in devising immigration policies. This analysis demonstrates how the arguments and justifications used by the Court may provide building blocks for a legal framework that is proceeding in the direction of institutionalizing separate hierarchical categories of citizenship.

Keywords: Israel's definition as a Jewish and democratic state - Palestinian citizens of Israel- right to family life- family unification- demography- comparative law.

Introduction

In January 2012, the Supreme Court of Israel issued its long awaited decision on the constitutionality of the Citizenship and Entry to Israel Law (Temporary Order)-2003 (the Citizenship Law) and its amendment. The decision in *Galon v. Attorney General* (2012) upheld the constitutionality of the law that imposes a sweeping prohibition on the family unification processes between Israeli citizens and Palestinians residing in the Occupied Palestinian Territory (OPT), residents and citizens of Syria, Lebanon, Iraq and Iran.¹ The overwhelming majority of those affected by the law are Palestinian citizens of Israel (PCI).² The 232-page decision confirmed an earlier decision by the same Court

from 2006 (*Adalah*). It was delivered by eleven Justices and was described by one of the Supreme Court Justices as one of the most important cases ever discussed by the Supreme Court (*Galon*, 2012: para 47, Levi). It dealt with a number of issues of constitutional importance, mainly the right to family life, immigration policy and equality. More importantly, the decision provided some indications about the nature of the relationship between the state of Israel and its Palestinian citizens, and the future trends in this relationship.

In this article, I will engage some of the arguments relied upon by some of the majority Justices, and situate this decision in the broader debate on Israel's constitutional definition as a Jewish and democratic state. This is a debate which has been on-going since the Israeli parliament (the Knesset) introduced this definition in the Basic Laws enacted in 1992. The 'Jewish and democratic' definition combines two ideas: a democratic state, understood to be one that is based on the idea of equal citizenship; an inclusive attribute that guarantees equal membership to all members of the polity included in the state, and acceptance of difference. It usually implies a state whose legitimacy is based on the consent of the governed. On the other hand, a Jewish state implies exclusion of non-Jews on the basis of religion and/or ethnicity. It also implies homogenization by designing the polity along religious and ethnic lines, as well as a role for religion in shaping the state. This definition highlights the question of the status of the PCI, as a national homeland minority that inhabited the area before the creation of the state.

There was little open discussion in this particular decision on the meaning of Israel's definition as a Jewish state and the impact of this definition on the Palestinian minority. The decision, however, exemplifies patterns in which the state's definition, even if not explicitly mentioned, plays an important role in defining the nature of the citizenship held by the PCI, and in the demarcation of the limits of their rights.³ It is useful, therefore, to consider the Court decision through the lens of Israel's definition as a Jewish and democratic state and the status of the PCI. I

offer to do so by examining three main issues that arose in the case: the scope of the protection of the right to family life, the comparative method used by some of the majority Justices to limit this right, and statements made about the legitimacy of demographic considerations in devising immigration policies. When situated in the broader question of Israel's definition, the examination of these three aspects confirms that despite the rhetoric of the Supreme Court about citizenship and equality, the Israeli authorities, including a significant number of Justices in the Supreme Court of Israel, see and treat the Palestinian citizens as an immigrant group (Jabareen, 2002). Indeed, in this case the approach of some Justices went beyond this and was akin to treatment as non-citizens. Furthermore, this examination also shows that arguments and justifications used by the Supreme Court in the *Galon* case provide the building blocks for a legal framework that is proceeding in the direction of explicitly institutionalizing separate hierarchical categories of citizenship.

I will begin with providing some background on the Citizenship Law that the decision dealt with, including the first decision in 2006 by the Supreme Court which upheld the constitutionality of the Law, and an overview of the most recent decision, the *Galon* decision. I will then examine in depth three main issues that were dealt with in the decision. The first, which is one of the main points of disagreement between the majority and minority opinions, is the disagreement on the scope of the right to family life. Second, I will examine the arguments provided for restricting the right to family life and excluding family unification from it, focusing mainly on the use of comparative law by some of the majority Justices. The third issue will examine the approach of some of the Justices to the question of demographic considerations. I will then situate the decision and the arguments provided in the context of the status of the PCI and the impact of Israel's constitutional definition as a Jewish and democratic state. The final part will provide concluding comments.

Background: Family Unification in Israel

The family unification process under Israeli law is controlled by a combination of the Citizenship Law-1952 and the Entry to Israel Law -1952. A non-Jewish foreigner married to an Israeli citizen or resident who wishes to acquire resident status or citizenship in Israel has to go through what is called the 'gradual process' where s/he 'gradually' goes up the scale starting with a temporary permit to live in Israel, then temporary resident status, then residency and finally citizenship - depending on the status of the sponsoring spouse. Entering into the process and getting the 'resident status' is contingent on security and criminal background checks. Historically, the number of marriages among Palestinians across the 'Green Line'- the line which separates between Israeli sovereign territory and the OPT- is high. Palestinian citizens of Israel and Palestinians in the OPT are considered historically, culturally, politically and geographically as belonging to the same nation that was abruptly and arbitrarily separated by a line drawn on a map in 1949 which became the border line. In some places, this line divided villages into two. The (relatively) easy access of the PCI (from Israel to the OPT) also contributes to high number of marriages across the Green Line. This makes the family unification process an essential channel for many PCI to unite with their spouses from the OPT. According to the Ministry of Interior, about 130,000-140,000 OPT Palestinians acquired status in Israel through family unification from 1994-2002 (*Galon*, 2012: para 1, Levi).

In 2002, during the height of the Second Intifada, the Israeli Government put a freeze on all family unification applications between Israeli citizens and their Palestinian spouses who are residents of the OPT. This decision came after a suicide bombing in a restaurant where the bomber acquired resident status through family unification. This decision, also known as Decision 1813, was justified by security concerns. Later on, the Knesset enacted the Citizenship and Entry to Israel Law (Temporary Order)-2003. The Law was first enacted for the period of one year, but was periodically and consistently renewed with some amendments.⁴ It imposed an almost absolute prohibition on family unification between Israeli citizens (most of whom are PCI) and their spouses who are

originally residents of the OPT -areas which have been under Israeli occupation since 1967. This prohibition did not include the Israeli settlers in the OPT, and was justified based on security concerns.

Section two of the Law provides that:

During the period in which this law shall be valid, notwithstanding any legal provision, including article 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship according to the Citizenship Law, to any resident of the area [OPT], or a citizen or a resident of the states mentioned in the annex, and shall not give him a license to reside in Israel on the basis of the Entry to Israel Law. The Area Commander shall not grant the area inhabitant a permit to stay in Israel on the basis of the security legislation in the area.⁵

Essentially, the Law instructed the Minister of Interior not to approve citizenship or residency applications to any Palestinian who is registered in the population registry of the OPT. It also instructed the Military Commander of the OPT, who is responsible for issuing the permits allowing OPT residents to enter Israel, not to issue any entry permits except for medical treatment, employment, or any other purpose as long as it is a temporary one. The Law allowed for temporary permits to be issued for spouses who are above the age of 35 for males and 25 for females. These age ranges were justified based on statistics indicating that people younger than those age categories were more likely to be involved in violent attacks against Israel. The temporary permits have to be renewed periodically and they do not allow their holders to work or drive a car in Israel, nor do they allow access to the healthcare system.

The sweeping prohibition in the law that left very little room for discretion almost solely affected the Palestinian minority in Israel. Its effect was disastrous for couples seeking family unification. Couples who are below the age of 25 for women and 35 for men had two choices only, either to relocate to the OPT or risk criminal prosecution under the Entry to Israel Law-1952. For those above these ages, the options were slightly better, but still grim: either move or obtain

temporary permits that do not allow the holders the right to work or entitle them to healthcare or any social benefits. For many families, the choices were between splitting the family and relocating. On some occasions, police conducted night-time raids in Palestinian villages in Israel, arresting and deporting individuals who had been living there for years but could not get status because of the Law (The Association of Civil Rights in Israel, 2006). It is not surprising, therefore, that the Citizenship Law was criticized twice by the United Nations Human Rights Committee (2003, 2010), and twice by the United Nations Committee on the Elimination of Racial Discrimination (CERD) (2007, 2012). Both committees recommended the revocation of the law citing concerns about the scope of the law, its discriminatory effect on a minority group, and the violation of the right to family life. CERD especially emphasized that the restriction that the Law imposes which targets ‘a particular national or ethnic group in general is not compatible with the Convention, in particular the obligation of the State party to guarantee to everyone equality before the law. (Articles 1, 2 and 5 of the Convention)’ (CERD, 2007: para.20).

The Adalah Case

A number of individuals and human rights organizations challenged the constitutionality of the Law arguing that it violates the right to family life, liberty and personal autonomy, and the right to equality since it mainly affects the PCI. Some of the petitioners also claimed that the real objective behind the law was demography not security, that is, that the Government was trying to control the number of the Palestinians who have Israeli citizenship in order to preserve a Jewish majority among its citizens. The argument that the Citizenship Law’s objective is demographic was supported by the fact that some members of Knesset made comments to this effect,⁶ and by the low number of people involved in violent attacks against Israel who acquired status through family unification.⁷

The petitions in *Adalah v. Minister of Interior* (2006) resulted in a split decision. Led by then Chief Justice Aharon Barak, six out of the eleven Justices found that the Law violated the right to family life and the right to equality. These rights are derived from the right to dignity, which is protected under Basic Law: Human Dignity and Freedom, which has constitutional status. The six Justices (then Chief Justice Aharon Barak, Justice Dorit Beinisch, Justice Edmond Levi, Justice Salim Jubran, Justice Ayala Procaccia and Justice Esther Hayout) found that the violations were not proportionate and therefore could not meet the requirements of the 'limitation clause' (Section 8 of Basic Law: Human Dignity and Freedom) which prescribes that any violation should be 'by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.' However, one of the six, Justice Levi, decided, despite the violation, to join the minority in rejecting the petition since the Citizenship Law was a temporary one which was about to expire. Those he joined (then Deputy Chief Justice Michel Chechin, Justice Asher Grunis, Justice Miriam Na'or, Justice Eliezer Rivlin, and Justice Yontan Adi'el) decided that either there was no violation of constitutional rights, or that any violation by the impugned Law is justified since it meets the requirements of the limitation clause. Thus, although the majority found that the legislation violates constitutional rights, the final outcome was that the petition was rejected and the constitutionality of the legislation was upheld.

The *Adalah* petition stirred an academic debate on the questions of family unification and immigration to Israel in general, especially the need for a comprehensive immigration policy on the immigration of non-Jews, and the legitimacy of limiting immigration for security or demographic objectives (Carmi, 2007; Ben-Shemesh, 2008; Rubenstein and Orgad, 2006; Zilbershatz, 2006). Some commentators discussed other aspects of the decision, such as characterizing OPT Palestinians as subjects of an enemy entity given that they have been living under Israeli occupation since 1967 and the Palestinian Authority is only a limited self-rule entity under occupation (Gross, 2007).

Galon Case

After the *Adalah* decision was issued in 2006, the Knesset extended the law again, and in 2007 it was amended again. The amendment broadened the scope of the prohibition in two ways. The expanded prohibition included citizens and/or residents of Iraq, Iran, Syria and Lebanon. More generally, the prohibition was broadened to include anyone who could be seen as a security risk based on residence in a state or an area where ‘activity that may risk the security of the State of Israel or its citizen takes place.’ The mere residence in such an area is enough. This amendment broadened the scope of the prohibition such that now, even if the applicants meet the age criteria for temporary residence permits, this section could be used to deny him/her the permit. Since 2007, the validity of the amended law has been extended consistently by a simple majority vote in the Knesset.

The Law was challenged in the Supreme Court again in 2007. The petitioners argued that the amendment intensified the violations since it broaden the scope of the prohibition. While four new judges joined the panel (Justice Neal Henedel, Justice Edna Arbel, Justice Elyakim Rubenstein and Justice Hanan Meltzer) to replace those who had retired, the changes in the composition of the panel did not change the outcome, and for the second time, the Supreme Court upheld the constitutionality of the amended Law in a split decision of six to five. Five out of the six majority Justices (Justice Elyakim Rubenstein, Justice Miriam Na’or, Justice Neal Henedel, Justice Asher Grunis, and Justice Hanan Meltzer) ruled, citing the *Adalah* decision, that there was no violation of the right to family life, and they distinguished between the right to family life and the right of citizens to exercise this right with a foreign spouse *in Israel*. The latter right, they decided, is not a constitutional right in Israel. Similarly, the same five Justices decided that there was no violation of the right to equality in this case. They acknowledged that the law affects almost solely the PCI and not the Jewish citizens of Israel, but they concluded that in this case the distinction is based on the

fact that those citizens decided to marry ‘enemy subjects’ (in the words of the Justices). This distinction, the Justices stated, reflects a justified and relevant distinction because of security concerns, and as such, the distinction in this case does not amount to illegitimate or prohibited distinction. Despite this determination, all of them went on to examine the requirements of the limitation clause and found that the law meets those requirements. The sixth member of the majority, Deputy Chief Justice Eliezer Rivlin reached the same result and rejected the petitions, but his reasoning differed in that he acknowledged that the Citizenship Law violates the rights to family life and equality, but he found that these violations are proportionate and therefore meet the tests of the limitation clause. In addition, some Justices added other grounds supporting their findings. Justice Grunis, for example, highlighted what he called the ‘risk’ in making security assessment: that the assessment may end up being wrong regarding the applicants requesting status. He treated this potential risk as *certain* attacks on the lives and bodies of Israeli citizens, essentially profiling all those who fall under the prohibition as potential terrorist. Justice Meltzer invoked the ‘Precautionary Principle,’ which is a principle used to deal with future risks. According to this principle, precautionary measures should be taken in activities that carry the risk of harm, even if some cause and effect relationships could not be fully established. This final outcome is that while the majority rejected the petition and upheld the constitutionality of the Law, the Justices of the majority presented two positions. The first position, adopted by five members, saw that there was no violation of the right to family life and equality, and if there was one, it is proportionate and the Law therefore is constitutional. The second position, represented by Justice Rivlin, determined that the Law did violate the right to family life and equality. This violation, however, was proportionate and the impugned law was therefore constitutional.

The minority (Chief Justice Dorit Beinisch, Justice Edmond Levi, Justice Salim Jubran, Justice Edna Arbel, and Justice Esther Hayout) decided that the current Law, even after its

amendment, violates the right to family life and equality. This violation did not meet the proportionality requirement of the limitation clause because it does not include particular assessment of the potential risk of those who wish to benefit from the family unification process. Similarly, the Law does not provide any mechanism that could alleviate the violation.

Observations from the *Galon* Decision: The Right to Family Life, Comparative Law and Demography

One of the main points of disagreement in *Galon* was the disagreement on the scope of the right to family life. Five of the majority Justices distinguished between the right to family life and the right to family life *in Israel*. The right to family life, they ruled, does not mean that the right should necessarily be exercised in Israel. As long as the right could be exercised elsewhere, there is no violation. The minority on the other hand rejected this distinction.⁸ This distinction between family unification and the right to family life was first made in *Adalah*. There, four out of the six majority Justices discussed the distinction in their opinions. While it did not necessarily affect the outcome of the decision since the majority found that even if this right exists the violation meets the limitation clause, it is worrying that this distinction found favour with five of the eleven members of the *Galon* court. This distinction, and the arguments it was based on, have implications for the relationship between the State and its Palestinian citizens. The main arguments for limiting the scope of the right will be discussed below.

Human Rights, Identity and Immigration

In determining whether the right to family life is protected by Basic Law: Human Dignity and Freedom, and the scope of this protection, the majority Justices attributed significant importance to the fact that the issue discussed is a question of immigration. Regulation of immigration, as a rule of

international law, is a matter of sovereignty; the state has the right to decide who can enter or immigrate to it. As a rule, no foreign citizen has a right to enter or immigrate to the country. Relying on this principle, five of the six majority Justices (the exception was Justice Rivlin) argued that the scope of the right to family life should not be construed to include the right to bring the foreign spouse into the country in order to avoid conflict with state sovereignty, as embodied in the state's 'right' to determine limiting criteria for immigration. The right to family life, they said, is a broad category and includes many aspects such as the right to marry and the right to parenthood. However, as Justice Na'or stated,

[t]he question whether there is an obligation on the state to allow the exercise of family life with a foreign spouse in Israel specifically is not everything about the right to family life. It is only one layer that should not necessarily be seen as included in the right to family life. (*Galon*, 2012: para. 8 ,Na'or).

This understanding is built on the premise that

there should be a distinction between the right to family life and the right to exercise family life by determining the place of living of the foreign spouse. The source of the distinction is based on two things. First, the right to family life does not include all aspects related to family life. Not every aspect amounts to a violation of human dignity and liberty. Second, we cannot ignore that defining this issue as a basic right practically means a fundamental and broad obligation on the state towards an individual who is not a citizen or a resident....The choice to marry a foreign spouse *de facto* broadens the circle of the demands and duties of the state towards an additional person who lacks any relation to it. It is obvious that the state is authorized to enact immigration laws. The choices of its citizens should not dictate policy in this area. (*Galon*, 2012: para 2, Hendel).

A significant minority of the court (five Justices) therefore decided that family unification that entails the right of a citizen or a resident to bring to Israel his or her foreign spouse is only at the periphery of the right to family life and does not constitute part of its core. They were concerned that if the

right to family life includes the right to family unification as a constitutional right, then the state, - and the Minister of Interior- cannot fulfil their role as the gatekeepers.

The reasoning for this concern, however, raises a number of problems. First, it is conceptually problematic to argue that including family unification in the right to family life should be avoided because it brings about a conflict with state sovereignty. Constitutional rights, almost all of them, entail some kind of limitation on the state in exercising its powers. This is the essence of constitutionalism, which regulates the establishment of political power and regulates its exercise (Gordon, 1979). This is the rationale behind adding a bill of rights in most modern constitutions. Of course, these rights are not absolute and most legal systems introduce methods such as proportionality in order to balance rights with other interests. In this case, the five Justices introduced a proportionality consideration at the level of determining the scope of the right instead of examining proportionality at the later stage of applying the tests of the limitation clause which include proportionality.

The second problem in this determination is that the Israeli legal system accepts the limitation of executive discretion in the case of immigration to the point of limiting sovereignty. It also accepts the importance of the unity of the family unit in the process of immigration. The Law of Return-1950 allows for the immigration of any Jew, and together with the Citizenship Law-1952, the granting of automatic citizenship. According the Law of Return, Jewish immigration to Israel is seen as *a right*, and this right is also extended to the non-Jewish family members of Jews. The Supreme Court acknowledged that it is an immigration law that limits the powers of the state to adopt a selective admission policy when it comes to Jewish immigrants (*Pesro (Goldstein) v. Minister of Interior*, 1995; *Stamka v. Minister of Interior*, 1999). This could also be discerned from another decision by the Supreme Court dealing with the question of conversion to Judaism in the context of eligibility under the Law of Return. Under Israeli law, the only officially recognized conversion to Judaism in

Israel is conversion that is done according to the Orthodox stream by the recognized Orthodox Jewish authorities. For conversions abroad, the state recognizes conversions conducted by institutions belonging to other recognized Jewish streams such as the Conservative and Reform streams. In *Toshbeim v. Minister of Interior* (2005), the Court dealt with the question of whether individuals who start their non-Orthodox conversion process in Israel and finish it abroad are recognized as Jews who are eligible to immigrate under the Law of Return. The majority decided that the state should recognize such conversions if the final parts of the conversion are done by recognized Jewish communities outside Israel. Since conversion determines eligibility to immigrate as a matter of right, what the majority Justices did in *Toshbeim* was, in essence, to delegate part of the state sovereignty to foreign institutions –the institutions of the Jewish communities outside Israel– that the state has no control over. Limiting the state’s power in the issue of immigration is therefore not a novel occurrence in Israel.

The Supreme Court, therefore, shows tolerance for limiting the powers of the state in regulating immigration if it is limited to Jewish immigration only, because the state is defined as a Jewish state, and because Jewish immigration is closely related to Jewish self-determination (*Toshbeim*, 2005). The fact that the rights under the Law of Return are extended to the non-Jewish family members means that the right to family life for Jewish citizens, or rather, potential Jewish citizens, is broader, stronger and more valuable than the right to family life of a PCI. The rights that the state is willing to recognize in the case of immigration of Jewish individuals who are not citizens yet, it is not willing to recognize for its other citizens. At one extreme, the Law of Return almost eliminates the discretion of the executive in that it provides very little room to deny admission to Israel or application for citizenship for individuals from Jewish background and their families. At the other extreme, the Citizenship Law eliminates the discretion of the executive in that it provides almost no room for granting status to spouses of Israeli citizens (mostly PCI) who live in the OPT.

The Use and/or Misuse of Comparative Law

The same five members of the six person majority found support for their position that limits the scope of the right to family life in decisions of American Courts, UK Courts, European Court of Justice and the European Court of Human Rights (ECtHR). The goal of this comparative exercise, as Justice Rubenstein explained, was to show

that the constitutional protection of the concrete right does not extend, on the constitutional level, to all its possible derivatives and branches. Second, to show that although the right to family life is recognized in comparative law and in international law as a basic right, and it could be said that there is consensus on it, nevertheless views diverge on the derived right to family unification, and it should not be seen, in advance, as an inherent and inseparable part of the first right (*Galon*, 2012: para 16, Rubenstein).

The range of the cases used as authorities was wide and diverse, and many of the cases were not relevant in that their focus was mostly on deference to the legislator and the utilization of a lower standard for review. Some of the cases were referenced without taking into consideration their temporal context. For example, Justice Meltzer, Justice Rivlin and Justice Na'or mentioned the case of *Knauff v. Shaughnessy* where the US Supreme Court decided in 1950 that issues of immigration law require a lower standard of scrutiny and deference to the political branches of Government. This case was decided at a time when US immigration law explicitly excluded certain races from immigration to the US. It should also be read in the context of the political climate of the era which was characterized by what was known as the 'Red Scare' (Motomura, 2006:100).⁹

The same five Justices especially emphasized the jurisprudence of the ECtHR since it deals specifically with the interpretation of Article eight of the European Convention on Human Rights, which protects the right to family life. The scope of this right was often discussed in the context of

immigration cases. They also examined the application of this Article by the House of Lords. A closer look at the cases referenced and sometimes quoted reveals two trends that require attention.

The first trend is that the opinions were selective in the choice of cases and in the quotes used in a way that distorted the legal situation in EU law and conveyed an inaccurate picture about the trends there. Justice Na'or and Justice Hendel, for example, referred to a case by the European Court of Justice that dealt with Article eight of the Convention in the context of family reunification (*European Parliament v Council of the European Union*, 2006). Since it dealt mainly with the European Convention on Human Rights, the European Court of Justice applied the law as interpreted by the ECtHR. Justice Na'or quoted part of paragraph 55 of the decision which states that '(c) Where immigration is concerned, Article eight cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.' But this paragraph, which is a summary of the rule as used in earlier cases, opens with '(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.' That is, although there is no *general* obligation, there is a *special* obligation to examine the particular circumstances. Justice Na'or omitted this from her quote. This omitted phrase also states specifically that this is the rule for 'settled immigrants'. Similarly, when she quoted from the House of Lords decision *Huang v. Sec. of State for the Home Department* (2007), she only quoted the section dealing with the general rule and omitted any mention that in some cases Article eight applies. In the same vein, the case of *Abdulaziz v. UK* (1985), which was referred to in *Galon*, and was quoted in *Adalah* as an authority for the determination that the right to family life according to Article eight does not apply in cases of immigration, states that 'immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8 (art. 8).' It is

therefor more accurate to say that while Article eight does not confer a *general* right, it is relevant in the context of immigration and it might give rise to such a right where the state will have a positive obligation as the ECtHR ruled in *Priya v Denmark* (2006). Justice Rubenstein cited this latter decision as an authority, but he chose not to mention the nuanced approach it adopts.

It seems that by their emphasis on the lack of a general obligation to authorize family reunion these five Justices chose only one principle among a number of principles that regulate family reunification under EU law. By doing so and overlooking the other principles which clearly state that under particular circumstances Article eight does apply in cases of immigration, they conveyed a distorted picture of the state of the law. The Justices also overlooked a general trend in the jurisprudence of the ECtHR extending the scope of the protection that Article eight grants in cases of immigration (Thym, 2008). They also overlooked a recent case from the UK Supreme Court where the majority Justices described *Abdulaziz* as old and inconsistent with recent trends and refused to follow it (*R (Quila) v Secretary of State for the Home Department*, 2011). The Justices also ignored the fact that in cases where sweeping or indiscriminate immigration arrangements are used by states in a manner that targets a specific population, the matter was also dealt with using Article 14 of the Convention that prohibits discrimination. The ECtHR approached such matters by applying Article 14 in conjunction with Article 8 (*Kiyutin v Russia*, 2011). Although Justice Meltzer referred to the latter decision, he only emphasized the lack of a general obligation on the part of the state to respect of the choice of the married couple.

The second trend that could be identified is that most of those cases -C-540/03, *European Parliament v Council of the European Union*; *Z. and T. v The United Kingdom*; *Priya*; *Huang*; *Abdulaziz*- deal with situations where foreigners seek to enter the country to join long term residents or naturalized citizens and not citizens by birth. This is especially pertinent in the case where European human rights cases were used. One of the leading cases referred to by a number of Justices was Case C-

540/03 of the European Court of Justice which dealt with European Union Directive 2003/86/EC. This Directive deals with family reunification between *foreign* residents of the EU countries and their foreign spouses. Even in the one case that concerned a citizen of an EU country, the ECtHR accepted the distinction between naturalized citizens and citizens by birth (*Abdulażiz*, 1985). The Justices also ignored, or were unaware of a decision by the UK Court of Appeal -which was confirmed by the Supreme Court- in which the Court attributed significant importance to the fact that the sponsoring spouses are UK citizens when it struck down a rule of immigration that limited the right to sponsor foreign spouses in immigration (*Quila v Secretary of State For the Home Department*, 2010). While one may disagree on the legitimacy or adequacy of this distinction between citizens and residents, and between naturalized citizens and citizens by birth, it is important to highlight that this distinction is based on the premise that citizens, especially citizens by birth, have fewer links with other states where they can exercise family life.

The use of the cases mentioned in the earlier paragraph in order to justify limiting the right to family life is significant. The Justices of the Supreme Court relied mainly on cases that deal with long-term residents, refugees or naturalized citizens when they were examining a law that applies to Israeli *citizens* by birth who belong to a homeland minority and have no connections to other states.¹⁰ Whether intentionally or not, this interpretation renders members of the Palestinian minority outsiders whose citizenship status is different from the status of the Jewish citizens. This conclusion becomes even more pertinent when seen as part of the larger immigration policy in Israel where the state provides significant financial incentives for non-Israeli Jews and their non-Jewish family members to immigrate to Israel (Ministry of Absorption, 2012). While this opinion was adopted by five out of eleven Justices only, it is still significant especially that the five justices were part of the majority that determined the outcome of the case.

Demography

In *Galon*, four Justices (Rivlin, Levi, Na'or and Meltzer) discussed the issue of the demographic balance between Jews and Palestinians in Israel, and the relevance of demographic considerations in determining an immigration policy and the scope of the right to family unification. *Galon* was the first case in which the Supreme Court explicitly discussed the demographic balance between Jews and Palestinians as a policy consideration. While the Supreme Court had in the past emphasized the significance of the Jewish majority as an essential component of Israel's definition as a Jewish state and the importance of preserving this majority (see eg *BenShalom v. Central Elections Committee* (1988) and *Central Election Committee for the Sixteenth Knesset v. Ahmad Tibi* (2003)) still, until *Galon*, there had been no discussion of what could be considered legitimate means of maintaining it. Nor was there any discussion about what that significance means for the PCI since the primacy of having a Jewish majority essentially associates the interests of the state with the interests of one group and subordinates or marginalizes the other group, sometimes casting their membership in the state as a threat.

The discussion on demography arose in the context of the objective of the Citizenship Law. Some of the petitioners in *Adalah* argued that its main goal was not security but to reduce the growth in the number of the Palestinians who are Israeli citizens. While all the judges in *Adalah* examined the constitutionality of the Law assuming that it was motivated by security considerations, Justice Proccacia and Justice Jubran -who were in the minority- wondered if demographic considerations played a role. However, they did not explore that idea any further. The state, on the other hand, despite insisting that security was the sole objective, also argued that using various means in order to achieve demographic objectives is in conformity with Israel's principles as a Jewish and democratic state (*Adalah*, 2006). In *Adalah*, Justice Chechin disapproved of the very mention of demographic concerns, although as Ben-Shemesh and others observed, demography

featured implicitly in his opinion in the form of discussion of the status quo and the importance of preserving the society's image and culture (Ben-Shemesh 2008; Gross, 2007). The situation changed in *Galon* and what was implicit in *Adalah* became explicit in *Galon*. The discussion did not affect the outcome of the decision but it is important to examine it because it gives important indications about the future trends in the Supreme Court.

The most detailed discussion in *Galon* was by Justice Rivlin. Justice Rivlin quoted approvingly from a study recommending an immigration policy that takes into consideration that Israel is 'a democracy with a mission', that is, a state that is meant to embody the self-determination of a specific group- Jews.¹¹ Rivlin shared the concerns of the authors of this study that Israel suffers from a negative 'immigration balance' when it comes to Jewish immigration at the same time when a large number of Palestinians seek to unify with their spouses in Israel. Speaking about a future plan to enact a law that will provide comprehensive treatment of the immigration issue, Justice Rivlin noted that there is no indication that it will deal

with the demographic question, that is, reference to the question of the meaning of the Jewish state, and if such meaning includes the need to promote a Jewish majority in the country. Regarding that latter issue, Chief Justice A. Barak has already ruled that "Israel's *raison d'être* is in being a Jewish state" and that at the centre of the nuclear characteristics that shape the definition of the state as a Jewish state "stands the right of every Jew to ascend [immigrate] to Israel, that Jews will constitute a majority in it." Does this justify taking measures with the intention to prefer members of one group over another for the purposes of immigration? (see: Avineri, Orgad and Rubenstein) (*Galon*, 2012: para 16, Rivlin).

While on its face the question is left open, the reference he mentions provides a strong indication that such preference is justified. This is reinforced by his assertion that if this is done as part of a comprehensive normative scheme, such a question is not for the Court to decide or interfere with and the Court should defer to the legislator in issues of immigration.

Justice Meltzer took a more explicit approach. While he maintained that he had no intention of discussing the question of demographic considerations, he quoted an article by Ruth Gavison: ‘As a matter of principle, Palestinian families are supposed to be unified in their [Palestinian] state, Jewish families on the other hand will be unified in their [Jewish] state’ (Gavison, 2003b). In the same vein, Justice Na’or opined that while the objective of the Citizenship Law is based on security, she was well aware of the fact that the reasoning she provided in *Adalah* and repeated in *Galon* regarding the scope of the right to family life would have implications for the future immigration policy. That is, if there is no right to exercise the right to family life in Israel, future legislation that limits family unification because of demographic considerations will not be declared unconstitutional because there is no violation of constitutional rights (*Galon*, 2012: para 5, Na’or). The examination of the constitutionality of such legislation will stop at the point of stating that there is no constitutional right to be violated without the need to examine the requirements of the limitation clause. Justice Levi, who was in the minority, said that he reached his conclusion because the state insisted that the legislation is motivated solely by security concerns. He added that if it was argued and *proved* otherwise, his conclusion could have been different.

The way the question of demography and its impact on immigration and family unification were discussed reveals an inclination to accept that demography is a legitimate consideration in devising family unification policies that violate the right to family life. While it is only an inclination expressed in vague and implicit terms that fell short of an open acceptance of demographic considerations as legitimate, the very fact that four justices decided to address it even though this was not a question in this case, and referred to specific authors –such as Ruth Gavison- who see demographic considerations as legitimate, gives an indication about possible future trends in dealing with the question.

Palestinian Citizens in the Jewish and Democratic State: Equal Citizens or a Demographic Threat?

This section of the article will situate some of the developments and discussions of the *Adalah* and *Galon* cases in the broader question of the status of the Palestinian minority in Israel. Although the discussion in these cases did not explicitly deal with the status of the PCI as such, or the meaning of Israel's definition as a Jewish state, it still provides important indications about the relationship between the state and the Palestinian minority, and the direction in which this relationship is possibly headed. The focus here will be on two main issues. The first issue will be the general trend in the literature on Israel's definition as a Jewish state to separate between rights and their actual exercise in Israel as part of justifying the definition. The distinction between the right to family life and right to family life *in Israel* will be situated and discussed as part of this trend in the broader discussions on the rights of the Palestinians minority. The second issue will focus on the discussions on demography in the decision and their broader implications.

Full Citizens or Deemed Foreigners?

Israel is defined as a Jewish and Democratic state in its Basic Laws. This definition plays an important role in defining the polity, the public culture, state policies and the scope of protection of constitutional rights. The meaning of the terms 'Jewish and democratic' was discussed a number of times by the Supreme Court of Israel (*Central Election Committee for the Sixteenth Knesset v. Tibi*, 2003; *BenShalom v. Central Elections Committee*, 1988; *Ka'dan v. Land Administration of Israel*, 2000). The Court stated that the nuclear characteristics that shape the minimum definition of Israel being a Jewish state

have a Zionist perspective and a traditional perspective at the same time... At their centre stands the right of every Jew to make *aliya*¹² to the State of Israel, that in Israel Jews will be a majority, Hebrew

will be the main official language of the state, and its main holidays and symbols reflect the national emergence of the Jewish people, the heritage of Israel is a central component of the state's religious and cultural heritage (*Central Election Committee for the Sixteenth Knesset v. Tibi*, 2003: 22).

The definition as a Jewish and democratic state has a 'normative constitutional status that is above the law.' (Barak, 2004: 83). It is also central to the institutions of governance and their powers. Although the values as a Jewish and democratic state are only mentioned in a handful of Basic Laws (Basic Law: Human Dignity and Freedom, Basic Law: Freedom of Occupation; Basic Law: The Knesset), their relevance encompasses the Israeli legal system in its totality. As former Chief Justice Barak has put it, the values of Jewish and democratic are 'standards for the interpretation of the purposes of all Basic Laws,' which affect the scope of human rights in Israel. Consistency with these values is seen as a condition to any restriction on human rights, whether those rights are explicitly protected by a Basic Law or not (Barak, 2004:82-83). The Jewish and democratic values also affect the interpretation of legal texts in general. In this context, the approach should be one that assumes 'that the general purpose of every legal text is to fulfil Israel's values as a Jewish and Democratic state' (Barak, 2004:83). Fulfilment of Israel's values therefore is seen as a presumption in the interpretation of any legal text. The Jewish and democratic definition also plays an important role in determining the scope of the right for political participation. According to Basic Law: The Knesset, no party or individual is allowed to participate in the elections if their goals or deeds, explicitly or implicitly, 'negate the existence of Israel as a Jewish and democratic state.' The Law of Return is one of the main components of the Jewish state. Although it is not a Basic Law, that is, it is not officially part of the constitutional framework, the Court sees it as one of the most important and foundational laws that should be seen as a Basic Law (*Toshbeim*, 2005).

How does the Court reconcile this definition with democracy and the rights of the significant Palestinian minority who are essentially excluded from this definition? The Supreme Court states that the minorities, including the Arab minority (the Court does not recognize the Palestinian minority as Palestinian, but a number of minority communities who belong to different religious sects who speak Arabic) should enjoy full equality. As for the immigration policy that favours Jews, the Court says that it is not discriminatory because while ‘a special key’ to enter the ‘house’ is given to Jews, inside the ‘house’ everyone shall enjoy equal rights. The Court justified this distinction by asserting that Israel is a Jewish state. It is a Jewish state in that belongs to the Jewish nation and the Jewish nation only. (*Ka’dan v. Land Administration of Israel*, 2000; *Central Election Committee for the Sixteenth Knesset v. Tibi*, 2003).

That this definition creates tension, if not contradiction, with the basic tenets of liberal democracy is a matter that is discussed and debated at length (Barak, 2004; Bishara, 2005; Gavison 1999, 2002, 2007; Ghanem, 2009; Jabareen, 2002; Joseph, 2003; Ravitzky and Stern, 2007; Raz, 2000; Rouhana, 2006; Rubenstein and Yakobson, 2009; Smootha, 2002; Yiftachel, 2006). Most liberal nationalists who defend and justify the definition usually invoke the argument that Israel is a nation state, that is, a state which is designated as the embodiment of the right to self-determination of a specific national group (Gavison, 1999; Rubenstein and Yakobson, 2009; Gans, 2008; Carmi, 2003). The state is thought of as ‘a framework for organizing nations on national, ethnic, cultural, historical, religious basis within a state framework’ (Gavison, 1999:26). In this kind of state, there is ‘a relationship between the state institutions and a particular national culture, it provides important advantages to the people that the state is associated with, and imposes a heavy burden on the citizens who do not belong to that nation.’ (Gavison, 2003a:54). The actual meaning here is an ethnically defined nation state, or an *ethnic* nation state. This conception of the nation state stands in opposition to another conception which views the state as being the ‘state of all of its citizens’, as

espoused by critics of the current Jewish and democratic definition such as Bishara (2005), Rouhana (2006) and Yiftachel (2006).

According to the liberal nationalist understanding, such a state (the ethno-national state) is allowed to favour members of the dominant national group in certain areas such as immigration, language policy and public culture. The most cited example in this regard is German immigration policy that gives favourable treatment to ethnic German immigrants. The favourable treatment is seen as part of the right to self-determination. A variation of this argument that links immigration policy to the right to self-determination is the cultural argument -that immigration policies should take into account and reflect the national identity and the culture of the people of the state in order to protect their culture, or as Michael Walzer puts it, 'we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of community we want to have' (Walzer, 1983:24). Selective and restrictive immigration policy is thus justified in terms of preserving the culture by reducing the number of immigrants, and making sure that immigrants who belong to different cultures are integrated in the society (Miller, 2005; Orgad, 2009). The culture that immigration laws and policies are supposed to protect is inherently related to national identity and sense of nationhood. The literature on citizenship and nationhood usually identifies a number of conceptions of nationhood which affect the nature of citizenship and immigration policy. Brubaker (1992) for example distinguishes between ethnic nationhood (where the nation and membership is conceived of in terms of ethnicity) and civic nationhood (where the nation is based on civic values and is seen as more inclusive and assimilationist). Walzer (1997) emphasizes the distinction between his conception of nation states where the common life is organized by a dominant group, and states with immigrant societies where the society is made of different waves of immigrants with different backgrounds. Most states implement some form of a restrictive immigration policy and see it as part of nation building. States

with immigrant societies and civic nationhood are often seen as more tolerant of immigration, whereas ethnic nation states are seen as more protective of their cultures and adopt more restrictive immigration policies (Skrentny et al, 2007). While these distinctions and categories have been challenged in the recent literature suggesting that in all conceptions of nationhood there is tension between ethnic/particular values and liberal/universal elements, these distinctions could still be useful since, as Joppke acknowledges, in many situations an ethnic understanding of the nation prevails over the liberal-civic elements (Joppke, 2005, 2007).

These distinctions can provide a useful lens to assess citizenship in Israel. Shafir and Peled (2002) suggest a model of three competing citizenship discourses -colonial civic-republicanism, liberal and ethno-national- attaining various degrees of dominance over time. For example, they highlight the emphasis on the principles of pioneering, settlement of land and military service as components of the colonial civic-republicanism discourse. The liberal discourse is best exemplified by the advent of economic liberalization, the rise of the human rights discourse, and the protection of some of those rights in Basic Laws that were enacted in the early nineties. The Jewish definition of the state, the emphasis on its Jewish identity and the Law of Return are the main markers of the ethno-national discourse. Despite the competing discourses, when it comes to immigration, citizenship in Israel is dominated by strong ethno-nationalism. This dominance could be seen clearly in the definition of the state and the restrictive immigration policy that opens the country to immigration of Jews only and virtually closes it for all other groups except through family unification (Peled, 2008; Bishara, 2005; Joppke, 2005). The Citizenship Law that was discussed in *Adalah* and *Galon* further intensifies the restrictive immigration policy and the ethno-national discourse in citizenship. Thus, even when it is compared to the most restrictive policies in Europe, Israel's immigration policy remains more restrictive (Joppke, 2008). In this context, reliance on the cultural argument, or the preservation of the Jewish culture (and majority), reflects a position that the only

‘culture’ that could have official representation, promotion and protection in Israel is Jewish culture. Analogies to policies adopted by European countries, mainly Holland and Denmark are used to support the legitimacy of the cultural argument (Gavison, 2007; Rubenstein and Orgad, 2006). The argument and the analogies made could be challenged on at least two accounts. First, the conception of the state’s culture as Jewish culture only is problematic. It disregards the culture and interests of 20% of the citizens who are also a homeland group (Gans, 2008). More importantly, since foreign spouses of Jewish Israeli citizens will be seen as being able to integrate in the Jewish culture, and therefore are not a threat, the adoption of the cultural defence will only target the ‘aberrant’ non-Jewish (Palestinian) culture, creating distinctive categories among citizens based on their ethnic belonging which could violate the individual right to family life. Second, the examples furnished, like Holland and Denmark, as Hassan Jabareen and Christian Joppke observe, usually employ the cultural element as part of a broader immigration policy that is more liberal and sometimes within a liberalizing framework, and especially so when compared with Israel’s Jews only policy (Jabareen, 2005; Joppke, 2008).

Since liberal nationalists see this favourable treatment that aims to protect culture as part of the right to self-determination, the result is that the PCI are not included in the self-determination that the state embodies even though they carry Israeli citizenship. The nation and nation building that governmental policies (including immigration policy) aspire to promote is not an Israeli nation. In fact, Israeli courts declared twice that there is not such thing as an Israeli nation. (*Tamarin v. The State of Israel*, (1972); *Ornan v. Ministry of Interior*, (2008)). Liberal nationalists such as Na’ama Carmi, Ruth Gavison, Assa Kasher, Amnon Rubenstein, and Alexander Yakobson justify this approach by stating that minority groups or individuals living in the nation state belong to other national groups that are favoured in other nation states, such that the preferential treatment of the citizens who belong to the majority nation will not be considered unjust or illegitimate discrimination. In the case

of Israel, Israel should accord Jews favourable treatment congruent with its designation as their nation state. The PCI on the other hand are expected to enjoy full equality in terms of self-determination and favourable immigration laws in the *future Palestinian state* and not in the state in which they are citizens (Carmi, 2003:54; Gans, 2008:136; Gavison, 2003b:86-87, 2007:107; Kasher, 2005:174; Rubenstein and Medina, 2005:406; Rubenstein and Yakobson, 2009: 156).

The idea that citizens, especially citizens who belong to a homeland group, should tolerate some form of discriminatory treatment enshrined in law because they are expected to exercise some of their rights in a different state is conceptually problematic. Equality among citizens should be measured within the state, not from without. The assumption that a citizen has to *emigrate* elsewhere in order to enjoy the rights that the state secures for the citizens of the majority group creates hierarchy among the citizenry in a manner contrary to the principles of equal citizenship. This becomes more problematic when the emigration in this case is not repatriation, as in the case of the PCI. Since the PCI did not originate from the OPT, they cannot be seen as having the right to 'return' to it. Insistence that the PCI should be able to exercise such rights in the OPT is viewing them as belonging to that area. The PCI, who are a national homeland minority are thus viewed as an immigrant minority. The fact that the putative state where these citizens are expected to exercise those rights (the future state of Palestine) does not exist, and it does not exist because its supposed territory is under Israeli occupation, makes this idea even absurd. It should be emphasized that this distinction between citizens who belong to the majority national group who are part of the self-determination, and citizens who belong to a national minority who are not included in the self-determination that the state represents, creates an opening for the idea that *some* citizens may, or even should, exercise some of their rights elsewhere.

The determination of the five Justices that the right to family life does not include the right to enjoy family life *in Israel* as long as it could be exercised elsewhere is part of this trend, especially

that it is clear that those citizens who are supposed to exercise their rights elsewhere are the PCI, and not Jewish Israelis. Further examination of the circumstances of the Citizenship Law and the distinction between the right to family life and the right to family life *in Israel* shows that this distinction, and not only the Citizenship law, in effect, applies to the PCI only. The essence of this distinction is that the families can seek to live together in the country of the foreign spouse, the OPT in the overwhelming majority of the cases or Iran, Iraq, Syria and Lebanon.¹³ This means the movement of thousands of Israeli citizens to areas that the Court sees as hostile in order to live with their spouses. As acknowledged by the Court, the overwhelming majority of those citizens are PCI, but if we assume, *arguendo*, that the composition of the affected citizens is similar to the composition of the population in Israel (75% Jewish and 20% Palestinian), that means an influx of more than 100,000 Jewish Israeli citizens to the OPT which the majority Justices perceive as an enemy country, or at least perceive its residents as potential terrorist. If exercising the right in the OPT or the other countries is really an option for Jewish Israeli citizens then this will defeat the stated purpose of the Law which is the protection of the (Jewish) Israeli public from violent attacks since part of this public will be moving to a hostile territory which will make them easy targets. Similarly, it will defeat the purpose of the Law of Return which was enacted to promote Jewish immigration to the country, and the policy that actively promotes Jewish immigration and provides significant financial incentives to Jews to move to Israel.¹⁴ It will also be contrary to the state's definition as a Jewish state since the Jewishness of the state is interpreted, *inter alia*, to mean the promotion of Jewish immigration. It is reasonable therefore to conclude that the distinction affects the PCI only, and that it is very likely that it was made because it affects them only, as it provides the advantage of using a distinction that is neutral on its face but discriminatory in its effect without having to justify it. Five Justices of the majority, without explicitly stating it, restricted the right to family life in a manner that applies to PCI only.

This conclusion -that the distinction is made because it affects the PCI only- is supported by observations made by Ben-Shemesh relating this distinction to demographic considerations. Commenting on the *Adalah* decision where the distinction was first made, he argues that two of the Justices who made this distinction made it –without explicitly acknowledging it- because of demographic considerations. Ben-Shemesh observed that Justice Chechin and Justice Na’or approached immigration as a threat and a danger since the admission of new citizens to the state affects the *status quo ante*, that is, the social, political and cultural situation before their admission. Because of its risky nature and the fear of disrupting the *status quo ante*, they reasoned that the state should retain absolute discretion in regulating immigration. Explaining that Israel had many waves of (Jewish) immigration that made significant social and political changes, Ben-Shemesh concludes that this fear of changing the status quo ante is only related to the immigration of Palestinians (Ben-Shemesh, 2008:29-30).

When these details are viewed in conjunction with the Law of Return which allows for (and promotes) the immigration of Jewish families, it becomes clear that the group that is meant to exercise the right to family life outside Israel is the PCI only. The five Justices here assume that the links of the PCI to the state are not as strong as those that Jewish citizens have. The links of the PCI are seen to be similar to the links that foreigners have, who can enjoy some of their rights elsewhere. The Justices thus see and treat the Palestinian minority as a group whose rights are limited to the rights of long term residents as opposed to the rights of Jewish Israelis who enjoy the full range of rights associated with citizenship.

This conclusion is supported by the use, or rather, the misuse of comparative law discussed above. The use of cases that dealt mainly with family unification of long term foreign residents as authorities to limit the scope of the right to family right is an attempt to make an analogy between situations that are not analogous. This attempt helps explain the approach of the five Justices

discussed above regarding the nature of the citizenship of the PCI. It indicates that these Justices see the citizenship of the PCI as one that is different from the citizenship of Jewish citizens. The PCI are at best seen as naturalized citizens who are not full and equal members of the political community. They are seen as 'deemed foreigner' who have to adapt to the needs of the majority even if this comes at the expense of their rights, some of which they can exercise elsewhere. This distinction between 'citizens who belong' and 'citizens who do not' is present in national rights and immigration rights. The *Galon* decision is now extending it to the right to family life which is an individual right and provides the mechanisms for extending it to other rights.

This could be seen as one of the practical effects of the 'Jewish and democratic' definition as understood and interpreted by the writers discussed above and at least five Justices of the Supreme Court. It actually means that there is no one uniform Israeli citizenship, but different categories of citizenships, depending on the ethnic/national belonging of the individual. Those who belong to the favoured majority group enjoy the full rights, but those who belong to the unfavoured minority group should exercise some of their rights *elsewhere*- where they are deemed to belong to. PCI, thus, are seen and treated as foreign nationals or naturalized immigrants despite being indigenous to the territory of the state.

Jewish State, Jewish Majority and Human Rights

That demographic concerns are almost always present in the decision making process in Israel is not new. These concerns have always been dominant and could be traced back to the Zionist institutions that preceded the creation of the State of Israel in 1948 (Halpern, 1969). Some historians include the events they describe as ethnic cleansing which accompanied the war of 1948 as part of this demographic policy (Masalha, 1992; Pappe, 2006).¹⁵ Demographic considerations were at the heart of many policies especially the 'judaization' plans from the 1970s and 1980s where the

Government initiated and carried out plans that aimed at increasing the number of Jewish citizens in areas with high concentration of PCI such as the Galilee (Sa'adi, 2003). The Law of Return and the related policies that aim at promoting Jewish immigration also provide a clear indication about demography as an important consideration since one of their main goals is to maintain a strong Jewish majority. Jewish majority, as mentioned earlier, is one of the most important meanings of the Jewish state. For a long time, the Government was advised by 'the Demography Centre' on issues of demographic planning. Successive Israeli Governments have adopted a policy of mainly increasing Jewish population growth and reducing Palestinian population growth (Strupler, 2006).

So far, discussions in the Supreme Court on demography (always framed as Jewish majority) did not centre on whether it is a legitimate consideration or not. Promoting and preserving Jewish majority -which is at its heart, a demographic consideration- has always been seen as legitimate. Not only is Jewish majority a legitimate consideration, but it is also a constitutional given, and its promotion is a constitutional precept embodied in the idea of 'ingathering the exiles'. For many, and indeed according to the Supreme Court of Israel, this is seen as Israel's *raison d'être*, and one of the foremost manifestations of the Jewishness of the state (*Stamka v. The Minister of Interior*, 1999). The question not yet addressed by the Court is the legality of accepting demographic considerations in devising policies and enacting laws that directly violate individual rights. Demographic considerations in immigration policy that exclusively favour the Jewish majority could be seen as a violation of the right to equality for the PCI. Such an immigration policy favours one group and their interests and disregards the interests of the other group in devising an immigration policy. This unequal approach is normally justified by arguing that this policy is not discriminatory since, as mentioned earlier, it does not mandate discrimination inside Israel, and in any event others, including PCI, benefit, or are supposed to be able to benefit, from favourable immigration arrangements elsewhere. The novelty in *Galon* is in that four Justices (Rivlin, Na'or, Meltzer and

Levi) have signalled that not only are demographic considerations acceptable and legitimate generally, but that the Court may be inclined to accept them in certain circumstance when they clearly, openly, and intentionally violate the individual right to family life, not just the right to equality among groups.

The approach adopted by a significant minority of the Justices, which distinguishes between exercising rights and exercising rights *in Israel*, and provides an implicit approval of the use of demographic considerations in the process of limiting individual rights, begins to create a legal framework for legitimizing future discriminatory legislation. Although it is a minority of the Justices, it is a source of concern. In the context of immigration, the main message to be taken by the legislator in this ‘dialogue’ between the Court and the Knesset is that since family unification is not included in the right to family life, and the Court is willing to show deference to the Knesset in judicial review of legislation related to immigration, future legislation prohibiting or severely restricting family unification with Palestinian spouses based on demographic considerations may be found constitutional even if the practical result is discrimination against the PCI. This ‘conversation’ is especially significant today given the trend in the Knesset of enacting discriminatory and even racist legislation in the past few years (Shihadeh, 2010).¹⁶

Conclusion

The outcome of the *Galon* case and the reasoning of a significant minority of its judges are a serious source of concern. They will shape the relationship between Israel and its Palestinian citizens for years to come. Practically, the decision directly affects the lives of more than 15,000 couples that will have to separate or live a life full of uncertainty. It will also impact 1.6 million PCI who now have laws that in effect delineate who they can fall in love with and marry. But one of the most significant outcomes here is that a significant minority of the Supreme Court has confirmed that the rights of

the Palestinian citizens in Israel are not equal to those of Israel's Jewish citizens. It essentially casts PCI as outsiders who may exercise some of their rights in a different country but not in their ancestral homeland.

As the human rights organization *Adalah* has argued in its petition, the Citizenship Law creates three channels of acquiring citizenship in Israel. On the top of the hierarchy is the channel for Jewish foreigners and their non-Jewish family members through the Law of Return. Second is the channel for non-Palestinian foreigners, and the third is for Palestinian/Arab foreigners (*Adalah*, 2007: para. 10). Despite former Chief Justice Barak's assertion that the different routes of acquiring citizenship ought not affect the rights of citizens in the state, the recent developments show that this may not be the case. Legislation such as the Citizenship Law, the subsequent decisions upholding its constitutionality, and the reasoning provided in these decisions, may reflect three new hierarchical categories of citizenship that confer different levels of human rights protection. These categories of citizenship will be maintained through modes of thinking that see the PCI as long term residents despite holding formal citizenship. The *Galon* case may have provided the legal stamp of approval for these modes of thinking. Through highlighting the distinction between the right and the location of its exercise, the misuse of comparative law, and the emphasis on demographic considerations, a significant minority in the Court has provided the building blocks for creating different categories of citizenship.

¹ This matter was first discussed by the Supreme Court in *Adalah v Minister of Interior*.

² This article deals with the Palestinian citizens of Israel (PCI) whom are referred to by Israeli authorities as Israeli Arabs. They were subsequently given Israeli citizenship though they suffer from discrimination in a number of areas. Their number today is about 1.6 millions -together with the Palestinians of East Jerusalem who were given Israeli residency by not citizenship- and constitute about 20% of the population in Israel. While the Palestinians of East Jerusalem are not Israeli citizens, the Citizenship Law and the Court decision discussed here applies to them. The Citizenship

Law may also apply to Jewish Israelis who marry Palestinians from the OPT, but such marriages are almost non-existent.

³ For a discussion on the impact of the definition as a Jewish state on the PCI, see below the section titled “Palestinian Citizens in the Jewish and Democratic State: Equal Citizens or a Demographic Threat?”

⁴ The Citizenship Law was first amended in 2005. See Citizenship and Entry to Israel Law (Temporary Order) (Amendment)-2005.

⁵ This is the text of the section after the 2007. The amendment only added the word ‘or a citizen or a resident of the states mentioned in the annex’. I prefer to provide the more updated version.

⁶ See for example the comment by MK Nissan Solmiansky of the National Religious Party (Mafdal). In a discussion on the law at the Internal Affairs and Environment Committee of the Knesset, MK Solmiansky opined that ‘The security element is made of two things: 1. Of the fact that there are terrorists and saboteurs. 2. Of the fact that demography is being changed.’ (Internal Affairs and Environment Committee of the Knesset, 2003). In a 2005 discussion, MK Michael Ratzon (Likud) explained that ‘[t]his law is too liberal, in my opinion. The Attorney General is too liberal, in my opinion. I think that the State of Israel, as a Jewish and democratic state, should defend itself in the security sense and in the demographic sense. Azmi Bishara, we are not ashamed of the demographic aspect. We need to protect ourselves and preserve the Jewish majority here’ ((Internal Affairs and Environment Committee of the Knesset, 2005).

⁷ According to data provided by the state, out of more than 130,000 who acquired status in Israel from 1994-2008, only 54 were ‘involved’ in some way or another in violent attacks against the State. Of the 54, only seven were indicted and convicted. Two of the seven were released after serving their sentences which shows that the charges were not serious (Jabareen and Zaher, 2012).

⁸ On this specific point, a majority of the Justices rejected the distinction between the right to family life and the right to family life *in Israel*.

⁹ Justice Meltzer referred to a book on this case (*The Ellen Hanuff Story*) but did not mention its circumstances.

¹⁰ While PCI have family and cultural connections to the OPT Palestinians, their origin is not from the OPT.

¹¹ For an English translation of the study, see, Avineri et al.

¹² A term in Hebrew which means ‘to ascend’ that is used to describe Jewish immigration to Israel.

¹³ This option is also very limited. In 2000, the Military Commander of the West Bank issued Military Order number 387 banning the entry of Israeli citizens to area A where most Palestinians live under the partial control of the Palestinian Authority.

¹⁴ In 2011, a single immigrant was eligible to a cash payment of NIS 17,368 (USD\$4,600). A couple is eligible for NIS 33,110 (USD\$8,800) (Ministry of Immigration Absorption, 2011).

¹⁵ For a different perspective on the events of 1948 and the creation of the Palestinian refugee question see Gelber (2006).

¹⁶ For example, the adoption of the Foundations of the Budget Law (Amendment No. 40) (Reduction of Budget or Support Because of Activity Against Principles of the State)- 2011, which gives the Minister of Finance the powers to cut funding for publicly-funded body, such as a municipalities and schools, if that body contributes to activities that could be seen as challenging Israel's definition as a Jewish and democratic state, or marks the day when Israel was created as a day of mourning. Another example is the Law to Amend the Communal Societies Ordinance (Number 8) -2011. The amendment provides that anyone who wishes to live in towns known as "community towns" in the Galilee and the Negev –areas with sizable Arab population- should be admitted through an admissions committee. The impetus for this law was to protect the emerging trend in those towns of adding to their bylaws provisions to the effect that new residents should recognize Israel as a Jewish state and support Zionist values in order to be considered.

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