

Israel: Citizenship and immigration law in the vise of security, nationality, and human rights

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Citizenship law—immigration and security—profiling and ethnic discrimination—family reunion—constitutional interpretation—the right to equality—the right to family life

An amendment to Israel's citizenship law sweepingly banned Palestinians residing in the occupied territories from entering the country for the purpose of residence and naturalization, even in the context of family unification with (usually Arab) Israeli citizens.¹ This note analyzes the constitutional implications of the amendment and the 2006 decision of the Israeli Supreme Court that, after painful deliberation and disagreement, upheld it by a thin majority.²

1. Background: Israeli citizenship law and the new security threats

Citizenship, a cherished attribute of modern life, defines the contours of the political community; accordingly, citizenship and immigration laws are inevitably a focus of tension and interest. When the advantages attached to citizenship (or legal residence) are great and when issues of inclusion and exclusion are not consensual—as is the case in Israel at the moment—then the interest and tension only intensify.

The controversies surrounding the amendment to the citizenship law need to be discussed within the broader framework of the basic tenets of Israeli democracy and Israeli citizenship law, generally. Israel, established in 1948, defines itself as a democracy that guarantees formal equality to all its citizens regardless of origin, quite apart from whatever problems it may confront in realizing this formal equality. At the same time, Israel defines itself as a Jewish state, intended to serve as a home to the Jewish people. This dichotomy extends to citizenship and immigration law. On the one hand, Israel has a neutral citizenship law that contains provisions of a universal nature regarding the acquisition of citizenship (although these conditions are not easily met and, in practice, imply a lengthy and gradual naturalization procedure).³ On the other,

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¹ Citizenship and Entry into Israel (Temporary Order) Law, 2003, S.H. 544.

² HCJ 7052/03 Adalah et al. v. Minister of Interior [2006] (publication forthcoming) (hereinafter *Adalah*).

³ Citizenship Law, 1952, 6 LSI 50 (1951–52) (Isr.).

Israel also has a special law that grants an additional specific right to every Jew in the world to enter Israel and acquire citizenship, thus effectively exempting Jews from the burdens imposed by the citizenship law. This special law—the Law of Return⁴—reflects a conception of Israel as a safe haven for Jews from the persecutions they have suffered throughout their history, with special emphasis on the Holocaust.

However, the Law of Return, which does not allude to these circumstances as a precondition for the privileges it confers, has often been at the center of controversy. Opponents of the law argue that it is a central example of a discriminatory distinction drawn between Jews and Arabs in Israel. At the same time, the law's proponents consider it necessary in light of the historical experience that justified the establishment of the state of Israel, and they assert that the differentiation between Jews and non-Jews does not infringe formal equality. As they see it, the principle of equality is only relevant to citizens and does not apply at the stage of immigration, at which other countries also customarily implement differential policies. Although this controversy has dimensions beyond the scope of this note,⁵ it should be borne in mind as part of the broader context of the debate concerning the amendment, discussed below.

The 2003 amendment to the citizenship law states that the minister of interior shall not grant any resident of Judea, Samaria, or Gaza (the territories occupied by Israel since 1967) a permit to reside in Israel and leaves no room for discretion, even for humanitarian reasons. The amendment allows only a few exceptions to the general principle (mainly regarding certain men over thirty-five years of age and women over twenty-five); and these categories leave no room for administrative discretion on an individual basis. These limitations were enacted by the Israeli Knesset against the background of terrorist attacks originating in the occupied territories and aimed at Israeli civilians, following the eruption of the second intifada, as it is known. In the legislative deliberations, the amendment was justified as a measure needed in order to forestall potential support for Palestinian terrorists by their relatives and friends residing in Israel.⁶ The amendment is based on an assumption that all Palestinians residing in Israel would uniformly place loyalty to their people above loyalty to the state. Applied across the board, with no room for adjustment based on an assessment of individual circumstances, it amounts to an extreme case of profiling on the basis of national origin.

Formally, the amendment was enacted as a provisional measure to address the special security situation and, as such, was designed to be of limited duration.

⁴ Law of Return, 1950, 4 LSI 114 (1950) (Isr.).

⁵ See, e.g., Chaim Gans, *Nationalism and Immigration*, 1 ETHICAL THEORY & MORAL PRAC. 159 (1998).

⁶ For the legislative history of the amendment, see *Adalah*, (Barak, C.J., paras. 1–6).

In practice, it had a significant effect on Israel's Arab population because it affected mainly the naturalization of Palestinians who had married Israelis.

The public debate surrounding the new amendment also ascribed to it the purpose of limiting Palestinian immigration to Israel for demographic reasons. Most of the Supreme Court justices who reviewed the law rejected this allegation; however, demographic considerations were in the background of their discussions, particularly in light of the thin evidence submitted by the state to support its argument concerning the potential danger posed by Palestinians residing in Israel.⁷

2. The constitutional issues

The petition against the citizenship law amendment was submitted by Adala, an organization advocating equality for Israel's Arab citizens, along with other civil rights organizations, including the Association of Civil Rights in Israel. It was difficult to claim a violation of the interests of the Palestinians affected, since they do not have a right to immigrate to Israel. Adala's claim, therefore, alleged that the enactment violated two rights of Israeli citizens—namely, the right to family life, infringed for those with Palestinian spouses, and the right to equality before the law, infringed by the amendment's disproportionate effect on Israeli Arabs.⁸

To address these arguments, the Court had to confront the following three questions:

1. Do the rights to family life and equality, albeit not expressly mentioned in Israel's Basic Laws, enjoy constitutional protection?
2. What is the scope of these rights and their proper application in the circumstances of the case? More specifically, does the right to family life encompass the right to marry noncitizens and reside with them in the country? Is the right to equality infringed when the law disproportionately affects only one group, that of Arab citizens?
3. Even if these rights are constitutionally protected and have been infringed, can the infringement survive constitutional scrutiny? More

⁷ Many of the politicians who defended the amendment in the public arena also raised demographic concerns regarding the prospect of Israel remaining a Jewish state if the Arab minority were allowed to grow significantly by virtue of marriages with Palestinians from the occupied territories. The petitioners argued that the underlying purpose of the amendment, indeed, was demographic engineering. As noted, the justices rejected this argument and considered the amendment to be concerned only with promoting security. See, e.g., *Adalah*, (Barak, C.J., paras. 79–81). See also Yaacov Ben-Shemesh, *Constitutional Rights, Immigration and Demography: Following the High Court of Justice Judgment Concerning the Constitutionality of the Citizenship and Entry into Israel Law*, 10 *LAW & GOV'T* 47 (2006) [Hebrew].

⁸ For an academic criticism of the law along similar lines, see Guy Davidov, Amnon Reichman, Ilan Saban, & Jonathan Yovel, *State or Family? The Citizenship and Entry to Israel Act (Temporary Order) 2003*, 8 *LAW & GOV'T* 643 (2005) [Hebrew].

specifically, do the state's security needs merit the infringement based on the criteria for judicial review dictated by the Israeli Basic Laws?⁹

The decision of the Israeli Supreme Court in this matter reflects both the tensions connected with the amendment to the citizenship law and the split in public opinion. The majority opinion (six out of eleven justices in the panel) held that the amendment did infringe the constitutionally protected rights of Arab Israeli citizens,¹⁰ yet they were reluctant to intervene. Although there were variations of opinion, most justices held that the law was justified in the circumstances, first, because of the significant threat posed to Israeli civilians by Palestinians from the occupied territories and, second, after taking into consideration its provisional nature, Justice Edmond Levi, who joined the majority, offered an analysis that was close in substance to that of the minority; namely, while he did not share the view that the amendment was justified, he preferred that the Court not intervene in view of the provisional nature of the amendment. In a spirit of judicial restraint, Levi preferred to wait until the infringing legislation expired. His opinion was grounded in institutional considerations and not in the substantive arguments made by the state.

All the justices adhered to a broad interpretation of the right to human dignity recognized in the Basic Law: Human Dignity and Liberty. They further agreed that the right to dignity implies the right to equality and the right to family life, although these are not expressly mentioned in the Basic Law. This view should be understood in the context of the history of Israel's two basic laws enacted in 1992—Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty—which were intended to be the first of a series of basic laws dealing with human rights. As such, they refer only to a short list of rights—the right to human dignity and liberty, the right to life and physical integrity, the right to property, the right to privacy, the right to freedom of movement, and the right to freedom of occupation. However, the controversy that has emerged regarding the interpretation of these basic laws led to the suspension of the legislative process for other basic laws, and it is doubtful that they will be enacted in the foreseeable future.¹¹

⁹ Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, §8 (According to this section, usually called the “limitation clause,” “There shall be no violation of rights under this Basic Law except 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”).

¹⁰ In practice, Israeli citizens who have Palestinian spouses are Arabs (who are members of the same national community).

¹¹ The Supreme Court interpreted the two basic laws as empowering the courts to carry out judicial review of primary legislation. For precedent to that effect, see CA 6821/93 United Hamizrahi Bank Ltd. v. Migdal Kfar Shitufi [1995] IsrSC 49(4) 221 [hereinafter *United Hamizrahi*]. This fundamental change in the constitutional regime has grounds in the text of the basic laws but relies also on interpretive choices made by the Court. For history of the basic laws see Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

Meanwhile, the Israeli Supreme Court, led at that time by its influential chief justice Aharon Barak, adopted the view that the right to human dignity may be interpreted as implying other rights intertwined with the concept of dignity and autonomy. In a series of articles on the Basic Laws, Barak had suggested that they should be interpreted as encompassing a full set of civil and political rights, including equality, freedom of speech, freedom of religion, freedom of art, and freedom of association. In his view, Basic Law: Human Dignity and Liberty is founded on a vision of free individuals, which also implies the protection of rights not expressly written into the law.¹² This interpretive tactic was germane to the decision on the amendment to the citizenship law, in which the right to human dignity was interpreted as implying both a right to equality and a right to family life.

3. The scope of constitutional rights and the balancing challenge

The main controversy in the case rested on the proper way to balance human rights and security concerns. Eventually, a narrow majority of six (against five), relying on various rationales, decided that the Court should not intervene. The most significant and controversial opinion was written by Justice Cheshin, who stated that the law did not infringe the rights of Arab citizens to equality and to family life. According to Cheshin, the amendment's distinction between enemy aliens and others is a relevant one at a time of armed conflict and, therefore, does not constitute discrimination. In addition, he stated, the right to family life does not include the right to unite with noncitizen family members on the territory of the state. Moreover, even if the amendment were found to infringe on the rights to equality and to family life, the petition should be dismissed, he held, so long as the infringements met the constitutional standards set by the basic laws. Because the amendment was enacted in support of a worthy aim, under harsh security conditions, it should not be considered disproportionate. Justice Miriam Naor concurred with Cheshin's views on the scope and application of the rights in question.

Other majority justices reached the same conclusion with varying opinions. Justices Asher Grunis and Yonatan Adiel joined the majority, stating that the security situation justified the infringement of the rights in question. Justice Eliezer Rivlin was willing to join in this conclusion but emphasized that the limited duration of the amendment must be factored into the balancing equation used to decide the proportionality of the law. Justice Levi stressed that he was joining the majority only because the enactment would lapse in a few months and be reconsidered by the legislature. As noted, for Levi, the decision not to intervene was a matter of judicial restraint regarding short-term legislation and not a substantive judgment on the constitutional questions.

¹² See, e.g., Aharon Barak, *Protected Human Rights: Scope and Limitations*, 1 LAW & GOV'T 253, 261 (1993) [Hebrew].

There was a stronger consensus among the minority, which included Chief Justice Barak and Justice Dorit Beinisch, who succeeded Barak as chief justice several months later. The minority shared the view that the amendment infringed on both the right to family life and the right to equality and found that, even considering security conditions at the time, the balance struck by the legislature was disproportionate because it had left no room for individual evaluation of immigration and citizenship applications. Justices Ayala Procaccia and Salim Joubran (the first Arab to occupy a permanent seat in the Israeli Supreme Court) were concerned that demographic criteria had played a role in the legislative process but acknowledged that, in the circumstances of the case, this was a moot question. They both believed that the amendment had to be struck down even based on the assumption that it was aimed only at achieving its professed security goals.¹³

4. Judicial legitimacy

The *Adalah* decision sheds light on the development of Israeli constitutional law since the enactment of the two basic laws on human rights in 1992. These basic laws have been interpreted by the Court¹⁴ as introducing judicial review of legislation, constituting a departure from the earlier tradition of an unwritten constitution and legislative sovereignty. This change opened up new possibilities for judicial activism while, at the same time, exposing the Court to criticism that jeopardized its legitimacy among some groups, right-wing and religious circles, in particular.¹⁵ As a result, the Supreme Court's jurisprudence is marked, on the one hand, by activism in its interpretation of the basic laws and, on the other, by hesitation concerning the actual exercise of judicial review of legislation. This dualism is reflected in the results of most constitutional petitions. The Israeli Supreme Court has invalidated legislation only in a very few cases, usually in cases with little bearing on human rights.¹⁶ In the *Adalah* decision as well, the Court made significant declarations regarding the scope of the right to dignity; nonetheless, the petition was dismissed, although

¹³ *Adalah*, (Joubran, J., para. 24 and Procaccia, J., para. 14).

¹⁴ See *United Hamizrahi*, *supra* note 11.

¹⁵ For the controversy surrounding the constitutional adjudication of the Israeli Supreme Court, see Shimon Shetreet, *Resolving the Controversy Over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 *TULANE L. REV.* 659 (2003).

¹⁶ See H CJ 1715/97 *Bureau of Inv. Managers v. Minister of Fin.* [1997] IsrSC 51(4) 367; H CJ 6055/95 *Tzemach v. Minister of Def.* [1999] IsrSC 53(5) 241; H CJ 1030/99 *Oron v. Speaker of the Knesset* [2001] IsrSC 53(5) 640; H CJ 1661/05 *Reg' Comm. of the Gaza Coast v. Knesset* [2006] IsrSC 59(2) 481; H CJ 8276/05 *Adalah v. Minister of Def.* [2006] (publication forthcoming). This latter decision, rendered after the *Adalah* decision, is exceptional in that it deals with a hotly debated issue—an enactment giving the government a broad immunity from tort liability for damages caused in areas of conflict in the occupied territories.

some of the majority justices shared the petitioner's view that the law attacked by them was indeed problematic.

5. The role of legal analogies and legal definitions

The *Adalah* decision is a classic instance of the role that legal analogies and legal definitions play in the analysis of hard cases. The question that hung over the debate between the justices—and in society, in general—was whether Israel is allowed, for all practical purposes, to relate to the Palestinians in the territories as enemy aliens. If Israel is understood to be at war with the Palestinians, then the residents of the Palestinian territories are, indeed, enemy aliens and forbidding them to enter Israel is entirely within the bounds of international practice and precedent.¹⁷ Comparisons with other countries and international practice were regarded by the justices as highly relevant to their constitutional analysis, recalling the openness of the Israeli courts to comparative law and international law.¹⁸ In this vein, Justice Naor stated that it would have been inconceivable during World War II for German citizens to have been allowed to enter England or Japanese citizens to enter the United States.¹⁹

But is this analogy a fitting characterization of the relationship between Israel and the Palestinians? Israel is unquestionably confronted with acute security threats, and the extent to which its citizens are targeted by terrorists may pose a danger as great as that faced during war. Nevertheless, the relationship between Israel and the occupied territories is complex and not analogous with that of sovereign nations at war. The occupied territories are, at least partially, under Israeli control. Israeli citizens live there, in what are known as settlements, and many Israeli citizens drive through the area (although sporadic terrorist attacks on Israelis do occur). In addition, some of the Palestinians residing there have permits to enter Israel to work, although they are not allowed to stay. Israel's borders are thus relatively open, and the analogy with warring nations is inapt.

6. The profiling dilemma

From a broader and less Israel-focused perspective, the citizenship law amendment and the *Adalah* decision illustrate the complex issues involved in the use of profiling in the context of antiterrorism.

¹⁷ An argument based on reference to comparative law and international law was made by Amnon Rubinstein & Liav Orgad, *Human Rights and National Security—The Case of Israeli Restrictions of Family Reunification during Armed Conflict*, 48 HAPRAKLIT 315 (2006) [Hebrew], cited throughout the *Adalah* decision.

¹⁸ See, e.g., Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT'L J. CONST. L. (I•CON) 611 (2004).

¹⁹ *Adalah*, (Naor, J., para. 22).

Nationality-based profiling is sometimes mentioned as an alternative to racial and ethnic profiling. Arguably, this approach is less harmful to internal social cohesion because it is directed only at foreign nationals and is also based on a rational criterion, assuming that citizenship has implications regarding national loyalties.²⁰

The amendment to the citizenship law can serve, then, as a test case for this view of nationality-based profiling as a preferable alternative. Consider, however, the following: first, even if the law uses only nationality as a criterion, when nationality is significantly correlated with ethnicity, it is publicly perceived as being based on ethnic distinctions. This was true of the Israeli citizenship law amendment and presumably would also apply if, for example, the United States resorted to the profiling of citizens from Middle East countries, ostensibly refraining from using ethnicity as a criterion. Second, the Israeli amendment shows that distinctions applied to foreign nationals can also have a significant impact on citizens. In this case, the amendment affected Israeli citizens of Arab origin who could not establish family relationships with noncitizen partners belonging to their ethnic group.²¹

7. Citizenship in a Jewish and democratic state

The main question underlying the *Adalah* case centers on whether Israel's Arab citizens are full citizens for all purposes. Although Israeli Arabs are formally entitled to equal citizenship rights, the actual picture is not so clear-cut. Historically, Israel's Arab citizens have suffered from various forms of de facto discrimination in the allocation of opportunities and privileges by the state.²² In addition, the Jewish public's perception of Arab citizens in Israel suggests that the latter are often thought to have dual loyalties or, possibly, as having a stronger allegiance to the Palestinian cause than to Israel.

Israel defines itself as a "Jewish" state, and the basic laws have reiterated this definition, by declaring that Israel is "a Jewish and democratic" state.²³ The view of Israeli Zionist liberals, which usually comes to the fore in the jurisprudence of the Israeli Supreme Court, is that the tension between "Jewish" and "democratic" can be reconciled. Israel can be a home for the Jewish nation and a medium for

²⁰ See PHILIP B. HEYMAN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 101–108 (MIT Press 2005).

²¹ For a more elaborate argument on this matter, see Daphne Barak-Erez, *Terrorism and Profiling: Shifting the Focus from Criteria to Effects*, 29 *CARDOZO L. REV.* 1 (forthcoming 2007).

²² See, e.g., HCJ 727/00 Nat'l Comm. of Arab Mayors v. Minister of Hous. & Bldg. [2002] IsrSC 56(2) 79; HCJ 11163/03 High Follow-up Comm. for Arab Citizens in Israel v. Prime Minister of Israel [2006] (publication forthcoming) (concerning government allocations to areas of "national priority").

²³ See Basic Law: Freedom of Occupation, 1994, S.H. 1454, §2; Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, §1(a).

the flourishing of Jewish culture without infringing the full equality of its Arab citizens. However, the citizenship law amendment and the decision of the Israeli Supreme Court imperil the perceived validity of this compromise, even among its advocates. The amendment sent a message to Israel's Arab citizens that they are considered inherently suspect, and it authorized legal as well as de facto discrimination against them. The amendment effectively precludes their marrying noncitizens from their own ethnic group (unless they are willing to live outside Israel), whereas Jewish citizens can do that and even enjoy the advantages afforded by the Law of Return, which grants automatic citizenship to every Jew who wishes to live in Israel (when their spouse is Jewish). In this sense, it is impossible to understand the full effect of the amendment without reference to the Law of Return, which provides the other half of the picture.

The *Adalah* decision is one of the most important ever issued by the Israeli Supreme Court and one of the last significant judgments in which Chief Justice Barak participated. Its significance arises from several factors. It touches on the basic tensions of Israeli law—between Israel's democratic nature and its Jewish identity—even though it was purportedly based solely on security considerations. In addition, it exemplifies the challenges that democracies face when they impose security measures during periods of perceived emergency or terrorist threats, exposing the fragile legitimacy of judicial review in the public eye at such times. The story is still evolving. The balance struck by the court was based, to a great extent, on the weight that some justices afforded to the provisional nature of the enactment. Therefore, because the amendment was renewed, after its original period of effect had elapsed (based on the prevalent perception in the Knesset that it still reflects the public interest), the public and constitutional debates around the decision of the Court in this matter will go on, as Israel continues its search for a course that will meet its security needs and preserve its democratic legitimacy.