

A Comment on Yaacov Ben Shemesh, "Demography and the Supreme Court:  
The Return of the Repressed

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What should judges do when the state promotes a demographic policy? Should the promotion of such a policy in Israel be perceived as advancing a proper purpose? More generally, what should judges do when there is reason to suspect that the state is concealing demographic considerations under the mask of other concerns? Should judges expose the demographic objective which the government is concealing, and if so – by what means? Ben Shemesh perceives the judicial forum as a necessary forum in the assessment of the legitimacy of demographic policies; as the institute with ultimate authority to, in suitable cases, veto the majority's will to ensure a Jewish majority.

At the core of Ben Shemesh's article is the HCJ ruling on the amendment to the Citizenship Law; an amendment which prevents family unification between Israeli citizens (primarily Arabs) and the residents of the occupied territories. The Justices writing for the majority opinion, Cheshin and Naor, ruled that this law does not infringe constitutional rights at all, because there is no constitutional right to family unification in Israel itself; And that even if it did infringe such rights, this infringement would meet the requirements of the limitation clause of the Basic Law since it serves a proper purpose and satisfies the test of proportionality.

Ben Shemesh's central claim is that the form of reasoning adopted by the majority judges is a negative example of the methods by which courts ought to assess demographic considerations. Instead of serving as a buffer against the sort of phobias which may give rise to demographic concerns, the majority's decision is itself inflicted with such phobias. According to Ben Shemesh, the majority's peculiar definition of constitutional rights can only be explained by their own anxieties concerning demographic threats.

Ben Shemesh asserts that judges have a duty to pursue three types of measures in relation to demographic considerations: Firstly, "*the demographic*

*consideration must be openly acknowledged*". This demand applies both to the state and to the judges themselves. Secondly, since the demographic discourse tends to be non-cognitive, guided by phobias and anxieties towards the "other", judges must carefully examine the rational connection between the means deployed and the demographic objective. Thirdly, since the demographic consideration is but one of many concerns within the liberal state, judges must balance it against other liberal values.

I will discuss Ben Shemesh's article in light of these three points. In my view the article is important and interesting, but there is nevertheless a need for further elaboration of the above-mentioned points. In this response I will attempt to outline a possible course of development based upon the principles delineated by Ben Shemesh.

#### The Demographic objective

In a clear and flowing analysis presented in the first part of his article, Ben Shemesh well illustrates how the state's desire to attend to demographic considerations can be justified within the framework of liberal theory. Since Jews, like all nations, have a right to self determination, taking demographic considerations into account can be legitimate. Although this might seem like a plausible conclusion, it is often the case that the government nevertheless tends not to admit to the existence of demographic considerations. One can think of three reasons for this: first, the state may nevertheless be concerned that judges will determine that the pursued objective is illegitimate. Second, demographic considerations are suspect considerations, since the state is taking account of people's national, religious and ethnic identity; in such circumstances courts tend to apply strict scrutiny, and it is this that the state seeks to avoid. Third, the state may be concerned that its interests in the sphere of international relations would be ill served if it were to be perceived as a state which discriminates between individuals on the basis of national, ethnic or religious identity.

Despite these reasons, Ben Shemesh asserts, and rightly so, that the court must openly acknowledge the demographic consideration in such circumstances. In

order to assess the proportionality of the demographic consideration, the demographic objective must first be exposed. This is so because the test of proportionality concerns the relationship between the means deployed and between the ends pursued. This relationship can only be analyzed when the pursued end is exposed.

Against this background Ben Shemesh argues that the majority judges in the case of the amendment of the Citizenship Law failed to discharge their duty. To the contrary, in their effort to avoid addressing the demographic objective they formulated the constitutional rights in a distorted manner. Ben Shemesh determines that the majority's ruling according to which the state's citizens have a right to marry, but do not have a constitutional right to maintain family life within Israel itself, is "obscure". He equates this ruling to the statement that people have a right to freedom of expression, but do not have the right to realize this freedom within the State of Israel's territorial borders.

But is this equation correct? There is, after all, a relevant difference between a citizen's right to maintain family life with someone who is not a citizen of the state and between the citizen's right to freedom of expression. Assuming that family life can only be maintained in one territory, and since the couple are citizens in different territories, then by definition a binary determination is required – the couple may maintain family life in either one or the other territory. It is, after all, well known that the motivation to restrict the right to family unification stemmed from the fact that this right was realized almost entirely in Israel and not in Palestine. On the other hand, when people wish to exercise their freedom of expression no such binary decision is required with regards to the territory in which the right is to be realized.

However, Ben Shemesh is still correct in his critique of the manner in which the majority judges formulate the constitutional rights. If the consideration is demographic, then it is necessary to evaluate the means deployed in accordance with the method of analysis established in the limitation clause: identifying the objective and assessing the relationship between the means and ends. The

limitation clause is the appropriate place to assess the legitimacy and rationality of the demographic considerations.

Ben Shemesh uses relatively decisive language to describe the significance of the demographic consideration in the formulation of the statute. As he put it: "It is undeniable that the demographic consideration played an important role in the enactment of the Law". But where does this confidence stem from? Does the fact that a number of Knesset members made statements to this effect necessarily establish that this was indeed the intention? Clearly, policy makers have also repeatedly stated that the motivation to enact the statute derives first and foremost from security reasons as opposed to demographic concerns. The security consideration at the root of the statute is based upon the fact that tens of the tens of thousands of Palestinians who attained family unification over the years were involved (or suspected of involvement) in terrorist activity against Israeli citizens. Moreover, the wording of the statute was, to a certain extent, adapted to the security objective, as the statute was made to apply to couples of certain age groups meeting a profile of dangerousness.

Even if we share Ben Shemesh's intuitive suspicion with regards to the motive, judges must base any such determination on clear positive findings, and it does not appear that any such findings were available to them. Ben Shemesh also ignores the institutional difficulty which judges have in telling the state that it is "lying" or "concealing its real motive". Ben Shemesh in fact requires judges to do that which is politically virtually impossible for them to do. In practice, what judges tend to do in such situations is to determine that the means selected were disproportionate, this being a subtle method of detecting and getting rid of hidden motives. From an institutional perspective it better suites the court to determine that an error has been made than to voice accusations about lies and deceit.

### Rationality

Ben Shemesh tells us that judges must verify that the demographic consideration is not unfounded, that it is not influenced by irrational phobias

which people have towards the "Other". At first glance, it would appear that the most suitable test to assess the rationality of the means is the first test of proportionality: the rational connection test.

However, one must note that judges in Israel, as well as elsewhere, tend to interpret the rational connection test in a "soft", toothless, manner. In Canada it has been ruled that a commonsense connection between means and ends will suffice and that the state is not obligated to present facts to establish the existence of such a connection. In the United States as well, the rational basis test is usually applied with much deference to the state. In order to properly assess demographic considerations, what is required is a rationality test "with teeth".

In view of the fact that a demographic policy is suspect of being based upon a hostile attitude towards minorities, courts ought to require the state to provide serious empirical basis indicating a logical connection between means and ends. When the state seeks to justify a demographic policy, it is the one who ought to bare the burden of proving a rational connection.

However, assessing the rational connection between the means and ends becomes far more complicated in the circumstances discussed in the case of amendment of the Citizenship Law. There appear to be two motivations for enacting the amendment: demographic and security. Ben Shemesh doesn't tell us much about what judges are supposed to do in such situations. Is a perfect fit required for each of the motivations? How will courts assess the dominance of each motivation? Should the court also consider whether the "demographic threat" is real? Should the court take account of demographers' drastically diverging estimates as to the projected ratio of the Jewish population in Israel vis-à-vis the Arab population in 10 or 20 years time? What scientific tools, what expertise, does a judge have to assess such accounts?

It is interesting to note that Ben Shemesh focuses on the decisions of the majority judges, who failed to acknowledge the presence of demographic considerations. But what about the leading minority opinion, that of former

President Barak. Like the majority judges, Barak too avoids asserting that the statute's real objective is demographic. Quite to the contrary, he decisively determines that the statute serves a security objective. If Ben Shemesh is correct, and the demographic consideration did in fact have substantial influence on the enactment of the statute, then Barak's failure to acknowledge this consideration leads to a distortion in the manner in which Barak balances the competing interests in his application of the third test of proportionality. At this stage Barak balances the right to family life against the security threat and asserts that in the circumstances the right to family life prevails. But if, as Ben Shemesh argues, the statute is also grounded on the demographic consideration, then Barak should have placed this consideration alongside the security consideration weighing them both against the infringement of family life. It is possible that the outcome of such a balance would differ from that which Barak arrived at in his decision.

### Balancing

This brings us to the decisive point in the petition regarding family unification: the test of proportionality in the strict sense. In this test the court balances the extent of the harm caused to the protected right against the degree to which the statute promotes its purpose and considers whether what has been gained justifies the sacrifices that have been made. Ben Shemesh rightly argues that if our starting point in recognizing the legitimacy of the demographic consideration is liberal (the right to self determination and the preservation of cultural identity), then this consideration is not the only one that has to be taken into account, and must be balanced against human rights.

However, in his article Ben Shemesh ignores the difficulties entailed in conducting such balances. It may be argued that judges should not balance legitimate national objectives against the protection of rights. The test of proportionality in the strict sense is especially problematic because it lacks clear standards. As former President of the Supreme Court Shamgar put it in the *Bank HaMizrachi* case, this test is more conclusion than standard. Without

clear standards there is reason for concern for subjective judicial review. It is therefore not surprising that in Canada no law has ever been annulled on the exclusive basis of this test and that no such test even exists (at least not explicitly) in the American strict scrutiny test.

Let's look at the various methods by which Justices Barak and Cheshin balance between security and the right to maintain family life. Barak asserted that the statute does not sufficiently take into account constitutional rights, while Justice Cheshin believes that the right to life is more important than the right to family life. This dispute between Barak and Cheshin demonstrates that the balancing of conflicting rights does not depend only on a factual examination but also on a substantial evaluation which might be subjective in nature.

However, it is still possible to justify Barak's reluctance to defer the legislator in this case. Since the demographic discourse is not always based on public reason, as it is sometimes influenced by non-cognitive phobias, there is reason to fear that the balance of values in such matters within democratic forums will be distorted. It is therefore justifiable to transfer the authority to conduct such balances to the courts.

Support for such thinking can be found in John Hart Ely's important book *Democracy and Distrust*. Ely tells us, on the basis of research conducted in the field of social psychology, that there is a substantial reason for concern that utilitarian balances will be distorted in cases of "we-they" dichotomy. In the case at hand: there is a danger of selective empathy in the manner in which the security or demographic considerations are balanced against the violation of rights. When the rights are those of Arab citizens, the political calculus tends to be corrupted.

This can be illustrated by reference to an imaginary statute prohibiting people from traveling by car on the basis of the reasonable assumption that such a prohibition will save the lives of hundreds of people every year. If we strictly follow the reasoning of Justice Cheshin, then the right to life of the hundreds of people saved every year ought to outweigh other people's interest in the

convenience of auto-travel. Despite this, the chances of such a law being enacted are next to none. Why then is such a law not accepted while the law preventing family unification is? It seems to me that the reason for this is that a law preventing people from traveling in cars would cause significant harm to our freedom of movement. Whereas, in the case of the Citizenship Law, the cost of maintaining security is born entirely by others – Arabs. This is a classic example of a situation in which it is justifiable to remove the balance of conflicting interests from democratic forums to the judicial forums.

In conclusion, Ben Shemesh's argument that judges must acknowledge the existence of demographic statutory objectives and to apply strict scrutiny over the means deployed to realize such objectives is to be applauded. This response was meant to further elaborate the complex and unique set of concerns guiding judicial forums when they exercise judicial review on sensitive political issues.