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Citizenship and Its Erosion: Transfer of Populated Territory and Oath of Allegiance in the Prism of Israeli Constitutional Law

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Ilan Saban

Abstract

This article discusses two issues of majority-minority relations in deeply divided societies. The first is the legitimacy of the transfer of a homeland minority (or a part of it) — along with the territory it inhabits — to a neighboring kin-state against the will of the minority or most of its members. The second is the constitutional validity of legislation that renders citizenship or the right to vote contingent upon an oath of allegiance to the state or to its fundamental attributes. These two interrelated steps, advanced by a central partner in the current government coalition in Israel, are aimed at the Arab-Palestinian minority. This article's main focus is the examination of Israeli constitutional law safeguards that may prevent the implementation of these initiatives, which I find to be very dangerous.

KEYWORDS: majority-minority relations, transfer of a homeland minority, constitutionality, constitutional law safeguards

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INTRODUCTION AND BACKGROUND

More than six decades after its establishment in 1948, Israel has still not solved most of its fundamental problems. This Article probes one proposed solution that has gained considerable sympathy in the Israeli public arena. Before presenting this proposal, I map out the mesh of problems that it aims to solve.

Israel is deeply divided by three main schisms whose edges do not dull. The first is a nationality-based strife between the Jewish majority and the native Arab-Palestinian minority that remained in Israel after the war that accompanied Israel's establishment and constitutes approximately 18 percent of Israel's citizens. The second is a religious divide within the Jewish majority community between a majority of secular and moderately observant Jews, on the one hand and the orthodox and ultra-Orthodox, on the other hand. The third schism is political and is associated with the deep controversy regarding the way to confront a shadow much darker than the others: the question of how to deal with the Palestinian inhabitants and territory occupied by Israel since 1967 and how to manage the conflict with the Palestinian people and Israel's adversaries in the region.¹

In the background stand two major events. The first was the establishment of Israel in 1948 within a large part of Mandatory Palestine following a war that took a heavy toll on both sides and turned a significant portion of the Palestinian people into refugees. The second was the war in 1967, in which Israel occupied the remainder of Mandatory Palestine (the West Bank, East Jerusalem, and the Gaza Strip), conquered the Golan Heights from Syria, and the Sinai Peninsula from Egypt. In 1980, a peace treaty was signed between Israel and Egypt after which Israel retreated from the Sinai, and in 1994 a peace treaty was signed between Israel and Jordan. But the heart of the conflict remains: A significant part of the Palestinian people remains under Israeli military occupation and neither the refugee problem nor the impasse over Jerusalem have been solved. In addition, there is no arrangement terminating the conflict between Israel and Syria or between Israel and Lebanon.

Moreover, the 1967 occupation did not merely consist of placing the Palestinians inhabitants of the West Bank and Gaza Strip under military regime, but rather it is accompanied by wide scale colonization. Approximately 480,000 Jewish Israeli citizens—almost 7% of Israel's general population—presently live

¹ For important recent works covering Israel's multiple cleavages/complexities see, inter alia, ASHER COHEN & BERNARD SUSSER, *ISRAEL AND THE POLITICS OF JEWISH IDENTITY: THE SECULAR-RELIGIOUS IMPASSE* (2000); GERSHON SHAFIR & YOAV PELED, *BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP* (2002); GAD BARZILAI, *COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES* (2003); AS'AD GHANEM, *ETHNIC POLITICS IN ISRAEL* (2010).

behind the Green Line (the border between Israel and its neighbors as per the 1949 armistice agreements) in settlements of varying sizes, most of which were built relatively near to the Green Line or as part of Jerusalem's expanded municipal boundaries on the Palestinian side, but some of which are deep within the West Bank.²

In 2005, Israel pulled out of the Gaza Strip and uprooted its 8,000 settlers. The "disengagement" from the Gaza Strip was accompanied by great internal tension in the Israeli-Jewish collective and it did not mitigate the conflict with the Palestinians. On the contrary, in the 2006 elections to the Palestinian Authority, the fundamentalist Hamas movement won a majority and a short but violent chapter of Palestinian civil war ensued. Bloodshed, siege and fragile cease-fires characterize the current relations between Israel and the Gaza Strip.³

All of these occurrences obviously have an impact on the inter-communal relationships within Israel's pre-1967 borders ("Israel proper" or Israel within the Green Line). Indeed the rise and fall in the tides of the Israeli-Palestinian conflict have created parallel processes in Jewish-Arab relations within Israel. It is sufficient at this point to compare the relations between the State and the Arab-Palestinian minority during the euphoric days of the Oslo process between Israel and the PLO (1993-1995) to the October 2000 killing by Israeli police of 13 Arab demonstrators at the outbreak of the second *Intifada*.⁴ Notwithstanding, solidarity of the Arab-Palestinian minority with its people has not been translated into its participation in the armed conflict. This has so far been a distinct and consistent pattern of the minority political behavior.

The secular/religious and the political schisms that split Israeli society are deeply connected and are due in part to the vanguard role of the "religious-

²According to *B'Tselem*, The Israeli Information Center for Human Rights in the Occupied Territories:

By the end of 2008, the number of settlers in the West Bank stood at 484,100. This figure is based on two components: according to Israel's Central Bureau of Statistics (CBS), in 2008, 290,400 settlers were living in the West Bank, excluding East. In addition, based on growth statistics for the entire population of Jerusalem, the settler population in East Jerusalem at the end of 2008 is estimated at 193,700.

See <http://www.btselem.org/english/Settlements/Statistics.asp> (last visited Aug. 18, 2010).

³ Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *ISR. L. REV.* 68 (2008).

⁴ These grave incidents, known as the "October events," were thoroughly analyzed (together with majority-minority relations in Israel in general) in the report of the official Commission of Inquiry into these events; see *THE OR COMMISSION REPORT (2003)* [in Hebrew], available at http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm.

Zionist” community in the colonization of the occupied territories. Relinquishing of territorial control thus, creates tremendous internal political tension. There is much concern that if the West Bank and East Jerusalem are to be placed in the balance an internal Jewish civil war will erupt.

Completing this rather bleak picture is the inevitable relationship between the mounting extremism within one people and the parallel phenomena within the other. The rise of the Hamas movement is often attributed to the failure of the Fatah and the Palestinian Authority to successfully end the Oslo Process because of a self-centered, stubborn Israel. On the other side of the equation, Hamas, a movement officially dedicated to end the very existence of Israel as a state, won the 2006 Palestinian elections, and consequently has contributed greatly to the rise of the Israeli right.

Indeed the rise of the Israeli right is the point of departure for this Article. I attempt to comprehensively discuss a proposal advanced by *Yisrael Beitenu* (Israel our Home), a political party that attained significant success in the 2009 general elections under the leadership of the now Foreign Minister Avigdor Lieberman and is an important part of the government coalition.⁵ The proposal is fast taking hold in the Jewish-Israeli public arena and integrates the following elements: 1. reducing the number of Jewish settlers who will be uprooted if Israel pulls out of the West Bank by annexing many settlements to the State of Israel and; simultaneously altering the demographic balance between Jews and Arabs inside Israel by transferring territory inhabited by Arab-Palestinian citizens living relatively adjacent to the Green Line from the Israeli side to the Palestinian side; 2. limiting suffrage to only those citizens willing to declare their allegiance to the *Jewish* State. These ideas are attractive in the Jewish-Israeli political arena since they purport to mitigate two of the worst fears of the Jewish public: demographic balance vis-à-vis the Arab-Palestinian minority and the potential for a Jewish civil war.

More concretely, these are the four main steps advocated in the proposal.⁶

⁵ For more information on the *Yisrael Beitenu* party, see http://www.knesset.gov.il/faction/eng/FactionPage_eng.asp?PG=101; in ten years of existence the party has grown from four Members of Knesset to fifteen (12.5% of the Knesset). The party holds five portfolios in the Israeli government, see http://www.knesset.gov.il/govt/eng/GovtByNumber_eng.asp.

⁶ The proposal and platform of *Yisrael Beitenu* is posted on the Israeli Democracy Institute website. Here it is cited in full.

1. Israel will initiate a step in which its border with the Palestinians will be determined.
2. The new border will lead to a situation in which the Jewish majority in the State of Israel will be stable and ensured for many years.
3. The policy regarding the border will include two components: “the location of the border” and “the relations at the border.”

a. Annexation of territory beyond the Green Line—large blocs of Jewish settlements in the West Bank would be annexed to Israel.

b. & c. Israel would cede to a future Palestinian state certain Arab-Palestinian inhabited regions (known as the large and small triangles or the *Triangle* for short), as well as 170,000 Palestinians residents in the municipality of Greater Jerusalem.

d. Major civil and political rights will be allocated only to citizens who pledge allegiance to the State of Israel as a Jewish state.

These steps raise both international law and domestic law issues. The transfer component of the proposal has been the subject of analysis from the international law perspective,⁷ thus, I focus upon Israel's constitutional law, a perspective not yet analyzed. I also tackle the oath of allegiance component, which too is understudied.

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- a) Israel and the Palestinians shall exchange territory, and the basis of these exchanges will be demographic considerations. The aspiration is to arrive at an agreed upon border with the Palestinians, and to entrench that agreement in the international community and the United Nations.
 - b) The Arab communities in *Wadi Ara* and "*The Triangle*" shall be transferred to the sovereignty of the Palestinian Authority.
 - c) The Israeli settlement in "the large blocs" adjacent to the Green Line shall be transferred to Israeli sovereignty (*e.g. Ariel, Ma'aleh Edumim, Gush Etsion, et al.*).
 - d) Approximately 170,000 Arabs in the Jerusalem municipal area shall be included in the Palestinian territory.
 - e) After the transfer, Israel shall be released from its economic obligations toward citizens who are outside its borders, including national insurance payments.
 - f) It is hoped that the border relations will be those of an "open border", allowing monitored passage of people and goods. The extent of the openness shall be in accordance with the level of security which Israel enjoys. The more tranquility increases, the more open the border shall be.
Everyone pledges allegiance to the state.

See www.idi.org.il/elections_and_parties/documents/israel_beytanu_18.pdf (last visited Aug. 18, 2010).

⁷ See Yoram Rabin & Roy Peled, *Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective*, 17 MINN. J. INT'L L. 59 (2008). See also the debate between Professor Shany and Professor Waters: Timothy William Waters, *The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan*, 2 L. & ETHICS HUM. RTS. 221, art. 9 (2008); Yuval Shany, *Redrawing Maps, Manipulating Demographics: On Exchange of Populated Territories and Self-Determination*, 2 L. & ETHICS HUM. RTS. 286 (2008); Timothy William Waters, *A Different Departure: A Reply to Shany's 'Redrawing Maps, Manipulating Demographics: On Exchange of Populated Territories and Self-Determination'*, 2 L. & ETHICS HUM. RTS. 311 (2008).

Since cession of part of a country's territory—a phenomenon often termed “downsizing the state”⁸—is not so rare, this Article is likely to contribute to the comparative constitutional debate of such cases. Likewise, it can assist, and can be assisted, by constitutional debates in resembling contexts, such as Britain/Northern Ireland;⁹ Britain/Hong Kong; Britain/Gibraltar;¹⁰ and more.¹¹

Before turning to the legal analysis of the proposal, I present what I take to be the essence of the proposal's problematic moral and political nature. This part is important in and of itself—so I hope—but it is also necessary for the constitutional discussion that follows.

I. TRANSFER OF SOVEREIGNTY OVER POPULATED TERRITORIES WITHOUT THEIR RESIDENTS' CONSENT AND MAKING THE RIGHT TO VOTE CONTINGENT UPON AN OATH OF ALLEGIANCE—MORAL AND POLITICAL PROBLEMS

One of the more severe problems of the proposal—difficulty to gain needed consent of the parties involved—has already been discussed elsewhere.¹² Territorial exchange would affect at least three parties: Israel, Palestine (currently the Palestinian Authority) and the Arab-Palestinian citizens of Israel who are to be transferred to the future Palestinian state. The latter vehemently reject the proposal.¹³ Nor is the

⁸ See the following collection of articles in *RIGHT-SIZING THE STATE: THE POLITICS OF MOVING BORDERS* (Brendan O'Leary, Ian S. Lustick, & Thomas Callaghy eds., 2001).

⁹ See, *inter alia*, Colm Campbell & Fionnuala Ni Aolain, *Overview: Local Meets Global: Transitional Justice in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 871-92 (2003); Colm Campbell, Fionnuala Ni Aolain, & Colin Harvey, *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 *MODERN L. REV.* 317-45 (2003); Geoff Gilbert, *The Northern Ireland Peace Agreement, Minority Rights and Self-Determination*, 47 *INT'L & COMP. L.Q.* 943, 946, 950 (1998); Brian Thompson, *Transcending Territory: Towards an Agreed Northern Ireland?*, 6 *INT'L J. MINORITY & GROUP RTS.* 235, 255-59 (1999).

¹⁰ For a discussion of Britain/Northern Ireland, Britain/Hong Kong and Britain/Gibraltar, see Rabin and Peled, *supra* note 7.

¹¹ See O'Leary et al. eds., *supra* note 8.

¹² COMPARE SHAUL ARIELI, DOUBI SCHWARZ & HADAS TAGARI, *INJUSTICE AND FOLLY: ON THE PROPOSALS TO CEDE ARAB LOCALITIES FROM ISRAEL TO PALESTINE*, http://www.fips.org.il/site/publications/item_en.asp?iid=751 (last visited Aug. 18, 2010) with Gideon Biger, *The Only Way to an Agreement*, *HAARETZ*, Aug. 13, 2007, available at <http://www.haaretz.co.il/hasite/spages/893001.html>; Uzi Arad, *Trading Land for Peace: Swap Meet*, *THE NEW REPUBLIC*, Nov. 28, 2005; Sergio DellaPergolla, *Demographic Trends in Israel and Palestine: Prospects and Policy Implications*, 103 *AM. JEWISH Y.B.* 3 (2003).

¹³ According to one representative national survey performed by Sammy Smooha in the framework of The Arab-Jewish Relations in Israel Index (2007) [in Hebrew], only 10.1% of Arabs questioned were willing to live in the Palestinian state. This is also the position of the residents of the *Triangle* and of the leadership of the Arab population. This finding is also verified by other

Palestine Authority likely to accept it. Palestine would not impose itself upon a minority of its own people who wish to remain part of Israel.¹⁴ Without the consent of two of the three parties, moral and legal difficulties abound. I expand on this issue below, but first I wish to outline other major problems of the proposal.

There are two clarifications that I would like to make as companions to the analysis of the proposal's problems: First, the problems I outline below are of a somewhat speculative nature. That is the inevitable nature of predicting events in a complex, multivariable reality. Nevertheless, I hope to moderate the level of uncertainty with data and discussion. Second, the heavy toll I expect the proposal to take is likely to affect all three parties involved. This emphasis is important, as some of us are accustomed to understanding the national conflict as a "zero sum game," i.e., as an arena in which "whatever is bad for my opponent is good for me," and vice versa. This is a simplistic approach; playing with fire often endangers all those nearby.

I expect the proposal to levy the following harms. First (as shall be explained in the next paragraph), the proposal depletes the layer of citizenship that protects the Arab-Palestinian minority of Israel, and that layer is one of the central apparatuses that prevent their slide toward participation in the armed struggle of parts of their people.¹⁵ Second, the two state solution to the Israeli-Palestinian conflict (partitioning of the contested territory of Palestine/*Eretz-Yisrael* into two states) remains viable only as long as Israel's Arab-Palestinian citizens are not turned into Israel's enemies or bitter opponents. As most of them live in integrated areas that are difficult to partition, even theoretically, (the Galilee, the Negev, mixed cities,

surveys performed over the last two decades. For a summary of the index report, see soc.haifa.ac.il/~s.smooha/download/Index_2007_Highlights_Eng.pdf. See also the survey performed by MADA, the Arab Center for Applied Social Research, according to which 92% of those surveyed, who were residents of the *Triangle*, expressed their opposition to the proposal, http://www.mada-research.org/sru/press_release/survey_landPop.shtml.

¹⁴ ARIELI, SCHWARZ & TAGARI, *supra* note 12, at 59-61. This view is shared also by Prof. Matti Steinberg. He added that the Palestinian leadership in the West Bank objected both to *Yisrael Beitenu's* plan and to the general idea of population exchange. One of the arguments is not to provide legitimation to ideas that may open the door for ethnic cleansing of the Arab-Palestinian minority. (in conversation, June 28, 2010). This is probably an outcome of their fear of the "logic" of demographic homogeneity argument advanced by *Yisrael Beitenu*, to be discussed below.

¹⁵ Compare Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389 (1990). For a warning regarding the proposal's threat to the political stability of Israeli society, see Ali Haider, *Um el Fahem is Just Like Nazareth*, YEDIOTH AHARONOTH, Aug. 22, 2007, available at <http://www.ynet.co.il/articles/0,7340,L-3440396,00.html>.

etc.),¹⁶ should they turn into enemies of the state, or become determined opponents of its territorial framework, the possibility of partition will probably disappear.

Until now, Israeli citizenship has been a real factor in the Arab-Palestinian minority identity. The last 60 plus years of their history is the same history as that of the State of Israel: they grew up with it, it is the center of their experience—political, economic and social—and it is the framework in which they see their future.¹⁷ A substantial majority of this community is bilingual, and many are intimately acquainted with features of Israeli-Jewish culture. In Israel they enjoy a certain amount of social and economic benefits, a rule of law and important measure of freedom to exercise political activity, a certain amount of protection from religious coercion of fundamentalist forces within their own community, etc. It may be for this reason (as well as others) that Arab-Palestinian citizens' cooperation with the armed struggle and acts of terrorism has remained marginal and is internally condemned.¹⁸ Furthermore, the current ideological challenging of the state's "Jewish and democratic" definition, advanced by the minority elites, is carried out through peaceful means and focuses on the territory supposed to remain the joint framework for all Israeli citizens: the post-1948 Green Line Israeli state.¹⁹

However, what will happen if something crucial inside the minority cracks due to Israel's conduct? It is my view that should either of the proposal's two components be implemented (the populated-territories exchange or the oath of allegiance condition)—the continued political restraint of the minority would not survive. It was due to things that seem smaller than these that the legitimacy of the "Home Rule" in Northern Ireland in the late 1960s collapsed and brought to a head a thirty year period of violent struggle and bloodshed on the part of the two national

¹⁶ And on an additional, adjacent point: the proposal undermines the only territorial boundaries of Israel which have received a de-facto international legitimacy—the Green Line boundaries. If that is the case, why shouldn't it be demanded that alteration of those 1949 armistice borders be discussed, e.g. to borders that were outlined in the 1947 UN partition plan and provide for a much larger Palestinian-Arab state?

¹⁷ Sammy Smooha, *Index of Arab-Jewish Relations in Israel: The Lost 2000s Decade 6* (2010, unpublished) (on file with the author).

¹⁸ *Id.* at 20. See also the report of the *Shabak* (Israel's General Security Service): *FOUR YEARS OF CONFLICT—DATA AND DIRECTIONS IN THE REALM OF TERROR* (2004) [in Hebrew], available at <http://www.shabak.gov.il/SiteCollectionImages/סקירות20%ופרסומים/terror-summary-4years-new.pdf>. "Nevertheless it should be noted and emphasized that those engaged in terror from amongst the Israeli-Arabs are extreme margins consisting only of a very minor percentage of this population." *Id.* at 9.

¹⁹ For the "Future Vision" documents—a series of documents formed by various groups of researchers and intellectuals among the Arab-Palestinian minority, that appeared in 2007—see, *inter alia*, Elie Rekhess, *The Evolution of an Arab-Palestinian National Minority In Israel*, 12 *ISR. STUD.* 1 (2007).

communities living there.²⁰ That violent breakdown occurred despite the fact that (unlike Israel's relations with the Palestinian people) British-Irish relations were at that time tranquil.

In this context of possible violent breakdown, the main point to understand about the proposal is that its advancement spells out for the Arab-Palestinian citizens of Israel how fragile their citizen status is. These citizens, and concretely of the *Triangle* region, who for three generations have lead their lives within a certain community vis-à-vis a specific society, economy, and culture, are being told that the border will be moved west and north, and thus, they will be detached from everything they know and belong to. The most acknowledged implication will be employment difficulties, for a border will divide their residence from their work venues (in Nazareth, Haifa, Tel Aviv, etc.). This is, however, only one part of the story. That border change also entails a severe impingement upon the social and cultural ties that the transferred citizens currently maintain with the society closest to them—the rest of the minority community, and the Jewish-Israeli society; moreover, and very importantly, is the fact that these people have maintained family ties over three generations with their relatives from the Galilee, the mixed Arab-Jewish cities and the Negev. And now the state in which they hold citizenship is about to say to them: “you must cross border checkpoints in order to see your children, your grandchildren, your parents or your siblings.”

Furthermore, the question is not merely what the proposal intends to detach the *Triangle's* citizens from, but also with what it intends to connect them. In the future things may appear in a different light, and maybe then, the reaction of these citizens (or some of them) might change, but at present the future Palestinian state looks to be unstable, poor, not sufficiently democratic, bogged down by fierce internal struggles between extremists and moderates, fundamentalists and secular. In light of these anticipated absorption difficulties and the hardships of detachment, it is no wonder that such strong opposition to the proposal has developed among the great majority of *Triangle* residents and among the minority community as a whole.²¹

One additional point should be mentioned in the context of possible violence: As people often take on an identity on the basis of expectations, it may be assumed that when the Arab citizens of the *Triangle* internalize their status as temporary citizens of Israel, marked as an “exchange” commodity whose future

²⁰ See John Whyte, *How Much Discrimination Was There under the Unionist Regime, 1921–68?*, in CONTEMPORARY IRISH STUDIES 1 (Tom Gallagher & James O'Carroll eds., 1983); Graham Ellison & Greg Martin, *Policing, Collective Action and Social Movement Theory: The Case of the Northern Ireland Civil Rights Campaign*, 51 BRIT. J. SOC. 681 (2000).

²¹ See *supra* note 13.

lies in Palestine, their self-identity is likely to change, *along with their political behavior—with all that this entails.*

Yet, isn't the predicted damage to the identity and political behavior of the Arab-Palestinian minority—already felt even without the actual implementation of the proposal—expressed by increasing internal opposition to the character of Israel as a Jewish state? I find at least three answers to that question. First, there is a considerable difference between objectives and the means to attain them i.e., even if the Arab-Palestinian minority (particularly its elites) objects to the character of the state, it still maintains internal checks that prevent resort to armed struggle in order to bring about this desired change.²² Second, the growing opposition within the minority community to the character of Israel as a Jewish state stems from its disillusionment with the “Jewish and democratic state” formula that is perceived as the repetitive excuse for Israel’s misdeeds toward both the minority’s people (continuation of the occupation and settlement expansion) and toward the minority itself (long years of discrimination and exclusion). And indeed, as demonstrated during the period of the Rabin-Peres government (1993-1996, the first years of the Oslo Peace Process)—when an improvement in Israeli policy toward the Palestinians and toward the Arab-Palestinian minority in Israel took place simultaneously, actual change resulted in the minority’s attitude toward the state.²³ People may have dreams but will be content with a state of affairs that they perceive as fair enough. Third, even if relations inside Israel are already deteriorating, how would the proposal stabilize the situation? It presents a direct and clear threat to more than ten percent of the minority community and alienates and outrages the rest. These aroused feelings are not geographically limited to the *Triangle*; rather, the proposal demonstrates to all Arab citizens the fragility of their citizenship, so much in contrast to the “eternalness” of the right of every Jew to (immediate) naturalization in Israel. In addition, the strain on family ties would not only be paid by the Arab citizens who will be transferred, but, of course, also by their relatives who will remain within Israel.

What then are the benefits of the proposal? Its supporters view it as “the only way to an agreement,”²⁴ a necessary condition for the settlement of the Israeli-Palestinian conflict. The argument is that the concessions that such settlement demands from the Israeli party would not gain the needed support within the Israeli public without the proposal’s benefits in its eyes: i.e., changing the demographic

²² Findings show that only 10.8% of the Arabs surveyed supported use of all ways, including violence, to improve their situation in Israel.” See *The Arab-Jewish Relations in Israel Index*, *supra* note 13.

²³ *Id.*

²⁴ See the sources in *supra* note 12. The quote is the title of Biger’s piece.

balance to favor the Jewish community; reducing the numbers of Israeli settlers in the occupied territories to be displaced including limiting their suffering and alleviating the financial burden cast upon the state in term of necessary reparations; and reducing the danger of civil war between Jews should no population and territorial exchange be undertaken.

My answers to those claims are included as part of the following constitutional analysis.

II. CONSTITUTIONAL HURDLES STANDING IN THE WAY OF THE PROPOSED STEPS

The lion's share of this essay is dedicated to the legal analysis of the proposal and to the question of its validity under Israeli constitutional law. Two questions arise: will the legislation required in order to implement the proposal confront constitutional hurdles, and could it stand up to these hurdles?

Answering requires an understanding both of the proposal's legal implications and Israel's constitutional order. The main legal implications of the proposal once enacted into law are as follows:

- a. The transfer of citizens to foreign sovereignty.
- b. The transfer of territory from the State of Israel to foreign sovereignty.
- c. Citizenship will not be revoked formally; however, the "economic obligations" of the state toward these citizens will not be preserved.²⁵
- d. Moreover, citizenship is to be conditioned: "Everyone pledges allegiance to the state."²⁶ The proposal suggests to award citizenship rights (specifically the right to participate in parliamentary elections) only to citizens who pledge allegiance to Israel as a "Jewish State."²⁷

²⁵ See *supra*, note 6, sec. 3(e).

²⁶ *Id.* last sentence of the Proposal.

²⁷ Mr. Lieberman makes the following obligation:

In the next Knesset, *Yisrael Beitenu* shall advance legislation of the Citizenship Law, which will return our national honor to us, and insert content into the word allegiance. The law will require every citizen to sign an oath of allegiance to the Jewish state, to its principles, and to its laws. Whoever refuses to do so shall lose his right to vote and be elected. In addition, *Yisrael Beitenu* shall act to define a closer link between military service or national service and the rights granted by the National Insurance Institute, in the spirit of the clear principle that whoever is more loyal receives more."

See www.beytenu.org.il/147/2674/article.html. See a more detailed wording in the party platform, *supra* note 6, at 7 and see also the law draft bill referred to *infra* note 48.

e. Re-entering of the state by transferred citizens is conditional upon “the level of security which Israel enjoys.”²⁸ I.e., their freedom of movement (and of other citizens wishing to continue their ties with them), is dependent on the conduct of others. Put differently, as explained above, their ability to preserve the entirety of human experience— family ties, employment, cultural and identity links with other members of the minority Arab-Palestinian community, as well as with the Israeli-Jewish community—is restricted.

Do these legal implications clash with constitutional imperatives? By the early 1990s, Israel had moved significantly away from the *majoritarian*, “Westminster,” model of government: supremacy of the sovereignty of Parliament principle. Meaningful elements of *constitutionalism* became part of Israel’s legal regime due to two major developments, which have become known as Israel’s “constitutional revolution.”²⁹ The first is the enactment of the Basic Law: Human Dignity and Liberty³⁰ and of the Basic Law: Freedom of Occupation in 1992;³¹ the second is the landmark decision *Mizrachi Bank v. Migdal*,³² which is arguably the most important ruling ever in Israeli law, in which the Supreme Court determined the meaning and significance of the 1992 enactment of the basic laws. The net outcome has been a change in the normative pyramid of Israeli law granting a new—constitutional—status to an important spectrum of human rights and to Israel’s entire set of Basic Laws, including those constructing the powers of all state branches/basic institutions, which had been enacted prior to the 1990s but had been viewed until then as belonging within the normative level of regular legislation. Thus, now new Israeli legislation is valid only if it does not conflict with any of the Basic Laws.³³

There is one other very important trait of Israeli constitutional regime whose discussion is left for the concluding part of the Article—this is the fragility of this regime: the fact that most constitutional provisions are not entrenched; they do not require a heightened Knesset majority to amend or even abolish them.³⁴

As the exchange element of the proposal proposes a combined “population exchange” and “territorial exchange,” I shall start with the less complicated issue:

²⁸ See *supra* note 6, art. 3(f).

²⁹ Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9 (1992) [in Hebrew].

³⁰ Basic Law: Human Dignity and Liberty, 5752-1992, 1391 L.S.I. 150 (1992) (Isr.).

³¹ Basic Law: Freedom of Occupation, 5754-1994, 1454 L.S.I. 90 (1994) (Isr.).

³² CA 6821/93 *Mizrachi Bank v. Migdal Co-Operative Village* [1995] IsrSC 49(4) 221.

³³ For elaboration see, inter alia, AMNON RUBINSTEIN & BARAK MEDINA, *THE CONSTITUTIONAL LAW OF ISRAEL* ch.2 (6th ed. 2005) [in Hebrew].

³⁴ See text *infra* adjacent to note 94.

is there a constitutional hurdle standing in the way of transfer of Israeli territory to foreign sovereignty?

A. THE “TERRITORIAL EXCHANGE” COMPONENT:
CONSTITUTIONAL HURDLES REGARDING TRANSFER OF EAST JERUSALEM
AND THE “TRIANGLE REGION” FROM ISRAEL’S SOVEREIGNTY

According to Israeli domestic law, only the transfer of territories in Jerusalem would raise a constitutional hurdle. Soon after the 1967 War Israel annexed parts of the territories it occupied. East Jerusalem was annexed in 1967³⁵ and the Golan Heights in 1981.³⁶ These acts are not recognized by international law, but since the Article discusses Israeli Constitutional law, it is sufficient to note that the international law position has been widely discussed elsewhere.³⁷ In September 1967, following the annexation of east Jerusalem, Israel conducted a census in East Jerusalem and issued status to its Palestinian inhabitants—Israeli residency. Under certain quite demanding conditions the Palestinian residents of East Jerusalem may acquire Israeli citizenship, however almost all of them, mainly for political reasons, have opted not to even begin the naturalization procedure.³⁸

In July 1980 the Knesset enacted the Basic Law: Jerusalem, Capital of Israel.³⁹ According to Section 1, “Jerusalem, complete and united, is the capital of Israel.” This basic law was amended in 2000 and Article 6 states: “[n]o authority relating to the area of Jerusalem and granted pursuant to law to the State of Israel or the Municipality of Jerusalem shall be transferred to a foreign political or governing entity, or to any other similar foreign entity, whether permanently or for a set period.” At the same time, Article 7 determines that “the provisions of Articles 5 [which determines the boundaries of Jerusalem] and 6 can only be amended by a basic law enacted by a majority of the members of the Knesset,” “A majority of the members of the Knesset” is at least 61 Knesset Members out of its 120.⁴⁰ Thus, this is a real constitutional hurdle: The passing of a regular statute (a statute which is not a basic law or an amendment thereof) adopting the populated territorial exchange program is insufficient to transfer East Jerusalem or parts of

³⁵ Law and Administration Ordinance (Amendment No. 11) Law §11(B), 5727-1967, 21 L.S.I. 75 (1966–67) (Isr.); and Law and Administration Order (No. 1), 1967, KT 2064, 2690.

³⁶ The Golan Heights Law, 5742-1981, 36 L.S.I. 7 (1981) (Isr.).

³⁷ Compare, *inter alia*, Ruth Lapidot, *Jerusalem – Some Jurisprudential Aspects*, 45 CATH. U. L. REV. 661 (1996) with Yehezkel Lein, *The Holy City in Human Dimensions: The Partition of Jerusalem and the Right to Social Security*, 26 NETH. Q. HUM. RTS. 199, 208 (2008).

³⁸ Lein, *supra* note 37, at 209-10.

³⁹ Basic Law: Jerusalem, Capital of Israel, 5740-1980, 34 L.S.I. 209 (1980) (Isr.).

⁴⁰ H CJ 98/69 Bergman v. Minister of Finance [1969] IsrSC 23(1) 693.

it to Palestine, notwithstanding the majority it assembles; rather, only a basic law (or an amendment thereof) adopted by a “majority” of the members of Knesset is sufficient to allow such a transfer. It should be noted, however, that the main hurdle here is not the demand for a “basic law,” but rather the necessity to receive the minimal support of 61 members of Knesset (as opposed to a regular majority). This is because at present, in most cases, amending a basic law does not require a demanding majority or unique procedures.⁴¹

The legal situation is different regarding the transfer of the *Triangle*, which is regulated by the Law and Administration Law⁴² which makes concession of territory of the State of Israel (barring *lex specialis*, e.g., in the case of Jerusalem) conditional upon: a) a government decision; b) a Knesset decision (as opposed to a statute or—more demanding—a basic law) determined by “a majority of its members” (at least 61 MKs); and c) adoption in a referendum by “a majority of the valid votes of the participants in the referendum.” This final condition has not yet crystallized—it will be only when and if Basic Law: Referendum is ever enacted. I do not enter into a comprehensive discussion of the meaning of these requirements as they do not present a true constitutional hurdle. This is because the Law and Administration Law is a regular statute that can be overcome by *lex posterior*, particularly *lex specialis*. Hence, it does not provide a basis for judicial review of the validity of a possible Knesset legislation adopting the territorial exchange proposal regarding the *Triangle* region.

B. THE VALIDITY OF THE POPULATION EXCHANGE COMPONENT AND THE OATH OF ALLEGIANCE: ARE CONSTITUTIONALLY PROTECTED RIGHTS BEING INFRINGED?

Transferring populated territory is, of course, not only an issue of territory. It impacts upon a myriad of peoples’ life dimensions.⁴³ There is no real claim that the proposal (if adopted) does not impinge upon basic rights. However, a) what is the status of the impinged rights: Are they constitutional rights? And b) is there a justification for their impingement? The status of the rights infringed upon is central since only a clash with constitutional rights or other constitutional provisions will lead to judicial review of Knesset legislation.⁴⁴

Judicial review submits impinging laws to important limitations that appear in what is probably the most central provision in Israel’s constitutional structure,

⁴¹ For a short elaboration see text below near *infra* note 94.

⁴² Law and Administration Law (Cancellation of the Application of the Law, Jurisdiction and Administration), 5759-1999.

⁴³ See discussion *supra* Part I.

⁴⁴ *Mizrachi Bank*, *supra* note 32.

the “limitation clause.”⁴⁵ The limitation clause requires a) that the impingement upon the constitutional rights be provided “in statute” or pursuant to “express authorization” in statute; b) that the statute benefit “the values of the State of Israel” as a Jewish and democratic state; c) that the statute pursues a “proper purpose”; d) and that the means chosen to serve the statute’s purpose will impinge upon the constitutional right only “to an extent no greater than is required.”⁴⁶

1. CONDITIONING THE CONSTITUTIONAL RIGHT TO VOTE UPON AN OATH OF ALLEGIANCE

The concluding sentence quoted from the proposal declares “everyone pledges allegiance to the state.” Party leader Minister Lieberman has promised to promote an amendment to the Nationality Law, 1952⁴⁷ according to which a person who does not pledge allegiance to the Jewish state “shall lose his right to vote and be elected.”⁴⁸

Conditioning the rights to vote and be elected upon an oath of allegiance to Israel “as a Jewish, Zionist and democratic state” may clash with constitutional imperatives because both these rights are protected in Basic Law: The Knesset.

⁴⁵ Basic Law: Human Dignity and Liberty, *supra* note 30, art. 8; Basic Law: Freedom of Occupation, *supra* note 31, art. 4. On the importance and on the detailed mechanisms of the Limitation Clause and especially its “proportionality” requirement, see, inter alia, Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 370-73 (2007); Alec S. Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 131-37 (2008).

⁴⁶ The limitation clause applies directly to those basic rights protected by Basic Law: Human Dignity and Freedom or Basic Law: Freedom of Occupation. It also applies by way of analogy, if the right impinged upon is a right protected in basic laws that do not contain an expressed limitation clause. So ruled the Supreme Court of Israel when analyzing the right to be elected (Articles 6 and 7 of Basic Law: The Knesset, 1958, 12 L.S.I. 85 (Isr.)), EA 92/03 Mofaz v. The Chairperson of the Central Elections Committee for the Sixteenth Knesset IsrSC [2003] 57(3) 793.

⁴⁷ Nationality Law, 1952, S.H. 146.

⁴⁸ See *supra* note 27 for Mr. Lieberman’s written commitment. And, indeed, Members of Knesset from his party have submitted a bill to amend the Nationality Law, which is even more restrictive than conditioning one’s right to vote and be elected upon an oath of allegiance—it seems to wish to condition citizenship itself upon such an oath, and moreover, upon a service to the state:

A condition for receiving citizenship pursuant to this statute [The Nationality Law, 5712-1952] is that the receiver of citizenship has made the following oath of allegiance: “I pledge to be loyal to the State of Israel as a Jewish, Zionist and democratic state, to its symbols and its values, and to serve the State, to the extent that I am called upon to do so, by military service according to the Security Service Law [Consolidated Version], 5746-1986, or in alternate service as provided in statute.

See the Nationality Law Draft Bill (Amendment – Oath of Allegiance), 5769-2009 [P/18/102].

However, Basic Law: The Knesset already makes the right to be *elected* conditional upon pledging an oath of allegiance, but does so using different wording.⁴⁹ In contrast, at present there is no law or basic law which makes *the right to vote* conditional upon a similar oath. The proposal wishes to change that.

Making the right to vote dependent upon an oath of allegiance is not expected to fulfill the requirements of the limitation clause. I am not aware of any democratic legal system that allows revoking the right to vote from citizens who do not wish to “pledge allegiance,”⁵⁰ and this component of the proposal is therefore expected to be struck down.⁵¹ Oaths of allegiance are found in Israeli law but only as a condition for serving various public capacities⁵² or as part of a “naturalization”

⁴⁹ Article 7a of the Basic Law: The Knesset (*supra* note 46) prevents participation of candidates and parties who reject the existence of the State of Israel as a Jewish and democratic state, incite to racism or support armed struggle of an enemy state or terrorist organization against Israel. It also determines that “[t]he candidate shall make a pledge regarding this Article,” and that “details regarding [...] this] pledge shall be determined in statute.” And indeed Article 57(i1) of the Knesset Elections Law [Consolidated Version], 5729-1969 determines that “in the writ of authorization [...] the candidate shall make the following pledge: ‘I promise to be loyal to the State of Israel and to refrain from acting against the principles in Article 7a of Basic Law: The Knesset.’” (*See also* the following provisions: Articles 15 and 16 of Basic Law: The Knesset and section 72 of the Knesset Bylaws). On the other hand, the right to vote is *not* conditional upon any pledge whatsoever. *See* Article 5 of Basic Law: The Knesset. Furthermore, in light of the fact that Israeli society is a deeply divided society, the suggestion to change the contents of the pledge to the state as “a Jewish, Zionist and democratic state, to its symbols and its values, and to serve the State, to the extent that I am called upon to do so” entails a very serious difficulty for the Arab-Palestinian minority (as well as for the ultra-Orthodox Jewish minority). This difficulty thus also impinges upon the “equality” of the Knesset elections, a right entrenched in Article 4 of Basic Law: The Knesset.

⁵⁰ *Cf.* GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 65-68 (1993).

⁵¹ I shall not discuss herein the complicated possibility of enacting the proposal by way of a basic law, as opposed to regular statute. This possibility would make judicial review very difficult, but it appears that it would not necessarily block it. This raises a multitude of issues, some of which were discussed in the *Mizrachi Bank* case (*supra* note 32). Indeed, in comparative law we at times encounter judicial review that annuls “unconstitutional constitutional amendments,” but that is very exceptional intervention. Such intervention took place recently in Turkey. *See* Emrullah Ursu, *Constitutional Court Ruling on Headscarf Deepens the Democracy Crisis in Turkey*, EURASIA DAILY MONITOR 204/5, October 24, 2008, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=34051.

⁵² *See supra* note 49 regarding the right to be elected in Knesset elections. Regarding the right to be appointed to positions as a state employee and for judicial positions, see the following provisions of law: State Service Law (Appointments), arts. 34 & 52, 5719-1959; Kadies Law [Muslim Religious Judges], art. 7, 5721-1961; Basic Law: Judicature 1984, art. 6, 38 L.S.I. 101 (Isr.); furthermore, the wording of the oath is usually as follows: “I pledge to be loyal to the State of Israel and its laws.”

process for those who wish to attain Israeli citizenship by living in Israel pursuant to the Nationality Law, 1952 (as opposed to the Law of Return,⁵³ where no oaths are required).⁵⁴ The wording of these oaths is at most times much less controversial than in the proposal.⁵⁵ While I have some reservations regarding these oaths, I do not expand on them here.⁵⁶ I would rather like to emphasize what is crucial here—the proposal’s suggestion to condition upon such an oath the very right of citizens to their vote. Needless to say, this is a radical suggestion, a fateful one for a deeply-divided society if adopted.

Supporters of the proposal often refer to the pledge of allegiance that U.S. public schools sometimes require of their pupils in various ceremonies; however, this example does not serve them well. Generally, this requirement does not carry the threat of official disciplinary sanctions. Moreover, disciplinary sanctions in such context were decisively struck down long ago by the U.S. Supreme Court. In *West Virginia Board of Ed. v. Barnette* the Court annulled a rule that required students to salute the U.S. flag and that allowed disciplinary actions against those refusing.⁵⁷ Furthermore, an oath of allegiance to democratic-liberal values is not identical to an oath to “Jewish, Zionist and democratic” values.

⁵³ 1950, S.H. 159.

⁵⁴ See the oath required for naturalization—the Nationality Law, 1952, *supra* note 47, art. 5:

(b) if the requirements in subsection (a) have been fulfilled regarding a person who has requested citizenship, the Minister of the Interior, if he sees fit to do so, shall grant him Israeli citizenship by granting him a certificate of citizenship. (c) prior to the granting of citizenship the applicant shall make the following oath: ‘I pledge that I will be a loyal citizen of the State of Israel.’ (d) The citizenship is granted effective the day of the oath.

⁵⁵ Compare these oaths (*supra* notes 52 and 54) with the wording of the oath in the proposal advocates’ bill (Nationality Law Draft Bill, mentioned above in *supra* note 48): “I pledge to be loyal to the State of Israel as a Jewish, Zionist and democratic state.”

⁵⁶ I shall say briefly that a demand for taking an oath regarding political and public-service positions, thrust upon a non-Jewish homeland minority in a state that defines itself as the state of the Jewish people, is no small issue. What is the justification for granting the state the power to revoke a person’s equal right to be elected to the Knesset or to be appointed to various public positions only since she/he wishes to alter the national character of the state—in nonviolent ways—say, from a Jewish state to a bi-national state? For the sake of comparison, in 1973 in Northern Ireland, the duty of elected officials to pledge allegiance to the crown was annulled (section 21 of N.I. Constitutional Act, 1973). The pledge was seen as a violation of the essence of the republican character of Northern Ireland, which strove toward unifying Ireland, while not dealing directly with the concern that had brought about the duty to pledge—the concern of choosing violent *means* in order to attain the republican goal. See Clive Walker, *Political Violence and Democracy in Northern Ireland*, 51 *Mod. L. Rev.* 605 (1988).

⁵⁷ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). See the well known remarks of Justice Jackson, reflecting the heart of his reasoning, *id.* at 642: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what

At the same time, in the *Yassin* case, the Israeli Supreme Court discussed a similar proposal to the one we discuss here, which was put forward by another political party (*Yemin Yisrael*), according to which “the right to vote and be elected in Knesset elections shall be subject to an oath of allegiance to the State of Israel as a Jewish state.”⁵⁸ However, in this case the Court did not examine the constitutionality of the oath requirement, but rather asked whether an agenda to advance such requirement disqualifies a political party from registration. The petitioners claimed that this requirement “constitutes incitement to racism, and is, in and of itself, an illegal objective.” President Barak, writing for the Court, rejected that argument:

the determination that the right to vote and be elected in Knesset elections will be conditional upon an oath of allegiance to the State of Israel as a Jewish state – without rejecting an oath to the state as a democratic state as well – is not an illegal objective, and it is not racist.⁵⁹

While, I do not find President Barak’s reasoning convincing, it is important indeed to recognize that *Yassin* does not relate to the very constitutionality of conditioning the right to vote upon an oath. It dealt with a different legal question of whether to bar a party at the entrance gate—its registration. Between this stage and the stage where a dangerous proposal is enacted and becomes a valid law, there are quite a few important “check points.”⁶⁰ In other words, the decision in *Yassin* case to allow registration of the *Yemin Yisrael* party is substantially different from the decision that a statute embracing this party’s platform is constitutionally valid.

Indeed one can assertively expect that the Israeli Supreme Court will not validate a statute that revokes citizenship or the right to vote from citizens whose only “crime” is refusing to pledge allegiance. After all this is the same court that rejected a petition to revoke the citizenship of Yigal Amir—assassin of Itzhak Rabin, Israel’s Prime Minister—inter alia due to the fact that it found citizenship to be a

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

⁵⁸ CA 7504/95 *Yassin v. Yemin Yisrael* [1995] IsrSC 50(2) 45.

⁵⁹ *Id.* para. 27.

⁶⁰ Beyond the party registration stage lay stages which involve greater danger: these are its participation in Knesset Elections, and when it submits law draft bills. Aware of this problem, the Israeli legal system authorizes the Central Elections Committee (with appeal jurisdiction to the Supreme Court of Israel) to disqualify a party from running for Knesset, under Article 7a of Basic Law: The Knesset, and it authorizes the Knesset Speaker and his deputies to disqualify a draft law bill “which is, in their opinion, racist in essence or rejects the existence of the State of Israel as the state of the Jewish people” (Knesset Bylaws, *supra* note 49, art. 134(c)). Moreover, as discussed above, Israeli law grants power to the judiciary for judicial review of the validity of statutes that impinge upon constitutional rights.

basic right that constitutes “the foundation of the right to vote in Knesset elections, from which democracy stems.”⁶¹

Liberal democracies do not restrict the basic rights of their citizens according to how they feel about the state or in order to imbue them with feelings of solidarity or to separate those who are loyal from those who are not. Impingement upon basic rights is conditional upon fulfillment of the “harm principle”⁶² i.e., a necessary precondition for restricting a person’s basic rights is that he or she has caused harm or places others in real danger of such harm or—in rare cases—there is danger of significant self-inflicted harm. Citizens’ freedom of conscience and thoughts, especially members of a homeland minority, regarding their state of citizenship—a state which they may perceive as forced upon them and as one they would like to change—cannot be infringed upon, unless the conditions of the “harm principle are met. Hence, the majority community in a democratic state cannot impose upon a native minority population a choice between adopting the national character, which it itself wishes to preserve for the state, and forfeiting the minority’s own civil and political rights. As long as citizens utilize measures permitted in a democracy to change the national character of their state, the harm principle is not fulfilled.⁶³

⁶¹ H CJ 2757/96 Elroi v. The Minister of the Interior [1996] IsrSC 50(2)18, para. 4 of Justice Zamir’s judgment.

⁶² JOHN STUART MILL, ON LIBERTY 68, 144-147 (1858).

⁶³ There is an important distinction I wish to clarify at this exact point. I find real difference between the democratic character of the state and its national character. This difference is manifest in the following way: even those who think that Israel has justification for both of those characters in their present forms must agree that there is a difference between them, and that the justification for Israel’s national identity is a contingent one, as opposed to the justification for its democratic character. In other words, a change of circumstances might remove the justification for preserving Israel’s national identity, whereas, according to the liberal approach, even extreme circumstances (such as a state of emergency) can only *temporarily suspend* a state’s democratic conduct. More concretely: it is very difficult to reject the possibility of peacefully bringing about a dynamic regarding collective rights and the framework of the inter-community relations in a state. What, for example, justifies serious limitation of the ability to try to persuade that the right to self-determination of the Jewish people will be preserved to a great extent in a bi-national state as well (just as the Flemish identity is preserved in Belgium, and the Anglophone identity in Canada)? Put differently, even those who do not support the bi-national option for various reasons—*see, e.g.,* Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT’L L. & POL. 885, 994-98 (2004)—must recognize the rights of its supporters to strive toward its realization via the entirety of means that substantive democracy puts at their disposal in such political struggles. The main limitation is therefore upon the means of attaining the objective of altering the national identity of Israel, and it is very difficult to justify limitations upon nonviolent means toward attaining such an alteration. The case is different regarding the democratic character. From the liberal point of view the state’s democratic character is axiomatic. It is not dependent upon the consent of the majority, and hence

Even when a citizen transgresses distinct red lines, as did the assassin of Prime Minister Rabin, it is very doubtful whether it is proper or legally permissible to add to his punishment revocation of his citizenship or his right to vote.⁶⁴

To continue the constitutional discussion let us assume a more lax version of the proposal, one that preserves Israeli citizenship of transferred Arab-Palestinians (and of course all other citizens) without conditioning their right to vote upon an oath of allegiance. Does transfer alone (transfer without detaching the transferee from her/his home) infringe upon the transferee's constitutional rights?

2. THE PROPOSAL'S INFRINGEMENT UPON OTHER MAJOR CONSTITUTIONAL RIGHTS

By redrawing the border, un-consenting citizens are placed in the following dilemma: be uprooted from their home, local community, and property, in order to remain in the state's territory or be transferred, with their home and local community to the control of another sovereign. Indeed, citizens may freely choose to move temporarily (tourists, workers) or permanently (migrants) to another country, but once it is involuntary and a state forces this dilemma upon its own citizens, serious moral and legal problems arise.

A. By redrawing the border (especially a predictably unstable border) the state restricts *freedom of movement into Israel* of its citizens who it has transferred beyond its borders, and thus adversely affects their constitutional right according to which "[e]very Israeli citizen who is out of the country has a right to enter Israel."⁶⁵

B. This restriction of freedom of movement radiates and brings about restriction of other rights, such as *freedom of occupation* which is a constitutional right through the Basic Law: Freedom of Occupation.

C. As explained above, the *right to family life* is seriously impaired by the redrawing of the borders. But is it a constitutional right (i.e., providing for the judicial review of the infringing legislation)? Recently the Supreme Court in a judgment discussing the validity of the Citizenship and Entry into Israel Law (temporary provision), 5763-2003,⁶⁶ ruled that the right to family life is

it is possible to block even those who strive to attain the annulment of democracy by nonviolent means; it is sufficient to identify the stage at which there is a *real chance* that the democracy in the state will be annulled if the nonviolent but anti-democratic forces are not restricted. Cf., Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 51, 69-70 (1995); Nancy L. Rosenblum, *Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies*, 1 L. & ETHICS HUM. RTS. 17 (2007).

⁶⁴ See the *Elroi* case, *supra* note 61.

⁶⁵ Basic Law: Human Dignity and Liberty, *supra* note 30, art. 6(b).

⁶⁶ Nationality and Entry into Israel (Temporary Order) Law, 2003, S.H. 544.

constitutionally protected, pursuant to the right to “human dignity”; however, in this judgment the Court examined the right to unification of the nuclear family: spouses, parents, and their small children.⁶⁷ Its stance on the constitutional standing of family ties to those of a lesser familiar degree is not clear and such ties may not enjoy constitutional status.

D. Another very central right that is infringed upon is *the right to equality*. A political party of the majority community proposes that the minority community pay the price for Israel’s deeds and misdeeds, as well as for the compromise with the Palestinian people. Legally speaking, the effect—and arguably the motivation—of the proposal is to adversely impact a specific ethnic group, the minority. The Supreme Court has recognized that certain aspects of the right to equality—including the right not to be discriminated against on the basis of ethno-national affiliation—is constitutionally protected in the framework of the right to “human dignity.”⁶⁸

E. An additional component of the proposal—revoking the “economic obligations” of the state toward the transferred citizens—is a complex issue that is (constitutionally) related both to *the right to minimal dignified existence* and the *right to property*.⁶⁹ Through the payment on national insurance, a person acquires rights to benefit payments, rights that cannot be annulled *a fortiori* if the person does not leave the country voluntarily.⁷⁰

G. The aggregate picture shows—even without including conditioning of the voting rights upon an oath of allegiance—that the proposal will grossly handicap the citizenship of those citizens who will be excluded from the boundaries of the state. Citizenship means a kind of partnership, or in the very least, protection from each of the following harms: placing a group of citizens under the jurisdiction and control of another sovereign; restriction of their right to enter Israel; severance of family, social, and employment ties; and becoming the target of these harms due to their national-ethnic background; etc. In other words, citizens have a right to expect that their state not deplete their citizenship of so much of its content while pretending that their citizenship has been left intact because it has not been officially revoked.⁷¹

⁶⁷ H CJ 7052/03 Adalah—The Legal Center for Arab Minority Rights in Israel v. The Minister of Interior [May 14, 2006] (unpublished).

⁶⁸ H CJ 6427/02 The Movement for Quality Government in Israel v. The Knesset [May 11, 2006] (unpublished); *Adalah—The Legal Center for Arab Minority Rights in Israel v. The Minister of Interior*, *supra* note 67.

⁶⁹ H CJ 5578/02 Manor v. The Finance Minister [2004] IsrSC 59(1) 729, 739 (2004); H CJ 366/03 Mechuyavut v. The Finance Minister [2005] IsrSC 60(3) 464.

⁷⁰ For a discussion of this issue regarding East Jerusalem, see Lein, *supra* note 37.

⁷¹ A last point on the list of harms inflicted by the proposal, once implemented, regards the Palestinians in the Occupied West Bank as opposed to the Arab-Palestinian minority: examination of

Indeed we have identified numerous constitutional rights that are impaired by the implementation of the territorial/population element of the proposal—dignity (equal protection), right to enter one’s country, freedom of occupation, the right to property. Now we turn to the last stage of the constitutional analysis: reviewing possible justification for the (proposed) legislation—its potential constitutional validity.

3. IS THE INFRINGEMENT OF CONSTITUTIONAL RIGHTS JUSTIFIED?
THE REQUIREMENTS OF THE LIMITATION CLAUSE

We have reached the last issue which is also the core issue. Can a statute that embraces the proposal be validated? The constitutional grounds for validation appear in the “limitation clause”; two of its main requirements are the “proper purpose” requirement and the “proportionality” requirement.

The demand for proportionality concerns the means to achieve the purpose: Are the means carved “to an extent no greater than is required”? They do only if they fulfill the following *cumulative* requirements:

The first step is that a link of fit or *rational connection* is needed between the objective and the means. The means employed by the statute must be derived from the achievement of the objective that the statute seeks. The second step is that the means employed by the statute must impair the right as little as reasonably possible. This is the necessity, or *least drastic means*, element. The third subtest requires that there exist a *proper proportion between the means and the objects*. This is the proportionate effect element, also referred to as ‘proportionality *stricto sensu*.’⁷²

My analysis will be conducted along each of the arguments that are advanced or can be advanced by the proposal’s advocates.

a. “THE LESS SUFFERING ARGUMENT”

The central argument made by the proposal’s advocates could be phrased as follows: “our proposal is the most justifiable of the possibilities being considered for attaining viable sustainable agreement with the Palestinians. We strive to avoid

the effect of the construction of the “separation fence” in the Palestinian territory already shows that the territorial exchange proposal has a price that is likely to be paid not only by the Arab-Palestinian citizens of Israel, but also by the Palestinians. These are Palestinians whose land (at least) is meant to be transferred, according to the proposal, to Israeli sovereignty, together with the settlement blocks. I would not discuss this harm further here however, because I focus on the issue of the constitutional hurdles to the proposal, and the question of whether the Palestinians are protected by Israeli constitutional guaranties has not yet been decided by the Israeli Supreme Court.

⁷² Barak, *supra* note 45, at 372 (emphasizes added I.S.).

the tremendous burden entailed in uprooting the citizens of group A (the settlers) through a step that does not involve physical uprooting of citizens from group B (the residents of the *Triangle* region). The latter will suffer less since their transfer does not involve uprooting them from their homes and local communities.” Put differently, the proposal argues that it offers *the* least drastic, least restrictive, measure in order to reach the proper purpose of an agreement with the Palestinians. In my opinion, this argument is unsuccessful and should not traverse the constitutional hurdle. It is unconstitutional mainly because of two reasons.

To what extent can one really compare the homeland minority of Israel to the settlers? The settlers chose to engage in an act that became illegal according to international law because of the Israeli government’s involvement in it, contrary to Article 49 of the Fourth Geneva Convention.⁷³ Moreover, even the Supreme Court has referred to the status of the settlements as “temporary” in a certain important sense.⁷⁴ Under international law the rights of the settlers are hence not equal to those of regular citizens, *a fortiori* to those of members of native communities.⁷⁵

However, the discussion in this essay focuses upon Israeli constitutional law, and for it the implications of the fact that those who erected the settlements or preserve them are involved in an act which is illegal from the standpoint of International Law are much less unequivocal.⁷⁶ Thus, Israeli constitutional law

⁷³ Article 49(6) of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287), as well as the opinion of the International Court of Justice on the subject of the fence, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 136 (July 9). For a comprehensive analysis of settlers’ status in international law, see Yaël Ronen, *Illegal Occupation and its Consequences*, 41 ISR. L. REV. 201 (2008); Yaël Ronen, *Status of Settlers Implanted by Illegal Regimes under International Law*, 195 BRIT. Y.B INT’L L. (2009).

⁷⁴ H CJ 390/79 Duikat v. The Government of Israel [1979] IsrSC 34(1) 1, 21:

A considerable question has been raised before us ... how a permanent settlement can be erected on land that has been occupied only for temporary [military] use? The answer given by Mr. Bach [The State Attorney] is acceptable to us: ‘that the civilian settlement can exist at that location only as long as the IDF holds the territory pursuant to an order of seizure. That seizure itself can end one day, as a result of international negotiation which may conclude in a new arrangement that will receive effect according to International Law, and will determine the fate of this settlement, and of other settlements...

⁷⁵ Moreover, from a fairness perspective, it may be argued that if, in order to reach an agreement that will end violence, and maybe even bring peace, it is necessary to harm some of the citizens, it seems fairer to harm those citizens that are more responsible for obstructing peace and for our dire situation, namely the settlers.

⁷⁶ See H CJ 1661/05 The Gaza Coast Regional Council v. The Knesset [2005] IsrSC 59(2) 481, as well as H CJ 7957/04 Ma’arabe v. The Government of Israel [2005] IsrSC 60(2) 477, 498, para. 19 (2005):

forces us to examine whether there aren't additional reasons, beyond the legal status of the settlements in international law, which counter the argument of "less-suffering" or otherwise delegitimize choosing the Arab-Palestinian citizens of the *Triangle* to pay the heavier price for an Israeli-Palestinian agreement. I find at least two such reasons.

First, we have to be "on guard" of a claim of "less suffering" when it is voiced by a political party of the majority community that proposes that the minority community pay the higher price for the compromise. A comparison can help us better grasp this point. When the Disengagement Plan and the uprooting of the Gaza Strip settlers in 2005 are examined, it is recognizable that the plan was intended for the good of the Israeli public in general. The settlers were uprooted because, inter alia, their settlements were viewed as a major incitement of the Palestinian uprising and the Israeli political branches considered disengagement and the uprooting of the settlers necessary steps in deflating the conflict. In retrospect, the decision-makers may have been mistaken when assessing the potential consequences of the disengagement, but this does not change the fact that their objective was not discriminatory; it was for the good of all citizens of Israeli society. This is not true in the present case. If the Arab-Palestinian citizens were the cause or a cause for the deepening of the conflict, or if the Palestinian partner to the negotiations had demanded unification with part of its people living in Israel as a condition for peace with Israel, those propounding the proposal might have been able to speak in the name of "the common good."⁷⁷ However, the state of affairs is different here: it is entirely clear, even proclaimed, the reason *Triangle* resident-citizens were chosen as the population to be transferred, albeit their opposition—is their ethnicity. Now, if the minority community is chosen by the majority community to pay an added price for the general good, it is rightly presumed to be a violation of the right to equality vested in the individuals of that community.

Second, comparing the suffering of uprooted settlers to that of citizens who are transferred along with their homes and local communities is a multivariable comparison, but it seems likely that for most of us, the erection of a border (certainly an unstable one) between ourselves and our children, parents, siblings, friends,

[O]ur conclusion is thus that the military commander is authorized to erect a separation fence in the *area* in order to defend the lives and security of the Israeli settlers in the *area*. For the purposes of this conclusion, there is no relevance whatsoever to examination of the question whether that settlement complies with International Law or violates it.

⁷⁷ Or, take another example, if one had to choose between a sparsely and a densely populated part of Israel to be exchanged, it would have been possible to argue that the decision to choose the sparsely populated area is arguably fair, since it could be the one chosen behind the "veil of ignorance."

workplaces, and the society to which we have belonged is a greater burden than forsaking a house and local community. Uprooting the settlers—notwithstanding the pain that is certainly involved—keeps them entirely within the society in which they had lived and to which they are linked and want to continue to be linked by social, familial, economic, political, national, and cultural ties. That is not the case regarding the Arab-Palestinian citizens in the *Triangle*. While their ties with their people in the West Bank are meaningful, they are significantly lesser than those central ties that form their present lives within the Arab-Palestinian minority inside Israel and Israeli society in general.⁷⁸

b. “THE SECURITY/STABILITY ARGUMENT”

The proposal makes another attempt to aim at the “general good” by referencing security considerations regarding the stability of the arrangement with the Palestinians:

[T]he arrangement [with the Palestinians] must be symmetric and ensure long term stability, as opposed to one that can only perpetuate the conflict, the reason for which is, *inter alia*, the friction between the two peoples. Anywhere in the world that two peoples who believe in two religions and who speak two different languages live next to each other, there are conflicts, from the Caucasian region in Russia to the Balkans, from Belgium to Canada. For that reason, any solution must include maximal separation between the two peoples.”⁷⁹

This line of reasoning—that stability requires ethnic homogeneity—is deeply disturbing. First, that was the impetus for the recent dreadful crusade of “ethnic cleansing” in the Balkans, which resulted in around 100,000-110,000 dead and 1.8 million displaced in Bosnia alone.⁸⁰ Second, homogeneity and “maximal separation” are no more realistic in Israeli society—regardless of whether the proposal is implemented or not—as the proposal directly involves approximately

⁷⁸ Yaël Ronen holds a similar view with regard to the harm inflicted upon the settlers. See Yaël Ronen, *International law and the Right of Settlers to Remain in the Territory Following Withdrawal of an Occupying Power: Settlers in the West Bank, in Northern Cyprus and in the Baltic States*, 13 MISHPAT UMIMSHAL sec. D2 (forthcoming, 2010) [in Hebrew].

⁷⁹ From the party platform updated to January 2009, published on the *Yisrael Beitenu* website under the title *Chilufei Shtachim veOchlusiot [Exchange of Territory and Population]*: <http://beytenu.org.il/85/2627/article.html>.

⁸⁰ Ewa Tabeau & Jakub Bijak, *War-Related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results*, 21 EUR. J. POP. 187 (2005).

100,000 Arab citizens and provokes their outrage as well as that of one million other Arab citizens of Israel, who will remain in Israel after the proposal is implemented. Third, is “maximal separation” really the lesson of contemporary comparative politics in democratic deeply-divided societies? Other countries have resolved peacefully their conflicts or at least moderated them *without even the mention of territorial and population exchange*: Canada,⁸¹ Belgium,⁸² and Spain (both Catalonia and the Basque country).⁸³ In South Africa as well the 1996 Constitution was able to manage peacefully a remarkable racial, ethnic, and lingual diversity.⁸⁴ The same is true with the conflict in Northern Ireland (the 1998 Belfast Accord).⁸⁵ Fourth, how can those supporting the proposal claim it to be viable and sustainable when the Palestinians are expected to reject it?⁸⁶

Advocates of the proposal will find it extremely hard to show that it meets even the less demanding subtest of the proportionality requirement, the *rational connection* between the proposal and its objectives: better security and a more stable relationship in the Israeli-Palestinian conflict. Moreover, the success of other countries in solving ethno-national conflicts without the transfer of citizens and land raise serious doubts as to the proposal’s success in meeting the second subtest of the proportionality requirement—being the “least restrictive means.”

Another problem embedded in the proposal concerns the question of whether it meets the demand for a “proper purpose.” *Yisrael Beitenu*’s political activity and its official rhetoric testify to the party’s views that Arab citizens are a disloyal minority and its supposition that they are therefore punishable, i.e., their basic rights may be violated and thus, inter alia, some of them can be forcibly transferred with their localities to the Palestinian sovereignty. However, as analyzed in the

⁸¹ Stephane Dion, *Explaining Quebec Nationalism*, in *THE COLLAPSE OF CANADA?* 78 (R. Kent Weaver ed., 1992). See also KENNETH MCROBERTS, *QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS* 434 (1993); Ilan Saban, *Appropriate Representation of Minorities: Canada’s Two Types Structure and the Arab-Palestinian Minority in Israel*, 24 *PENN ST. INT’L L. REV.* 563 (2006).

⁸² Dirk Jacobs & Marc Swyngedouw, *Territorial and Non-Territorial Federalism in Belgium: Reform of the Brussels Capital Region*, 13 *REGIONAL AND FED. STUD.* 127 (2003); Daniel Beland & Andre Lecours, *Federalism, Nationalism and Social Policy Decentralization in Canada and Belgium*, 17 *REGIONAL & FED. STUD.* 405 (2007).

⁸³ See Luis Moreno, *Ethnoterritorial Concurrence: The Spanish Comunidades Autonomas*, in *MULTINATIONAL DEMOCRACIES* 201 (Alain-G. Gagnon & James Tully eds., 2001); ARANGO E. RAMON, *SPAIN: DEMOCRACY REGAINED* (1995).

⁸⁴ See, *inter alia*, Adam Heribert & Kogila Moodley, *SEEKING MANDELA: PEACEMAKING BETWEEN ISRAELIS AND PALESTINIANS* (2005); Courtney Jung, Ellen Lust-Okar, & Ian Shapiro, *Problems and Prospects for Democratic Settlements: South Africa as a Model for the Middle East and Northern Ireland?* 33 *POLITICS & SOCIETY* 277 (2005).

⁸⁵ See *supra* note 9.

⁸⁶ See *supra* note 14.

discussion of the oath of allegiance, the state cannot impinge upon the basic rights of its citizens on the basis of disloyalty to the national character which the majority community chooses for the state (nor, for that matter, on the basis of disloyalty to the democratic character of the state as exemplified by the Jewish ultra-Orthodox and by Arab citizens who aspire to a *Shari'a* [Muslim law] state). Fulfillment of the “harm principle” is a necessary condition for limitation of basic rights.

However, if the proposal’s objective is not attaining the good of *all* Israeli citizens, but rather to distribute the burdens of a Israeli-Palestinian agreement in an ethnically-biased manner; and if the drive for ethnic homogeneity proved itself to be so dangerous, as in the case of the Balkan Wars; and if disloyalty (imagined or real) does not justify revoking basic rights; how else can the infringed rights be validated?

c. “THE DEMOGRAPHIC ARGUMENT”

Demographic politics is often hidden in the Israeli official discourse;⁸⁷ however, *Yisrael Beitenu* is not shy about its pretenses. While, it claims to strive not for ethnic cleansing but for a “modest” demographic objective: strengthening the Jewish majority by removing some of the Arab citizens, along with their territory/local communities.⁸⁸ Is this demographic objective legitimate as a basis for substantive restrictions against citizens?

The Supreme Court of Israel ruled that although the State of Israel is under no obligation to provide equality for the Arab national minority in the field of group-differentiated rights, it is obligated to ensure its members absolute equality of rights in the field of individual rights: the common rights of citizenship.⁸⁹ The *Ka'adan* case provides a telling precedent:

⁸⁷ Gila Stopler, *Israel's Demographic Policy in the Area of Childbirth and Women's and Minorities' Rights*, 11 MISHPAT UMIMSHAL 473 (2008) [in Hebrew].

⁸⁸ As mentioned above, these citizens are meant to be removed from the pool of those entitled to vote, by making the right to vote conditional upon an oath of allegiance to the Jewish State; furthermore, moving the border and thus terminating the residency of the transferees may promote the demographic ‘utility’ in an additional way, since Israeli law restricts attaining Israeli citizenship as the child of an Israeli citizen who is not a resident of Israel. The child of an Israeli parent is not entitled to Israeli citizenship if the parent was born outside of Israel and is not an Israeli resident (assuming the child is not entitled to citizenship due to a different source, such as if the child is Jewish or a member of a Jew’s family, as determined in the Law of Return). See the Nationality Law, *supra* note 47; RUBINSTEIN & MEDINA, *supra* note 33, at 1103.

⁸⁹ For the important distinction between the common rights of citizenship and the group-differentiating rights, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS, 26-33 (1995); WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 17-27 (2001); Jacob Levy, *Classifying Cultural Rights*, in ETHNICITY AND GROUP RIGHTS 22 (Ian Shapiro & Will Kymlicka eds., 1997). See also Saban, *supra* note 63, at 904-19.

It is true, members of the Jewish nation were granted a special key to enter (see the Law of Return-5710-1950), but once a person has lawfully entered the home, he enjoys equal rights with all other household members.⁹⁰

These lucid and decisive words clarify that the demographic objective is possible only within immigration policy vis-à-vis immigrants to Israel. The state may constitutionally prefer Jewish immigration; however it is unconstitutional to follow demographic considerations or be otherwise ethnically biased in the relations of the State vis-à-vis the basic rights of *its citizens*.⁹¹

d. THE “EVADING AN INTERNAL ISRAELI-JEWISH CIVIL WAR” ARGUMENT

The last argument—which is truly explanatory of Israeli (Jewish) politics vis-à-vis the Israeli-Palestinian conflict—is the fear of a civil war within the Jewish majority. This fear is not imaginary. The West Bank (Judea and Samaria) is the heart of biblical *Eretz-Yisrael*, and within it live many thousands of settlers, of whom many are religiously ideological about rooting themselves in this land. Moreover, the stressful disengagement in 2005 (and the uprooting of the 8,000 settlers) from the Gaza Strip is conceived by the big part of the Israeli-Jewish public as a clear indication that the Palestinians aim to attain more than the end of Israel’s 1967 occupation and the uprooting of the settlers. How else—this is the claim—can the rise of the Hamas in 2006 be explained? And what will happen in terms of the Palestinian regime if Israel disengages from the West Bank as well—what promises a different fate? And how can the conflict end when the Palestinians are insisting upon the right of return for the 1948 refugees? These are not rhetorical questions and answers vary; however, this state of affairs is volatile. It seems that there are not enough incentives/reassurances for the risks and the concessions demanded from the Israeli-Jewish collective, hence these concessions and risks are controversial enough to push the Israeli society to the brink of a Jewish civil war if pursued.

A civil war is a frightening possibility from any perspective; however, at least the humanistic-liberal perspective cannot opt for prolongation of Occupation and the colonization project on the basis of this fear. These prices are just too high and have been paid already for decades too long.

⁹⁰ HCJ 6698/95 Ka’adan v. The Israel Lands Authority [2000] IsrSC 54(1) 264, para. 12, an English translation is available at elyon1.court.gov.il/files_eng/95/980/066/a14/95066980.a14.pdf.

⁹¹ For a detailed discussion of this argument, see Guy Davidov, Jonathan Yovel, Ilan Saban, & Amnon Reichman, *State or Family? The Citizenship and Entry into Israel Law (temporary provision)*, 5763-2003], 8 MISHPAT UMIMSHAL 643, 679-685 (2005) [in Hebrew]; see Stopler, *supra* note 87, at 507-16. The demographic argument is a major bone of contention in the debate between Waters and Shany referred to above, *supra* note 7.

However, the proposal's advocates may claim that they are not looking to prolong Occupation but to the opposite: to end it. They may add that they are searching for a less violent manner to arrive at it. The flaw in this reasoning is that they fail to show that the means—transfer of Arab-Palestinian citizens and territory—meet the proportionality requirement.

First, if the proposal's purpose is to attain a viable and stable Israeli-Palestinian agreement, how can it be achieved in face of the Palestinians objection to it—both Palestinians under Israel's Occupation and Arab-Palestinian citizens? Second, if the purpose is to bring about an agreement with as little violence as possible, what is the answer to the long list of harms and risks caused by the proposal (when it is more seriously advanced and especially when implemented), harms and risks that were outlined in Part I above? To rename a few: the expected change in the political identity and political behavior of the Arab-Palestinian citizens (especially from the *Triangle*, but not limited to), and the subsequent serious risk of violent breakdown of the inter-communal relations between Arab-Palestinian and Jewish citizens, which in turn may inflict a death blow to the “two-state solution”; and of course, the enormous risk that will evolve once the partition option would die away.⁹² In short, the proposal is also disproportionate from the standpoint of the third subtest of the proportionality demand—“the balance of harm.” It wishes to alleviate one tension—vis-à-vis the settlers and their supporters in the Israeli public—by creating another, more dangerous tension with the Arab-Palestinian minority and subsequently with the Palestinian people as a whole.

Often times—as seen in the discussion above about the less suffering argument—the Israeli-Jewish elites, the decision-makers calculating harms and risks, opt to avoid what is more painful or frightening *for them*. They fear the internal Israeli-Jewish civil war more than the “usual” war with the Arab adversaries, notwithstanding the possible apocalyptic consequences of the latter; they are more sensitive towards their brethren-settlers' pains than to “other” citizens' pains, etc. The proportionality requirement assesses the balance of harms and risks in a supposedly non-ethnocentric way and will, thus, lead to the disqualification of the proposal.

III. EAST JERUSALEM

As the end of the analysis approaches, let us examine the following challenge: Why is it acceptable to agree to alter the border (or the extent of sovereignty) in

⁹² I dealt elsewhere with the grave problems and risks accompanying the bi-national option for Israel-Palestine: Saban, *supra* note 63, at 994-97; see also *The Muddy Lure of the Bi-National Option, Proceedings of a Roundtable: Multiculturalism and the Challenges of Differentiated Citizenship in Israel*, at 44, The Walter Lebach Institute for Jewish-Arab Coexistence through Education, Tel-Aviv University, June 2006 (2007) [in Hebrew & Arabic].

Jerusalem and to terminate Israeli residency status of the Palestinian residents of East Jerusalem, but to strongly oppose to the transfer and eroding of the citizenship of the Arab-Palestinian Israeli citizens in the *Triangle*?⁹³

The first answer to the question is that most of the Palestinian residents of Jerusalem will probably consent to having their Israeli residency terminated as part of an Israeli-Palestinian agreement. At present this residency status is very valuable to them since the alternative is being occupied like all other Palestinians in the West Bank; however, once the alternative is different—end of the occupation, a subsequent Palestinian meaningful citizenship, and keeping their homes and localities under a Palestinian State’s sovereignty—they will opt for it. This argument can be put forward assertively because there are substantial differences between Palestinian residents of East-Jerusalem and the Arab-Palestinians of 1948: They have a somewhat different collective identity; their “imagined future” is different; they have a different leadership, agenda, etc. Moreover, as mentioned, Palestinians in East Jerusalem are residents, not citizens of Israel, and as such do not hold the right to participate in Israeli general elections. Thus, altering the border would likely increase rather than detract from their political rights. Moreover, Palestinians in East Jerusalem have their close familial, community and cultural ties with the Palestinian people in the Occupied Territories, not with the Arab-Palestinian minority community inside Israel. Hence, except with regard to the important aspect of employment, the results of border changes are almost opposite in the two cases.

The second answer is the outcome of the former and it concerns the probable consequences of each of the two acts of border redrawing. Alteration of the border (or sharing the sovereignty) in East Jerusalem is actually expected to have a positive effect, both upon the relations with Jerusalem’s Palestinian residents and upon Arab-Jewish relations inside Israel since it meets the political aspirations of both these minority communities. Yet, alteration of Israel’s border along the *Triangle* will involve a rift, most likely violent, in the relations between Jews and Arab-Palestinians in Israel.

The third and last answer regards the likelihood of achieving a final agreement with the Palestinians without handing over East Jerusalem to Palestine or sharing with it the sovereignty over Jerusalem. Israeli “dis-annexation” of the Arab section of Jerusalem appears to be an absolute Palestinian condition. Thus, this issue, as explained above, may constitute a “common good” that justifies taking such a step.

⁹³ Remember that the willingness to terminate the Israeli residency of the Palestinian residents of East Jerusalem does not in any way mean consent to revocation of the economic rights which they have accumulated over the years, including the rights accumulated by deductions to the National Insurance Institute. See Lein, *supra* note 37.

In short, the *Triangle* region and East Jerusalem are quite different issues both morally and legally.

IV. CONCLUSION: A FINAL NOTE OF AMBIVALENCE—THE EXISTING
CONSTITUTIONAL HURDLES ARE EMBEDDED IN
A FRAIL CONSTITUTIONAL STRUCTURE

The proposal to transfer the *Triangle* and to make the right to vote conditional upon an oath of allegiance to Israel as a Jewish state places the relationships between Jews and Arabs in Israel in great danger, and (if adopted) will severely violate moral imperatives. Fortunately, Israeli constitutional law still places obstacles—primarily in the form of Basic Law: Human Dignity and Freedom and Basic Law: The Knesset—which should block, in the short run, the realization of this proposal.

However, the ability of these constitutional tools to stand ground in the long-term is questionable. Although the basic laws stand at the top of Israel's pyramid of norms and establish judicial review of legislation, they themselves have not been granted any real means of protection. Most of Israel's basic laws, including the Basic Law: Human Dignity and Liberty and Basic Law: Judicature (pursuant to which the judicial branch exercises constitutional judicial review), are not entrenched. They are amendable by a regular majority vote in the Knesset acting in its capacity as a constitutional assembly.⁹⁴ Preventing the occurrence of such interventions depends upon the existence of a political culture that honors human rights and recognizes the reason "constitutionality" is needed, especially in a deeply divided society and especially during stormy times. Unfortunately, political culture of this type is being eroded in Israel in the recent years.

Is Israel able to stand up against this dark wave of fear that sparks aggression, nationalism, and messianic fervor (on both sides)? I used to be more optimistic with regard to the answer to this question.

⁹⁴ See RUBINSTEIN & MEDINA, *supra* note 33, at ch. 2; Yoav Dotan, *Constitution to Israel?—The Constitutional Dialog after "The Constitutional Revolution,"* 28 MISHPATIM 149 (1997) [in Hebrew]; Saban, *supra* note 63, at 972-75.