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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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CITIZENSHIP AND ITS EROSION:
TRANSFER OF POPULATED TERRITORY AND OATH OF ALLEGIANCE
IN THE PRISM OF ISRAELI CONSTITUTIONAL LAW

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Abstract
This article discusses, through a constitutional law prism, two issues of majority-
minority relations in deeply divided societies. The first is the legitimacy of transfer of
a homeland minority (or a part of it) - 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 threats to citizenship are policy suggestions advanced by a
central partner in the current governmental coalition of Israel; they aim at the Arab-
Palestinian minority.
The analysis turns to an examination of the safeguards that Israeli constitutional law
puts in the way of implementing such initiatives, but at the same time it touches upon
the weaknesses of these safeguards.
There is an effort to discuss the limits of state power to set demands or conditions
upon the full citizenship of members of its native minority. This theoretical
exploration is of course relevant to other deeply divided societies that are engaged in
or contemplate citizenship-eroding measures of this kind.

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I. INTRODUCTION AND BACKGROUND

More than six decades after its establishment in 1948 Israel has still not solved most of its fundamental problems. This essay attempts to probe one proposed solution which has gained considerable sympathy in the Israeli public arena. Before presenting this proposal, I shall try to map out the mesh of difficulties that it aims to be a central axis in solving.

Israel is deeply divided by three main schisms whose edges do not dull. The first is a national schism between the Jewish majority and the native Palestinian minority that remained in Israel after the war that accompanied Israel's establishment. This minority 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. The third schism is political, and it relates to the deep controversy regarding the way to confront a shadow darker than all that is described above: the question of how to deal with the Palestinian territory occupied in 1967 and how to manage the conflict with the Palestinian people and Israel's Arab neighbor states.

In the background of the armed conflict between Israel and some of its neighbors and the Palestinians under its military control two major events led to the current state of affairs. The first was the establishment of Israel in 1948 in a large part of Mandatory Palestine, after 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 large part of the Palestinian people remains under Israeli military occupation, and neither the refugee problem nor the problem of 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 has not consisted merely of placing under military regime Palestinians who do not enjoy Israeli citizenship (as opposed to the 1948 Arab-Palestinian Minority), but is accompanied by a wide scale colonization project.
Approximately 350,000 Jewish Israeli citizens – more than 5% of Israel's general population – presently live behind the border between Israel and its neighbors as per the 1949 armistice agreements (the Green Line). They live in settlements of varying sizes, most of which were built relatively adjacent to the green line on the Palestinian side, but some of which are deep inside the West Bank. The establishment of those settlements entailed expropriation of private Palestinian land and use of the reserves of public land.

In 2005 Israel pulled out of the Gaza Strip. It uprooted its 8,000 settlers from Gaza as it had done in 1980 from the Sinai Peninsula. The "disengagement" from Gaza was accompanied by great internal tension in the Israeli-Jewish collective and 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. Missiles were still being massively launched at Israel from the direction of the Gaza strip and Israel retaliated by a full scale onslaught and siege of Gaza. All this impacts deeply upon the inter-communal relationships within the pre-1967 borders.

The rise and fall in the tides of the Israeli-Palestinian conflict have created parallel processes in Jewish-Arab relations within Israel. Sufficient at this point to compare the state-minority relations during the euphoric days of the Oslo Accord between Israel and the PLO (1993-1995) to the October 2000 killing by Israeli police of 13 demonstrators at the outbreak of the second Intifada. Notwithstanding, solidarity of the Arab-Palestinian minority with its people has not been translated into participation in the armed conflict. This has so far been a distinct pattern of the minority political behavior.

The secular/religious and the political schisms that split Israeli society are also connected, as the vanguard of the project of colonization of the occupied territories is the religious nationalistic public within the majority Jewish community. Relinquishing of territorial control as in the Gaza strip in 2005, and as might take place in the West Bank in the future, creates tremendous internal political tension. So much so that on occasion there is a fear that once the West Bank and East Jerusalem be on the balance an internal Jewish civil war will erupt.

Completing the picture is the inevitable connection between the mounting extremism within one people and its parallel in the other. The rise of the Hamas movement on the Palestinian side is often attributed to the failure of Fatah movement
The rise of the Israeli right is indeed the point of departure of this essay. I wish to address a proposal that integrates two ideas and that is fast taking hold in the Jewish-Israeli public arena. One idea is to greatly reduce the number of Jewish settlers who will have to be uprooted if Israel pulls out of the West Bank by annexing their settlements to the state of Israel. Simultaneously, runs the proposal, to alter the demographic balance between Jews and Palestinians inside Israel, by transferring Arab-Palestinian citizens inhabited territory that is relatively adjacent to the green line on the Israeli side to the Palestinian side. The second idea is to limit suffrage to citizens willing to take an oath of allegiance to the state as a Jewish one.

Propounding these ideas is a party which attained significant success in the 2009 general elections - Yisrael Beitenu (Israel our Home). Yisrael Beitenu has become an important part of the governmental coalition in Israel and its leader is Foreign Minister Avigdor Lieberman. The attraction of these ideas in the Jewish-Israeli political arena is that they purport to provide solution to two of the worst fears of the Jewish public. One is that the demographic balance between Jews and Arabs in Israel might tilt in favor of the latter and the other is the potential for a Jewish civil war if Israel does uproot many thousands of its settler citizens in the West Bank and relinquish its full control in East Jerusalem.

These are the main steps advocated in the proposal.¹

¹ The proposal of the Yisrael Beitenu party is posted on the site of the Israeli Democracy Institute. The site refers to the party's platform, and see id., at p. 6: www idi.org.il/elections_and_parties/documents/israel beytenu 18.pdf. The full wording is as follows:
"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) 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."
a. Annexation of territory outside the Green Line - large blocs of Jewish settlements in the West Bank) Ariel, Ma'aleh Edumim, Gush Etsion) would be annexed to Israel.

b. Israel would cede Arab-Palestinian inhabited regions) Wadi Ara, The Triangle) to a future Palestinian state, as well as 170,000 Palestinians currently resident in the municipality of Greater Jerusalem.

c. Allocate major civil and political rights only to citizens who pledge allegiance to the state of Israel as a Jewish state.

These steps raise questions on two compound levels, that of international law and that of domestic constitutional law. The territorial component of the proposal has been the subject of analysis from the perspective of the former. I shall therefore focus upon Israel's constitutional law, which has not been analyzed yet, and I will also tackle the oath of allegiance issue.

As the questions regarding countries' cession of part of their territory – a phenomenon known also as "downsizing the state – "are not so rare, this essay might contribute to the comparative constitutional debate on the issues that accompany such measures. It can assist, and can likewise be assisted, by constitutional debates in

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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."

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other countries, such as Britain/Northern Ireland, Britain/Hong Kong, Britain/Gibraltar, and et cetera.

One may wonder why we bother analyzing a proposal which has not yet been adopted by the Israeli Parliament, the Knesset? The answer is that unfortunately it may in fact be adopted in the foreseeable future. The democratic roots of Israel’s political culture are not sufficiently deep, and the turns that might take place in the relationships outlined above may add impetus to such policies.

Before turning to the constitutional law analysis of the proposal, I shall present what I take to be the essence of its 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.

II 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 severe problems in the proposal has already been discussed elsewhere. Territorial exchange would affect at least three parties: Israel, Palestine (currently the Palestinian Authority) and the Arab-Palestinian citizens of Israel who may be


4 For a discussion of Britain/Northern Ireland, Britain/Hong Kong and Britain/Gibraltar, see Rabin and Peled ,supra note 2.

5 See the following collection of articles :RIGHT-SIZING THE STATE: THE POLITICS OF MOVING BORDERS 138 (Brendan O’Leary, Ian S. Lustick, and Thomas Callaghy eds., 2001). Indeed the analysis unfolded in this essay may carry comparative insights even if the specific proposal analyzed here fails to gain a majority support in the Israeli public.

6 See SHAUL ARIELI, DOUBI SCHWARZ & HADAS TAGARI, INJUSTICE AND FOLLY: ON THE PROPOSALS TO CEDE ARAB LOCALITIES FROM ISRAEL TO PALESTINE, Floersheimer Institute for Policy Studies]...

transferred to the future Palestinian state (residents of the areas known as the large and small triangles or The Triangle for short in the central part of Israel). The latter vehemently reject the proposal. Nor is Palestine's attitude likely to favor it. Palestine would not impose citizenship upon a minority of its own people who wish to remain part of the state of which they are citizens. With no consent to the proposal on the part of two of the three parties, the moral and legal difficulties abound. I shall expand on that below, but first I will point out the proposal's other difficulties.

I shall begin with two reservations. First, the difficulties 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 vagueness by data and arguments. Second, the heavy toll that I expect the proposal to take, it is likely to take simultaneously from all three parties involved: Jewish Israelis, Arab-Palestinian Israeli citizens and Palestinians. 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." That is a simplistic approach; playing with fire often endangers all who stand by.

These are the prices I expect the proposal to levy.

First, the plan wears down the layer of citizenship that protects the Arab-Palestinian minority of Israel, and that layer is one of the central apparatuses that restrain their slide toward participation in the armed struggle of parts of their people. I shall expand on that point presently. 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 so long as Israel's Arab-Palestinian citizens are not turned into its enemies or bitter opponents. As most of them live in

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7 According to one representative national survey performed by Sammy Smooha in the framework of Madad Yachasei Aravim-Yehudim b'Yisrael 2007 [The Arab-Jewish Relations in Israel Index 2007], 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 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 the Madah el-Carmel le'Mechkarim Chevrat'im [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.

integrated areas difficult to partition even theoretically (the Galilee, the Negev, mixed cities, et cetera), should they turn into enemies of the state, or become determined opponents of its territorial framework, the possibility of partition will melt away.

Until now, Israeli citizenship has had real weight in the identity of the Arab-Palestinian minority. The last 60 years and more of their history is the history 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. A substantial majority of them is bilingual, and have made Israeli culture partly their own. In Israel they enjoy a certain amount of social and economic benefits, a certain level of rule of law and of freedom to exercise political activity, a certain amount of protection from religious coercion of fundamentalist forces within their own community, et cetera. It may be for this reason (as well as others) that Arab-Palestinian citizens' cooperation with terrorism has remained marginal and is internally condemned. Furthermore the current ideological challenging of the state's "Jewish and democratic" definition 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.

However, what will happen if something deep inside the minority cracks due to Israel's conduct? It is my view that should the "territorial exchange" proposal be implemented or the oath of allegiance condition be imposed – or even if the probability of such eventualities is intensified – the continued political restra int of the minority would not survive. It was due to things that seem smaller that the legitimacy of the "Home Rule" in Northern Ireland in the late 1960's broke down, bringing in a thirty year period of armed struggle and terrorism on the part of the two national communities living there. That violent breakdown occurred there despite the fact

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9 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 a demand be raised to discuss alteration of those 1949 armistice borders, e.g. to borders that were outlined in the 1947 UN partition plan and provide for a much larger Palestinian-Arab state?

10 For the "Future Vision" documents – a series of documents worded by various groups of researchers and intellectuals among the Arab-Palestinian minority, that appeared in 2007, see, inter alia, Elie Rekhess, The Evolvement of an Arab–Palestinian National Minority In Israel, 12(3) ISR. STUD. 1 (2007).

that (unlike Israel's relations with the Palestinian people) British-Irish relations were at that time tranquil.

The main point to understand about Yisrael Beiteenu's proposal is its significance in spelling out for the Palestinian citizens of Israel how fragile and potentially temporary their citizenship is. In essence these citizens, who for three generations have been leading their lives within a certain community vis-à-vis a certain society, economy and culture, are being told that the border will be moved west and north, and will detach them 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, et cetera). That also entails a severe impingement upon the cultural ties that the transferred citizens currently maintain with the society closest to them – the rest of the minority Arab-Palestinian community, and the Jewish-Israeli society. Moreover, and very important, is the fact that these people have maintained family ties over three generations with their relatives from the Galilee, the mixed cities and the Negev. And now their state of citizenship is about to say to them: "you must cross border checkpoints in order to see your adult children, your grandchildren, your parents or your siblings, who live in Nazareth, Haifa, Ramle, or, in the other direction – in Um el Fahem or Kafar Kassem."

Furthermore, the question is not merely what the proposal intends to detach the Arab citizen residents of the "Triangle" 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 the Arab citizens (or some of them) might change, but at present the future Palestinian state looks to be unstable, poor, not sufficiently democratic; a society in the shadow of a neighbor (Israel) seen as very powerful and exploitive, and one expected to continue intervening in its affairs. The society of the new Palestinian state may well be bogged down by fierce internal struggles between extremists and moderates, fundamentalists and secular. At least at first its poverty will make it difficult for it to be welcoming, especially towards the "Arabs of 48" (the Palestinian-Arabs who remained in Israel after the 1948 war). 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 residents of the "Triangle region", and among the minority community as a whole.
One additional point should be noticed: people often take on an identity and behave on the basis of their expectations, that is to say, on the basis of the fashion in which they imagine their future. It may be assumed that when the Arab citizens of the "Triangle" internalize their new status as temporary citizens of Israel marked for 'exchange' and people whose expected future is in Palestine, their self-identity is likely to change, along with their political behavior – with all that that entails. To that one must add the anger that they would feel towards what the proposal symbolizes regarding their civil status and the tolls that it will take.

Some may ask: isn't the predicted damage to the identity and political behavior of the Arab-Palestinian minority in the wake of the proposal in existence already without it, expressed by increasing internal opposition to the character of Israel as a Jewish state? There are 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 contains real internal checks preventing resort to armed struggle in order to change it. Second, the growing opposition within the minority community to the character of Israel as a Jewish state stems from disillusionment and even desperation of the "Jewish and democratic state" formula. The formula is perceived as the repetitive excuse for Israel's misdeeds both toward the minority's people (continuation of the occupation and settlement expansion) and toward the minority itself (years of discrimination and exclusion). And indeed, as demonstrated by the Rabin-Peres government period (1993-1996, the first years of the Oslo process), when an improvement in the Israeli public policy took place simultaneously toward the Palestinians and toward the Arab-Palestinian minority in Israel, a real change resulted in the minority's attitude toward the state. Third, even if the pattern of relations inside Israel is already deteriorating, how would the populated territorial exchange proposal stabilize the situation? It presents a direct and clear threat to more than ten percent of the minority community, and it alienates and outrages the rest. The alienation and anger are not geographically limited, as the proposal demonstrates the fragility of their citizenship to all Arab citizens, a citizenship the temporality of which

12 In the Jewish-Arab Relations Survey 2007 (supra note 7), the findings showed that only 10.8% of the Arabs surveyed supported use of "all ways, including violence, in order to improve their situation in Israel."

13 Id, id.
is even more striking by comparison with the "eternalness" of the right of every Jew to naturalization in Israel. In addition, part of the price involved in moving the border, e.g. the strain that will be put upon family ties, would be paid not only by the Arab citizens transferred beyond the border, but, of course, also by their relatives remaining on the Israeli side.

However, if we invite to the discussion calculations of utility and practical reason, what lies on the "benefit" side of the proposal? Its supporters see it as "the only way to an agreement"; a necessary condition for the settlement of the Israeli-Palestinian conflict. Why is it so? Probably because they foresee no support of the Israeli-Jewish public for the concessions needed for such a settlement without the proposal's benefits in the eyes of this public: changing the demographic balance within Israel in favor of the Jewish community; a reduction in the numbers of Israeli settlers in the occupied territories to be displaced, with all the suffering and reparation burden which that entails; and reducing the danger of civil war between Jews should no populated territorial exchange be undertaken.

My answers to those claims will be provided as part of the constitutional analysis that follows.

III. 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 in Israel's constitutional law. The essay does not deal with the validity of the proposal in International Law. As mentioned above, International Law scholars have discussed the territorial exchange aspect of the proposal. By contrast, Israeli constitutional law has not been explored. Often constitutional law is more detailed, and in some countries more protective, than international law.

Two questions arise: will the legislation required in order to implement the proposal confront constitutional hurdles? And could it overcome them?

I shall begin with laying out the main legal implications of the proposal:

14 For the supporting reasons see the sources referred to in supra note 6. The quotation is the title of Bigger's piece.

15 See, supra, the sources noted in note 2.
a. The proposal intends to transfer citizens to foreign sovereignty.
b. The proposal also intends to transfer territory from the State of Israel to foreign sovereignty.
c. According to the wording of the proposal, the citizenship of these citizens will not be revoked formally, but the "economic obligations" of the state toward them will not be preserved.16
d. However, the question of the civil standing of the transferees does not end there. There is also a "bottom line" in Yisrael Beiteenu's proposal: "everyone pledges allegiance to the state."17 This integrates two ideas of the party – territorial exchange and subjecting Israeli citizenship rights (specifically the right to participate in Knesset elections) only to citizens who pledge allegiance to the state.18
e. The proposal makes the recrossing of the border by the transferred citizens conditional upon "the level of security which Israel enjoys."19 That is to say, it restricts their freedom of movement (and of other citizens wishing to continue their ties with them), on the basis of the conduct of others. As explained above, the meaning of that is restriction of those citizens' ability to preserve the entirety of fields of human experience: family ties, employment, cultural and identity links with the other members of the minority Arab-Palestinian community, as well as with the Israeli-Jewish community.

These are the legal implications of the proposal, if adopted. Do they clash with constitutional imperatives? An outline of the current constitutional structure of Israel is called for at this point.

In the early 1990s, Israel has significantly moved away from a "Westminster model" of government – the supremacy of the sovereignty of Parliament principle.

16 See, supra, note 1, sec. 3(e) of the proposal.
17 See, supra, note 1, the last sentence of the proposal.
18 In his presentation appearing in the Yisrael Beiteenu site, Mr. Lieberman makes the following obligation:
"In the next Knesset, Yisrael Beiteenu 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 Beiteenu 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." (beiteenu.org.il/147/2674/article.html). See a more detailed wording in the party platform, p. 7 (supra note 1), and see also the law draft bill referred to in note 29 below.
19 See, supra, note 1, sec. 3(f) of the proposal.
Meaningful elements of constitutionalism became part of its regime. This has been the product of two major developments, which came to be known as the “constitutional revolution”: the first is the passing of Basic Law: Human Dignity and Liberty and of Basic Law: Freedom of Occupation, both in 1992; and the second is the case of Mizrachi Bank v. Migdal, perhaps the most important ruling ever in Israeli law, in which the Supreme Court determined the meaning and significance of the first development. 20 The net outcome has been a change in the normative pyramid of Israeli law, involving the granting of a new – constitutional – status to an important spectrum of human rights, and to Israel’s entire set of Basic Laws, including those dealing with state institutions, which were enacted before the 1990s but had been viewed as belonging on the normative level of regular legislation. This means that new legislation is now deemed valid only if it does not conflict with the Basic Laws. 21

As the proposal proposes both "population exchange" and "territorial exchange", and its intention is to transfer the "Triangle" area and East Jerusalem to Palestine, I shall open with the less complicated issue: is there a constitutional hurdle standing in the way of transfer of Israeli territory to foreign sovereignty?

3.1 "Territorial Exchange": Constitutional Hurdles regarding Transfer of East Jerusalem and the "Triangle Region" from Israel's Sovereignty

According to Israeli domestic law, currently only East Jerusalem raises a constitutional issue.

Soon after the 1967 war and its conquests Israel acted through its domestic law to annex parts of the occupied territories: East Jerusalem was annexed in 196722 and the

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Golan Heights in 1981.\textsuperscript{23} These acts are not recognized by International Law, but since I concentrate on Israeli Constitutional Law I will not expand on it.\textsuperscript{24} In September 1967, following annexation, Israel conducted in East Jerusalem a census and issued status of residents to the Palestinians inhabitants. Under certain quite demanding conditions the Palestinian residents of East Jerusalem could in principle acquire Israeli citizenship but almost all of them, mainly for political reasons, opted not to.\textsuperscript{25}

East Jerusalem raises a constitutional issue because in July 1980 the Knesset enacted the Basic Law: Jerusalem, Capital of Israel. According to Section 1, "Jerusalem, complete and united, is the capital of Israel". In 2000, an amendment to the Basic Law was adopted. Article 6 of that basic law now states that "No 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 of the basic law 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 120. Thus, this is a real constitutional hurdle: a regular statute (a statute which is not a basic law or an amendment thereof) adopting the populated territorial exchange program, will not be sufficient to transfer East Jerusalem to Palestine, notwithstanding the majority it assembles; what is necessary is a basic law (or an amendment thereof) adopting it by a majority of the Members of Knesset.

The legal situation is different regarding the "Triangle region". Controlling that territorial transfer is the Law and Administration Law (Cancellation of the Application of the Law, Jurisdiction and Administration), 5759-1999. That statute makes concession of territory of the State of Israel (barring \textit{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) taken by "a majority of

\textsuperscript{23} The Golan Heights Law, 5742-1981.


\textsuperscript{25} Lein \textit{id}, at 209-210.
its members" (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 shall not enter into a comprehensive discussion of the meaning of these requirements, as they do not present a true constitutional hurdle for the time being. The Law and Administration Law (Cancellation of the Application of the Law, Jurisdiction and Administration) is a regular statute, which can be overcome with a lex posterior, particularly lex specialis. Thus it appears that The Law and Administration Law does not provide a basis for judicial review of the validity of a Knesset legislation adopting the territorial exchange proposal regarding the "Triangle region". Concerning the issue of the territory itself a real constitutional hurdle hence appears only with regard to relinquishing East Jerusalem.

3.2. "Population Exchange" and Accompanying Steps – Constitutional Hurdles regarding Harm to Citizens and Residents: Are Constitutionally Protected Rights being Infringed?

Transferring populated territory is of course not only an issue of territory. I discussed above the implications of the proposal upon myriad life dimensions of the Arab-Palestinian citizens of Israel who are to be transferred with their municipalities to Palestine. I will soon discuss the issue of the oath of allegiance. There is no real claim that the proposal (if adopted) does not impinge upon basic rights. However once the proposal be translated into statute, as indeed Israeli constitutional structure demands for its implementation, two advanced questions will have to be answered: what is the status of the impinged rights – are they constitutional rights? And is there a valid justification for their impingement? The question of the rights' status is central, as only a clash with constitutional protections or other constitutional provisions leads to judicial review by the courts of Knesset legislation.

The judicial review submits impinging laws to important limitations. These limitations appear in what is probably the most central provision in Israel's current
constitutional structure, the "limitation clause".\footnote{Article 8 of Basic Law: Human Dignity and Liberty, 5752-1992, 1391 LSI 150 (1992) (Isr.); Article 4 of Basic Law: Freedom of Occupation, 5754-1994, 1454 LSI 90 (1994) (Isr.). On the importance and on the detailed mechanisms of the Limitation Clause and especially its "proportionality" requirement, see, \textit{inter alia}, Aharon Barak, \textit{Proportional Effect: The Israeli Experience}, 57 U. Toronto L.J. 369, 370-73 (2007); Alec S. Sweet and Jud Mathews, \textit{Proportionality Balancing and Global Constitutionalism}, 47 Colum. J. Transnat’l L. 72, 131-137 (2008).} The limitation clause requires a) that the impingement upon the constitutional rights be provided "in statute" or pursuant to "express authority" in a statute; b) that the statute befit "the values of the State of Israel" as a Jewish and democratic state; it is accepted that one can assume that such a fit exists if the two following requirements in the limitation clause are fulfilled; c) that the statute pursues a legitimate purpose; d) and that the means chosen to serve the statute's purpose will impinge upon the constitutional right only "to an extent that does not exceed the necessary extent."

The limitation clause applies directly in the case of 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 express limitation clause.\footnote{So ruled the Supreme Court of Israel when analyzing the right to be elected (Articles 6 and 7 of Basic Law: The Knesset), EA 92/03 Mofaz v. The Chairperson of the Central Elections Committee for the Sixteenth Knesset, 57(3) PD 793 (2003).} As we shall now see, the proposal impinges simultaneously upon a number of constitutional rights.

\subsection{3.2.1 Conditioning the Constitutional Right to Vote upon an "Oath of Allegiance"}

The concluding sentence quoted from the Yisrael Beitenu proposal for transferring populated territories declares "everyone pledges allegiance to the state". These are not "just words". Party leader Minister Lieberman has promised to promote an amendment of the Citizenship Law, according to which a person who does not pledge allegiance to the Jewish state "shall lose his right to vote and be elected",\footnote{See supra note 18 for his written commitment.} and, indeed, MKs from his party have submitted a draft law bill to amend the Citizenship Law which goes even farther than the right to vote and be elected, according to which "A condition for receiving citizenship pursuant to this statute [The Citizenship 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.'

The oath of allegiance component in the proposal entails an impingement upon the constitutional rights to vote and be elected – which are entrenched in Basic Law: The Knesset. It should be noted in advance that Basic Law: The Knesset already makes the right to be elected conditional upon an oath of allegiance, but a) it does so in a significantly different wording than the one proposed; and b) Israel's current law does not make the right to vote conditional upon a similar oath. The proposal intends to change that.

I will state at the outset that making the right to vote contingent upon an oath of allegiance is expected to fail to fulfill the requirements of the "limitation clause". I know of no democratic legal system whatsoever that allows revoking the right to vote from citizens who do not wish to "pledge allegiance". This component of the proposal is expected to be struck down. I shall expand my reasoning a bit. Oaths of allegiance are found in Israeli law, but only in the following two places: as a condition

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

30 Article 7a of the basic law, which 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, determines that "The 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 split 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. This difficulty thus also impinges upon the "equality" of the Knesset elections, a right entrenched in Article 4 of Basic Law: The Knesset.


32 I shall not discuss here the complicated possibility of enacting the proposal by way of 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 an entanglement of issues, some of which were discussed in the Mizrachi Bank case (supra note 20). Indeed, in comparative law we at times encounter judicial review that annuls "constitutional amendments which are not constitutional," but that is very exceptional intervention. Such intervention took place recently in Turkey. See Emrullah Uru, 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
for serving in various public capacities\textsuperscript{33} and as part of a "naturalization" process for those who attain Israeli citizenship as a result of living in Israel, whose citizenship is pursuant not to the Law of Return, but rather to the Citizenship Law.\textsuperscript{34} I have reservations regarding this state of affairs, but this is not the place to present them.\textsuperscript{35} However, the focus of the proposal under review is the extreme alteration of this state of affairs to the extent of making conditional upon such an oath of allegiance the very right of citizens to their citizenship, or at least to their vote. I have already noted that no such norm can be found at all in democratic states I know.

At times the supporters of the proposal refer to the example of the pledge of allegiance that some schools in the US require of their pupils in various ceremonies; however this example cannot support the proposal. First, in most cases the requirement of American pupils is not accompanied by the threat of any official sanction whatsoever. Second, in the past, the punishment for refusal to "pledge allegiance" was disciplinary punishment on the part of the school (far from revocation of the right to vote), but even that was decisively struck down. In the \textit{Barnette} case, the Supreme Court annulled a rule of the West Virginia State Board of Education

\textsuperscript{33} \textit{See supra} note 30 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, \textit{see}, primarily, the following provisions of law: sections 34 and 52 of The State Service Law (Appointments), 5719-1959; section 7 of the Kadies (Muslim Religious Judges) Law, 5721-1961; Article 6 of \textit{Basic Law: Judicature}. Furthermore, the wording of the oath is usually as follows: "I pledge to be loyal to the State of Israel and its laws." That is a much more neutral wording than the oath of allegiance to the State of Israel "as a Jewish, Zionist and democratic state", proposed by \textit{Yisrael Beitenu}.

\textsuperscript{34} \textit{See} section 5 of the Citizenship Law, 5712-1952: "[…] (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".

\textsuperscript{35} I shall say briefly that such a condition regarding public 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 – from a Jewish state to a bi-national state in the borders of the green line or of \textit{Eretz Yisrael}/Mandatory Palestine? 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 \textit{means} in order to attain the republican goal. For discussion \textit{see} Walker Clive, \textit{Political Violence and Democracy in Northern Ireland}, 51 MODERN LAW REVIEW 605-622 (1988).
allowing schools to require students to salute the US flag and to take disciplinary action against refusers.\textsuperscript{36}

However, it should be noted that the Supreme Court of Israel has already discussed a similar proposal by another party that was registered in Israel, the \textit{Yemin Yisrael} party, 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."

However, the Court did so then \textit{not} by way of examining the constitutionality of the oath requirement, if legislated, but whether such a requirement disqualifies a political party from registration. This was the \textit{Yassin} case,\textsuperscript{37} the judgment in which the applicant requested the annulment of the political parties registrar's decision to allow registration of the \textit{Yemin Yisrael} party, on the basis of this clause in its platform. The reasoning in the application was that this said requirement "constitutes incitement to racism, and is, in and of itself, an illegal objective." Justice Barak, writing for the Supreme Court, rejected that argument. He was of the opinion that "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."\textsuperscript{38}

There is no small degree of difficulty in this wording of Justice Barak, but what is important for the issue under discussion is that the decision in the \textit{Yassin} case \textit{does not} relate to the very constitutionality of conditioning the right to vote upon an oath, should the Knesset attempt to adopt it. This is an important point, as the decision in \textit{Yassin} deals with a relatively early stage of the development of danger posed by dangerous parties – their registration. The stages in parties' lives that involve greater danger are participation in Knesset Elections, and when they submit law draft bills. Conscious to this the law authorizes the Central Elections Committee (with appeal jurisdiction to the Supreme Court of Israel) to disqualify a party from running for Knesset, in Article 7a of Basic Law: The Knesset, and it authorizes the Knesset

\textsuperscript{36} West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). \textit{See} the well known remarks of Justice Jackson, reflecting the heart of his reasoning, \textit{id.}, at p. 642: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

\textsuperscript{37} CApp 7504/95 Yassin v. Yemin Yisrael, 50(2) PD 45 (1995).

\textsuperscript{38} \textit{Id.}, at paragraph 27 of the judgment.
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" (section 134(c) of the Knesset Bylaws). Moreover, as discussed above, regarding constitutional rights, Israeli law grants the Court jurisdiction for judicial review of the validity of statutes enacted by the Knesset that impinge upon those rights.

Indeed the Court is not expected to confirm a statute that revokes the citizenship or the right to vote of citizens whose only crime is their refusal to "pledge allegiance." I am assertive here since it is very hard to assume differently from the same Court that rejected a petition against a decision of the Interior Minister not to revoke the citizenship of Yigal Amir, the assassin of Israel's Prime Minister – *inter alia* due to the fact that it found that citizenship is a basic right and constitutes "the foundation of the right to vote in Knesset elections, from which democracy stems". 39

Liberal democracy does not impinge upon basic rights of its citizens on the basis of how they feel about the state, or with a view to imbue them with a feeling of solidarity, or to sift the loyal from the disloyal among them. Impingement upon basic rights is conditional upon the fulfillment of the "Harm principle": 40 a necessary precondition for impinging upon a person's rights is that he or she has caused harm, or puts others in real danger of such harm, or – in rare cases – that there is a danger of a significant self-inflicted harm. The thoughts of a citizen, especially in the case of a member of a homeland minority, regarding the state of his citizenship – a state which she may see as one forced upon her, and as one she would like to change – are far from fulfilling the "harm principle". The majority community in a democratic state cannot impose upon a native population within it 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. So long as a person acts to realize her/his thoughts and desires regarding the national character of her/his state in nonviolent ways the harm principle is not fulfilled. 41

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39 HCJ 2757/96 Elroi v. The Minister of the Interior, 50(2) PD 18 (1996); paragraph 4 of Zamir, J.'s judgment.

40 JOHN STUART MILL, ON LIBERTY, pp. 68, 144-147.

41 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 must agree that there is a difference between them, and that the justification for its national identity is a contingent one, as opposed to the justification for its democratic character. In other words, a change of
Even a person who transgresses distinct red lines, as Prime Minister Rabin's assassin had done, there is still considerable doubt whether it is proper or legally possible to add to the punishment or the legal restrictions revocation of citizenship as well.\textsuperscript{42}

To continue the constitutional discussion let us assume a softened version of Yisrael Beitenu's proposal put up for political and legal considerations, one that preserves the Israeli citizenship of transferred Arabs (and of course all other citizens) without making their right to vote conditional upon the oath of allegiance. What are the components of the impingement entailed in the transfer itself?

\subsection*{3.2.2 The Proposal's Impingement upon Other Major Constitutional Rights}

A. As explained at the beginning of this essay, by restricting freedom of movement into Israel of its citizens who are transferred beyond the border, the moving of the border impinges upon their \textit{right to family life}. But is it a constitutional right? Recently the Supreme Court of Israel, in a judgment dealing with the validity of the Citizenship and Entry into Israel Law (temporary provision), 5763-2003,\textsuperscript{43} ruled that

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\textsuperscript{42}See the Elroi case, supra note 39.

the right to family life is constitutionally protected, pursuant to the right to "human dignity"; but in that judgment the Court dealt with the right to unification between spouses, and between parents and their small children. Its stance on the constitutional standing of family ties of a less immediate degree is not clear. It may well be that such ties do not enjoy a constitutional right status in Israeli Law.

B. Moving the border, and the limitation of freedom of movement that such a step imposes also manifestly impinge upon the freedom of occupation of the citizens transferred beyond the border and that is a constitutional right protected by Basic Law: Freedom of Occupation.

C. The expected instability of the border between Israel and the Palestinian state also negatively affects another constitutional right appearing in Article 6(b) of Basic Law: Human Dignity and Freedom according to which "Every Israeli citizen who is out of the country has a right to enter Israel."

D. Another very central right that is impinged upon is the right to equality (see explanation below). The Supreme Court of Israel has recognized certain aspects of this right as constitutionally protected in the framework of the right to "human dignity".44

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.45 The correct view is that by paying national insurance payments, a person acquires rights to benefit payments, rights that must not be annulled (a fortiori if the person did not leave the country of his own accord).46

F. The aggregate picture shows – even without the issue of making the right to vote conditional upon an oath of allegiance – that the population and territorial exchange proposal, if implemented, will grossly handicap the citizenship of those

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45 HCJ 5578/02 Manor v. The Finance Minister, 59(1) PD 729, 739 (2004); HCJ 366/03 Mechuyavut v. The Finance Minister, 60(3) PD 464 (2005).

46 For a discussion of this issue regarding East Jerusalem, see: Lein, supra note 24.
citizens whom the new border will leave outside the boundaries of the state. Citizenship means a kind of partnership, or at the very least protection from the aggregation of the harms entailed in the removal from the boundaries of the state: restriction of the right of citizens to enter Israel; severance of family, social and employment ties with their partners to citizenship; being the target of these harms due to their national-ethnic background; et cetera. In other words, citizens have a right to expect their state not to deplete their citizenship of content while pretending it is still intact by not passing a formal decision of citizenship revocation.47

Now that we have identified the proposal's impingements upon the constitutional basic rights of the transferred Arab citizens, we shall turn to the next and last stage of the constitutional analysis: the possibility of justifying these impingements; validating them by answering the demands of the "limitation clause".

3.3 Does the Impingement upon Constitutional Rights fulfill the Requirements of the "Limitations Clause", Especially the Demands for "Legitimate Purpose" and "Proportionality"

We have reached the last issue which is also the core issue. The central argument of the proposal's advocates might be phrased as follows: "our proposal is the most proportionate of the possibilities being considered for attaining viable sustainable agreement with the Palestinians. We strive to avoid the tremendous burden entailed in uprooting group A of citizens (the settlers) through a step that does not involve physical uprooting of citizens from group B (the residents of the Triangle region). The suffering of the Arab citizens transferred in territorial exchange is less than the suffering of the Jews living in the settlements, as the burden of the former does not involve uprooting them from their homes and local communities."

This argument is, in my opinion, an unsuccessful one.

47 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 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 it further here however, because I focus on the issue of constitutional hurdles to the proposal, while the question of whether the Palestinians are protected by Israeli constitutional guaranties has not yet been authoritatively decided by the Supreme Court.
First, 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 involvement in it, contrary to sec. 49 of the 4th Geneva Convention.\textsuperscript{48} Even the Supreme Court of Israel referred to the status of the settlements as "temporary" in a certain important sense.\textsuperscript{49} If asked to differentiate between the Israeli settlers of the West Bank and the resident citizens of the "Triangle region" from the perspective of International Law, the distinction would be quite clear: the rights of the settlers are not equal to those of regular citizens, \textit{a fortiori} to those of members of native communities, especially since government-supported settlement in occupied territory is illegal. Moreover, from a fairness perspective, 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 makes more sense to harm those citizens more responsible for obstructing peace.

However, the discussion in this essay is focused 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.\textsuperscript{50} Thus, Israeli constitutional law forces us to examine whether there aren't additional reasons, beyond the legal status of the settlements in international law, which delegitimize choosing the Arab citizens of the "Triangle" to be those to pay the price of the proposal.


\textsuperscript{49} HCJ 390/79 Duikat v. The Government of Israel, 34(1) PD 1, 21 (1979): "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…".

\textsuperscript{50} See HCJ 1661/05 The Gaza Coast Regional Council v. The Knesset, 59(2) PD 481 (2005), as well as HCJ 7957/04 Ma'arabe v. The Government of Israel, 60(2) PD 477, 498, paragraph 19 (2005): "our 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."
Hence I reach my second counter-argument. Comparing the burden and suffering of uprooted settlers to that of citizens transferred along with their territory is a multivariable comparison, but it seems likely that for most of us, erection of a border (certainly an unstable one) between us and our children, parents, siblings, friends, workplaces and in general the society to which we have belonged all our lives, is a greater burden than forsaking a house and local community. Uprooting the settlers – notwithstanding the pain that is certainly involved – leaves them entirely within the society in which they live and to which they are linked by social, familial, economic, political, national, and cultural ties. That is not the case regarding the Arab-Palestinian citizens in the "Triangle" that the proposal plans to exchange. Their ties with their people in the West Bank are of great importance, but of significantly lesser than those central ties that form their present lives, within the Arab-Palestinian minority inside Israel and Israeli society in general.

Third, its discriminatory aspect is the most conspicuous of the proposal: 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. If we compare with the "disengagement" plan – the uprooting of the settlers from the Gaza strip in 2005 – we find that it aimed at the public good. The settlers were uprooted because their settlements were seen to be a major reason for the Palestinian uprising and the government and later the Knesset considered this a necessary step towards calming down the conflict. In retrospect, they may have been mistaken (at least in the short run), but my point is that the objective of the disengagement from Gaza was not discriminatory; it was the good of all citizens of Israeli society. That not being the present case, the majority decision to have the minority community pay the price is thus an impingement upon the right to equality vested in the individuals of that community.

To clarify more the point about discrimination: if the situation were reversed, and the Palestinians had demanded unification with part of their people living in Israel as a condition for peace with Israel, the propounders of the proposal might have been able to speak in the name of "the common good"; or if one had to choose between a sparsely and a densely populated part of Israel, it would have been possible to argue that the decision to choose the sparsely populated part is one that would be made behind the "veil of ignorance". However, the state of affairs is completely different: it is entirely clear, almost proclaimed, why the "Triangle" resident-citizens are the ones
chosen for transfer, in face of their opposition. This point reveals the ethnocentric character of the choice.

*Yisrael Beitenu* attempts to answer these arguments. It does so by referring to the "common good" in another way: by reference to the security argument, regarding "stability of the arrangement with the Palestinians." From the party's platform:

> [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."

Such argumentation – that stability requires ethnic homogeneity, is a most problematic one. First, that was the impetus for the recent terrible crusade of "ethnic cleansing" in the Balkans, which resulted in around 100,000–110,000 dead and 1.8 million displaced in Bosnia alone. Second, homogeneity and "maximal separation" are no more realistic in Israeli society – whether the proposal is implemented or not – as it directly involves approximately 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 that Canada and Belgium teach us? Is that the lesson from Spain, Catalonia and the Basque country? What can we learn from the example of the new South Africa and the way its constitution handles the great racial, ethnic and lingual diversity within?

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51 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


54 See, *inter alia*: Adam, Heribert and Kogila Moodley, *SEEKING MANDELA: PEACEMAKING BETWEEN ISRAELIS AND PALESTINIANS* (2005); Courtney Jung, Ellen Lust-Okar and Ian Shapiro, *Problems and*
And what does the resolution of the conflict in Northern Ireland (the 1998 Belfast Accord) teach us? All these conflicts were resolved without the idea of territorial and population exchange even being raised. Fourth, Yisrael Beitenu's wording testifies to the party's views of the Arab citizens as a disloyal minority, and its supposition that they are therefore punishable, i.e., their basic rights may be violated and they may be enforced to transfer to Palestinian sovereignty. However, as analyzed in the 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, exemplified by the Jewish Ultra Orthodox and some Arab citizens who aspire to a Shari'a [Muslim law] state). Fulfillment of the "harm principle" is a necessary condition for the limitation of such rights.

The proposal hence fails to meet two major requirements of the "limitation clause": the "legitimate purpose" and the "proportionality" requirement.

As for the demand that there be a "Legitimate Purpose" for the impinging legislation: if the objective of the proposal is not really to attain the good of all Israeli citizens; and if ethnic homogeneity is an extremely dangerous idea; and if disloyalty is no justification for revoking basic rights; what else may be called for to validate the rights' infringement? The proposal’s proponents claim they strive not for ethnic cleansing but for a more "modest" demographic objective: strengthening the Jewish majority by removing some of the Arab citizens, along with their local communities, by moving the border. Is this demographic objective legitimate as a basis for substantive restrictions upon citizens?


55 See supra note 3.

56 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 section 4 of the Citizenship Law, 5712-1952, and AMNON RUBINSTEIN & BARAK MEDINA, HA Mishpat HaCHUKATI SHEL MEDINAT YISRAEL [THE CONSTITUTIONAL LAW OF ISRAEL] 1103 (6th ed. 2005).
The Supreme Court of Israel ruled that although the State of Israel does not obligate itself to the objective of equality for the Arab national minority in the field of group-differentiated rights, it does ensure it "absolute equality of rights" in the field of individual rights. The Ka'adan case is a telling precedent. It states: "True, a special key to enter the 'house' is granted exclusively to the members of the Jewish people (see the Right of Return, 5710-1950). But when a person is a legal lodger he enjoys rights equal to those of all other household members". In other words, the demographic objective is possible from a legal standpoint on the plane of "immigration quotas", and on the policy plane, regarding foreigners wishing to immigrate to Israel, but it is unconstitutional in the relations between a state and its citizens.

The "limitation clause" has another requirement for the validity of statutes that impinge upon constitutional rights. Hence, even those who have different thoughts regarding the legitimacy of demographic considerations as a "purpose" for negating or restricting basic rights must face an additional hurdle: the one concerning the "proportional means" requirement. Are the concrete proposed means – the transfer without consent of citizens, together with their localities – proportionate?

I shall encapsulate the aspects discussed above, because in my view they crystallize the answer: a) the great tolls levied on the transferred Arab citizens; b) the fact that the subjects of this "special tax" were chosen purposely since they are members of the national minority community; c) the fact that transfer of these populated territories, excepting East Jerusalem, is not in any way a demand of the Palestinian side; d) the unbearably heavy price to be expected in inter-community relations inside Israel should the proposal be advanced. If we keep all these aspects in mind, most of us would agree that the proposal is manifestly disproportionate.

57 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). See also Saban, supra, note 41, at 904-19.

58 HCJ 6698/95 Ka'adan v. The Israel Lands Authority, 54(1) PD 264 (2000).

There are those who would answer, that the aspiration to reduce the danger of civil war between Jews (should no populated territorial exchange be undertaken), must be taken into account in the proposal's balance of harm. I agree that taking this possible price into account in the framework of proportionality is acceptable. However, this argument is also doomed to failure: a) the proposal does not constitute the "least harmful means", as the objective of peace with the Palestinians can be attained without it, as far as the Palestinians are concerned; b) it is also disproportionate from the standpoint of the balance of harm that accompanies it, as it wishes to alleviate one tension – with the settlers and their supporters in the Israeli public – by creating another, more dangerous tension (for the reasons mentioned at the beginning of this essay), with the Arab-Palestinian minority; c) Red lines have to be demarcated: democracy does not allow the majority community to push the price of correcting its mistakes, and of the risks to which it has been exposed, over onto the minority.

IV. EAST JERUSALEM

We approach the end of the analysis. Some may challenge: why is there a tendency to agree to altering the border in Jerusalem and to terminating the residency status of the Palestinian residents of East Jerusalem, but sharp objection regarding the Arab-Palestinian Israeli citizens in the "Triangle"?60

One answer is related to the difference regarding the consent of the transferred citizens or residents, which leads also to a difference regarding the harm caused to them and regarding the "common good" equation. Regarding the equation on this last point it seems that most of the Palestinian residents of East Jerusalem would prefer to be "annexed" to the Palestinian State. Although I am not arguing that consent of a majority of the transferred residents is a condition (neither necessary nor sufficient) for the legal validity of a transfer proposal, it is, nonetheless, a variable of real moral, practical and legal significance.

60 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 24.
For example, the alteration of the border in East Jerusalem is actually expected to have a positive effect, both upon the relations with Jerusalem's Arab residents and upon Arab-Jewish relations inside Israel – as it fulfills the desire of the Palestinian residents of East Jerusalem and of the Arab-Palestinian citizens of Israel – whereas, on the other hand, alteration of the border in the "Triangle" area will definitely involve a break-up (most probably violent) of the relations between Jews and Arabs in Israel.

A second answer regards the chances for a final arrangement with the Palestinians without such a step. Transferring or shedding Israel's sovereignty over East Jerusalem to Palestine (that is to say, "Israeli dis-annexation" of the Arab part of Jerusalem) seems to be an absolute condition as far as the Palestinian side is concerned. This point, as explained above, may constitute "common good" that may justify that step.

Attention should also be paid to a third point: what the Palestinian residents of Jerusalem would lose as a result of the alteration of the border is much less than the burden that would be cast upon the Arab citizens of Israel transferred beyond the border: a) the Palestinians in East Jerusalem are, as explained above, residents not citizens of Israel; the right of participation in elections in Israel was in any case not possessed by them. Thus, altering the border would actually be likely to increase rather than detract from their political rights; b) the result regarding ties with family, community and culture of the East Jerusalem Palestinian residents is almost opposite to the result for the citizens of the "Triangle", as the main relations that the former have maintained have been with the Palestinian people in the occupied territories, not with the Arab-Palestinian minority community inside Israel. Thus, except with regard to the important aspect of employment, the results of border changes are almost opposite regarding the East Jerusalem residents.

The "Triangle region" and East Jerusalem are hence quite different issues, morally and legally.

V. CONCLUSION

The proposal to transfer populated territory, and to make citizenship or the right to vote conditional upon an oath of allegiance to Israel as a Jewish state, place the ethnic relations inside Israel in great danger, and (if adopted) severely violate moral
imperatives. It is lucky that Israeli constitutional law still places obstacles before the realization of these proposals, primarily in the form of Basic Law: Human Dignity and Freedom and its limitation clause, and Basic Law: The Knesset.

However, the question of the ability of these constitutional tools to stand their ground is present at all times, as it should be understood that although the basic laws are of superstatautorial status, they themselves have not been granted real means of protection. Most of Israel's basic laws, including the basic laws on human rights, and including 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. The chances of preventing the occurrence of such an amendment, which would revoke rights or weaken apparatuses for their protection, depend upon the existence of a political culture that honors human and minority rights, and understands how much more necessary "constitutionality" is in a deeply divided society, and especially in stormy times. Political culture of this type is wearing steadily thinner in Israel in the recent years.

Do we still have strong enough antibodies to stand up to this dark wave of fear that sparks aggression, nationalism and messianic fervor (on both sides)? I used to be more optimistic with regard to this question.

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61 See RUBINSTEIN & BARAK MEDINA supra note 56, at ch.2 and sources in supra note 21.