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WHY CITIZENSHIP?

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## Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime

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# Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime

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*In this Article I argue that the citizenship status of Israel's Palestinian citizens has been eroding since the "events" of October 2000 and that, as a result, Israel, within its 1967 borders, may be moving from a form of democracy that has been termed "ethnic democracy" towards a form of non-democratic state that has been termed "ethnocracy." My argument is based primarily on two legal documents: the new Citizenship and Entry into Israel (Temporary Order) Law, 2003, which denies Palestinian citizens the right to unite with their closest family members who are residents of the Occupied Territories, and the decision of the High Court of Justice that upheld the constitutionality of this law in 2006. Two other developments that seem to support my thesis are analyzed as well: the "events" of October 2000 themselves and the report of the state commission of inquiry that investigated these events (the Or Commission), and the plan, advanced by Yvette Lieberman and his political party, "Yisrael Beytenu," to shift the border between Israel and the West Bank westward, depriving tens of thousands of citizen-Palestinians of their Israeli citizenship.*

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\* Department of Political Science, Tel Aviv University. The author would like to thank Ilan Saban for his help in obtaining several of the documents used in this article and for his insightful criticism, the organizers and participants of the Why Citizenship? workshop, University of Toronto Law School, May 2006, and, especially, Horit Herman Peled.

### INTRODUCTION: A WESTERN DEMOCRACY?

The Advisory Committee for the Examination of an Immigration Policy for the State of Israel (the Rubinstein committee) was appointed by the Israeli cabinet in June 2005 as part of its decision to design "an immigration policy for the State of Israel — that will be based not only on security considerations, but that will also guarantee the existence of Israel as a Jewish and democratic state."<sup>1</sup> Historically, Israel has not seen itself as an immigration country. The Law of Return (1950), which granted every Jew in the world the right to settle in Israel, was not an immigration law, declared David Ben-Gurion when he presented it to the Knesset, but rather the founding law of the state. For the law did not grant Jews any right that they had not possessed beforehand. The Jews' right to the Land of Israel preceded the establishment of the State of Israel, and the state's right to the land derived from the Jews' right to it, not vice versa.<sup>2</sup> Persons not covered by the Law of Return had virtually no way of immigrating to Israel, except through marriage to an Israeli citizen or permanent resident.

In 2003, as an ad-hoc measure in the context of the second *intifada*, the Citizenship and Entry into Israel (Temporary Order) Law<sup>3</sup> was enacted, prohibiting the granting of Israeli residency or citizenship to Palestinian residents of the Occupied Territories, even if they were married to Israeli citizens, for one year. Repeatedly extended since then, this "temporary order" in effect deprived Israel's Palestinian *citizens* of the right to unite with their non-citizen Palestinian spouses and children, creating, for the first time, an *explicit*, if only consequential, distinction between their individual citizenship rights and those of Israel's Jewish citizens. (Only Palestinian citizens are likely to marry non-citizen Palestinians.) Following criticism by the High Court of Justice (HCJ), the law was amended and made marginally less restrictive in July 2005. A permanent version of the law is now being prepared.<sup>4</sup>

The academic committee charged with preparing the groundwork for this

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1 Advisory Committee for the Examination of an Immigration Policy for the State of Israel, Interim Report (Feb. 2, 2006) (unpublished report, on file with author) (Hebrew) [hereinafter Rubinstein Committee, Interim Report]. The committee was established by Cabinet Decision No. 3805 (June 26, 2005).

2 DK (1950) 2035-37; Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432 (1992).

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

4 Legal Counsel, Ministry of the Interior, Memorandum Regarding Draft Bill Amending the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003 (Nov. 23, 2006) (unpublished memorandum, on file with author); see also a response

permanent law defined its task as stemming from the fact that "Israel is the only Western democracy whose land borders are all adjacent to poor Third World countries."<sup>5</sup> This definition raises an important question: can a "Jewish and democratic" state be considered a "Western democracy"? The answer to this question depends, in turn, on what is understood by the term "Western democracy." Does the term designate a particular cultural orientation, a political orientation in some kind of global struggle, or perhaps a certain kind of regime or political system? To have a coherent theoretical meaning, the term "Western democracy" must be taken to mean "liberal democracy." The question, then, becomes: can a "Jewish and democratic" state be considered a liberal democracy?

Conceptually, the answer to this question is a very clear negative. To put it simply, a liberal democracy must accord equal individual citizenship rights to all of its citizens, regardless of ascriptive affiliation. For its self-definition to have any meaning, on the other hand, a state that defines itself as Jewish must privilege Jews in one way or another. These two principles, or discourses, of citizenship are incompatible.<sup>6</sup> The theoretically interesting debate in Israel has been, therefore, over the question whether Israel can be described as an *ethnic democracy*, or is it in reality a non-democratic "*ethnocracy*."<sup>7</sup>

As defined by Sammy Smooha, who adapted this concept to Israel, an ethnic democracy is a distinct type of democracy, to be distinguished from liberal, multicultural, consociational and *Herrenvolk* democracies. Smooha's unit of analysis is the state, both in the sense of the State of Israel within its pre-1967 borders and in the sense of the institutional complex charged with maintaining and reproducing the social order. The criterion he uses to distinguish between different types of democracy is the *constitutional* relationship between the dominant, or core, ethnic group, the state, and minority ethnic group(s). In an ethnic democracy, "the ethnic nation, not the citizenry, shapes the symbols, laws and policies of the state for the benefit

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to this memorandum by a group of law faculty professors (Dec. 8, 2006) (on file with author).

5 The committee is made up of four prominent legal scholars — Amnon Rubinstein, Yaffa Silberschatz, Ariel Bendor and Ruth Lapidot — and the *doyen* of Israeli political theorists, Shlomo Avineri. Rubinstein and Lapidot received the 2006 Israel Prize for legal scholarship.

6 GERSHON SHAFIR & YOAV PELED, *BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP* (2002).

7 See Yoav Peled & Doron Navot, *Ethnic Democracy Revisited: On the State of Democracy in the Jewish State*, 20 *ISR. STUD. F.* 3 (2005).

of the majority. This ideology makes a crucial distinction between members and non-members of the ethnic nation."<sup>8</sup>

An "ethnic democracy" is a democracy, according to Smooha, insofar as it still meets the minimal, procedural definition of democracy — rule by majority vote — and respects the liberal, individual rights of its citizens. It is

diminished [however] by the lack of equality of rights. Non-members of the ethnic nation enjoy rights that are in some way inferior to the rights of the members and endure discrimination by the state. Rule of law and quality of democracy are reduced by state measures intended to avert the perceived threat attributed to non-members.<sup>9</sup>

The crucial question, then, is: how much inequality of rights can a form of state sustain and still be called a democracy?

A thicker definition of democracy informs Oren Yiftachel's argument that Israel should not be characterized as a democracy at all. His definition of democracy includes several elements: equal and inclusive citizenship, civil rights, protection of minorities, and periodic, universal and free elections.<sup>10</sup> He persuasively argues that "despite the complex understanding of democracy, we must acknowledge that below a certain level, and with structural and repeated deviations from basic democratic principles . . . 'democracy' is no longer a credible classification."<sup>11</sup>

Yiftachel's territorial unit of analysis is the Israeli "control system," encompassing both the sovereign State of Israel and the Occupied Palestinian Territories. He argues that "'Israel proper' . . . simply does not exist, since it is impossible to define 'Israel' as a spatial unit, and it is difficult to define the boundaries of its body-politic . . . Israel operates as a polity without borders. This undermines a basic requirement of democracy — the existence of a 'demos.'<sup>12</sup> He also emphasizes "the dynamics of Israel's political geography, which have caused the state to radically change its demography, alter patterns of ethnic territorial control, rupture state borders, incorporate Jewish and

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8 Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 NATIONS & NATIONALISM 475, 477 (2002).

9 *Id.* at 478.

10 OREN YIFTACHEL, ETHNOCRACY: LAND, POLITICS AND IDENTITIES IN ISRAEL-PALESTINE 107 (2006); *see also* As'ad Ghanem et al., *Questioning "Ethnic Democracy": A Response to Sammy Smooha*, 3 ISR. STUD. 253, 255 (1998).

11 YIFTACHEL, *supra* note 10, at 91-92.

12 *Id.* at 96-97; Ghanem et al., *supra* note 10, at 260-64.

block Palestinian diasporas and form strong links between religion, territory and ethnicity."<sup>13</sup> Yiftachel concludes that it is the Jewish *ethnos*, not the Israeli *demos*, that rules the Jewish state, which therefore should be defined as an *ethnocracy* rather than a *democracy*.

Yiftachel's rejection of the distinction between the sovereign State of Israel and the Israeli control system renders the debate about Israel's democratic character superfluous. The control system, with 40% of its residents not enjoying any citizenship rights at all, is clearly not a democracy, and no serious scholar has argued differently. While Jews still enjoy a slight majority within the "control system," the fact that all Jews enjoy full citizenship rights, while the vast majority of Palestinians do not, qualifies this as a *Herrenvolk* democracy (which, of course, is no democracy at all). The debate over democracy is meaningful only in regard to Israel within its pre-1967 borders.

Contrary to Yiftachel's thesis, Israel within its pre-1967 borders is a well-defined entity in Israeli law (even if that definition has faded considerably in actual government practice and in the political consciousness of most Israeli Jews). The Israeli state holds the West Bank under belligerent occupation,<sup>14</sup> with no claim of legitimacy from its Palestinian residents, but that does not necessarily impinge on the democratic character of Israel itself. As Robert Dahl has noted, states can be "democratic with respect to [their] own demos, but not necessarily with respect to all persons subject to the collective decisions of the demos."<sup>15</sup>

Is pre-1967 Israel a democracy or an ethnocracy, then? Two issues are crucial to answering this question, beyond the basic procedural requirements: the degree to which Israel's Palestinian citizens enjoy equal citizenship rights, and their ability to effect positive change in their citizenship status within the framework of the law.<sup>16</sup> In the remainder of this essay I will argue that, based on these two criteria, in the first few years of the 21st century Israel, within its pre-1967 borders, has been moving steadily from ethnic democracy towards a form of state that strongly resembles an ethnocracy. My argument will be based primarily on two legal documents: the new Citizenship and Entry into Israel (Temporary Order) Law of 2003, which denies Palestinians

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13 YIFTACHEL, *supra* note 10, at 100.

14 HCJ 7052/03 Adalah v. Minister of the Interior [2006] 2 TakEl 1754 (Barak, C.J., para. 17). The formal situation of Gaza is not very clear right now, following Israel's disengagement from there, but substantively, and probably formally as well, it is also held by Israel under belligerent occupation.

15 ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 32-33 (1989).

16 *Cf.* Smooha, *supra* note 8, at 481.

who are citizens or permanent residents of Israel the right to unite with their spouses, children or parents who reside in the Occupied Territories, and the decision of the HCJ that upheld the constitutionality of this law in 2006.<sup>17</sup> For additional, supporting evidence I will rely on several other developments that have affected the citizenship status of Israel's Palestinian citizens during this period.

### I. FAMILY UNIFICATION

In July 2003 the Knesset enacted the Citizenship and Entry into Israel (Temporary Order) Law that categorically *prohibited* the Minister of the Interior from granting any kind of residency in or citizenship of Israel to residents of a "region" (an official euphemism for the Occupied Territories), even those who are married to Israeli citizens or have Israeli children or parents. Only a few esoteric categories of people were excepted from the prohibition, most significantly, collaborators with the Israeli security services. This law retained the main elements of an executive order that had already been in effect since May 2002.<sup>18</sup> The duration of the new law was to be one year, but it has been extended repeatedly since then. In July 2005, in response to criticism by the HCJ, the law was amended, so that now the Minister *may* grant temporary residence (but not permanent residence or citizenship) to men aged thirty-five or older and to women aged twenty-five or older whose spouses are legal residents of Israel, and to children aged fourteen or younger whose parents are legal residents of Israel. The state claimed that this amendment reduced the number of Palestinians barred from receiving temporary resident status in Israel by 30%.

Prior to the enactment of this law, "foreign" (i.e., non-Jewish, non-Israeli) spouses of Israeli citizens had to go through a graduated process of naturalization lasting four-and-a-half years, from the time the Israeli spouse applied for family unification to the time the foreign spouse could be granted Israeli citizenship. During this time the foreign spouse was examined on a yearly basis to ensure that he or she did not pose a criminal or security risk to the country (and, of course, that the marriage was a legitimate one). This arrangement is still in force for non-Palestinian foreign spouses of Israeli citizens.

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<sup>17</sup> *Adalah*, [2006] 2 TakEl 1754.

<sup>18</sup> Cabinet Decision No. 1813 (May 12, 2002). See ISRAEL AND THE PALESTINIAN MINORITY 2004, at 21-27 (Nimer Sultany ed., 2004).

Ever since it was enacted in 2003, the new law has been subject to intense debate and tested by a number of appeals to the HCJ. The debate has revolved around three issues: (a) does every Israeli citizen have a constitutionally guaranteed, fundamental right to family life *in Israel* (as opposed to the Occupied Territories, for example)? (b) if such a right does exist, can it be legally breached with respect to a *specific* group of citizens for considerations of national security? and (c) can that right be legally breached, with respect to a specific group of citizens, for the national-demographic reason of maintaining a Jewish majority in Israel?

Proponents of the new law have argued that while every Israeli citizen has a fundamental right to establish a family with whomever he or she chooses, he or she does not have a fundamental right to do so *in Israel*.<sup>19</sup> The right to do so in Israel can be legitimately breached for both security and demographic considerations. However, only security considerations can justify breaching that right collectively, for a *specific* sub-group of the citizenry, i.e., Palestinian citizens who choose to marry Palestinian residents of the Occupied Territories. Because of the ongoing conflict between Israel and the Palestinian Authority (PA), Palestinian residents of the Occupied Territories can be legitimately presumed to be a security risk to Israel, with no need to demonstrate that such a risk actually exists in any particular case. Demographic considerations can be applied as well, but only universally, without discriminating between different ethnic or national groups. In the words of Rubinstein and Orgad:

[Demographically motivated] limitations on marriage migration . . . must not be imposed indiscriminately on a particular population group . . . because of its origin . . . Total prohibition of marriage migration

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19 For the views of the proponents of the law I will rely primarily on Rubinstein Committee, Interim Report, *supra* note 1, and on a law review essay written by the committee's chair and its secretary: Amnon Rubinstein & Liav Orgad, *Security of the State, Jewish Majority and Human Rights: The Case of Marriage Migration*, 48 HA-PRAKLIT 315 (2006) (Hebrew). For the views of the opponents of the law I will rely primarily on Guy Davidov et al., *State or Family? The Nationality and Entry into Israel Law (Temporary Order) 2003*, 8 MISHPAT U-MIMSHAL 643 (2005) (Hebrew). See also B'TSELEM & THE CTR. FOR THE DEFENCE OF THE INDIVIDUAL, *FROZEN FAMILIES: THE PROHIBITION IMPOSED BY ISRAEL ON FAMILY UNIFICATION IN THE TERRITORIES SINCE THE OUTBREAK OF THE SECOND INTIFADA* (2006) (Hebrew). See also *Special Issue: Citizenship, Immigration and Naturalization in Israel*, 10 MISHPAT U-MIMSHAL (2006) (Hebrew); Aeyal Gross, *From Friend to Foe: Justice, Truth, Equity and Common Sense Between Israel and Utopia in the Citizenship Law HCJ Case*, 23 HA-MISHPAT 79 (2007) (Hebrew). The last two sources were published after the present article had already been submitted.



is [legally] unacceptable, and [even if it were acceptable], it would not sanction a prohibition of entry directed at a particular population group [for demographic reasons].

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Therefore . . . the law is legitimate for achieving its declared purpose [i.e., security], but it cannot be justified for reasons of demographic policy.<sup>20</sup>

Opponents of the law argue that every Israeli citizen has a fundamental right to establish a family with whomever he or she chooses *in Israel*. Furthermore, they argue, under Israeli constitutional law that right can be breached for security considerations only if it is demonstrated that the particular individual(s) involved, not a whole sub-group of the population, poses a security risk to the state. This task, they claim, had been accomplished very effectively by the previous Citizenship Law, which established the graduated process of acquiring Israeli citizenship mentioned above. The right to establish a family in Israel cannot be breached at all for demographic considerations, which the opponents of the law suspect to be its real aim. But whatever its aim, they contend, the new law is unconstitutional.

#### A. The Rubinstein Committee

The Rubinstein Committee is the academic committee charged with preparing the groundwork for the permanent version of the new citizenship law. Its interim report, intended to provide the theoretical basis for this task, covers three basic areas — general immigration policy, immigration from countries that are deemed hostile to Israel to one degree or another, and special cases deserving of humanitarian consideration.<sup>21</sup>

*General immigration policy:* The committee took it for granted that the immigration of persons not covered by the Law of Return will continue to be effected primarily through marriage to Israeli citizens or permanent residents. It proposed to place serious limitations on this kind of immigration, using age limits, income tests and quotas, as well as requiring a pledge of allegiance to the state at the time of migration, to implement them.

*Immigration from countries deemed hostile:* This is the most important area, as most Palestinian marriage immigrants are likely to come from the

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<sup>20</sup> Rubinstein & Orgad, *supra* note 19, at 345-46 (author's translation).

<sup>21</sup> See *supra* notes 1, 3; cf. Adriana Kemp, *Managing Migration, Reprioritizing National Citizenship: Undocumented Labor Migrants' Children and Policy Reforms in Israel*, 8 THEORETICAL INQUIRIES L. 663 (2007).

Occupied Territories and the Arab countries. Countries deemed hostile were divided by the committee into three categories: (a) "States and regions of risk," such as Egypt and Jordan, that have signed peace agreements with Israel, but where "systematic and institutionalized incitement against Israel takes place in the educational systems and in the media."<sup>22</sup> Potential immigrants from these areas will be presumed to be unfaithful to Israel and will have to prove the opposite in order to be admitted; (b) "Enemy states and conflict regions," such as Syria and Iran. Immigration from these specific countries could be limited by a special quota, in addition to all the other requirements mentioned above; and (c) "Combat areas," i.e., the Occupied Territories. Entry into Israel from these areas could be prohibited completely, in line with the statute (temporary order) currently in force. Needless to say, the special limitations proposed for immigration from these countries and regions are to be in force only for the duration of the Arab-Israeli conflict.

*Cases deserving of special humanitarian consideration:* These include migrant workers and their children, and refugees and asylum seekers, with respect to whom a slightly more liberal policy than the current illiberal practice is proposed.

### **B. *Adalah v. Minister of the Interior***

The HCJ turned down the appeal to declare the new law unconstitutional by a 6:5 majority on May 14, 2006, with Chief Justice Barak voting with the minority. Generally speaking, the majority on the court accepted the views of the proponents of the law as delineated above, while the minority accepted the views of the law's opponents. This decision of the Court will undoubtedly influence the writing of the permanent version of the law.

The two main opinions in *Adalah* were written by Barak and by retired Deputy Chief Justice Mishael Cheshin. They both agreed that the sole purpose of the law was to enhance the security of Israel and that some infringement of the rights of Israel's Palestinian citizens could be justified in order to achieve that goal. Their disagreements, spelled out at great length in their opinions (about eighty pages each), can be narrowed down to two key points: (a) Did the renewal of armed conflict between Israel and the Palestinians in September 2000 affect the *scope* of the Palestinian citizens' equal right to family life in Israel, or did that right, grounded in Basic Law: Human Dignity and Freedom,<sup>23</sup> remain intact, so that its infringement by the

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<sup>22</sup> Rubinstein Committee, Interim Report, *supra* note 1, para. 3(5)1 (Summary).

<sup>23</sup> S.H. 1391 (1992).

new law must pass the tests of the "limitation clause" of the Basic Law? And (b), assuming that the right remained unaffected, can the margin of security achieved by denying all Palestinian residents of the Occupied Territories the ability to enter Israel for the purpose of family unification, as opposed to checking the security risks posed by each individual on a case-by-case basis, justify the infringement of that right?

According to Barak, the rights guaranteed by Basic Law: Human Dignity and Freedom, whether explicitly or implicitly, are not context-sensitive. Israel's constitutional law, he argued, does not distinguish between different sets of rights, one for times of peace and another for wartime. Thus the Palestinian citizens' rights to equality and to family life in Israel remained intact during the second *intifada*, and were clearly infringed by the new citizenship law. That infringement could be justified, but only if the law passed the three tests of the "limitation clause": that it serve a worthy purpose, be compatible with Israel's values as a Jewish and democratic state, and meet the test of proportionality. Barak determined that the law easily passed the first two tests, but failed the test of proportionality: the enhanced security gained by the shift from the examination of applicants on a case-by-case basis to a blanket prohibition of the entry of all Palestinian residents of the Occupied Territories could not justify the infringement of the Palestinian citizens' rights to equality and to family life in Israel. Therefore, Barak concluded, the new citizenship law was unconstitutional.<sup>24</sup>

Justice Cheshin argued that a distinction must be made between the *core* rights guaranteed by Basic Law: Human Dignity and Freedom and peripheral rights that can be derived from them. Extending the same protections to the core and to the peripheral rights would violate the separation of powers, because it would infringe on the legislative powers of the Knesset.<sup>25</sup> According to Cheshin, whereas the right to family life is indeed a core right guaranteed by the basic law, the right to "import" a foreign spouse, parent or child into the country is a peripheral right and is, therefore, context-sensitive.<sup>26</sup> If the spouse, parent or child in question is an "enemy alien," especially when the country is at war, the citizen's right to bring them into the country under certain conditions is not guaranteed, and it can be infringed upon in order

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24 H CJ 7052/03 Adalah v. Minister of the Interior [2006] 2 TakEl 1754 (Barak, C.J., paras. 92, 98).

25 *Id.* (Cheshin, D.C.J., paras. 37-44).

26 Curiously, while Israeli citizens do not have an explicitly stated right to bring their "foreign" spouse, child or parent into the country, non-citizen Jews immigrating under the Law of Return, as amended in 1970, do have that right, down to the third generation. *See infra* p. 619.

to protect the right to life of all Israeli citizens. Moreover, Cheshin argued, *even* if the right to bring in a foreign spouse, parent or child were a core constitutional right, its infringement by the state at the present time would easily pass the proportionality test of the "limitation clause," for the enhanced security of the right to life of all citizens easily trumps the infringement of the right of some to bring in their enemy alien spouses, children or parents. This conclusion is reinforced by the fact that the law is only a temporary measure, and that it exempts certain age categories of applicants from its blanket prohibition.

### C. Security or Demography?

Eight of the eleven justices in *Adalah* accepted unquestioningly the state's argument that the new law was a security measure, designed to prevent Palestinian terrorists from entering the country through family unification. However, the state was able to produce only twenty-six cases (only one of them involving a woman) where persons who had acquired residency in Israel through marriage were suspected of being involved in terrorist activities. Only two of these cases occurred in the two-year period 2004-2005. Of the twenty-six suspects, one killed himself in a suicide bombing, but none of the others was ever charged with involvement in terrorist activities. In forty-two additional cases intelligence reports alleging some kind of involvement with terrorism led to the suspension of the graduated naturalization process that had prevailed under the old system. All in all, then, and giving the state full benefit of the doubt, the total number of Palestinians who entered Israel through family unification and who were alleged to be involved with hostile activities of some kind was sixty-eight, out of thousands of people in that category (how many thousands is also unclear; as I will point out in a minute). These figures led one of the three skeptical justices, Justice Esther Hayut, to observe that "it emerges from the data presented by the state that the scope of the involvement in hostile activities of Palestinian spouses of Arab citizens of Israel who had gained permission for family unification was minuscule, *if any*."<sup>27</sup>

Two other justices, Salim Joubran and Ayala Procaccia, referred explicitly to a possible demographic motive for the enactment of the law, as alleged by its opponents. In the words of Justice Procaccia:

In assessing the credibility of the security argument, we cannot ignore

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<sup>27</sup> *Adalah*, [2006] 2 TakEl 1754 (Hayut, J., para. 2) (emphasis added).

the fact that . . . [as] emerges from the Knesset proceedings . . . the demographic issue hovered over the legislative processes at all times, and was a central topic of discussion in the Knesset Committee on the Interior and in the plenary. Several Members of Knesset, from different factions [both supporters and opponents of the law], believed that the demographic aspect was the main justification for the legislative arrangement that was adopted.<sup>28</sup>

Moreover, while Justice Cheshin vehemently denied that the enactment of the law had any other motivation except to save Israeli lives, his own opinion is rife with demographic allusions. For example:

Massive entry of foreign residents and citizens [into a country] may significantly change its complexion. Granting the individual the right to bring his foreign spouse with him to Israel can amount to changing the face of the society, and the question should be asked, is it right and proper that we should give each and every one of the country's citizens and residents a constitutional key that opens the doors of the country to strangers?

. . .

The strong and decisive interest of the state in maintaining the *identity* of Israeli society overrides . . . the right to family life as far as the immigration of a foreign spouse to Israel is concerned.<sup>29</sup>

One of the respondents in the case, added to it by the Court, was an organization called "The Jewish Majority for Israel," the goal of which is clearly evident from its name. This organization did indeed argue the demographic case for the law. Lastly, in the cabinet decision that established the Rubinstein Committee, the committee was entrusted with designing "an immigration policy for the State of Israel — that will be based not only on security considerations, but that will also guarantee the existence of Israel as a Jewish and democratic state," the standard code formulation for maintaining a Jewish majority in the country.

To assess the argument that demographic considerations stood in the background of the amended citizenship law, and, indeed, to assess the severity of the security threat posed by Palestinian "marriage immigrants" (the term used by the Rubinstein Committee), it is crucially important to ascertain how many such immigrants there were over the years. Amazingly,

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<sup>28</sup> *Id.* (Procaccia, J., para. 14).

<sup>29</sup> *Id.* (Cheshin, D.C.J., paras. 54, 62) (emphasis added).

no clear answer to this question is presented in the documents I perused in writing this Article.

The Rubinstein Committee, which operates under the auspices of the National Security Council, noted that it could not obtain reliable information on this issue and estimated the number to be between 5,400 and 21,300 for the period 1993-2003.<sup>30</sup> According to Barak, from 1993 until 2001 (inclusive) sixteen thousand applications for family unifications with Palestinian residents of the Occupied Territories *had been granted*.<sup>31</sup> According to Cheshin, sixteen thousand was the number of *applications* for family unification that were still pending on May 12, 2002, when the executive order that preceded the citizenship law came into effect.<sup>32</sup> Justice Procaccia, citing the Attorney General and the Director of the Population Administration of the Interior Ministry, quoted 130,000 as the number of Palestinian residents of the Occupied Territories who had received some status permitting them to reside in Israel since 1994.<sup>33</sup>

Obviously, the question whether the sixty-eight Palestinian marriage immigrants who were alleged to have been involved in hostile activities were a sub-group of a larger whole numbering 5,400 or 130,000 is crucial to determining the seriousness of the security threat they pose (although even sixty-eight out of 5,400 is still a minuscule number). The lack of reliable information on this issue casts serious doubt on the validity of the security argument, but it also weakens the demographic justification for the law. If the number of Palestinian marriage immigrants was about two thousand a year, as claimed by Barak, it is demographically insignificant in relation to the one million Palestinians who are already citizens of Israel; but if the number is over fifteen thousand a year, as claimed by Procaccia, then it does constitute a significant supplement to their ranks. If the exact figure is not known even to the most authoritative government organs, then it is hard to argue that they were motivated solely by demographic considerations, at least in the simple sense of being concerned about pure numerical ratios between Jews and Palestinians in Israel.

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<sup>30</sup> Rubinstein Committee, Interim Report, *supra* note 1, at 5; The Ass'n for Civil Rights in Israel, *Citizenship and Entry into Israel Law: Enacted with No Factual Basis* (Dec. 28, 2005), <http://www.acri.org.il/english-acri/engine/story.asp?id=255>.

<sup>31</sup> *Adalah*, [2006] 2 TakEl 1754 (Barak, C.J., para. 46).

<sup>32</sup> *Id.* (Cheshin, D.C.J., para. 123).

<sup>33</sup> *Id.* (Procaccia, J., para. 13). For further discussion of these numbers, see Guy Davidov et al., *State or Family? The Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003*, 1 HE'ARAT DIN 62 (2004) (Hebrew), <http://www.law.haifa.ac.il/lawatch>.

#### **D. Enemy Aliens?**

A major theme that runs through Justice Cheshin's opinion, as well as the Rubinstein Committee's report and its ideological backdrop in the Rubinstein and Orgad essay, is that the Palestinian residents of the Occupied Territories are enemy aliens, and as such Israel is under no obligation to allow them to immigrate to Israel, even for family unification. This argument is based on the fiction created by the Oslo Accords that the PA is a state-in-the-making that effectively rules the Occupied Territories and is engaged in war with Israel. The reality of the situation is very different, however. Israel is the effective sovereign in the entire area of Mandatory Palestine, and it has incorporated the indigenous Palestinian population of this area into its control system in two different ways: some as second-class citizens of Israel, but most as subjects devoid of rights living under military rule. True, between 1995 and 2000 the PA received some measure of autonomy in the cities of the West Bank (designated Area A in the Oslo agreements), but that autonomy derived from Israel's sovereign authority over these areas. The evolution of the PA towards a state-in-the-making was halted with the breakdown of the Oslo process in 2000, and in 2002 Israeli forces reoccupied Area A, leaving the PA with no autonomous territorial base. In this situation, the movement of people from the Occupied Territories to Israel, through marriage or otherwise, and their change of status from non-citizens to Israeli residents or citizens cannot be considered "immigration" in any real sense. These Palestinians are no more "immigrants" than the African-American slaves who escaped from the slave states to the non-slave states of the U.S. prior to the American Civil War. One indication that this kind of movement was never considered to be immigration is the state's lack of reliable information about its magnitude.

Moreover, the Palestinian population on both sides of the Green Line (1967 border) constitutes one national group, whose two parts were forcibly separated for twenty years (1948-1967) but were able to enjoy practically free interaction for thirty-five years subsequently (1967-2002). There are very strong cultural, economic and family ties between these two parts of the Palestinian population, and for many years the non-citizen Palestinians were integrated, albeit as a subordinate group, into Israeli society as a whole. Therefore, the establishment of marriage ties between citizen- and non-citizen Palestinians is not at all similar to a Third World immigrant in Europe or the U.S. marrying a partner in his or her home country and bringing them to his or her country of residence, as Justice Cheshin and the Rubinstein Committee purported it to be. Nor can Palestinian residents of the Occupied Territories be considered enemy

aliens, because they are not citizens of any independent political entity that could be at war with Israel.

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The primary justification for curbing the Palestinian citizens' right to family unification has been the security of the state. That justification was based on the argument that the right to life takes precedence over any other human right, and if some rights of the Palestinian citizens have to be sacrificed in order to safeguard everybody's right to life, this sacrifice is justified both legally and morally. However, the empirical evidence marshaled in support of this argument was quite weak. Israel's Palestinian citizens have been surprisingly law-abiding in their political behavior, and the number of those among them who have threatened the security of the state, including "immigrants" from the Occupied Territories, has been negligible.

Given the weakness of the empirical evidence supporting the security argument, opponents of the new Citizenship Law, including three justices of the HCJ, have argued that behind that argument lurk the demographic interests of the Jews. This suspicion was buttressed not only by internal evidence, as indicated above, but also by the prominence achieved by the demographic discourse in Israel's political life since the demise of the Oslo process in 2000. The most concrete expression of this prominence has been the plan to deprive some of Israel's Palestinian citizens of their citizenship by shifting the border between Israel and the West Bank westwards in the Wadi Ara region.

## II. SHIFTING THE BORDER

The idea of "transferring" Israel's Palestinian population out of the country first came up as a concrete political program in 1984, when Rabbi Meir Kahane was elected to the Knesset on a platform advocating ethnic cleansing of all Palestinians, citizens and non-citizens alike. At that time his election caused a political shock, resulting in an amendment to Basic Law: The Knesset that made it possible to bar anti-democratic political parties from participating in national elections. Kahane's political party was subsequently declared an unlawful association.<sup>34</sup>

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<sup>34</sup> Yoav Peled, *Restoring Ethnic Democracy: The Or Commission and Palestinian Citizenship in Israel*, 9 *CITIZENSHIP STUD.* 89 (2005). The idea of "transfer" had a long pedigree in Zionist thinking before 1948, and a massive transfer



The failure of the Oslo process, the "October events"<sup>35</sup> and the beginning of the second *intifada* revived the idea of "transfer" under a more sophisticated and respectable guise: instead of moving the Palestinians, moving Israel's eastern border westward, so that the Palestinian residents of the border area would find themselves in the West Bank, deprived of Israeli citizenship. On the face of it, the idea is couched in benign terms: since Israel would like to annex the "settlement blocs" in the West Bank that are populated with Jews, the future Palestinian state would be compensated with a stretch of land along its border with Israel that is populated with Palestinians. Through this "territory and population exchange," Israel would become demographically more Jewish and the Palestinian state would gain some territory.

In reality, however, the idea of this territorial exchange came up *after* the demise of the two-state solution to the Israeli-Palestinian conflict, and in the context of devising unilateral territorial arrangements to be imposed by Israel, such as the separation wall and the disengagement from Gaza and parts of the West Bank.<sup>36</sup> In this context, the idea of shifting the border westward simply means depriving the Palestinian residents of the border area of their citizenship. In the 2006 elections, Yisrael Beytenu — a political party advocating this as the main plank of its platform — received eleven seats in the Knesset (just short of 10% of the total).<sup>37</sup> In October 2006 Yisrael Beytenu joined the governing coalition and its leader, Yvette Lieberman, became Deputy Prime Minister in charge of handling strategic threats to the country.

The demographic effects of this plan as currently presented would not be very significant — at most, 200,000 Palestinian citizens, or 20% of the total, would be deprived of their citizenship. Legally, carrying out this plan would require a major transformation of Israel's legal culture. The right to citizenship is considered a fundamental human right in Israeli law, and depriving even people who have committed major offenses against the state of that right is exceedingly difficult. (The HCJ turned down a petition to

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of Palestinians took place during the 1947-1948 war. BENNY MORRIS, *Notes on Zionist Historiography and the Transfer Idea in 1937-1944*, in *JEWS AND ARABS IN PALESTINE/ISRAEL 1936-1956*, at 42 (2000) (Hebrew).

<sup>35</sup> See *infra* p. 620.

<sup>36</sup> See, e.g., Yossi Alpher, *The Strategic Interest: They're There and We are Here*, *DAILY JEWISH FORWARD*, Apr. 17, 2006, <http://www.forward.com/articles/7642>.

<sup>37</sup> SHAUL ARIELI ET AL., *INJUSTICE AND FOLLY: ON THE PROPOSALS TO CEDE ARAB LOCALITIES FROM ISRAEL TO PALESTINE* (2006) (Hebrew); Yisrael Beytenu, <http://www.beytenu.org.il/content.asp?NID=2> (last visited Nov. 1, 2006) (Hebrew/Russian).

strip Yitzhak Rabin's assassin, Yigal Amir, of his citizenship.)<sup>38</sup> Depriving a group of citizens of their citizenship just because they are Palestinians who happen to reside in a particular region of the country would be impossible under current Israeli law.

This legal situation may actually pose an advantage for the proponents of this "transfer" plan, because Yisrael Beytenu is advocating a major transformation of Israel's system of government as well, in order to make the executive branch much stronger than it already is. Be that as it may, the success of the plan does not depend necessarily on its implementation in the near future. Its success lies in the fact that depriving the Palestinian citizens of their citizenship has become a legitimate topic of discussion in the political discourse and has won significant electoral backing.

Whether or not it played a major role in the legislation of the new Citizenship Law, since 2000 the demographic argument has become an established feature of Israeli political culture. That argument, however, rests on very dubious theoretical, moral, and empirical grounds.

As is very well known, between one-quarter and one-third of the million immigrants from the former USSR who have arrived in Israel since the end of the 1980s, and a *majority* among those arriving since the late 1990s, are not Jewish according to the definition of "Jew" used in the Law of Return. This was made possible by an amendment to the Law of Return adopted in 1970<sup>39</sup> (at the same time as a change in the legal definition of "Jew") that extended the privileges of that law to non-Jewish family members of Jews down to the third generation, including their spouses and minor children (the so-called "grandfather clause"). Without saying so, this amendment actually turned the Law of Return into an immigration law, albeit of a very restrictive kind.

If these non-Jewish immigrants were to be counted as part of the non-Jewish population of Israel, they would weaken the demographic and political position of the Jews. Still, aside from ultra-Orthodox Jews, no one objects to their immigration and naturalization, and the Jewish Agency is making frantic efforts to find such "Aliyah-entitled" non-Jews in the farthest reaches of the former USSR. As Ian Lustick has argued, this policy reveals that the real aim of the state is to safeguard not a *Jewish* majority in the

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38 H CJ 2757/96 Elrai v. Minister of the Interior [1996] IsrSC 50(2) 18. Unlike some states in the U.S., in Israel convicted criminals have the right to vote, even while still in prison.

39 S.H. 51 (1950); S.H. 586 (1970).

country, but rather a *non-Arab* one.<sup>40</sup> What lies at issue, then, is not so much the affirmation of the Jews' right of national self-determination as the denial of that right to the Palestinians.

Moreover, the demographic threat posed by the Palestinians is a serious threat only insofar as they are citizens in a democratic state, possessing the right to vote. If they were not citizens, or if the state were not democratic, even a large Palestinian majority could be controlled by military means (as the African majority was controlled for many generations in South Africa). This is the reason why, with all the talk of the demographic danger, Israel has done nothing of substance, except during the failed Oslo process, to emancipate its Palestinian subjects in the Occupied Territories.

The tendency to blur the difference between citizen- and non-citizen Palestinians within Israel's "control system," and thus, in effect, to deprive the citizen-Palestinians of their citizenship rights, was pointed out as a major problem by the Or Commission that investigated the "events" of October 2000 inside the borders of the sovereign State of Israel.

### III. THE "OCTOBER EVENTS" AND THE OR COMMISSION<sup>41</sup>

When the second *intifada* erupted in October 2000, Israel's Palestinian citizens came out in demonstrations of solidarity that assumed a violent character and resulted in a number of major highways being temporarily blocked.<sup>42</sup> Throughout the northern police district, where the majority of Israel's citizen-Palestinians live, the police fired rubber-coated steel bullets and live ammunition at the protestors, killing thirteen of them (twelve Palestinian citizens and one non-citizen Palestinian; one Jewish citizen was killed by Palestinian protestors) and wounding many more. In some areas Jewish demonstrators also attacked Palestinians, resulting in major property losses, injuries, and perhaps even deaths.

The death toll in this series of confrontations, which lasted almost

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40 Ian Lustick, *Israel as a Non-Arab State: The Political Implications of Mass Immigration of Non-Jews*, 53 MIDDLE E.J. 417 (1999).

41 This Part is based on Peled, *supra* note 34.

42 For an analysis of the broader context of this reaction, see AFTER THE RIFT: NEW DIRECTIONS FOR GOVERNMENT POLICY TOWARDS THE ARABS IN ISRAEL (Dan Rabinowitz et al. eds., 2000) (Hebrew); Doron Navot, *Is the State of Israel Democratic? The Question of Israel's Democratic State in the Wake of October Events* (2002) (unpublished M.A. thesis, Tel Aviv University) (On file at the Brender-Moss Library of Social Sciences, Tel Aviv University) (Hebrew).

two weeks, was the heaviest since the *Kafr Kassem* massacre of 1956, when forty-nine citizen-Palestinian villagers were murdered by police for breaking a curfew of which they were unaware.<sup>43</sup> Still, it took six weeks of strong pressure from the Palestinian political leadership and from some Jewish public figures for the government to appoint a state commission of inquiry, headed by Supreme Court Justice Theodore Or, to investigate the clashes. The Commission submitted its report in September 2003.<sup>44</sup>

Without explicitly using this term, the Or Commission called for the restoration of ethnic democracy, which had been seriously undermined in October 2000. This call was manifested through a dual move: on the one hand, the report catalogued in great detail and with surprising forthrightness the history of discrimination against the citizen-Palestinians, particularly in the area of land ownership and use. In addition, the report severely criticized the behavior of the police and of the government as a whole during the "October Events." At the same time, however, the Commission also accused the Palestinian citizens, and especially their political and religious leaders, of behaving improperly in airing their grievances, although this accusation fell short of pointing to any unlawful activity on the part of these leaders. In other words, while relating the continuous and incessant violation of the Palestinians' citizenship *rights* by the state, the report demanded that they adhere to their *obligation* to protest this violation within the narrow confines of the law.

The Commission determined that although discrimination on the basis of national, religious or ethnic identity is strictly forbidden under Israeli law, Israel's "Arab citizens live in a reality in which they are discriminated against as Arabs."<sup>45</sup> The Commission cited a National Security Council report dated only two weeks before the "October Events," which proposed that Prime Minister Ehud Barak should apologize for this "continuing discrimination" and undertake concrete measures to correct it.<sup>46</sup> Naturally, most (though by no means all) of the government documents cited by the Commission referred to the Palestinian citizens' *subjective* feelings, rather than to a reality of discrimination. But the Commission stated very clearly that "we believe

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43 UZI BENZIMAN & ATTALAH MANSOUR, SUBTENANTS: ISRAELI ARABS, THEIR STATUS, AND STATE POLICY TOWARD THEM 106 (1992) (Hebrew); KAFR KASSEM: EVENTS AND MYTHS (Ruvik Rosental ed., 2000) (Hebrew).

44 REPORT OF THE STATE COMMISSION OF INQUIRY TO INVESTIGATE THE CLASHES BETWEEN THE SECURITY FORCES AND ISRAELI CITIZENS IN OCTOBER 2000 (2003) (Hebrew).

45 *Id.* at 33.

46 *Id.* at 38.

these feelings had solid grounding in reality."<sup>47</sup> Summing up its review of the "profound" causes for the "October events," the Commission stated that "the Arab community feels deprived in a number of areas. In several areas, the deprivation is a consequence, among other things, of discrimination practiced against the Arab community by government authorities."<sup>48</sup>

The Commission alluded to the fact that, because the state is defined as Jewish and democratic, the citizen-Palestinians feel that "Israeli democracy is not democratic towards the Arabs to the same extent that it is democratic towards the Jews."<sup>49</sup> It chose neither to confirm nor to challenge this perception, however, but to adhere to the view that, legally speaking, Israel's Palestinian citizens enjoy full and equal individual citizenship rights, just like its Jewish citizens.<sup>50</sup> The Commission took this equality, that is, Israel's presumed character as a liberal democracy, as a basic assumption, and did not feel the need to argue that this was indeed the case. It could thus avoid a critical examination of the true nature of the Israeli state, describing the real-life situation of the Palestinian citizens as an aberration rather than a manifestation of Israeli democracy.

Both Prime Minister Barak and his Public Security Minister, Shlomo Ben-Ami, as well as high-echelon police officers, were criticized by the Commission for failing to act decisively in order to halt the killing of demonstrators, especially after the first day of protest ended with three fatalities. Clearly, the cavalier attitude with which these higher officials treated the news of the fatalities stemmed solely from the fact that they were Palestinians. Moreover, the Commission stated, for some of the decision-makers in the cabinet and in the top ranks of the police, the events of the first day of protest meant that the Green Line, which separates citizen- from non-citizen Palestinians, had been erased.<sup>51</sup>

Where this erasure of the Green Line was most obvious, according to the Commission, was in the use of rubber-coated bullets as the primary means of crowd control in the confrontations between the police and the protestors. Rubber-coated bullets are widely used by the Israeli military in the occupied territories, as a non-lethal substitute, supposedly, for live ammunition. The Commission, however, concluded, after painstakingly studying the matter, that rubber bullets are both deadly and highly inaccurate. In other words, they are not only extremely dangerous to the targeted individuals, but

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47 *Id.* at 41.

48 *Id.* at 60.

49 *Id.* at 28.

50 *Id.* at 29.

51 *Id.* at 219, 582.

also to innocent bystanders in their vicinity. But the Commission did not find it necessary to criticize, let alone prohibit, the use of rubber bullets in general. What it stressed, rather, is that what may be allowed in dealing with non-citizen protestors in territories that are under belligerent occupation is not allowed in dealing with *citizens* inside the sovereign territory of the state.<sup>52</sup> Similarly, the Commission invested a great deal of effort in investigating whether snipers, commonly deployed in the occupied territories, had ever before been utilized against unarmed demonstrators inside the state of Israel. It concluded that their utilization in three instances during the "October Events" was unprecedented and constituted a dangerous threshold in the relations between the state and its Palestinian citizens.<sup>53</sup>

Against this background of continuous structural discrimination, the Commission turned to analyzing the "radicalization" of the citizen-Palestinian community in the 1990s. However, in moving from its narrative of structural discrimination and deprivation to discussing "radicalization," the Commission used a simple rhetorical device that severed the connection between the two. It stated that the events of October 2000 must be seen "also" in the context of the processes of political escalation that had taken place among citizen-Palestinians in the years leading up to 2000.<sup>54</sup> This "also" creates the impression that these processes of "radicalization" were not a *consequence* of the history of discrimination and deprivation, but rather a separate, additional factor that combined with that history to produce the "October Events."

The disassociation of what it termed the "profound causes" of the October Events from the events themselves is evident as well in the Or Commission's recommendations. These recommendations were largely concerned with the fate of individuals and the reform of institutions, rather than with the restructuring of the discriminatory system itself. The main reason for this choice, I would argue, was the Commission's commitment to ethnic democracy and its realization that a radical transformation of the situation of the Palestinian citizens could be achieved only if they were truly integrated into the society. This would have required that the state itself be transformed into a liberal democracy, a transformation that would defy the most basic goal of Zionism — the establishment of a Jewish state.

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52 *Id.* at 458-59.

53 *Id.* at 475, 495, 497.

54 *Id.* at 60.

#### IV. THE HISTORICAL CONTEXT

The three developments discussed in this Article — the "events" of October 2000 and the Or Commission report, the new Citizenship and Entry into Israel Law, and the plan to deprive some Palestinian citizens of their citizenship by shifting the border — form an ascending order of threats to Palestinian citizenship in Israel. In October 2000 the police ignored their right to demonstrate and used lethal weapons in order to prevent them from exercising that right, and the Or Commission's recommendations, intended to ameliorate that behavior, were ignored by the government.<sup>55</sup> The new citizenship law deprives the Palestinian citizens of only two fundamental human rights — the right to equality and the right to establish a family in Israel with whomever they choose. And the Lieberman plan (originally proposed by certain academics and Labor Party politicians) aims at depriving some Palestinian citizens of their citizenship altogether. This escalating threat, beginning in October 2000, might seem to indicate that the relations between the state and its Palestinian citizens began to deteriorate as a result of the breakdown of the Oslo peace process. In reality, however, the tensions that led to these developments had begun to build a few years earlier and resulted from the Oslo process itself, not from its breakdown.

The main reason for the development of these tensions was that the state and its citizen-Palestinian minority had conflicting expectations regarding the establishment of a Palestinian state in the West Bank and Gaza. The state, or actually the more liberal elements within the Jewish elite, expected that once the Palestinian state became a reality, this would satisfy the national aspirations of all Palestinians. Israel's Palestinian citizens would then settle for a modest liberalization of their citizenship status only, with the basic structure of the state as a Jewish state remaining intact.

The citizen-Palestinians, on the other hand, felt excluded from the anticipated settlement between Israel and the PLO. Historically, the PLO had not considered itself a representative of the Palestinians who are citizens of Israel. On their part, the citizen-Palestinians have also not seen the PLO, an enemy of Israel until 1993 (and again since 2001), as their political representative. Moreover, as the primary constituency of the PLO

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<sup>55</sup> Justice Or, who had retired in the meantime, stated in September 2004 that the recommendations of his commission had not been implemented. THEODORE OR, *A YEAR TO THE STATE INVESTIGATIVE COMMISSION ON THE OCTOBER 2000 EVENTS* (2004) (Hebrew).

has always been in the West Bank and Gaza, there was an interesting role reversal between the Palestinian national minority in Israel and its "external homeland" in the Occupied Territories. Instead of the external homeland taking care of the interests of the minority, it was the minority which was expected to help the interests of its homeland. Thus, the PLO sought to guide the political activity of the citizen-Palestinians, including their voting behavior, in ways that would serve its own interests and not necessarily the interests of the citizen-Palestinians themselves. This situation was not changed by the establishment of the PA in part of the Occupied Territories in 1994, nor was it expected to change after the establishment of a full-fledged Palestinian state. Moreover, the non-democratic character of the PA was perceived by many citizen-Palestinians as a handicap in their own struggle to democratize the Israeli state.<sup>56</sup>

Caught between their nation and their state, as the cliché goes, the citizen-Palestinians felt that their interests were likely to be sacrificed by both in the final settlement between them:

A tacit agreement by all sides — the PLO, Israel, and the Palestinians in Israel — made [the latter] community an invisible part of the Palestinian people. It became abundantly clear to the Arab public [in Israel] that whatever problems they had with Israel were their own as a minority, and theirs alone.<sup>57</sup>

In other words, many politically conscious citizen-Palestinians were afraid that if they did not act immediately and resolutely before a final settlement was reached, they would have to pay the price for that settlement, in terms of both the perpetuation of their status as second-class citizens of Israel and the attrition of their national-cultural identity as Palestinians.

Two main political stances were developed by Israel's Palestinian citizens in order to deal with this state of affairs: the Islamic stance and the pan-Arab stance, associated with Azmy Bishara's Democratic National Alliance (which has three seats in the 17th Knesset, elected in 2006).<sup>58</sup> In both cases, the more or less conscious realization that the Palestinian national movement is too weak and too dependent on Israel to ground the collective identity of the citizen-Palestinians has led to a reliance on larger cultural-political

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56 Nadim Rouhana & As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT'L J. MIDDLE E. STUD. 321, 334 (1998).

57 *Id.* at 333.

58 AS'AD GHANEM, *THE PALESTINIAN-ARAB MINORITY IN ISRAEL, 1948-2000: A POLITICAL STUDY* 95-135 (2001).



frameworks in order to ground that identity — the Moslem world in one case, the Arab world in the other.

While the Islamic Movement has worked quite successfully to establish a system of *de facto* autonomous educational, cultural and social service institutions without entering into an ideological or political debate with the state, Bishara has sought a far-reaching liberalization of the Israeli state by redefining it as a state of its citizens, as well as re-defining the citizen-Palestinian community itself as a national minority that possesses collective rights.<sup>59</sup> These demands were perceived by the state and by most Israeli Jews as a threat to the Jewish character not only of the state, but of the society as well, and even to its very existence as a Jewish society. The elective branches of the state, more attuned to public opinion, sought to forestall the Palestinian citizens' demands by, among other measures, curbing the citizenship rights already enjoyed by the Palestinian citizens under ethnic democracy. The looming danger of a Palestinian demographic preponderance has been increasingly played up by mainstream Jewish politicians and academics, with the thinly disguised encouragement of the state, accompanied by demands to limit the citizen-Palestinians' political rights, prosecute Palestinian members of the Knesset for challenging the Jewish character of the state, and even to transfer the Palestinian citizens out of the territory of the State of Israel.<sup>60</sup>

Up to a point, the Supreme Court sought to mitigate the policy of the other two branches of government by trying to forestall the citizen-Palestinians' demands for liberalization and for collective rights. Instead of curbing the Palestinians' individual citizenship rights, the Court has safeguarded, and at times even enhanced them. The most significant manifestation of this policy was the Court's celebrated *Qaadan* decision of March 2000, which outlawed discrimination between Jewish and Arab citizens in the leasing of state lands.<sup>61</sup> This decision was indeed criticized by Palestinian lawyers,

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59 Azmi Bishara, *On the Question of the Palestinian Minority in Israel*, 3 THEORY & CRITICISM 7, 16 (1993) (Hebrew); Rouhana & Ghanem, *supra* note 56, at 332.

60 HERZLIYA FORUM FOR NATIONAL RESILIENCE, THE BALANCE OF NATIONAL RESILIENCE AND SECURITY: POLICY DIRECTIONS (2001) (Hebrew); Arnon Sofer, *The Israeli Arabs and the Peace Process — Policy Recommendations*, in THE JEWISH-ARAB RIFT IN ISRAEL: A READER 145 (Ruth Gavison & Dafna Hacker eds., 2000) (Hebrew); Oren Yiftachel, *The Shrinking Space of Citizenship: Ethnocratic Politics in Israel*, 223 MIDDLE E. REP. (2002), [http://www.merip.org/mer/mer223/223\\_yiftachel.html](http://www.merip.org/mer/mer223/223_yiftachel.html).

61 HCJ 6698/95 *Qaadan vs. ILA* [2000] IsrSC 54(1) 258; Neta Ziv & Ronen Shamir, "Politics" and "Sub-Politics" in the Struggle Against Land Discrimination, 16 THEORY & CRITICISM 45 (2000) (Hebrew); Alexander (Sandy) Kedar, *A First Step*

scholars and activists for embodying precisely that strategy.<sup>62</sup> But *Qaadán* was the swan song of this judicial policy, and by 2006 the Court adjusted itself to the other two branches, as evidenced in its *Adalah* decision.

### CONCLUSION

The instability of ethnic democracy was one of the earliest points on which the model was criticized, both as a theoretical construct and as a characterization of the Israeli state. The potential sources of instability, it was pointed out, could be both internal, stemming from the sphere of majority-minority relations, and external, stemming from the minority's "mother country" or its diaspora abroad. Thus Yiftachel argued that minorities' resistance to their inferior position in ethnic democracies will inevitably generate inter-ethnic violence and cause the state to be transformed in the direction of either consociationalism (known in the Israeli context as bi-nationalism), as currently seems to be the case in Northern Ireland, or outright majority domination, as, I have argued, may be happening in Israel.<sup>63</sup>

In line with Yiftachel's prediction, the developments surveyed in this Article, taken as a whole, create a strong impression that the impairment of the Palestinian citizens' rights is not really a (justified or unjustified) price to be paid for achieving other goals — security, demography, or whatever — it is the *very goal* of the measures taken since October 2000. Blurring the line that separates citizen- from non-citizen Palestinians, as was done during the "October events," denying the Palestinian citizens' right to family unification, and the plan to deprive some of them of their Israeli citizenship altogether all seem to be partial measures contributing to the gradual achievement of this goal.

Can the Israeli tale told in this Article shed light on a larger truth — the current state and trajectory of development of citizenship in Western liberal democracies? I believe it can. The overall context in which this tale unfolded

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*in a Difficult and Sensitive Road: Preliminary Observations on Qaadán vs. Katzir*, 16 ISR. STUD. BULL. 3 (2000).

62 E.g., Jamil Dakwar, *How Much of an Achievement Is This [?]*, HA-ARETZ, Mar. 15, 2000, at B2 (Hebrew); Hassan Jabarin, *Israeliness that 'Faces the (Arabs') Future' in Accordance with Jewish-Zionist Time, in a Space Empty of Palestinian Time*, 6 MISHPAT U-MIMSHAL 53 (2001) (Hebrew).

63 Oren Yiftachel, *The Concept of 'Ethnic Democracy' and Its Applicability to the Case of Israel*, 15 ETHNIC & RACIAL STUD. 125, 130 (1992).

in Israel was defined by the state as a war on terror. Since September 11, 2001, the entire West, but especially the U.S. and Great Britain, have been involved in a similar conflict with "terror" — a conflict that promises to be not only protracted but actually self-perpetuating. One reason for this gloomy projection is that the nature of the enemy, at least as defined by the current regimes in the U.S. and Great Britain, makes it impossible to determine what would constitute victory in this war, or how it could be achieved.<sup>64</sup>

Like Israel, many of the other states involved in the "war on terror" have used fear in order to entice legislatures, courts, and the public to agree to the limitation of the citizenship rights of those alleged to be potential accomplices in terror activity.<sup>65</sup> In 1938, Dr. Moshe Kleinbaum, the Polish Zionist leader later to be known as Dr. Moshe Sneh, leader of the Israeli Communist Party, warned that "if one brick is damaged at the base of the edifice of legality and constitutionality, the whole structure of the state is placed in jeopardy."<sup>66</sup> The immediate context of his warning was the effort to pass a law in the Polish Sejm prohibiting the Kosher slaughtering of animals, thus depriving Polish Jews of an essential element of their religious freedom. Almost seventy years later, this warning rings relevant not only to Israel, but to many of the world's leading democracies as well.

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64 IAN LUSTICK, *TRAPPED IN THE WAR ON TERROR* (2006).

65 See, e.g., Marjorie Cohn, *Rounding Up U.S. Citizens*, PORTSIDE, Oct. 1, 2006, <http://lists.portside.org/cgi-bin/listserv/wa?A2=ind0610a&L=portside&T=0&P=312>; Alexandra Dobrowolsky, *(In)Security and Citizenship: Security, Immigration and Shrinking Citizenship Regimes*, 8 THEORETICAL INQUIRIES L. 629 (2007).

66 1 MOSHE SNEH, *The Jewish Warning Sound*, in WRITINGS 185 (Emmanuel Melzer ed., 1995) (Hebrew).