

Voting as a Vehicle for Self-Determination in Palestine and Israel

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Through a study of the situation in Palestine and Israel, this essay argues that collective self-determination can, in some circumstances, be realized through voting in the political system of an occupying power. More specifically, we contend that (1) a power exercising “indefinite occupation” has a duty to grant voting rights in its own domestic political system to those members of the occupied population who may wish to vote; (2) a demand for voting in the political system of an occupying power does not in itself constitute consent to acquisition of title by the occupier; and (3) that a demand for voting under occupation can be a viable part of a struggle for de-colonization, even without a preexisting social contract among members. The argument we set forth amounts to a paradigm shift in the way the international community should understand the international law of occupation both in the Palestinian territories and more broadly.

1. Introduction

This paper reconceptualizes the individual right to participate politically, particularly the right to vote, as a vehicle for collective self-determination.¹ Through a study of the situation in Palestine and Israel, we argue that collective self-determination can, in some circumstances, be realized through voting in the political system of an occupying power. More specifically, we contend that (1) a power exercising “indefinite occupation” has a duty to grant voting rights in its own domestic political system to those members of the occupied population who may wish to vote;² (2) a demand for voting in the political system of an occupying power does not in itself

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¹ See generally Kevin Duong, *Universal Suffrage as Decolonization* (unpublished draft, available on academia.edu).

² On “indefinite occupation” see AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (2017) (especially Chapter 2 on the “indeterminacy of occupation”); Orna Ben Naftali, Aeyal Gross and Keren Michaeli, *Illegal Occupation: The Framing of the Occupied Palestinian Territory*, 23 *BERKELEY J. INT’L L.* 551, 598 (2005). On voting rights under occupation, see Ariel Zemach, *The Emerging Right of West Bank Palestinians to Israeli Citizenship*, 42 *U. PENN. J. INTL L.* (forthcoming 2020)

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constitute consent to acquisition of title by the occupier; and (3) that a demand for voting under occupation can be a viable part of a struggle for de-colonization, even without a preexisting social contract among members.

The argument we set forth amounts to a paradigm shift in the way the international community should understand the international law of occupation both in the Palestinian territories and more broadly.³ The case of Palestine and Israel is admittedly a unique one, but it may also illuminate other debates around the world. In this specific area, we believe the argument has not only theoretical importance but also significant practical purchase, which makes it an urgent one in present circumstances.⁴

The historical trajectory in the area, from Palestine during the British Mandate years to present-day Israel, entrenched a peculiar understanding of self-determination. This understanding is characteristic of a specific colonial context in the interwar period.⁵ According to this understanding, separation into two ethnically homogenous states is a necessary condition for self-determination both generally, and specifically for both the Palestinian and the Jewish-Israeli peoples.⁶ Call this the "separatist" paradigm.⁷ The separatist paradigm emerged from the international community's *nomos* when it comes to this area.⁸

We argue for a different understanding of self-determination and a different *nomos*. Self-determination can in principle be realized in multiple radically different political arrangements.⁹

³ Cf. IAN S. LUSTICK, *PARADIGM LOST: FROM TWO-STATE SOLUTION TO ONE-STATE REALITY* (2019).

⁴ Cf. Itamar Mann and Yael Berda, *Annexation or Not, It's Time All Palestinians Under Israeli Control Had the Right to Vote*, NEWSWEEK, May 21, 2020 <https://www.newsweek.com/annexation-west-bank-right-vote-1505494>.

⁵ Catriona Drew, *Remembering 1948: Who's Afraid of International Law in the Israeli-Palestinian Conflict?*, in *WHO'S AFRAID OF INTERNATIONAL LAW?* (Raimond Gaita & Gerry Simpson eds., 2017); See also UMUT ÖZSU, *FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS* (2015).

⁶ *Id.* at

⁷ We borrow the term from PARTITIONS: A TRANSNATIONAL HISTORY OF TWENTIETH-CENTURY TERRITORIAL SEPERATISM (ARIE DUBNOV & LAURA ROBSON, 2018).

⁸ We use a term Orna Ben-Naftali draws from Robert Cover to describe Israel's occupation of the Palestinian territories, See Orna Ben-Naftali et al., *Nomos*, in *THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY* 277 (2018). Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. (1983).

⁹ Under Principle 5 of the G.A. Res. 2625(XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24,

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Neither a preexisting social contract among members of one nation, nor the ability of a people to secede from such a social contract into a new political unit, are necessary conditions for self-determination. While formally equal political participation through voting for all people under a permanent governmental authority is not a sufficient condition for self-determination to be realized, it is deeply relevant; and it can sometimes be a vehicle for achieving self-determination, especially when an occupying power nullifies other options such as the establishment of an independent state. To be sure, voting is not the only way to reach conditions in which a people can exercise self-determination. It is not even clearly the preferable one in all political contexts. It is simply one important way of exercising self-determination that the separatist paradigm has tended to eclipse; one that may be crucial in overcoming an impasse in Palestine and Israel,¹⁰ and in de-colonizing the regime currently in place in this area of the world.¹¹

The separatist paradigm, linking the right to collective self-determination to exclusively national terms, is not specific to Israel/Palestine. It has, however, been uniquely cemented into this area's politics ever since it was introduced by British authorities and developed in the 1947 UN partition plan; and especially by how the plan was thwarted in the aftermath of the 1948 war. It has come to monopolize the international community's "normative universe"¹² when it considers Palestine and Israel. No matter how firm it seems, if we want to end a status quo of indefinite occupation, people living in territories that Israel currently controls must shake off its sediment. Contrary to other authors, we do not believe this necessarily means that ultimately both the Palestinian and the Jewish-Israeli people should realize their self-determination in one

1970) (hereinafter: Declaration on Friendly Relations), self-determination may be realized in multiple different ways: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." *See also* Knop, *infra* note 110.

¹⁰ On contemporary Israel-Palestine as situated in a lasting condition of political impasse, *see* THE POLITICS OF NIHILISM: FROM THE NINETEENTH CENTURY TO CONTEMPORARY ISRAEL (ROY BEN-SHAI & NITZAN LEBOVIC eds., 2014) (Chapter 1).

¹¹ While it may be controversial to label Israel's differential governmental system applying in the West Bank, Gaza, and "Israel proper" as "colonial", we believe the label is accurate in key respects. For one, Israel has inherited many British-colonial legal mechanisms of governing the area. On colonial features in Israel's constitutional making *see e.g.* JOHN REYNOLDS, EMPIRE, EMERGENCY, AND INTERNATIONAL LAW (2017); MAZEN MASRI, THE DYNAMICS OF EXCLUSIONARY CONSTITUTIONALISM: ISRAEL AS A JEWISH AND DEMOCRATIC STATE (2017) (especially Chapter 5); Markus Gunneflo, *Settler-colonial and Anti-colonial Legalities in Palestine*, 20 PAL. Y'BOOK INT'L L. 171 (2019).

¹² Cover, *supra* note 8, at 4.

state.¹³ Universal voting rights on a non-discriminatory basis, we argue, can have a *procedural* role: they may help as a mechanism of negotiating the relationship between self-determination and statehood, on democratic and formally equal terms.

As we write, recent plans to annex parts of the West Bank, occupied since 1967, seem to have been suspended.¹⁴ Whatever ends up happening with those plans, the struggle against indefinite occupation involves an internal reconfiguration of our *nomos*, or our legal-political consciousness of this place.¹⁵ Such a shift requires a thorough reconsideration of the theory behind the right to self-determination, and a better understanding of equal voting rights as a vehicle to its realization. As former Israeli Chief Justice Aharon Barak wrote (albeit in a wholly different context), "a new reality sometimes requires a new interpretation" of familiar rules.¹⁶ The government's attempt to turn its "creeping annexation" to annexation *de jure*, though suspended for now, is one such breaking point.

As reflected most flagrantly by the many Jewish settlements, a de-facto annexation of the West Bank and De jure annexation of East Jerusalem is already here.¹⁷ In order for international law applying to the area to be normatively defensible, it must change. An updated interpretation of the norms that apply would help liberate Palestinians under occupation and ensure self-

¹³ See e.g. Ahmad Kilani, Mohammad Ali Alawieh, E. V. Mussaui-Uliyanishcheva & L. V. Ulyanishcheva, *Peace to Prosperity Plan as a One State Solution*, 13 J. POL. & L. 94 (2020); George E. Bisharat, *Maximizing Rights: The One State Solution to the Palestinian-Israeli Conflict*, 8 GLOBAL JURIST [i] (2008); ALI ABUMINAH, *ONE COUNTRY* (2007).

¹⁴ See e.g. Daniel B. Shapiro, *Annexation Isn't Dead. A Desperate Trump Could Bring It Back to Life*, FP (Aug. 11, 2020), <https://foreignpolicy.com/2020/08/11/annexation-israel-palestinians-trump-netanyahu/>.

¹⁵ A "legal consciousness" may be defined concisely as "a vocabulary of concepts and typical arguments" that are available to competent lawyers and competent actors relying on the law. See Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631, 634 (2003).

¹⁶ H CJ 769/02 Public Committee Against Torture v. Government 62(1) PD 507 (2006) (Isr.) (hereinafter: Targeted killings case), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf>.

¹⁷ *Born Without Civil Rights: Israel's Use of Draconian Military Orders to Repress Palestinians in the West Bank*, HUMAN RIGHTS WATCH (Dec. 17, 2019), <https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress>; *The potential impact of West bank annexation by Israel on the human rights of Palestinian residents*, YESH DIN (Apr. 20, 2020), <https://www.yesh-din.org/en/the-potential-impact-of-west-bank-annexation-by-israel-on-the-human-rights-of-palestinian-residents/>; *Direct Legislation by the Knesset for the Territories: Annexation and the Weakening of the Laws of Occupation – Human Rights Ramifications*, THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL (Aug. 2019), https://01368b10-57e4-4138-acc3-01373134d221.usrfiles.com/ugd/01368b_5c6659990e9b4481a6a1cec1a3bc47fc.pdf.

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determination for Palestinians and Jewish Israelis. Law may thus provide the scaffolding for a broader political program. In proposing such a new paradigm, one must carefully consider not only the illegality of changes to occupied territory, including annexation.¹⁸ Equally important are the effects of perpetual occupation on the exercise of individual political rights. If we are just able to drop the baggage we collectively carry on our backs – the view that self-determination is dependent on separation, we will discover new potential in international human rights law. Without the dubious colonial inheritance of separatism, international human rights law can become not only the basis for the political participation of an occupied people – but also for its liberation.

Part 2 below briefly presents the need for a new paradigm in international law, to displace the separatist *nomos*. Part 3 answers the question of "how did we get here?"—i.e., how did we become so unnecessarily committed to a separatist view of self-determination? Part 4 develops an alternative view of self-determination. This view builds upon the excess of Israeli control over Palestinian day to day life in the West Bank, and upon the history of voting among Palestinian citizens inside Israel. The latter's self-determination is premised on the sovereignty of the people, not territorial sovereignty.¹⁹ Part 5 seeks to clarify how we understand the relationship between individual rights of political participation and collective self-determination--the key theoretical question this essay addresses. Part 6 briefly addresses several important objections to our argument. Part 7 concludes—with the hope this essay encourages further discussion within a context that finally, after many years, seems to be more open to radical conceptual change.

2. A New Paradigm in International Law

On December 12, 2019 the UN Committee for the Elimination of Racial Discrimination (CERD) made a recommendation that surely surprised anyone that has been following the international

¹⁸ See Ben Naftali et al., *supra* note 2.

¹⁹ Cf. Office of the Prosecutor, *Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States*, ICC-01/18, Apr. 30, 2020, para. 42 (quoting Gross, *supra* note 2, at 18).

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legal discussion surrounding Palestine and Israel.²⁰ Addressing Israel, it suggested “that the State party ensure *equal treatment for all persons on the territories under its effective control* and subject to its jurisdiction, *including by guaranteeing equal access to citizenship*, legal protection, social and economic benefits [...]” (emphases added).²¹ The committee addresses what political scientist Ian Lustick and others have called a “one state reality”, in which Israel governs the entire territory.²² Such unified control has been achieved by a regime of mobility and surveillance, further differentiated by a patchwork of political membership (citizens, residents, infiltrators, foreigners).²³

The recommendation that Israel grant citizenship to “all persons on the territories under its effective control and subject to its jurisdiction” – meaning the Palestinian residents of the West Bank, may raise eyebrows. Among those surprised will be not only international lawyers, but numerous competent users of the language of international law to define the condition in the Occupied Palestinian Territories. At first glance, it flies in the face of decades of UN pronouncements. Does granting Israeli citizenship to Palestinians under occupation mean the death of the struggle for Palestinian sovereignty, after so many landmark achievements (joining UN bodies, acceding to treaties, and gaining recognition of statehood)?²⁴ Does it undermine Palestinians’ right to self-determination, recognized by the International Court of Justice?²⁵

To use the language of UN Security Council Resolution 2334, the recommendation seems to contradict the unequivocal UN condemnations of “all measures aimed at altering the

²⁰ Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined seventeenth to nineteenth reports of Israel*, CERD/C/ISR/CO/17-19 (Dec. 13, 2019), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/ISR/INT_CERD_COC_ISR_40809_E.pdf.

²¹ *Id.*, at 3.

²² See also ARIELLA AZOULAY & ADI OPHIR, *THE ONE-STATE CONDITION: OCCUPATION AND DEMOCRACY IN ISRAEL/PALESTINE* (2012); YEHOUDA SHENHAV, *BEYOND THE TWO-STATE SOLUTION: A JEWISH POLITICAL ESSAY* (Dimi Reider trans., 2012).

²³ YAEL BERDA, *LIVING EMERGENCY: ISRAEL'S PERMIT REGIME IN THE OCCUPIED WEST BANK* (2017).

²⁴ See *Diplomatic Relations*, PERMANENT OBSERVER MISSION OF THE STATE OF PALESTINE TO THE UNITED NATIONS NEW YORK (June 19, 2020), <https://palestineun.org/about-palestine/diplomatic-relations/>. For an assessment of this strategy, see Victor Kattan, *A State of Palestine: The Case for UN Recognition and Membership*, ALSHABAKA: THE PALESTINIAN POLICY NETWORK (May 27, 2011), <https://al-shabaka.org/briefs/state-palestine-case-un-recognition-and-membership/>.

²⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 1 (July 9), <https://www.icj-cij.org/en/case/131>.

demographic composition, character and status of the Palestinian Territory occupied since 1967".²⁶ General Assembly Resolutions 224 and 338 conveyed the international community's overt demand that Israel withdraw from the occupied territories under a peace deal.²⁷ Granting citizenship to residents of the West Bank seems to encourage Israel's presence in occupied territories and may be held as consonant with Israel's annexation plan. Following Orna Ben-Naftali, who takes Robert Cover's cue, it may seem to contradict the *nomos* the international community inhabits, in which the partition of historic Palestine into two political units is a fundamental tenet.²⁸

The principle of self-determination in international law is ordinarily divided to external self-determination and internal self-determination.²⁹ External self-determination is supposed to provide people with protection from foreign domination, including by formation of their own independent state. Internal self-determination guarantees their right to govern themselves freely without outside interference. The seeming problem with the recommendation to ensure equal rights, including voting rights, to Palestinian non-citizens, can thus be restated: it sacrifices external self-determination in favor of individual human rights. It invites a condition of permanent foreign domination by Israel (for them, a foreign state).

However, such a rejection may be too quick. The CERD document clearly regards the Palestinian territories as *occupied*.³⁰ The committee stresses the right to self-determination of all residents in territories under Israeli control. It emphasizes that Israel's regime of separation between Palestinians and Jews, in which different laws apply to different populations in the same territory, is contrary to the Convention for elimination of all forms of Racial Discrimination.³¹

²⁶ S.C. Res 2334 (Dec. 12, 2019), <https://www.un.org/unispal/document/implementation-of-security-council-resolution-2334-report-of-the-secretary-general-2/>.

²⁷ G.A. Res. 70/224 (Feb. 23, 2016), <https://undocs.org/en/A/RES/70/224>; G.A. Res. 73/338 (Sep. 17, 2019), <https://undocs.org/en/A/RES/73/338>.

²⁸ Ben-Naftali et al., *supra* note 8 at 293.

²⁹ For an overview of the principle of self-determination in international law, *see e.g.*

³⁰ See CERD recommendation, *supra* note 20: "Furthermore, while Israeli settlements in the Occupied Palestinian Territory are not only illegal under international law but also an obstacle to the enjoyment of human rights by the whole population, the Basic Law constitutionally elevates them "as a national value" (arts. 1, 2 and 5)."

³¹ Article 3 of International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, U.N.T.S., <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

How should one understand the demand to provide citizenship, while maintaining international law's specific protections for occupied populations, including the strict rule against annexation?

The answer lies in the reality of what Aeyal Gross has called "indefinite occupation", one that may not end up being permanent, but can also no longer be called "temporary".³² Already in a paper from 2005, Ben Naftali, Gross and Keren Michaeli have argued that such an occupation is illegal.³³ Whether that is indeed the case is a difficult question, which we will not directly engage here. What is clear is that without the political participation of the occupied population, any remedy that might exist for such illegality is ineffective at best. And yet, such an occupation is so long-term, that international human rights law simply cannot allow for the occupied population to be excluded from political participation.³⁴ While the status of the territory remains occupied, those Palestinians who want a voice in choosing the government that has effective control over them, must have individual voting rights. By accepting such rights--indeed by demanding them--they would not forfeit their right to external self-determination, nor the path to *independent* statehood. Israel must offer its citizenship to Palestinian non-citizens under indefinite occupation, unilaterally, as a remedial measure as long as Palestinian self-determination remains unrealized.

It is hard to exaggerate how out of step such an interpretation is with mainstream international legal understandings of the area. While "Pluralistic societies encompass divergent *nomoi*", and each of these is in principle "legally valid",³⁵ our use of the word *nomos* signals deep and nearly immutable normative commitments. All the more so, when these normative commitments seem to be common across the international community (with the exception of the Israeli community³⁶). For our purposes here, a *nomos* becomes synonymous with a "paradigm" when it is so hegemonic as to appear to be providing the *only* way to understand the law on a particular issue. This is precisely what happened to the separatist *nomos* in international law. We

³² See Gross *supra* note 2, at 54.

³³ See Ben Naftali et al. *supra* note 2.

³⁴ See Zemach, *supra* note 2; Sari Bashi, *Human Rights in Indefinite Occupation: Palestine*, CARDOZO J. INTL AND COMP. L. (forthcoming 2020).

³⁵ Ben Naftali, *supra* note 8 at 277.

³⁶ *Id.* at 278.

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follow Lustick in using Thomas Kuhn’s notion of a paradigm in the history of the sciences to illuminate context of the law in Palestine and Israel.³⁷

Lustick explains that the “Two State Solution paradigm” reached its apex during the Oslo years, and has remained solid long after.³⁸ While some political commentators have since come around to endorsing a "one state solution"—or simply recognizing a “one state reality” — lawyers have generally not yet provided the legal vocabulary to buttress it.³⁹ For these reasons, the importance of our proposed shift in the separatist international legal paradigm goes far beyond CERD’s authority as an interpreter. As mentioned in the introduction, if developed fully, it presents the kernel of a new paradigm or *nomos* for the area – and a corrective to the separatist understanding of self-determination.

Yet a caveat may be in order. This paradigm is indeed novel within the context of a still-Eurocentric discussion of international law. But it is not that new once one considers voices that have conceptualized self-determination from the perspective of colonized nations.⁴⁰ Historically, the Palestine Liberation Organization’s (PLO) platform proposed one democratic Palestinian state in all of the territory of historical Palestine. The fifth national council of the PLO in February 1969 passed a resolution confirming that the PLO's objective was "to establish a free and democratic society in Palestine for all Palestinians whether they are Muslims, Christians or Jews".⁴¹ In a 1974 speech at the UN General Assembly, dedicated by and large to characterizing Zionism as a colonialist movement, PLO leader Yasser Arafat articulated the position clearly:

³⁷ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (University of Chicago Press 4th ed. 2012) (1962).

As Lustick explains,

“...both scientific and political projects maintain institutional dominance for longer than could be justified by their ability to explain or change the world. That is why Thomas Kuhn’s theory of scientific revolutions, which explains the overthrow of previously hegemonic ideas in the natural sciences and the discontinuities surrounding that process, borrowed its key concept—revolution—not from natural science itself but instead from political science.”

Lustick, *supra* note 3, at 91.

³⁸ *Id.*, at 100.

³⁹ But see, Bashi and Zemach *supra* note 34.

⁴⁰ See generally ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND THE FALL OF SELF-DETERMINATION* (2019); Duong, *supra* note 1.

⁴¹ Alain Gresh, *Problematic partition of Palestine: A history of conflict between opposing ideals*, LE MONDE DIPLOMATIQUE (Oct. 3, 2010), <https://mondediplo.com/2010/10/03binationalism>.

"So let us work together that my dream may be fulfilled, that I may return with my people out of exile, there in Palestine to live with this Jewish freedom-fighter and his partners, with this Arab priest and his brothers, in one democratic State where Christian, Jew and Muslim live in Justice, equality and fraternity."⁴² Since 2006, the Hamas movement adopted a similar position with regard to Palestinian self-determination.⁴³

From a vantage point closer to our own, in recent months, proposals for equal political participation in Israel / Palestine have emerged in the specifically legal literature. Particularly noteworthy are recent works by Ariel Zemach and Sari Bashi.⁴⁴

In his article titled "The Emerging Right of West Bank Palestinians to Israeli Citizenship" Zemach explains: "The West Bank is a territory under Israeli occupation, and annexation by an occupier of any part of the occupied territory violates international law." The *de-facto* annexation of the West Bank by Israel, he further says, renders "that territory a part of Israel for the limited purpose of the right to citizenship."⁴⁵ This juxtaposition of "limited purpose" and "citizenship" is somehow ironic, because citizenship is often regarded as the very "right to have rights".⁴⁶ While endorsing Zemach's proposal, we do not seek to employ his rhetoric of legalist minimalism. To the contrary, we acknowledge the revolutionary potential of universal suffrage in this context, which connects it to earlier visions of de-colonization.⁴⁷

Bashi, for her own part, complements this picture with another important aspect of the scholarship framing a new *nomos* for the area. Her analysis "is grounded in the factual circumstances of the occupied Palestinian territory (OPT), given the duration of the occupation and the concerns about protections of civilians that it raises..."⁴⁸ This analysis of the facts leads

⁴² U.N. GAOR 29th Sess. Agenda Item 108 U.N. Doc. A/PV.2282 (Nov. 13, 1974), <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/a238ec7a3e13eed18525624a007697ec?OpenDocument>; See also YOUSIF MOHAMMAD YOUSIF AL-QARA'IN, THE PALESTINIAN RIGHT TO SELF-DETERMINATION 5 (1983) ["Ḥq Ālš' b Āl- 'rby Āl-Flstyny fy Ṭqryr Āl-Mšyr"].

⁴³ See *infra* Quigley, note 75.

⁴⁴ Bashi and Zemach, *supra* note 34.

⁴⁵ Zemach, *supra* note 34 at 1.

⁴⁶ See ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY AND INTERNATIONAL LAW (2012).

⁴⁷ Duong, *supra* note 1.

⁴⁸ Bashi, *supra* note 34 at 2.

her to conclude that under the law of occupation--when applied in tandem with human rights law--Israel is under a duty of non-discrimination between its citizens and Palestinian non-citizens under its control. Within this context she grants attention to social economic rights, including health; and especially to the freedom of movement.⁴⁹ Alongside citizenship as the basis for voting, all of these are key to our own understanding of self-determination too.

Both Zemach and Bashi begin their intervention from a strong assertion of individual rights. But what is the relationship between such proposals centered on individual rights and the principle of *collective* self-determination? And how should we be thinking about the relationship between external and internal self-determination in this context? Neither of the authors clearly introduce the view, developed below, that individual rights of political participation, particularly voting, can become a vehicle for Palestinian self-determination. We believe this argument about self-determination is the key for shifting the paradigm in international law.

A brief foray into the history of the area is helpful to show how voting in Israeli elections has indeed long functioned as a vehicle for Palestinian self-determination (Part 4). But before that, only by reassessing how we have become so committed to a separatist view of self-determination (Part 3), will we be able to see the way forward in overcoming it.

3. The Emergence of the Separatist Paradigm

The realization of collective rights through self-determination and the individual right to participate politically often appear to stand in binary opposition, or at least as strictly separate issues. But in the context of Palestine and Israel, it has become apparent that the bifurcation between these rights is simply a bias of the separatist *nomos*. It is neither an analytical truth, nor does the right of self-determination decree any particular order of preference in their realization.⁵⁰ The bifurcation of questions of individual rights and collective rights is the result of

⁴⁹ See also Berda, *supra* note 23.

⁵⁰ Thomas Franck, *The Emerging Right to Democratic Governance*, 86(1) AM. J. INT'L L. 46 (1992).

a specific history and path-dependency; one that we must learn, but that we have no reason to adopt today as our own.⁵¹

The 19th century concept of self-determination is closely related to the emergence of the nation-state, conceived in terms of an ethnically, culturally, and often racially homogenous group. Hannah Arendt expressed this idea, when she wrote: "Nations entered the scene of history and were emancipated when peoples had acquired a consciousness of themselves as cultural and historical entities, and of their territory as a permanent home, where history had left visible traces, whose cultivation was the product of the common labor of their ancestors and whose future would depend upon the course of a common civilization."⁵² As the Max Planck Encyclopedia of Public International Law explains, "This so-called 'principle of nationalities' provided the basis for the formation of a number of new States and finally, at the end of World War I, for the dismemberment of the Austro-Hungarian, Russian, and Ottoman empires."⁵³

In this view, "nations" or "peoples" are naturally given. Observing this reality, specific social contracts should neatly divide between them, to give individuals the opportunity to express their political will within the bounds of their own nation. Arguably, for Arendt, the American revolution further radicalized this bifurcation between collectivity and individual participation. The former is defined by a constitution, which is foundational political act that binds all members of the polity, drawing enduring limits for the latter.⁵⁴ The notion of self-determination as reflected in a division between individual participation and collective self-determination also arguably became dominant in international law. Yet it is worth noting that it was not the only way of seeing self-determination. Early socialist writings on self-determination did not bifurcate

⁵¹ For a classical critique of "traditionalism" in law, at the same time defending *historical* legal thinking, see David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1058 (1991).

⁵² HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* 229 (Harcourt Brace Jovanovich 1973).

⁵³ Daniel Thürer, Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=fSyk01&result=1&prd=MPIL>.

⁵⁴ See HANNAH ARENDT, *ON REVOLUTION* (2nd edition 1963).

between an individual right to political participation and a collective right to self-determination. They were both parts of a single plan for emancipatory transformation of society.⁵⁵

In the colonial context, however, self-determination obtained yet another hue:⁵⁶ "the mandates system was devised as a compromise solution between the ideal of self-determination and the interests of the administrative powers".⁵⁷ With the dissolution of the Ottoman empire, and specifically with British mandate demographic planning, partition emerged as a favored technology of governance.⁵⁸ It is this emphasis on partition which we label "separatist". In Palestine, the desirability of partition was first assumed by the Peel Commission (1937).⁵⁹ The plan was authored by a group of British colonial officers and was specifically couched in a security rationale.

The political support for partition among Mandate authorities was, from the outset, a response to conflict. The basic question the commission was designed to answer was how to pacify "the Arab revolt" (1936-1939) (Ṭwrī Flstyn Ālkbrā) and thus obtain regional stability.⁶⁰ The Commission's answer borrowed a page from an earlier project that the League of Nations had fostered. The 1923 Lausanne Agreement, framed at the decline of the Ottoman empire, was designed to "unmix" Greek and Turkish populations, and was a principal instrument of a violent population exchange.⁶¹ Accordingly, the Peel Commission sought to demographically separate the Jews of Palestine from its Palestinian Arabs (and even recommended the Greek-Turkish exchange).⁶² As empires were hammered into new nation states, partition was perceived as a

⁵⁵ See e.g. Vladimir Ilyich Lenin, *The Right of Nations to Self-Determination*, 4-6 J. PROSVESHCHENIYE 393 (1914); Bill Bowring, *Response to Robert Knox*, 19 HISTORICAL MATERIALISM 195 (2011).

⁵⁶ See Joseph Massad, *Against Self-Determination*, HUMANITY JOURNAL (Sep. 11, 2018), <http://humanityjournal.org/issue9-2/against-self-determination/>, (elaborating the meaning of "colonial nationalism").

⁵⁷ Max Planck encyclopedia, *supra* note 53; League of Nations Covenant art. 22.

⁵⁸ See generally Dubnov and Robson, *supra* note 7.

⁵⁹ This understanding was based on two historical moments: the first was the partition of Bengal in 1906, to separate Hindu and Muslim Bengalis, introduced by Lord Curzon. The second was the treaty of Lausanne that viewed population transfer to achieve ethnic homogeneity as compatible and at times necessary for achieving national self-determination.

⁶⁰ Chap. II of Palestine Royal Commission Report, July 1947 (Peel Commission report).

⁶¹ ÖZSU, *supra* note 5, at 72.

⁶² Peel Commission report, *supra* note 60, provision 40 of Chap. 22.

means to achieve national self-determination for communities. And this solution, the Commission thought, necessitated carving up territory and transferring population, along perceived religious or ethno-national divides.⁶³ In the Peel Commission’s own language, this was a “natural” solution, and indeed a necessary one:

An irrepressible conflict has arisen between two national communities within the narrow bounds of one small country. There is no common ground between them. Their national aspirations are incompatible. The Arabs desire to revive the tradition of the Arab golden age. The Jews desire to show what they can achieve when restored to the land in which the Jewish nation was born. Neither of the two national ideals permits of combination in the service of a single state.⁶⁴

After World War II, the outlines of this plan were adopted by the UN General Assembly in Resolution 181—“the partition plan”.⁶⁵ The Resolution envisaged and indeed aimed to ensure freedom of movement and economic integration between the Jewish and Arab states. The way the separatist model played out on the ground, alas, defeated these objectives. The main political representation of Palestinian Arabs at that time, headed by Hajj Amin-Al-Husseini, rejected the partition. War broke out when neighboring Arab states sent their troops to intervene in Mandate Palestine and to attack the Jews and their political presence in the area. Yet the latter were not only successful in defending their state-in-the-making; their military groups occupied territories beyond those that were granted to them under Resolution 181.⁶⁶ On May 14, 1948, Israel declared its independence.⁶⁷

⁶³ Id., provision 36 of Chap. 22

⁶⁴ Id., Chap. 20 (aptly titled “The Force of the Circumstances”).

⁶⁵ G.A. Res. 181(II) UN Partition Plan (Nov. 29, 1947).

⁶⁶ One Palestinian political commentator describes this as “the first illegal occupation” see: Nasser al-Qudwa, *Once again, the Palestinian State and its Protection is the Basic Issue*, MASARAT (July 26, 2020), <https://www.masarat.ps/article/5466/%D9%85%D8%B1%D8%A9-%D8%A3%D8%AE%D8%B1%D9%89-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9-%D8%A7%D9%84%D9%88%D8%B7%D9%86%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D8%AB%D8%A8%D8%A7%D8%AA-%D8%B9%D9%84%D9%8A%D9%87%D8%A7-%D9%87%D9%88-%D8%A7%D9%84%D8%A3%D8%B3%D8%A7%D8%B3>.

⁶⁷ Israeli Declaration of Independence.

For most Arab Palestinians, Israeli independence did not translate into citizenship in a newly mapped territory. Rather, it marked the moment in which they became foreigners, refugees, intruders, or stateless people.⁶⁸ As imaginary and ideological limits for the nation were articulated, physical lines mapped control over territory for the new state, with around 700,000 Palestinians officially outside its borders. As the violence subsided, a state project to prevent their return gradually materialized by various means including the erasure of Palestinian neighborhoods and villages.⁶⁹ Those remaining came to be classified by population lists, identity documents, questionnaires, and executive regulations. Landscapes of paper shaped their daily lives, the spaces and communities to which they belonged, and most significantly, to which they could not return. Their properties were confiscated by the force of a law that declared them “absentees”—a euphemism that ignores the bloody circumstances of this absence.⁷⁰

The war thus gave way to the demographic rationality of “otherness”, one that was reflected in the Jewish national movement's existential goal of achieving and maintaining a majority. Under the guise of a specific understanding of the principle of self-determination in international law—one closely tied with colonial peace-building in other regional contexts--partition contributed to the conditions for a forced displacement of Palestinian Arabs. The Palestinian refugees were excluded from citizenship in Israel – the new state that was established within the armistice line agreed upon in the Rhodes treaty.⁷¹ And the plan left a phantom behind it, that of the unborn Arab-Palestinian State. These factors were crucial for the emergence of a separatist *nomos*, which gradually evolved into an overarching, hegemonic paradigm.

Indeed, the partition plan ended up cementing separation into reality, casting it ever since into the political commonsense in the area. Perceived as a territorial solution to the conflict, partition would shape citizenship as mutually exclusive, and turned peoples’ location, and their mobility capacities, to determining factors in claiming citizenship. This is the view, often made explicit today, that Palestinian participation in the political framework that Israel put in place

⁶⁸ Berda, *supra* note 23.

⁶⁹ Simha Flapan, *The Palestinian exodus of 1948*, 16 J. OF PALESTINE STUDIES 3 (1987).

⁷⁰ Absentee's property law, 5710-1950 4 LSI 68 (1948-1987) (Isr.).

⁷¹ Drew, *supra* note 5; ÖZSU, *supra* note 5; Israel-Jordan Armistice Agreement, Isr.-Jordan Apr. 3, 1949, I.L.M. (hereinafter: Rhodes Treaty).

was incommensurable with the right to self-determination for Jews.⁷² Importantly, Jewish Israelis came to hold this view, in different versions, almost across the entire political spectrum.

As noted above, the PLO historically supported a plan to establish one democratic Palestinian state across all of historical Palestine. In that regard, the Palestinian imagination aligned with the separatist paradigm much later—with the Peace Talks in the early 1990s—and even then, only partially. The historical Palestinian plan for one state was, however, not to be realized through participation in the political structures established by Israel.⁷³ It was premised, rather, on a refusal to recognize Israel as a state. The majority of Jews in Palestine believed, not unreasonably, that the PLO’s plan sought their own expulsion.⁷⁴ As one commentator observes, Hamas’s position since its success in the 2006 Gaza elections is its contemporary heir.⁷⁵

4. An Excess of Control

While the logic underlying the Partition Plan was to advance stability, the conflictual structure between the two separate national groups generated instability from the outset. Within Israel proper a large Arab-Palestinian population remained after 1948 and received voting rights almost immediately. As Hassan Jabareen has argued, Israel granted such rights as part of a pattern of illiberal coercion, not in the context of free choice under an equal social contract.⁷⁶ Voting rights, he explains, were granted not as a measure of emancipation within a new state, but precisely as a means to extinguish these people’s external self-determination.⁷⁷ This seems to be in direct

⁷² The view is reflected, e.g. in proposals to remove Palestinian citizens from Israel in the course of a “land swap”, which was included recently in Trump’s plan for a “Deal of the Century”.

⁷³ Bisharat, *supra* 13 note at 11; Ghada Karmi, *The One-State Solution: An Alternative Vision for Israeli-Palestinian Peace*, 40 J. OF PALESTINE STUD. 62, 69 (2011).

⁷⁴ *Id.*, at 63.

⁷⁵ John Quigley, *Self-Determination in the Palestinian Context*, PUBLIC LAW AND LEGAL THEORY, Working Paper Series No. 101 3 (2007). *See also* Letter of Mohammed Zahar, Foreign Minister, Palestinian Authority, to UN Secretary-General Kofi Annan, April 4, 2006 (addressing the aim of the Palestinian people as being “to establish their fully sovereign independent State, with Jerusalem as its capital, and the right of the Palestine refugees, including their right to return and compensation.”)

⁷⁶ Hassan Jabareen, *Hobbesian Citizenship: How the Palestinians Became a Minority in Israel* in MULTICULTURALISM AND MINORITY RIGHTS IN THE ARAB WORLD (Will Kymlica and Eve Pföstl, eds., 2014).

⁷⁷ *Cf.* Massad, *supra* note 56.

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contradiction with UN pronouncements, according to which self-determination must be “freely determined” by a people.⁷⁸ And yet, the history of Palestinian citizens in Israel reveals another, non-separatist notion of self-determination. One that is premised on the sovereignty of the people, not territorial sovereignty; one that is closely tied with the right to vote; and one that has come to constitute a modality of Palestinian self-determination.

To be sure, even after Palestinian residents of Israel obtained voting rights, the rationality of separation reflected in the partition plan prevailed. Israel initially effected separation by imposing movement restrictions on Palestinian towns and villages, and by governing Palestinians by colonial emergency laws.⁷⁹ Through systemic impediments on freedom of movement and practices of surveillance,⁸⁰ partition between Palestinians and Jewish Israelis was achieved by other means, and ensured the two groups would remain distinct “nations”.⁸¹ Palestinians held political rights in their citizenship status, while they were confined to the territory of the phantom Arab state on the other side of the partition line under the 181 Resolution. In 1966, the military government ended, but ethnic separation continued to prevail through a mixture of formal and informal limitations on planning, urban development, and through a separate education system for Arab Palestinians.⁸²

The Significance of Indefinite Occupation

⁷⁸ See e.g. Principle 5, Declaration of Friendly Relations, *supra* note 9.

⁷⁹ Sara Roy, *Reconceptualizing The Israeli-Palestinian Conflict: Key Paradigm Shifts*, 41 J. PALESTINE STUD. 71, 78 (2012); Alison p. Brown, *The Immobile Mass: Movement Restrictions In The West Bank*, 13 SOCIAL & LEGAL STUDIES 501 (2004).

⁸⁰ Orna Ben-Naftali et al., *X Rays*, in THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 475–498 (2018); Helga Tawil-Souri, *Colored Identity: The Politics and Materiality of ID Cards in Palestine/Israel*, 29 SOCIAL TEXT 67 (2011); Andrew Stevens, *Surveillance Policies, Practices and Technologies in Israel and the Occupied Palestinian Territories: Assessing the Security State*, (working paper 4) SOC. SCIENCES AND HUMAN. RES. COUNCIL OF CANADA (2011); Ismael Abu-saad, *Separate and unequal: the role of the state educational system in maintaining the subordination of Israel's Palestinian arab citizens*, 10 SOC. IDENTITIES 101 (2004).

⁸¹ Israeli identity cards.

⁸² Han Saban, *Theorizing and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel's First Three Decades (1948-1978)*, 25 EMORY INT'L L. REV. 299 (2011).

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With the occupation of new territories that came under Israeli control after the 1967 war, significant legal changes were required. Without annexation – which at this point was already illegal under customary international law⁸³ – the law that would apply to Palestinians in the West Bank and Gaza was international humanitarian law; particularly the law of occupation. While Israel never formally accepted that the territories were "occupied", it applied The Hague Regulation of 1907 as well as parts of the Fourth Geneva Convention.⁸⁴

The law of occupation is a limited legal framework for governing a population over a long period of time. The Israeli Supreme Court characterized the occupation in 1982, opining that "It is, of its essence, a temporary regime even if this temporariness is of long duration."⁸⁵ But what had been held as temporary was becoming indefinite (the difference being that the 'temporary' definitely has an end while the 'indefinite' may or may not have an end.⁸⁶). During the same year, former Deputy Mayor of Jerusalem Meron Benvenisti famously declared that with 100,000 Jewish Settlers in the West Bank, it was “five minutes to midnight” for the two-state solution.⁸⁷ Realizing that the international law of occupation framework is inadequate under such circumstances, Ben Naftali and Shany argued, already in 2003, that it should be supplanted by international human rights law,⁸⁸ a framework applicable on the basis of the exercise of jurisdiction over a territory, regardless of its political status.⁸⁹

⁸³ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 1 (Feb. 25) (hereinafter: *Chagos case*).

⁸⁴ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 U.N.T.S (hereinafter: Hague Regulation); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter: Geneva Convention). Orna Ben-Naftali, *Geneva Law* in THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 141 (2018).

⁸⁵ HCJ 393/82 Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. Commander of the IDF Forces in the Area of Judea and Samaria 37(4) PD 785 (1983) (Isr.), http://www.hamoked.org/items/160_eng.pdf.

⁸⁶ Ben Naftali et al., *supra* note 2.

⁸⁷ See also Peter Beinart, Yavne.

⁸⁸ Orna Ben-Naftali and Yuval Shany, *Living in denial: the application of human rights in the occupied territories* 37 ISR. L. REV. 17 (2003).

⁸⁹ The International Covenant on Civil and Political Rights, Dec. 16, 1966 U.N.T.S (ICCPR); CERD, *supra* note 20; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984

The Palestinian popular uprising of 1987 – 1993, the “First Intifada”, led to the Oslo Peace Process. Yet over time it became clear that the failures of the Oslo process led to annexation *de facto* and the territorial, economic and legal expansion of Israel’s control over every aspect of Palestinian life.⁹⁰ This has not only left a vacuum of rights. It has also generated an excess of control: Palestinians are actively governed by the Israeli state apparatuses and markets but are denied political participation in decisions that affect their lives. The right to protection from discrimination, and indeed the right to vote, are central parts of the human rights framework. Yet even after the view Shany and Ben Naftali espoused became more and more accepted,⁹¹ these two rights could not be engaged under a situation of occupation. The implicit assumption – one that no one seemed to question – was that the *lex specialis* of the laws of war could still trump the right to participation in the political community.⁹² The time has come to question that assumption: based, as it is, on the separatist *nomos* which sought partition to foster stability, it defies its underlying rational.

One cannot emphasize it enough: Annexation *de facto*, or “the one state reality” has implications for every aspect of daily life.⁹³ Indeed, as harsh, sophisticated and violent as a military occupation can be, annexation *de facto* is different. It means that the organizations and apparatus of the state and its markets deeply infiltrate the occupied (Palestinian) society. Annexation *de facto* is not only a direct result of the settlement expansion project, but also of the economic dependencies and massive surveillance system that governs Palestinian mobility.⁹⁴ It is the penetration of the Israeli state into Palestinian daily life, economy and society that

U.N.T.S (hereinafter: CAT) and Convention on the Rights of the Child, Nov. 20, 1989 U.N.T.S (hereinafter: CRC) use the term jurisdiction' in order to describe their scope of application.

⁹⁰ Zemach, *supra* note 34.

⁹¹ See e.g. HCJ 3239/02 Marab v. Commander of the IDF Forces in the West Bank 57(2) PD 349 (2003) (Isr.), https://www-nevo-co-il.ezproxy.haifa.ac.il/psika_html/ilr/ilr-02-3239.pdf.

⁹² Jabareen, *supra* note 76 at 217.

⁹³ Lustick, *supra* note 22.

⁹⁴ Benjamin G. Waters, *An International Right to Privacy: Israeli Intelligence Collection in the Occupied Palestinian Territories*, 50 GEO. J. INT'L L. 573 (2019); Cedric Parizot, *Undocumented Economy Of Control: Workers, smugglers and State authorities in southern Israel/Palestine*, HAL: ARCHIVES-OUVERTES.FR (2012); Fadle M. Naqib, *Economic Aspects Of The Palestinian Israeli Conflict: The Collapse Of The Oslo Accord*, 15 J. INT'L DEV 499 (2003); Amira Hass, *Israel's Closure Policy: An Ineffective Strategy of Containment and Repression*, 31 J. PALESTINE STUD. 5 (2002); Elia Zureik, *Constructing Palestine through Surveillance Practices*, BRITISH J. OF MIDDLE EASTERN STUD. 28 (2001)

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underscores the nature of this control, a nature that far exceeds the traditional scope of control exercised by an occupation regime. This excess requires that people subjected to this control participate in the decisions that affect every minute detail of their lives. The right to vote and be elected are the vehicles to affect this participation.

In a recent ruling, however, the Israeli Supreme Court, sitting in its capacity as a High Court of Justice, upheld the right to equality of everyone effected by Israeli legislation.⁹⁵ The context for this holding was the Court's striking down of a law that sought to expropriate private Palestinian property in the occupied territory for the purpose of Jewish expansionism. The court thus echoes, in an unexpected way, the above-mentioned CERD-based decision;⁹⁶ paraphrasing Lustick, with the imposition of equality by an Israeli Court we start to see the evidence of the hegemonic legal paradigm crumbling.⁹⁷

Alluding to the Palestinian displacement of 1948, and the "Absentee Property Law", the Court says clearly that similar laws expropriated private Palestinian lands shortly after Israel's founding. The comparison is indicative. It suggests that at that time, no solid protections existed for equality among the population of the newly founded state, but that this is no longer the case. Indeed, quoting famous words by former Chief Justice Dorit Beinisch, the Court reiterates that such a violation of equality can no longer be defended today.⁹⁸

While Beinisch is usually counted among the more "liberal" justices on the bench, this view is not confined to "liberal" judges. Thus, in a famous opinion seeking to legalize Jewish settlements in the West Bank, the late "conservative" justice Edmond Levi asserted a similar position of equality among all those living under Israeli control.⁹⁹ As one commentator remarked on the pages of the Israeli newspaper, Ha'aretz, given the realities of racial hierarchy in the West

⁹⁵ HCJ 1308/17 Iryat Silwad v Haknesset (Jun. 2, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.) available at <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\17\080\013\v48&fileName=17013080.V48&type=2>.

⁹⁶ CERD recommendation, *supra* note 20.

⁹⁷ Lustick, *supra*.

⁹⁸ Iryat Silwad v Haknesset, *supra* note 95 at para. 72.

⁹⁹ Report on the Legal Status of Building in Judea and Samaria (June 21, 2012) [hereinafter: the Levy Committee report], available at https://www.gov.il/BlobFolder/news/spokeedmond090712/he/documents_doch090712.pdf; But see description of Levy report in Ben-Naftali et al, Nomos *supra* note 8 at 279 n.11.

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Bank, this rhetoric of equality is “surreal”.¹⁰⁰ But the fact the Court devises such a bizarre dream reflects, once again, the reality of excessive Israeli control that it confronts.

This excess of control comes with a legal lesson. And the descriptive account of facts on the ground that it relies upon, suggests specific prescriptive conclusions. If we are just able to drop the baggage we collectively carry on our backs – the view that self-determination is *necessarily* dependent on separation, we will discover new potential in international human rights law. Without the dubious colonial inheritance from the interwar period, the separatist paradigm, it will become clear: international human rights law can indeed become not only the basis for the political participation of an occupied people – but also for its liberation. Constitutional law is arguably the most natural source for rights of political participation (including voting rights).¹⁰¹ But when a people is occupied indefinitely, the rights to political participation and equality under international human rights law become an alternative source for voting rights. The latter can be obtained even when a group is not tied together by a single political contract. In this construction, international human rights law functions in the interim period, that is, until self-determination is realized through new political institutions. This can happen either by separation from the occupying state, or by a changes in its basic structure. Voting rights obtained by a group under occupation realize a measure of internal self-determination, which is then ultimately granted the external aspect too.

Palestinian Self-Determination Inside Israel

Despite its very different legal trajectory and political circumstances, the *de facto* annexation of the West Bank is not the first time that Palestinians face a situation where they are occupied indeterminately.¹⁰² Indeed, Palestinians have an important experience of being under an excess control in a state they did not choose to be citizens of. Between 1948 and 1952, the Arab Palestinian population that remained in Israel after the “Nakba”, participated in Israeli elections

¹⁰⁰ Menachem Mautner, *The High Court's Surrealism ("Hasurealism Shel Bagatz")* HA'ARETZ, (Jun. 13, 2020), <https://www.haaretz.co.il/opinions/premium-1.8914436>.

¹⁰¹ Eyal Benvenisti & Alon Harel, *Embracing the tension between national and international human rights law: The case for discordant parity*, 15 ICON 36, 40 (2017).

¹⁰² See Nasser al-Qudwa, *supra* note 66.

even while they were not yet citizens. Governed by the military government that ruled between 1949-1966, Palestinians were granted citizenship only in 1952, but they had already participated in election prior to the application of formal citizenship laws.¹⁰³

As Hassan Jabareen writes, when Palestinians within Israel first voted in Israeli elections, Israeli official definitions distinguished “The State of Israel” from the “occupied territories” or “administered territories” in which the majority of Palestinians lived.¹⁰⁴ These were the territories designated as the Arab state in the Partition Plan. Ben Gurion explained the governmental policy by the indeterminacy of the status of the occupied or administered territories: “It is not wise to declare that we will not return the occupied territories and it is not wise to declare that we will return them”.¹⁰⁵ Such words strikingly echo the positions of Israeli governments regarding the West Bank from 1967 to this day. They reflect the logic of indeterminate occupation generating, eventually, the de-facto annexation. Participation in the 1948 census which preceded the first Israeli elections for Palestinians inside of Israel was critical. It was conducted amidst a campaign to exile “infiltrators”, the refugees attempting to return to their homes. For Palestinian "of the inside" (Āl-Dāḥl), citizenship was first and foremost a status of non-deportability under Israel's "anti-infiltration" law.¹⁰⁶ Very much like the Palestinians in the West Bank and Gaza, Palestinians were governed through emergency regulations and security laws.

Most importantly, for the Palestinian inside Israel, political participation did not entail relinquishing their rights of self-determination. It was the product of the practical necessities instantiated by an indeterminate occupation of the lands that had been designated to be the Arab state. And indeed, today we see the “Joint List” in the Israeli Knesset exercising a form of Palestinian national self-determination through the institutions of the “Jewish state”. What has allowed them to do so, even without a sovereign Palestinian state, is their exercise of an individual right to vote. Today, the Palestinian right to self-determination is exercised in

¹⁰³ Jabareen, *supra* note 76.

¹⁰⁴ *Id.*

¹⁰⁵ Israel State Archives, Protocol of the PSC, 17 June 1948, p. 33.

¹⁰⁶ Berda, *supra* note 23.

Ramallah by the Palestinian authority; in Gaza, by the Hamas authorities; and in Jerusalem, by Palestinian members of the Israeli Knesset. In each place, the right takes a different form. But there is no *a priori* judgment that one is better than the other. Indeed, they are not, or not necessarily, mutually exclusive, nor does each or any exclude the eventual realization of Palestinian collective right to self-determination.

The right to self-determination is often upheld as underwriting the connection between a people and its land.¹⁰⁷ However, “[C]urrent international law understands sovereignty to be vested in the people, giving expression to the right to self-determination”.¹⁰⁸ Sovereignty and national rights are not embodied solely in the territory itself, or even in the previous sovereign state, but in the people. Further, self-determination is an enduring right, even if its material realization is delayed by occupation or conquest.¹⁰⁹ The whole premise, and most basic principle of the international law of occupation is that the occupation does not transfer sovereignty. If self-determination is an inalienable right that is embodied in the people, why would individual participation in the political life of the occupying power, under conditions of an indefinite occupation, affect it?

5. Between Individual and Collective Rights

When, in the mid-1970s, Yasser Arafat presented a vision of one democratic state as part of a vision of decolonization, he was working within a larger historical-political context; one in which individual rights were not thought of as separate from collective rights. While their bifurcation has seemed to dominate the theory of self-determination, one should not simply assume it *a-priori*. As Karen Knop has argued, the jurisprudence supporting the right displays “not a uniform judicial method, but a pattern of creativity that may be seen as responsive” to practical political challenges.¹¹⁰

¹⁰⁷ Margaret Moore, *Foundations of a Theory of Territory: Individual Moral Rights of Residency, Collective Moral Rights of Occupancy, and a People’s Rights of Self-Determination*, In *A POLITICAL THEORY OF TERRITORY* (2015).

¹⁰⁸ Ben Naftali, et al., *supra* note 86 at 554.

¹⁰⁹ *Id.*, at 574.

¹¹⁰ KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION UNDER INTERNATIONAL LAW* 110 (2019).

Thus, for instance, midcentury black Atlantic intellectuals have conceived of universal suffrage as decolonization. As political theorist Kevin Duong explains, they “figured suffrage expansion as a vector for political self-determination and cultural self-expression” and “mass enfranchisement as a Trojan Horse. Universal access to the ballot box would explode rather than redeem the imperial institutions into which subject populations entered.”¹¹¹ Like the Marxist view of self-determination, these views do not reflect the dominant bifurcation between individual and collective rights. The “nation” is not a given reality, where every voter needs to fit within her preexisting box. Rather, voting is a vehicle to redefine and re-constitute the nation.¹¹² Voting and belonging to a nation are mutually constitutive, a performance of belonging by making a difference.

Yet the dominant bifurcation is not only a matter of political theory. As already mentioned above, it is also reflected in mainstream readings of international law. The right to vote is recognized under Article 25 of the International Covenant on Civil and Political Rights (ICCPR). A distinction is drawn, here too, between the principle of collective self-determination and the right of individuals to participate in those processes which constitute the conduct of public affairs. As the UN Human Rights Committee explains:¹¹³

“The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), [the right to self-determination] peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.”

Even so, no single realization of the right to self-determination can prevail.¹¹⁴ Far from necessitating a strict separation between collective and individual rights, the analytical

¹¹¹ Duong, *supra* note 47.

¹¹² Cf. Jacques Derrida, *Declarations of Independence*, 7 NEW POLITICAL SCIENCE 7 (1986).

¹¹³

¹¹⁴ See Principle 5 of the Declaration of Friendly Relations, *supra* note 9: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other

distinction above can be read as defining their interconnectedness. In the present context, one can be fully respectful of the Palestinian right to self-determination, while also serious about the rights of individuals to participate in decisions that shape their current reality. Further, one might mistakenly conclude that voting rights in Israel may harm the measure of self-government that Palestinians have under the Palestinian Authority. This couldn't be further from reality. International law clearly allows dual citizenship.¹¹⁵ While voting rights have not been realized in the Palestinian authority since 2006,¹¹⁶ there is no reason why, in principle, they cannot be granted both in the occupying state which controls one's life as well as in the Palestinian state under an alien control.

The Israeli government has used the theory of transformative occupation, developed in the context of the U.S.'s occupation of Iraq,¹¹⁷ to circumvent prohibitions on the use of natural resources in the occupied territory for the benefit of the occupier. But this objectionable decision, upheld by Israel's Supreme Court,¹¹⁸ has a flipside. If the transformative nature of the occupation requires the recognition of long-term needs, it must recognize that political rights cannot be extinguished indefinitely. And as mentioned above, granting Palestinians the voting rights they deserve, does not necessarily mean that we are looking at a one state future. It remains a possibility, but once people have equal voting rights, they can use them to help establish any political framework they want, including one state, two states or a confederation.¹¹⁹ Individual voting rights are thus not conceived as "the free association or integration with an independent

political status freely determined by a people constitute modes of implementing the right to self-determination by that people."

¹¹⁵ Nottebohm Case (Liechtenstein v Guatemala), Judgment, 1955 I.C.J. Rep. 4 - (Apr. 6).

¹¹⁶ Ben White, Are Palestinian elections on the horizon? Aljazeera (Dec. 15, 2019), <https://www.aljazeera.com/news/2019/12/palestinian-elections-horizon-191211182354352.html>.

¹¹⁷ Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EJIL 721 (2005).

¹¹⁸ HCJ 2164/09 Yesh Din v. Military Commander in the West Bank (Dec. 12, 2011) Nevo Legal Database (by subscription, in Hebrew) (Isr.) available at <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%A2%D7%AA%D7%99%D7%A8%D7%95%D7%AA/%D7%9E%D7%97%D7%A6%D7%91%D7%95%D7%AA/%D7%A4%D7%A1%D7%A7+%D7%93%D7%99%D7%9F+%D7%A2%D7%AA%D7%99%D7%A8%D7%AA+%D7%9E%D7%97%D7%A6%D7%91%D7%95%D7%AA.pdf>.

¹¹⁹ Dahlia Scheindlin, *An Israeli-palestinian confederation can work* FP (June 29, 2018), <https://foreignpolicy.com/2018/06/29/an-israeli-palestinian-confederation-can-work/>.

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State” – the state of Israel.¹²⁰ They are conceived as a way of deciding just how to “emerge into any other political status” including “The establishment of a sovereign independent state.”¹²¹

The right to citizenship – or “nationality” as it is more often called in international legal discussions, is at the heart of a state’s prerogative. Any interpretation of international law that assumes that a state has a *duty* to give particular people citizenship may thus be regarded as highly problematic. Israel has no such duty and is free to withdraw from the occupied territories and disallow Palestinians there from political participation in its institutions. If it does not do so – whether while imposing formal annexation or not – the occupation cannot be an obstacle to individual political rights. A contemporary interpretation of international law, and one that couples the non-separatist idea of self-determination with the reality of excessive and indefinite control, presents a plausible solution. It is hard to see how Israel can otherwise avoid violating Article 3 of the Convention on the Elimination of All forms of Racial Discrimination, which bars “racial segregation and apartheid”.

6. A few important objections

We have shown how voting rights may become a vehicle for self-determination for populations under indeterminate occupation, specifically Palestinians occupied by Israel. Before conclusion, response is due to a few basic objections to the argument.

First, a program for voting rights and citizenship is clearly not suitable for all peoples under protracted occupation. Their number may be too small to obtain any electoral weight in the occupying country, making it impossible to exercise self-determination through the electoral process of that country. It should therefore be made clear: an occupied people are not under the general duty to accept voting rights offered by an occupying power. Nor can offering such rights, in and of itself, rectify alone a condition of indefinite occupation.¹²² As we have emphasized, the voting patterns of a population under indefinite occupation do not, in themselves, establish title

¹²⁰ Declaration of Friendly Relations, *supra* note 9.

¹²¹ *Id.*

¹²² Orna Ben-Naftali, *Temporary/Indefinite in THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY* 399, 410 (2018).

in an occupied territory. The decision how to exercise self-determination remains for the people whose rights are to be realized. No realization of individual rights of participation can extinguish the collective claims.

Second, some readers will have surely asked themselves, by now, “what about the right to self-determination of Israeli Jews?” While this is not our subject here, we remain deeply concerned about this issue too. Yet there is nothing within the proposal outlined above—to realize Palestinian self-determination by a demand to vote within Israel—that compromises Jewish-Israeli self-determination. Indeed, a condition in which Israel permanently controls a population of Palestinian non-citizens, without voting rights, is arguably destructive to Jewish self-determination. As others have shown, over the last years the need to preserve such control has skewed participatory process for Jews inside Israel. It has eroded our own possibility of realizing political rights—both individual and collective--as well. To be sure, we reject any interpretation of self-determination for Jews which is premised on a claim of entitlement to a Jewish demographic majority. Although such a claim is a deeply entrenched in Israeli constitutional law, and has been asserted numerous times by the Israeli Supreme Court, we believe it is inimical to democratic principles; to used Joseph Massad’s words, it reveals how self-determination can become, in practice, a “right to conquest”.¹²³ In the latter condition, Palestinians are denied access both to their own sovereignty, and to participation in the sovereign state controlling them.

A third question that may arise is how does the model above influence important considerations of national security. The preservation of security and stability in the area is a condition of possibility for having and for making a life. This too is a condition international law seeks to realize. The realization of this condition for both Palestinians and Jews under Israeli control has been hampered to the extreme by the indeterminate occupation. Universal suffrage as an interim measure that does not negate collective self-determination will only help the population choose rules that can truly provide it with safety.

A fourth and crucial issue that cannot go unaddressed here is the Palestinian refugee question. Palestinians who have called for one democratic state in historic Palestine have done so

¹²³ See Massad, *supra* note 56.

in the name of the entire Palestinian people, both inside and outside of the bounds of current Israeli control. They have called for one democratic state precisely in order to exercise of the right to return of Palestinians displaced during the 1948, and since. It is therefore questionable whether any vision premised on the voting rights of those under Israeli control, and not Palestinians in the diaspora, can indeed be a vehicle for Palestinian self-determination.¹²⁴ While the issue is indeed a defining one for Palestinian self-determination, we believe that at present, the proposal to start from equal voting also provides the best path for realizing Palestinian return. Consonant with our approach towards voting as a procedural mechanism for negotiating deep normative questions, we believe here too voting can have such a procedural role. By proposing legislative arrangements that will have to muster support among most voters between the river and the sea, Palestinians will have to translate return into concrete terms. The best possibility for allowing 1948 refugees to return to historic Palestine is through an immigration policy that would recognize the need to rectify historical wrongs. Such a policy, however, will have to be sensitive to security and economic concerns of everyone living in the territory under Israeli control; it will have to reflect not only a moral position, but also political feasibility within a population united life under Israeli government.

Lastly, throughout the discussion, Gaza remained an elephant in the room. The current situation in Gaza is complex, both legally and factually. We therefore prefer to postpone a sustained treatment of Gaza to a future project. A few words are in order, nonetheless. The debate over the status of Gaza since the 2005 unilateral “disengagement” of Israel notwithstanding, Israel cannot unilaterally alter “the demographic composition, character and status of the Palestinian Territory occupied since 1967”. The international legal framework includes Gaza in that territory. Thus, even if Gaza is not formally occupied, Gazans' political participation in a Palestinian State is actively prevented by Israel. Given that Israel is still the state that determines most powerfully their basic conditions of life, they too should be invited to participate in the Israeli political process.

7. Conclusion

¹²⁴ Cf. Guy Goodwin-Gill opinion.

This essay suggests a paradigm shift in international law: one that conceives voting rights under indeterminate occupation as a vehicle not only for the realization of individual rights, but also for collective self-determination. To make the case, it walks through the history and politics of one part of the world where the argument is particularly pertinent: Palestine and Israel. In doing so, we sought to draw a roadmap for overcoming what we have called the separatist *nomos*.

We should start to imagine what it would mean, practically, for more and more Palestinians to do demand voting rights in Israel. Initially, such demands may not be granted. But indeterminate occupation imposes upon Israel a duty to grant political participation to Palestinian non-citizens who want it. The pressure of Palestinian demands, and perhaps of foreign governments and social movements who will back them, may lead to their partial and gradual realization

This will not happen without a sense of threat from the Israeli government and the mainstream of Israeli society. Both governmental and non-governmental Jewish-Israeli actors may respond to such demands with a measure of violence. It is not unlikely that Palestinian non-citizens objecting to such demands, as a form of “normalization”, may also respond with violence towards Palestinians non-citizens who will make them. Such forms of violence indeed present the most significant risk of the strategy we outline. But due to the sheer excess of Israeli control over all aspects of Palestinian life, it will be hard to stop the cascade once it starts.¹²⁵ The next thing you know, Palestinians gain larger political power within the Israeli system. They may even be able to vote for measures that realize their self-determination. One such measure could be secession from the Israeli state.

Once again, we have no illusion that such a program will not generate conflict. It is clearly against the interests of the Israeli government, and the Israeli government will try to shut it down. Yet when compared to other options, it might be a more secure form of conflict, which could save precious lives and win hearts around the world, including among Israeli Jews. Ultimately, whether to pursue such a reconfiguration of the law applicable during indeterminate

¹²⁵ Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHICAGO J. INT'L L. 1 (2001); KATHRYN SIKKINK, *THE JUSTICE CASCADE* (2011).

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occupation is up to the occupied people. For what it's worth, in our own political context, we believe a non-separatist concept of self-determination reveals that it is worth pursuing.