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Palestine's Legitimate Citizenry

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Abstract:
For its democratic legitimacy whatever state rules historic Palestine must have a legitimate citizenry. A legitimate citizenry must include all people significantly, seriously, or existentially affected by the rules of the state ruling the territory in question. Palestinians now residing in historic Palestine are obviously thus significantly affected by the rules of Israel. This paper argues that the roughly half of the Palestinians residing outside the borders of historic Palestine, as well, are significantly enough affected to justify a claim of citizenship in whatever state rules the territory, which can undoubtedly be called their homeland. Israel does not fulfil this necessary condition for democratic state legitimacy, but a state comprised of all Palestinians, after many of them exercise their right of return, as well as all others now residing in historic Palestine, would.

Keywords: democratic state legitimacy, legitimate citizenry, historic Palestine, right of return

> Countries with their civil and other rights and privileges are the property of their inhabitants and constitute an heirloom of the nation, handed down from father to son. Now the people of Palestine inherited this country from their ancestors, as these did from those who had gone before them.
>
> Musa Kazim Al-Husseini 1921

1 Introduction

Notwithstanding some difficulties surrounding the concept of state legitimacy, my assumption is that having the legitimate citizenry is a necessary condition for a state to be democratically legitimate.[1] Accordingly this paper asks what the legitimate citizenry is of *whatever state* rules historic Palestine. That state is now Israel, but its citizenry, including as it does all Jews anywhere as soon as they immigrate, and excluding eighty-five percent of the 12 million Palestinians worldwide, is arguably not the legitimate one.

The definition of 'democratically legitimate' sufficient for this paper is that the state is seen *subjectively* as rightful or proper by a majority of its governed subjects, the state being the people and institutions with a monopoly on the use of force in the territory.[2] Crucially, 'subjects' covers not only citizens but also non-citizens who, like citizens but in contrast to the rest of humanity, both (1) have subjective and objective ties to the country or territory ruled by the state and (2) are existentially subjected to or *significantly affected by* the state's laws and practices. To illustrate, the North Americans who cried 'No taxation without representation' were British *subjects* because British taxation, etc., affected them significantly.

Because the paper is concerned only with who Israel's subjects are, and which of them should be its citizens, it does not need a stronger, *objective* definition of democratic legitimacy, for instance one going beyond subjective acceptance to include civil, political and social rights and freedoms, protection of human rights, equality, and rights to participate in shaping the state. (Marshall 1950; 10–11; Schaar 1984 [1969], 107–09; Lefort 1988)

Section 2 gives some context of the current legitimacy debate in historic Palestine, relating both to the ubiquitous but incoherent Montevideo conditions and to efforts to de-legitimise Israel. Section 3 then looks briefly at other reasons why Israel is arguably illegitimate, then asserts a causal relation between Israel's Jewish essence and its exclusion, territorially and as citizens, of Palestinians. Section 4 sketches the history of Palestinians' citizenship, their disenfranchisement by Israel and legal arguments that their citizenship in historic Palestine is still valid, though dormant. Section 5 approaches democratic legitimacy through political theory, i. e. that it is not limited to the relation between the state and those who already are its citizens, but rather also to whoever is significantly affected by the state. Section 6 argues that all Palestinians fulfil this criterion of significant affectedness. Section 7 touches on three related issues needing further scrutiny.

Within the broad topic of a state's legitimate citizenry, the paper purposely touches on more issues than can be adequately dealt with, hoping merely to instigate more detailed discussion. I moreover assume certain facts about the history of Zionism's success: it depended on Britain's colonial pro-Zionism, Israel's ethnic cleansing, and Israel's refusal to let Palestinians return to their places of origin. Finally, I focus on the *ethics* of inclusion

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and exclusion rather than their legality, for along with power relationships, ethics co-determines international law. This paper is asking after the relative legitimacy of two opposing citizenries, one encompassing an ethno-religiously defined group whose vast majority is from outside Palestine, the other made up of indigenous people of whatever race or religion.

2 Context

The term 'legitimacy' applied to states has no rigorous definition within either international law or political theory. I assume as the term's *genus* the relation between the state and its subjects, and as a necessary *differentia* subjective acceptance:

> [L]egitimacy is precisely the belief in the rightfulness of a state, in its authority to issue commands, so that those commands are obeyed not simply out of fear or self-interest, but because they are believed in some sense to have moral authority, because subjects believe that they ought to obey. (Barker 1990, 11, 23)

Again, while it is true that sufficient conditions for legitimacy must include objective relations as well – participation, protection against the tyranny of the majority – this paper's argument needs only the will of (the majority of) the people. We are looking for who should be citizens, not the quality of that citizenship.

To earn its keep as a useful concept, state legitimacy cannot be synonymous with state legality – whether internal (in that the state follows its own rules) or external (in terms of international law). To illustrate, the PLO did not claim to be the 'legal', but rather the 'legitimate', representative of the Palestinian people.[3] And Israel, although legal by various criteria of international law, feels it necessary to show over and above legality some ethical legitimacy, or "justness" (Levinthal 1945, 90–91), its moral right to exist as "the only democracy in the Middle East." States want to be good as well as legal. (Kane 2001, 15, 259) So although we use legality and legitimacy almost interchangeably when speaking of heirs, contracts, and children, legitimacy is used best as a pre-legal, ethical attribute. The word is in any case positively loaded, and illegitimate states, implicitly, should not exist.

The Montevideo Convention, mentioned in virtually all discussions of state legitimacy, is a conflationary mixture of realist gristle and some moral *rights* of states. Its text opens with a factual description of entities aspiring to state "personhood":

> The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States. (LoN (League of Nations) 1933, Art. 1)[4]

These four criteria say nothing about the relation between the state and its 'permanent population' or the democratic qualities of its 'government'. It only denotes such entities as states and bestows upon them *personhood*, a status from which the Convention then – invalidly – derives legitimacy.

For the text – signed by a group of twenty American states meeting on 26 December, 1933, in Montevideo – then elides into our question of normative legitimacy: Such a state-cum-personhood has "fundamental rights" – namely to "defend" and "conserve" its "integrity and independence" and "organise" and "legislate" for itself (Arts. 3 and 5), and not to be interfered with by other states (Arts. 5 and 8), all moreover by sole virtue of fulfilling the four *non-normative* criteria in Art. 4 quoted above. Since whatever entity fulfils these criteria has rights, and if only legitimate states should, ethically, have rights, the Convention has committed the 'naturalistic fallacy' of jumping from an 'is' to an 'ought'.

The ambiguous term 'recognition' (of a state) then undergoes the same elision from what is to what should be: "Recognition" means to "accept the personality of the other with all the rights and duties determined by international law." (Art. 6) The recognised personhood, that is, is recognised *as legitimate*, not merely as an entity in fact exercising power over a certain territory and group of people. The Convention does not even make recognition conditional on the state's being "peace-loving". (UN Charter, Art. 4)

An application of the Convention's logic was Israel's repeated statement during its fight to join the United Nations, "But we have a state." (Gunneflo 2017; Heian-Engdal, Jensehaugen, and Waage 2013) The intended implication was that by that reason alone said state is good and legitimate. But this relies on "the legal maxim of *uti possidetis*, which says that one owns what one possesses."(Quigley 1990; 91, 1997; 107; Roth 1999; 246–49) Thus, due to its conflation of descriptive and normative elements, the Convention is not useful for the real ethical debate over Israel's legitimacy.

That political debate is indeed carried on in the ethical terms of democracy. Everybody 'recognises' Israel's real-existing statehood; it is its legitimacy that is challenged. While thinkers from Golda Meir on down have

asserted that God gives the Jewish state legitimate rule over Palestine,[5] and while 'realists' extinguish talk of whether it is *right that* Israel exists with reference to the fact that it (unalterably) exists, Israel itself argues in terms of proper democracy.

For instance the Reut Institute, a Zionist think tank close to the centre of Israeli power, has in several studies adumbrated Israel's concern with its "de-legitimization" (Reut Institute 2010a; 2010b). Reut's "objective is simple: Delegitimizing delegitimization."(2010b, 1) The Israeli establishment faces a "Delegitimization Network" (2010b, 35, § 48) opposed to the two-state solution (2010b § 112, 124, 127, 131) because that solution would "consolidate recognition of Israel's Jewish character … " (2010a, § 81), favouring instead the anti-Zionist "one-state paradigm." (2010b, § 69, 126–131) Israel's legitimate citizenry is "the Jewish people" with its right to "self-determination", and Reut correctly notes that "Israel's right to exist" is at stake. (2010b, 1, 5, § 13, 39, 47, 52, 69, 70 88) One-staters, by contrast, would deny "any element of its Jewish character" and pursue "fundamental delegitimization". (2010b, § 8, 70, 97 109, 112, 123; *also* Amir 2016; Kahan n. d.)

The legitimacy at stake is "moral legitimacy" or "the moral basis of Israel's sovereign existence", (2010b, 5, § 41, 69) or alternatively its "fundamental legitimacy" rather than its "international legitimacy", i. e., fulfilment of the Montevideo criteria. (2010b, 1, § 96) The Delegitimization Network's approach is "a human rights-based discourse that emphasizes individual rights, such as the 'right of return'". (2010b, § 123)

The Reut Institute praises democratic and ethnocratic values both, justifying Zionism by appeal to the principle of majority rule (2010a, 82, § 13, 76–78, 102, 105, 120) – even if, as shown below, the majority was demographically engineered to be Jewish. This common defence of Zionism thus accepts that democratic legitimacy depends on representativeness, but Palestinians alas do not belong to a group deserving representation. If the citizenry's present composition is legitimate, the state passes the legitimacy test of consent of the majority, and the "context through which [Israel's] actions can be understood and justified" (2010a, § 18, 91) is the collective Jewish right to a Jewish state in Palestine.

Former US UN Ambassador Jeanne Kirkpatrick likewise opined that the

> … adoption of [the General Assembly's (UNGA 1975) resolution equating Zionism with racism] was tantamount to declaring Israel an illegitimate state based on an illegitimate philosophy … [Since] Zionism is the national movement on which Israel is based … when the UN majority declared Zionism is racism, it declared immoral the foundations of Israel. (*quoted in* Quigley 1990, 226)

Ari Shavit has similarly bemoaned the fact that Israel is sailing towards an "iceberg [namely] the loss of the State of Israel's legitimacy. … A national movement that began as 'legitimacy without an entity' is becoming 'an entity without legitimacy'." (Shavit 2013; 119; *also*, 2009)

3   Plausible illegitimacy

Before looking more closely at the legitimate-citizenry concept, as further context, there are other normative grounds bearing on Israel's legitimacy.

Firstly, without prejudice to the legitimacy or subjective desirability of a Jewish state as such (somewhere, at no cost to other people), Israel is *in the wrong place*. The Palestinians had nothing to do with the persecution, in Europe, by Christians, which led to Zionism in the first place (Abboushi 1977, 32; Said 1979, 69; Quigley 1990, 29, 32-34; Abu Sitta 2016, 324 note 32). Israel is a (settler-)colony, and *colonialism* is not legitimate (UNGA 1960; ILC 2001, Art. 40; Quigley 1990, 23; IPS 2017).

Second, a necessary condition for Israel is the denial of *self-determination* for the indigenous inhabitants; the Palestinian 'self' would create a state radically different than the present Jewish one (Bassiouni 1971, 31, 33; UNGA 1974; Quigley 1990, 24, 33-34, 44, 52, 117; Kattan 2009, 118-19, 126; Roth 1999, 12-13, *but see* 201-51)[6]. Upon the expiration of the Mandate sovereignty reverted automatically not to another state but to the Palestinian *people* – stymied by Britain, the Jewish Agency and other states (Sayigh 1970, 4, 17; Cattan 1988/2000, 79, 325-26).

Third, All of Palestine has been militarily occupied by Britain and Israel since 1917. Prolonged *occupation* of land – taken by force – is illegitimate, as is a state's establishment through conquest and terrorism (Al-Khouri 1948; Quigley 1997, 70-71, 99-100; 2010; Roth 1999, 11-12; Grossman 2001, 860; Qafisheh 2015, 61-62). The Mandate which set up *the preconditions for Israel* was illegitimate because it violated the League of Nations Covenant (LoN 1920, Arts. 20, 22). Any state requiring for its existence the *forcible transfer* of indigenous residents (Masalha 1992; Prior 2001, 11) is not legitimate, and perhaps even has an obligation to "reverse its unlawful act" by repatriating them (Quigley 1998, 219-25). *A fortiori* illegitimate are transfer and the state it enables when the cleansing is based on *ethnicity* (Pappe 2006; Halaby Gordon 2016)[7].

Fourth, Israel has constituted itself as an *apartheid* state over against all groups of Palestinians in all locations; apartheid is not a legitimate relationship between a state and its subjects (UN 1973, Art. II c; Falk and Tilley 2017, 10; Adalah 2018)[8].

Fifth, Palestinians are *indigenous* people, to whom the granting of residence and political rights is a necessary condition for legitimacy. (Bassiouni 1971, 37, 38; Grossman 2001, 858; UNGA 2007, Arts. 2, 3, 5, 10, 19, 20, 33 & 36; UN DESA 2009; 2014). Even if the UN could legitimately create states, Israel violates the "recommendation" in UNGA *Resolution 181* that it uphold specifically named basic human rights (UNGA 1947, I B 10 d; Mallison and Mallison 1984, 50; Hadawi 1967, 144; Karmi 2012). In particular, the denial of the Palestinians' *right of return* upon which Israel's existence is based constitutes severe harm, perhaps even a crime against humanity; right of return is uncontestedly anchored in international law (UNGA 1948b; 1972, 32, 54, 102, 128, 135; Cattan 1988, 346 & *passim;* Hadawi 1967, 126-47; Quigley 1998, 193 & *passim;* Aruri 2001; Brynen & El-Rifai 2013; 2015). Hence, the "arbitrary deprivation of nationality" by which Israel achieves its Jewish majority violates international law (UNGA 1948a, Art. 15).

This paper investigates the further argument that a necessary condition for democratic legitimacy is that a state recognise its objectively-determined legitimate citizenry.

4 Facts, law

Let us define Palestinians as those who at the end of the Mandate were citizens according to the Palestinian Citizenship Order (Bentwich 1926, Arts. 1, 2, 3–6), and their descendants, consisting of Moslems, Christians and Jews (McCarthy 1990; 33, 171–72; Qafisheh 2008; 75–85, 2013; 86–94; Banko 2012; Khalil 2014; 210–11). Aside from those identifying as both Jewish and Palestinian, today they number approximately 12,000,000, at least three-fourths of whom are externally or internally displaced 'refugees'. (BADIL (Resource Center for Palestinian Residency and Refugee Rights) 2018) Most are externally displaced outside historic Palestine altogether, while about 300,000 are internally-displaced Israeli citizens. (Boqa'i 2008/09)[9]

Israel's treatment of Palestinians follows from its *essence* as a Jewish state with a Jewish majority, i. e. a citizenry ethnically tailored to achieve its survival as self-definedly Jewish. An early Zionist statement:

> We are in favour of local autonomy where ever the conditions allow it. Whoever the suzerain Power of Palestine may be, we are in favour of the Jews, when their numbers permit it, ultimately obtaining the power which *any large majority* may justly claim. (*quoted in*Ingrams 1972, 15–16, *emphasis added*)[10]

Yet regardless of any alleged ethno-religious *collective rights* of Jews in Palestine (Quigley 1990, 66–72),[11] this demographic engineering, to correct the indigenous majority in Palestine, has been done by a combination of privileged inclusion of Jews into, and discriminatory exclusion of non-Jews out of, both territory and citizenry. (Falk and Tilley 2017, 30–32) Seen dynamically, can a legitimate polity result from forcible, illegitimate means? (Bassiouni 1971, 36)

When it comes to determining its *demos* Israel is "religious-primordial" or "Jewish ethnocentric", granting "different kinds of 'membership cards' to the population under its control ... ". (Kimmerling 2002, 191) Such ethnical homogeneity "involves the idea of a common status and a national structure of politics [and] involves ... the notion of a common culture ... ", which is a "social status based upon universal norms of social membership." (Turner 1994; 165, 153; *also* Barber 2003 [1984], 232) Such "social membership" rigorously entails one group's hegemony, a

> ... unitary democracy [wherein] citizens are blood brothers united by a genetic ... consensus and bound together almost preternaturally ... Pan-Slavism or Aryan nationalism or even Zionism may be taken as an example of such civic ideologies rooted in blood, where territory follows rather than precedes civic identity. Modern Israel faces a civic quandary precisely because its Zionist tendencies are at odds with its secular, territorial tendencies ... [One cannot] reconcile theoretical universality with ... restrictive civic practices – simply by ruling women or blacks or Jews or even the poor ... out of the human race. (Barber 2003 [1984], 218)

Or non-Jewish Palestinians, whose claim to equal citizenship even for those who are citizens of Israel has elsewhere been denied by Yoav Peled (1992; 432–35, 2005; 92, 102) on the "ethnorepublican" grounds of Palestinians' "non-contribution" to Israel's "common good".

Both the Mandate's and Israel's fundamental ethno-religious, racial legal rules assure its Jewishness in terms of number, privilege and symbols:

1. The constitution of the proto-state established by Britain, namely the League of Nations Mandate text in Arts. 2, 4, 5, 7, 11, 17 & 22, required that the Balfour Declaration's "establishment of the Jewish national home … in Palestine" should be achieved working closely with a "Jewish agency" through "Jewish immigration", "close settlement by Jews" and "a nationality law [facilitating] the acquisition of Palestinian citizenship by Jews".

2. The Israeli Declaration of Establishment of 14 May 1948 opens thus: "The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped." Paragraph 4 extols the "Jewish state", while Paragraphs 5 and 10 lean on the Balfour Declaration and Mandate text to justify the "right of the Jewish people to rebuild its National Home" in "Eretz-Israel" and "be masters of their own fate … in their own sovereign State." (PGI (Provisional Government of Israel) 1948, *also* § 6, 9–11, 17)

3. Dozens of laws, including some 'Basic Laws' which make up Israel's constitution, ensure that a majority of both residents and citizens are Jews; e. g. the Laws of Flag & Emblem, Absentees' Property, Return, Citizenship, Entry into Israel, and Israel Lands. (Adalah (The Legal Center for Arab Minority Rights in Israel) 2018; 1990, 177 & *passim*) Exclusion is completed by the *de jure* and *de facto* prevention of Palestinians' return.

4. The Jewishness imperative even forbids political parties for and Knesset candidacies of those guilty of "negation of the existence of the State of Israel as the state of the Jewish people". (Adalah (The Legal Center for Arab Minority Rights in Israel) (2018))[12] A twelfth Basic Law – 'Israel as the Nation-State of the Jewish People' – is due in 2018 for final passage, equating for the first time in so many words "The State of Israel" and "the National Home of the Jewish People". (Times of Israel 2017)

Jews are there by right, Arabs on sufferance.

While a general, ethical comparison of ethno-centric as opposed to territorial concepts of a legitimate *demos* (e. g. Marshall 1950; Barber 2003 [1984]; Molavi 2009) is beyond the scope of this article, some legal aspects should be mentioned. The Israeli ethnocracy (Yiftachel 1998) required the forcible disenfranchisement of the bulk of the Palestinians, yet seen in light of international law, including humanitarian law, the hurdles to disfranchisement are high; citizenship or nationality are ineluctable for both human rights and identity, and are not outweighed by 'reasons of state'. (Quigley 1997; 70–71, 99–100; Benhabib 2004; 63) Israel itself, as well, early on doubted the legality of its citizenship-stripping. (Kattan 2009; 83–85; Robinson 2013; 96–97, 102)

Qafisheh has concluded that nothing can override the rule of state succession, i. e. the automatic transfer of citizenship to states replacing other ones:

[So far as] nationality is concerned, [during the Mandate] Palestine formed an independent state. Should Palestine have gained its independence after the end of the mandate, Palestinian nationality would not have differed from the nationality of independent states. … Israel could not, according to international law, remove the nationality, or the right to recover it, from those Palestinian citizens who were displaced from their places of residence in the territory of Palestine in which Israel was established (Qafisheh 2008, 212-13; *also* 2013, 60–61, 103; UNGA (General Assembly) 1947, I.C.3.1; Quigley 1998, 206-08; 2010, 92–93)

That is, Palestinian nationality still exists, and Palestinians legally possess "Israeli citizenship, although non-effective at present". (Qafisheh 2008; 5, 200, 214, 2013; 74–75; Kattan 2009; 138, 243; Khalil 2014; 209, 212–15)[13] Again, while this view expresses a factual statement about what the law actually is, this paper is an attempt to ask *why* Palestinians ethically and politically, rather than legally, *should be* members of whatever polity holds sovereignty in Palestine.

Quigley similarly writes,

An individual's right is based on attachment to a territory. A change in sovereignty does not override that attachment. … [Law demanded] an orderly transfer of power from the mandatory *to the population* of Palestine. (1997, 97; 2010, 120, *emphasis added;* also Kattan 2005; 91–92, 2009; 221–22)

If disenfranchisement and refusal of return were illegal, the case for *return as citizens* is made. (Bauböck 2007, 2439) On grounds of a combination of *jus soli* and *jus sanguinis*, then, Palestinians still qualify for citizenship *in their original territory*, and according to Art. 80 of the UN Charter a change of states cannot alter that (*also* CoE (Council of Europe) 1963, Arts. 2–4). It would be most helpful to go beyond such legal analysis into the ethical reasons why this body of international law states what it does.

5 Political theory

Inclusion/exclusion theory begins with a tristinction between full citizens, subjects, and the huge category of foreigners with negligible bond to the polity or territory. *Subjects* are those affected by the state in ways

distinguishably stronger than the vast majority of the global population in that they are specifically targeted by the state's laws and practices – for instance either positively, as when Israel's Law of Return names all Jews anywhere as eligible for citizenship, or negatively, as when Israel *de jure* and *de facto* designates Palestinians as unwanted. Perhaps they or family members live within the state's borders, or used to, and want to again. At one end of the spectrum of affectedness lies 'serious', 'significant' or 'existential' affectedness, implying a strong case for citizenship's benefits of residence and political participation.

The bare-bones definition of citizenship needed in this paper is that it entails the right of residence in the state, protection by it, a passport, and, on democratic principles, some degree of participation in state decisions. (Marshall 1950) This definition is without prejudice to other definitions formulated by Palestinians themselves from within a culture different from mine, and the question is not the advisability of attaining *Israeli* citizenship, but rather the right to it in *whatever state* rules Palestine. Nor does the argument prejudice the proposal to make all willing Palestinians citizens of a state of Palestine conceived either virtually or within the 1967 borders (Azzam 2015; Khalil 2014; Qafisheh 2013); but it is explicitly an argument for citizenship rights in all of historic Palestine and is consistent with a revival of the pre-1988 PLO claim to sovereignty over all of what is now Israel, the West Bank and the Gaza Strip.

Following Aristotle the paper asks after the "citizens [those "sharing in rule"] ... The doubt is, not who is, but whether he who is ought to be a citizen."[14] One faces the "vital problem of defining the class of citizens. [The] potential membership in the polity ... becomes a subject" for the polity. (Barber 2003 [1984], 127, 227) For the territory of historic Palestine the search is for the "just membership" (Benhabib 2004, 3, 42, 134–43) or a "legitimate membership" (Murmann 2000, 22). The phrase 'legitimate citizenry' thus means the 'rightful' citizenry judged on ethical grounds of rights, freedoms, political participation and the degree to which a person is significantly affected by a state – regardless of (perhaps involuntary) place of residence.

State legitimacy is usually judged on its relation to those who already are its citizens, usually seen as a

> ... quality of 'oughtness' that is perceived by the public to inhere in a political regime. That government is legitimate which is viewed as morally proper for a society. (Schaar 1984 [1969], 108)

Who, however, comprises "the public", and what is the "society"? Similarly, "Without ... a mandate from the citizenry in free and open elections a government lacks legitimacy ... " (Falk 1994, 128), but first the "citizenry" has to be determined. (Dahl 1989; 3, 32–33, 119–128; *also* Dahrendorf 1994; 17, 19; Roth 1999; 2; Murmann 2000, 14–22) Democratic state legitimacy requires congruency between the values of the community and the state – but the (rightful) community must still be determined. (Cole 2000, 2–8, 89, 185–94)

The political scientist who deals most deeply with this "problem of inclusion" is Robert Dahl in his "strong democratic" political theory, wherein he first puts forth four conditions for a democracy which is only *internally* legitimate because it pertains only to those who already belong: Absolutely equal citizens must (1) be informed or enlightened and (2) participate in public discussion, (3) set the agenda and (4) vote; such a state is "fully democratic in relation to its *demos*." (Dahl 1989, 108, 114, 119)

But there is

> ...a curiously neglected and yet absolutely crucial problem: if we agree that by democracy we mean in some sense 'rule by the people,' we need to clarify ... what we mean by 'the people' [but] most political theorists ... take for granted that a people has already constituted itself. (Dahl 1970, 59, 61; *also* 1989, 3, 119)

Dahl therefore adds a fifth necessary condition for a state to be democratically legitimate: the *demos* must also be the right one:

> What persons have a rightful claim to be included in the *demos*? ... Who must be included in a properly constituted *demos*, and who may or may not be excluded from it? ... No doubt questions like these transcend 'democratic theory.' But that is precisely my point. Advocates of democracy – including political philosophers – characteristically presuppose that 'a people' already exists. (Dahl 1989, 119, 3)

This paper is asking whether it is rightful that the state ruling Palestine declares its 'people' to be those of one ethno-religious group to the exclusion, as the other side of the coin, of the indigenous citizens not belonging to that group.

Citizenship claims by persons already legally or illegally resident in a state's territory are dealt with often and comfortably by political theory. Considerable attention is devoted as well to who should be allowed to cross the border to become a resident. To be sure, I cannot answer the challenge of those who argue on liberal grounds for totally open borders. (Abizadeh 2008; Cole 2000; *also* Benhabib 2002; 152, 2004; 3, 20, 43) Under such a rule Palestinians could enter greater Israel and the common discussion over residents' citizenship claims would take over.

The argument here, however, assumes legitimate reasons for restricted entry and/or inclusion as citizens, just that they do not apply to Palestinians regarding Palestine. Their case for return and repatriation becomes to be sure much tougher due to their absence either from historic Palestine altogether or from the 1948-occupied territories. Does their absence not significantly diminish their affectedness?[15] Or does the fact that the absence is involuntarily – through flight, expulsion and refusal of return – actually *increase* their affectedness?

Pertinent to our theme of Israel's indispensable Jewish majority, Dahl also observes that

> In some circumstances violations of fundamental rights or interests might be minimized by changing the composition of the citizen body, either by inclusion or by exclusion, by enlarging it or by reducing it. (Dahl 1989, 184)

Repatriation of Palestinians would enlarge it; Israel, confronted with a Palestinian majority, reduced it (Quigley 2010, 103).

The case for Palestinian inclusion can thus rely on a substantial body of theory arguing that

> It would … be a mistake to assume that the democratic character of the society we live in remains unaffected by the decision to close the gates at the frontier to outsiders. … [A]nyone targeted by the norms constitutive of the legal system should be considered a member of the democratic association. (Beckman 2013, 57, 58)

Undoubtedly diaspora Palestinians lie somewhere on a spectrum of subjecthood: "[Some] sorts of interests entitle you to a say (when your basic needs or fundamental human rights are at stake, for example) … also in proportion to the degree to which [your] interests are affected." (Goodin 2007: 51)

By contrast, one of the few academic applications of citizenship theory to Palestinians deliberately excludes the absent, diaspora Palestinians:

> The idea of citizenship should refer to a determined range of effectiveness of a centre of decision-making. This is what Robert Dahl … means by saying that an ideal democratic state should extend citizenship to include all the people submitted [sic: subjected] to the consequences of its policies … [However,] empirically, we can narrow the field of our analysis to a territorial and jurisdictional range, and focus on the population living permanently in an area [historic Palestine] ruled by a specific and sovereign authority. … The existence of a sovereign territorial entity therefore defines the largest group of people to which we can apply the concept of citizenship – the resident *demos*. (Allegra 2009, 557)

Whether the author's principle is "empirical" or apodictic, this *a priori* exclusion of the ethnically cleansed legitimises the disenfranchisement of expellees, and leaves the fate of 6 million people off the radar.

Returning to theory, the inclusion/exclusion criteria in play in the case of the state now ruling Palestine are ethno-religious, and we have seen that the argument that a society needs some common 'values' or 'cultural' homogeneity risks ethnocracy,[16] which can be ruled out on liberal-democratic grounds:

> You may stipulate certain criteria of membership, but they can never be of such a kind that others would be permanently barred from becoming a member of your polity. (Benhabib 2004, 135)

Jewishness, or Arabness, understood as genetic heritage, are permanent traits which on this ethical principle do not suffice to include or exclude anybody from historic Palestine.

6 Significantly affected

We are seeking the ethically legitimate relation of whatever state rules Palestine to the Palestinians in involuntary exile. If they are significantly, strongly, or existentially affected by Israel they are, on some principles of democratic theory, entitled to the citizenship relation. For Dahl, again, a state fulfilling his conditions over against its citizens would be

> … democratic with respect to its own *demos*, but not necessarily democratic with respect to all persons *subject to* the collective decisions of the *demos*. … No one subject to the rules of the *demos* should be excluded from the *demos* [and] all adults *subject to* the laws of a state would be members of the *demos* of that state. … A government must rest on the consent of the governed [i.e.] no one should be subject to a law not of one's own choosing or subject to a law made by an association not of one's own choosing. … Shouldn't the good of nonmembers, outsiders who are *seriously affected by* the collective decisions of the polity, also be counted? (Dahl 1989, 32-33, 122-23, 126-27, 284-85; *also* 208; *also* 1970, 64-67 (*emphasis added*)

For Benhabib we need to identify "those who stand under the law's authority":

> With Jürgen Habermas, I hold that only those norms and normative institutional arrangements can be deemed valid … if all who would be affected by their consequences can be participants in a practical discourse through which the norms are adopted. … '[A]ll those affected by the consequences of the adoption of a norm' have an equal say in its validation if democratic legitimacy is to be attained. (Benhabib 2002, 20; 2002, 11, 147).

Affectedness entitles to participation, one of the privileges of citizenship, and "the basis of all political legitimacy must be some form of consent of the governed". (Benhabib 2002, 63) How affected must you be to count as "governed"?

Because Palestinians in the West Bank and Gaza Strip are today full Israeli subjects except for a bit of local autonomy, the case for their enfranchisement is relatively clear. (Peled 2008; Allegra 2009; Karmi 2012, 217; Khalil 2014, 218-19; Qafisheh 2015, 73-74; Amir 2016) But this paper is concerned with all Palestinians displaced during the period 1948-52, when Israel's military, legislative and judicial actions were in the process of excluding and materially dispossessing Palestinians. (Sayegh 1952; Morris 1988 [2004]; Khalidi 1988, 2005; Abu Sitta 2001; Pappe 2006) They certainly were *at that time* "subjected to the binding collective decisions" (Dahl 1989, 120) of Israel, and thus significantly affected. Laws were then being passed to codify military and political displacement decisions (Adalah 2018; 1990, pp 36, 57-63, 82-86; Qafisheh 2008):

1. The 1950 Law of Return grants citizenship any Jew arriving in Israel and to "every Jew who was born in this country" – but not to non-Jews born in the country. (*also* Weiss 2002, 89-90)

2. The 1952 Nationality (Citizenship) Law first opens the citizenship door to non-Jewish Palestinians, namely all "who immediately before the establishment of the State was a Palestinian citizen" but slams it shut by requiring that he or she was 1) an inhabitant on 1 April 1952, *and* 2) registered as an inhabitant on 1 April 1952, *and* 3) "was in Israel… from the day of the establishment of the State to [1 April 1952] or entered Israel legally during that period." At most 150,000 non-Jews fulfilled these criteria, and absence was enough for disenfranchisement. (Quigley 1998, 205-06 and note 190)

3. The Nationality Law also states stringent conditions for *naturalisation* (as opposed to *continued* enfranchisement) of non-Jews.

4. The 1952 Entry into Israel Law repeals the Immigration Ordinance of 1941 by which Britain restricted Jewish immigration and gives the Minister of the Interior carte blanche on the issuance or denial of visas. (*also*Peled 2008, 343)

5. The 1950 Absentees' Property Law revoked non-Jewish Palestinians' land titles, completing their exclusion, because after all, a land-owner has an air-tight case for returning to owned land. (Quigley 1990, 105-10, 121-25)

While these past injustices remain unatoned, one must also determine whether and in what degree they are still today life-shaping for Palestinians, whose lives would be significantly different had Palestinians remained and co-determined their polity.

An argument for inclusion of certain non-residents, based on the ongoing relevance of history, has been offered by Rogers Smith (2014):

> [N]ations and citizens have special obligations … that they do not have to all humanity … to persons, including noncitizens as well as citizens, insofar as those persons' identities, aspirations, and interests have been *coercively constituted* by past and present actions of the nations' and citizens' governments. The weight of this obligation depends roughly on the breadth, depth, and duration of the coercive constituting. (382)

Smith has in mind former colonial subjects, and given the fact that Palestinians were displaced by a settler-colonial power the argument would apply to them perhaps even more. Other political theorists point to existential affectedness in familial, historical, national and political respects. (Goodin 2007: 51; Bauböck 2007, 2014-15, 2020-26; Salih 2013)

It is beyond this article's scope to investigate what exiled Palestinians themselves feel and say about their exclusion. Such personally-related experiences would encompass oral history, photographs, and a large fictional literature on their displacement and lacking citizenship.[17] One exile, for example, always wanted to relive the feeling of being "the citizen of a country, a native of a land that is my own." (Turki 1972, 142), and other eye-witness writings often reveal the feeling that the greatest loss was not of "brick and mortar", but rather "the

loss of a sense of belonging in my own community." (Halaby Gordon 2016, 46) Typical of statements still heard after decades: "The Nakba changed us from a person who has his own land, house, job, family – a LIFE – into someone who is excluded from all this." (BADIL 2007, 48)

At the risk of stating the obvious, but in order to concretise this discussion somewhat, please consider this list of specific emotional and existential areas of affectedness:

1. Subjective victimhood. The ethnic cleansing of the Nakba and the over 200,000,000 refugee-years since 1948[18] have ongoing traumatic effects; that is, the experience of the injustice persists without closure. Refugee status is humiliating and damages identity. (Said 1999; Baroud 2018)

2. Objective victimhood. The economic, social and political degradation of existential life conditions is real in terms of poverty, landlessness, restricted freedom of movement through statelessness, divided families, other broken personal ties, and political impotence, as well as situations of discrimination, stigmatisation, precariousness and damage to dignity. Objective reparation is still missing. (Salih 2013, 70-71, 82, 87)

3. That their flight, expulsion and ongoing plight is based on their ethnicity – a factor not under their control (Benhabib 2004, 135; Lawand 1996, 555) – makes things worse, makes them ongoing victims of the crime of apartheid (Falk and Tilley 2017, 9, 37-48).[19]

4. They were citizens; their present status is one of loss rather than failed attainment.

5. Palestinians lost political freedom, both individual (Peteet 2005) and in terms of self-determination, amounting to ongoing political impotence and politicide (Peled and Rouhana 2004; Amir 2016).

6. Return as citizens is perhaps more a need than a desire, as witnessed by "acts of citizenship" (Turner 2016) manifested as resistance with high risk of death, maiming and jail, often organised into guerrilla organisations or political movements (see also Turki 1972, 102; Jiryis 1976, 190-94) and as persistent lobbying for realisation of their right of return by groups such as Al-Ard (The Land), Heroes of Return, BADIL, the Palestinian Return Centre, the Palestine Land Society and numerous Return Committees.

Behind the legal effective links to Palestinian territory (Lawand 1996), the argument is nothing if not an ethical one, a normal story of injustice to be righted, and return as (equal) citizens would do this.

7 Discussion

7.1 Rights of return and restitution

A legitimate state would arguably have to grant right of return and restitution to the externally and internally displaced if it is indeed the case that these rights have earned the status of *jus cogens*, i. e. legally binding 'peremptory norms' (Lawand 1996; Qafisheh 2013; 72; *but see* Benvenisti, Gans, and Hanafi 2007; 2004; 330–32).[20] For behind this body of international law are uncontested ethical judgments, as expressed directly, for instance, by UN Mediator Folke Bernadotte just before his assassination:

> It would be an offence against the *principles of elemental justice* if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries. (Bernadotte 1948, V.§6)[21] *(emphasis added)*

Return and restitution are ethically and legally almost universally unchallenged, and return as non-citizens can be ruled out as apartheid.

The ethnic cleansing of about 85 % of the Palestinians from the 78 % of Palestine ruled by Israel by late 1948 was the most important precondition for Palestinian loss of citizenship. Had they remained physically present, they could not have been so easily de-nationalised. Return now would moreover even legally suffice for citizenship. (*also* UNGA (General Assembly) 1947, I (C) Ch 3 (1); UN (United Nations) 1973). Conversely, since citizenship includes right of residence, re-enfranchisement contains within it the right of return. (Robinson 2013; 70–74; Qafisheh 2013; 68) Furthermore, the arguments for repatriation and return are similar. (Quigley 1997, 73–75) Here the point is merely that residence following return is a sufficient condition for citizenship, just as citizenship is a sufficient condition for return. Or, from the Zionist point of view, absence justifies depatriation and lack of citizenship justifies denial of entry.

7.2 Absentees

Any possible claim of externally displaced Palestinians to membership or citizenship in the polity ruling Palestine is relatively difficult to frame within political and citizenship theory due to the very fact of their absence,

their non-residency. The similar cases of South Africa and Rhodesia as well as the literature of citizenship studies concerns itself almost exclusively with the claims of *residents* for legality, for participation, for citizenship: Historically slaves, women, blacks, Native Americans, the 'weak-minded' and the property-less have been able to join, and today's discussions center around the claims of immigrants and refugees as well as the achievement of full equality of citizenship.[22] In contrast to this paper, moreover, most of the literature specifically on Palestinian citizenship focusses largely on citizenship for those now resident in historic Palestine, in a Palestinian state restricted to the 1967 borders, in a Palestinian state with undefined borders, or in the host countries where they now live. (Allegra 2009; 554–58; Qafisheh 2013; 55–62, 66, 104–08; Azzam 2015; Khalil 2014; 204, 218–22)

Theory is thus weak in dealing with the many historical examples of realised or failed repatriation and re-enfranchisement of absentees, for instance of Hugenots (France), Germans (Poland and Czech Republic), Armenians (Turkey), Assyrians (Turkey, Iraq, Syria, Iran), Ilois (Chagos), Native Americans (to the Southeast U.S.A.), Jews (to Central Europe and to Spain and Portugal after 500 years), Rohingyas (Myamar), and various ethnic groups in former Yugoslavia. Also worth studying would be the ethical and legal *reasons why*, in the current Syrian refugee crisis, no one is suggesting they are being, or will be, refused return.

7.4   Consequences of illegitimacy

A case could be made that illegitimate states have no 'right to exist', a tenet which would have severe consequences for Israel. Unless one simply adopts the Montevideo criteria analysed in Section 2, it would seem that only if a state is legitimate can it legitimately use forcible means for its security, either internal or external. Since we are defining state legitimacy in democratic and human-rights terms, failure on these criteria can even suggest application of Security Council intervention according to the UN Charter, Arts. 2.4 and 2.7, Ch. VII, or some steps of the Responsibility to Protect doctrine ranging from economic and diplomatic sanctions to armed intervention. (*also* UNGA 2005; § 139; Roth 1999; 1–3; Shavit 2009; Tasioulas 2013; notes 18, 27) Whether or not action by the international community would ensue, the verdict 'illegitimate' means that the search would be on for a better – more legitimate, if you will – state. That is, if choosing a constitution that is democratically legitimate means the replacement of a relatively deficient state, then so be it. But the narrative would shift from the illegitimacy of one state to the positive legitimacy, based on a legitimate citizenry, of another.

8   Conclusions

In judging a state's legitimacy it should matter whom it includes as citizens. And sometimes it does matter. World opinion judged South Africa before 1991 and Rhodesia between 1965 and 1980 to be illegitimate – with corresponding diplomatic and economic boycotts and sanctions – because most of their subjects were not full and equal citizens.[23] But while those countries' non-citizens were present in the territory, making the discrimination against them easy to see, around half the Palestinians are (involuntarily) absent from Palestine, the other half being present, either in the West Bank and Gaza Strip or in the territory controlled by Israel since 1948. The paper attempts to show that despite these territorial absences all Palestinians are significantly affected enough by whatever state rules historic Palestine to deserve citizenship therein. No citizenry without them is legitimate, and a necessary condition of a state's legitimacy is that it have its legitimate citizenry.

That Israel practices apartheid within Israel is now uncontested (Adalah (The Legal Center for Arab Minority Rights in Israel) 2018; 2017; 2009). But correcting this would not bring legitimacy because Israel also controls the territory occupied since 1967, justifying the term 'apartheid' to cover Israeli rule over that roughly 20 % of historic Palestine and its roughly 4 million people, whose right to citizenship of whatever state rules the territory is strong (Allegra 2009; Falk and Tilley 2017). But this, too, would not suffice for legitimacy because it would still leave the displaced Palestinians in the diaspora, although existentially affected by Israeli rules, without citizenship in Palestine.

To the extent that it focuses negatively on the de-legitimisation of Israel, this paper did not need to be written. Its argument could be made without even mentioning Israel, putting the same content in positive terms. Based on historical knowledge of the last century in Palestine one can simply ask after all the rights of *all* the Palestinians and Jewish Israelis, namely: right of return and restitution; freedom from colonial occupation; equal political rights; de-partition of Palestine; and normal citizenship for all current residents.[24] There would be no vacuum in the case of Israel's illegitimacy, but a single human-rights-based democracy following rigorously from the realisation of the named rights, including the one addressed in this paper: recovered citizenship. The burden of proof in fact lies with Zionism to 'positively' show that the state is legitimate which depends on the expulsion, dispossession, refused return and de-patriation of the Palestinians who, arguably, form a legitimate citizenry based not in ethnicity or religion but in indigeneity.

Notes

1 Democratic legitimacy contrasts with divine or traditional legitimacy or that of 'facts on the ground' or recognition by other states.

2 This definition diverges from the seminal one of Weber (1984[1958]), 33) which defined the state as the personal and institutional apparatus exercising a monopoly on the *legitimate* use of force. Like the similar definition of Habermas (1973), 144, this begs this paper's question because according to it all states are by definition legitimate, even oppressive ones (Lipset 1981, 88). *See also* Benhabib (2004) and Roth (1999), 44.

3 Witness as well the language of the PLO Charter, Arts. 19 & 20.

4 While not globally legally binding, the Convention does have some traction in international law. (Quigley 2010, 206).

5 *Le Monde*, 15 October 1971: 'Ce pays existe comme accomplissement d'une promesse faite par Dieu lui-même. Il serait ridicule de lui demander des comptes sur sa légitimité.'

6 Considering the forced dispersement of most Palestinians, the Palestinian self is today a Non-Self-Governing Non-Territory.

7 For defences of Israel's ethnic cleansing *see* Shavit 2013 and Schwartz 2013, 600-46.

8 On Zionism's closely-related racism *see* OHCHR 1965; UNGA 1975; UNGA 1991; Grossman 2001, 876; Benhabib 2004, 119–24, 135-38; Tilley 2005, 13, 132, 147–49.

9 One should also include those born in Palestine as Ottoman citizens who emigrated before 1925. (Banko 2012).

10 C.G. Montefiore, President of the Anglo-Jewish Association, 4 October 1917; *also* (Kattan 2009), 251.

11 *See* the White Paper written by Herbert Samuel and Winston Churchill on "right" as opposed to "sufferance" (HMG (His Majesty's Government) 1922), and Israel's Declaration of Establishment (PGI (Provisional Government of Israel) 1948).

12 Basic Law: The Knesset, Amendment No. 9 (to Section 7A) of 1985 and the Law of Political Parties, Amendment No. 12 of 2002.

13 While the PLO/Palestinian Authority did draft citizenship laws in 1995 and 2012 (Qafisheh 2017, 113, 131–32), it did not to my knowledge publish it, and judging by its support of UNGA Resolution A/67/L.28 of 26 November 2012, in which it recognised Israel's legitimacy within the 1967 borders, it would seem that the concept of a citizenship for all Palestinians applicable in all of historic Palestine now contradicts its ideology. (*see*Khalil 2014, 217–19).

14 *Politics* 3.10.1281a11 and 3.13.1284a17-b34; 3.I § 1 & 3; 3.II, § 2.

15 If it is claimed that (the Palestinians') absence precludes citizenship, it must also be maintained that, contrary to Israel's Law of Return, absent Jews likewise cannot justifiably claim entry as citizens.

16 *See* Miller 2009 and the counterarguments of Cole 2000.

17 A small sample: Hadawi 1967; Bauböck 2007; Sayigh 1978; Khalaf 1981; Khalidi 1984, 1992; Karmi 2002; Peteet 2005; Baroud 2010; Barghouti 2011; Sabbagh 2006; Abu Sitta 2016.

18 70 years with on average an assumed 3,000,000 refugees per year.

19 The crime is discrimination of a group based on race. (UN 1973, Art. II & III (b) & (c); also ICC 1998, Art. 7.1 (j) and 7.2 (h)).

20 Mallison and Mallison (1984) mention: Magna Carta; Universal Declaration of Human Rights Arts. 13.1 & 2; UNGA Resolution 194, § 11; 4th Geneva Convention Arts. 49 & 134; UNGA Resolutions 513, 2452, 2535, 2963, 3236; UN Commission on Human Rights (several dozen Resolutions); International Covenant on Economic, Social, and Cultural Rights, Art. 12 (4) 2; UN Economic and Social Council Resolution 1982/18 (point 2).

21 *Also* Aruri 2001, Brynen and El-Rifai 2013, and Qafisheh 2015.

22 A special issue of the journal *Citizenship Studies* (Turner 2016, vol. 12 [3]) on the topic of Israeli citizenship, while containing one article dealing partly with the Palestinian residents of the West Bank and Gaza Strip, makes practically no mention of the Palestinian refugees.

23 For a nuanced view partially rejecting international intervention in such cases *see* Roth 1999, 201–51.

24 This feature is without prejudice to the question whether current Israeli Jews have an *acquired right* to remain as citizens, or whether this is a *political concession* a majority of the legitimate citizenry is prepared to make.

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