

# Introduction

In this issue of *Theoretical Inquiries in Law*, we take up one of the most contested, debated and explosive conflicts in modern history—the Israeli-Palestinian conflict. Our aim is to provoke an academic and theoretical debate concerning the relevant considerations regarding justice, territory, individual rights, and collective rights that this conflict raises. The issue presents both an evaluative outlook on the past and a forward-looking approach, suggesting ways to think about what a *just* solution for the two peoples would entail.

We suggest reading the articles presented in this issue in four segments, each of which shares a common theme: the Zionist vision, territorial justice and Zionism, the 1948 war and its aftermath, and justice and the State of Israel. In the following sections we provide an overview of the articles and the connecting themes.

## I. THE ZIONIST VISION

What are the conditions under which Zionism can be just? Zionism, the intellectual and political nationalist movement of Jews from the 19th century onwards, is highly contested. While some consider it a movement for Jewish self-determination, others see it as a vehicle for colonialism and ethnic supremacy. The first group of articles in this issue take neither of these stances as necessary. Instead, each article in this segment contemplates, from a variety of perspectives, what type of Zionism could be considered just. This is a question of both contextual historic visions and theoretical analysis of broader implications for the consideration of nationalist projects.

Historically, the paradigm of nationalism was defined as a supreme aspiration for the nation's full political sovereignty, before all other allegiances of the individual. Today, nationalism persists over two related matters: the attitude of the individual towards their national identity; and the actions that the members of a nation are willing to take in order to preserve or attain political self-determination. Thus, nationalists consider the nation-state to be a core feature of the political organization of the national collective, and a part of the ethno-cultural context of a nation.

Some contemporary liberal thinkers believe that the right of self-government, a sovereign nation state, is the best way to enable members of a national

group to live their lives within their national culture.<sup>1</sup> Respectively, a nation's claim to a state is often based on the right of self-determination. But self-determination alone cannot justify a nation's claim over a specific territory. When nations claim a specific territory, they justify it by their "historical rights"—an independent argument from the question of whether or not they are already exercising their right of self-determination.<sup>2</sup> And when a nation occupies a particular territory claiming an historical right, it does so in order to establish a cultural and geographical presence there, regardless of the people currently residing in that territory. But a problem arises when more than one group claims historical rights over the same territory.<sup>3</sup>

In the opening article of the issue, Cheyney Ryan argues for a stance of nationalism that avoids its bellicose aspect. He first presents the idea of nationalism and the nation-state, determining that bellicosity is an inherent aspect of nationalism, because it serves to differentiate between nations. Ryan then goes on to briefly explore the historical development of nations and nationalism. He suggests that the dynastic states of the past considered territory and population as the possession of the rulers, serving the latter as a means to gain resources, and therefore the threshold for wars depended on the willingness of these rulers to use and acquire such resources. Wars as we know them, he offers, emerged when wars transformed from property rights conflicts to conflicts about security interests and "higher values." Thus, nation states are more prone to engage in wars over territory and ideals, as territory is considered a part of the nation's identity. Finally, Ryan considers Martin Buber's civic nationalism, arguing that while nationalism has indeed a bellicose aspect, civic nationalism presents a more peaceable perspective and a different outlook on national ideas.

Yitzhak Benbaji's article explores the circumstances in which scattered nations are entitled to establish a neutral state, and their justifications for doing so, with a deeper analysis of scattered non-national minorities and their attempts to invent or revive a societal culture and a national identity. In this context, Benbaji promotes the ideas of egalitarian Zionism by providing responses to common objections to it. He bases his stance on Rawls's theory of justice and an investigation of Patten's "principle of fair opportunity for

---

1 CHAIM GANS, *THE LIMITS OF NATIONALISM* 23 (2003). Gans also states that others admit that self-government rights can be a part of a larger political mechanism, in which a national group has the ability to express their original culture while integrating with other groups.

2 *Id.* at 97.

3 *See* TAMAR MEISELS, *TERRITORIAL RIGHTS* (2009); BERNARD YACK, *NATIONALISM AND THE MORAL PSYCHOLOGY OF COMMUNITY* (2012).

individual self-determination,” while corresponding with Chaim Gans’s argument that the Jewish people did not constitute “a nation” in the early years of the Zionist movement and prior to the founding of Israel.

In the last article of this segment, Julie Cooper focuses on the works of Jewish intellectuals in the time of mandatory Palestine, which provide a political imagination for the Zionist movement that poses alternatives to the assumption of the nation-state regime. Cooper thereby demonstrates the political imagination that these intellectuals envisioned could be instrumental in establishing viable democratic alternatives to current discussions of regime for the Israeli-Palestinian conflict.

## II. ZIONISM AND TERRITORIAL JUSTICE

Territory plays a crucial role in international conflicts, in particular in the Israeli-Palestinian context. Political theory sees territory as the domain of legitimate jurisdictional control, associated with rights. Territorial rights consist of a bundle of non-exhaustive rights (powers and immunities), of which the primary and most fundamental is jurisdiction—the right and power to enact and enforce laws on a given territory, to make war and peace, to conclude treaties and to enter into alliances.<sup>4</sup>

Territorial justice is often discussed in the contemporary international context, especially in the context of the Israeli-Palestinian conflict. Not surprisingly, it is also a recurring concept in the articles in this issue. Theories of historical justice try to justify rights over territory. These theories examine the relationship between three concepts—the people; the land; and the sovereign or the state—in trying to explain what rights are, who holds them, and what their limits are.

Kant’s theory of territorial justice finds the state to be necessary to the pursuit of justice, because, in abstract, the state enables a civic and just society, which respects the rights of individuals.<sup>5</sup> This theory fails to challenge the status quo<sup>6</sup> and justifies the state’s right to jurisdiction. It does not fully explain

---

4 David Miller, *Territorial rights: Concept and justification*, 60 *POL. STUD.* 252 (2012).

5 For a further elaboration of Kant’s theory and its shortcomings, see, e.g., Margaret Moore, *Territorial Justice in Israel/Palestine*, 21 *THEORETICAL INQUIRIES L.* 285 (2020) (in this issue); JEREMY WALDRON, *PROXIMITY AS THE BASIS OF POLITICAL COMMUNITY*, WORKSHOP ON THEORIES OF TERRITORY, KING’S COLLEGE (2009); David Miller, *Property and Territory: Locke, Kant, and Steiner*, 19 *J. POL. PHIL.* 90 (2011).

6 Lea Ypi, *A Permissive Theory of Territorial Rights*, 22 *EUR. J. PHIL.* 288 (2014).

what makes a state *just*, or how the state “earned” its territorial rights in the first place, and it fails to offer an account of the particularity problem—that is, why a particular state has the authority over a particular territory.

Scholars today suggest that just states are ones that respect and protect human rights, due process and the rule of law.<sup>7</sup> Others find justification for territorial rights under nationalism, rooted in the idea of the “nation’s homeland.”<sup>8</sup> Self-determination theories of territorial rights build upon the nationalist argument, but aspire to avoid the inherent difficulty in assuming a culturally homogenous nation, discussing the moral interrelation between people and place.<sup>9</sup>

The Israeli-Palestinian conflict brings to the fore difficulties in theories of territorial justice. Thus, the articles that make up this segment raise questions regarding the just division of territories between nations, from the perspectives of before or at the beginning of a conflict; and that of occupancy and seizure of land.

Margaret Moore’s article discusses the shortcomings of two prominent theories of territorial justice, in order to show that both of them do not provide reasonable solutions and justifications for territorial rights and the claims of parties in ongoing conflicts. Moore applies Kant’s theory of territorial justice and territorial self-determination theories to the Israeli-Palestinian conflict and shows that these theories do not provide a determinate solution to the conflict, as they fail to take into consideration the parties’ claims and retrospective historical circumstances.

Manal Totry-Jubran seeks to shed light on the moral implications of private actors operating in the market to take part in the state-building process. She focuses on the legal history of the Baron Edmond de Rothschild’s settlements project during the Ottoman and Mandate periods. Totry-Jubran argues that although the Baron’s settlements project and land transactions were carried out in the private sphere, they had enormous repercussions for the Arab population (the “Fellaheen”)—both normatively and legally. Totry-Jubran argues that due to the Baron’s project and Jewish land acquisition, the Fellaheen’s territorial rights were unjustly infringed, and she points out that this injustice should be addressed in the discussion regarding the state-building processes of Israel and the discussion regarding historical justice.

---

7 ALLAN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2003).

8 *See, e.g.*, DAVID MILLER, *ON NATIONALITY* (1995).

9 Anna Stilz, *Territorial Rights and National Defense*, in *OXFORD HANDBOOK OF ETHICS OF WAR* 251 (Seth Lazar & Helen Frowe eds., 2018).

### **III. The 1948 War and Justice in its Aftermath**

The Israeli-Palestinians conflict constantly raises questions of historical justice. As one of the most enduring, complex and intractable of contemporary conflicts, its roots don't lend themselves to any easy explanation. Yet there is little dispute that a turning point in the conflict's trajectory came in 1947-1949 with the adoption of the partition plan by the United Nations, the retreat of Great Britain upon the termination of the mandate given to the British Empire by the League of Nations after World War I, the declaration of the founding of the State of Israel in 1948, the immediate war that followed—and its results. This series of events repositioned groups and individuals and brought to the fore the question of justice in and after a war. These moments serve as an anchor for the articles of this segment, all of which deal with the question of justice in the—still ongoing—aftermath of the 1948 war.

In the first article of this segment, Victor Tadros raises the question whether we can justify an intergenerational right of return through the idea of inheritance of rights, and applies that argument to the Israeli-Palestinian conflict. Tadros explains the general concept of the right of return, points to difficulties in prior justifications, and presents his own justification for an intergenerational right of return. Tadros suggests that descendants of displaced persons that have legitimately joined the struggle of their ancestors can still acquire their parents' right of return, even if they had other opportunities to develop alternative life-plans somewhere else. He argues that the life that the parents planned for their descendants, as well as the wrong that was done to them by their displacement, justifies the return rights of descendants of such displaced parents.

David Miller's article seeks a moral justification for one's right of return to his country. After challenging the conception that the right is based on autonomy, Miller goes on to argue that the right of return can be best understood as grounded by the human need to belong to a homeland. Miller's understanding of the need to belong focuses on the strong ties that exist between persons and the places they recognize as homes. These ties therefore highlight the importance of securing access to such places in the form of the human right of return. From this perspective Miller evaluates the specific return claims of Jews and Palestinians to Israel/Palestine. Accordingly, despite being entitled to the right, most Palestinians are currently in a tragic situation where their right cannot be fulfilled.

Tamar Meggido & Eyal Benvenisti offer an assessment of the appropriate mechanisms and institutions with which we should settle competing property claims in the aftermath of a conflict. They suggest that the authority to settle these claims should be based on two principles, inclusion and representation,

in order to secure the public good of each of the parties, and to ensure that individual claims, interests and rights are taken into true consideration. Meggido & Benvenisti examine these principles at work through the example of the case of Northern Cyprus, and then examine the attempt at settling property rights claims in the Israeli-Palestinian context through the Israeli Regulation Law, which was recently rejected by the Supreme Court of Israel. They show how the Regulation Law fails to *include* and *represent* the Palestinian public and individuals, and therefore consider it an unjust solution for such claims.

Itamar Mann's article discusses the ways in which three groups' historical stories of seeking refuge have been tied together and suggests an initial political outline for the disentanglement of these narratives. Mann focuses on the idea that the strategy chosen by the Israeli government in an attempt to deal with the justification of the displacement of Arab Palestinians in 1948, the idea of a population exchange, had grave consequences for both the Mizrahi Jews and the Arab Palestinians. Mann outlines the ways in which the Zionist movement associated the Mizrahi community's refuge in Israel with the Palestinian displacement, arguing that the Mizrahim, as well as the Arab Palestinians, were largely affected by the narrative of a population exchange and by the inequalities that emerged as a result. He concludes by suggesting a mechanism of reparations aimed at settling the historical wrongs.

#### IV: JUSTICE AND THE STATE OF ISRAEL

The last segment of the issue engages with the question of the justification of a Jewish nation state, in its current form, and whether the Israeli regime can provide justice for Israelis and Palestinians across Israel/Palestine. As Israel is internally defined as both Jewish and democratic, the question of the possibility of justice under the Israeli regime across Israel/Palestine has long been central to contemplations of the conflict. In the past three decades, the Jewishness of Israel has taken constitutional form—both in the Basic Laws of the 1990s and in the recent Basic Law: Israel as the Nation-State of the Jewish People. Thus, the question whether a Jewish state can provide justice to Palestinians seems ever timelier.

In the first article of the segment, Raef Zreik argues that in the Israeli-Palestinian conflict, Israel often uses second-order arguments for justice, a mode of argumentation that ignores the legitimate first-order arguments of the Palestinians. Zreik stresses that while the first-order arguments are principles of justice that derive their power from the original distribution of entitlements, the second-order arguments derive their logic from the conflict itself. Zreik points out that over the years Israel has broadly interpreted considerations

of security and self-defense, *viz*, its second-order arguments. In this way, it justifies the continuation of the conflict and the violations of the rights of the Palestinian people.

In his article, Hassan Jabareen examines the validity of three prevailing assertions regarding the status of Palestinians in the eyes of the State of Israel. The first assertion contends that Israeli constitutional law ensures equality for all of the country's citizens. The second regards the Israeli occupation of the West Bank and Gaza as irrelevant to the discussion on justifications of the state's "Jewishness." The third assertion is that Jewish group rights, which include the Law of Return and a Jewish demographic majority in Israel, do not discriminate against Palestinian individuals. Jabareen provides a review of the case-law in family unification cases, his examination exposing the falseness of these assertions. Jabareen concludes that in practice, colonialism is the relevant framework of Israel's constitutional identity in Palestine.

Lastly, Alan Patten explores the definitions of Jewish self-determination and a Jewish state, and the relationships between them, in order to determine whether the idea of Israel as a Jewish state is morally defensible. Consequently, Patten offers two accounts for the basis for a Jewish state: a descriptive conception, under which a Jewish state might be perceived as one in which most of the citizens are Jewish; and a normative conception, where the state has certain responsibilities to further the common good of the Jewish people. Patten examines both these conceptions through the stance of oppression, stability, equal recognition, basic rights, equal standing, and fair opportunity.

Taken together, the articles presented in this issue offer rich contemplations of the interaction of justice, history and political thought. They engage with both analytical and normative aspects of the Israeli-Palestinian conflict and provide a robust array of approaches, methods and moral commitments.

\*\*\*

The articles collected in this issue are the product of the conference on *Historical Justice in the Context of the Israeli-Palestinian Conflict*, held at Tel Aviv University, Buchmann Faculty of Law in May of 2019, sponsored by the Cegla Center for Interdisciplinary Research of the Law at Tel Aviv University and the Stockholm Centre for the Ethics of War and Peace at Stockholm University. Theoretical Inquiries in Law thanks Yitzhak Benbaji and Helen Frowe, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors of this issue; Ruvik Danieli for style-editing the articles; and all the conference participants and commentators for a most fruitful discussion. We also thank our managing editor, Ayelet Avriel—for everything. The articles published

in this issue are available online at the *Theoretical Inquiries in Law* Website (<http://en-law.tau.ac.il/til>).

The Associate Editor, Junior Editors,  
and Assistant Editors