

Whose *Right* Is It? Reflections on Harel's Reflections on Palestinians' Interest in Return

David Enoch*

INTRODUCTION

In an interesting and provocative paper,¹ Alon Harel revisits the topic of the Palestinian claim to a right of return from a surprising angle. Harel suggests that, with few and fairly narrow exceptions, the Palestinians have no interest in return² and that, given the intimate connection between interests and rights (with the same narrow exceptions), this casts serious doubt on their demand for a right of return.

I do not wish to quarrel here with Harel's critical discussion of the possible Palestinian interests he surveys. Nor do I wish to argue that his survey is incomplete, that there is an important Palestinian interest — one he neglects to mention — that may, after all, ground a right of return wider in scope than

* Cardinal Cody Lecturer in Canon Law and Lecturer in Philosophy, The Hebrew University in Jerusalem. I thank Alon Harel for many relevant discussions and for comments on an earlier version of this comment.

1 Alon Harel, *Whose Home Is It? Reflections on the Palestinians' Interests in Return*, 5 *Theoretical Inquiries L.* 333 (2004). All references to Harel's theses and arguments are to those made in this article.

2 Though nowhere does he say so explicitly, Harel must have in mind the claim that Palestinians have no *legitimate* interest in return, that is, no interest of a kind that might conceivably ground a right of return. If, for instance, (some) Palestinians have an interest in annihilating Israel and killing its Jewish citizens and if return might facilitate such deeds, this is not to be thought of as a counterexample to Harel's thesis. In what follows, a qualification referring to legitimate interests should be understood as implicit.

the exceptions Harel concedes. What I want to argue is that there is something irrelevant — and, perhaps, also inappropriate — about the very attempt to settle the normative issue by examining possible Palestinian interests and how they might be facilitated by return or by other, alternative means. My concern starts out with a nagging intuitive doubt and then proceeds to a more theoretical controversy about the nature of the relationship between rights and interests. Now, in a brief section (Section II.B.), Harel anticipates the major line of criticism developed below, substantially weakening his thesis so as to accommodate the effect of this criticism. In what follows, I hope to show that, this attempt at accommodation notwithstanding, Harel still underestimates the effect the criticism has on his line of argument.

I. WHY NOT DISCUSS INTERESTS? THE INTUITIVE THOUGHT

You want to do something — say, express your political views — and I will not let you. In an attempt to remove the obstacle I pose to your expressing your views, you put forward a right-claim. You cite your (moral and, perhaps, also legal) right to free speech. Suppose I then respond by noting that it is not at all clear why expressing your political views would be in your interest, why doing so would promote your well-being in any legitimate way. It is not that I do not take your right-claim seriously. Indeed, I am willing to put considerable time and effort into finding out whether you have the right you claim to have. And I say things like "Oh, come on, you are much better off devoting your time to your studies than to expressing your political views right now"; "Your well-being will not be promoted if everyone knows that your politics are so simple-minded"; "Perhaps you should wait with expressing such controversial views until after you have received tenure"; and so on. I may even write a paper that surveys all the possible ways in which expressing your political views (here and now) might be considered in your interest, carefully showing that none of these ways in fact withstands criticism. Have I successfully addressed your right-claim? Have I showed that, in the absence of any *interest* to speak in these circumstances, you have no *right* to speak either?

It seems to me clear — and fairly uncontroversial — that the answer to this question is no. Indeed, it is a part of the point of invoking a right-claim that — if the claim is true — the right-holder need not show that the way she wants to exercise the right is justified in order to enjoy the right's protection. If you have a right to free speech and if it is applicable to the circumstances at hand, then — within certain boundaries, no doubt — you are entitled to exercise it as you see fit, even in ways that are detrimental to

your own interests. Certainly, you need not justify yourself *to me* in order to be protected by the right. This not-needing-to-justify-yourself-to-others constitutes, to a significant extent, the point of rights, why we have rights in the first place.

Back to the Middle East, then. The point I want to pursue is that Harel's discussion of the Palestinians' interest in return is — whatever its exact details may be — just as misguided as my attempt to survey your interests in expressing your political views. By engaging in this discussion as though it is intended to settle the normative issues surrounding the (purported) Palestinian right of return (or even just to be directly relevant to them), Harel *already* shows disrespect for the (purported) right. This intuition is stronger, I think, when the discussion is conducted by an Israeli. Surely Palestinians need not justify themselves *to Israelis* with regard to how they choose to exercise their right of return (if, indeed, they have this right). Suppose that in the example above I am in power and you want to express your political objections to my regime. If you have a right to free speech that protects such expression, you certainly do not have to justify yourself *to me* in order to win the protection of the right to free speech. Similarly, if the Palestinians have a right of return, they do not have to show any interests to which return is conducive in order to win the right's normative protection and they certainly do not have to convince Israelis that they have such interests.

At least two features of the normative situation — relevant to the point in the previous paragraphs — seem intuitively highly relevant to the normative status of the purported right of return, but are rendered (almost) entirely irrelevant due to Harel's focusing on the interests return might facilitate. These are, first, the wrong from which the right of return arose and, second, the apparent fact that the Palestinians (or many of them) want to return. If — as seems clear enough — the Palestinians were wronged in and around 1948 (with the establishment of the State of Israel) either by being expelled or, at the very least, by not being allowed to return shortly after their departure, surely this must affect the normative status of their demand to return — directed primarily at Israel, the entity responsible for the original injustice — in a more direct way than Harel can allow. And if the Palestinian refugees are the victims of an injustice perpetrated by Israel, are their preferences (and, perhaps, also their beliefs) regarding possible remedies not a relevant factor in determining the appropriate remedy?

II. DERIVATIVE RIGHTS

These points, then, express the nagging doubts. But it is not immediately clear that they can be defended in a philosophically respectable way. After all, as Harel emphasizes, the connection between an injustice and the proper remedies for it is hardly ever straightforward, and the preferences of the victims are not granted special status — not *any* status, sometimes — in determining the appropriate remedy. And if the Palestinians have no interest in return, how can they have a right of return? And why should it matter whether a careful survey of the possible Palestinian interests in return is presented by an Israeli? Is it not the content of the survey rather than the identity of the surveyor that should matter?

Let me start my attempt at presenting a more rigorous defense of these criticisms by reconsidering the relation between rights and interests. The compelling thought underlying interest theories of rights is that rights are ultimately grounded in the right-holder's interests, in aspects of her well-being. But to be at all plausible, a theory of rights must avoid postulating too intimate a connection between rights and interests, for — as can be seen from the onerous-property-example (considered by Harel) — we can clearly have rights that are not directly grounded in parallel interests. How can we have such rights if rights are ultimately grounded in interests?

This is where derivative rights come in. Some rights, the thought goes, are directly grounded not in the right-holder's interests, but rather in other, more fundamental rights. To be sure, there remains a connection between such derivative rights and the right-holder's interest. It is just that the connection is not as direct as might naively be thought. Derivative rights are directly grounded in more fundamental rights and only indirectly — via their core rights — grounded in interests. Derivative rights are also supposed to save the interest theorist from examples like the one described above: The reason it is inappropriate for me to survey your interests when you are invoking your right to free speech is that your right to express your political views here and now is derivative. It is grounded not directly in your interests, but rather in your general right to free speech, which is, in turn, presumably grounded in your interests. Given your general right to free speech, your speech here and now is already protected by a right, and whether or not voicing your opinion now is in your interest is, therefore, beside the point.

Derivative rights are thus not a matter of minor detail for an interest

theory of rights. Though the term is Raz's,³ the need for derivative rights is not peculiar to his version of an interest theory of rights. The mechanism of derivative rights (or some mechanism closely resembling it) is essential to any interest theory of rights. Without derivative rights, no interest theory of rights is consistent with significant parts of our rights discourse.

It is now clear, I hope, how we can make more rigorous sense of the intuition I started with — that there is already something offensive about surveying possible Palestinian interests in return in an attempt to settle the normative issue of the right of return. The Palestinians' right of return should be seen — if, that is, they have such a right — as a derivative right, not a core right. And this means that whether or not it is in their interest to exercise this right is irrelevant to whether they have the right — just as whether or not voicing your political opinion here and now is in your interest is irrelevant to whether or not such action is protected by your right to free speech. And just as, given your general right to free speech, you do not owe me (or anyone else) a justification in terms of your interests for exercising it in this or that way — indeed, just as requiring such a justification would already constitute a failure to show respect for your right — so too, given the core right from which the right of return is presumably derived, Palestinians do not owe Harel (or anyone else) a justification for exercising it, and, indeed, requiring such a justification of them is already a way of failing to respect their right.

Notice that what is offensive about the discussion of interests is not that it challenges the claim that there is a relevant right here (be it the right to express your political views or the Palestinian right of return). The point is, rather, that once it is clear that what is being challenged is a claim to a *derivative* right, a discussion of the (purported) right-holder's interests is inappropriate. The (derivative) right may still be challenged, but not by an attempt to show the purported right-holder that it is not in her interest to exercise it. (How, then, is a dispute about the very existence of a derivative right to be decided? I offer a (very preliminary) reply in the next section.)

Harel is right, then, in anticipating that his line of reasoning may sound dismissive or paternalistic. But he is wrong about the reasons for this being the case. The problem with Harel's reasoning is not that it distinguishes between people's interests and what they want (I agree, of course, that one's desires do not alone determine one's good). Rather, it is that it fails to respect people's rights.

3 Joseph Raz, *The Morality of Freedom* 168 (1986).

III. PUTTING ONE'S MONEY WHERE ONE'S MOUTH IS

But if it is to be established that the Palestinian refugees do have a (derivative) right of return, much more needs to be done. First, as Harel notes, a core right must be recognized. Second, it must be shown that — and how — the right of return is derived from the core right. Let me briefly address these challenges in turn.

In the free-speech case from a few pages back, it is clear enough what the relevant core right is: a general right to free speech (or perhaps to free political speech or something of this sort). But what could be the core right from which the right of return is derived? I want to suggest that the answer depends on the right of return being a remedial right. Seeing that it is a remedial right, its normative status depends on (though not only on) the original injustice, the one perpetrated in 1948. And this immediately suggests that the relevant core right (or rights) is (are) the one (ones) violated in 1948.⁴ This, then, is my answer to the first question: the right of return, if there is such a right, is derived from the rights violated in 1948, such as the right to live peacefully on one's land, the right not to be expelled forcefully from it, the right to return to that land immediately after showing the desire to return, and all other relevant property (and other) rights violated at that time.

The following worry now arises: If remedial rights are viewed as derived from the original, violated rights, are we not pulled towards blurring the very distinction between the original right and the remedial one? Are we not in violation of what "all lawyers know," namely, that "not all wrongs can be remedied by reinstating the status quo ante"?⁵ Are we not committing ourselves to thinking of "reversion as a remedy for injustice"?⁶

It is important to see why these related worries are misguided. The relation

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- 4 This is certainly so if Raz is right in saying that "[t]he statement that the derivative right exists must be a conclusion of a sound argument (non-redundantly) including a statement entailing the existence of the core right." *Id.* For is it not clear that the right originally violated is part of the normative story relevant for the justification of the remedial right? Indeed, is this not true for *any* remedial right?
- 5 Harel, *supra* note 1, at 343, quotes Eyal Benvenisti, *The Right of Return in International Law: An Israeli Perspective* 8 (2003) (paper presented at the Stocktaking Conference on Palestinian Refugee Research, Ottawa, Canada, June 17-20, 2003).
- 6 This is a view Waldron criticizes. See Jeremy Waldron, *Settlement, Return and the Supersession Thesis*, 5 *Theoretical Inquiries L.* 237 (2004). I want to emphasize that Waldron's Supersession Thesis, according to which it is possible that past injustices be superseded by subsequent events so that reversing them, or even supplying a remedy for them, is no longer called for, is not in tension with anything

between a core right and one of its derivative rights is justificatory in nature, not logical.⁷ In other words, for one right to be derivative of another, it is neither necessary nor sufficient that a statement of the existence of the latter logically entails a statement of the existence of the former. The route from the core right to the derivative one is always substantive, not formal. So it is always a substantive, normative question which remedial rights are derived from the relevant core right. And this means that it is consistent with the derivative nature of remedial rights that reversion is not always the appropriate remedy, that some wrongs cannot be remedied by reinstating the status quo ante.

In order to establish the Palestinians' right of return, then, all that remains to be shown is that such a right really does derive from the core rights violated in 1948. But how can it be established whether it does or does not? We already know of two ways in which it *cannot* be established. We know that it does not follow from the fact that the core rights do not formally entail any such derivative right that the latter does not exist. And we know that interests need not be relevant — this, remember, was the point of invoking derivative rights (from within the general framework of an interest theory of rights). So how can it be established whether a derivative right in general and a derivative right of return in particular exist?

It is here that my discussion will remain most clearly incomplete. For I do not know how to answer this question in detail. If the existence of a derivative right is to be established, what is needed is a substantive, normative argument, starting from the original right and ending with a statement of the derivative one. What is needed in our case is an argument showing somehow that the original rights violated in 1948 are not appropriately respected unless a derivative right of return is acknowledged. The discussion would have to include a careful presentation of the original rights and of their justification and would then have to examine whether these support the right of return in our current circumstances. This is a discussion I cannot embark on here (though it seems to me rather clear that the result would be that the Palestinians do have a *prima facie* right of return). So let me make just the following three preliminary remarks.

First, it seems to me that Palestinians' desires cannot be dismissed as irrelevant in such a discussion. Seeing that they were wronged in 1948 and given the nature of the rights then violated (such as the right to live one's life on one's land if one so chooses), it seems to me that a normative

in the text. I argue that the original injustice is normatively relevant to the current normative situation, certainly not that it is the *only* thing that is relevant to it.

7 See Raz, *supra* note 3, at 169-70.

discussion trying to determine whether they have a derivative right of return cannot ignore their⁸ rather strong desire to return. Since it is a part of the original injustice that the Palestinians were not allowed to continue to reside where it was important for them to continue to reside, it seems that the fact that it is still important for them to reside there is of normative significance. And just as in 1948 it was inappropriate to second-guess such preferences and desires of Palestinians by inquiring about their interests (even though it is possible that they were mistaken in their preferences and that immigrating was, in fact, in their interest), it remains inappropriate today to second-guess such preferences by analyzing their interests.⁹

Second, I want to note that in this discussion — the one attempting to determine whether a derivative right of return exists — interests may be relevant. Of course, they cannot be relevant in the way implied by Harel's discussion, for the whole point of invoking derivative rights is to distance rights from interests, to allow for there to be a right where no immediately corresponding interest exists. But interests may be relevant in other ways. The interests grounding the original, core rights are certainly relevant, because without an understanding of them, one lacks an understanding of the core rights and their justification, and so one cannot determine whether the right of return derives from them. But perhaps even the interests Palestinians may or may not have in return today may be relevant — this is so if, and only if, the core right calls for an evaluation of such interests in assessing the soundness of arguments from the core right to purported derivative rights. It is not clear to me whether this is the case here.

Nevertheless, and this is the third point, nothing like Harel's survey of possible Palestinian interests in return is at all relevant for the concern seemingly underlying the discussion, namely, whether the Palestinians have a (*prima facie*) right of return. Given that if there is such a right, it is most

8 In the text I speak — for simplicity — as if Palestinians are all of one mind about all these matters. This is, of course, false, but the fact that this is false does not, I think, undermine any part of my argument.

9 Earlier I said that I would not quarrel with Harel about the interests he surveys and the exhaustiveness of his list of interests. Let me nevertheless suggest a possible interest he does not consider: the interest in living one's life as one wants, in accordance with one's preferences and, perhaps, also beliefs. This is the interest, in other words, in autonomy. Given their preference to return, it seems the Palestinians' interest in autonomy is of the kind that could conceivably ground a right of return. And given that the original injustice was partly constituted by the failure to respect Palestinian autonomy, it seems that a right grounded in the interest in autonomy (be it a core right or a derivative one) could be fairly weighty.

likely to be a derivative one, Harel's survey of interests is simply beside the point.¹⁰

IV. RECONSIDERING THE INTEREST THEORY OF RIGHTS

This, then, is the way an interest theorist of rights should try to accommodate the intuitions I started with. But perhaps this cannot, after all, be done. Perhaps the preliminary discussion above requires too much of the modest mechanism of derivative rights. Perhaps when the details are filled in, it will become apparent that there is no philosophically respectable way of accommodating these intuitions consistently with the general tenets of an interest theory of rights.

For all I know, this may be so. But this is not, I think, a threat to the intuitive thoughts I started with. Rather, it is a threat to the interest theory of rights. If no version of this theory can accommodate the intuition, most notably, that in order to justify their claim to a right of return, Palestinians need not show that return would promote their (legitimate) interests, then so much the worse for the interest theory of rights.

V. THE RELEVANCE OF INTERESTS

So, am I suggesting that whether or not Palestinians have a legitimate interest in return, and, if they do, how strong it is, are irrelevant to deciding the normative issues surrounding the Palestinian-Israeli conflict? Of course not.

One way in which such interests may be relevant was tentatively hinted at in Section III. I want to mention now two others (both briefly noted by Harel).

To begin with, even if Palestinians have a right of return, theirs may not be the only relevant right around, and certainly not the only normatively significant consideration applicable to the political circumstances. And this means that even after such a right — a *prima facie* right — is acknowledged, it still has to be weighed against possibly competing normative considerations and an *all-things-considered* judgment has to be synthesized. In this second stage of the normative discussion, identifying the interests of all involved and weighing their strengths may be of the utmost

10 Though not beside *any* point, see *infra* Part V.

importance. This is one place where Harel's survey of possible Palestinian interests may be helpful. But, crucially, in this way, the discussion of interests is not relevant to whether Palestinians have a (*prima facie*) right of return. Rather, on this understanding, interests become relevant only further down the normative road.

And interests may be relevant in another way as well. As is widely acknowledged, rights often protect even unjustified actions; you may have a right that it is — in given circumstances — morally wrong to exercise in a certain way.¹¹ There may even be cases in which you have a right that it is your moral *duty* not to exercise in a certain way.¹² When Palestinians engage in a moral discussion, deliberating whether, and how, to exercise their right of return, it may be very relevant indeed whether they have a legitimate interest in return and, if they do, how strong it is. If they do not have sufficiently strong interests in return, then despite having a right of return, they may be unjustified in exercising it. Or perhaps they are under a moral duty to waive that right, perhaps because they (and not only they) are under a moral duty to do what they can to peacefully end the conflict. Whether or not this is so may depend on the strengths of Palestinian interests in return. But this, again, is not the kind of relevance Harel seems primarily interested in. And, furthermore, this is where it *does* matter who puts forth the argument and not just what the argument is. For, assuming they have a right of return, Palestinians are entitled to use it as a conversation stopper, or at least as a stopper of conversation with certain interlocutors. True, they may still be morally required not to exercise it. But in discussing this option, they may very well not want to be given advice by Israelis. In this way, whether or not Palestinians have an interest in return may be — though relevant — simply none of Harel's business.

VI. BACK TO POLITICS

There are ways, then, of making rather rigorous conceptual sense of the intuitions I started with — that the discussion of interests is largely irrelevant for determining whether Palestinians have a right of return and is, therefore, also inappropriate in our political context, especially when conducted by an Israeli; that the original injustice is relevant in a more direct way than Harel allows to the discussion of the right of return; and that the desire to return

11 See, e.g., Jeremy Waldron, *A Right to Do Wrong*, in *Liberal Rights* 63 (1993).

12 I argue for this claim in David Enoch, *A Right to Violate One's Duty*, 21 *Law & Phil.* 355 (2002).

shared by many Palestinians cannot be dismissed as irrelevant in the context of such a discussion. That all this can be done is not, after all, surprising: for if a theory of rights were presented that could not accommodate such intuitions, this would count rather heavily against it.

Harel emphasizes the advantages of conducting such a discussion in a somewhat detached academic environment. And in a way, my discussion is even more detached — for it deals largely with theoretical, conceptual questions about rights. But if my conclusions are correct, Harel cannot have the detached atmosphere he wants. For an adequate discussion of Harel's topic will have to involve a discussion of the injustices committed in 1948, of the desires of Palestinian refugees, indeed of Harel's own place in this discussion as an Israeli.¹³ One can still conduct such a discussion in different tones, more or less passionately, in a more or less intellectually respectable way. But one cannot conduct such a discussion without doing politics. And this, too, it seems to me, is neither surprising nor to be regretted.

13 Gans' discussion does more, I believe, to take these factors into account. See Chaim Gans, *The Palestinian Right of Return and the Justice of Zionism*, 5 *Theoretical Inquiries* L. 269 (2004).

