

Hobbesian Citizenship: How the Palestinians Became a Minority in Israel*

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INTRODUCTION

The literature that discusses the status of the Arab Palestinian citizens of Israel has never reached the crucial foundational questions of: (1) how, when, and why this group joined the Israeli polity; (2) what were the historical conditions of their incorporation into this polity; and (3) whether the terms of this incorporation, the foundation of their citizenship, still effect their legal status and rights today. This chapter deals with these questions, the answers to which will reveal one of the most unique historical circumstances that has occurred in the last three centuries concerning a defeated group joining a victorious new polity. This group is the first and only Arab group in modern history that has become a homeland minority; they did not become so by choice or consent or any international treaty but by the force of arms. Further, as a result of the establishment of Israel, they directly experienced the Nakba, the most catastrophic tragedy in the history of the Palestinian people. Notably, the Arabs rejected the UN Partition Plan of Palestine in 1947 because they refused to divide their homeland and to compel a large number of Arab natives to become a minority subjected to a foreign Western group (just as the Zionist

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leadership rejected the notion that Jews should live as a minority within a Palestinian Arab majority).

This chapter will focus on two key historical moments: the elections for and the initial legal acts of the first Knesset in 1949–50 and the post-1992 debates on constitutional reform. However, before turning to the three questions already posed, and to these events, it is important to address an important problem of perspective in the existing literature. It is common for Israeli legal scholars to argue that even if Arab citizens are marginalized in some respect by Israel's self-conception as a "Jewish and democratic state," this is no different from the status of minorities in many other Western states, and that Israel is, in this sense, similar to any Westphalian state.¹ This literature justifies demographic domination to ensure a Jewish majority by relying on liberal multiculturalist theories, which recognize the special rights of groups such as the Native Americans to control their membership policy.² Others point to some European countries, which are said to have adopted policies of ethnic hegemony.³ Gavison, for example, claims that just as the hegemony of Christian culture in the United States does not negate American democracy, Israeli recognition for Jewish group rights does not negate the democratic aspects of Israel.⁴

This argument for the "normality" of Israel depends also on drawing a sharp distinction between Israeli rule within the Green Line and its control of the Palestinian territories occupied in 1967 (West Bank and Gaza, hereafter "the OPT" (Occupied Palestinian Territory)). The commentators' description of rule within the OPT as a colonial or occupation regime implicitly supports the conceptualization of the Green Line as a democratic nation-state. Palestinians living in the OPT, unlike those residing within the Green Line, are denied one of the most fundamental citizenship rights in a democracy: the right to elect and to be elected. These perspectives rely strongly on Aristotle's idea, "A citizen is . . . one who has a share both in ruling and being ruled," and

¹ The former Chief Justice of the Israeli Supreme Court, Aharon Barak, stated that this combination of Jewish and democratic values "makes Israel, Israel, just as there are values that make France, France and England, England." Aharon Barak, *A Judge in a Democratic Society* (Princeton, NJ: Princeton University Press, 2008), 80.

² Chaim Gans, *A Just Zionism: On the Morality of the Jewish State* (Oxford: Oxford University Press, 2008), 122–5, and Na'ama Carmi, "Immigration Policy: Between Demographic Considerations and Preservation of Culture," *Law & Ethics of Human Rights* 2/1 (2008). See my comments to Na'ama Carmi's paper delivered at an International Conference on "Demography and Human Rights," held by the Ramat Gan Law School in January 2007, available at <<http://www.clb.ac.il/workshops/2007/articles/jabareen.pdf>>, accessed September 2013.

³ Alexander Yakobson and Amnon Rubenstein, *Israel and the Family of Nations: The Jewish Nation-State and Human Rights* (New York: Routledge, 2008).

⁴ Ruth Gavison, "Can Israel be both Jewish and Democratic?" Van Leer Institute, Jerusalem, 1999 (Hebrew).

citizens claim the right “to take it in turns to exercise authority.”⁵ Even progressive international scholars such as Seyla Benhabib suggest that Israel is a pre-Westphalian state in so far as it still occupies the OPT, but for its Jewish population and its Palestinian citizens living within the Green Line it is a Westphalian state that exhibits strong features of a liberal social democracy.⁶

In short, within both the Israeli and the international literature, there is a tendency to say that the definition of Israel as a “Jewish and democratic state” fits more or less the general pattern of Western nation-states. Arab citizens may not be accorded group rights, since Israel is not a bi-national state, but their individual rights are guaranteed. Jewish citizens may be accorded certain ethnic privileges but these are seen as needed to express the self-determination of the Jewish people.

I will dispute the picture of Israel as a “normal” Westphalian state, and argue instead that even within the Green Line Arabs are governed by a *colonial form of citizenship*. If the Palestinian citizens enjoy individual rights, as portrayed by Israeli scholars, and the principle of anti-discrimination is about being neutral toward individual belonging and one’s identity, how can Israeli law be neutral toward the identity of Israeli-Palestinians when Palestinians in the OPT are defined as “enemy aliens” or when it negates the right of return of Palestinian refugees based on their Palestinian national identity? Can we speak about equal rights for Palestinians in Israel by neglecting the fact that the high politics of Israel denies the Nakba and its consequences? How can we speak about democratic citizenship based on the Aristotelian idea when the Arab members of Knesset have never shared the right to rule by being part of the government? What sort of citizenship is it when both Jews and Arabs agree that Palestinian citizens should not serve in the army, even though military service is a main source of equal individual rights and citizenship?

To understand the nature of Palestinian citizenship in Israel, we need to challenge the popular perception that they enjoy equal individual rights. The reality is that perceptions of national loyalty—of who is a friend and who is an enemy—have profound effects on both individual and group rights. Carl Schmitt calls this the *Political*—the persistent tendency of states to reduce political relations to those between friend and enemy.⁷ It is true that homeland minorities in the West were typically incorporated involuntarily into larger polities and have also suffered at various points in their history from the *political*, but they have since passed through a process of “citizenization” and

⁵ Aristotle, *The Politics*, trans. T. A. Sinclair (London: Penguin, 1981), bk. III ch. 13, pp. 131, 115.

⁶ Seyla Benhabib, “Democracy, Demography, and Sovereignty,” *Law & Ethics of Human Rights* 2/1 (2008): 8–39 at 30.

⁷ Carl Schmitt, *The Concept of the Political* (Chicago, IL: University of Chicago Press, 1996), 26.

decolonization.⁸ The language of rights based on reciprocity—duties, rights, and loyalty—is accepted in majority–minority relations in Western European countries since it is not based on Hobbesian fear. In Paul Kahn’s words, it is a debate between friends and not motivated by the *political*.⁹ This account explains why the original national attachment of these groups to a nearby kin-state is not a serious factor of debate.¹⁰

Some scholars such as Yakobson and Rubenstein note that Israel’s initial process of state formation is not that different from many Western countries, which caused tragedies to the natives. However, having noted this point of comparison, they do not go on to ask whether the citizenship of the Palestinians has undergone a process of decolonization or “citizenization.” The lack of such an inquiry might be explained by the idea that raising colonial discourse will delegitimize the right for self-determination of the dominant group. But describing citizenship as colonial does not entail that rulers are foreigners who lack rights of self-determination; as Kymlicka puts it, “what matters is simply the facts of domination and vulnerability” and not the identity of the oppressors, whether they are foreign long-distance colonizing settlers or internal groups.¹¹ Mamdani expresses a similar opinion regarding colonial citizenship when he argues that the issue is examining the historical formation of citizenship and its development as a form of the state, and not the ideology, justifications, morality, or identity of the rulers.¹² Here I define “colonial citizenship” as a form of citizenship based on ethnic hierarchy, which is built on institutional discrimination that leads to vulnerability, domination, and control on matters that make the citizen a citizen. The ethnic hierarchy creates separate and unequal tracks in the exercise of fundamental rights and duties, which usually belong to citizens and not to aliens, such as the right to vote and to be elected.¹³ Since equality between citizens is the basis and presumption of reciprocity, this language of rights—rights, duties, and loyalty—leads in crucial cases under colonial citizenship to a trap or a contradiction.

⁸ According to Kymlicka, this process involved three stages. The first stage consisted in the decolonization of citizenship, which repudiated ideologies of group hierarchy; the second stage was a civil rights movement against racial segregation; and the third stage involved a struggle for minority rights and multiculturalism. Will Kymlicka, *Multicultural Odysseys* (Oxford: Oxford University Press, 2007), 91.

⁹ P. W. Kahn, *Putting Liberalism in its Place* (Princeton, NJ: Princeton University Press, 2005), ch. 6.

¹⁰ These historical developments are relevant mostly to homeland minorities since many Western countries still view some refugees and immigrant groups such as Muslims and Arabs as potential enemies.

¹¹ Kymlicka, *Multicultural Odysseys*, 280.

¹² Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996), 28.

¹³ Linda K. Kerber, “The Meaning of Citizenship,” *Journal of American History* 84 (1997): 833–54 at 834.

The first section of this chapter tracks the historical moments during 1949–50 of making the Palestinians a minority in Israel: how they were introduced to the new polity; how their citizenship was created, constrained, and shaped; what were the terms of loyalty; and how these terms shaped their language of rights. I will call these the “Hobbesian moments” of the Palestinians. Hobbes distinguished two political communities in relation to the sovereign: the first is the founding community that created the sovereign because of fear of the state of nature, and the second is the conquered, occupied, and defeated community that unconditionally surrenders to this sovereign because of fear of being killed by him.¹⁴ This latter idea captures the Hobbesian citizenship offered to (and accepted by) Palestinians in their participation in the first election in 1949. As this chapter indicates, the Palestinians joined the Israeli polity when they began to use the language of rights as *Israelis* in 1949 and not when they were conquered in 1948 or when the Citizenship Law was enacted in 1952.

The second section explores the period after the Israeli constitutional revolution in 1992. This new constitutionalism is portrayed as turning Israel into a more “normal” state, and strengthening the principle of equality. I will argue that while the Palestinians started to assert their equal citizenship rights by creating distance from their humiliating rights talk established during the Hobbesian moments in 1949–50, the law attempted to reaffirm the original terms of their Hobbesian citizenship. The terms set down during the Hobbesian moments reappear, often through the new constitutional values of the “Jewish and democratic state,” to limit individual rights and to reaffirm the terms of the *surrender*. Despite the strength of the right of freedom of speech and the intensive use of the language of rights, the *political* is still the dominant consideration in deciding the scope of Arab citizenship. I conclude that the story of Palestinian citizenship gives us a better understanding of the sources of the ideas of Israeli legal philosophy, the politics of surrender and partitioning, and the limits of theories of liberal constitutionalism.

THE HOBBSIAN MOMENTS OF 1949–50

The terms of citizenship for Arabs in Israel remain heavily shaped by decisions that were made in the earliest days of Israel’s establishment. The Provisional State Council (PSC) was established on the day of the reading of Israel’s Declaration of the Establishment of the State, 14 May 1948. The PSC functioned as a temporary legislature until the national election for the first

¹⁴ Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998).

Knesset on 25 January 1949.¹⁵ In addition to the PSC, the Provisional Government (PG) was established and it appointed David Ben Gurion to serve as the temporary prime minister and the minister of defense. In Hobbes's words, this is the sovereign, which was established by the first political community. In this period the Jewish forces occupied more territory than had been designated for the Jewish State under the UN Partition Plan, General Assembly Resolution 181. Hundreds of thousands of Palestinians were forced, directly or indirectly, to leave their homeland and to become refugees for the first time in their history. Only about 160,000 Palestinians remained and they came under the control of Israel.¹⁶ Many of the internally displaced moved to the Nazareth area in the north, which was designated for the Arab State under the Partition Plan but which also came under Israel's military control.

The debates held in the PG and PSC indicate that the main purpose of the first national election in Israel was to gain international legitimacy for the new state. The PG discussed the significance of immediate elections in its meeting on 8 August 1948 and here, the foreign minister argued that the election was very important to ease the acceptance of Israel as a new member of the UN: "if we will not have an election, our image in the world will be different and we cannot insist on our rights."¹⁷ Ben Gurion supported this argument and added that, "if we will be a member of the UN, we are a sovereign state."¹⁸ Ben Gurion made it clear that the election was important internationally, despite the fact that internally it was very risky to have an election at this time.¹⁹

The UN Partition Resolution set the terms for the new state's international legitimacy, relying on Westphalian constitutional premises. Accordingly, citizenship should be territorial in that all residents living within each of the defined territorial borders of the two states would be treated equally. The ethnic name of each state—the Arab State and the Jewish State—did not affect the principles of equal rights. In its session held on 3 November 1948, the PG decided that the elections could take place without deciding who were citizens: Israel had no citizenship law. At the time, Israeli official definitions distinguished "The State of Israel" from the terms "occupied territories" or "administrative territories." The former term referred to territory designated by the UN Partition Resolution to the Jewish State, while the second term referred to territory under the control of the Israeli army but designated as belonging to

¹⁵ See the Knesset's website, "The Provisional State Council," available at <<http://www.knesset.gov.il/review/ReviewPage3.aspx?kns=0&lng=3>>, accessed September 2013.

¹⁶ Ilan Pappé, *A History of Modern Palestine: One Land, Two Peoples* (Cambridge: Cambridge University Press, 2004).

¹⁷ Israel State Archives, Protocol of the Provisional Government (PG), 8 August 1948, p. 28 (Hebrew).

¹⁸ Israel State Archives, Protocol of the PG, p. 24.

¹⁹ Israel State Archives, Protocol of the PG, p. 28.

the Arab State, such as the Nazareth area.²⁰ Israeli officials and even the Supreme Court used this distinction until the early 1960s. Ben Gurion explained the governmental policy before the PSC: "It is not wise to declare that we will not return the occupied territories and it is not wise to declare that we will return them."²¹ During a discussion of the Election Ordinance, Ben Gurion suggested that it define "the State of Israel" to include "areas under the Israeli government's control," by which he meant to include the "occupied territories." Mr. Bechor-Shalom Sheetrit, the Minister of Minority Affairs, was the only member to object to Ben Gurion's suggestion: "Can anyone imagine that the UK would let her colonies' subjects participate in [the UK] parliament's election . . . It is absurd from an international law perspective . . . to grant this right to the Nazareth area."²² The government ignored his objection. In fact, the relevant law that should apply in these occupied territories is the Hague Regulations, which regulate the customary laws of war and occupation. Accordingly, the occupying power is not allowed to demand loyalty and to ask the occupied inhabitants to swear allegiance to it.²³ Nonetheless, this law does not prohibit voluntarily accepting participation in the national elections of the occupying power. This sort of acceptance, however, has consequences as it indirectly accepts as binding the citizenship law of the occupying power. Exercising the right to elect and to be elected is about exercising active citizenship, which involves claims of rights, duties, and loyalty.

In November 1948 the PG decided to conduct a census of the population. Registration by the census-takers would give each person an identity card for the election. The army conducted the census under a curfew.²⁴ The Arab population had a strong interest in being registered in order to be counted as "present" and not to be deported as "infiltrators," an Israeli term referring to the 1948 Palestinian refugees who tried to return to their homes.²⁵ The results

²⁰ The term "administrative territories" belongs to Article 55 of the Laws and Customs of War on Land, The Hague Regulations of 1907 (hereafter the Hague Regulations), which provide that: "The occupying State shall be regarded only as an administrator and usufructuary . . . It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Israel later used the legal term "administrative territories" to refer to the West Bank, Gaza, and the Golan Heights after the occupation in 1967. In the 1980s the term was replaced by "The Territories."

²¹ Israel State Archives, Protocol of the PSC, 17 June 1948, p. 33.

²² Israel State Archives, Protocol of the PG, 12 December 1948.

²³ See Article 45 of the Hague Regulations.

²⁴ Anat Leibler and Daniel Breslau, "The Uncounted: Citizenship and Exclusion in the Israeli Census of 1948," *Ethnic and Racial Studies* 28/5 (2005): 880–902.

²⁵ According to Supreme Court rulings, the identity cards and the registration were not a guarantee of later registration as a citizen nor did it prevent deportation; thus, the purpose of the registration by the census was only for statistical reasons. See HJC 155/53, *Kiwan v. Minister of Defense et al.* Isr SC 8, 301.

of the census indicated that the majority of eligible Arab voters lived in the occupied territory.²⁶

The PG introduced progressive Westphalian terms for the first election based on actual residency in the territory, with no ethnic discrimination. In fact, in the eyes of many members of the PSC, the terms of the election were almost *anti-Zionist*. The majority wanted to grant the right to vote to Jewish fighters who were deported from Palestine by the British Mandate and put under arrest in Cyprus. The PSC felt that excluding the fighters from the vote would send a negative message to the people, especially during wartime. Nonetheless, the PG convinced the PSC members to change their position and the minister of transportation put the Westphalian territorial argument strongly: “We must be constrained to the territorial wall and a State is a territorial concept. If we do so we will stand on our rights here.”²⁷

This commitment to Westphalian concepts for the election is striking, given that Israel’s Declaration of the Establishment of the State is based on extra-territorial concepts and notions that contradict the theory of *jus soli*. But as noted above, the UN Partition Plan emphasized the principle of territorial equality and more importantly, the territorial conception of the electorate provided a safe way to exclude the hundreds of thousands of Palestinian refugees from the election. Ben Gurion explained this plainly before the PSC:²⁸

The world, the states, international public opinion and the UN might ask us, and we will not have an answer: why did you grant the right to participate in the election for some thousands in Cyprus . . . but you did not care for the rights of hundreds of thousands who lived in the country but were forced to leave [Palestinian refugees]? If Jews who are abroad have the right to vote, why won’t the Arabs who were here but who now are also abroad have the same right? Isn’t it an extreme discrimination? . . . every one of us wants our prisoners and soldiers abroad including the Cyprus group to participate in the election but the state’s interest is stronger than our sentiments toward them . . . in order to give legitimacy to the first national election that constitutes the state of Israel . . . the election must be clean and make no one delegitimize its legality.²⁹

We see here that Israel’s purported commitment to providing equal voting rights to Jews and the Arabs living under one authority is grounded in a deeper commitment to *exclude* Palestinian refugees. It is a fantasy to suppose that this

²⁶ The PG’s protocol of 17 November 1948 noted the figures thus: the Jewish population numbered about 720,000, and of that amount, 450,000–480,000 would be eligible to vote. The Arab population numbered *only* about 68,600, and of them, 30,000–35,000 would be eligible to vote; 66 percent of them lived in the “occupied territories.” The number of Arabs noted in the PG protocol is very low in comparison to the number of Arabs estimated to have remained as of May 1948 (160,000).

²⁷ Israel State Archives, Protocol of the PSC, 28 October 1948, p. 22.

²⁸ Israel State Archives, Protocol of the PSC, 11 November 1948, p. 8.

²⁹ Israel State Archives, Protocol of the PSC, 28 October 1948, p. 20.

sort of ethnic hierarchy can be liberal toward the insiders and colonial toward the outsiders, given that the “outsiders” (the refugees) and the “insiders” (the Palestinians who remained) belong to the same people, with the same original claims to territorial belonging. In reality, despite the appearance of Westphalian territorial equality in voting rights, ethnic hierarchy and domination applied to insiders as well as outsiders. This explains why the Palestinians who remained went to vote while they were under military control and even prohibited from electoral campaigning within their society. In a speech before the PSC two weeks before the elections the minister of the interior acknowledged that the Arab population of the “occupied territories” is quiet and peaceful, but said that any election propaganda would be prohibited because it might fall into the enemy’s hands.³⁰ After a historical review, he also concluded: “This is the first time in modern history that a population under a belligerent situation will exercise the right to elect and to be elected.”³¹ He added that when a national minority in Europe belongs to an enemy nation with active hostility, they boycott the state’s election, but Israel is creating a historical, unique precedent.

We can see here, at this moment of creating Arab citizenship, three constitutive constraints. First, the issue of demography was already visibly at hand. In demographic terms, in order to build a Jewish State based on popular sovereignty, the state must create by force a minimal Palestinian population. Second, the security constraints placed on the Palestinians under Israeli control were not a matter of whether they themselves constituted a physical threat; it was already a matter of their belonging to one people, the enemy. Third, the factors of demography and security had already created two different laws for the voters in the first election.

Despite these constraints—demography, security, and differential laws—the new state viewed Arab participation in the election as vital to its interests. Arguably, the Arab vote had the power to legitimize Israel internationally as a democratic state and not as a colonial or apartheid regime. Equality between Arabs and Jews in voting would diminish the distinction between natives, occupiers, and settlers. Ben Gurion expressed this sentiment indirectly before the PG stressing that, unlike France, which did not need elections for its legitimacy since the French people had inhabited France’s territory for many years, Israel needs this legitimacy. Moreover, the Arab vote would contribute to legitimating the *de facto* borders of the new state, which later became known as the Green Line. If the population of a region agrees to elect and to be elected for a parliament, they express their free will to accept the state’s sovereignty.

This then is the conception of citizenship that Arabs were initially offered by the Israeli state—namely, a conception in which the appearance of

³⁰ Israel State Archives, Protocol of the PSC, 6 January 1949, pp. 14–18.

³¹ Israel State Archives, Protocol of the PSC, 6 January 1949, pp. 14–18.

Westphalian equality based on territorial belonging is underpinned and undermined by a deeper friend–enemy dynamic tied to the exclusion of Palestinian refugees. Let us return to the situation of the Palestinians during the period between May 1948 and the first election in January 1949. At this time, the Palestinian people faced the most unimaginable national catastrophe in their history, called “the Nakba.” The word “Nakba” in Arabic refers to “the catastrophe of the ages.” Not only did the Palestinians who remained become for the first time a numerical minority under foreign control and belong to a defeated nation, but also they lost their leaders, elites, cities, and contact with their relatives, friends, the rest of their people, and the Arab nation. Movement between their villages was prohibited as they were put under military curfews and closure. Local and national communication in Arabic no longer existed. The Israeli forces demolished hundreds of Arab villages.³² About one-quarter of this group moved inside other Arab villages as internally displaced persons and were not allowed to return to their original villages despite the fact that they had become citizens of Israel. In short, the language, the spaces, the geography, and the people totally changed during this short period. The picture of Europe in 1945 as portrayed by Tony Judt in his book *Postwar*, regarding the total destruction, the mass displacement, the movement of these refugees, and the loss of families and properties, is not far from the scene experienced by the Palestinians who remained in their homeland in 1948–49.³³

Despite the tragedy of the Nakba, and even before the signing of the ceasefire agreement between Israel and its Arab neighbors’ countries, the Palestinians who remained took part in the first parliamentary elections in Israel on 25 January 1949. Their participation rate was very high: 79.3 percent. The majority of the Arab vote, 51 percent, was given to the Arab list named “The Nazareth Democratic List,” which subsequently sent two Arab members to the first Knesset. The name of the list carried the name “Nazareth,” the symbolic city of the “occupied territory,” and its list was totally controlled by the political party led by Ben Gurion. The second party, Maki (“The Communist List”), got 22 percent of the Arab vote; it sent one Arab member and two Jewish members to the first Knesset.³⁴

³² Jiryis noted that from May 1948 and during 1949, “Arabs were attacked, their property was confiscated, and they were forcefully expelled.” Sabri Jiryis, *The Arabs in Israel*, trans. Inea Bushnaq (New York: Monthly Review Press, 1976), 15; and Tom Segev, *1949: The First Israelis* (New York: Henry Holt, Reprint Edition, 1998), 52.

³³ Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin, 2005).

³⁴ Three Arabs were elected to the Knesset in 1949 among 120 members of parliament. The two members of the Nazareth List were: (1) Sief Adin Zoabi, the chair of the list, who served as an MK until 1977. He is an Arab Muslim from Nazareth and over time he became known among the Palestinians as a symbol of collaboration; and (2) Amin Jarjoura, an Arab Christian from Nazareth, who worked as a lawyer during the British Mandate. He served only one term and is not known today in Arab politics. The third Arab MK was Tawfeeq Tubi, an Arab Christian from

Arab participation in the 1949 election can be viewed as an act of deep self-exclusion from the politics of the Arab nation and the rest of the Palestinian people. Some of the activists among the remaining Palestinians tried quietly to advocate for a boycott of the election, since the situation was not stable, and it was too early to treat Israel as a political reality. The Palestinian leadership in the Diaspora and on Cairo radio called on the “insiders” not to surrender and to boycott the election in order not to legitimize the “colonial Zionist entity”; they promised that the case would soon be brought before the UN.³⁵ By participating, Arab insiders deviated from the long-standing political identity and the self-perception of the Arab nation and the Palestinian people. The Arab League and the Palestinian leadership opposed the UN Partition Plan, in part, because of their refusal to accept that Arabs would be a minority in their homeland. This refusal derived from the Palestinians’ self-identification as natives.³⁶ The concept of nativity was strong enough for the Arab leadership to reject any partition of Palestine.³⁷ Conversely, the Zionist leadership rejected the idea of one state for all of Palestine because they did not want to be a minority among the Palestinian majority.³⁸

Participation in the first election in Israel made the Palestinians who remained a minority. Their experience is totally different from that of other Arabs who were occupied by Israel in 1967 and later annexed to Israel, such as the Syrian Druze in the Golan Heights and the Palestinians of Jerusalem.³⁹ Undoubtedly, the acceptance of the Palestinians as being an “Israeli minority” created distance between them and their nation, which also contributed to

Haifa, who was only 27 years old when he was first elected to the Knesset; he served as an MK for forty-three years, from 1949 to 1992.

³⁵ See Atallah Said Coptly (ed.), *Memoirs of a Palestinian Lawyer: Hanna Deep Naqara, Lawyer of the Land and the People* (Washington, DC: Institute for Palestine Studies, 2011), 235–40 (Arabic).

³⁶ John Strawson, *Partitioning Palestine* (London: Pluto, 2010).

³⁷ See Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford: One World, 2006), 31–5; Walid Khalidi, “Revisiting the UNGA Partition Resolution,” *Journal of Palestine Studies* 27/1 (1997): 5–21 at 16–17.

³⁸ As Khalidi notes: “At the time, one of the arguments frequently raised by the Jews against a unitary state in Palestine had been the unfairness of Arab majoritarian rule over the Jewish minority. Commenting on this argument, the Pakistani delegate at the UN, Zafrulla Khan, remarked: ‘If it is unfair that 33 percent of the population of Palestine (the Jews in the proposed unitary state) should be subject to 67 percent of the population, is it less unfair that 46 percent of the population (the Arabs in the proposed Jewish state) should be subject to 54 percent?’” (Khalidi, “Revisiting the UNGA Partition Resolution,” 17).

³⁹ While Israel annexed the Golan in 1981 and tried to impose Israeli citizenship on the inhabitants, they protested against this move by staging a long general strike. They have refused to participate in any Israeli election, municipal or national, and they continue to define themselves as an occupied population. Similarly, the Palestinians in East Jerusalem who are defined by Israel as Israeli residents still refuse to participate in the local election for the Jerusalem municipality. See Bashar Tarabieh, “Education, Control and Resistance in the Golan Heights,” *Middle East Report* 194 (1995): 43–7.

their exclusion from the politics of the Arab states and later from the PLO. In some ways they lost having any actual kin-state or any Arab entity to raise the issue of their status before any international forum.

If participation in the first election is a moment of exclusion of the Palestinian refugees as well as a divorce between the “Israeli Arab minority” and their Arab nation, it is also a moment of “inclusion” of this group into the Israeli polity, a new framework introduced in one of the most celebratory moments in the Zionist movement’s history. The Knesset held its opening celebration and its first working session in the Jewish Agency’s Office on 14 February 1949. After the singing of *Hativka*, Israel’s national anthem, only two speeches were delivered on this day. The first president of Israel, Chaim Weizmann, gave the celebratory Zionist and patriotic speech. The second speech was not delivered by the founder of the state and its prime minister, Ben Gurion, or by the leader of the opposition, Menachem Begin, or any other Jewish political leader: it was given by the Arab MK, Mr. Amin Jarjoura, in Arabic in the first working session of the Knesset. His full speech was translated into Hebrew and covered by the media as one of the celebratory moments of the new era.⁴⁰ Without a doubt, if the first election was introduced as a Westphalian moment based on the idea of a “state for all its citizens,” so the opening session of the first Knesset, with an Arab MK speaking in Arabic wearing his Turkish *tarbush*, is a scene of a multicultural democracy at its climax. As Ben Gurion put it, in his first speech before the Knesset, this is the first time that the two peoples meet equally.

MK Jarjoura’s speech is a landmark text. It is the first speech to introduce the universal civil rights talk of the Arabs in Israel in that it emphasized their desire for justice and liberty. But it also introduced the constraints of a patriotic Zionist framework, the dominant paradigm among the Arabs in Israel for a very long time. MK Jarjoura opened his speech by stating that:

It is a great day and a very historical one in which the *Yishuv* [Hebrew term indicating the Jewish entity before the establishment of the State of Israel] is celebrating this Knesset’s opening [session] . . . I am using this opportunity to send to you on behalf of my colleagues and myself on the list, loyalty greetings on this great day . . . the eyes of the Arab citizens of Israel are looking forward to this Knesset which relies on justice and the interest of all.⁴¹

MK Jarjoura emphasized his hope that the state will be based on “equality and justice” between all citizens. But above all, he had to express strong loyalty to, and pride in, the new state. MK Jarjoura defined the Arabs not as “Israeli

⁴⁰ See coverage in the *Historical Jewish Press*, 16 February 1949 (Israel State Archives); newspapers *Davar*, 16 February 1949, 1; *Ha’aretz*, 16 February 1949; and *Al-Yum*, 16 February 1949.

⁴¹ Protocol of the Knesset, First Session, 14 February 1949 (Hebrew).

Arabs,” an infamous term used by the government, or the “Palestinian national minority” but as “Arab citizens of Israel.” He was the first political leader to officially use this term, which is still dominant today. While he repeatedly spoke about equality and justice, he did not give any clues, even implicitly, about the tragedy of his people, although he delivered his speech during the climax of the Nakba.

MK Tawfeeq Tubi of *Maki* delivered his first speech during the Knesset’s second session.⁴² Throughout the years and until his retirement from the Knesset in 1992, MK Tubi became the most prominent nationalist leader among the Palestinians in Israel. In his speech, he expressed loyalty and welcomed the establishment of the new state, and in line with the position of the Soviet Union, he then heavily attacked the Arab leaders for not accepting the Partition Plan, and thus bringing on the tragedy of the Nakba. In addition, he also criticized the military actions against the Palestinians in Israel. Ben Gurion delivered his first speech during the Knesset’s third session.⁴³ He welcomed the speeches of MK Jarjoura and MK Tubi, but he also strongly attacked MK Tubi for his pre-1948 national activities against the Zionist Movement in Palestine. Ben Gurion’s first speech in the Knesset is the starting point of the de-legitimizing rhetoric against the elected Arab leadership in Israel, which continues until this day.

If the PSC and PG made efforts to hold the first election in accordance with Westphalian territorial concepts, the first elected Knesset undertook four legal acts that totally negated the territorial concept and instituted the “colonial citizenship” of the Palestinians in Israel. The first law enacted was the Defense Service Law—1949, which imposes a duty on every Israeli citizen to serve in the military.⁴⁴ During the Knesset debate in 1950, MK Tubi demanded that the law be applied to Arab citizens. He explained that the Arabs’ exemption from the military is a discriminatory act. Ben Gurion rejected this demand.⁴⁵ Both positions are problematic in ways that reveal the contradiction at the heart of Arab citizenship. MK Tubi’s position tried to emphasize the Westphalian concept of a “state for all its citizens” but at the same time he asked the Arabs to be in the army that controls them and that is still fighting against their people. Ben Gurion’s position is anti-Westphalian because it is based on the politics of the “friend–enemy” distinction. Whether or not it is morally justified to draft the Arabs, this law indirectly made the Israeli army a Jewish army. The characterization and structure of an army are the most significant elements in examining the relationship between sovereignty, citizenship, and

⁴² Protocol of the Knesset, Second Session of the First Knesset.

⁴³ Protocol of the Knesset, Third Session of the First Knesset.

⁴⁴ The law in English is available at: <<http://www.israellawresourcecenter.org/israellaws/fulltext/defenceservicelaw.htm>>, accessed September 2013.

⁴⁵ Knesset Reporter, ch. 3, session held on 16 January 1950, pp. 534–5.

domination. As Hobbes put it, “And therefore, whosoever is made general of an army, he that hath the sovereign power is always generalissimo.”⁴⁶ This “ethnic sacrifice” among the Israeli Jewish community has contributed strongly to the strength of the *Political* as well as the perception of “owning” the state as a Jewish state.

The second legal act was to leave the Emergency Regulations fully intact, especially those of the British Mandate, which were adopted by the PG. The Knesset did not decide to cancel, amend, or change these regulations. These regulations imposed a harsh military regime on the Palestinians in Israel, which lasted until 1966. With this omission, the military was accorded total discretion in setting curfews, imposing limits on freedom of movement, and ordering administrative detention, deportations, home arrest, internal exile, property demolitions, land confiscation, etc.⁴⁷ The military regime treated the Arabs in Israel as “enemy aliens.”⁴⁸ Thus, an elected body did confirm the most radical laws used against Arab citizens even today.

The third legal act was the passage of the Absentees’ Property Law—1950, which stipulates that an “absentee,” *inter alia*, is someone who left his place of residence in Palestine after the UN Partition Resolution and thus, his property was transferred to the state.⁴⁹ In addition to the Palestinian refugees who left or were expelled from the homeland, Palestinians in Israel also found themselves defined as “absentees” and had their property expropriated by the state. For example, thousands of internally displaced persons who were forced to leave their villages and move to the Nazareth area and who voted in the first election are characterized as “present absentees.” The government considered these individuals as citizens for the purpose of the election, although they lived in the “occupied territories,” yet they were also designated as absentees from Israel because they lived in the “occupied territories.”

The fourth legal act was the enactment of the Law of Return—1950, which stipulates that any Jew, including his or her non-Jewish family members, is entitled to immigrate to Israel and automatically receive citizenship. Section 4 of the Law of Return creates a stark contrast *vis-à-vis* the status of the Palestinian refugees by stating that any Jew who immigrated or who was born in this country before or after this law was passed will have the same status as someone who has immigrated under this law. This section made Jews “non-absentees” and always present. When this law was enacted, there was

⁴⁶ Hobbes, *Leviathan*, 111.

⁴⁷ See Jiryis, *The Arabs in Israel*, 9–16.

⁴⁸ This act violated the Laws of War of the 1907 Hague Regulations, which prohibit limiting the rights of civilians who are not involved in armed conflict. See Michael Kagan, “Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East,” *Columbia Human Rights Law Review* 38 (2007): 263–319 at 292–7.

⁴⁹ The English version of the law is available at: <<http://unispal.un.org/UNISPAL.NSF/0/E0B719E95E3B494885256F9A005AB90A>>, accessed September 2013.

still no citizenship law in place governing the status of Palestinians in Israel. Notably, Palestinians who were registered in the census and who had participated in the Knesset election in 1949 tried to use their identity cards and the fact that they participated in the election in order to fight deportation; however, the Supreme Court decided that an identity card is not a guarantee of status but is valid only for statistical purposes.⁵⁰ The Citizenship Law would be enacted only in 1952, and it adopts similar concepts to that of the Absentee Property Law.

These four laws together negated the façade of territorial citizenship and form the basis of colonial citizenship. On the one hand, the military regime and the Absentee Property Law were applied unequally to Arabs and Jews and created different legal regimes inside the same territory. On the other hand, the Law of Return enshrined a conception of citizenship based on ethnic extra-territorial belonging. If the 1949 election tried to distinguish “insider” Jews and Arabs from “outsider” Jews and Arabs based on territorial residence, these new laws came to prove otherwise. The linkage between the rights of the insiders and the outsiders is very strong. They imposed similar burdens on all native Palestinians, both refugees and those who remained, and conversely endowed benefits on all Jews in the world regardless of any territorial test. In this way, these legal acts created an apartheid regime in terms of citizenship and property with the additional component of force and domination over the Palestinians by an ethnic Jewish army. These laws, including the emergency regulations, are still valid today.

Despite this discrimination, the two Arab members of the Nazareth List voted for the Absentees’ Property Law and the three Arab MKs voted for the Law of Return in 1950. They simply voted against themselves and to be excluded. If we agree with Dworkin that no one with self-respect would agree to be excluded, this vote is the climax of the Palestinians’ humiliation, regardless of any reasons that may justify these laws.⁵¹

⁵⁰ HCJ 155/53, *Kiwan v. Minister of Defense et al.* Isr SC 8, 301. J. Cheshin noted that “an identity card is not a talisman against expulsion from the country . . . does not accord special rights, except for the right to receive an ID” (at 304).

⁵¹ Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 502–6. Statman argues that individuals’ self-worth is shaped to a large extent by what others think about them and how they are treated. Individuals cannot bestow self-respect on themselves; they need the other. “Humiliation takes advantage of this fact and seeks to injure self-respect by sending painful messages of subordination, rejection and exclusion . . . This vulnerability to humiliation is the flip side of the human urge for social inclusion and recognition.” Daniel Statman, “Humiliation, Dignity and Self-respect,” *Philosophical Psychology* 13/4 (2000): 523–40 at 535–6. One of the reasons that the national leader MK Tawfeeq Tubi did not write his memoirs, which could also be the history of the Arabs in Israel, is that he felt ashamed by his actions in 1949–50, as noted in this chapter. This information was brought to my attention by the General Secretary of Hadash (formerly Maki), Ayman Odeh.

In sum, despite the superficial appearance of normal Westphalian citizenship, citizenship rights for Arabs were subjected to Israeli patriotic Zionist conditions. These conditions include: (1) the expression of loyalty to the new state as a sovereign and legitimate entity; (2) the expression of loyalty to the new state's basic Zionist values; (3) the self-negation of the Palestinians' national identity and the Nakba, including the exclusion of the refugees and the historical injustice that occurred in the period of the state's foundation.

Hobbes stated that a defeated population, for fear of death, will authorize all the actions of the sovereign "that hath their lives and liberty in his power."⁵² The defeated group's surrender should be unconditional and it should be signified as a relationship between the master and his servant. This "dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenanteth, either in express words or by other sufficient signs of the will, that so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure."⁵³ Arabs' participation in the first election, alongside the Arab MKs' first speeches in the Knesset and their voting for exclusionary laws during this first Knesset, all together indicate an act of unconditional surrender, which I call the "Hobbesian moment" of Palestinian citizenship. The terms of this citizenship are Hobbesian in that they are based on surrender and humiliation. This citizenship was not acquired by free men and women but by a defeated people who were controlled, humiliated and filled with fear of expulsion.⁵⁴ Their only concern was to remain, to save their family life, and not to be deported.⁵⁵

The Israeli government needed their vote for international legitimacy; a boycott of the election would have cast Israel as an occupying power. This put the Palestinians in an impossible situation. Hanna Naqara, the first Palestinian national cause lawyer who became known as "the lawyer of the land and the people," mentioned in his memoir a speech that he delivered in 1949 before a small Arab group to convince them to participate in the first election. His main argument was that Zionist parties would interpret a boycott as evidence that the Palestinians are a fifth column, a group that listens to its leadership abroad and rejects the "new reality." He emphasized that a boycott will give Zionist parties "a new reason to hit and attack again the last remaining Arab natives in this country." He added further that if we show indifference toward the election, the Zionist parties will say to the Jewish community, "you see how the Arabs behave, they don't want to live with us, they don't want to recognize

⁵² Hobbes, *Leviathan*, 122.

⁵³ Hobbes, *Leviathan*, 124.

⁵⁴ Tom Segev noted that in 1949, the remaining Palestinians were "still dazed by the defeat. They were a frightened, leaderless people; they caused no danger to state security" (Segev, *1949: The First Israelis*, 52).

⁵⁵ Of course some Arab activists or small groups were interested in participating either because of their relationship with the new polity or because of other ideological reasons but their power could not explain the mass participation without the strong element of fear.

the State of Israel, and they are still bound to their leadership.”⁵⁶ An elderly Arab man told me that some Arab cars on Election Day in Nazareth in 1949 flew white flags, exactly as the villagers put white flags on their homes to signify surrender at the moment of the Israeli occupation. Participation in the election, declarations of loyalty and support for exclusionary laws were all, as Hobbes put it, good signs of unconditional surrender to the sovereign.

THE RISE OF CONSTITUTIONALISM AND NATIONALISM IN THE 1990s AND SINCE

The 1990s marked a moment of optimism around the world for the prospects of liberal constitutionalism and minority rights. Internationally, the UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992; the literature on liberal multiculturalism proliferated; the Apartheid regime fell in South Africa; and liberal constitutionalism spread as “the Enlightenment hope in written constitutions is sweeping the world.”⁵⁷ Many countries adopted new constitutions through reconciliation processes with the active participation of groups historically discriminated against.⁵⁸ In these and other ways, older colonial and Hobbesian forms of citizenship were challenged and transcended in many countries, replaced with more inclusive and democratic citizenship.

Versions of these trends were also visible in Israel. In 1992 the Knesset enacted two Basic Laws—The Basic Law: Human Dignity and Liberty and The Basic Law: Freedom of Occupation. Unlike constitution-making processes elsewhere, these basic laws were not enacted through the active participation of the national minority, processes of reconciliation, or by recognizing historical injustices.⁵⁹ While most recent constitutions include the words, “We, the people of . . .” to refer to the whole political community with its diversity, Israel was instead defined for the first time in law as a “Jewish and democratic state.” Nevertheless, these Basic Laws contain constitutional protections for certain civil liberties. The Israeli Supreme Court, under the leadership of Chief Justice Aharon Barak, strengthened the rhetoric of civil and human rights, and

⁵⁶ Coptly, *Memoirs of a Palestinian Lawyer*, 238–9.

⁵⁷ Bruce Ackerman, “The Rise of World Constitutionalism,” *Virginia Law Review* 83 (1997): 771–97 at 772.

⁵⁸ Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (The International Institute for Democracy and Electoral Assistance, 2006), 5.

⁵⁹ See Aeyal Gross, “The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel,” *Stanford Journal of International Law* 40 (2004).

for the first time in Israel's legal history delivered landmark decisions in anti-discrimination cases brought by Palestinian citizens of Israel.⁶⁰

Optimism was strengthened by the signing of the Oslo Accords in 1993 between Israel and its arch-enemy the Palestine Liberation Organization (PLO). Although the Oslo Accords did not relate in any way to the status of the Palestinian citizens of Israel—and maybe because of that—the new political changes locally and internationally strongly influenced their politics in the 1990s; it transformed their political imagination. The “two-state solution” was perceived as a viable and legitimate political track. In this framework, within the 1967 lines, Jews and Palestinians would constitute the legitimate citizens of the political community; the former constitutes the majority and the latter is a national minority. Based on this conceptualization, the Palestinians in Israel began to claim not only civil liberties but also group rights, and for the first time they began to refer to themselves as a “national minority.”⁶¹ This terminology is not obvious; the term “minority” was never used before in their political discourse and was perceived as disempowering.⁶² By the 1990s, however, the Arab elites perceived this term as empowering due to the new international legal status of national minorities as well as the rise of multicultural politics worldwide. By conceiving of themselves as a permanent national minority, Palestinians in Israel now repositioned themselves to challenge the “essence” of the political community in order to determine “who is a citizen” and who is “politically *in*.” Dr Azmi Bishara, the founder of a new Arab national party, Balad, coined the concept of “full identity, full citizenship.”⁶³ This agenda became dominant politically among other Arab parties and it led

⁶⁰ See e.g. HCJ 6698/95, *Ka'adan et al. v. The Israel Land Administration et al.*, P.D. 54 (1) 258 (decision delivered 8 March 2000); HCJ 1113/99 *Adalah et al. v. Minister of Religious Affairs et al.*; HCJ 4112/99, *Adalah et al. v. The Municipalities of Tel Aviv-Jaffa et al.*

⁶¹ Notably, Palestinian academics started to use the term “national minority” for the first time: e.g. Nadim Rouhana and As'ad Ghanem, “The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens of Israel,” *International Journal of Middle East Studies* 30/3 (1998): 321–46; Amal Jamal, “The Ambiguities of Minority Patriotism: On Love for Homeland versus State among Palestinian Citizens of Israel,” *Nationalism and Ethnic Politics* 10/3 (2004): 433–71.

⁶² State officials used the term “minorities” but the phrase articulated by MK Jarjoura “the Arab citizens of Israel,” was the dominant expression. The *Ittihad* Arabic-language newspaper of Maki did not use the term “minority”; instead it used “the Arab masses” or “the Arab citizens.” The term did not appear in the Arabic literature and the former mayor of Nazareth, one of the strongest Arab national leaders, and a former MK of Maki, Tawfeeq Zayad, wrote in the 1950s in his poem: “But . . . are we a minority? No . . . and one million nos. We are here the majority. We are the nation who is ready for sacrifice to build its happiness . . . in Egypt . . . in Algeria . . . in Iraq . . .”

⁶³ See Ari Shavit, “Citizen Azmi,” interview with Azmi Bishara, *Ha'aretz*, 29 May 1998, available at: <http://azmibishara.com/site/topics/article.asp?cu_no=1&item_no=249&version=1&template_id=294&parent_id=29>, accessed September 2013; and Amal Jamal, “The Vision of the ‘Political Nation’ and the Challenge of ‘State of all its Citizens’: Explorations in Azmi Bishara’s Political Thought,” *Alpayeem Journal* 30 (2006): 71–113 (Hebrew).

to challenging the definition of Israel as a Jewish state and to highlighting the claim for a “state for all of its citizens.”

This new liberal climate of the 1990s, and its hopes for a new form of citizenship, lasted a short time. It ended with one of the most shocking events for the Palestinian citizens—the October 2000 killings. On 29 September 2000, the head of the opposition, MK Ariel Sharon, decided to challenge the peace negotiations between the PLO and the Barak government by entering the Al Aqsa Mosque compound. During this “visit,” many Palestinians were killed and injured by Israeli security forces. These acts marked the beginning of the Second *Intifada*. During protests against the killings, thirteen Palestinians were killed in Israel by the security forces. An official commission of inquiry was established and the Arab citizens cooperated actively with its work. In its report, the Commission emphasized that the police exceeded their power by violating their own open-fire regulations and that the police must stop treating Arab citizens as “enemies.”⁶⁴ It also recommended that the Attorney General (AG) open criminal investigations against the police officers and commanders who were involved in the killings. However, in January 2008, the AG decided to close all of the files, explaining that the police opening fire was legal, likening the situation to a military battle, which justified the use of deadly force. In this way the AG treated civilian Palestinian demonstrators as “enemies” standing in a warlike confrontation.⁶⁵ The Arab leadership decided not to appeal to the Supreme Court against the AG’s decision and instead to turn to the international community.

Another development taking place was a wave of new legislation directed against the citizenship status of Palestinians in Israel. In 2003 and 2007, the Knesset passed the most discriminatory laws since 1950, namely, amendments to the Citizenship Law, which banned Arab family unification in Israel. It prohibits family unification between Palestinian citizens of Israel with their spouses from the West Bank, Gaza, and “enemy states” (Iraq, Iran, Lebanon, and Syria). In two cases, the Supreme Court upheld these amendments by a six to five majority by accepting the AG’s position that every “enemy alien” such as the Palestinian living in the OPT is a security threat.⁶⁶ The principle of “separate and unequal” creates more than ever a clear apartheid regime in citizenship (naturalization and family life).

⁶⁴ Report of the Official Commission of Inquiry, September 2003, available at: <http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm>, accessed September 2013 (Hebrew).

⁶⁵ “Adalah: Mazuz’s Decision to Close October 2000 Investigation is Racist and Inflammatory,” *Adalah’s Newsletter* 44 (January 2008).

⁶⁶ HCJ 7052/03, *Adalah et al. v. Minister of Interior et al.* (1) Isr LR 443 (2006), available in English at <http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.htm>, accessed September 2013. See also HCJ 466/07, *MK Zahava Galon—Meretz-Yahad et al. v. Attorney General et al.* (decision delivered 11 January 2012).

Yet another blow was the constitution-making process initiated by the Knesset in 2004, which continued for three years but was not completed. While the Arab MKs initially hesitated, they ultimately decided not to participate in the process for three main reasons. First, the Knesset did not suggest any terms of reference for national minority participation. Second, the drafts of the proposed constitution did not determine the borders of Israel and Arab MKs refused to be a part of legalizing the occupation of the OPT. Third, the drafts strongly emphasized the ethno-centric nature of the state.⁶⁷

The Palestinian elites decided to take a different tack and to address the Israeli public directly, outside of the Parliament. In 2006 and 2007, several Palestinian institutions proposed their own future vision documents.⁶⁸ These documents mark the first time that the Arab national movement has articulated clearly their relationship with Israel as citizens, as well as their relationship to their Palestinian people and to their Arab nation. The common element of these “Arab documents” is that they emphasize: (1) the narrative of the Nakba as the constitutive element of the Palestinians’ identity; (2) the claims for a democratic state that guarantees full equality between Arabs and Jews; (3) the demand to end the Israeli Occupation; and (4) a remedy for the historical injustice mainly in land matters and the recognition of the Right to Return of Palestinian refugees based on UN Resolution 194. They set forth provisions on citizenship, official languages, educational and cultural institutions, model mechanisms for the Arab minority’s participation in parliamentary decision-making, and distributive and restorative justice.⁶⁹

These documents show that Arab citizens, having embraced a language of rights, were deconstructing assumptions and identities inherited from the Hobbesian moments in 1949. In order to be “included” and not deported, they presented themselves in 1949–50 as if they had no connection to their Nakba and no belonging to the Arab nation. Now, in the name of “inclusion,” they rejected their Hobbesian identity and instead articulated their historical claims with connection to the consequences of the Nakba. As an act of

⁶⁷ See e.g. Nadim Rouhana, “Constitution by Consensus: By Whose Consensus?” *Adalah’s Newsletter* 7 (November 2004); Jonathan Cooke, “Israel Constitutional Committee Faces a Double Bind,” *Adalah’s Newsletter* 7 (November 2004); and Hassan Jabareen, “Collective Rights and Reconciliation in the Constitutional Process: The Case of Israel,” *Adalah’s Newsletter* 12 (April 2005).

⁶⁸ There are three documents: the “Democratic Constitution” prepared by Adalah, the Legal Center for Arab Minority Rights in Israel; the “Future Vision” document put forward by the National Committee of Arab Mayors in Israel, and the “Haifa Declaration” led by Mada al-Carmel. Available at <<http://www.adalah.org/newsletter/eng/mar07/thabet.php>>, accessed September 2013.

⁶⁹ The only Arab political group that expressed serious opposition to these documents was the extra-parliamentary Islamic movement led by Sheikh Raed Salah. They claimed that no one authorized these Palestinian groups to articulate a vision on behalf of Arab citizens, and also objected to the documents’ liberal, secular spirit as well as to the two-state solution.

surrender, their claim to civil rights in 1949–50 was subordinated to the superiority of Zionist values. Now their claims for equal rights reject Zionist superiority. Their new language of rights puts a strong emphasis on the need for a remedy as a homeland minority for the historical injustice to them.⁷⁰ All of this does not mean that their struggle started only in the 1990s or that they were unaware of their national Palestinian identity. In the past, their struggle focused on how to survive, but in the 1990s it shifted to how to live. The *articulation* of rights language is always attached to the group's politics; when your existence is at stake, it takes one form, and when you seek better ways of life, it takes on another form.

In asserting their own national rights, the Arab citizens did not attempt to delegitimize the rights of the Israeli Jewish community. The total loss of the Palestinian entity in 1948 led the Palestinians to surrender to the use of the Hebrew language, and through the years they became bilingual. Outside the Jewish community, they are the only Hebrew speakers in the world. Now, they demand that Israel become a bilingual state based on mutual respect and equality. In addition, and very importantly, the Arab documents recognized clearly the right of self-determination of Israeli Jews through the claim for a bi-national state. These documents are the first and only "official" Arab statements in the history of the Arab nation to recognize this right.⁷¹

The Palestinian elites believed, from a Habermasian perspective, that the Arab documents would open a constructive dialog with the Jewish Israeli elites, but they were wrong. Israeli officials, politicians, and academics lashed out with hostility toward the documents, which they perceived to be an attempt to delegitimize the existence of the state as Jewish.⁷² This criticism reached a climax when the director of the General Security Services (GSS) declared that the Arab citizens of the state constituted a "strategic threat" and

⁷⁰ The first time that the term "homeland minority" was used in Israel regarding the Palestinians was in my article in *Mishpat Umimshal (University of Haifa, Faculty of Law)* 6/1 (July 2001): 53–86 (Hebrew). A shorter version appears in English as "The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place with no Palestinian Memory," in Daniel Levy and Yfaat Weiss (eds.), *Challenging Ethnic Citizenship* (New York: Berghahn Books, 2002), 196–220.

⁷¹ The Israeli treaties with Egypt, the PLO, and Jordan recognize the right of Israel to exist as a sovereign state but they do not refer to questions of the essence of the state. There is no serious debate in the Arab world regarding these questions.

⁷² For example, Shlomo Avineri, a professor of political science at the Hebrew University, who represents the mainstream academic position, emphasized that, "Adalah's proposal is a very clear and sophisticated mechanism for disestablishing Israel as a Jewish state" (quoted by Dan Izenberg, "The Future Vision of the Palestinian Arabs in Israel," *Jerusalem Post*, 4 April 2007). See also Rory McCarthy, "Israeli group calls for increased rights for Arabs," *The Guardian*, 28 February 2007, quoting Avineri on the Democratic Constitution: "It is an Arab nationalist programme and its aim is to de-legitimize Israel as a Jewish state. This document is not going to end discrimination. It is counter-productive and will create the exact opposite effect—an extreme response from the Israeli right-wing."

that the GSS intends to “disrupt activities of any groups that seek to change the character of Israel as a Jewish and democratic state even if they use democratic means.”⁷³

All of these developments—the response to the Or Commission, the discriminatory citizenship law, the exclusionary constitutional process, and the response to the Arab documents—indicate two important points. First, they reveal the deep linkage between the status of Palestinian citizens of Israel and the rest of their people. October 2000 and the AG’s response, as well as the Arab MKs’ refusal to take part in the Knesset’s constitution-making process, are connected to matters belonging to the Occupation, while the Citizenship Law and the Arab documents belong to categories of “enemy aliens,” the Nakba and demography. Second, they reveal the deep limits on the extent to which the terms of citizenship could be renegotiated. It seems clear that Israeli officials and the Israeli Jewish public do not accept that the terms of Arab citizenship include the right to challenge discriminatory laws that are based on Zionist values and the identification with the Nakba narrative, even if these actions are done peacefully and democratically.

What is the source of these hostile positions? I argue that these positions are constituted by the law that sets forth the scope of the constitutional values of the “Jewish and democratic” state, as they were decided by the Supreme Court. I will also explain that these Court decisions attempt to reaffirm the terms of the Hobbesian moments.⁷⁴

The elections law is the best example by which to explain the status of the Arabs in the “Jewish and democratic” state. Article 7A of the Basic Law: The Knesset authorizes the Central Election Committee (CEC), which is composed of representatives of the Knesset parties, to disqualify any political party list from running in the elections if its agenda either negates Israel as a Jewish and democratic state, incites racism, or supports a terror organization. In 2003, the AG and right-wing MKs disqualified MK Azmi Bishara and his political list from running in the Knesset elections.⁷⁵ On review before the Supreme Court, the AG’s representative argued that the principle of “a state for all of its citizens,” the central plank of the party’s platform, negates Israel as a Jewish

⁷³ See Yoav Stern, “Arab leaders air public relations campaign against Shin Bet,” *Haaretz*, 6 April 2007; “Not a matter for the Shin Bet,” *Haaretz* Editorial, 28 May 2007; Yitzhak Laor, a non-Zionist intellectual, criticized the Shin Bet in “Democracy for Jews only,” *Haaretz*, 30 May 2007.

⁷⁴ Trubek’s analysis is relevant here when he emphasizes that the Law has constitutive power to influence the consciousness of the public including the relations with others; David Trubek, “Where the Action Is: Critical Legal Studies and Empiricism,” *Stanford Law Review* 36 (1984): 575–622 at 604. See also Robert Gordon, “Critical Legal Histories,” *Stanford Law Review* 36 (1984): 57–125 at 57.

⁷⁵ (Election Confirmation) EC 11280/02, *The Central Elections Committee for the 16th Knesset v. MK Ahmad Tibi et al.* PD 57 (4) 1 (decision delivered on 15 May 2003).

and democratic state.⁷⁶ The Court, in a seven to four decision, voted to overturn the decision to disqualify. The majority canceled the decision based on procedural grounds and articulated the standard for disqualification. In order to disqualify a party, the state must provide evidence to demonstrate its central activities actively oppose the following: a Jewish demographic majority in Israel; the Law of Return; Hebrew as the primary language; and the Jewish symbols, national holidays, Jewish law, and heritage as part of the cultural life of the state. In this case, Barak decided that the AG provided insufficient evidence. The four justices in the minority decided that the mere contradiction between the Jewishness of the state and the notion of full equality based on a “state for all its citizens” is sufficient by itself to disqualify.

The majority decision could be read as a victory for liberal constitutionalism, especially as the Israeli public shares the AG’s view that the mere principle of a civic state negates the Jewishness of the state. However, here again we need to situate this case in the broader context of Hobbesian citizenship. As the Palestinians’ citizenship was conditioned on their acceptance of the Zionist narrative in 1949, the Court in the Bishara case, close to fifty-five years later in 2003, reaffirmed these conditions. But unlike the Hobbesian moments where the Arabs affirmatively expressed their loyalty to the state, in Bishara they are asked to do so passively. As the majority expressed it, no one can demand that Bishara work with the Jewish Agency to encourage Jewish immigration but he should not propose bills in the Knesset to cancel the Law of Return.

The appearance of Arab politicians before the Elections Committee or the Court to prove that they are not anti-Zionist and that there is not enough evidence to show that they struggle strongly and actively for full equality has become an act of humiliation as well as de-legitimization for the Arab MKs in almost every election.⁷⁷ In fact, this process of de-legitimization started with Ben Gurion’s first speech in the Knesset against MK Tubi. It is rarely used against right-wing parties that incite to racism by advocating actively for the transfer of Arab citizens or against ultra-orthodox Jewish religious parties that are not only anti-Zionist but also negate the democratic values of the state by

⁷⁶ Then Attorney General Elyakim Rubinstein (now a Supreme Court justice) wrote in 2002: “The Israeli Arabs are full citizens of the state as a fundamental right . . . At the same time we have to struggle against every attempt to remove from Israel its character as a Jewish and democratic state. Whoever calls to turn the character of the state into ‘the state for all its citizens’ intends to remove the Jewish identity of Israel. Our duty is to struggle strongly against that without compromise.” See Elyakim Rubinstein, “Government Advisory Opinion and the Rule of Law: Assignments and Complication in a Jewish, Democratic and Polarized State,” *Mahkare Mishpat* 17/1 (2002), at 7, 14 (Hebrew).

⁷⁷ See e.g. Adalah, “Elections Q & A: The 2013 Israeli Elections and Arab Parliamentarians,” 11 December 2012, available at: <http://adalah.org/Public/files/English/International_Advocacy/Arab-MKs/Questions-and-Answers-Israeli-Elections-Arab-Parliamentarians-2012.pdf>, accessed September 2013.

seeking a state based on *Halacha* (Jewish religious law). The irony is that these groups consistently vote for the disqualification of Arab parties.

We see here a clear double standard. There is no political will to apply disqualification tests to Jewish parties that sit in the governmental coalition. Indeed, the Court has already decided that a political party that advocates the transfer of Arab citizens is legitimate.⁷⁸ The voters of one society, Jewish Israelis, have free party platforms and the voters of the other society, Palestinian citizens, may only advocate limited party platforms. If an Israeli Jewish political party advocates for the transfer of Arab citizens, or for “Greater Israel,” or for a *Halacha* state, they will be allowed to run for the Knesset. But if an Arab political party that advocates actively in the Knesset for full equal citizenship, for the right of return, for a one-state solution, or for a state based on the UN Partition Plan, or an Islamic Movement with an Islamic agenda, such as the one led by Sheikh Salah, were to run for election, it might be disqualified. If Arab participation in the 1949 election was limited for security reasons, now it is restricted on ideological grounds based on the constitutional values of “Jewish and democratic.”

This suggests that the new Israeli constitutionalism—including its doctrine of a “Jewish and democratic State”—has left untouched the basic terms of Hobbesian citizenship. These constitutional innovations were done on the initiative of liberals with good intentions. However, as Kahn argues, law is what it is determined to be by an authorized decision, not by the intentions of its original drafters or through its neutral language,⁷⁹ and it is right-wing politicians who have driven the development of the “Jewish and democratic state” doctrine. To take just one example, in 2011, right-wing politicians in the Knesset enacted the “Nakba Law,” which aims to limit the freedom of expression of any association funded by the state against challenges to the values of the state as “Jewish and democratic” or commemoration of Nakba Day. This law attempts to regulate love and sadness, happiness and tragedies.

Baruch Kimmerling is one of the few Israeli scholars to suggest that the two Basic Laws enacted in 1992, “are among the most problematic, ethnocentric

⁷⁸ In Civil Appeal 7504/95, *Yasine v. The Registrar of Political Parties*, the Supreme Court ruled that a political party that advocates for the voluntary transfer of Arab citizens of the state should be registered as a legitimate party. However, in 1985 the Supreme Court confirmed the CEC’s decision to disqualify the political party led by Meir Kahane as one that “incites to racism” since it advocated strongly for ethnic segregation between Arabs and Jews in all fields such as workplaces, universities, marriage, beaches, etc. To use the analogy and differentiation between petty Apartheid and grand Apartheid of South Africa, these cases indicate that the Court is ready to disqualify a Jewish party as racist if it advocates for petty Apartheid, like Kahane, but not for grand Apartheid, like Lieberman, who seeks to transfer Arab citizens to the OPT in order to maintain a Jewish majority in Israel.

⁷⁹ Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011), 73–90.

and discriminatory in the Israeli codex.”⁸⁰ But it is important to emphasize that Israel did not become an ethno-national state just in 1992; its ethnic constitutional values existed long before and without being written in law books. For example, when the first Arab nationalist group, the Al-Ard Movement, attempted to run for the Knesset in 1965 based on a platform that included the demand for full equality, support for the Right to Return and for anti-colonial movements in the Arab world, the Supreme Court disqualified it from participation based on security reasoning.⁸¹ At the time, there was no written law authorizing such disqualification. In a dissenting opinion, Justice Cohen found that no evidence was introduced to indicate that the Al-Ard Movement constituted a threat to national security and that the disqualification is against the principle of the rule of law. But the majority upheld the disqualification by ruling that the mere existence of Israel is the highest constitutional value and there is no need for a written law to confirm it. Chief Justice Agranat added that the fact of the Jewishness of the state is a constitutional axiom. Challenging this dominant ethnic ideology was perceived by the Court as a security threat, just as the head of GSS perceived the “Arab documents” in 2007 as a security threat.

All of this suggests that, following Schmitt, we need to distinguish “the Constitution” from “constitutional law”—and to distinguish “the People” from “citizens”—and to recognize that the latter term is always subordinate to the former. As Schmitt famously stated: “The concept of the state presupposes the concept of the *Political*.”⁸² A political community is a group that defines itself based on who is its enemy and the willingness of its members to make sacrifices. This shared identity of the *Political* group does not rely upon legal norms,⁸³ and being a citizen by itself does not make one belong to the political community. Schmitt argues that the political character of the state refers to the founding *People* who produce the Constitution and thus the Constitution, which includes the identity of the polity, and its substantive principles, must prevail and take precedence over constitutional law, since it expresses the will of the *People* and its identity.⁸⁴ Based on this analysis, the scope of “We, the People,” as understood by Schmitt, does not refer to “We, the Citizens” but to a founding particular *People* who are attached to the *political* and its friend–enemy dynamic.

The *Bishara* case illustrates this logic. It interprets the sovereign as related to the founding people: Israel is a Jewish state and not a Jewish–Arab state. It is a

⁸⁰ Baruch Kimmerling, “Jurisdiction in an Immigrant–Settler Society: The ‘Jewish and Democratic State,’” *Comparative Political Studies* 35 (2002) 1119–44 at 1141.

⁸¹ (Elections Appeal) EA 1/65, *Yardor v. the Chair of the Electoral Committee of the 6th Knesset*, 19(3) P.D. 365.

⁸² Schmitt, *The Concept of the Political*, 19.

⁸³ Schmitt, *The Concept of the Political*, 26–7 and 38.

⁸⁴ Carl Schmitt, *Constitutional Theory* (Duke, NC: Duke University Press, 2008), chs. 1 and 2.

state for a *particular people* who founded it, who fought for its establishment, who sacrificed its young men and women through bloody war for its existence, and who were willing to kill and be killed for the cause of the people. The finality of the 1948 War is not for negotiation or legality. When the Court in the *Al-Ard* case referred to “high, unwritten constitutional values,” it meant not only the state’s mere existence but also its foundational identity of and for a *particular people*.

In Schmitt’s terms, we can say that the constitutional reforms of 1992 may have changed “constitutional law” in Israel, but they have not changed “the Constitution” or the definition of the People and did not lead to a decolonization process or to any “new beginning.” More generally, it has not changed the fundamental political imagination of Jewish Israelis, or the requirement of Arabs to accept this political imagination as a condition of participation. To be accepted, the Arabs had to negate their original identity as Palestinians and welcome the state’s identity as it appears in the Declaration of the Establishment of the State. This offer of conditional citizenship by Israeli Jews—and its acceptance by Arabs—has been the foundation of Israel’s imagined democracy. The disqualification cases reveal this logic: while Arabs are not permitted to challenge the Zionist narrative by demanding a state for all their citizens, their participation is nonetheless permitted, and indeed essential, to shore up the image of Israel as a just Westphalian state. If in the past the terms of surrender appeared through the military regime, now they appear through demands for loyalty to the constitutional values of “Jewish and democratic.” If we agree that the acceptance of Zionist values during the Hobbesian moments was an act of humiliation, then we can understand that asking for loyalty from the Arabs to these values is also a humiliation, regardless of the respect afforded to the right of self-determination of Israeli Jews.

Relying on Kahn’s analysis, we can summarize that the law applied to Arab electoral participation is different from the others. Despite the fact that the Court in this period dismissed all of the disqualification cases against Arab political parties and their candidates, this law conditions Arab MKs’ entrance to the Knesset on ideological terms; it limits their rights actively to challenge the legality of Zionist laws and it restricts their right to rule in turn, as they have never been a part of the governmental coalition. The exercise of this fundamental individual right and its consequences is based on an unwritten track: *separate and unequal*.

These cases concern fundamental individual rights and not questions of group rights. The *Political* works strongly against the individual rights of Arab citizens not because they are perceived as an enemy in its strict Schmittian sense, and not because they constitute a real security threat, but because of their national belonging. This Palestinian national belonging carries with it the Nakba, the “refugeeness,” and the Occupation. The Arabs in Israel are an unarmed group and they do not fight. An enemy does not sit in the Parliament

or as a Justice on the bench of the Supreme Court. Yet the *Political* was behind the Attorney General's closing of the October 2000 killings files, and also behind the family unification laws and the Absentee Property Law that treats internally displaced Arab citizens as "present absentees."

The language of rights works in the liberal nation-state to ensure that the relationship between citizens is based on friendship and not enmity or an ethnic or hierarchical relationship. What is striking in Israel, however, is that neither side has expressed interest in the most basic *starting point* of rights and duties—namely, the right to rule and to be ruled in return. Arab MKs have been in the Knesset since 1949 but have never asked (or been invited) to join a government coalition. Both sides agree that Arab citizens should not serve in the military, a fundamental aspect for equal citizenship. Arab MKs chose not to participate in a constitution-making process, which is essential to any democratic relationship between the minority and the majority. In one of the crucial cases for Palestinian citizens, the October 2000 killings, they chose not to go to court to challenge the AG's decision to close all the files.

None of this is "normal." A minority in a nation-state seeks to be part of the government, to lead the army, and to struggle for their rights through the state's institutions. While there are cases in nation-states where minorities do not claim rights and duties, like the Amish in the US who avoid participating in public schools or courts, these cases are owing to religious reasons. In the case of the Palestinians in Israel, the reason is different; it is because of the *Political*, national hierarchy, domination, and control. The political behavior is more similar to that of an occupier–occupied relationship or a colonial citizenship than to that of citizens in a democratic nation-state.⁸⁵

CONCLUSION

The politics of the foundation of Palestinian citizenship still strongly shape Israeli law and its legal philosophy. The Nakba is central to this politics. Israeli legal scholars do not reach the Nakba in their analysis of citizenship. A Westphalian decision was taken once in Israeli history, in 1949, to introduce Israel as a state for all its citizens. The Israeli legal philosophy sees only this

⁸⁵ Lately the two groups are debating whether Arab citizens should do national civil service instead of serving in the army. I wrote elsewhere in Hebrew about this debate. Here, I will argue that instead of inquiring into the first question—why the Arabs do not serve in the army—they moved to the second question of why they do not instead do civil service. The answer to the first question will tell us that the character of the legal regime reveals the problematic of the second question since it relies on *imagined* equal rights and duties between the citizens based on the notion of the right to rule and to be ruled in turn. To note, reciprocity presupposed legal structure based on equality between citizens which does not exist here.

decision without its context. Based on this imaginary perception, the “Arab minority” was always a part of the Knesset and has always participated equally. In this sense, the Arab vote creates the perception of Israel as a democratic state and without this participation, Israel is an apartheid state. This might explain why this philosophy imagines the borders of the “Jewish-democratic state” as the area in which Arab citizens vote, and why it portrays the Palestinian citizenship as though it is born as democratic and continues to be such without passing any process or stage of colonization or decolonization.

Contrary to the dominant perception, it is not accurate to say that Israel upholds individual rights. The track of *separate and unequal* works strongly against Arab citizens in terms of the four fundamental rights and duties that make a citizen a citizen: citizenship (family life and naturalization), the franchise, land rights, and the army. The power of the *Political* allows us to think also about the politics of partition and division. In all the cases mentioned in this chapter we noticed the strong linkage between the rights of the “insiders” and the “outsiders.” The attempt to show that the legal status of one Palestinian group has nothing to do with the other is false. How the Arabs introduced themselves to the Israeli polity through the Hobbesian moments has also contributed strongly to the politics of partitioning.⁸⁶

The politics of surrender and the concept of the finality of war still shape Israeli law and its legal philosophy. This old concept of war, as Whitman puts it is, “a kind of trial with a kind of verdict,” where the loser accepts the finality of the war and its consequences.⁸⁷ This finality is not a matter of legality or negotiation. Accordingly, there will be no return of the refugees and no Jewish–Arab state. It is thus no wonder that the Israeli government demands that the Palestinian leadership recognize Israel as a Jewish state.⁸⁸ But the evolution of the Palestinians’ language of rights teaches us that they accept the fact that they lost the war but they do not accept the surrender including the terms of the war’s finality.⁸⁹

⁸⁶ To understand the power of the Hobbesian moments, let us imagine their absence. Suppose that the Arabs living within the Green Line behaved like the Arab Druze of the Golan Heights and never participated in Israeli elections. How then can one imagine Israel as a democracy? Could the PLO have signed the Oslo Accords without referring to them when these Palestinians also declared that they are under occupation? Could any Arab country agree to adopt a two-state solution when part of the “occupied people” live within the Green Line? What would the status of the UN Partition Plan be? Could any Israeli liberal scholar speak then about a “Jewish and democratic state” within the Green Line?

⁸⁷ James Q. Whitman, *The Verdict of Battle* (Cambridge, MA: Harvard University Press, 2012), 3.

⁸⁸ Hassan Jabareen, “Why Palestinians can’t recognize a ‘Jewish state’,” *Ha’aretz*, 2 September 2011.

⁸⁹ Many Israeli scholars are unaware as to the adoption of the politics of surrender and the concept of finality of the war. Yakobson, for example, blames the Palestinian citizens for using the Nakba narrative and not adopting instead the first speech of MK Tubi in 1949, in which he blamed the Arab leaders for the Nakba. Yakobson is not aware that Tubi himself felt ashamed

This concept of war and the idea of surrender contradict the basic principles of modern international law, including the laws of war.⁹⁰ It is an anachronistic concept today to consolidate war victory and the dominance of a particular group in any constitution.⁹¹ In this sense, the constitutional values of the “Jewish and democratic state” are the continuation of the war by other means.

In my view, the story of Arab citizenship in Israel reveals the limits not just of Israeli constitutionalism, but also of liberal constitutionalism more generally. Many prominent liberal scholars argue that constitutional guarantees of political participation are fundamental for creating civic relations amongst citizens. Rawls and Dworkin view the right of participation in elections as fundamental for guaranteeing individual rights and civil liberties.⁹² Minow argues that using the language of rights will help in building a common identity between groups, and Mouffe contends that representation will minimize relations of enmity.⁹³ But this literature avoids the role of the *Political* and the power of ethnicity. Today Palestinians have strong rights of freedom of expression, and the exercise of these rights is greater than in the past. No one was arrested for initiating and supporting the Arab documents. There are no limitations on their right to use the international arena. There is no criminal law that prohibits the expression of non-Zionist views. However, it is apparent that the more that Palestinian citizens use their “rights talk,” the greater the antagonism between the two communities. When they are less assertive of their rights, the resentment is much less; when they assert their rights forcefully, racist laws are enacted. Exercising the right to vote and sitting in the Knesset since 1949 has not led Arabs to exercise the right to rule and to be ruled in turn. Despite this participation, domination still runs very deep. The colonial citizenship that existed during the Hobbesian moments is still valid.

and humiliated by this speech. Gans is one of the most liberal Israeli philosophers, and he argues that the political solution should be based on two states delineated by the 1949 borders; no right of return to the Green Line; and since Palestinian citizens belong to the enemy, and for defense, Israel must keep its Jewish domination in security and demography. Gans portrays the Hobbesian state and relies on the principle of finality of war. But all Hobbes’s philosophy is about eradicating mutual fear by an agreed contract between the parties, which either Gans does not grasp or he assumed that the Palestinians would accept their inferior status. See Alexander Yakobson, “Speech for the Nakba Day,” *Ha’aretz*, 24 May 2012 (Hebrew); Gans, *A Just Zionism*.

⁹⁰ Whitman, *The Verdict of Battle*, 260.

⁹¹ As Ghai and Galli emphasize, “Unlike older, classic constitutions, perhaps, constitutions today do not necessarily reflect existing national politics or power relationships, consolidating the victory and dominance of a particular class or ethnic group” (“Constitution Building Processes and Democratization,” 13).

⁹² John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap, 1971); and Ronald Dworkin, “Liberal Community,” *California Left Review* 77 (1989): 479–504.

⁹³ Martha Minow, “Interpreting Rights: An Essay for Robert Cover,” *Yale Law Journal* 96 (1986–87), 1860–915; and Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000).

Kymlicka explains that a dominant group's acceptance of minorities' claims requires the existence of reliable human rights protections and the de-securitization of ethnic relations.⁹⁴ Drawing an analogy from Kymlicka's work will lead us to suggest that we need a process of reconciliation in which to speak first of all about the equal rights of the two peoples in Palestine in the absence of the politics of surrender and division. This process must treat seriously and equally the rights of self-determination of the two nationalities, Israeli Jews and the Palestinians, as well as the civil and political rights of individuals who belong to these peoples.⁹⁵ Only then will we be able to discuss political regional arrangements, be it one state, two states, three states, or some other alternative model.

⁹⁴ Kymlicka, *Multicultural Odysseys*, 182–5.

⁹⁵ To date there is no serious debate in the Arab world, except among the Palestinians, regarding the right of self-determination of Israeli Jews. The dominant position in the Arab world still refers to Israeli Jews as a religious group and not as a nationality entitled to national self-determination.