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Constitutional Frameworks for a One-State Option in Palestine

An Assessment

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Statehood is inherently intertwined with the law. The powers of the state and their limits, the different organs of the state and their relationships with each other, the relationship between the citizens and the state, and the rights of citizens—all these are governed by constitutional law. The constitutional model to be adopted, the internal ordering of the state, the relationship between the citizenry and the state, and how the constitution addresses matters of membership, belonging, and rights are all significant questions in any exercise related to thinking about possible constitutional frameworks. These are especially important in the context of exploring options for creating a single democratic state in the area of historic Palestine (Israel and the West Bank and Gaza Strip) as part of resolving the Israeli-Arab conflict.

Any such thinking about solving the conflict will have to address the many challenges that the conflict presents. It is a longstanding conflict that has its roots in the late nineteenth century between two conflicting national movements. One of the movements, Zionism, shares many characteristics with settler-colonial movements in its ideologies, narratives, and strategies. Indeed, that is how the Palestinians, the native population, experienced and still experience the policies and practices of the Zionist movement and later on the state of Israel. As in other settler-colonial situations, the current reality reflects conditions of severe inequality between the settler population and the native population. This inequality is built into the political system, the economy, and law, reflecting the privileges that the settler population enjoys in the settler state. In addition to pervasive inequality there are certain events in the history of the conflict that became important landmarks because of the intensity of their violence and the profoundness of their impact. Events such as the Nakba came to embody decades of historical injustice.

A solution that is based on a single state built on the principles of equality and democracy has to address these challenges of inequality as well as tackle the injustices of the past and foster a sense of security and partnership for the future.

What would the possible constitutional frameworks for a single state be? What are the merits and demerits of each model? Would these models be able to satisfy the rights and needs of citizens of the future state? To guide the discussion and the assessment of the various options, this chapter will first discuss a number of guiding principles against which the models will be assessed. These principles are designed to address the problems under the current conditions, the historical injustices, as well as the needs, claims, and aspirations of the people living in this region today. It then moves to discussion of the different unitary models available, particularly the liberal state, the binational model, and the multicultural model. The chapter will also examine the possible federal models, mainly purely territorial federalism, and a mix between federalism and consociationalism. Finally it discusses human rights arrangements, assessing the role of human rights in any future constitutional settlement.

GUIDING PRINCIPLES

Constitutional design is not an abstract exercise conducted on a blank slate. While in this case it signifies a new beginning, no beginning and no thinking about constitutional design can be separated from its context. Constitutional design means thinking about the issues, the problems, the questions, and the controversies that affect a certain country, and thinking of ways to articulate the principles on which the new constitutional order will be built. In our context, these principles are meant to address the problems and the injustice of the current situation, problems that the two-state solution is unlikely to solve, as well as potential problems that are likely to emerge in the context of a one-state arrangement. Setting clear principles is also necessary to guarantee fairness and justice and a measure of stability for the regime that is being designed.

Equal Citizenship

Lack of equality between Palestinians and Israelis is one of the core problems and injustices that affect that daily lives of people, and it reverberates throughout Israel's legal and political system. It stems from the colonial outlook and policies implemented by Israel that have their roots in the early (pre-state Zionist) thought. If one were to classify the inhabitants of the area between the Mediterranean and the river Jordan according to their rights as a *matter of law*, it would be clear that there are a number of hierarchical categories. On the top we can find the Jewish citizens of Israel. They enjoy the full spectrum of rights, and their rights and interests almost automatically trump the rights of all those in the categories ranked below them. The second category is the Palestinian citizens living in

Israel. While formal citizenship gives them a measure of civil rights, their nominal citizenship does not grant full equality, for according to Israeli law and Zionist thought they do not belong to the "nation" that alone exercises self-determination in Israel. The rights enjoyed by this group do not extend to the full spectrum of rights.[1] The third category is the Palestinians of East Jerusalem, who, according to Israeli law, have residency rights but not citizenship rights. Under Israeli law, residency is a status that can be easily revoked if the individual lives outside Israeli areas for an extended period of time. Fourth are the Palestinians in the West Bank, who live under Israeli occupation. Israel has ultimate control over this territory, with the Palestinian Authority acting as the local agent that runs the day-to-day affairs of the population. Fifth are Palestinians in the Gaza Strip, which is legally still under Israeli occupation and who live under the most severe situation: while the Hamas-controlled Palestinian Authority rules over the population, the state of Israeli siege, prohibition of movement of people and goods, and the periodic bouts of violence visited upon the population by Israel make the conditions drastically more serious than in the West Bank. Finally, the group that is most disenfranchised and lacks even minimum rights are the Palestinian refugees. Many of the Palestinian refugees (those displaced in 1948) live in refugee camps and towns in the West Bank and Gaza Strip, but a significant number are concentrated in Jordan, Syria, and Lebanon as well as other countries in the world. A sizable number of these refugees are stateless.

While the question of inequality is inherently political, these hierarchies were created and are maintained by law, mostly Israeli law. This is clear in Israel's constitutional definition as a Jewish state, which designates the Jewish collective as the dominant group of the state and the public sphere. It is also clear in a range of laws and policies that affect the rights of Palestinians, whether they are in Israel, the West Bank, the Gaza Strip, or in exile.[2] This legally sanctioned inequality was put on a more firm footing with the enactment in 2018 of *Basic Law: Israel: The Nation State of the Jewish People*. This law, which has a constitutional status, reasserts many of the principles that are associated with the definition of the state as a Jewish state. It highlights the notion of self-determination as reserved exclusively for Jews in Israel and reaffirms the connections between Israel and Jewish communities elsewhere, the supremacy of Hebrew as the official language, and the importance of Jewish immigration and Jewish settlement. All of these ideas are already constitutional values in Israel, as stated repeatedly by Israeli courts. But the fact that Israeli politicians decided to reassert their importance in the form of a basic law (legislation that has constitutional status higher than ordinary legislation in the normative hierarchy) indicates the level at which the regime is determined to entrench inequality in Israel.

Any solution for the conflict should be based on the idea of equal citizenship for all of these population categories. Equality in this context could be divided into legal and political equality on the one hand, and social equality on the other. Legal

and political equality means that all members of the categories mentioned above should be entitled to citizenship as a matter of right, and that each citizen should be entitled to the same basic bundle of rights. Equality should also extend to cultural, linguistic, and religious rights, such that each cultural group will be able to enjoy and preserve its culture. It is important to highlight that legal and political equality cannot be achieved without social equality, especially in a situation where there are several categories of people with significant economic and social differences among them. As such, in order to achieve equality, future arrangements should contain significant schemes to tackle the sources of inequality. Resources should be allocated with the view of eliminating social gaps, an effort which should include affirmative action plans. Furthermore, transitional justice schemes are needed and these should include reparations, especially with regard to the losses of the Palestinian refugees. Reparations, which should include restitution of property, would help in addressing the current state of economic inequality between Palestinians and Israelis.

Immigration, Residency, and Citizenship Laws and Policies

Citizenship and immigration laws and policies are essential components of membership in the polity, for they control who can enter the polity and the status of individuals and sometimes groups within it. For Palestinians, the 1948 ethnic cleansing has been described as the Nakba (catastrophe) and it entailed the mass displacement of the majority of Palestinians and the loss of a homeland and all of the entitlements that are associated with it—citizenship, land, dwellings, et cetera. On the other hand, the policy of creating a Jewish state in Palestine relied on Jewish immigration (in addition to expulsion of the indigenous Palestinians) in order to establish a critical Jewish mass or a majority that would create its own state. Immigration (and demography) was, and still is, vital for the Zionist project. Negotiations, contestations, and campaigns to increase Jewish immigration and the absorption of the resulting immigrants in Palestine were central to Zionist activities both before 1948 and after the creation of Israel. For the Zionist leadership these immigrants, many of whom were refugees fleeing atrocities in Europe, were an essential part of the process of building a Jewish majority.[3]

The current immigration and citizenship laws and policies are more or less a translation of this approach, and are characterized by serious discrimination and racism.[4] The various categories discussed above are essentially the outcome of the operation of citizenship and residency laws and policies that allocate rights differentially. Any new constitutional model adopted must address the issues of citizenship and immigration with the view of eliminating the current legal sources of inequalities, and should also strive to provide an equitable immigration policy for the benefit of the citizenry of the future state as well.

Such a model should eliminate the current immigration regime, particularly the idea of exclusive Jewish immigration, known as "return" or *shvout*, which was

recently emphasized in the 2018 *Basic Law: Israel: The Nation State of the Jewish People*. This idea is not just a matter of the technicalities of immigration legislation (for at some point during or right after the transformational change that would bring about the creation of a single state, *all* existing legislation would need to be revised and adapted to the new situation) but extends to the level of fundamental principles. Jewish immigration, or *aliya*, as former Chief Justice of the Supreme Court of Israel Aharon Barak explained, is not a technical term. It is regarded as a fundamental political principle, or as Barak puts it, "a social, value-laden, and national term."[5] Accordingly, the Law of Return of 1950, even though it is not officially a basic law, is seen as "one of the most important laws in Israel, if not the most important." Its importance stems from the notion that it "is the key to entering the State of Israel, which constitutes a central reflection of the fact that Israel is not merely a democratic state, but also a Jewish state; it constitutes 'the constitutional cornerstone of the character of the State of Israel as the state of the Jewish people.'"[6]

The Law of Return therefore is not merely a matter of immigration: it is the main category of distinction between Jews and non-Jews (mainly Palestinians); a distinction between those who, according to Israeli law, have the right to self-determination and the right to a homeland in Israel with all of the associated national and collective rights, and those whose presence in the country is based on individual rights or status. This distinction is carried from this foundational point throughout the legal system and is used to justify discrimination against non-Jews.

On the other hand, the concept of Jewish "return" should not be confused with the right of return of the Palestinian refugees. While the former is based on a political ideology that was codified into law and has no equivalent anywhere else in the world, the latter is a well-established human right that refugees (and others who are arbitrarily denied the right to access their countries) are entitled to under international law.[7] The right of return of the Palestinian refugees is essential in equalizing rights and eliminating the current discriminatory hierarchy.

Group Rights

The population between the river Jordan and the Mediterranean belongs to two main groups: Jewish Israelis and Palestinians. While both groups are diverse in their composition (for example, Palestinians include Muslims and Christians but almost all are Arabic speakers; Jews include a number of subgroups, some of whom speak other languages such as Russian and Amharic; and some subgroups are not "legally" Jewish but speak Hebrew and embrace Jewish Israeli culture), the affiliation as Jewish or Palestinian/Arab is the cardinal division. This division is the main point of distinction that determines which people have rights under the current regime, and is the most pronounced in terms of defining the identity of the various populations living under Israeli rule. It also overlaps with the distinction (discussed below) of settler or indigenous.

These two groups (and in some cases the subgroups) each have their own distinctive language, culture, heritage, and religion. These markers are important markers of identity. Today, these two groups live more or less separately, even though they inhabit the same land. This separation is not between equals. The Jewish-Israeli collective is the dominant group in almost all aspects—politically, economically and linguistically, The Jewish group is the one that elects the government, it is the one that controls the economy, and Hebrew is the dominant language of governance and trade.[8] Palestinians, however, enjoy some cultural/religious autonomy in the areas of the Palestinian Authority. Palestinians who live in Israel seemingly enjoy some cultural autonomy in the form of separate religious institutions and courts and a separate education system, however these institutions are tightly controlled by the Israeli government and are designed to benefit the state rather than the members of these religious groups.

Accounting for the diversity of the population is crucial for a stable and just settlement of conflicts in countries with deep national, ethnic, or religious divisions. The constitutional principles and state institutions should acknowledge the fact that there are at present two main groups, and these groups have different identities that should be accommodated. This recognition and accommodation does not and should not mean dominance of one group over the other, or special rights or privileges for one group, as is the situation today. The principle of equality should be observed in the design and administration of group rights, both on the level of the group and that of the individuals belonging to each group. At the same time, special attention should be given in order to guard against a situation where belonging to a certain group, rather than citizenship or membership in the broader polity, becomes the most significant source of rights.

Historical Redress, Transitional Justice, and Transformative Constitutionalism

Constitutional change in a postconflict context cannot be a tool to preserve the past. At the same time, we cannot imagine a constitution that is totally separated from the conflict, its history, its injustices, and its underlying causes. The constitution should play a dual role: to anchor and facilitate transitional justice measures such as truth-telling, reparation, and prosecution.[9] The second role for the constitution is mainly forward-looking: to transform the present into an equal reality. It should mark a break with the past and its injustices and inequities, and signal the beginning of a new constitutional order that aims at transforming the state and society based on a new, just vision. Transformational constitutionalism, Karl Klare explains, is

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social

> change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase "reform," but something short of or different from "revolution" in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the "private sphere."[10]

Transformation cannot be an initiative that is undertaken solely by the legal system. It is essentially a political process with many actors and in which the legal system can play an important role. This role was articulated in the postapartheid jurisprudence of the South African Constitutional Court, which emphasized that the postapartheid interim Constitution of South Africa,

> is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. . . . The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment. (*Shabalala and Others v Attorney-General of the Transvaal and Another*, 1995)

This vision helped transform South Africa, and made its Constitutional Court a leading actor especially with regards to social and economic rights, even if this transformation did not go far enough in some areas.[11] This kind of transformative thinking about the constitution is indispensable for a one-state model to work effectively, regardless of the model adopted. In our context it means a major change in the doctrines, principles, mindsets, and practices that have informed existing constitutional and legal thinking and have established and entrenched the current apartheid realities. It means that constitutional practice should be guided by the principles that ensure a viable and democratic single state, such as the principles discussed below.

Decolonization

Colonialism, and more specifically settler-colonialism, lies at the heart of the conflict between Palestinians and Jewish Israelis. The division is not just ethnic/national in its nature, but also a division between a settler society that has almost full control over the state, and an indigenous society that is resisting the status quo. As in other colonial situations, the colonization process was accompanied by widespread processes of elimination of the indigenous population. The uniqueness in the case of Israel is that Israel as a state was formed as a settler-colonial state, and at the same time acts as a colonial power in the West Bank under the guise of occupation.

Patrick Wolfe, a prominent theorist of settler-colonialism, identifies its essential feature as "the logic of elimination, a sustained institutional tendency to supplant the indigenous population which reconciles a range of historical practices that might otherwise seem distinct."[12] This colonial process applies to Israel. However, the characterization of Israel and the Zionist movement as settler-colonial is not accepted by many Israelis who think of Israel as the culmination of a historical and natural right to establish a Jewish state.[13] Many writers on the other hand see the Zionist project and the formation of the state of Israel as a form of settler-colonialism.[14] They highlight the intensive immigration from Europe with the intention of building a state exclusively for the benefit of the settler society. This approach is also accepted by a number of Israeli academics who agree that Israel and the Zionist project have a strong settler-colonial element, or who, like Baruch Kimmerling, have adopted the settler/native distinction without using the term settler-colonialism.[15] Some, like Wolfe, even observe that the Zionist logic of elimination is more exclusive than such logics in Australia or the United States.[16]

Since colonialism is one of the significant issues at the heart of the conflict, decolonization should be at the center of any solution. The concept of decolonization can have several meanings depending on context, location, and epoch, such as the decolonization in Asia and Africa in the 1950s–1970s and the creation of independent states. In our context we need to adopt an approach to decolonization that takes into account the particularities of the present Israeli-Palestinian situation. It does not mean the departure of members of the settler society, but rather a political process that addresses the main structures and manifestations of colonialism, and the distinctions, inequities, and injustices it has produced over the past one hundred years, with the view of transforming the relationships between the two major groups into ones that are built on equality. It entails, on the part of the settler society, the willingness to abandon colonial privileges and recognition of past injustices, and for the indigenous society, the willingness to accept that the settler society, having abandoned its colonial privileges, has the legitimate right to exist as an equal partner in the new state. The same way colonialism affects all aspects of life, decolonization should also address those aspects, and should be a central theme in the constitutional design. Decolonization is at the heart of the four principles discussed earlier (equal citizenship, immigration, group rights, and transitional justice and transformative constitutionalism). In some sense, it is the means to ensure that these four principles guarantee equality and justice.

CONSTITUTIONAL DESIGN I: A UNITARY STATE

A unitary state is one in which state power is centralized—that is, there are no competing sources of state power, and the different branches of the state control exercise the same level of power in the whole territory of the state. Autonomous

regions are possible, but they are not seen as constituent components of the state. A unitary state could have a number of possible constitutional frameworks.

A Liberal, Difference-Blind State

A neutral state is one that does not adopt any preference regarding its citizens' values, preferences, or principles. It views the citizen first and foremost as an individual, and provides all citizens with the full range of liberal rights regardless of their belonging. It adopts a policy of difference-blindness when it comes to citizens' identities, whether they are cultural, linguistic, ethnic, or national. Such a state does not exist in reality. While there are states that adopt a policy of neutrality in certain areas such as religion, a state cannot be neutral in areas such as language for practical reasons. Rather, what exists in reality are states that try to promote what Charles Taylor calls "the politics of universalism," that is, the promotion of equality of all citizens and the avoidance of stratification of citizens into classes or ethnic identities.[17] This could be seen as the nation-building model: the state encourages a certain identity, culture, language, and political culture.[18] This approach applies to areas that are seen as "official" or public. The state on the other hand gives the citizens belonging to minority ethnocultural groups the liberty of using their languages or practicing their cultures in the private sphere.

It should be noted that what is seen as "universal equality" is in reality not universal, as it maintains a preference for particular cultures. It does promote a hegemonic culture; as Charles Taylor puts it, it is "a particularism masquerading as the universal."[19] France is generally adopted as the archetype for this model, with its emphasis on French republican values, French culture, and French language. These are seen as "universal" even if they are particular to France.

Adopting such a model for a new state in Israel/Palestine would raise many difficulties. Under the current situation, there is no one hegemonic culture that a clear and substantive majority would support. This obstacle, however, could be surmounted by leaving the question of hegemonic culture open and where absolutely necessary, adopting cultural elements of both groups, such as officially recognizing their respective languages as official languages. While this would be transformational in the sense that it would present a break with the current situation, in which Jewish Israelis dominate the state, this transformation would be of a limited scope because of the model's narrow conception of equality. For even though it is based on equality, and there is much to admire in the emphasis on "universal equality" among citizens, this kind of equality assumes uniformity, and is contrary to the realities of most societies. This concept understands equality in its narrow sense only. It is based on respect for individual equality and does not take into account individual and collective diversity. This indifference to diversity means that eventually one culture or group, whether through numeric preponderance, political power, or economic advantage, will eventually become hegemonic.

The emphasis on equality as uniformity and difference-blindness also creates problems when it comes to group rights, especially if those rights require some form of recognition of these groups and adjustment to their special interests or needs. Similarly, this model will hinder transitional justice, for transitional justice in the context of the Israeli-Arab conflict requires acknowledging group differences and identities. Under this model, there is no means to talk about settler society and indigenous society, but only individual citizens. The same problems arise regarding decolonization: for decolonization to work, one should first identify the colonial process and the privileges it created, which would be hard to achieve in a model based on uniformity.

The Binational Model

A binational state is one that acknowledges the political presence and rights of two national groups. Those who belong to the relevant national groups are able to enjoy individual and national rights, and their right to be represented in state institutions is constitutionally protected.[20] The origins of this approach in Palestine/Israel can be traced back to the Brit Shalom group, which was later recreated as Ihud and was active among the Jewish immigrants in Palestine in the 1920s–1940s. The impetus behind this group, which was small and politically marginal, was their understanding that the Palestinians would never agree to a Jewish state in their land since that would mean that they would not be able to exercise their right to self-determination. The group believed that Jews had "historical" rights over Palestine while the Palestinian Arabs had "natural rights." To reconcile those rights they proposed binationalism: the state would be composed of two nationalities (or nations), Jews and Arabs, and both groups would have equal political rights regardless of majority or minority status.[21]

But binationalism is to a large extent an abstract and vague concept that can mean a number of political configurations. It is possible to identify four levels or types of binationalism, as explained here.

Binationalism as Declarative. Binationalism could be expressed on a declarative level as recognition by the state, through its constitution or other legal instruments, of the fact the majority of the citizens belong to two national or ethnic groups. If such a clause is kept at the declarative level and not given normative weight, then it has the potential to satisfy the aspirations of both groups. It provides recognition without providing special rights or privileges to any group. Such a clause would be compatible with the principle of equal citizenship and would not necessarily have implications for immigration policy. It may be be vague with regards to the issue of group rights, since it would depend on how these rights would be defined and on the level of involvement of the state in protecting them. If issues such as religion, language, and culture are seen as a matter of private

preference only, the state would not promote any aspect of those, but at the same time would not interfere in regulating them.

Binationalism as Cultural Autonomy and Official Adoption of Symbols. This level complements the declarative level with active measures that give expression to group preferences. The recognition of the two groups would extend to granting some form of cultural autonomy in areas such as religion, cultural institutions, and recognition of the equal status of both languages. Additionally, the recognition would extend to state symbols (flag, anthem, emblem), which would combine elements representing both groups.

Recognition and cultural autonomy could take different forms, and those would determine its compatibility with the principles set out in the earlier section. If both groups are given *exclusive* jurisdiction on their cultural affairs, then a number of problems might arise. First, this arrangement would mean that *all* citizens have to belong to one of the groups. This raises difficulties regarding those who do not belong, or do not want to belong, to either group. Second, this emphasis on strict group differentiation might be manipulated to provide rights or services in a discriminatory manner to different groups, as is the situation today in religious services in Israel. A third problem that would arise is the problem of accountability and state control: To whom will those autonomous institutions be accountable? What is the role of the state in their regulation?

Binationalism and Immigration. The shape of the binational state is also going to be impacted by the way it deals with the issue of immigration and citizenship policy. Since it was enacted in 1950, the Law of Return has been justified and rationalized based on the right to self-determination, namely that a state in which a specific group exercises self-determination should allow members of that group the right to immigrate to it and become citizens. As such, Jews, as a national group, should be allowed to immigrate and join their conationalists in their national home.[22] If this logic is applied to binationalism then the binational state has to allow the immigration of members of both groups, or at least facilitate it significantly. This means the preservation of the Law of Return, or some variation of it. This component of binationalism was at the heart of the binational view promoted by Brit Shalom/Ihud. The group believed that there should be numerical parity between Palestinians and Jews in Palestine, and part of their plan was to allow unlimited Jewish immigration until this numerical parity was achieved.[23] This requirement might prove to be problematic on a number of levels.

Binationalism and Governance: Conscociationalism. The principle of consociational democracy proposed by Arendt Lijphart is the most relevant model of sharing power between multiple ethnic groups within any given state. Lijphart's model

aims to share, decentralize, and limit state power. The model has a number of elements. First, it institutes power-sharing on the executive level. Second, Lijphart advocates for proportional representation of the groups in parliament and in the main institutions of the state such as the civil services, judiciary, police force, and army. Third, this model allows each group to have mutual veto power on matters of vital interest. This is especially important for minorities whose representation is not always strong. Fourth, consociational democracy ensures segmental autonomy, in the form either of federalism or of group autonomy in areas linked closely to ethnic identity.[24]

Binationalism at the level of governance is indeed a form of consociationalism where the power is shared between the two groups. There is no one model to implement this system, but the principles listed above could be implemented in a number of ways. In the Israeli/Palestinian context, binationalism could entail a bicameral parliament, a cabinet composed of equal number of individuals belonging to both groups, quota systems in public service and other state offices, and veto rights on vital interests. This seems to be the thrust of the binational state proposed by Brit Shalom/Ihud in 1946. One of the main components of their proposal was the creation of a constituent assembly which would draw up a constitution and a legislative assembly which would include equal number of Palestinians and Jews.[25] This was at a time when Palestinians out-numbered Jews two to one, though the plan included massive Jewish immigration to bring about numerical parity. Parity would also be maintained at the level of the executive through the creation of an executive council. The proposal also spoke of a Jewish Council and a corresponding Arab Council which would be responsible for the cultural affairs of each community, such as issues related to education.

Binationalism: Pitfalls and Potential. The first problem of binationalism as a state model to resolve the Israeli-Palestinian conflict lies in defining the identity of the two nations creating this new state. Two questions arise here: Who are the two nations? And who is included in each group and who is going to decide on that? As for the first question, it is not clear whether the non-Palestinian group is Jewish (that is, composed of anyone who is religiously or culturally Jewish) or Israeli. While there is overlap between the two categories, there is definitely a big difference between them. Even though sociologically one can identify an Israeli collective that has emerged in the past seventy years, one that has features that distinguish Israelis from Jews elsewhere, Israel has refused to acknowledge this fact. Officially and legally, there is no such thing as an Israeli nation, and the only nation in Israel is the Jewish nation (*Tamarin v. The State of Israel*, 1972). On the conceptual level, stating that all Jews have a right to self-determination and a stake in the state flies in the face of contemporary practices that emphasize citizenship, and not religious or ethnic belonging, as the main criteria for being member of the state. On a practical level, especially if this arrangement is accompanied with

immigration rights similar to the ones adopted today, it means that millions of Jews whose only link to Palestine is religious will be able to immigrate to it and settle in it.

Equally problematic is the issue of who would be included in each group, or who is a Jew/Israeli, and who is a Palestinian. The question of "who is a Jew" has been a serious constitutional and political question in Israel. The question of who is Palestinian may prove to be easier to answer: anybody who originates from the area of Mandate Palestine is Palestinian. Yet there are some who could not be included in this category, yet could be seen as Palestinian by association, such as political figures who played important roles in Palestinian politics. Adopting a binational model means that these two categories need to be *legally* defined, since eligibility to participate in politics and access to some services will rest on the whether an individual belongs to one group or the other.

Similarly, this emphasis on group belonging in the power-sharing mechanisms assumes that all citizens belong to these two groups. But what about those who do not fit the definition? This emphasis might lead to absurd outcomes that undermine the principles of equality and citizenship. A case in point here is Bosnia Herzegovina and the decision of the European Court of Human Rights in the *Sejdić and Finci* case. As part of the Dayton Agreement, the preamble to the Constitution of Bosnia Herzegovina describes Bosnians, Croats, and Serbs as "constituent peoples." The presidency and all legislatures (on the federal level and state level) are shared with representatives from each group. In this case, Sejdić, who is of Roma origin, and Finci, who is of Jewish origin, wanted to stand for elections, but since they did not fit any of the three "constituent peoples," they were ineligible. The court ruled that this was a violation to their right to participate in free elections and their right to be protected from discrimination (*Sejdić and Finci v. Bosnia Herzegovina*, 2009). The other side of the coin here is the problem of compelled association: those who do not want to be part of any group, in order to participate in politics, would be compelled to associate with one of the two groups.[26]

The second problem that binationalism can give rise to relates to its emphasis on national/ethnic belonging as the main political criteria for belonging to the polity. It thus could be more conducive to highlighting what divides a polity rather than what unites it. Political power channeled through the ethnic/national affiliation makes membership in the communal group, rather than citizenship and membership in the state, the source of political power and rights. This might lead to both groups adopting initiatives to develop and highlight their particular identity in a manner not necessarily constructive for creating a new collective sense of "we," or a new common state identity.

In addition to these particular concerns, the academic literature points out other salient critiques of the consociational model. Critics argue that consociationalism tends to strengthen the elites of the national or ethnic groups, because its success relies on the elites' ability to demonstrate that they can enforce the consociational

arrangements within their respective groups. Critics also observe that consociationalism limits competition among elites over issues of public concern and policy questions, which in turns produces weak and undemocratic government. Moreover, consociationalism hinders politics of economic distribution, especially because it focuses on cultural/ethnic recognition and ignores social class. Questions of allocation of resources can easily escalate into disputes between the two groups, especially in situations of economic disparity as in our case. Additionally, since consociationalism requires many actors and political parties to be in power in order to form of a broad ruling coalition, the official opposition tends to be small and very weak. Consociationalism effectively eliminates or significantly weakens official opposition, which is essential for the functioning of a democracy. This, according to critics of consociationalism, weakens democracy.[27]

Consociationalism is also likely to violate some of the principles mentioned above. Most significantly, it could potentially violate the principle of equal citizenship especially if the equally divided legislature advocated by Ihud were to be implemented. While the numerical composition of the population of a binational state is hard to assess at this point, and may well be close to parity, it is hard to guarantee that it will stay the same, and if this happens, an equally divided legislature will give more power to the group that is a minority. This could be dangerous in situations where, for example, the ethnic/national divide also overlaps with a socioeconomic divide. Similarly, because of the general weakness and instability of the state under this model, it would be hard to implement transitional justice initiatives and changes that are conducive to decolonization.

Despite these critiques and potential problems, some of the ideas that consociationalism promotes could be employed without emphasizing their ethnic/national dimension. The adoption of a parliamentary system, proportionate representation (of parties) in parliament, recognition of ethnic/national groups, language rights, and some form of cultural autonomy are all ideas that could be used and implemented without necessarily adopting some of the problematic aspects of consociationalism. This way, power is shared and diffused without necessarily strengthening sectarianism.

A Multicultural State

Principles. A multicultural state is one that could potentially combine many of the benefits of a binational model and at the same time avoid the potential risks. There is no one universally agreed upon definition of multiculturalism, for it can take a number of different shapes or models.[28] The definition that Will Kymilcka, one of the leading theorists of multiculturalism, adopts could help clarify the concept. Kymlicka sees multiculturalism as "the view that states should not only uphold the familiar set of common civil, political, and social rights of citizenship that are protected in all constitutional liberal democracies, but also adopt various

group-specific rights or policies that are intended to recognize and accommodate the distinctive identities and aspirations of ethnocultural groups."[29] Kymlicka identifies three principles useful in struggles to achieve multiculturalism.[30] The first is the idea that the state belongs to all citizens equally. The second principle involves the state according "recognition and accommodation to the history, language, and culture of non-dominant groups, as it does to dominant groups." The third principle directly addresses the issue of past injustices: "a multicultural state acknowledges the historic injustice that was done to minority/non-dominant groups by these policies of assimilation and exclusion, and manifests a willingness to offer some sort of remedy or rectification for them."[31] These three principles could help in devising a state model that maintains group recognition without entrenching group privileges and making them the main marker of politics.

Equality and Cultural Autonomy. The starting point of such a model is equality. In our context, the state should recognize that nearly all citizens belong to one of two groups, Palestinians and Jewish Israelis, with different languages, culture, and history, and should give these groups a measure of cultural autonomy. This recognition includes recognition of Arabic and Hebrew as official languages of equal status, and recognition of the right of citizens to receive services from and communicate with the state in both languages. Also, special arrangements should be adopted to allow for the use of either language in government offices (both central and local), parliament, and the courts. Similarly, the state should adopt a policy of bilingualism and encourage (and in cases of critical services or monopolistic companies, mandate) the use of both languages. Both languages should be taught in all schools, whether public or private.

Cultural autonomy is commonly understood as allowing members of a distinct group to manage matters that are related to cultural affiliation, such as language, education, cultural and artistic production, and religious institutions. The state is a major player in these areas, and its policies should, as much as possible, leave the decisions on these cultural issues in the hands of the group as recognition of cultural distinctiveness. At the same time, policies encouraging cultural autonomy should be designed in a manner that highlights equality, diversity, and openness, and not adversity and difference.

A number of guiding principles could be adopted to achieve these goals. A major principle is related to group definition and membership. In our context, where the question of who is Jewish Israeli and who is Palestinian seems to be complicated and could potentially lead to disagreements, the best marker to define a group could be language. This way we can avoid the thorny question of group definition and membership and still maintain group recognition in a manner that is significant for the groups involved. As such, in all areas and institutions of cultural autonomy—except for religion—the autonomous institutions should first

and foremost be based on language. In this way, membership in each group will be based on self-identification and preference and not, as it is today in Israel, based on religious criteria or compelled identification.

Other principles could be adopted to guarantee equality and openness, such as accountability. Government departments that provide cultural services should be accountable to the public as a whole, and not just to the particular community they serve. They should be committed to the principles of equality and diversity. They should not discriminate against individuals in the provision of service even if those individuals are deemed not to belong to the linguistic group they are intended to serve. Similarly, other administrative law norms that guarantee fairness and accountability should apply.

It should be highlighted that equality in the context of a multicultural state in historic Palestine cannot be abstract. Policies aimed at equality should be informed by decolonization such that the new constitutional framework is a way to decolonize the state apparatus and address the wrongs of the past. They should make clear that this conception of equality aims to remove the privileges of the settler society rather than recreate them or rename them. They should also support and facilitate measures of transitional justice, as equality cannot be achieved without addressing the injustices of the past.

Multiculturalism and Democratic Governance. Multiculturalism does not offer specific guidelines about constitutional arrangements beyond the main principles discussed above. However one can use these principles, and borrow from some of the ideas discussed under consociationalism, to provide a framework that will help reflect the diversity of the population in the governing bodies and guarantee that no one group can abuse power in a manner that affects the rights of the other group, all while maintaining equal citizenship as the founding principle of the constitutional order.

The starting point should be constitutional entrenchment of the principles that are at the heart of multiculturalism such as equality, bilingualism, recognition of group rights, commitment to diversity, and acknowledgment of historical injustice. Constitutional amendments changing such principles should be possible with a large majority vote only. The Constitution of South Africa for example, provides that the principles of democracy, human dignity, nonracialism, and nonsexism may be amended only with the support of 75 percent of members of Parliament and the support of six out of nine provinces. These principles should be not just declarative in nature but also constitutional principles that legislation should observe and be compatible with.

Similarly, the system of governance could be designed in a manner in line with the general principles of multiculturalism. A parliamentary system is preferable to a presidential system because of its more collaborative nature. While a "first past the post" voting system (where the country is divided into regions, and the

candidate with the highest number of votes wins) would potentially provide a result representative of the population because of the current state of segregation, it is not the most desirable one. A mix between a proportionate representation voting system where the whole country is seen as one electoral district, and a number of relatively large electoral districts would probably be a better way to guarantee adequate representation and at the same time provide candidates from different backgrounds with incentives to cooperate with each other. Such arrangements can guarantee that parliament is representative of the general population, and that the cabinet will also have significant representation of both groups without having to specify quotas in the constitution.

A multicultural system seems to be the one that is most compatible with principles outlined above. It guarantees equality both for individuals and groups, provides a significant measure of recognition of group identity, allows significant cultural autonomy, but at the same time maintains an emphasis on the idea that the main relationship between the individual and the state is that of citizenship and not ethnic/religious background. The ideas of transitional justice and decolonization could fit into this model given its emphasis on acknowledging historical injustice.

While multiculturalism seems to be a satisfactory model that could address many of the challenges in our context, it is important to be aware of the critiques leveled against it. Two critiques are especially important. First, critics argue that the emphasis on culture and identity diverts attention from social and economic justice and undermines class solidarity.[32] Second is the question of vulnerable internal minorities, or minorities within minorities. The emphasis on the protection of equality of group identity might worsen existing inequalities within each group.[33] Subgroups such as women, sexual minorities, and religious dissidents might be adversely affected by members of their own group. These critiques are indeed significant, but they could also be addressed using other tools.

CONSTITUTIONAL DESIGN II: A FEDERAL STATE

Federalism: Principles and Rationale

While there is no one universally agreed upon definition of federalism, a useful definition that captures the essence of many federal arrangements is William Riker's. Riker sees a constitution as federal "if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere."[34] Essentially, the powers of the state are divided between the central or federal government and the regional or state government. The division of powers varies from one country to another depending on the history and the needs of each state. Some, like Switzerland, are very highly decentralized, and the cantons (the regional unit

in Switzerland) enjoy a wide range of powers, many of them are exclusive. The cantons hold so much power that the preamble of the Federal Constitution of the Swiss Confederation names the cantons, in addition to the people, as the "authors" of the constitution. Other countries, such as Germany, are more centralized even within a federal framework.

Supporters of federalism argue that it bolsters democracy, as it gives the local population more voice in public affairs through the tiered government system. It also allows more political participation, especially that of small communities. Similarly, the proximity between citizens and local decision-makers means more responsive government. Supporters also argue that the division of state power between two levels of government limits this power and contributes to protecting liberties. Some theorists highlight the freedom of movement and choice of residence offered by a federal state, which makes it easier for people to move to like-minded communities.[35]

Federalism Implemented: Possible Scenarios

The overwhelming majority of federal states use territory as the basis of federalism. The exceptions, mainly Belgium and Bosnia and Herzegovina, combine the territorial dimension with a communal (ethnic/national) dimension. Territorial federalism is based on territory, and the region, state, or province has powers that are distinct and independent from the power of the federal government. The division of power is usually done through the constitution. In situations where the constituent states are not preexisting political units with defined borders, the most important question is the question of internal borders. In postconflict federalism the territorial units are designed in a manner to give national minorities a majority in their own regions.[36] This, it is thought, will dampen the secessionist sentiments of minorities, will provide a measure of control and participation at least on the local level, will provide regional jurisdiction over education, language, and other cultural aspects, and will address some of the demands of the national groups.

In our case, one approach would be to adopt the 1967 line, creating two territories where each group—Palestinians and Israeli Jews—will form a clear majority in one of the two. It would also be possible to make some amendments to the line to account for major population centers that belong to the other group. Another option would be to adopt a larger number of units with significantly smaller territories. This would allow for a significant measure of self-rule for the residents of the units; given the existing state of segregation, those units would likely be homogenous, with the exception of some highly mixed areas such as parts of Haifa, Yaffa, and Jerusalem.

Another important question concerns the powers of the territorial units in a federal state. In postconflict federalism, regional powers are usually given control on matters related to language, religious services, education, and other cultural aspects as a way to satisfy the aspirations of the particular group living in that

area. The scope of regional power can be more challenging or contested in situations where questions of the distribution of natural resources (such as oil, gas, minerals) and their division arise. In the Israeli-Palestinian context though, this is not a major concern and the cultural aspects remain the most important domain for asserting regional autonomy. All other state functions and powers would be controlled by the federal state.

The other model of federalism is one that combines territorialism with consociationalism based on national/ethnic or linguistic dimensions. Belgium and Bosnia Herzegovina are the prime examples. Bosnia and Herzegovina is divided into two federal "entities": Republika Sparska and the Federation of Bosnia and Herzegovina. The federal legislature is composed of two chambers with quotas for the constituent peoples (Bosnians, Serbs, and Croats). The federal presidency is a joint presidency with the three peoples represented. The federal government has powers in limited areas related to international relations, trade, customs, immigration, and monetary policy. All other functions and powers are retained by the "entities."

The Belgian model is equally complicated. Belgium, as Article 1 of its constitution states, "is composed of Communities and Regions." There are three regions: Flanders (mostly Dutch-speaking), Wallonia (mostly French-speaking), and the mixed district of Brussels. There are three recognized communities, the French, Flemish, and the German-speaking community. The communities have powers in functional areas that are of cultural concern for the different linguistic groups, and in what is known as "person-related matters," which include certain aspects of healthcare, family policy, and education. The jurisdiction of the communities, however, is territorially defined, and each territorially defined region has power in economic areas and has its own elected parliament. In Brussels, for example, each community has authority with regards to members of its linguistic group. On the federal level, Belgium has a bicameral parliament. The constitution provides more seats for the Dutch-speaking population than for the French-speaking population, although linguistic parity is maintained in the federal Council of Ministers. For changing any current arrangement, the constitution requires a two-thirds majority as well as a majority of each linguistic group.[37]

A federal system that combined territorialism with communal belonging would be something along the lines of Belgium or Bosnia Herzegovina: it would add a layer of consociationalism to the federal structure. The particular powers given to the states or regions would be a matter to be decided, and a number of approaches could be taken. But since our concern here is with the cultural rights of national and linguistic groups, the states or the regions would have control over rights and services related to culture. Cultural autonomy (education, religion, language, et cetera) therefore would be overseen on the regional level. The region or the state would adopt policies and administer the cultural institutions. In addition, other powers could be given to the regions or states in service areas such as health,

social security, housing, and other fields that deal with the particular needs of the local population.

On the federal level, a number of options could be adopted. In the 1940s, Ihud proposed a federal structure with a federal parliament and federal executive based on parity.[38] They also proposed an Arab Council and Jewish Council for cultural affairs, and smaller administrative units (counties). In some sense, the proposal by Ihud resembles the Belgian model in that it combines federalism with consociationalism.

Federalism: Promises and Risks

Many critics argue that the promises of postconflict federalism are exaggerated. Some even suggest that federalism in this context is likely to exacerbate conflict and not solve it. They contend that the model is unstable and likely to reinforce conflict between identity groups. Simple policy questions, they argue, will be recast as conflicts or tensions between national groups. Additionally, the fact that the different groups would be in control of different regions—even if only partially and within the confines of federalism—means that they could use resources and institutional tools in order to push for greater autonomy.[39] Another problem related to instability is posed by the borders between the states or regions. On the one hand, drawing borders in order to create regions that represent national or ethnic minorities is one of the rationales for adopting a federal model. On the other hand, studies show that borders that are designed to create homogenous populations are unstable.[40] Some suggest that creating heterogeneous territorial units is more likely to force the different groups to cooperate. Economic equality is another major issue that should be flagged. Several studies show that there is a correlation between income inequality and federalism.[41] Federalism, and decentralization in general, tend to preserve the economic status quo.[42]

All of these critiques are relevant if a federal model is adopted. It is possible to imagine states or provinces using resources in a manner that disproportionately benefits the national majority in their areas, or in a manner that is designed to achieve goals that are contrary to the goals of the federal state or the spirit of the political settlement. For example, states could act to strengthen the bond between individuals and their local state at the expense of the bond with the federal state. Similarly, the question of economic redistribution would be a thorny one, especially since the Palestinian-majority states/regions will be economically weaker given the current economic realities. For a federal model to work in our context, the federal state should have ultimate say in economic matters including the ability to overturn the policies and legislation of the states. Other risks include the fact that it will be impossible to create regions that are homogenous: there will always be a minority. Similarly, language presents a serious challenge: Would the regions be allowed to choose just one language for administration and service provision? In addition to these particular challenges that federalism would

present, almost all of the challenges and risks discussed under binationalism are relevant when we consider federalism.

Given the nature of federalism and the risks in this model, there are important questions related to the compatibility of the model with the principles discussed above. While in theory the model could be accompanied by assurances regarding equality, comparative studies show its weakness when it comes to redistribution and inequality. Similarly, even though it satisfies the requirements related to group rights, it runs the risk of putting too much emphasis on group identity and group political power in a manner that might intensify tensions. The tendency to preserve the status quo that comparative studies associate with federalism could also cast some doubt about the ability of the state to implement transitional justice schemes or make changes in the context of decolonization.

HUMAN RIGHTS

The protection of human rights through an enforceable constitutional bill of rights has become an important feature of peaceful settlement of protracted ethnic/national conflict since the 1990s.[43] The Constitution of the Republic of South Africa is a good example. The Constitution of Bosnia and Herzegovina, which was adopted as an annex to the Dayton Agreement, integrated the European Convention on Human Rights and its protocols. The European Convention on Human Rights also played a role in the Good Friday Agreements in Northern Ireland.

One of the main debates in constitutional law and constitutional theory concerns judicially enforceable bills of rights, which give the judiciary the power to review legislation. Judicial review of legislation raises a number of problems. The rationale behind judicial review is that the legislature, as an organ of the state created and bound by the constitution, acts within its powers only when its actions do not violate the principles of the constitution, including the bill of rights. The problem arises when the legislative body is democratically elected. Here the conflict is between democracy, represented by the democratically elected parliament, and the idea of constitutionalism—the idea that powers of the state are limited by the constitution.

This debate has been one of the central debates in constitutional law, especially Anglo-American constitutional thought.[44] While cogent arguments are presented by both sides, the main question that concerns us here is the possible role that a bill of rights could play in the one-state model, and the desirability of such an approach. Some of the arguments in the debate on judicial review could be helpful. One of the most spirited opponents of judicial review is the constitutional theorist Jeremy Waldron. Waldron argues that judicial review is illegitimate from a democratic point of view, and that democratically elected legislatures are better suited to protect rights. His argument, however, is qualified: it is conditional upon satisfying a number of assumptions. Waldron's assumptions are

> (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the member of the society who are committed to the idea of rights.[45]

While the aspiration is to satisfy all these criteria, it is hard to anticipate whether this would be achieved in our case, especially in the transitional period. If they were not achieved, even according to the strongest arguments against judicial review, a bill of rights would be necessary.

Tom Ginsburg advances the theory that bills of rights serve as a form of political insurance in the context of transitions to democracy.[46] Hegemonic groups or parties who anticipate losing their control over the political system as a result of the democratic redistribution of political power are interested in being able to access a forum where they can challenge the legislature. In our context, where we have two large groups, and where it is not entirely clear which group will constitute a majority in the electoral sense (although it is expected that the number of Palestinians will increase if a significant number of refugees decide to return), this insurance model of judicial review could be helpful for both parties. In constitutional negotiations between the groups, each group would highlight and insist on constitutional protection of the issues that are of utmost interest for them.

One principle that should be given prominent status in the bill of rights is equality. Equality is the main guiding principle for any settlement based on a single state (regardless of the model adopted). In this context, the South African constitution provides a good example to follow: equality is mentioned in the preamble and in section 1, which can be amended only with a three-quarters majority of members of Parliament, and is also protected as part of the bill of rights. Equality should also be understood in the context of the conflict. The approach to equality should be one that is informed by decolonization and one that would allow for and even promote transitional justice and affirmative action. It should, for example, allow and facilitate measures such as land restitution and reparations.

Constitutional protection should not be limited to civil and political rights only. Social and economic rights should also be protected constitutionally. In a reality of deep social and economic inequality, the protection of social and economic rights is especially important in order to guarantee equality as well as the ability to participate in redistributive projects that can help redress economic inequalities. Beyond these fundamental ideas about the importance of social and economic rights, pragmatic factors also militate in favor of providing protection for such rights: the weaker (and more numerous) citizens will have an interest in the success of such a settlement.

EPILOGUE

The different models examined in this chapter show that the one-state solution is not necessarily one concrete idea. A variety of models could fit under this category, and each model's efficacy, potential, risks, and pitfalls depend to a very large extent on the details of its structure and implementation. As we saw, some models are more desirable and more amenable to addressing the important challenges, while others may end up recreating similar problems and even introducing new ones. The primary conclusion is that a number of models exist that could be described as democratic, and each model has its promises and risks. The hard task here is deciding which option to adopt. It is therefore very important, as a starting point for thinking about constitutional design, to have a clear understanding of the problems and challenges that need to be addressed, as well as a clear vision of future objectives to be achieved by the constitution. While some of these challenges and objectives were discussed in the first part of this chapter, these are inevitably intertwined with the social, political, historical, and economic questions discussed elsewhere in this book. The constitutional model should not be seen as an end, but rather a means to address challenges and achieve social and political ends.

The harder questions, therefore, are not the questions about what is legally desirable or what are the best practices in relation to constitutional design, but rather questions that go to the core of the political project that is being sought, namely decolonization, equality, and/or justice. The nature of the political project sought will dictate whether the constitution facilitates the political goals or hinders them. A constitution may include many clauses dealing with democracy, human dignity, diversity, and human rights and other concepts which sound very desirable when put on paper and discussed by jurists. But these ideas and concepts should go beyond debates among lawyers and elites and should also become the local currency of the population, as this is the ultimate test for the success of any postpartition constitutional design in Israel-Palestine. For this to happen the population should be able to see that the constitution is addressing its concerns and facilitating its political project of decolonization and guaranteed equality for all.

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