Chapter 9: An Assessment of Possible Constitutional Frameworks for a One State Option

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Introduction

Statehood is inherently intertwined with the law. The powers of the state and their limits, the different organs of the state and the relationship with each other, the relationship between the citizens and the state, and the rights of citizens, those are all 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 the questions 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 which has its roots in the late the nineteenth century between two conflicting national movements. One of the movements, Zionism, shares many characteristics with settler-colonial movements in its ideologies, narratives and the strategies pursued. 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 the pervasive inequality there are certain events in the history of the conflict that became important landmarks because of the intensity of the violence and the profoundness of its impact.

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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 in addition to the challenges of tackling the injustices of the past and fostering 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 different options, the chapter will begin with a discussion of a number of guiding principles against which the different models will be assessed. These principles are mainly designed to address the problems under the current conditions, the historical injustices, the needs, claims and aspirations of the people living in this region. These principles will be discussed in part II. The discussion of the different models will start in part III. This part will focus on unitary models, and will discuss three particular models: the liberal state which is totally blind to the differences among the different groups amongst the population, the bi-national model, and the multicultural model. Part IV will examine the possible federal models, mainly purely territorial federalism, and a mix between federalism and consociationalism. Part V will be devoted to human rights arrangements. It will assess the role of human rights in any future constitutional settlement. Part VI will finish with some concluding remarks.

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 could 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, and potential problems that are likely to emerge in the context of a one state arrangement. Similarly, the principles are necessary to guarantee fairness and justice and a measure of stability for the regime that 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 life of people, and reverberates throughout the legal and political system. It stems from the colonial outlook and policies implemented by Israel which 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. Those enjoy the full spectrum of rights, and their rights and interests almost automatically trump the rights of all the categories below. The second category is the Palestinian citizens 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 exercises self-determination in Israel. The rights enjoyed by this group do not extend to the full spectrum of rights.[2] 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 could be easily revoked if the individual lives outside Israeli areas for an extended period of time. Next (fourth) are the Palestinians in the West Bank who live under Israeli occupation. Israel has ultimate control over the territory with the Palestinian Authority acting as the

[2] Shourideh Molavi, *Stateless Citizenship: The Palestinian-Arab Citizens of Israel*, (Leiden: Brill, 2013); Mazen Masri, *The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State*, (Oxford: Hart Publishing, 2017); Nadim Rouhana and Sahar Huneidi, Rouhana, *Israel and its Palestinian Citizens: Ethnic Privileges in the Jewish State*, (Cambridge: Cambridge University Press, 2017).

local agent that runs the day-to-day affairs of the population. Number five is the Gaza Strip, which, legally is still under Israeli occupation, and it represents the most severe situation: while the Hamas-controlled Palestinian Authority rules over the population, the state of 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 the West Bank. Finally, the group that is most disenfranchised and lacks 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 in addition to 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, West Bank and Gaza Strip or in exile.[3] The 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 notions of self-determination exclusively for Jews in Israel, 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 indicates the level of entrenchment of inequality.

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

[3] Masri, *Dynamics of Exclusionary Constitutionalism.*

equality. Legal and political equality mean that all members of the categories mentioned above should be entitled to citizenship as a matter of right, and each citizen is 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, and it is especially so in a situation where there are several categories of people with significant economic and social differences. 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 which would include affirmative action plans. Furthermore, transitional justice schemes should include reparations, especially with regard to the losses of the Palestinian refugees. Reparations which would include restitution of property would help in addressing the current state of economic inequality.

Immigration, Residency and Citizenship Laws and Polices

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 individual 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, dwelling etc. On the other hand, the policy of creating a Jewish state in Palestine relied on Jewish immigration (in addition to expulsion) in order to create a critical mass or a majority which 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 their absorption in Palestine were central to the Zionist activities before 1948 and after the creation of Israel. While many of the

immigrants where refugees fleeing atrocities in Europe, for the Zionist leadership those were an essential part of the process of building a Jewish majority.[4]

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.[5] The various categories discussed above are essentially the outcome of the operation of citizenship and residency laws and policies that allocate rights differentially. Any constitutional model adopted must address the issue 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, and 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 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 should be revised and adapted to the new situation) but extends to the level of fundamental principles. The idea of Jewish immigration, or "*Aliya",* as former Chief Justice of Supreme Court of Israel explained, is not a technical term. It is regarded as a fundamental political principle, or as Barak puts it, it is "a social, value laden, and national term."(*Toshbeim v. Minister of Interior* (2004):para. 23). Accordingly, the *Law of Return-1950,* even though it is not officially a basic law (legislation that has constitutional status that is higher than ordinary legislation in the normative hierarchy) it is seen as "one of the most important laws in Israel, if not the most important" (*Toshbeim v. Minister of Interior* (2004):733).· Its importance stems from the notion that it

[4] Ibid., 101-125.
[5] Raef Zreik, "Notes on the Value of Theory: Readings in the Law of Return—A Polemic," *Law and Ethics of Human Rights* 2, no. 1 (2008); Hassan Jabareen, "Hobbesian CitizenshipHow the Palestinians Became a Minority in Israel," in *Multiculturalism and Minority Rights in the Arab World,* ed. by Will Kymlicka (Oxford: Oxford University Press, 2014); Masri, *Dynamics of Exclusionary Constitutionalism.*

> 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" (*Toshbeim v. Minister of Interior* (2004):733).

The *Law of Return* therefore is not just merely a matter of immigration: it is the main category of distinction between Jews and non-Jews (mainly Palestinians); 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.

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.[6] The right of return of the Palestinian refugees is essential in equalizing the 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

[6] The sources and literature on the issue of the right of return is immense. One of the main sources is the United Nations General Assembly 194 (III) which resolved "that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date". For a review of the literature, see Masri 2015.

some sub-groups 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 which decides rights under the current regime, and is the most pronounced in terms of identity. It also overlaps with the distinction (discussed below) of settler/indigenous.

These two groups (and in some cases the sub-groups) have their own distinctive language, culture, heritage and religion. These markers are important markers of identity(ies). Today, these two groups live more or less separately, even though they inhabit the same area. 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,[7] it is the one that controls the economy, and Hebrew is the dominant language of governance and trade. Palestinians, however, enjoy some cultural/religious autonomy in the areas of Palestinian Authority. Palestinians who live in Israel, while seemingly enjoy some form of cultural autonomy in the form of separate religious institutions and courts and a separate education system, these institutions are tightly controlled by the 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 the state institutions should acknowledge the fact that there are 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, on the level of the group and the individuals belonging to the groups. At the same time, special attention should be given in order to guard against a situation

[7] While the Palestinians who are citizens of Israel are entitled to vote in the parliamentary elections, their participation does not influence legislation or policy.

where belonging to a certain group becomes the most significant source of rights, rather than citizenship or membership in the broader polity.

Historical Redress, Transitional Justice and Transformative Constitutionalism

Constitutional change in a post-conflict 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.[8] The second role for the constitution is mainly forward looking: transformation. It should mark a break with the past and it is 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.'[9]

Transformation cannot be an initiative that is undertaken solely by the legal system. It is essentially a political process with many actors, and the legal system could play an important role.

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[8] Juan Méndez, "Constitutionalism and Transitional Justice," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, (Oxford: Oxford University Press, 2012).

[9] Karl Klare, "Legal and Culture Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 146.

This role was articulated in the post-apartheid jurisprudence of the South African Constitutional Court which emphasized that the post-apartheid 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 in the context of social and economic rights, even if this transformation did not go far enough in some areas.[10] 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 which have established and entrenched the current apartheid realities. It means that constitutional practice should be guided by the principles that are at the heart of the thinking about a single state, such as the principles discussed in this section.

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

[10] Dennis Davis and Karl Klare, "Transformative Constitutionalism and the Common and Customary Law," *South African Journal on Human Rights* 26, (2010).

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."[11] 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.[12] Many writers on the other hand see the Zionist project and the formation of the state of Israel as a form of settler-colonialism.[13] 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,[14] or like Baruch Kimmerling who adopted the settler – native distinction but without using the term settler-colonialism.[15] Some, like Wolfe, even observe that the Zionist logic of elimination is more exclusive than in Australia or the United States.[16]

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[11] Patrick Wolfe, "Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era," *Social Analysis* 36, (1994): 96.
[12] Alan Dershowitz, *The Case for Israel*, (Hoboken: John Wiley & Sons, 2003); Amnon Rubenstein and Alexander Yakoboson, *Israel and Family of Nations*, (New York: Routledge, 2009).
[13] Fayez Sayegh, *Zionist Colonialism in Palestine*, (Beirut: Research Center–Palestine Liberation Organization, 1965); Maxime Rodinson, *Israel: a Colonial Settler State?*, (New York: Monad Press, 1973); Edward Said, *The Question of Palestine*, (New York: Times Books, 1979); Nahla Abdo and Nira Yuval-Davis, "Palestine, Israel and the Zionist Settler Project," in *Unsettling Settler Societies,* ed. Daiva Stasiulis and Nira Yuvl-Davis, (London: Sage Publications, 1995).
[14] Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882 – 1914*, (Berkeley: California University Press, 1989); Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship*, (Cambridge*:* Cambridge University Press, 2004).
[15] Baruch Kimmerling, *Clash of Identities: Explorations in Israel and Palestinian Societies*, (New York: Columbia University Press, 2008).
[16] Patrick Wolfe, "Purchase by Other Means: The Palestinian Nakba and Zionism's Conquest of Economics." *Settler Colonial Studies* 2, no. 1 (2012).

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 could have several meanings depending on the context, location and epoch, such as 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 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 100 years, with the view of transforming society and the relationships between the two major groups into one that is built on equality. It entails, on the part of the settler society, the willingness to abandon the colonial privileges and recognition of the past injustices, and for the indigenous society the willingness to accept that the settler society, having abandoned it colonial privileges, has the legitimate right to exist as an equal partner in the 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, overlaps with the fours principles discussed earlier (equal citizenship, immigration, group rights and transitional justice and transformative constitutionalism). In some sense, they are all constituent components that are covered by the wider category of decolonization.

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 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 for its citizens' values, preferences or principles. It views the citizen first and foremost as an individual, and provides its citizens with the full range of liberal rights regardless of their belonging. It adopts a policy of difference-blindness when it comes to the citizens' identity 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 avoiding the stratification of the citizens into classes.[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 language or practicing their culture in the private sphere

It should be noted that what is seen as "universal equality" is in reality not universal, for it provides a preference for certain particular cultures. In does promote a hegemonic culture, or 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 the France. It does not impose the official language, but at the same time it does not recognize or promote the languages of the minorities.

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[17] Charles Taylor, "The Politics of Recognition," in *Multiculturalism,* ed. Amy Gutmann, (Princeton: Princeton University Press, 1994).
[18] Alan Patten, "Beyond the Dichotomy of Universalism and Difference: Four Responses to Cultural Diversity," in *Constitutional Design for Divided Societies: Integration or Accommodation?,* ed. Sujit Choudhry, (Oxford: Oxford University Press, 2008).
[19] Taylor, "Politics of Recognition," 44.

Adopting such a model for a new state 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, such as language, adopting cultural elements of both groups. While this will be transformational in the sense that it presents a break with the current situation where Jewish Israelis dominate the state, this transformation is 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 understanding of equality will be in its narrow sense only. It will be based on an individualist approach and will not account for diversity. This indifference to diversity means eventually that 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 will also create problems when it comes to group rights especially if those rights require some form of accommodation in the form of recognition of groups and adjustment to their special interests or needs. Similarly, this model will be in tension with transitional justice, for transitional justice in the context of the Israeli-Arab conflict has to account for identity and difference. But under this model, there are no groups, no settler society and indigenous society, but citizens and citizens only. It is likely to be the same approach regarding decolonization: for decolonization to work, one should first identify the colonial process and the privileges it created, which will be hard to achieve in a model based on uniformity.

The Bi-National Model

A binational state, in short, is one associated with two national groups. Those who belong the relevant national groups will be able to enjoy individual and national rights, and their right to be

represented in state institutions will be constitutionally protected.[20] The origins of this approach could be traced back to the *Brit Shalom* group which was later on 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 will never agree to a Jewish state in their land since that means that they will 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 could apply to a number of models. To avoid abstractions, the discussion here focuses on practicalities, and identifies four levels of binationalism.

Declarative Bi-nationalism

Bi-nationalism 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 of satisfying the aspirations of both groups. It provides recognition without providing special rights or privileges as a result of this recognition. Such a clause would be compatible with the principle of equal citizenship, and will not necessarily have implications for immigration policy. Group rights, may prove to be more complicated, depending on the kind of rights claimed and the level of involvement of the state. If issues such as religion,

[20] Bashir Bashir, "The Strengths and Weaknesses of Integrative Solutions for the Israeli-Palestinian Conflict." *Middle East Journal* 70, no. 4 (2016).
[21] Martin Buber, Judah Magnes, and Moshe Smilanksy, *Palestine: A Bi-national State*, (Jerusalem: Ihud Association of Palestine, 1946); Leila Farksakh, "A Common State in Israel–Palestine: Historical Origins and Lingering Challenges," *Ethnopolitics* 15, no. 4 (2016).

language and culture are seen as a matter of private preference only, the state will not promote any aspect of those, but at the same time would not interfere.

Bi-nationalism as Cultural Autonomy and Official Adoption of Symbols

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

Recognition and cultural autonomy could take different forms, and those will 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 will 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, will a cultural institution have the power to refuse service for or participation of a citizen just because she does not belong to the designated group? Third, 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 fourth 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?

Bi-nationalism and Immigration

The third level brings immigration and citizenship policy into the realm of bi-nationalism. Since it was enacted in 1950, the *Law of Return* was justified and rationalized based on the right to self-determination, namely that a state where 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 co-nationalists in their national home.[22] If this logic is applied to bi-nationalism then the 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 bi-nationalism was at the heart of the bi-national 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 is achieved.[23] This requirement might prove to be problematic on a number of levels.

Bi-nationalism and Governance: Consciationism

The principle of consociational democracy proposed by Arend Lijphart is the most relevant model of sharing power within the state between multiple ethnic groups. Lijphart's model aims to share, decentralize and limit state power. The model has a number of elements. First is 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, the police force and the army. The third element is mutual veto powers on matters of vital interests. This is especially important for minorities whose representation is not strong enough. The fourth element is segmental autonomy, either in the form of federalism or group autonomy in areas linked closely to ethnic identity.[24]

Bi-nationalism on the level of governance is indeed a form of consciationalism where the power is shared between the two groups. There is no one way to implement this system but the

[22] Ruth Favison, "The Jewish State: The Principle Justification and the Desirable Character," *Tkhelet* 13, (2002); Aharon Barak, *A Judge in a Democratic Society,* (Jerusalem: Nevo, 2004).
[23] Buber, Magnes, and Smilansky, *Palestine: A Bi-national State.*
[24] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration,* (New Heaven: Yale University Press, 1977); Arend Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15, no. 2 (2004).

principles listed above which could be implemented in a number of ways. In our context, this could be in the form of a bi-cameral parliament, a cabinet composed of equal number of individuals belonging to both groups, quota systems in the public service and other state offices, and veto rights on vital interests. This seems to be the thrust of the proposal by *Brit Shalom/Ihud*. One of the main components of their proposal included a constituent assembly to 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 too. Parity would also be maintained at the level of the executive control through an executive council. The proposal also spoke of a Jewish Council and a corresponding Arab Council which would be responsible for the cultural affairs for each community such as education.

Bi-nationalism: Pitfalls and Potential

The first problem of bi-nationalism in the context of the Israeli-Palestinian conflict is group definition. Two questions arise here: who are the two nations in the bi-national? The second question is: who is included in the 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 (anyone who is religiously or culturally Jewish) or Israeli. While there is overlap between the two categories, there is definitely a big difference. Even though sociologically one can identify that an Israeli collective has emerged in the past 70 year that has distinctive features 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 which emphasize citizenship and not religious or ethnic belonging. On a practical level, especially if this arrangement is accompanied with

[25] Buber, Magnes, and Smilansky, *Palestine: A Bi-national State.*

immigration rights similar to the ones adopted today, it means that millions whose only link is religious will be able to immigrate. Equally problematic is the issue of who would be included in the groups, or who is a Jew/Israeli, and who is a Palestinian. The question of "who is a Jews" 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 historic Palestine is Palestinian. But yet there are some who could not be included in this category, and could be seen as Palestinian by association, such as political figures who played important roles in Palestinian politics. Adopting a bi-national model means that these two categories need to be *legally* defined, and the eligibility to participate in politics and access to some services will rest on the whether the individual belongs to one 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 *Sejdic and Finici* case. As part of the Dayton Agreement, the Preamble to the Constitution of Bosnia Herzegovina describes Bosniacs, 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. Sejdic, who is of Roma origin, and Finci, who is of Jewish origin, wanted to stand for elections, but since they do 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 (*Sejdic and Finici 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: for them, in order to participate in politics, they will be compelled to associate with one of the two groups.[26]

The second problem is that emphasis on the national/ethnic belonging in politics in this manner is more conducive to highlighting what divides the polity rather than what unites it. Political power channeled through the ethnic/national affiliation makes membership in the communal group the source of political power and rights, rather than citizenship and membership in the state. This might lead to both groups adopting initiatives to develop and highlight the particular identity in a manner which is not necessarily constructive.

In addition to these particular concerns in our context, there are a number of salient critiques of the model in the academic literature. 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 among 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. Another critique is that consociationalism hinders politics of economic distribution especially that its focus is 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/political parties to be in power in the 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]

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[26] Sujit Choudhry, "Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power?," in *The Oxford Handbook of Comparative Constitutional Law,* ed. Michel Rosenfeld and András Sajó, (Oxford: Oxford University Press, 2012).

[27] Courtney Jung and Ian Shapiro, "South Africa's Negotiate Transition: Democracy, Opposition, and the New Constitutional Order," *Politics and Society* 23, no. 3 (1995); Rudey

Consociationalism is also likely to violate some of the principles mentioned in part II. Most significantly, it could potentially violate the principle of equal citizenship especially if implemented in the manner advocated by *Ihud* that speaks of an equally divided legislature. While the numerical composition of the population of a bi-national 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, such a 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 socio-economic 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 consocialtionalism promotes could be helpful without emphasizing the ethnic/national dimension. The adoption of a parliamentary system, proportionate representation (of parties) in parliament, recognition of the 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 bi-national model and at the same time avoid the potential risks. There is no one universally agreed

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Andeweg, "Consociational Democracy." *Annual Review of Political Science* 3, (2000); Donald Rothschilid and Philip Roeder, "Power Sharing as an Impediment to Peace and Democracy," in *Sustainable Peace: Power and Democracy after Civil Wars*, ed. Donald Rothschild and Philip Roeder, (Ithaca: Cornell University, 2005); John Nagel and Mary Clancy, *Shared Society or Benign Apartheid? Understanding Peace-Building in Divided Societies*, (London: Palgrave, 2010).

upon definition of multiculturalism, for there are a number of models that are practiced in different ways.[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 that are common for struggles to achieving multiculturalism.[30] The first one 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 is related to 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 principles could provide good guidelines that could help devise a model that maintains group recognition without entrenching group belonging and making it the main marker of politics.

Equality and Cultural Autonomy

The starting point of such a model is equality. In our context, in addition to this foundational level of relationship, the state should recognize that citizens belong to two main dominant groups, Palestinians and Jewish Israelis, with different languages, culture and history, and should give them 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

[28] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, (Oxford: Oxford University Press, 2007).
[29] Ibid., 61.
[30] Ibid., 66.
[31] Ibid., 66.

and communicate with the state in both languages. Also, special arrangements should be adopted to allow for the use of either language in government department (central and local), Parliament, and the courts. Similarly, the state should adopt a policy of bilingualism and encouraging (and in cases of critical services or monopolistic companies, mandating) 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 the distinctiveness of cultures. At the same time, 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. Cultural autonomy should be designed in a manner that avoids the problem of group definition, and in our context, where the question of who is Jewish-Israeli and who is Palestinian seems to be complicated and could potentially lead to many disagreements, the best marker that could be used is 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. And this way, the membership in the 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 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 they are not deemed 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. It should be informed by decolonization: that the new constitutional framework is a way to decolonize the state apparatus and address the wrongs of the past. It should be clear that this conception of equality aims to remove the privileges of the settler society rather than recreate them or rename them. It should also support and facilitate measures of transitional justice, for equality cannot be achieved without addressing the injustices of the past.

Multiculturalism and Democratic Governance

Multiculturalism does not provide specific guidelines about constitutional arrangements beyond the main principles discussed above. One can use these principles, and borrow from some of the ideas discussed under consciationism, 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 that rights of the other group, 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 and 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, non-racialism and non-sexism could only be amended with the support of 75% of members of Parliament and the support of 6

provinces out of 9. These principles should not just be declarative in nature but should also be seen as constitutional principles that legislation should observe and be compatible with.

Similarly, the system of governance could be designed in a manner that is more 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. Such arrangements can guarantee that parliament is representative of the general population, and that the cabinet will also have a 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 in part II. 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, one should also be aware of the critiques levelled 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 the vulnerable internal minorities, or minorities within minorities. The emphasis on the protection of equality of group identity might worsen existing inequalities within the group.[33] Sub-groups 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 are so central, that the preamble of the Federal Constitution of the Swiss

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[32] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, (Cambridge: Harvard University Press, 2001).
[33] Leslie Green, "Internal Minorities and Their Rights," in *Group Rights*, ed. Judith Baker, (Toronto: University of Toronto Press, 1994); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, (Cambridge: Cambridge University Press, 2001).
[34] William Riker, *Federalism: Origin, Operation, Significance*, (Boston: Little, Brown and Company, 1964), 11.

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, for 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 the citizens and the 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 within 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 or the state or the province has powers that are distinct and independent from the federal government. The division of power is usually done through the constitution. In situations where the constituent states are not pre-existing political units with defined borders, the most important question is the question of internal borders. In post-conflict 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

[35] Sujit Choudhry and Nathan Hume, "Federalism, Devolution and Secession: From Classical to Post-conflict Federalism," in *Comparative Constitutional Law,* ed. Tom Ginsburg and Rosalind Dixon, (Cheltenham: Edward Elgar, 2011); Daniel Halberstam, "Federalism: Theory, Policy, Law," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, (Oxford: Oxford University Press, 2012).
[36] Choudhry and Hume, "Federalism, Devolution and Secession."

the local level, 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 which will create two territories where each group –Palestinians and Israeli Jews- will form a clear majority. It is also 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 that will have significantly smaller territories. This will allow for a serious measure of self-rule for the residents of the units, and given the existing state of segregation, those units are likely to be homogenous with the exception of some highly mixed areas such as parts of Haifa, Yaffa, and Jerusalem.

Another important question is the powers of the territorial units. In post-conflict federalism, it seems that providing regional control of powers related to language, religious services, education, and other cultural aspects would satisfy the aspirations of the particular group living in that area. As opposed to other areas where questions of natural resources and their division arise (such as oil, gas, minerals) the cultural aspects are the most important aspects in our context. All other state functions and powers would be controlled by the federal state.

The other model of federalism is one that combines territorialism with consciationalism 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 linguistic groups, and what is known as "person-related matters" which include certain aspects of healthcare, family policy, education. The competence of the Communities, however, is territorially defined by the Regions. In Brussels, each Community is competent with regards to members of its linguistic group. The Regions have powers in economic area mainly. The Communities and the Regions have their own elected parliament. On the federal level, Belgium has a bi-cameral Parliament. The Constitution provides more seats for the Dutch speaking population than the French-speaking population, although linguistic parity is maintained at the Federal Council of Ministers. The Constitution requires a significant majority of two-thirds and a majority of each linguistic group for changing the current arrangements.[37]

A federal system that combines 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 powers given to the states or regions will be a matter to be decided, and a number of approaches could be taken. But since our concern here is with the cultural aspects of group rights of national and linguistic groups, the states or the regions will have control over rights and services related to culture. Cultural autonomy (education, religion, language, etc), therefore, would be 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 the areas of services such as health, social security, housing and other fields that deal with the particular needs of the local population.

[37] Maurice Adams, "Disabling Constitutionalism. Can the politics of the Belgian Constitution be explained?," *International Journal of Constitutional Law* 12, no. 2 (2014).

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, to a large extent, the Belgian model in that it combines federalism with consociationalism.

Federalism: Promises and Risks

Many critics argue that the promises of post-conflict 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 is more likely to reinforce conflict between identities. Simple policy questions will be recast as conflicts or tensions between national groups. Additionally, the fact that the different groups are in control of different regions –even if partial and within the confines of federalism- means that they can use the resources available and institutional tools for pushing for greater autonomy.[39] Another problem which is related to instability is the borders between the states or regions. On the one hand, drawing the boarder in order to create regional 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 a homogenous population 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.

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[38] Buber, Magnes, and Smilansky, *Palestine: A Bi-national State.*
[39] Philip Roeder, "Ethnofederalism and the Mismanagement of Conflicting Nationalisms," *Regional and Federal Studies* 19, no 2 (2009): 203; Dawn Brancati, "Decentralization: Fuelling or Dampening the Flames of Ethnic Conflict and Secessionism," *International Organizations* 60, no. 3 (2006).
[40] Donald Horowitz, *Ethnic Groups in Conflict,* 2nd ed, (Berkeley: University of California Press, 2000); Henry Hale, "Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse," *World Politics* 56, (2004).

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 the individuals and their local state at the expense of the bond with the federal state. Similarly, the question of economic redistribution will be a thorny one especially that 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 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 bi-nationalism are relevant when we consider federalism.

Given the nature of federalism and the risks in this model, there are important questions related to compatibility of the model with the principles discussed in part II of the chapter. 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

[41] Vicki Birchfield and Markus Crepaz, "The Impact of Constitutional Structures and Collective and Competitive Veto Points on Income Inequality in Industrialized Democracies," *European Journal of Political Research* 34, (1998).
[42] Barry Weingast, "The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development," *Journal of Law, Economics, & Organization* 11, (1995); Pablo Beramendi, "Inequality and the Territorial Fragmentation of Solidarity," *International Organization* 61, (2007).

and political power as a group 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 bills 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 as part of the Constitution. 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 is on judicially enforceable bills of rights that would 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

[43] Sujit Choudhry, "After the Rights Revolution: Bills of Rights in the Postconflict State," *Annual Review of Law and Social Science* 6, (2010).
[44] For a good summary, see Sultany (2012).

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 will be hard to anticipate whether this will be achieved especially in the transitional period. In this case, even according to the strongest arguments against judicial review, a bill of rights is necessary.

Tom Ginsburg advances the theory that bills of rights serve as a form of political insurance mechanisms in the context of transition to democracy.[46] Hegemonic groups or parties who anticipate losing their control over the political system as a result of 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, 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

[45] Jeremy Waldron, "The Core of the Case Against Judicial Review," *The Yale Law Journal* 115, (2006): 1360.
[46] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, (Cambridge: Cambridge University Press, 2003).

of judicial review could be helpful for both parties. In constitutional negotiations between the groups, each group will highlight and insist on constitutional protection of the interests 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, is mentioned in section 1 which could only be amended with a majority of 75% 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 to guarantee equality and the ability to participate in politics and facilitate redistributive projects. Beyond these fundamental ideas about 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. Different models could fit under this category, and the model’s efficacy, potential, risks and pitfalls depend to a very large extent on the details. As we saw, some models are more desirable and more amenable to addressing the important challenges, and others

may end up recreating similar problems and even introducing new ones. The primary conclusion is that a number of models exit that could be described as democratic, and each model has it promises and risks. The hard task here is the decision 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 social, political, historical and economic questions discussed 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 of 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; questions which will dictate whether the constitution facilitates the political project or hinders it. 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, for this is the ultimate test for its success. For this to happen the population should be able to see that the constitution is addressing its concerns and facilitating its political project.

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