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Constructing Equal and Vigorous Citizens. The Role of Legislative Politics

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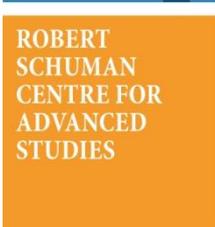
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Abstract

This paper proposes a 'constitutional' alternative to the current conflict between Palestinians and Israelis. Through an engagement with a particular branch of liberal political theory – Richard Flathman's 'wilful liberalism' – the paper proposes how strengthening legislatures rather than relying on judiciaries is central to the conflict. This proposal seeks to ensure that the nature of equality is protected in the region by encouraging citizens to be more actively engaged in their political lives through the creation of robust legislatures. Rather than seek to reinforce the existing legislative structures alone, however, the paper proposes how a transnational legislative structure might not only protect and empower individuals it might also help to lessen the conflict in the region. The paper is largely one of constitutional theory rather than empirical detail, though by setting out this alternative, it hopes to contribute to those seeking alternatives to the currently stalemated conflict.

Keywords

Introduction[*]

This paper argues that attaining a form of liberal equality in the Palestinian-Israeli context requires stronger legislative institutions. Admittedly, the current functioning of legislatures in either political context does not suggest that such institutional reform will accomplish this objective. Over the course of the argument, however, I seek to make a theoretical case for the importance of legislatures and then use that case to intervene into the Palestinian-Israeli context. In so doing, I do not presume that this will resolve the many overlapping issues surrounding this conflict; rather, this is an effort at 'out of the box thinking' with a particular focus on constitutionalism as a possible avenue for such thinking (Mossberg 2010; Grinberg 2010). In terms of constitutionalism, then, rather than rely on a judiciary to discover the rights of individuals by arriving at the 'right' answer through constitutional deliberation, this paper will propose how the design and implementation of legislative institutions provides a means by which individuals can claim and enforce their own equality. The argument develops a theory of liberalism that emphasizes the centrality of political agency.

Legislatures tend to be the least popular of governmental institutions. The inability of the US legislature to pass a budget in 2013, caused in part by ideological politics within the US House of Representatives, reminds us why. They are sites of political posturing, self-interested behaviours, special interest pleading, and political compromise that lay bare the hypocrisy associated with so much of modern politics. Yet, as Jeremy Waldron reminds us, legislatures are crucial to successful liberal politics. They are the location of vigorous deliberative democracy. They are the space in which disagreement can be addressed non-violently. They provide fora in which executives can be held accountable. They provide citizens with the means to legislate, which allows them to exercise their public reason in ways that advance their interests and the larger democratic project (Waldron 1999; Waldron 2006).

The paper will also briefly compare the practices of the Knesset and Palestinian Legislative Council in terms of how they protect and promote equality through their institutional structures concerning representation, law making and political party formation. The paper will propose that if there is to be a "two state-solution" to the conflict, these two institutions might be revised in some ways, but will also suggest that a more important innovation would be a transnational legislative body. This proposal could function in a federal and/or supranational context; its design is not intended to predetermine the larger political context. Drawing insights from the European Parliament and the devolved British constitutional structure, and keeping in mind the centrality of equality and citizenship, the paper will argue that such an institution would allow for the continuation of certain political identities in the contexts of Israel and Palestine, but would also ensure multiple forms of representation that can further protect and help cultivate active citizenship in the region.

The paper proceeds as follows: The first section uses Ronald Dworkin's defence of equality in liberal constitutionalism as the clearest argument for its importance and how it can be achieved by judiciaries ensuring the protection of rights. While Dworkin's understanding of liberal equality provides an excellent starting point, I suggest that it leaves the individual unable to ensure his or her equality through an active form of political practice. Partly as a supplement to, and partly in opposition to Dworkin's account, I turn to a different form of liberalism, that of Richard Flathman, whose 'wilful' liberalism proposes that the liberal tradition should promote a kind of deep scepticism about theories that seek normative agreement, due in large part because of the ways in which language and identity create profound differences among human persons. Comparing Flathman and Dworkin, I suggest that

there are points at which they agree, but that Flathman's account turns us away from Dworkin's largely judicial focused conception of constitutionalism.

I then turn to the centrality of the legislature in ensuring the kind of liberalism that Flathman proposes (though he himself was sceptical of most institutional solutions to political problems). I look to the work of Immanuel Kant *via* Jeremy Waldron to argue for the importance of legislating as central to liberal constitutionalism. Kant argued that to be a person using reason is paralleled by the act of a community making law. Legislatures do more than just make laws such as limiting the power of the executive. In this paper, however, I focus primarily on the act of law-making, which draws from both Kant's emphasis on the law of reason and Flathman's emphasis on the idea of self-making. Finally, I briefly review the Palestinian and Israeli legislatures, the former stunted by the ongoing conflict, the latter facing threats from an encroaching judiciary and executive, and suggest that both need to reassert their roles as the central elements in their respective political orders. But, I conclude that perhaps through a transnational legislature will there be a new phase in the conflict. I briefly propose how a transnational legislative body might both help bring together warring sides and also, more importantly, constitute equal citizens in this conflict ridden region.

The approach undertaken in this paper is that of International Political Theory which draws on the methods and traditions of political theory to speak to a wider range of issues and problems in the global order. While I argue for a form of liberalism in this paper, it is a liberalism that develops through an appreciation of the contested nature of liberalism itself. The analysis in this paper draws less on Middle East comparative politics and more on constitutional theory, which can be applied to the region (Brown 2002, Lang 2013, Thompson 2013). The proposal, especially of the transnational legislature, is admittedly not something to be achieved any time soon. Rather, it is an effort to work out the possibility of an alternative framework for how equality might be achieved in the context of the Palestinian-Israeli conflict.

Dworkin on Equality

Ronald Dworkin calls equality the 'sovereign virtue' (Dworkin 2000). His masterful defence of a form of liberal equality sets the stage for the issues to follow, though as will become evident soon enough, it has its limits. Dworkin begins by arguing that equality cannot be of 'welfare' but must be of 'resources'. By this, he means that because of the complexity of what it means to be a human being, due to diversity in lifestyles and taste, we cannot frame a political order such that it seeks to promote equality of welfare. Rather, because we can come up with some means of comparing access to resources and their benefits to our lives, we should establish a political order that seeks to promote some level of equality in this realm rather than in more open ended realms such as happiness. Dworkin argues that this basic idea underlies John Rawls' famous original position, the heuristic device by which individuals design a political society without knowledge of their own abilities in such a way that any limits on their liberty will be to advance the equality of those least privileged. As Dworkin notes, the decision to privilege this least advantaged group results from the existence of a moral foundation for the principle of equality of resources (Dworkin 2000: 119).

To achieve this equality, however, Dworkin does not look to the legislature due to his long standing defence of judicial review as the most important element of a liberal and democratic political order. His preference for the judiciary results in part from his very early defence of rights as trumps against which all other principles in a liberal society must be measured (Dworkin 2013 [1977]). In the book under consideration here, he argues that representative democracy, while of course central to the protection and advancement of equality, must take into account the importance of making what he calls 'accurate' decisions concerning political outcomes (Dworkin 2000: 204). Accuracy, he admits, assumes that there are right answers to moral questions, which would be connected in some ways to his defence of rights.

While rights can and do provide a way to achieve equality, there are other means by which equality can be achieved. Instead of an alternative, the argument made here should be seen as a supplementary means by which equality can be attained in liberal politics: an invigorated form of agency. By agency, I am making a claim similar to Aristotle's idea of citizenship, which is the virtue of being able to rule and be ruled. Agency means cultivating a kind of disposition in citizens that will encourage them to be involved in political life, to participate in public political events, and to stay informed about politics. This political agency and engagement should not come at the expense of citizens' personal interests but must somehow connect their interests to those of the community. Again, Aristotle is helpful here in his idea of *phronesis*, or prudence, which means being able to make judgments that are not completely self-oriented but include a healthy respect for and promotion of one's own personal interest. Hannah Arendt also privileges agency, in part through a dialogue with Aristotle and others in the Greek tradition. Her account highlights the centrality to political life of active engagements in the political sphere by which individuals reveal themselves and work toward the construction of a shared political space within which such activities can continue to take place (Arendt 1958).

Dworkin's liberalism, then, is one of not simply rights but of right answers. This kind of liberalism is admittedly a powerful corrective to certain accounts of majoritarian theories of politics in which rights can be overridden by the majority. Dworkin and others believe that judiciaries with the power of constitutional review can partly address this problem. There is an interesting analogue to Dworkin's account in the way that certain Middle East countries enact review by a different kind of court, one that derives its authority from sacred scriptures or clerics. Iran is the primary example of such an institutional framework. The Guardian Council, established in the wake of the Iranian revolution of 1979, seeks to ensure that all legislation is in accordance with sharia, or Islamic law. While this is not a court in Dworkin's sense, it is nevertheless a court of sorts. It seeks to find the 'right' answers to constitutional and political questions. Admittedly, the court structure in Iran is complicated, and its constitutional heritage is the result of historical Shi'ite jurisprudence. But what the Guardian Council demonstrates is that when such an appeals structure is established in order to advance a particular set of normative ideas or values, it will undoubtedly overstep its boundaries and become a power centre that advances its interests or a distorted version of its own morality. This is not a critique of the particular form of jurisprudence employed by this political system, i.e., Islamic; rather, it is a wider critique of how an appeal to 'right' answers undermines political process and deliberative democracy. As Said Arjomand demonstrates, the Guardian Council has undermined any role for a judicial structure that might protect the rights of individuals (Arjomand 2013). Additionally, especially because of its non-liberal role of approving candidates who can run for parliament, the Majles, the Iranian parliament, has been threatened not only by the executive in Iran but by the Guardian Council as well (Fahri 2013). The Guardian Council might be seen as an extreme version of Dworkin's idea, one that relies on a particular reading of Islamic law in the pursuit of ideological purity, or simply in an attempt to find the 'right answers'.

So, in the pursuit of rights that are central to liberalism, a judicial approach may lead to problems by failing to give agency to individuals, especially if that agency relies on and derives from a kind of deliberative democratic structure. The danger of leaving constitutional protections to a court might be seen as particularly dangerous in the Middle East, where efforts to find 'right' answers can lead to powerful interests overriding individual agency. Before moving on to how a legislature might counter this, let me suggest an alternative to Dworkin's particular underlying liberal philosophy, through a different kind of liberalism.

Flathman on Liberalism

Richard E. Flathman proposes what he calls a 'voluntarist' conception of liberalism. In other places, he calls this liberalism wilful or agonistic. It is, ultimately about the ability of individuals to make themselves by engaging in political action. Flathman undertakes this task through an engagement with

thinkers as diverse as Hannah Arendt, Ludwig Wittenstein, William James, and Thomas Hobbes (Flathman 1992, Flathman, 1994, and Flathman 1998).

Voluntarism relies on the importance of voluntary action, which Flathman argues is central to any liberal tradition that is true to its focus on liberty. Voluntary actions are those that we choose ourselves, are not coerced, and that result from 'desires and interests, beliefs, values and reasons that are in some sense the individual's own… Understood as an ideal for human life, its emphasis is always first and foremost on the often-wonderful character of human conduct (notwithstanding its frequent vulgarity, ugliness, immorality, and the like), on the ways in which the inexplicable diversity of our thinking and acting should be celebrated by us' (Flathman 1992: 9-10).

Flathman finds this voluntarism expressed most clearly in the political theory of Thomas Hobbes. This is surprising, at first glance, because Hobbes is so often presented as a theorist of absolutism, sometimes posed against the liberalism of John Locke. But Hobbes is certainly a liberal theorist, one who begins from many of the same epistemological and metaphysical premises as Locke. Their divergence, of course, centres on the ability of individuals to resist government if it violates the contract established among the people, which Hobbes does not find acceptable in the same way. This dimension of Hobbes' thought, however, is not central to the argument being made here. What is important is the centrality of 'self-making' that exists in Hobbes' political theory. Flathman traces this idea through Hobbes' scientific and philosophical ideas, but focuses in particular on how Hobbes viewed language as something that is used by individuals to make themselves and the world around them. This self-making extends, of course, to such things as the Leviathan, the state that provides the means for individuals to continue their acts of self-making by providing a form of order and structure.

For all of Hobbes' talk about the absolute authority and fear-inspiring power of the Sovereign, his Leviathan is and on this premises can only be a paper tiger, is and must be incapable of cogently demanding or effectively compelling more than minimal obedience from its subjects. His Leviathan could not begin to impose the order and control he wanted. (Flathman 1994: 7)

Flathman uses other thinkers than Hobbes to make his points, but his reading of Hobbes is so provocative that it is useful to emphasize. A key element of this reading is that Hobbes recognizes the diversity of human existence and especially the diversity of human thought patterns. Both Hobbes and Flathman are sceptical of efforts to convince us to change our minds through a deliberative process (Tuck 2002: 215). Indeed, it is only through individual self-making that we are truly human. For Flathman, this means that liberal institutionalism is problematic, especially when it verges toward efforts to create rules or the rule of law that will ensure individual citizens conform to standard values and/or norms in order to create a peaceful society (Flathman 1998: 79-104). The title of one of Flathman's books captures this sentiment – *Reflections of a Would-Be Anarchist* (Flathman 1998). Flathman argues that institutions that arise in a liberal state often verge toward communitarian value based efforts to create uniformity of belief and action in ways that prevent equal and engaged citizens from working together to create their political order. Though it might echo such ideas, Flathman differentiates himself from libertarian thought, such as is found in the work of Friedrich Hayek and other neoliberals. Rather, he presents his account as being sceptical of any 'arrangement or rule, principle or person' having the authority to establish what is right and good for all (Flathman 1998: xvi). This differs from his earlier work on authority in which he argued that for authority to function, it requires some broad acceptance of what he calls 'authoritative values' (Flathman 1980).

This last point from Flathman is important for the Middle East. Too often, there are efforts to describe Middle East politics as not simply *being* authoritarian but actually *needing* a kind of authoritarianism to deal with conflicting ethnic and religious frameworks. Indeed, a Hobbesian Leviathan, in the common sense understanding of that word, seems to be just what not only political actors but scholars writing about places as diverse as Egypt, Syria, and perhaps even Palestine seek to promote as necessary for governing the conflicting and violent polities they govern and study. But, in Flathman's reading of Hobbes, the authority of the Leviathan depends on individual people being

active, equal citizens who can evaluate and assent to a government rather than quiescent individuals forced to conform to a particular ideology or value system. That is, rather than being based on the power of the sovereign to define right and wrong, good and bad, (and God and Satan), Flathman's Hobbes provides a framework in which there need to be active, vigorous citizens who constitute the Leviathan that governs them. When polities appeal to the wisdom of leaders, their connection with ideological frameworks, or even divine conceptualizations of how the world ought to function in order to justify their mode of governance, it is precisely the sceptical political liberalism of Flathman that can help disabuse us of those notions.

Flathman does not develop an account of institutions in his liberalism, for he is wary of their power to overwhelm political life and prevent individuals from engaging in continual acts of self-making (Flathman 1998). Here I differ from Flathman in that I see a crucial role for institutions in which individuals can turn their energies into a long term set of institutions that can frame their political lives. In my view, the one institution that is the most important for constructing the means by which liberal self-making can flourish is the legislature. The act of law-making is the kind of action that Flathman finds in Hobbes and which he celebrates throughout his work; that is, I think that the act of law-making can be part of the wilful liberalism that Flathman seeks to promote. The following section makes this case through an engagement with the work of Immanuel Kant and Jeremy Waldron.

Kant (and Waldron) on Legislation

Legislation is not the same thing as law, for legislation is the act of making law by an assembly, usually a representative one such as a parliament. Moreover, legislation is often looked down upon in legal theory, a point from which Jeremy Waldron has recently made a vigorous dissent. In his Seeley Lectures, entitled *The Dignity of Legislation*, Waldron begins by noting that in many works on legal theory, particularly from the broad Anglo-American positivist tradition, the only good law comes from judicial bodies. The image of the wise judge deliberating about how to interpret a constitution is preferred to the self-interested and unpredictable antics of legislative bodies (Waldron 1999). In response to this preference for law making through judicial review, Waldron seeks to valorise the legislative body, not by turning to the utilitarian traditions of Bentham and Austin, but to theorists usually associated with the protection of rights, Locke and Kant, and a theorist noted for his focus on virtue and community life, Aristotle. Through an engagement with each philosopher, he develops a nuanced and powerful defence of the legislative branch and, importantly, the act of legislation as a crucial element in the practice of democratic and liberal governance. The core of his argument is that legislation and legislative bodies provide the space within which interests can be reconciled not by eliminating differences but by giving legislators and representatives the opportunity to understand and engage each other through a long term deliberative practice. In so doing, legislation creates a kind of public political action that is at the heart of liberal and republican political theory, which is at the core of constitutionalism. This is not to deny that other agents of government have crucial roles, both the executive and the judiciary. Rather, the point is that the legislature provides a space for more active engagement from citizens in ways that executive and judicial bodies do not.

Building on one aspect of Waldron's account, let me briefly turn to Immanuel Kant, who is considered one of the most important philosophers within the liberal tradition. Kant is a theorist of liberalism who is perhaps closer to Dworkin, especially in his belief that there is a 'right answer' that can be found through the correct exercise of reason. I do think, however, that some elements of Kant's conception of legislation can link up with Flathman's liberalism, especially in the centrality of the public use of reason to make law.

Before turning to his theory of legislation, however, it is important to highlight two elements of his thought. The first and most essential part of not only Kant's political philosophy but his moral philosophy is freedom, an idea he develops in the *Groundwork for the Metaphysics of Morals* (Kant 2002 [1785]). The moral law is something we know through reason. He believed that the proper use of

the faculty of reason would allow the person to understand the necessity of morally correct behaviour. Connected to reason is the will and it is through the use of our reason that the will's role in moral life can be understood. The will is central to Kant's moral philosophy, for morality only makes sense if we are able to act through a will that has not been coerced. Indeed, to understand this point does not require fully assimilating Kant's philosophy, for it is a rather common sense idea. If I am to be judged as acting rightly or wrongly, it is necessary that my actions be seen as emanating freely from something internal to me. If my actions can be explained away as the result of some force over which I have no control, whether it be God or nature, then it is difficult to see how I might be responsible for my own actions. For Kant, this internal element by which I can be judged to have acted morally or not is the will.

The will, however, should not be understood here as simply my desires. In fact, for Kant, a good will is one that acts in accordance with duty rather than desire (Reiss 1991: 18). This results from the fact that I live in community with others and for me to act in a way that allows me and others to have the same freedom means my actions must be constrained. This constraint, again, is not from an external authority. Because we live with others, our internal freedom must correspond to our external freedom. This external freedom means acting in accordance with the rule of law. So, to be truly free in Kant's philosophy does not mean doing what we desire, but acting so that our wills conform to our duty which creates a world of law abiding individuals.

The second principle of Kant's political philosophy is publicity. This means that politics should not be hidden from the citizenry in the name of some mythical national interest or security. For Kant, this is connected to his idea of enlightenment, which is in the background of much of his political writing. In his famous essay, 'An Answer to the Question: What is Enlightenment?' Kant links publicity to freedom (Kant 1991 [1784]). To be enlightened, for Kant, means that one's public use of reason is not subject to restrictive or paternalistic authority, especially governments and churches in Kant's day. For us today, that might mean thinking about matters in such a way as we are not influenced by the media, friends, or family. That is, for Kant, to be enlightened means to 'think for oneself'. But it also means that we must be able to think in public, something he describes in the following:

> For enlightenment … all that is needed is freedom. And the freedom in question is the most innocuous form of all – freedom to make public use of one's reasons in all matters…. The *public* use of man's reason must always be free, and it alone can bring about enlightenment among men; the *private use* of reason may quite often be very narrowly restricted, however, without undue hindrance to the progress of enlightenment. But by the public use one's own reason I mean that use which anyone may make of it as a *man of learning* addressing the entire *reading public*. What I term the private use of reason is that which a person may make of it in a particular *civil* post or office with which he is entrusted. Kant 1991 [1784]: 55

Kant is arguing that freedom is the most important foundation for enlightenment, but it should be freedom that is made use of in public. The 'public' space here is somewhat confusing, though. As Elisabeth Ellis has argued, this space is one which does not involve one's roles in civil society; so, for instance, a member of the clergy is acting in 'private' when he or she makes official statements about church doctrine, but is acting in the public sphere when he or she is stating how those doctrines relate to public life shared among citizens in a community (Ellis 2005: 20). Ellis develops this idea of publicity in Kant further, arguing that it provides us with an idea of civil society in which individuals can make their voices heard in an intelligent manner, one which will help the society and humanity overall evolve toward greater peace, justice and harmony.[1]

The third idea that requires some clarification is Kant's conception of law and legislation. Kant's political theory is very much a republican one, or one that emphasizes the creation of political space

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[1] Waldron finds the same principle of publicity central to Hobbes' work. In an essay he wrote in response to Flathman's account of Hobbes, Waldron claims that the publicity of the law is what Hobbes believes is necessary for individuals to ascent to it. See Waldron 2002.

that allows for the maximum amount of liberty with a balance for political order. Importantly, this means it is not only about ensuring rights for citizens, but ensuring that the state is organized such that no single agent within the state can dominate it, or what we would call the separation of powers. Kant's political system establishes such a separation, although not in the full sense in which this concept is understood today. Kant lays out this idea in the first part of his work, *The Metaphysics of Morals* (Kant 1991 [1797]). This work is composed of two parts, the first focused on right and the second focused on virtue. This first section is sometimes referred to by its German name, *Rechtslehre*, which means something like the 'science of right'. Note that this is not about 'rights' in the sense of human rights as we understand them. Rather, this section of Kant's work is about the idea of right as an organizing principle of politics, specifically how to structure the political system so that everyone's freedom can be respected, or as Kant puts it: 'Right is therefore the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with the universal law of freedom' (*Ibid*.: 133).

In this work, Kant separates the three institutions of governance analogously to the way in which individuals act. The legislator is like the operation of reason, the executive like the will, and the judge is like the actual outcome of the decision making process in specific cases (*Ibid*. 138).

Moreover, and importantly for this paper, the legislative power is the most important one in Kant's conception, in the same way that reason is the most important faculty in the human person. This legislative power constitutes the sovereignty of the people, for it is through participating in the legislative process that people unite into the general will. As Kant states, 'The legislative power can belong only to the united will of the people' (*ibid*. 139). Further, it is in so acting as the legislative power that the people become citizens: 'The members of such a society (*societas civilis*) or state who unite for the purpose of legislating are known as citizens (*cives*)…' (*ibid*.). The power of legislation, then, is not simply about creating good laws; it is the fundamental element of political life for the ordinary human person. Of course, this does not mean that all people are directly part of the legislating process, for this happens through various configurations such as parliaments. But, it is important to note that Kant distinguishes this legislative action from other kinds of rules, such as regulations, by the fact that it comes a unified will of the people. When the executive makes commands, these are not instances of law but of ordinances or regulations. When the executive seeks to make laws, this is when government becomes despotic (*ibid*. 141), for it conflates the role of the sovereign (reason) with that of the agent who enacts the law (will).

Waldron helpfully finds in Kant, then, a strong defence of the legislature, not just of law. That is, rather than a defence of the rule of law, this account makes a defence of law making one that links up to a defence of liberal agency, the importance of making the human person one who can defend him or herself through an engagement in the public realm. This account reflects Flathman's emphasis on the self-making at the heart of his liberalism, though, as noted above, Flathman is wary of over-institutionalizing political life. The legislature is a place where the liberalism of self-making and active citizenship can reinforce the basic equality of all persons. This differs from Dworkin's account, which looks to the judge and a foundational conception of rights to ensure equality. Of course, rights are central to how equality is defended in many realms, but it is also important to note that individuals can make themselves in many ways through their active engagement in political life, which the account so far suggests can best happen in legislative bodies.

Palestinian and Israeli Legislatures

To what extent do the legislatures of the Palestinians and Israelis live up to the model of a legislature that enables liberal political agency? First consider the Palestinian context. There exist two parliamentary structures for Palestinians, the Palestinian National Council (PNC) and the Palestinian Legislative Council (PLC). As described on the Palestinian observer mission to the UN website, 'The PNC, which is the highest decision-making body of the PLO, is considered to be the parliament of all

Palestinians inside and outside of the Occupied Palestinian Territory, including Jerusalem.'[2] The PNC meets in various places, including the Palestinian Territories, and has over 600 members. The PNC currently resides in Amman, Jordan, where it continues to meet.

When the Oslo Accords were signed in 1993, however, a process of institution building began within the Palestinian Territories which included the creation of the Palestinian Legislative Council (PLC). Officially, PLC delegates are members of the PNC, which gives the PNC the ultimate authority. When it was created, however, the PLC was a new institution for Palestinians; it was the first time that a parliamentary structure with law making powers had been created in Palestine itself (Brown 2003: 94-137). Elections were held in January 1996 and 88 delegates met for the first time in March 1996. Under the terms of the Oslo Accords, the PLC is not a sovereign parliament, though its design and activities belie this point. The majority party in the initial stages was Fatah, which dominated the institutions and political positions following the Accords. The parliament was as representative as it could be under the conditions imposed by the Accords and the ongoing conflict with Israel (Brown 2003).

For many, the PLC has been seen as a failure, for it has not constrained the executive, even in its initial phases, and since 2009 it has failed to be a significant presence in Palestinian politics (Abu-Amar 1997). While its continuing role is under question, especially in light of the split between the Gaza Strip and the West Bank (Hilal 2010), it might, in a small way at least, be interpreted as undertaking the type of law-making that I proposed as central to the wilful liberalism articulated above, particularly through its law making practices. First, its law making practices were more inclusive of the Palestinian population than the PNC had ever been (and more effective, in that was based in the territory and had competencies concerning domestic life). For instance, in its efforts to create a 'Basic Law', roughly the equivalent of a constitution, the PLC underwent a more inclusive process of law making.

> Drafts were publicly circulated, PLC members attended public workshops and town meetings, and the technical help offered by the PLO's Legal Committee and the Ministry of Justice's Diwan al-fawa wa-l-tasrhi gradually faded in importance in the process (though it retained its role in ordinary legislation). Other laws followed a similar path: the NGO Law was drafted initially in Palestinian ministries but then, when taken up by the PLC, came to resemble much more closely drafts produced by NGOs themselves. Professional associations participated in drafting laws that governed their own affairs… [B]y its very procedures-in which draft laws underwent an initial reading before the entire PLC-it became easy for affected groups to track relevant legislation, and PLC members and committees regularly consulted affected groups. Brown 2003: 126

Brown highlights a second crucial feature of the PLC, that its law making efforts reflected a less securitized and more broadly understood liberal approach to political life. The PLC worked with international NGOs and parliamentarians around the world in seeking advice on the laws it sought to pass. But because they came to their position with different concerns than the largely revolutionary members or the executive, who had learned their political practices from other Arab governments where parliaments were (and are) rather weak, the PLC members initiated legislation that sought to advance a more inclusive political structure within Palestine, from a revised version of political party laws to the Basic Law itself.

Again, there has not been much success since the early days of the PLC, and it failed to constrain the executive which continues to dominate the system. The results of the 2006 elections in which Hamas won the majority but then were not recognized by the executive authority of the Palestinians, and when many members were arrested, effectively immobilized the PLC (Hilal 2010: 29). My only point here is to highlight that when the PLC was working it seemed to embody a kind of liberalism that might have contributed to something different in the Palestinian context, a more engaged and active citizenry playing a role in making laws to govern it.

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[2]　See http://www.un.int/wcm/content/site/palestine/pid/12345.

Turning to the Knesset, there is, of course, a more robust parliamentary institution in place, one designed to be the dominant institutional structure at the founding of Israel in 1948 (Mahler 2004: 141). The 'Westminster model' in which the executive comes out of the parliament obviously gives great power to the legislature as the primary entity in the system. Additionally, the lack of a written constitution that would allow the judiciary a strong role in the system makes Israel's political order a prime candidate for the kind of liberalism described here.

But the Israeli political system has evolved in two directions that undermined the power of the legislature. First, in 1992, a law was passed that allowed for the direct election of the prime minister rather than having him selected by the President as a result of his or her party winning the majority in the Knesset. This law was reversed in 2001, but it nevertheless strengthened the power of the executive at the expense of the legislature. When the Israeli political system switched to a system in which the prime minister and party elections were separated, this may have contributed to an increase in identity politics focused on ethnicity and religious belief. The logic here, according to Myron Aronoff, is that because the prime minister is elected on the basis of a wider national interest concern (as with the US president), parliamentary elections focused instead on more localized interests (Aronoff 2000: 102). Such a focus would undermine the kind of self-making that Flathman proposes, and which I believe is best manifest in a powerful legislature, in that identity politics do not lead to the kind of interactive self-making that a political community requires. Rather, one can see it as a kind of anti-liberal self-making that generates conflict and dissent in a political community particularly through its exclusionary practices as opposed to a more pluralistic ideal. While this law has been reversed, one might argue that the larger 'Americanization' of Israeli politics that led to this change, and can be seen in the politics of Benyamin Netanyahu, continues to undermine a more vigorous political system in Israel. Indeed, the 2013 elections in Israel seemed to reinforce the focus on the personalization of politics, as parties put forward individuals as central to their platforms rather than ideas (Yiftachel 2013: 56).

The second change was a more active Supreme Court, and the creation of a constitutional like text through the activist court of Aharon Barak. Barak's efforts have been welcomed by many, as he has argued that judicial review is central to the creation of a democratic system in which equality and rights are paramount (Barak 2012). There is not enough space in this paper to explore this change in full depth, but it is important to highlight its role in constructing a kind of liberalism. Many see Barak's efforts as the embodiment of the Dworkinian approach to liberal democracy. And, indeed, Barak's efforts are to be welcomed on many fronts in making Israel a stronger, more rights based political system. At the same time, it is unlikely that this move might create a more vigorous citizenry engaged in the kind of political self-making that Flathman, and I, think are central to both liberalism and the promotion of equality.

The Knesset, despite these changes, remains a powerful institution with Israeli politics. It is also a model of democratic governance in many ways, and its robust and vigorous political debate, coalition politics, and efforts to advance democracy and equality in Israel do map on to many of elements of the liberalism I articulated above. At the same time, shifts in its politics to more identity based party structures and the creation of a more powerful Supreme Court may undermine these changes to some extent. Interestingly, the 2011 emergence of tent cities and protests throughout Israel in which Israeli citizens, many young, sought to advance a more equal and just distribution of resources and political power, did not emerge from the Knesset and, in some ways, arose in response to perceived inequalities arising from entrenched political interests and political parties. But even more importantly for the purposes of this paper, Israeli politics has moved away from accommodation with the Palestinians to a more aggressive effort to side-line their interests and agendas. If there is to be equality across the two communities, perhaps a different legislative structure is necessary.

An Alternative Legislature

The following brief remarks on the Palestinian and Israeli legislatures suggest that in both cases, the legislature can serve as an institution in which wilful liberalism might be able to flourish and enhance political equality. But in both cases, the existence of the other community has confounded the ability to truly advance such equality across the two. Is it possible, then, that a more inclusive transnational legislature might help remedy this?

There have existed and still exist models of legislatures that cross the boundaries of any single community. Reviewing some of these is helpful in establishing what an alternative legislative model might look like in this context. Colonialism, while by definition a relation of inequality, did see the emergence of law making practices that included individuals from different communities. For instance, Great Britain developed something called the 'legislative council' which sought to create legislative bodies that included representatives from the colonial centre and the colony. These institutions created laws that reflected the interests of both the colonizer and the colonized. Of course, such institutions reflected the power dynamics of colonialism, and are not ones that should necessarily be the model here. More importantly, by creating implicit inequalities, these institutions failed to allow for the advancement of political equality. Nevertheless, they suggest that law making can occur in a diversity of contexts (Wight 1946, Lang 2013b).

From the Middle East, the transition of the Ottoman Empire toward more constitutional reforms in the 19th century Tanzimat movement provides evidence of another alternative form. More germane to this paper, these reform efforts also contributed to the political activism of individuals throughout the empire. For instance, the peasant revolts of the mid-19th century Lebanon reflect the emergence of political activism on the part of those who had long been side lined from political life by the feudal structure of their societies. The efforts of Tanyus Shahin, a local Maronite peasant leader from Lebanon to increase the role of the previously marginalized community in the representative councils that made law in the Ottoman Empire demonstrates the ways in which a greater political activism developed during this era. Admittedly, this was more of a demand for greater representation, but this kind of demand is what could be the foundation for a transnational legislative structure. As described in Elizabeth Thompson's recent work on constitutionalism in the Middle East region, this activism led to the creation of a more actively engaged legislative politics in the Ottoman context (Thompson 2013: 37-60). Certainly, the Ottoman Empire's law-making structures did not conform to the liberal model of political agency described above, nor did the institutions that emerged from the Tanzimat reforms last very long. Yet, the important point is that it was through participating in law-making institutional structures that activists like Shahin sought to advance their equality by engaging in political action.

Today the most developed model of a transnational legislature is the European Parliament, which engages in law-making, in collaboration with other institutions within the European Union. Another model not transnational, but pluralist, might be the British devolved parliamentary system, in which Scotland, Wales and Northern Ireland all have parliaments and yet there remains a central parliament in Westminster governing the country as a whole in certain areas (though depending on the results of a referendum in Scotland in 2014, this model may revert to the more traditional one). Another model is the federal system of the United States in which state legislatures govern in some areas and the US Congress governs in other ways. These federal systems are not transnational, of course, but they provide some foundation for considering how such a model might work. Recently, Jean Cohen has argued for just such models as a way to think about a global governance system, one that is not a global constitutional order, but moves in that direction (Cohen 2013).

But there is no need to adhere to any one of these particular models. Indeed, the complexities of the Palestinian-Israeli context suggest that none of these would be the right fit. This is not a proposal for a one-state solution, but rather a proposal for a governing structure in which both Israelis and Palestinians would be active, elected members and which would govern particular areas of concern to both communities. Individuals elected to such a body might be distinct from or drawn from the

respective legislative bodies of both communities. It would undermine the executive dominance that is to be found more prominently in the Palestinian context and yet is increasing in the Israeli context. It would force the parties to engage with each other more directly and, if its deliberations were opened to the wider community, could active a more inclusive political life in which individuals across the political spectrum engage with each other.

How might such an institution function? The following four institutional design suggestions provide a starting point. First, such an institution would have two chambers to it, one directly elected throughout the entirety of the region and a second chamber elected from the two existing parliaments. This model would then allow for the continuation of the two states in some format but would encourage law-making by individuals from across the two political societies. Even more creatively, one might envision a role for the PNC as representative of Palestinians who remain outside of the boundaries of the territory. To introduce this, however, might also require how Jews living outside of Israel might be represented. Such a model is not anathema to liberal politics; France has long had representatives from outside of the territory of France who are elected to represent the interests of those living abroad. To design these electoral rules would require a great deal of work and political bargaining, for they go to the heart of the conflict in many ways; the right of return, for example, would be translated into a right of representation.

Second, the transnational institution would be vested with law making competency in a very limited sense to begin with, which might expand as the political process develops. This could mean something like a United Nations General Assembly or the pre-Maastricht European Parliament, an institution that cannot make law in a formal sense but expresses the 'sense' of the international community. A slightly more developed form of law making might be competencies in relation to limited issues that cross boundaries, such as developing administrative models for employment, social welfare, or boundary crossings. These more regulatory rules, while not fully 'legislation' in the Kantian sense described above, could be a starting point for allowing the political actors in these two societies interacting with each other.

Third, with any legislature in the modern liberal world comes the development of political parties. Party identification is one of the methods of self-making, yet it can also be extremely exclusionary and counteractive to a pluralist liberal ethos. For this reason, political parties should be allowed to form organically, but with the proviso that they include individuals from both communities. This would apply only to the lower house, for the upper house, arising from representatives from the already existing legislative bodies, would reflect existing political configurations. But, perhaps a rule could be put in place that would require those coming from existing political parties to somehow identify within a formal way the political parties that arise from the lower chamber's electoral politics. In so doing, only parties that encourage a kind of 'internal' pluralism would be able to run candidates for elections.

Fourth, the division of a territory into concrete structures from which representatives are elected is often one of the most contested parts of legislative politics. But alternatives certainly exist in the region; the Lebanese effort to include both sectarian and regional identities has resulted in shifting electoral laws throughout its turbulent political history (Baaklini, Denouex and Springborg 1999: 79-110). For the lower house of this transitional legislature, individuals would come from territorially demarcated districts, while the upper house, deriving as it does from the legislatures of the two communities and perhaps from institutions outside of the territories, more space would be allowed for different forms of identity. Certainly, the complexity of the currently existing identities of individuals, including Palestinian citizens of Israel, would make this difficult to achieve in practice. I cannot resolve these problems here, only point to them as ones that need to be considered. One related effort to deal with these issues, and which proposes a reconfigured territorial arrangements comes from Lev Ginsberg. His proposal for seven new territorial divisions suggests that creative efforts to rethink current territorial arrangements are possible (Ginsberg 2010).

These four principles are suggestions that might provide a means to advance the politics of liberal self-making. Legislative bodies can serve as institutional spaces within which political rights and equality can be vigorously defended and advanced. Alongside of this narrower mode of political activism, they can also advance what one theorist calls an 'enlarged mentality' (Nedelsky 2006). When political agents need to both advance their own interests and the interests of those they represent, but most also work with others to achieve the objective of passing legislation in whatever form, they are forced to see the politics of the other in a much more concrete and specific manner. Such an enlarged mentality also encourages respect for others and recognition of them as truly human and deserving of equality. A transnational legislative body is one way in which a constitutional solution to the Israeli-Palestinian conflict might advance some form of equality, diversity, and perhaps even peace and justice.

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