

RIGHT VERSUS GOOD: PALESTINIAN RIGHTS IN CONFLICT

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Not all rights-conflicts in the Israeli-Palestinian continuing confrontation are between Israeli and Palestinian rights-claims, although these latter contesting claims certainly remain to be the underlying ones. Challenging conflicts between rights on the practical level, and values, also exist within the respective communities, primarily induced by compromise political proposals envisioned as solutions to the underlying conflicts in rights-claims.

Perhaps the most obvious or important of the internal rights-conflicts on the Palestinian side are the two claims to the rights to statehood and of return. Posited simply, the envisaged political trade-off for Palestinian statehood and freedom from occupation is, to all intents and purposes, a geographic as well as a demographic recognition of Israel in its pre-'67 borders. This trade-off explicitly states or strictly implies the foreclosure of the option of return to pre-67 Israel by Palestinians and their descendants who originally come from this area. The mutually recognized new borders in such a political solution would seal off a sovereign Palestine which will host all Palestinians under occupation, in addition to refugees and expatriates who wish to live on Palestinian soil, from an Israeli state which will host all Jews wishing to live in the Land of Israel. Such a solution should in no way undermine the rights of Palestinians who are citizens of the State of Israel.

There is, understandably, much discontent and displeasure among Palestinians concerning such a trade-off. This natural discontent is sometimes explained and supported by an appeal to moral arguments which are put forward to discredit the moral basis for a political compromise. In what follows I shall try to state what I believe are the underlying moral sentiments or attitudes behind this discontent, as a prelude to showing why a political solution nonetheless holds moral primacy. Specifically, I shall address three closely-interrelated moral explanations for discontent. First, there is the moral discontent with the principle itself of a trade-off, which is seen as a forced concession on one natural right (return) as the price to be paid for the enjoyment of another natural right (freedom). Second, there is the moral question of authority. While it may be conceded that Government may engage in trade-offs concerning territory, its authority to make decisions affecting the people or individuals themselves whose territory, or property it is, is seen as a totally different matter. Third, there is what might be described as the principled rejection of a rejection of principle. Even assuming a Palestinian readiness to accept a pragmatic solution for the refugee problem,

pragmatically predicated on a demographic recognition of Israel, such readiness cannot –as seen by some- but be based upon Israel’s prior recognition of the right itself of return. The principle ought to be recognized for it to be possible to sign away its implementation.

These, then, are three basic explanations for Palestinian discontent over an envisaged political compromise. I would submit that these be distinguished from arguments, whether political or legal, that are put forward to uphold or defend this position of discontent. The citation, for example, of international law or of U.N. resolutions such as resolution 194 of 1948 as an argument against a particular compromise is, I believe, and understandably given the biography of this resolution, a means used to defend a position rather than being itself a factor in determining that position.

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Let us first consider the issue of exchange. Is it morally unjust and unacceptable to exchange one natural right for another? Contemporary Palestinian creed has it that Palestinians have an inalienable and natural right to statehood, self-determination and return. While the meanings of “statehood” and “self-determination” are generally accepted to be a reference to the collective right of the Palestinian people to establish an independent State (even only) in the territory occupied by Israel in 1967, there is less agreement on the meaning of “return”. Ranging in the people’s minds from being an almost mystical concept of time- and space-travel to a point in space-time from which they were ejected, to being a mundane legalistic concept of a practical implementation of resolution 194, “the right of return” as a personal rather than as a collective right has come to occupy a leading place in the argument against political compromise. An implementation of what is perceived to be the natural right to statehood and the people’s determination of its future ought not detract from or cancel the quite separate and independent natural right of return. A political compromise that facilitates the implementation of one right at the expense of the facilitation of the other is hence regarded as an unjust, or only a partially just choice awaiting moral completion. If the cancellation of this right is abrupt and final in the envisaged compromise, then the compromise or concession is viewed as being unjust and unacceptable. If the cancellation is merely tactical and temporary, then the choice is viewed as being tactically acceptable if incomplete.

However, how sharp are the teeth of a moral argument that can be brought to uphold a position of this nature? The bare and basic moral argument in this context seems to be that each natural right has an independent moral value, and an independent existential legitimacy. The existential fulfillment of one right has no bearing on the existential fulfillment of another. Therefore, an implementation of the right to statehood ought not to have any bearing on the continued validity of the right of return. However, stated in this fashion it can immediately be seen that there is a basic fault in the argument. Many natural rights, whether collective or individual, are also by nature mutually exclusive. The instantiation of one natural right often cancels out the possibility

of instantiating another natural right. Furthermore, such an instantiation does not undermine the moral weight or value of the action. Take the right to self-determination. This implies a natural right to independence, but an equally natural right to any form of confederation or federation with one or more neighboring states. However, a choice made in favor of fulfilling the right to independence, once embarked upon, will by definition preclude embarking upon the implementation of a choice in favor of confederation. A choice made in favor of federation will foreclose a choice to have been made in favor of confederation. Also, some such choices are reversible, while others are not. While some options remain potentially available after an initial choice has been made, others are totally written off by virtue of the circumstances surrounding that particular choice. In addition, some rights whose instantiation is excluded are such that their exclusion in the particular circumstances concerned is viewed as a deprivation legally requiring a compensation of some kind, while others are considered as choices not requiring a legal intervention of any kind. The former might include such examples as compensation for private property confiscated for public use. The latter might include selling off holdings in a company in which the majority shares have come to be owned by an investment group whose financial plans and philosophy are at odds with the initial shareholder's interests or beliefs. In short, rather than being the exception, a choice made in favor of statehood that forecloses or forfeits return represents a typical case in the domain of natural rights choices.

Therefore, rather than viewing natural rights as being existentially independent from one another, they should be seen, especially where choice is concerned, as commonly being existentially mutually exclusive. This existential mutual exclusivity, or the writing off of one right once another has been instantiated, clearly shows that choosing between two rights is not of itself wrong or morally reprehensible. While sufficient for our purposes to show that the act of choice in our case is not of itself wrong, it should none the less be pointed out that this negative argument does not show that the act of choice is automatically right. The act of choice would automatically be right if it were argued that a rightful option, whenever instantiated, presupposes a right choice, or if we assume that choosing a right is necessarily right. But I think it would generally be agreed that it is not. I could choose to spend my money on buying another pleasure boat instead of helping a friend in hospital for a life-saving operation he needs. But not many people would regard such a choice as being the right one to make. Clearly, in choosing between two actions both of which it is my right to choose, the moral value of the choice itself would have to be determined by balancing between the moral values or weights of the two potential actions. In our specific case, the balance would be between freedom and return. I shall argue below that this balance could be viewed in terms of right versus good. It could also be viewed in terms of a hierarchy of rights, or in terms (as per Nozick) of a maximization of benefits. At this stage I would simply suggest that an essential element for determining moral weight be the minimization of harm to the parties to be affected by the choice. Where one action clearly leads to the minimization of physical and more general harm, and would indeed avert war and further bloodshed, whereas another would prolong this harm and would reinforce a state of bloodshed, it would stand to reason to suggest that the first action,

as an instantiation of a right, be regarded as morally preferable, and hence that choosing it would be right.

But while it may be conceded, especially in situations where free choice is possible, that there is indeed a case for the existence of mutually exclusive natural rights, it may still be argued that the situation is different when choices are made under compulsion. Not only was a full-blown natural independence for Palestinians forcefully prevented and an exodus forcefully created, but both independence and return have since then also been forcefully denied. Where an instantiation of a natural right has thus been prevented, and its fulfillment later and under compulsion becomes an option having to be forfeited in exchange for another right, then, it might be argued, the grounds of legitimizing mutual exclusivity of rights can be seen to be immediately undermined. However, even such an argument, I would submit, does not hold much water. To explain, and given the assumption that choices are typically made against the background of limited resources, I shall take as examples two common resources for exercising choice, power and wealth. With a limiting resource of wealth, I can exercise my right to choose between acquiring one property rather than another. In choosing one, I forfeit the other. With a limiting resource of power, I can similarly exercise my right to choose between one political option and another. In choosing one, I forfeit the other. Thus, not only where unrestricted free choice is concerned, but where this freedom is restricted by my available resources for making a choice, mutual exclusivity is quite common. In our situation, the power in question is clearly that afore-mentioned force (the '48 and '67 wars) which brought about the present reality in which I have come to be dispossessed of more than one natural right, as well as that (the balance of power) which can be drawn upon to create change along the way to repossessing one or more of them. Given this power as my limiting resource, my choice of instantiating one right at the expense of another does not thus exclude this choice from being a legitimate moral act.

Finally in this context, the basic argument that since the initial act of dispossession itself is unjust then a later choice acquiescing in it and made on the basis of mutual exclusivity cannot but be unjust is one which is clearly faulty as well. Simply stated, the injustice of one act is not automatically conferred on another, especially when those two acts are in opposite political directions. The immorality of burning a house down on its inhabitants does not undermine the moral nature of an act to save, under compulsion of the circumstance, just one of those inhabitants. Clearly, therefore, the standard used to evaluate the initial act of dispossession of Palestinian rights must be different from the standard used to evaluate the moral nature of a choice in favor of repossessing one or more such rights. The injustice of the former act does not afflict the latter act, nor does it conflict with its justness.

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Let us next turn to the issue of authority. Granted that a rights-exchange is morally legitimate, there is the further question of who has the authority to make it. It may be argued in this context that while a decision concerning statehood or self-determination

is collective by nature, a decision concerning return is personal or individual in fact. While Government, being a collective, is thus entitled to make a decision on statehood, including one involving territorial concessions to another party, it has no authority to decide on behalf of individuals the forfeiting of the right of return (to the conceded territory). Clearly, this puts Government in a bind. In order to go ahead and exercise a right it is authorized to exercise, it finds itself having to forfeit a right it is not authorized to forfeit in the first place. Government is allowed to eat its cake, but is required to keep it. To better understand this dilemma, and how to get out of it, let us take a closer look at the moral foundations of this position.

First, it is clear that the very nature of this foundation is dubious. For, were the situation reversed, the dilemma would still remain, making the reason cited irrelevant. In other words, if Government, for populist or other reasons, were to uphold return at the expense of statehood, it might still be charged that, in so making a decision which involves a forfeiting of individual and collective rights, Government would not be acting with authority. A choice in favor of full return, being impracticable, realistically forfeits the exercise of freedom, at both the individual as well as collective levels. But Government has no authority to forfeit these rights on behalf of the individuals or people concerned. So Government has no authority to choose return over statehood. The apparent validity of this reverse argument alerts us to a fault in the original one. Putting the two arguments together, one finds oneself faced with the absurd conclusion that Government can neither act in favor of one option, nor in favor of the other. In order to preempt having to reach such a conclusion, a reexamination of the basic issue is required: Clearly, the issue is not one of personal versus collective rights, or of authority, because personal rights are involved in both choices. Indeed, so are collective rights, as I shall presently show. The issue, rather, seems more to do with the different weights one assigns to values; or, looked at differently, it has to do with the well-known argument of right versus good, as opposed to an argument of right versus right. Before saying how this is so, and how it might affect this particular cause of discontent, let me quickly elucidate how individual as well as collective rights are involved on both counts, or in both choices. It may be cogently argued, I submit, that the choice in favor of statehood addresses basic natural individual rights, as the right to different individual freedoms which one need not enumerate in this context, in addition to the collective right to self-determination, affecting Palestinians regardless of their categorization or status as refugees or occupied or expatriate. The choice in favor of return, likewise, while indeed and in theory positively addressing such individual rights as the natural personal right of return, among others, also and in practice affects adversely the collective right to independence and freedom. Whichever choice is made, therefore, both individual as well as collective rights remain affected, with clear implications bearing on the individual as well as on the collective or the community.

The matter of choice, therefore, would seem to depend more on balancing what is simultaneously in the public and individual good than on balancing between personal and public rights. We would thus seem to have here a paradigm case of right versus good. Could the case be made that the choice of statehood, being itself a fulfillment of one natural right, is a morally better choice than one favoring the natural right of return

even if it cancels out the latter ? In light of what is good for the community, it would certainly seem that way. A choice favoring return, though not canceling out any right in principle, in effect cancels out the fulfillment of all such rights in practice, including itself. To all intents and purposes, the balance of power will exclude the fulfillment of these rights. A choice favoring statehood, in contrast, and while canceling out a literal implementation of return, will in fact fulfill some natural rights, including, significantly, the return of refugees to their national soil, as well as their compensation. This would be a clear case of the maximization of benefits. It is arguable in these lights that it is indeed in the public as well as private good to make the choice in favor of statehood. In terms of the moral weight of the values concerned, the general good here would seem to have a higher value than that possessed by the pursuit after the literal instantiation of one natural right.

However, having stated the case in this manner, it becomes immediately obvious that it is not the matter of authority which is at issue. It would be at issue if it were truly the case that the choice involved presupposes that Government as a public institution and decision-maker infringe on the decision-making rights of private individuals. In our case, Government chooses to act for the public as well as for the private good, or on behalf of both public as well as private rights, and its reverse choice, or abstinence from choice, will likewise affect those two domains, though in totally dissimilar ways. The good as a guide for the right choice thus becomes the operating factor, rather than the nature of the authority. But since Government is the only cohesive authority with political legitimacy, it would stand to reason to suppose that Government, as opposed to any individual claimant or any collective group, is the natural party to be endowed with the authority to make the necessary choice.

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Let us finally turn to the principled rejection of a rejection of principle. There are two totally separate positions than can be derived from this. One of these, namely, the absolutist position that it is never acceptable therefore to make compromises of any kind, need not detain us. But there is another, let us call it "relativist" position which entertains actual compromise within the context of the firmly-held principle. The natural right of return must be held firmly onto, and be recognized, but a practical cancellation of its implementation can simultaneously be agreed to. An example of this relativist position is embedded in the Geneva Accords, where one clause refers to the right of return in accordance with U.N. resolution 194, but where it is a totally different clause that deals with how to address the actual implementation of return, arguably reformulating it to all intents and purposes as a limited right to apply for immigration. But Geneva aside, the relativist position has a fair following in some of the "enlightened" Palestinian circles. Once again, we are confronted with the question whether such a position is morally defensible, or is indeed morally superior to a direct offer of a rights-exchange.

Clearly, the relativist position is refugee-specific. For example, it does not apply to the issue of territory. Its proponents are not demanding that pre-'67 Israel be

conceded to the Government and people of Israel only once these recognize that this land is Palestinian by natural right. Therefore, the principled rejection of a rejection of principle is not itself a principle. At the politicians' level, it is a heuristic device. It aims to camouflage a concession before the public in order to be better able to market it. It is conceived in recognition of the psychological human pain associated with making such a concession; also in cognizance of a history of false promises made by the leaders to the refugees.

But at the ordinary level, it is a psychological device conceived to justify to oneself a readiness to compromise, or to make do with the fulfillment of one right at the expense of another. Clearly, it may be speculated that one would be more at ease with oneself feeling that one has kept one's right to something even as one signs it away. However, I would submit that both mechanisms are faulty, and that it is far healthier to choose a direct and transparent route. Politically, refugees can never anyway be deceived by a camouflage, however inventive the design, and they can never be pacified by it. At the ordinary level, self-repose can be better achieved through an understanding of the morally acceptable nature of a rights-exchange in the context of an unfavorable balance of power, than through a self-delusive process of squaring the circle, or of devising a formula whereby one's right is recognized if and only if it comes to be contractually unrealizable.

In conclusion, I would submit that a political solution envisaging compromise, including the forfeit of the right of return in exchange for the fulfillment of other rights, has moral primacy over other real options, including, paradoxically, the option of a principled clean-slate, or the option, in other words, of raising the banner of all rights indiscriminately in an absolutist manner. The latter may be a populist position. But it is certainly not a moral one. Looking at the prospect of a compromise from an Israeli perspective, I believe a parallel argument from the Israelis side could be made, envisaging a return to the '67 borders, and a complete evacuation of settlements. A political compromise then reached on the basis of mutual interest defined by clear parameters for an end-game in the negotiations between Israelis and Palestinians can be viewed as an enactment of the "overlapping consensus" principle, where opposite narratives need not be redefined and unified as a precondition for making peace, but where the parameters for making such peace could have been reached by each side independently and on the basis of different, if parallel calculations. However such arguments, being made pragmatically within the context of the existing circumstances, will clearly only remain valid circumstantially. Changing circumstances (as for example the development of an insuperable settlement presence and political constituency within Israel) will no doubt detrimentally affect the validity of the arguments, making other arguments, such as the argument for return and equality, compete for moral as well as practical validity. This observation should at once induce the parties to move ahead for a political compromise based on two states, and foreworn of what may otherwise be a totally different political landscape, necessitating totally different kinds of moral argument.