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An Introduction

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ARTICLES

THE FUTURE OF JERUSALEM: A SYMPOSIUM AN INTRODUCTION

*Marshall J. Breger**

It is a pleasure to introduce this Symposium which was inspired by a conference on the future of Jerusalem held on October 24, 1995 at the Columbus School of Law of The Catholic University of America. No one could participate in that conference without reflecting that tensions over Jerusalem mirror the reality of a city where competing and exclusive claims of religion and politics overlap in ways seen in few other places in the world.

For medieval Christians, Jerusalem was the *umbilicus mundi*—the navel of the world—and indeed, for centuries, European maps of the world used Jerusalem as their center. The City has been the focus of Christian pilgrims since the fourth century. It contains the reputed sites of the crucifixion, burial, and resurrection of Jesus Christ, including the Church of the Holy Sepulchre, the churches marking the stations of the cross along the *Via Dolorosa*, the Garden of Gethsemane, and the Church of the Ascension. The City, moreover, has been the underlying metaphor for the Christian notion of heavenly Jerusalem—where man lives out of time in God's good and fulsome grace.

For Jews, Jerusalem is the "mountain of the Lord," the very core of the Jewish people for 3,000 years. Indeed, the *mishnah* tells us that the *shechina*, the divine presence, has never left the Western Wall. It is the symbol of both spiritual and national revival. The *Hatikvah*, the Jewish national anthem, speaks of the yearning for the "return to Zion and Jerusalem." In the daily prayers, three times a day, the religious Jew entreats the Lord to "return in mercy to thy city Jerusalem."

Throughout history Jerusalem has been the center of Jewish consciousness. In medieval times, elderly Jews traveled to Jerusalem to be buried

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in its hallowed ground. Throughout the centuries they came to live in spiritual piety. By 1844, they constituted the largest single religious group in the City. In the 1870s, they were an absolute majority, and have remained so ever since.

For Jews, then, Jerusalem is not a city that encompasses holy places. Rather it is the earthly city itself that is holy, both the land and, as the former Chief Rabbi Kook tells us, even the air. Jerusalem, then, is synonymous with Judaism's entrenchment in the land of Israel. It is the very center of that entrenchment. For Jews, political control over the part of Jerusalem that it deems holy is intrinsic to its holiness. The religion itself "requires its political control as the capital of the Jewish Commonwealth."¹

At the same time, as Professor Werblowsky has underscored, "[t]he sanctity of Jerusalem in Islam is a fact."² It is the original direction for Moslem prayer, *'ula al-qublatheyn*, and the *al-mi'radj haqq*, the place from which the Prophet ascended (some say in a winged mount) to heavenly spheres. It is, moreover, the place that in Moslem tradition those eschatological events harkening the end of the world will commence. Those who try to suggest that al-Quds is less holy to Islam than to Judaism simply are incorrect. The construction of comparative hierarchies of holiness between religious faiths is a fruitless exercise.

It also must be recognized, however, that, as Saul Cohen points out, "[a]t no time in the thirteen centuries of Islamic rule was Jerusalem part of, let alone synonymous with, a national entity."³ The Umayyids in the seventh century chose Ramle, not Jerusalem, as the administrative capital of the country. The Ottomans ruled Palestine from Damascus. Indeed, some twelfth century Muslim leaders were prepared to trade the city of Jerusalem for Damietta (now Dumyat), a then-important port on the Egyptian coast.

The issue of Jerusalem, however, is not simply one of "sacred space." Jerusalem is a city of the living, with housing, industry, and road and infrastructure needs. It is the center of government for the Jews, and the intellectual and economic center of the Palestinian West Bank. It is a city of 550,000 persons, comprising 400,000 Jews and 150,000 Arabs joined, as it were, at the hip, living together separately in stippled fashion.

1. MICHAEL REISMAN, *THE ART OF THE POSSIBLE: DIPLOMATIC ALTERNATIVES IN THE MIDDLE EAST* 73 (1970).

2. R.J. WERBLOWSKY, *THE MEANING OF JERUSALEM TO JEWS, CHRISTIANS AND MUSLIMS* 2 (Jerusalem: Israel Study Group for Middle East Affairs, 1988).

3. SAUL B. COHEN, *JERUSALEM: BRIDGING THE FOUR WALLS* 109 (1977).

To make matters even more complex this “earthly Jerusalem” has become a “condensation symbol” for the nationalist political aspirations of both Israelis and Palestinians. For Israelis, whether religious or secular, it is “Jerusalem of Gold,” a united Jerusalem, the “eternal capital of Israel now and forever.” And; for their part, Palestinians find it hard to imagine a Palestinian entity that does not encompass some part of Jerusalem. These competing political aspirations create a belief among many that Jerusalem, like the baby in the Judgment of Solomon, presents a zero-sum problem in which, of necessity, winners must be offset by losers.

This Symposium on Jerusalem is unique in that it searches for understanding, not self-validation. It would have been relatively simple for the various authors to throw down the gauntlet on behalf of an assigned or self-assigned ethnic, religious, or nationalist “cause.” Instead of advocacy briefs, happily, this Symposium offers efforts at establishing contours for a “middle ground” and in better understanding the sociology of the various players in the Jerusalem *entropot*. Indeed, this Symposium reflects a more mature stage in the Jerusalem debate in that if there is any bias in these assembled papers, it is toward negotiable solutions.⁴

This Symposium is particularly rich in its discussion of issues related to the Holy Places—perhaps the area of contention within Jerusalem most amenable to resolution. The papers by Silvio Ferrari⁵ and Charalambos Papastathis⁶ strike new ground in their review of the positions of the Roman Catholic and Greek Orthodox churches respectively. Ferrari’s suggestion that the matter of “international guarantees,”⁷ so dear to the Vatican, could be met by Israeli reaffirmation of already-established international commitments regarding the Holy Places may well offer a significant breakthrough in the discussion of this issue. Papastathis’s explanation of why and how Greek Orthodox perspectives differ from those of Roman Catholics raises issues often overlooked. Menachem Klein’s study of *The Islamic Holy Sites As A Political Bargaining Card (1993-1995)*⁸ is among the first in English to explicate “Holy Place” poli-

4. One exception is John Quigley, who argues that Israel has no legal rights in Jerusalem under international law. John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765 (1996). Whether correct or not (and there are a slew of international law scholars who would take issue with him), Quigley’s legal formalism is likely to be relegated to advocates briefs rather than efforts at reconciliation and resolution.

5. Silvio Ferrari, *The Religious Significance of Jerusalem in the Middle East Peace Process: Some Legal Implications*, 45 CATH. U. L. REV. 733 (1996).

6. Charalambos K. Papastathis, *A New Status for Jerusalem? An Eastern Orthodox Viewpoint*, 45 CATH. U. L. REV. 723 (1996).

7. Ferrari, *supra* note 5, at 941-43.

8. Menachem Klein, *The Islamic Holy Places as a Political Bargaining Card (1993-1995)*, 45 CATH. U. L. REV. 745 (1996).

tics within the Muslim community. Klein makes clear that stakeholders in Jerusalem include not only the Palestinians and Jordan, but also the Islamic Conference and King Hassan of Morocco.⁹ The Saudis, guardians of Mecca and Medina, also maintain a watching brief on this third Moslem holy city. These papers in no way provide a full discussion of the religious problems involved in the "Holy Places" negotiations but they do inform the landscape in new and valuable ways.

And, of course, Justice Menachem Elon's opinion in *Temple Mount Faithful et al. v. Attorney General et al.*,¹⁰ with its deeply moving discussion of Jewish views of the Temple Mount makes clear the attachment of religious Jews to that holy site.¹¹ Justice Elon's opinion suggests particular problems of overlapping "holiness."¹² The Temple Mount, for example, is holy to *both* Jews and Muslims, making resolution of this religious problem exceedingly knotty.

The mere fact that both Israelis and Palestinians seek practical instead of ideological solutions is itself a sign of progress. Any discussion of the future of Jerusalem must recognize that there is a very narrow "trading range" in which the parties can bargain. No Israeli government will give the City back. Efforts then to prove that Israel has no "rights" in Jerusalem under international law, whether correct or not, will have little if any effect on the practical discussions over the City's future. Similarly, proposals to divide the City in two are likely "non-starters." Of course, we must recognize that the "trading range" itself is evolving as inter-communal confidence ebbs and flows. Nevertheless, possibilities meriting discussion include notions of devolution of power, including decentralized boroughs (talked up, but rarely acted upon, by former Mayor Teddy Kollect¹³), some form of a Vatican solution, and the idea that an enlarged "Greater Jerusalem" can in some way accommodate the political as well as religious needs of both communities.

One of the most popular of the academic plans for Jerusalem is well represented in this Symposium by John Whitbeck's contribution entitled,

9. *Id.* at 746, 754.

10. H.C. 4185/90 (S.Ct. Israel Sept. 23, 1993), *reprinted in* 45 CATH. U. L. REV. 861 (1996).

11. *Id.*, *reprinted in* 45 CATH. U. L. REV., *supra* note 10, at 889-92.

12. *Id.*, *reprinted in* 45 CATH. U. L. REV., *supra* note 10, at 917-20. This point is well-developed in, ROGER FRIEDLAND AND RICHARD D. HECHT, *The Politics of Sacred Place: Jerusalem's Temple Mount/al-haram al-sharif*, in SACRED PLACES AND PROFANE SPACES at 21-61 (Jamie Scott & Paul Simpson-Housley eds.) (1991).

13. See Teddy Kollect, *Sharing United Jerusalem*, FOREIGN AFFS., Winter 1988-89, at 156; Teddy Kollect, *Jerusalem: Present and Future*, 59 FOREIGN AFFS., 1041 (1981).

*The Road to Peace Starts in Jerusalem: The "Condominium" Solution.*¹⁴ This approach, in Hebrew University Professor Avishai Margalit's words, proposes a kind of "joint sovereignty over the city," seeking, "one city, capital of two states."¹⁵ Whitbeck's Symposium paper on joint sovereignty or a "condominium"¹⁶ solution provides a useful compilation of the advantages of this approach and of historical examples of the genre. Whitbeck argues that:

For more than seventy years, the entire Pacific nation of Vanuatu (formerly the New Hebrides Condominium) was under the joint, undivided sovereignty of Britain and France. For more than 700 years, the Principality of Andorra has been under the joint, undivided sovereignty of French and Spanish individuals (currently the President of France and the Bishop of Seo de Urgel) while its administration is entrusted to an elected General Council.¹⁷

There is a qualitative difference, however, between proposals to increase Palestinian involvement in the political process through, for example, the devolution of power and proposals to share sovereignty in Jerusalem. Borough system proposals might be viewed as a way to devolve authority to neighborhoods or as the beginning of shared sovereignty.

Unfortunately, Whitbeck notwithstanding, efforts at shared sovereignty, however well intentioned, are likely to collapse into divided sovereignty. That is because shared sovereignty does not mean shared authority. And like it or not, a city cannot be run by consensus. The shared sovereignty notion is nothing more than a replay in one city of the binational state idea fostered by Utopians like Judah Magnes before 1948. It marks a defeat for the Zionist impulses that lay behind the creation of a Jewish state. However subtle the diplomatic dance, when the music stops, the inescapable reality remains—there cannot be two sovereignties in one city. Thus, negotiations on the future of Jerusalem will almost certainly be predicated on the practical reality that Jerusalem must remain as a united city (and as Israel's capital). Here Israeli differences with the Palestinians are most starkly evident.

One question regarding Jerusalem has been addressed only obliquely in these papers—how to define the City's boundaries? The Jordanians

14. John V. Whitbeck, *The Road to Peace Starts in Jerusalem: The "Condominium" Solution*, 45 CATH. U. L. REV. 781 (1996).

15. Avishai Margalit, *The Myth of Jerusalem*, THE NEW YORK REVIEW OF BOOKS, Dec. 19, 1991, at 61.

16. Whitbeck, *supra* note 14.

17. *Id.*

when they controlled Jerusalem had planned to stake out new municipal boundaries but were interrupted by the 1967 war. For its part, Israel, after its 1967 victory, dramatically enlarged the City dimensions. And proposals for further enlargement continue to appear. Indeed, it is worth noting that the 1947 UN proposals for internationalization had a different geographical configuration in mind—one which enlarged the City to achieve relative parity between the Jewish and Arab populations.

The notion of geographically “relativizing” Jerusalem adds to the possibilities for creative diplomacy. To do this, however, one needs to better reflect on what geographical boundaries specifically encompass the holiness—in Hebrew the *Kedusha*—of Jerusalem for Muslims, Christians, and Jews. And similarly, what geographical boundaries symbolize their respective nationalist aspirations. This exercise may well prove instructive to Arabs and Jews alike.

Until recently, the national Israeli consensus regarding a united Jerusalem as an integral and indivisible part of Israel was hegemonic. Yielding up any portion of Jerusalem was inconceivable. Yet, as Asher Arian has recognized, “[p]ublic opinion in Israel on security questions is malleable.”¹⁸ Attitudes in Israel already have begun to change. Arian’s 1994 survey of Israeli political attitudes indicates that only fourteen percent of Israelis approved of the inclusion of the status of Jerusalem on the peace talks agenda.¹⁹ Yet a 1995 Gallup poll found “[l]ess than two-thirds (65 percent) of the Israeli Jewish public voiced full support for exclusive Israeli sovereignty over all of Jerusalem.”²⁰

Nevertheless, when a recent so-called “study” by the Jerusalem Institute for Israel Studies proposing a number of options for resolving the status of Jerusalem was leaked to the press in March 1996, the mere fact that an academic body was preparing reports to the government that raised the option of some form of Palestinian sovereignty in East Jerusalem created a political furor.²¹ At the time of writing, many of the pro-

18. ASHER ARIAN, *SECURITY THREATENED: SURVEYING ISRAELI OPINION ON PEACE AND WAR 1* (1995).

19. Asher Arian, *Israeli Security and the Peace Process: Public Opinion in 1994*, JCSS MEMORANDUM NO. 43 (Jaffee Center for Strategic Studies, Tel Aviv Univ.), March 1994, at 11.

20. Israelis May Be More Flexible on Jerusalem Poll (Reuters, May 31, 1995), available in LEXIS, Nexis Library, Curnws File; see also William Pfaff, *Jerusalem's Future Will Hinge on "Second Choices"*, CHI. TRIBUNE, June 12, 1995.

21. Storer H. Rowley, *Furor Erupts over Report on Jerusalem: Opposition is Outraged by Leaked Proposal for Sharing Rule with Palestinian Authority*, CHI. TRIB., Mar. 20, 1996, at 4; *Report on Future of Jerusalem: Israeli Think Tank Sets Out Options for Permanent Arrangement in Jerusalem*, (BBC Summary of World Broadcasts, Mar. 20, 1996) available in LEXIS, Nexis Library, Curnws File; *Report on Future of Jerusalem: Israeli Institute Sug-*

posals floated in this Symposium remain well outside the tolerance of the Israeli public.

In a sense, one is playing for time, waiting for the constant struggle between communal hope and communal fear to play itself out, recognizing that both the Jewish and Palestinian communities fear the other side's ultimate intentions.²² The Israelis fear that the Palestinians adhere to a "salami strategy" in which their protestations of peace will cause Israel, to give up strategic advantage (e.g. land) thus allowing her in a weekend state, to be dismembered, slice by slice. For their part, the Palestinians fear that their views of Israeli imperialism will force them into the equivalent of Middle Eastern *Bantustans*.

The example of Trieste reminds us that time can be a palliative. After World War II, Trieste was organized as a free state, or in United Nations language, a *corpus separatum*. In 1954, Britain and the United States negotiated the London Agreement, a resolution of the Trieste dispute which awarded the city itself to Italy and divided some of the outlying area (a so-called Zone A and Zone B) between Italy and Yugoslavia. In this resolution, "[n]either Italy nor Yugoslavia formally renounced its claims to the Free Territory. For the Great Powers, however, the territorial settlement was final."²³ While the Yugoslavs "preferred to look at the London Agreement as a final accord, the Italian legal experts underlined its provisional character."²⁴ In particular, it never referred to the imposition of Yugoslav or Italian sovereignty over the disputed zones. This was because Italian public opinion in particular would not accept forfeiture of their sacred land. Some twenty years later, however, then Council on

gests Extending Palestinian Autonomy to Holy Sites, (BBC Summary of World Broadcasts, Mar. 20, 1996) available in LEXIS, Nexis Library, Curnws File.

22. With his usual pithiness, Samuel Lewis notes that "if diplomats and politicians could only place the word, 'sovereignty,' in a deep freeze somewhere for several decades, a workable and politically acceptable arrangement for the Holy City would become infinitely more achievable." Samuel W. Lewis, *Reflections on the Future of Jerusalem*, 45 CATH. U. L. REV. 695 (1996).

23. BOGDAN C. NOVAK, TRIESTE, 1941-1954: THE ETHNIC, POLITICAL, AND IDEOLOGICAL STRUGGLE 460 (1970).

24. *Id.* at 463. Thus, the British negotiator Sir Geoffrey Harrison has pointed out:

The Yugoslavs wanted it to be a final settlement, but we knew that this would be quite unacceptable to the Italians; that any solution we took to the Italians which suggested that the solution would be final would not stand a chance of acceptance. So I think we did devise a formula in the end which worked, which was that the U.S. government and Her Majesty's government would not support any further claims by either side in the area, and this satisfied the Yugoslavs and was acceptable to the Italians. There were doors and windows left open for the future, of course, but no matter.

SUCCESSFUL NEGOTIATION: TRIESTE 1954, at 52 (John C. Campbell ed., 1976) (quoting Sir Geoffrey Harrison) (discussing his participation in the Trieste negotiations).

Security and Cooperation in Europe (CSCE) in a conference in Helsinki July 30-August 1, 1975 proposed a treaty to resolve the border dispute. This took less than three months to negotiate.²⁵

Ruth Lapidoth's extraordinary contribution to discussion of the future of Jerusalem is the wisdom that the focus on the emotive language of sovereignty leads only, in Moshe Hirsch's terms, to "zero-sum games" in which one side wins and another side loses.²⁶ Far more useful is the effort to devise areas where one community can, in a functional manner, exercise power and control over aspects of their lives in ways that do not force a stark resolution of the sovereignty question. Thus, Lapidoth asks us to think through the implications of what she calls "functional sovereignty" and "suspended sovereignty" in treating Jerusalem's future.²⁷ The contributors to this Symposium point the way toward developing the kind of innovative approaches that meet both Israeli needs and Arab sensibilities.

As a student at Oxford some years ago, I prepared a weekly tutorial paper on private property rights for the great legal philosopher, Professor H.L.A. Hart. He returned my manuscript with the underlined comment that property is a bundle of rights. This is particularly true of the notion of sovereignty. We should recall that the concept of sovereignty is a western import into the Middle East, where for centuries the Ottoman administrative structure provided significant religious minorities with religious and cultural autonomy through the millet system. In the nineteenth century, citizens of western countries retained numerous special communal privileges under various capitulation agreements. For centuries, the Mammaluke Emirs ruled Egypt under the nominal suzerainty of the Sublime Porte. Indeed, until the centralizing efforts of the Young Turks in the last years of the empire, in much of the Ottoman lands the Sultan ruled largely through his annual claim of tribute. For the rest of the year the Local Governor held sway. It will take such creative expressions of the concept of sovereignty to proffer solace to those who seek the "peace of Jerusalem."

25. LEONARD UNGER & KRISTINA ŠEGULJA, *THE TRIESTE NEGOTIATIONS* 39 (1990); *Italy and Yugoslavia Sign Accord on Trieste Region*, N.Y. TIMES, Nov. 11, 1975, at 34.

26. Moshe Hirsch, *The Future Negotiations Over Jerusalem, Strategic Factors and Game Theory*, 45 CATH. U. L. REV. 699 (1996).

27. Ruth Lapidoth, *Jerusalem—Some Jurisprudential Aspects*, 45 CATH. U. L. REV. 661 (1996).