


Why Legal Avenues to Mideast Peace Are Misguided

 realclearpolitics.com/articles/2017/09/13/why_legal_avenues_to_mideast_peace_are_misguided_134982.html

Commentary

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September 13, 2017

TEL AVIV -- Over the summer, Trump administration officials Jason Greenblatt and Jared Kushner visited Israel and the Palestinian Authority to renew efforts to resolve the conflict over the West Bank—as the international community and the Israeli left refer to the land Israel seized in fending off Jordan’s attack in the Six Day War. In dealing with this vexing challenge, the Trump team should reject the contention increasingly pressed by progressives in and out of Israel—and backed by U.N. Security Council Resolution 2334, which, in December 2016, the Obama administration regrettably declined to veto—that legal considerations settle the matter.

Fifty years since Israel’s astonishing victory in the Six Day War over Syria and Egypt as well as Jordan, more than 400,000 Israelis live in the territories the Israeli right prefers to call by the Biblical names Judea and Samaria. While the Palestinian Authority governs most aspects of the daily lives of the vast majority of the approximately 3 million West Bank Palestinians, Israel continues to exercise effective military control over the territories.

The left cogently argues that ruling over a Palestinian population against its will threatens Israel’s existence as a Jewish and democratic state. The right plausibly maintains that withdrawing from the heart of biblical Israel exposes Israel to unacceptable security risks. It adds that uprooting Israeli settlements betrays the Jewish people’s ancient heritage and the Zionist aspiration to rebuild the Jews’ ancestral homeland.

Notwithstanding the weighty *political* arguments on both sides, many intellectuals in Israel and abroad believe that legal considerations should decide the controversy. Several Israeli professors debated the issue this summer in Haaretz—a newspaper something like the New York Times of Israel. Conducted mostly in Hebrew, the debate exhibits the richness—and the vehemence—of public discourse here. It also illuminates the dangerous propensity of liberal democracies, against which Tocqueville warned 180 years ago, to transform political questions into legal ones.

The “juridification of politics”—to borrow a term from the French thinker Alexandre Kojève—erodes citizens’ civic habits by depriving them of the opportunity to resolve political controversies through democratic give-and-take. It also distorts those controversies, which are inextricably bound up with conflicting interests and perceptions, contingent events, and

prudential judgments. To subject them to legal reasoning that purports to yield rational, objective, and necessary judgments is to pretend that one right answer is available for disputes that can only be managed through compromise and mutual accommodation.

In early July, Hebrew University professor of law emerita Ruth Gavison, an Israel Prize winner and eminent center-left voice, expressed sympathy for “the spirit of the occupation’s opponents, Jews and Arabs, who have despaired of the chance to change the situation through politics and are therefore trying to turn the question of the occupation into a legal one (with the justification that the occupation is illegal and must end immediately) or one of human rights (with the justification that the Palestinians have the right not to live under occupation, so Israel must end it immediately).”

She also forcefully warned against it. A legal resolution to the controversy, Gavison argued, “does not advance the end of the occupation but actually deepens the deadlock.” That’s because the resort to legal reasoning obscures “the crucial political, social, cultural and religious processes in Israeli and Palestinian society” and “weakens, on both sides, the fortitude needed for painful concessions based on an agreement between the people and their leaders on what’s the best outcome under the present circumstances.”

In addition, the translation of the conflict into the language of law and human rights perverts the claims of both. “From the perspective of international law, the Palestinians have no ‘right’ to end the occupation—which was the result of a defensive war—and Israel has no obligation to end it without a peace agreement,” Gavison maintains. “This isn’t just an interpretation of the legal situation. It’s the necessary conclusion from the UN efforts to create incentives against the unjustified use of force.”

The critics responded sharply. Mordechai Kremnitzer, deputy president of the Israel Democracy Institute, accused Gavison of putting forward a proposal “to ignore the legal and moral aspects” of the occupation. Yigal Elam, a professor of the history of Zionism and the state of Israel, compared her insistence that the dispute between Israeli and Palestinians was fundamentally a political one to the mindset of German judges who upheld the Nazis’ Nuremberg Laws, which stripped German Jews of citizenship and prohibited them from marrying or having sex with Germans.

Gadi Taub, a senior lecturer in the School of Public Policy and the Department of Communications at the Hebrew University of Jerusalem, replied effectively to Gavison’s scholarly critics. It was not “Gavison who ignores the legal and moral context of the political question,” argued Taub, but rather “Kremnitzer who ignores the political context of the legal and moral question.” And any comparison of Israel’s occupation to the Nazis is, Taub wrote, “morally infantile.” Whereas the Nazis unleashed a “monstrous assault” on innocent Jews, such deprivations of rights as Palestinians suffer stem from “a violent conflict between two people” whose “beginning was in a defensive war and which would have ended long ago if the Palestinians were prepared for a solution based on compromise.”

What has impelled the Palestinians to reject, even as a basis for discussion, Israel's several offers to resolve the conflict?

In a remarkably ambitious and thoroughly compelling new book, "The Causes of War & the Spread of Peace: But Will War Rebound?," my friend Azar Gat does not discuss the West Bank's legal status, internal Israeli debates, or Palestinian politics and society. But his analysis—stretching from the prehistory of the human race to the emergence of China as non-democratic capitalist power challenging American preeminence—sheds light on the prospects for peace between Israel and the Palestinians.

A Tel Aviv University professor of political science, Gat shows that war is coeval with humanity and traces its causes to the struggle for resources and reproductive opportunities that flows from the logic of evolution. The human propensity to settle conflicts through deadly violence, he argues, is sown into human nature. So too, he emphasizes, are propensities to peacefully cooperate and compete aggressively. Circumstances—including ethnic and social bonds, cultural judgments, and religious beliefs—determine the preferred strategy.

Contrary to popular perceptions, maintains Gat, war has been on the decline for centuries. The percentage of deaths due to deadly violence has never been as low as it is today. The explanation, he demonstrates, is liberalization, democratization, and, most importantly, modernization and "the sweeping processes associated with it"—industrialization and commerce, affluence, urbanization, women entering the electorate and the workplace, sexual liberation, aging populations, and the globalization of mass culture. By providing abundantly for the peaceful satisfaction of fundamental human desires, modernization greatly increases the benefits of peace and the costs of war.

Gat's analysis suggests that American efforts to ease the Israeli-Palestinian conflict should focus on making peace more valuable to the Palestinians by promoting in the West Bank the protection of rights; popular rule; and industrialization, commerce, and trade. His analysis also indicates that the challenge is likely to remain vexing. That's because the means available to the United States—as well as to Israel, surrounding Arab nations, Europe, and the world community—to transform the Palestinian ethnic and social bonds, cultural judgments, and religious beliefs are quite limited.

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