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APA Citation

Shalakany, A. A. (2002). Privatizing Jerusalem or an Investigation into the City's Future Legal Stakes. *Current Legal Developments*, 431–444.

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MLA Citation

Shalakany, Amr A. "Privatizing Jerusalem or an Investigation into the City's Future Legal Stakes." *Current Legal Developments*, 2002, pp. 431–444.

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Privatizing Jerusalem or an Investigation into the City's Future Legal Stakes

*Amr A. Shalakany**

Keywords: Jerusalem; sovereignty; Israeli-Palestinian negotiations; critique of privatization; public/private distinction.

Abstract. The purpose of this article is not to propose yet another normative vision for Jerusalem's future. Instead, I map out the major sovereignty-related issues that have traditionally preoccupied the literature on the subject, and argue that most of these issues have become moot following the latest rounds of Israeli-Palestinian negotiations. In response to this recent paradigm shift, I propose that international law scholarship should turn its attention to studying the politics of Jerusalem's private sphere, a sphere so far dismissed as "merely technical," yet also a sphere replete with such deep distributional stakes as to make it the primary arena for playing out power-relations in the city's future. I conclude with critiquing recent proposals that privatization would play a constructive role in defusing political tensions associated with the future Jerusalem.

1. INTRODUCTION

I remember discussing the future of Jerusalem as a law student during international law class. The memory is one of a distinctly interminable debate. Fellow classmates argued back and forth: Which country gets what kind of sovereignty over which part of the city? Should religious institutions play any role in the city's governance? How to arrange day-to-day municipal arrangements in such a diverse space? The discussion went on and on. While the twin passions of nationalism and religion grappled for international legality, a physical condition of "Jerusalem-fatigue" gradually prevailed over the entire class room. It all seemed like an endlessly intractable drag, really. Finally, impatient with any more opining on the subject, a fellow student remarked with exasperation: "Can't we just hand over Jerusalem to Disney World? Turn the city into a private theme park?"

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I would like to thank Jean Allain, Lori Allen, Riham Barghouti, Nathaniel Berman, Enid Hill, Rima Hamami, Souad al-Emari, Hani Sayed, Salim Tamari and Yezid Sayigh for comments on earlier drafts.

I hereby propose the establishment of Jeru-Disney – on similar lines to Euro-Disney, but hopefully with better financial returns!”

Scandalously irreverent, I thought at the time. And yet, five years later, Jeru-Disney seems more relevant to the city's future than initially meets the eye. There are a couple of reasons for this: First, with intuitively playful sarcasm, Jeru-Disney succinctly captures the inevitable sense of exasperation which many international lawyers experience when trying to visualize the city's legal future. Second, and more importantly, my classmate chose to escape further exasperation on the topic by relegating Jerusalem's future to the private sphere. Handing over Jerusalem to a private corporation lies at the heart of his proposal. In that sense, Jeru-Disney essentially boils down to a proposal for privatizing the city. In today's neoliberal world, privatization has become one of the most popular modes in diffusing political or ideological conundrums. Although my classmate uttered his proposal half jokingly, Jerusalem's future may turn out to be no exception to the current depoliticizing ascendancy of privatization.

This brief article will explore the above observation regarding the role of the “private sphere” in addressing Jerusalem's “politics.” My purpose here is not to advance yet another proposal for dealing with Jerusalem's future. Rather, I will map out the major issues that have preoccupied international law scholarship on Jerusalem's future, summarize how recent political developments have rendered most of these preoccupations moot, and finally make a couple of observations on where I believe Jerusalem will be heading in the future and consequently which issues should preoccupy international legal scholarship addressing the city's future.

Accordingly, I make three arguments in this article: First, international legal scholarship on the future of Jerusalem has been predominantly preoccupied with questions of sovereignty as a public law concern. Most scholarship starts from the premise that the dispute is a territorially intractable one, with two peoples making mutually exclusive claims to a single sovereign space. Many writers advanced sovereignty-related issues as the main legal hurdle to reaching an agreement on the city's future. In response, most of these writers have turned to anti-formalist methodologies that lead to creative and unorthodox notions of sovereignty concurrently accommodating both Palestinian and Israeli claims to the city. Second, most of these sovereignty-related hurdles of public law have become moot following the latest rounds of Israeli-Palestinian negotiations. Sovereignty is no longer such a contentious issue requiring international lawyers to come up with creative interpretations – not because the parties have suddenly realized what every policy-conscious international lawyer has known all along, namely that sovereignty is nothing but a bundle of rights. Instead, sovereignty is no longer a contentious issue simply because the parties seem bent on territorially dividing the city, a development which most commentators did not predict, and a development which makes the city subject to governance under traditional notions of sovereignty. Third, if sovereignty is no longer an issue, then interna-

tional legal scholarship on Jerusalem's future should start a new discussion that takes stock of this recent paradigm shift and explores where the future legal stakes of the city may lie. The present article is intended as a step in this direction. To this end, I will argue that “technical” questions, whose solution is normally relegated to the “private” sphere, are today of paramount concern to Jerusalem's future. Municipal issues such as garbage collection are more likely to affect the distribution of wealth and power between the city's residents than any public law debate on questions of sovereignty may in the future. It is to these issues that scholarly attention should be directed.

This article is divided in three sections. Section 2 provides a map of the major issues that have traditionally preoccupied international law scholarship on Jerusalem's future. Section 3 provides a map of recent political developments and traces the major contours of a potential agreement on Jerusalem. Finally, Section 4 argues that the future stakes of Jerusalem lie in the private law sphere of the “technical,” a sphere replete with distributional stakes, yet traditionally dismissed as inherently a-political by international law scholarship.

2. MAPPING THE SCHOLARSHIP

Sovereignty occupies a tormented location in international law scholarship. The doctrine has long been dismissed as passé. Indeed, for over fifty years now, the critique of sovereignty has been one of the most enduring hallmarks of sophistication in international law scholarship. And yet, sovereignty remains on the scene and continues to receive sustained critical attention. This simple fact is more of a testament to sovereignty's unremitting relevance than a signal of its consignment to the dustbin of legal thought.

International law scholarship on Jerusalem is no exception. On the one hand, sovereignty is often advanced as *the* major hurdle to formulating a normative vision for the city's future, giving the impression that there can be no such normative agenda without prior delimitation of sovereign boundaries in the city. On the other hand, sovereignty has often been dismissed as too traditional a concept to be of any service in discussing the city's future.¹ Given how intractable the territorial dispute over Jerusalem seems to be, with competing national and religious claims being staked to virtually the same plot of land, much international law scholarship has been dedicated to explaining why a formal exercise of delimiting sovereign boundaries would not solve the Jerusalem question since no such formal delimitation is feasible.

1. For a survey of the different claims of sovereignty in Jerusalem which then moves on to dismiss them one by one, see, e.g., G. Watson, *The Oslo Accords. International Law and the Israeli-Palestinian Peace Agreements 269–280* (2000).

Thus torn between relevance and limitation, the most original response in international law scholarship was to approach sovereignty from an anti-formalist perspective: While the concept remains relevant, it should be demystified, deconstructed, and quite simply broken down to basic components that mutate over time.² Most recent international law scholarship falls under this category, where authors insist that sovereignty is not an abstract monolith but rather a convenient semantic trope under which a bundle of rights is articulated and exercised. With respect to Jerusalem, although the parties cannot agree on a clean cut division of territory in the city, they should nonetheless be able to agree on some division of functional rights therein. The argument thus goes that sovereignty will not be an obstacle to agreement over the city's future if the parties get down to a nitty-gritty discussion over the allocation of concrete rights in the city, instead of engaging in a politically abstract and ultimately futile debate over who has "sovereignty" over the city as an abstract space.

There is a paradox to all of this, however. The more international legal scholarship tries to escape sovereignty as a hurdle by reducing it to nothing but a bundle of rights, the more sovereignty as a hurdle persists on the scene. Thus, in the anti-formalist mode of scholarship, a flurry of legal articles has been written on every single minute aspect of sovereignty in Jerusalem, covering such diverse issues from the question of access to holy sites to the details of municipal administration in the city.³ Instead of providing an alternative to sovereignty as a debilitating abstraction, such anti-formalist scholarship served only to consecrate and expand the very initial paradigm it strove to escape. Despite the staggering diversity of anti-formalist approaches to the question of future sovereignty over Jerusalem, one may still detect a fairly limited set of preoccupations informing most of the literature. International lawyers seem to agree on the existence of a number of "hurdles" which make up Jerusalem's complicated present, and whose resolution is necessary for reaching any agreement on the city's future. These hurdles are predominantly articulated in the language of sovereignty as a "public law" concern: Over and again, the Jerusalem question is problematized from a public law sensibility, it expresses public law worries, and therefore its resolution is located within an expanded realm of public law normativity.

The edited volume *Whither Jerusalem?* provides a good illustration of

2. For a discussion of sovereignty and its anti-formalist variations, see D. Kennedy, *Receiving the International*, 10 Conn. J. Int'l L. 1, at 3 (1994). For one of the latest redefinitions of what state sovereignty entails today, see M. Hardt & A. Negri, *Empire* (Harvard, 2001).
3. In this vein, the Catholic University Law School organized a conference on the future of Jerusalem in Spring 1996. For a recent collection of international law scholarship on Jerusalem's future which gives a sense of the various approaches out there, see the many essays of the conference reproduced in 45 Cath. U. L. Rev. (1996).

this paradox.⁴ The book is perhaps the most systematized attempt at cataloguing the various proposals and positions developed for the future of Jerusalem over the period from 1916 to 1994. While mostly descriptive in nature, the editors do provide a critical chapter on "Comparative Analysis of Proposals and Positions According to Specific Subjects". In this chapter, the editors use three categories to cluster and explore the major issues that are perceived as hurdles in resolving the future of Jerusalem. Those categories are: national aspirations, holy places, and municipal administration. Under the first category, the editors cover a variety of concrete issues, extending from possible arrangements for citizenship and the political rights of the city's inhabitants, to demilitarization and neutrality, international supervision of the city's institutions, and whether the city should function as a political capital to one or more states. Despite the detailed nature of the issues covered in this chapter, the editors declare from the outset that the question of sovereignty is the most controversial of all hurdles obstructing the conclusion of an agreement on Jerusalem's future. The remaining two categories of hurdles, namely holy places and municipal administration, are also discussed in all the excruciating detail necessary to deconstruct sovereign power into its most minuscule components. And yet, sovereignty, this abstractly irrational monolith, continues to turn its ugly head: Although the parties are described as having "shown greater flexibility towards compromise [regarding holy places] than they have in other [issues],"⁵ disagreement nonetheless lingers in this regard, mostly stemming from "nationalist" positions on "sovereignty," with each party insisting on "sovereignty" over parts of the city where holy sites belonging to the other party are located. Similarly with respect to municipal administration in Jerusalem, many international law scholars have come up with various proposals to vest municipal institutions with considerable powers *vis-à-vis* the national government. Ostensibly, these proposals were made in order to side-step or diffuse "the effect – in daily life – of vesting sovereignty in a particular state."⁶

To sum up, international law scholarship dealing with Jerusalem has been mostly preoccupied with sovereignty as *the* major hurdle to reaching an agreement on the city's future. The reason is a common perception of the conflict as involving mutually exclusive sovereign claims to a territory, claims that cannot be mutually accommodated through traditional notions of sovereignty. In response, scholars have turned to anti-formalism

4. M. Hirsch, D. Housen-Couriel & R. Lapidoth (Eds.), *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem* (1995). A good equivalent in Arabic would be, Al-Haq, *The Legal Status of Jerusalem between the Mandate Period and Political Settlement* (2001) [in Arabic]. For a full review of the book, see Book Note, *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem*, by Moshe Hirsch, Deborah Housen-Couriel, and Ruth Lapidoth, 1997–1998 *George Washington Journal of International Law and Economics* 515.
5. Hirsch, Housen-Couriel & Lapidoth, *id.*, at 141.
6. *Id.*, at 143.

as a way of reconfiguring the concept of sovereignty, with approaches ranging from post-modern cultural studies⁷ to pragmatist applications of let's-expand-the-pie game theory.⁸

3. MAPPING RECENT POLITICS

In September 1993, representatives of the State of Israel and the Palestine Liberation Organization ('PLO') signed the first of what came to be known as the Oslo Accords.⁹ The Accords launched a "peace process" whose ultimate goal was a negotiated and comprehensive settlement of the Israeli-Palestinian conflict. Under this framework, the parties agreed that a number of issues would not be addressed immediately, chief among which was the future status of Jerusalem. Instead, the city's future would be addressed and resolved during the "permanent status negotiations" envisioned to start no later than 4 May 1996.

Effectively, serious negotiations on Jerusalem did not start until after the signing of the Sharm El-Sheikh Memorandum in September 1999, in which the parties pledged to reach a framework agreement on permanent status by early 2000, and a final settlement of the Israeli-Palestinian conflict by the end of 2000. A secret track of permanent status negotiations started in Stockholm, where progress is reported to have been made. However, news of the track was leaked to the press, and it was subsequently called off.¹⁰ Intensive negotiations on Jerusalem restarted again as part of the permanent status issues discussed during the Camp David II talks in June 2000. Although Camp David collapsed without the parties reaching an agreement, permanent status negotiations nonetheless continued between Jerusalem and Tel Aviv. The *Al-Aqsa intifada* broke out in late September 2000, and another round of intensive negotiations were called for in the Egyptian resort of Taba in January 2001. By this time, President Clinton had presented the negotiators with a set of framework proposals to guide future talks. The negotiations at Taba largely relied on what came to be known as the "Clinton Proposals" – with a set of reservations from both sides. As Israeli elections drew near, Taba was called off without reaching formal agreement, but with much fanfare from both sides concerning the acute imminence of "striking a deal." As of writing

7. See N. Berman, *Legalizing Jerusalem or, Of Law, Fantasy, and Faith*, 45 *Cath. U. L. Rev.* 823 (1996).

8. See M. Hirsch, *The Future Negotiations over Jerusalem, Strategic Factors and Game Theory*, 45 *Cath. U. L. Rev.* 699 (1996).

9. The term "Oslo Accords" is used here to describe a series of agreements between the State of Israel and the PLO, the most important of which for our purposes are the 1993 Declaration of Principles on Interim Self Government Arrangements (the 'DOP'), and the 1995 Interim Agreement.

10. The Beilin/Abu-Mazen understanding is yet another important, non-formal track, which preceded Stockholm, and which terminated without written agreement. See M. Klein, *Jerusalem. The Contested City* 301–310 (London 2001).

this article, there have been no "formal" permanent status talks on the future of Jerusalem.

Accordingly, Israel and the PLO have not yet reached a concrete agreement on the future of Jerusalem. Nonetheless, negotiations on Jerusalem have reached such an advanced stage whereby the general contours of an agreement on the city's future are fairly discernable today. To my mind, these "general contours" have ushered in a veritable paradigm shift in conceiving the future of Jerusalem. Many of the issues addressed in international law scholarship as hurdles to the resolution of Jerusalem's future have essentially become moot. In particular, sovereignty-related hurdles, which inform the majority of scholarship on the subject, appear today as not particularly worthy of jurisprudential anxiety. The reason for this paradigm shift is *not* that sovereignty has become irrelevant to resolving the dispute – indeed, the parties are as much invested in sovereignty arguments today as they were when the peace process first started. What changed since then, however, is that a clean-cut division of sovereignty over Jerusalem appears today as the most likely option for the city's future. Ten years ago, dividing Jerusalem seemed so inconceivable that international lawyers had to come up with creative interpretations of sovereignty in order to accommodate the parties' competing claims to the city. It would seem such anti-formalist creativity is no longer needed. The issue is not *that* contentious anymore: the parties have reached a stage in negotiations where dividing sovereignty over the city appears doable, discernable and indeed desirable. After almost two years of the current intifada, there is growing willingness on both sides to "separate" out of the conflict – including in Jerusalem.

To elaborate on this argument, I will sketch out the general contours of what the parties agreed regarding the future of Jerusalem.¹¹ This mapping exercise is not based on the imminence of a political agreement on Jeru-

11. What "really" happened at Camp David, and to a lesser extent at Taba, is the subject of a growing genre of literature. While a lot was written on the subject following the collapse of Camp David II in the summer of 2000, a more revisionist strand of scholarship has appeared more recently. Both waves of literature are mostly based on information derived from interviews with Israeli and Palestinian negotiators and their advisors who were present at the negotiations. Undoubtedly, new scholarship will emerge in the future as negotiators set out to publish their much-awaited diaries. For purposes of the present article, I rely on this emerging scholarship to construct, the best I can, a comprehensive picture of what the most likely peace deal on Jerusalem could have contained. In particular, I rely on the following sources: H. Agha & R. Malley, *Camp David: The Tragedy of Errors*, *The New York Review of Books*, 2 August 2001, available at <http://www.nybooks.com/articles/14380>; Klein, *supra* note 10; R. Pundak, *From Camp David to Taba: What Went Wrong?*, 43 *Survival* 31 (2001); A. Shavit, *End of a Journey. An Interview with Shlomo Ben Ami*, *Ha'Aretz Magazine*, 14 September 2001, available at <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=74353&contrassID=3&subContrassID=0&sbSubContrassID=0>; Y. Sayigh, *Arafat and the Anatomy of a Dysfunctional Revolt*, 43 *Survival* 4 (2001); D. Sontag, *Quest for Mideast Peace: How and Why it Failed*, *The New York Times*, 26 July 2001, Section A, 1, Column 1, Foreign Desk; A. Hannieh, *Camp David Papers* (2000) [in Arabic]; G. Usher, *Interview with Menachem Klein, Advisor to Chief Israeli Negotiator Shlomo Ben Ami*, *Publico* (Lisbon), 14 September 2000.

salem, nor is it based on the legally binding quality of Israeli-Palestinian negotiating positions at Camp David or Taba. Indeed, all negotiating positions were presented as expiring with the termination of President Clinton and Prime Minister Barak's political tenure. Rather, my argument is: Never mind that a deal on Jerusalem might not be concluded before another three or fifteen years. Given where negotiations have reached so far, here is a sketch of what such an agreement on Jerusalem's future would most likely contain. The sketch demonstrates that earlier taboos regarding the city's territorial indivisibility have been broken today – and although no deal has yet been reached on Jerusalem's future, the taboos will most likely remain broken in the future.

Thus, it is necessary to reexamine the continued relevance of the hurdles discussed earlier in this article, as well as to examine where future legal hurdles in Jerusalem's future may lie. In charting how recent politics have mooted many of the hurdles that preoccupied international legal scholarship on the subject, I will use the same three categories of "hurdles" employed earlier by the editors of *Whither Jerusalem?* namely: national aspirations, holy places, and municipal administration.

First, with respect to national aspirations, Israel and the PLO started negotiations from almost mutually exclusive redline positions, with each party demanding exclusive full sovereignty over East Jerusalem. For purposes of this section, East Jerusalem is understood to comprise the Palestinian neighborhoods and Israeli settlements within the Israeli defined municipal borders of the city east of the 1948 Green Line, including the walled Old City of Jerusalem with its four quarters (namely, the Muslim, Christian, Armenian and Jewish Quarters). These maximalist positions, of literally clashing spatial applications of sovereignty, account for the over-investment by international legal scholarship in developing creative concepts of sovereignty to accommodate the two parties' conflicting claims on exactly the same plot of land.

In contrast to its formally maximalist position, Israel seems to have made the following concrete offer in Camp David: First, Israel would annex under its sovereignty all the Jewish settlement blocks in East Jerusalem. Second, Arab suburbs of East Jerusalem would fall under two types of jurisdictional rings: An "outer ring" of suburbs governed by full Palestinian sovereignty, and an "inner ring" of suburbs falling under full Israeli sovereignty but governed by some form of Palestinian autonomy. Although the Old City of Jerusalem has an overwhelming majority of Palestinian inhabitants, the Israeli offer seems to have excluded it from the Palestinian autonomous area of the "inner-ring" and annexed it instead under full Israeli sovereignty. The Israeli offer was rejected by the Palestinian side.

Following the collapse of Camp David, President Clinton came up with a number of proposals for the conclusion of a final settlement. With respect to the future of Jerusalem, the Clinton Proposals adopted a basic formula whereby Arab neighborhoods fall under Palestinian sovereignty and Jewish

neighborhoods fall under Israeli sovereignty. The Palestinian side had reservations on this formula, mostly due to the incorrect use of the term "neighborhood" to characterize Israeli settlements in East Jerusalem. According to the Palestinian position, Israeli "neighborhoods" in East Jerusalem are nothing but illegal settlements built on occupied territories in contravention to international law.

Compared to other permanent status issues, Jerusalem was largely not discussed at Taba. Nonetheless, the parties entered the negotiations with some conditional-acceptance of the Clinton proposals. Accordingly, in the limited talks that took place over Jerusalem, the parties seem to have agreed on a clean-cut division of sovereignty over the city. Israel would annex to its sovereign territory the major Jewish settlement blocks in East Jerusalem, as well as the Jewish Quarter in the Old City. The nascent Palestinian state would enjoy full sovereignty over the remaining Arab neighborhoods in Jerusalem, including the Muslim and Christian Quarters of the Old City. However, the question of sovereignty over some areas remained unclear, namely whether Israel would annex its settlements in the Armenian Quarter of the Old City, as well as the fate of its newer settlement projects in Jabal Abu-Ghneim and Ras Al-Amud.

Second, with respect to holy places, both parties have consistently agreed on the basic principles of freedom of access and worship, as well as on the continued role of religious institutions in governing their private affairs in the city. Under the Clinton proposals described above, each party would have sovereignty over its major religious sites: The Jewish Quarter and the Wailing Wall would fall under Israeli sovereignty, while Palestinian sovereignty would apply to Muslim and Christian holy places in Jerusalem. The major remaining hurdle is that of Al-Haram Al-Sharif/Temple Mount, and Jewish religious sites outside of the Jewish Quarter, chief among which is the Jewish cemetery on the Mount of Olives. Various proposals were floated around to resolve these issues. One such proposal was the "sovereignty to God" idea, whereby neither party would enjoy sovereignty over Al-Haram Al-Sharif/Temple Mount. Instead, supra-national sovereignty would be vested in God, with Palestinians enjoying functional powers, and Israelis having "historical and archeological" rights in the area. Another scheme proposed granting the Palestinians horizontal sovereignty over the surface of Al-Haram Al-Sharif/Temple Mount, while Israel would exercise vertical sovereignty on the space that lies beneath this area. Ultimately, the issue was not discussed in Taba, and there has been no agreement on the subject. Nonetheless, it is understood that a viable agreement on Al-Haram Al-Sharif/Temple Mount would at minimum require Palestinian functional control over the holy compound, and recognition of Judaism's historical attachment to the place.

Finally, with respect to municipal administration, the two sides' opening position was identical to the extent that both affirmed the undesirability of re-dividing the city in the future. In the vein of indivisibility, much international law scholarship has been dedicated to examining the future

of municipal administration in an undivided Jerusalem. However, the driving logic behind this scholarship has largely become moot today. More specifically, prior to the commencement of permanent status negotiations, one of Israel's major redlines was that Jerusalem must remain "unified" as its eternal capital. Israel thus refused to relinquish its claims of sovereignty over East Jerusalem. On the other hand, the Palestinians demanded sovereignty over East Jerusalem as the capital of their future state. The idea of an "Open City" was proposed to accommodate these mutually exclusive positions. In response to Israel's demand for sovereignty over a "unified" Jerusalem, the Palestinians proposed that the city would be "undivided" under an Open City scenario. The driving force behind the idea was the difficulty of dividing sovereignty over East Jerusalem between Palestine and Israel. However, as explained above, Israel and the PLO seem to have agreed on the major outlines of dividing sovereignty in East Jerusalem – and if sovereign territory can be divided, then so can municipal arrangements. Naturally, some administrative arrangements will need to be worked out between the Palestinian and Israeli municipalities of Jerusalem. However, these arrangements are bound to be limited, both geographically and functionally, with the Old City of Jerusalem probably constituting its major scope of application. In all cases, the division of Jerusalem does seem imminent, and its desirability has greatly intensified following the outbreak of the present *intifada*. Indeed, as of the writing of this article, a new plan has been proposed by the Israeli Government to unilaterally separate Jerusalem from its Palestinian hinterland, as well as Israeli occupied East Jerusalem from West Jerusalem, effectively laying the ground work for the city's future division.¹²

4. THE TECHNOCRATS ARE COMING

In Section 2 of this article I argued that international law scholarship on the future of Jerusalem is largely preoccupied with questions of sovereignty over the city. In Section 3, I argued that recent political developments have rendered many of these preoccupations moot. Internationalists no longer need to agonize over creative and unorthodox definitions of sovereignty in order to accommodate mutually exclusive Palestinian and Israeli claims to the city. It turns out the city is *divisible* in the most basic sense of the term, and traditional notions of territorial sovereignty can do the job very well. While the exact form of sovereignty over Al-Haram Al-Sharif/Temple Mount remains the major exception to this general observation, any likely solution on this topic will at minimum give Palestine

12. For a recent view on the subject, see N. Shragai, *Analysis: Developing Doubts about Enveloping Jerusalem*, Ha'Aretz Magazine, 27 February 2002, available at <http://www.haaretzdaily.com>.

functional control over the area, while concurrently recognizing Israel's historical attachment to the space.

However, to my mind, the stakes of day-to-day life for residents of Jerusalem do not stem from such intellectually thrilling quandaries as who gets sovereignty over the one-square-kilometer of holy space known as Al-Haram Al-Sharif/Temple Mount? Rather, now that sovereignty appears likely to be divided over all neighborhoods in East Jerusalem, including the Old City neighborhoods of Jerusalem, the city's residents are more likely to be affected by laws governing the dull and lackluster concerns of urban technocracy. By this I mean the distributional background norms governing the provision of services such as water, electricity and transportation. Will rent-control be dismantled in the poor neighborhoods of the Old City and who will provide for moderate-income housing? Will bus lines remain affordable? What will happen to the provision of basic social services in the fields of health and education? In other words, with the settling of competing sovereign claims to the city, garbage collection, not religion, will be the order of the day.

International law scholarship on Jerusalem has seldom been interested in discussing these "technical" stakes. And understandably so, for most of this scholarship is premised on the idea that the future of Jerusalem is a "political" question, its politics a product of clashing "sovereign" claims, and therefore its solution should be sought in the public sphere. International law scholarship thus fits in a long liberal tradition in which the "public" is "political": International law deals with the problems of "sovereignty," while private law deals with the more "technical" problems emanating from "property" rights.¹³

However, while internationalists have shunned the "technical" and concentrated their efforts on discussing "sovereignty," others have been busy filling this gap. Like any other city in the world, Jerusalem has its technocrats: various members of the liberal professions, engineers and urban planners, on both Palestinian and Israeli sides, have been systematically trying to come up with solutions for the lackluster technical issues mentioned above. They are not interested in who has sovereignty over Al-Haram Al-Sharif/Temple Mount. Rather, they would like to figure out who will be collecting the garbage left by visitors to the holy compound? And, much like my classmate back at law school, they would like to privatize Jerusalem – if not by handing it over to Disney World, then by placing municipal services such as garbage collection in the hands of private companies. The idea has won widespread support from both Palestinian and Israeli technocrats over the recent years leading to the last round of per-

13. See N. Bobbio, *Democracy and Dictatorship* (1989). And while international law "marks its modernism by downplaying the [public/private] distinction," it nonetheless remains of continued relevance in accounting for the disciplinary divisions between public international law, international economic and trade law and comparative law. See D. Kennedy, *The International Style in Postwar Law and Policy*, 1 Utah L. Rev. 7, at 12 (1994).

manent status negotiations.¹⁴ And the idea is quite simple: Jerusalem is a politicized space of clashing sovereign claims to an ideological landscape replete with national and religious symbols. The best way to diffuse these political/ideological tensions is to "take the symbolism out of Jerusalem"¹⁵ and re-characterize the "political/ideological" as "technical."

Thus, instead of arguing over public law questions of sovereignty, the technocrats would prefer it if politicians wizen-up and instead discuss which private company will collect Jerusalem's garbage. They argue that the benefits of privatization should then become immediately visible: as long as the company is being paid regularly for its services, it will continue to collect the city's refuse on time, and will do so without discriminating between Jewish and Palestinian garbage. Jerusalem's holy sites are thus transformed into technical spaces in need of garbage-collection management – as opposed to political spaces of competing ideological claims. And to further affirm the technical, Palestinian and Israeli members should be appointed to the board of directors of such companies, and a clear definition of areas of common notification and support should be delineated.¹⁶ The same logic applies to all other municipal services: sewage, water purification, production and distribution of energy, health, education, transportation, rent control, affordable housing, etc. All these services are habitually experienced as political issues due to the politicized nature of the city where they are delivered. However, much like Jerusalemite garbage, privatization should transform also these services from a political liability into a technical concern.

To my mind, the above proposal to transform the "political" into "technical" through privatization is both deceptive and dangerous for a very simple reason: *the technical is political*.¹⁷ The walled segment of the Old City of Jerusalem is the main candidate for the above privatization program, since the Old City is the most likely segment to remain open under a freedom of movement regime and therefore requires closer ties between Israeli and Palestinian municipalities more than anywhere else in Jerusalem. However, the Old City also happens to be one of the poorest neighborhoods in Jerusalem. The absolute majority of residents there are Palestinians living in extreme poverty conditions. Drugs and petty crime are abundant, while sanitation and housing conditions are abysmal. Much of this results from Israel's systematic post-1967 policy of collecting 30% of Jerusalem's municipal taxes from its Palestinian residents, while

investing only 5% of said revenues in Palestinian neighborhoods in the city.¹⁸ Privatizing municipal services in the Old City is thus likely to hurt poverty-stricken Palestinians living there in at least four ways:

First, given the present distribution of wealth and power in Jerusalem, municipal services inside the city are not merely a "technical" concern. Rather, the provision of services such as garbage collection, or the absence thereof, is a distributive issue contributing to the poverty scale we see in Jerusalem today. Any attempt to achieve a more equitable redistribution of wealth and power in Jerusalem will require deliberate intervention in favor of the city's poor. State apparatuses are traditionally responsible for guaranteeing minimum living standards in any city, and do so by providing municipal services without profit – indeed, often at a detrimental deficit to their budget. It seems highly unlikely that a private company will intervene systematically to favor the Palestinian poor neighborhoods of Jerusalem. In other words, a privatized service of garbage collection is likely to leave the garbage at Palestinian poor neighborhoods decaying in its place.

Second, privatization is likely to allow discriminatory policies against Palestinians to persist in the future. Privatization is premised on the idea that turning municipal governance over to the *homo-economicus* will guarantee equal access to services. Private companies are expected not to act in a racist or discriminatory fashion as long as there is a profit involved. However, present experiences in Jerusalem testify to the opposite. Many Israeli companies continue to systematically discriminate against Palestinian consumers – even when providing Palestinians with their services would be at a visible profit. One infamous example here is that of the leftist Israeli newspaper *Ha'Aretz*, whose marketing directors refuse to have its daily English edition delivered to subscribers living in the non-Jewish quarters of the Old City – even though more subscribers can easily mean more profit. In other words, it is highly deceptive to think of Jerusalem as just another city inhabited with the ideal *homo-economicus* actor whose economic decisions are motivated by profit maximization. Economic decisions in Jerusalem are based on many factors which cannot be exclusively accounted for under the mantle of profit. In other words, private companies may fail to collect Palestinian garbage, even at the expense of lost profits, simply because it is just that: *Palestinian* garbage.

Third, Israeli capitalist interests are the most likely beneficiaries of privatization. The Palestinian private sector is presently in shambles, and will remain so absent active support from the nascent Palestinian state and its development institutions. Israeli interests, however, are likely to receive the benefits prophesied by Israel's then-Foreign Minister Shimon Peres following the conclusion of the Declaration of Principles, namely that after peace is concluded

14. Two excellent examples from the Palestinian and Israeli sides is the work of Elinoar Barzacchi and Riad al-Malki. See E. Barzacchi, *Specialization and Urban Services*, in E. Barzacchi & I. Spharim (Eds.), *Planning Jerusalem in Peace* (2000). R. al-Malki.

15. See Barzacchi, *id.*

16. See al-Malki, *supra* note 14.

17. There is nothing new in claiming that laws governing technical issues are also political. The American legal realists were the first to convincingly develop this argument, and much of critical legal studies scholarship on the subject continues to be derived from the Realists' insights. See, generally, W.W. Fisher III, *et al.* (Eds.), *American Legal Realism*, Chapter 4 (1993); *Symposium, The Public-Private Distinction*, 130 U. Pa. L. Rev. 1289 (1982).

18. For a detailed analysis, see *The Palestine Poverty Report 1998*, PNA Ministry of Planning and International Cooperation.

the national or class collective will not constitute the basis of social organization. Rather, the individual will assume responsibility. National goals will no longer be based on control or territorial expansion [...] economics will carry more weight than politics.¹⁹

Finally, even if Palestinian companies are able to compete and are assigned some of the privatized services, the main beneficiaries will be powerful Palestinian economic actors, as opposed to the vast majority of the Palestinian poor. And even then, it still remains uncertain whether Palestinian garbage will indeed be collected from the poor neighborhoods.

The above concerns I have with privatization are only a hunch. I probably failed to mention many more, and probably the ones mentioned above are rife with incoherence and internal contradiction. So, in self defense, let me restate the hunch: The stakes in Jerusalem's future reside in the mundane questions of who receives what kind of services in which part of the city. Now that Israel and the PLO have come close to agreeing on a relatively clean-cut division of sovereignty in East Jerusalem, the question remains open as to the distributional background norms governing the provision of services in the city. Given the present neoliberal penchant for privatization, sovereignty in Jerusalem may end up meaning nothing more than national (Palestinian and Israeli) courts enforcing private law contracts between Jerusalem residents and private service providers. In other words, the future stakes of sovereignty over Jerusalem seem to reside primarily in private law relations. And if sovereignty ultimately boils down to courts enforcing the terms of private law contracts, then it is high time to start exploring the distributional stakes most likely to be embraced by the city's new sovereigns.

19. For detailed analysis see, J. Beinin, *Palestine and Israel: Perils of a Neoliberal, Repressive Pax Americana*, 25 *Social Justice* 20-39 (1998).