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Introduction

1.1 THE BOOK'S ISSUES: RETHINKING ETHNO-NATIONAL (IN)JUSTICE AND PEACE

1.1.1 *The Rise of Power-Sharing as a Tool of Peacemaking*

On November 21, 1995, in Dayton, Ohio, a dramatic peace agreement was signed between Yugoslavia, Croatia, and Bosnia and Herzegovina to end the horrific ethnic war that had been raging for the previous three-and-a-half years in Bosnia. Faced with the challenge of how to set up a state "on the basis of little more than the ruins and rivalries of a bitter war" (Bildt, 1998, 392, cited according to Bose, 2005, 324), the Dayton Peace Agreement devised a complex power-sharing framework. The overall aim of the power-sharing arrangements was to allow the sovereign power in Bosnia and Herzegovina to be shared among the three ethno-national groups that fought the war and comprise most of the citizenry. On April 10, 1998, in Belfast, the Good Friday Agreement (GFA) was signed to end the violent conflict that had persisted in Northern Ireland for 30 years. One of the central elements of this peace agreement is a complex power-sharing arrangement between the two major communities that constitute the Northern Ireland population. In recent years, attempts to resume negotiations between the two communities in long-divided Cyprus have been taking place. For decades, the prevailing paradigm for a Cyprus solution has been the bizonal, binational federation, another complex power-sharing arrangement. Meanwhile, the halting of peace negotiations between the government of Israel and the Palestinian Liberation Organization and what today seems to be the collapse of the peace process based on the traditional two-state solution have sparked a renewed interest in alternative approaches to Israeli–Palestinian peace. Among the prominent visions being discussed and evaluated are federal and confederate models based on power-sharing arrangements between the two ethno-national groups.

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These are a few examples of a practice that has become a central component of contemporary peace strategies to overcome ethno-national conflicts. As of the beginning of the new millennium, ethno-national conflicts, such as those in Kashmir, Cyprus, Northern Ireland, Bosnia and Herzegovina, and Israel–Palestine, are estimated to comprise more than 80 percent of the world's conflicts (Wimmer, 2013a, 2–3). Overcoming, settling, resolving, or managing these conflicts remains a high priority for many national governments and the international community. The examples of Bosnia and Herzegovina, Northern Ireland, Cyprus, and Israel–Palestine demonstrate the centrality of restructuring the basic constitutional arrangements in accordance with democratic "power-sharing" in efforts to end these conflicts. Unlike majoritarian democracy, power-sharing (or "consociational democracy"), is deliberately designed to accommodate the major social groups within the state's political structures. Power-sharing offers an alternative model of democracy, more suitable for places riven by group conflict, and serves as an additional tool of peacemaking, for conflicts that cannot be settled through, or *only* through, the partition of the territory or the adoption of a constitutional democracy with a bill of rights.

While the advantages of power-sharing arrangements are gradually being substantiated in practice and research and gaining the support of scholars and conflict resolution experts, they have not yet gained normative legitimacy, nor have they been properly incorporated into either the human rights framework or into international and regional law. When power-sharing arrangements utilize predefined ethno-national groups as a central feature of the constitutional structure, these arrangements are widely seen as illiberal (and unjust) and as violating individual rights to equality and nondiscrimination. Consequently, significant tensions arise between peacemaking efforts and national-political choices on the one hand and international law and human rights law on the other hand. These tensions are revealed starkly in the European Court of Human Rights (ECtHR) rulings regarding the conformity of the constitutional arrangements of Bosnia and Herzegovina with the European Convention on Human Rights (ECHR).[1] In these cases, the ECtHR ruled that fundamental constitutional provisions of Bosnia and Herzegovina's political structure – those relating to the election of the presidency council and of the members of the House of Peoples (Bosnia and Herzegovina's upper legislature chamber) and reserving them to citizens of Bosnia and Herzegovina who are affiliated to

[1] These cases include *Sejdić and Finci* v. *Bosnia & Herzegovina* (December 22, 2009) ECtHR Application Nos. 27996/06, 34836/06 and the subsequent *Zornić* v. *Bosnia & Herzegovina* (July 15, 2014) ECtHR (3681/06); *Šlaku* v. *Bosnia & Herzegovina* (May 26, 2016) ECtHR (56666/12); and *Pilav* v. *Bosnia & Herzegovina* (June 9, 2016) ECtHR (41939/07).

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one of the three ethno-national groups – violate the right to equality and non-discrimination and the right to equal participation in elections, and therefore must be revised.

1.1.2 *Peace versus Justice*

The tensions between power-sharing arrangements and human rights are generally viewed as a dilemma between *peace and justice*, and, until now, the primary way to reduce them has been through the development and promotion of liberal versions of power-sharing. While these versions considerably reduce the tensions, they do not eliminate them entirely. Moreover, in practice, and given the high complexity of peace negotiations, it is not always possible to devise an agreement based on liberal power-sharing models. Therefore, while infringement of individual rights might be reduced when designing power-sharing arrangements, it cannot be avoided. Thus, a need to justify infringements of human rights – as Bosnia and Herzegovina was required to do before the ECtHR – remains.

Generally, the main justification given to support human rights violations caused by ethnic power-sharing arrangements is that such arrangements are an indispensable political compromise in situations of ethno-national conflict and are preferable to the continuation of bloodshed. However, relying on this justification may result, as in Bosnia and Herzegovina's case, in a clear conflict between peacemaking and national politics and human rights requirements. As the ECtHR case law reveals, ethnic power-sharing arrangements are viewed as legitimate only in exceptional circumstances, and they are expected to be temporary, until a majoritarian democratic system, whose political legitimacy is taken for granted, can replace them. Although the use of exceptional and temporary political circumstances to justify power-sharing arrangements and the recommendation that courts adopt a much more prudent approach when they review such arrangements are in place, they do not adequately tackle the problem of legitimacy underlying the disparity between ethnic power-sharing and human rights obligations.

This book argues that this "peace versus justice" framing of the tensions between power-sharing and human rights is inaccurate, as it is built on an individualistic conception of justice and a narrow understanding of a legitimate political system. Importantly, these narrow conceptions fail to account for the meaning and requirements of justice in loci of deeply divided places, consequently ignoring the actual justice that power-sharing and other collective-based arrangements can promote.

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1.1.3 *Reevaluating Justice: Collective Equality*

To capture more accurately what justice means and what promoting justice requires in the context of deeply divided places, this book proposes the concept of "collective equality" as a central element of justice in deeply divided places and as a new theoretical basis for the *law of peace* (Bell, 2008). Collective equality adds to the existing theoretical treatment of questions regarding peace, justice, and constitutional frameworks by recognizing national groups (minorities and majorities) as primary and legitimate political actors that are substantially equal. The new concept acknowledges that in situations of conflict, the construction of equal and nondominating relations among rival groups is a core rationale of just peace. Collective equality is built on a collective and relational understanding of justice that reflects the prevalent understanding of justice in places of group conflict. Its core elements include the recognition of ethno-national groups as primary political entities, which are substantively equal and engaged in interdependent and nondominating relations among themselves. By clarifying that the responsibilities of national groups are extended not only toward states and individuals, but also toward the other national groups with which they interact, collective equality reinstates the principle of *reciprocity* to the framework of group rights (compare Rawls, 1993, 16–17; 2001a, 6, 49; 2001b, 7, 14, 35). I propose four dimensions in order to evaluate the construction of equal and nondominating relations among rival groups: equality in negotiations; political equality (often requiring bespoke power-sharing arrangements); social and economic equality; and equal recognition of culture, language, and national aspirations. The study does not suggest collective equality as a general principle applicable in all places at all times. Rather, it is a special concept (cf. Hart, 1955, 183–188) conducive to the promotion of equality and inclusion in deeply divided places, where the political landscape is shaped by a conflict between national groups.

1.2 NATIONALISM IN DEEPLY DIVIDED PLACES

1.2.1 *The Challenge of Ethno-national Conflict*

The 1995 Dayton Peace Agreement succeeded in ending the war in Bosnia that erupted during the disintegration of Yugoslavia in the early 1990s. The Bosnian war lasted for three-and-a-half years (1992–1995) and took the lives of about 100,000 people, while over 2 million others were displaced as part of a deliberate policy of "ethnic cleansing." The war was fought between the three ethno-national groups of Bosnia and Herzegovina – the Bosnian Serbs, the Bosnian Croats, and the Bosnian Muslims, which pursued opposite

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political and territorial goals. The Bosnian Serbs and Croats aimed to divide Bosnia's territory and create mono-ethnic territories (and possibly to annex them to the neighboring Serb-dominated remainder of Yugoslavia and Croatia, respectively). Bosnian Muslims, supported by the international community, objected to dismantling the country and sought to maintain Bosnia and Herzegovina's territorial integrity. Only after extensive military and diplomatic international intervention did the Republic of Bosnia and Herzegovina, Croatia, and Yugoslavia sign the Dayton Accord, which ended the war. While the conflict was driven by political aims, in the Western media and public and academic debates during the 1990s, it was portrayed as a barbarian war, driven by irrational ancient hatreds between the rival ethnic groups of the country (Kaplan, 1993; for analysis see Hansen, 2013).

By April 1998, when the GFA was signed, the violent conflict in Northern Ireland had been raging for three decades. During these three decades, over 3,000 people were killed, another 30,000 people were injured, and many were displaced by intimidation, forcing them to move to ethnically segregated neighborhoods. Frequently regarded as a conflict between the Catholics and Protestants of Northern Ireland, it is at least as deeply rooted in the centuries-old Irish struggle against the British colonial rule of the island.

Cyprus today is an ethnically divided island. A United Nations (UN)-controlled buffer zone separates the northern section where Turkish Cypriots live, occupied by the Turkish Army, and the southern part of the island inhabited by a great majority of Greek Cypriots, internationally recognized as the Republic of Cyprus. This territorial and political division is a relatively recent occurrence and does not characterize the historic interethnic relations on the island. The first major ethnic violence between Greek and Turkish Cypriots broke out at the end of 1963, following the collapse of the power-sharing government that was established under the original Cypriot constitution in 1960. Between 1963 and 1974, a third of the Turkish Cypriots were pushed to move to separated enclaves. A coup d'état by Greek nationalists against the Greek Cypriot President Makarios prompted Turkey to respond with a military invasion, upholding its right under the 1960 Treaty of Guarantee. With the collapse of UN-led negotiations on August 14, 1974, Turkish troops in Cyprus took control of 37 percent of the island's territory. The Turkish Army's occupation of the island's territory was accompanied by a mass displacement of approximately 200,000 Greek Cypriots (Michael, 2009, 31–35, 37). When the fighting ceased, the Turkish Army remained, resulting in the division of the island between the "Greek side" and the "Turkish side," which remains to this day. While the Cyprus conflict is generally regarded as a "frozen conflict," the rivalry between Greek Cypriots and Turkish Cypriots continues to shape

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the relations on the island and between the Republic of Cyprus and Turkey, repeatedly threatening to burst out.

The conflict between Israel (or Israeli Jews) and the Palestinians (Palestinian Arabs) is known as one of the most intractable contemporary conflicts, has cost the lives of more than 15,000 people, and continuously affects the lives of millions. From the early twentieth century to the present, the conflict has seen multiple violent forms, including full-scale war between Israel and its Arab neighbors in 1948, leading to a massive displacement of Palestinians, many of whom became refugees. The conflict has also caused Israeli military actions against Lebanon; terrorist operations against Israel led by the Palestinian Liberation Organization (PLO) and various factions over the years; two Palestinian uprisings; rocket attacks from the Hamas-controlled Gaza Strip; and Israeli incursions and use of air power, routinely taking the shape of larger-scale military operations. Further, since 1967, Israel has enacted prolonged and continuous military control, in various forms and degrees, of the West Bank and Gaza Strip. Israeli military control is accompanied by a continuous expansion of Israeli settlement in East Jerusalem and the West Bank, alongside restricting Palestinian settlement and development in these areas.

These are a few examples of "ethno-national conflicts," labeled here also as "deeply divided places," representing sites of actual or potential mass political violence, where "genocide, ethnic expulsion, or coercive assimilation are threatened, or have taken place" (McEvoy & O'Leary, 2013, 5–6). Other contemporary examples of ethno-national conflicts include India's region of Kashmir, Iraq, Ethiopia, Sudan and South Sudan, Nigeria, and Yemen. Ethnic or ethno-national conflicts are regarded today as one of the major threats to international peace and security. As of the 2000s, over three-quarters of the world's prominent wars were classified as ethnic or ethno-national wars, fought by nationalists who either seek to establish a new nation-state for their ethnic nation, to secede and join a kin-state, or to gain a more favorable balance of power within an existing state (Wimmer, 2013a, 2–3; see also Marshall, 2020). As the examples already given indicate, the consequences of ethno-national conflicts include great human suffering, and may result in the destabilization of provinces, states, or even whole regions. Unlike "old wars," in which states are involved and battle is the decisive encounter (Kaldor, 2012), these "new wars" involve state and nonstate actors, run along ethnic lines of division, are generally not resolved on the battlefield, persist over a long period of time (Kriesberg, 1993, 417–421; 1998; Wimmer, 2004a; 2004b; Bar-Tal, 2007a, 25–28; 2013), and commonly perceived by the involved parties as irresolvable (Leshem et al., 2016).

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As ethnicity and nationalism are primary social factors that shape and drive ethno-national conflicts, a better understanding of them is essential for evaluating whether the existing theoretical and legal frameworks are adequate for the task of overcoming such conflicts.

1.2.2 *Ethnicity and Nationalism*

Ethnicity. A century ago, Max Weber defined ethnicity as any subjectively experienced sense of commonality based on a belief in common ancestry and shared culture (Weber, 1978, 385–398). Like many other existing definitions of the term (Chandra, 2006), this understanding emphasizes the subjective belief of the group's members that they share a common descent and culture as the distinguishing factor of ethnicity and ethnic groups. Weber's understanding also clarifies the role played by different objective markers such as religion, geographic region, and language. While ethnicity is not dependent on a particular marker or set of markers, objective indicators such as common religion, common territory, common language, or common race are typical of ethnic identity, and are used to substantiate the belief in shared culture and ancestry.

Nations and nationalism. *Nations* are one subtype of ethnic groups, and in practice many nations are "nationalistic ethnic groups" (Kuzio, 2002; 2007; see also Wimmer, 2002; 2013b), which makes the distinction between ethnic groups and nations in many cases blurry. Whereas the literature has historically defined nationalism either in ethnic (excluding all non-members of the ethnic group) or civic terms (defining the nation on a territorial basis), more recent constructivist interpretations understand ethnic and civic nationalism not as permanent and immanent classifications of a specific nation, but rather elements that can coexist and change over time (Tamir, 2019b, 427; Kuzio, 2002; 2007, 1). Thus, following Weber and Wimmer, and slightly altering both, I define an ethno-national group as a community defined in ethnic terms whose members have developed national aspirations, connected with an aspiration to (or a practice of) self-rule (Wimmer, 2013a, 1–2; Kymlicka, 1995, 11–20). (Notably, this definition excludes ethnic groups who do not aim for national self-determination, like Circassians in Israel.) The group's aspiration to "self-rule" expresses the nationalistic demand that "rulers and ruled hail from the same ethnic background," which has become the principle for legitimate statehood (Wimmer, 2013a, 1). At the core of these aspirations (and practice) rests the claim to national self-determination (De-shalit, 1996, 906; Eller, 1997; 1999, 21).

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1.2.3 *National Self-Determination*

Conflicting sides of ethno-national conflicts generally frame their aspirations and justify their demands by claiming national self-determination. However, self-determination is a complex concept and receives various interpretations in different contexts. Prominent accounts of self-determination found in various schools of thought distinguish between cultural and political understandings of self-determination and between civic (or statist or territorial) and ethnic versions. From these common typologies, collective equality adopts a concept of self-determination that can be labeled as *political and ethnic*.

The ethno-cultural approach to nationalism stresses the importance of culture – that is, a collective culture – for individuals. Though individual actors interpret, make claims, and struggle in the name of their group's culture, these struggles are not (only) about culture (or religion), as the ethno-cultural approach seems to imply, but struggles *with* culture. Culture, being a code for authentic groupness, is the basis of the entitlement of the group to certain other stakes and rights (Eller, 1997). However, the ethno-cultural approach seems to overlook this role that national culture plays. The ethno-cultural interpretation of self-determination also misrepresents the actual demands of nations to self-determination and their justifiable interests. While the cultural interpretation focuses on cultural preservation and the institutions needed to enable it, demands made by nations are directed toward institutional arrangements that secure much wider political interests (De-shalit, 1996; Eller, 1997; 1999, 21), including the expectation that rulers and ruled hail from the same people (Wimmer, 2013a; 2013b; 2018a).

Eric Hobsbawm has provided a very concise formulation of the prevailing conception of nationalism, in which "nation = state = people" (Hobsbawm, 1992, 19). Indeed, equating the nation with the state, and both with "its" people, is prevalent, and various reasons seem to support and justify it. Accordingly, civic nationalism, frequently regarded as the only version of nationalism that can be settled with liberal ideals and with a just political system, equates the nation with the state's citizenry. Ethnic nationalism, in which the nation is defined in ethnic terms, is the repudiated alternative. It is regarded as both dangerous and unjust, since by definition it excludes those who come from other ethnic backgrounds. In similar vein, international law adopts a statist/territorial interpretation and rejects the ethno-national interpretation of self-determination.

Despite the great appeal of the equation between the nation, the state, and the people (defined as the state's citizenry), it cannot be adopted as the only way to understand self-determination, or the right to self-determination, in

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deeply divided places. Defining the nation in territory and civic terms cannot be assumed as a pragmatic goal of peacemaking in such places, or as an adequate theoretical basis for the law of peace. Such assumptions disregard the sociopolitical realities and what can reasonably be expected in terms of social development in such places. The real or probable incongruity between the nation (defined in ethnic terms) and the state and its citizenry (defined in territorial terms) is precisely the background against which nationalistic demands are made and conflicts erupt (Young, 2005, 139; Brubaker, 1996).

The international consensus seems to identify the problem of deeply divided places as resting with the ethnic divide itself. Prominent international approaches support overcoming ethno-national violence by consolidating a new nation, of the entire state's citizenry, that will replace the former conflicting ethno-national identities. Following the rise of the politics of recognition and multiculturalism, acknowledging demands for cultural preservation has also become commonplace and is included today in international and regional human rights instruments. But understanding self-determination either as restricted to a civic (or statist or territorial) understanding (as is done in prominent liberal strands and within international law), or as restricted to the preservation of the national culture (as depicted by the ethno-cultural strand of nationalism), is an inaccurate and unhelpful interpretation of self-determination. They are both inaccurate as they do not provide a genuine description of the social phenomena that they are supposed to describe, and they are unhelpful for resolving self-determination conflicts. As will be developed later, they are also unhelpful for providing adequate redress for the underlying claims for justice. If we seriously consider *how ethnicity and nationalism develop* in deeply divided places, we must acknowledge that civic nationalism is unlikely to emerge in the short or medium term in these places, especially if we rule out morally impermissible policies, such as forced assimilation, ethnic cleansing, or worse (cf. Wimmer, 2018a; Hughes, 2014; Nagle, 2009).

1.2.4 *The Role of Ethno-national Groups in War and Peace*

In popular beliefs, ethnic and national identities are viewed as inevitable. This approach has been labeled in the literature as the primordial approach to ethnicity. Ethnicity, by this account, is a given and stable fact of the social world – acquired by birth, subjectively felt due to its deeply rooted character, and maintained independently of changing circumstances. But in recent decades researchers have repudiated these beliefs about ethnicity. They have uncovered the *constructed* nature of ethnic and national identities and aimed

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to specify how ethnicity and nationalism *work* and how ethnic boundaries are made and unmade (Eller, 1997; 1999; Eriksen, 2002; Wimmer, 2008a; 2013b; Brubaker, 2009, 29). Labeled as the constructivist-instrumentalist approach to ethnicity and nationalism, researchers find the sole raison d'être of ethnic and national organization in its political functioning. According to this view, which represents the contemporary consensus among researchers, ethnicity and nationalism need no historical or cultural explanation. Instead, they are the outcome of a dynamic process of making ethnic boundaries, driven by actors (such as political leaders) and political motivations (prominently exclusion from state politics, as well as deprivation and discrimination), solidified by the media and the educational system as well as through a variety of conspicuous and implicit means, in which ethnic and national categories are invoked in everyday life (Billig, 1995; Brubaker, 2009, 34).

One possible conclusion might have been that since ethnic and national identities are not "given" but "constructed," they can be reconstructed in a way that better fits peaceful political arrangements. Alas, this does not seem to be the case in deeply divided places. While in nonconflictual circumstances ethnic identity can be one of many personal identities, if it reaches the consciousness of individuals at all, in places and times of ethnic conflict this identity tends to heighten and even triumph above all others (Ashmore et al., 2001; Bar-Tal, 2007b, 1443). The prominence of the ethno-national identity over other personal identities and personal preferences and worldviews is evident in the four cases compared here. Thus, although ethnicity is not a natural and inevitable fact of the social world, not all ethnic identities are fluid, unstable, and contested (Wimmer, 2013b, 204). A realistic and reasonable approach to deeply divided places must assume the ethno-national boundary itself, the division from others, as stable, at least for the foreseeable future. Several attributes of ethno-national identities during conflict and peace are assumed by the collective equality account.

Centrality: ethno-national groups play a central role in the politics of deeply divided places. The ethno-national identity provides a group consciousness and acts as a mobilizing force, which turns into the overriding, or at least a central, consideration in national politics.

Agency: changing the situation – primarily of the violent struggle – requires the involvement of reliable representatives of the ethno-national groups. While significant progress can be made without the prior consent of the groups' representatives, eventually their approval and even active participation will be necessary. The Northern Ireland peace process illustrates this point. Important changes in socioeconomic inequalities could take place without any prior consent of the representatives of the Nationalist/Irish

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