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Delacroix, S

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FROM CONSTITUTIONAL WORDS TO STATEHOOD? THE PALESTINIAN CASE

Sylvie Delacroix*

Abstract

A lot of dreams have been invested in the Palestinian constitution. Its ambitious provisions promise a socially progressive, inclusive and tolerant State. Yet, today, these drafts have lost the semantic ambiguity that typically characterises constitutions in the making. It is all too easy to decide that those constitutional words have lost any hint of their politically-induced performative force. It may be tempting to imagine what things may be like had the Oslo Agreements led to a successful constitutional draft; or what could have happened had Arafat not believed that he could somehow artificially turn back the legal clock to a pre-1967 legal patchwork. It is equally tempting to imagine what could – still – happen if, instead of being merely tolerated, perduring customary laws were encouraged to lend their full gravity to a burgeoning civic movement. The sovereignty deficit that plagues the Palestinian constitution-making effort may turn out to be an asset if, by standing in the way of establishing a constitutional democracy from the top down, it has allowed customary practices to flourish.

Keywords

Palestinian constitution, self-determination, sovereignty, customary law, urf, Gandhi, Swaraj, sovereignty, legal pluralism, Oslo Agreements

1 Introduction

Can words – rather than a state (or army) – constitute a country?¹ They would be words that have taken some knocking about. Seasoned through extensive parleys, stretched by multi-dimensional aspirations, challenged by occupational anger, the words of the Palestinian Constitution are meant to carry the weight of their country. Can they (and should they) carry it all the way towards statehood?

* University College London, Faculty of Laws. This is an updated version of “Drafting a Constitution for a Country of Words: The Palestinian Case,” which appeared in (2012) 4 *Mid East L Gov* 72. Many thanks to Koninklijke Brill for permission to reproduce the sections that overlap here.

¹ ‘We have a country of words. Speak speak so I can put my road on the stone of a stone. We have a country of words. Speak speak so we may know the end of this travel’. See M Darwish, ‘We Travel Like Other People’ in M Darwish, S al-Qasim & Adonis (eds), *Victims of a Map: A Bilingual Translation of Arabic Poetry*, (1984: tr. A al-Udhari) 31.

An increasing number of Palestinian voices stress the fact that statehood cannot be, and never was, an end in itself. As a means to promote the rights of all segments of the Palestinian population, statehood is only viable if a certain number of conditions are met. Prominent among them is the state's accountability to the whole of the Palestinian population.

In March 2011, the Palestinian Legislative Council's (PLC) constitution-drafting committee was asked to 'finalise' its work 'in accordance with the merit of finalising the independent Palestinian State's establishment'. Yet raising concern about the merit of such 'finalising' has not so far dampened the ambition of this constitutional draft.² Its endeavour to set the basic legal framework for limiting and organising the powers of the executive, legislature and judiciary (with significantly greater staunchness than other Arab constitutions)³ is not only an attempt to shape a way of life; its performative language defiantly blazons the very elements that have until now stood in the way of this aspiration. Constitutions do not usually define borders or the rights of its 'refugees'; nor do they usually come *before* statehood.

What can, and what do, constitutions usually constitute? Chalmers suggests a threefold answer to this question, distinguishing between the 'epistemological' setting out of 'the conditions which enable individuals to have a conception of the political or legal'; the formal identification of the 'subjects of the rights and entitlements bestowed by the Constitution'; and the forging of some kind of aspirational identity or so-called 'politics of the soul'.⁴ As this framework proves helpful as a bid to structure my discussion of the Palestinian constitution-making endeavour, this paper is structured along these three themes, starting with 'the sphere of the legal.'

² Two main processes of writing constitutional drafts have been conducted in parallel. Under the auspices of the PLO, drafts have been written since 1988; the latest draft, ('Third Draft') was written during the build-up towards the establishment of the Palestinian State in Provisional Borders within the framework of the Second Phase of the Roadmap. Under the auspices of the Palestinian Authority, the PLC presented the Basic Law in 1997 as an interim constitution. This document was not approved by Arafat until 2002. See The Palestinian Basic Law, 2003 Permanent Constitution draft (tr N Brown), <<http://www.palestinianbasiclaw.org/basic-law/2003-permanent-constitution-draft>> [accessed 8 December 2014].

³ As it stands, the current draft may still be deemed one of the most liberal constitutions in Arab history, not only because of the strength of its rights provisions but also because of the genuine attempt to close many of the loopholes that exist in other Arab constitutions (especially when it comes to emergency powers and the independence of the judiciary).

⁴ See: D Chalmers, 'Constituent Power and the Pluralist Ethic', in M Loughlin & N Walker (eds), *The Paradox of Constitutionalism* (2007) 291.

2 The sphere of the legal

Even when considered in a strictly epistemological sense, the claim that constitutions somehow 'set out the conditions which enable individuals to have a conception of the political or legal' is problematic. It suggests a transition from some sort of pre-legal, hazy merging of the legal and political to a formally *constituted* legal sphere that lends itself to a specifically legal framework of analysis (as opposed to its political counterpart). This claim is remarkably akin to that first formulated by Jellinek at the turn of the 20th century and lends itself to the same objections: any attempt to sort the legal away from the political fabric that conditions and enables it leads to an inability to explain the normative status of law.⁵ This inability is in turn paid for by an exposure to either some reductive 'legal realism' or convenient reference to an absolute (whether it be God, natural law or otherwise) to ground law's normative claim.

As a particularly daring instance of 'building the ship at sea', the Palestinian construction of the legal sphere could hardly be more foreign in its eclectic pragmatism to the romantic claim that constitutions somehow constitute the sphere of the legal (even if only epistemologically). When, in September 1993, the signing of the first of the Oslo Agreements entrusted the Palestinian leadership with some control over a small territory, the Palestine Liberation Organization's Legal Committee quickly drafted a provisional constitutional document, which was fiercely criticised both externally⁶ and internally.⁷ As a result, the Palestinian Authority was established before any basic law was issued, hence prompting an enduring difficulty, given the Palestinian Authority's limited representativeness (I develop this issue at length in section 2).⁸ It also meant, more importantly, that the emerging Palestinian institutions were left devoid of any clear 'non-Oslo' legal

⁵ In a bid to free legal science from the 'vice of methodological syncretism', Jellinek denounced as illegitimate any amalgam of different methods of cognition, observing: '[i]f one has comprehended the general difference between the jurist's conceptual sphere and the objective sphere of natural processes and events, one will appreciate the inadmissibility of transferring the cognitive method of the latter over to the former.' See G Jellinek, *System der subjektiven öffentlichen Rechte* (tr S Paulson, in S Paulson, B Litschewski Paulson & M Sherberg, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 28.

⁶ The draft proclaimed Jerusalem the capital and clearly aimed at the production of a permanent constitution for a sovereign state (this is still very much the case in the current 2003 draft).

⁷ The hasty drafting lacked any publicity and was unlikely to stand in the way of Presidential authoritarianism.

⁸ While the PLO purports to represent Palestinians everywhere (this includes 4.7 million United Nations registered refugees), the Palestinian Authority represents the Palestinian population of the West Bank and Gaza.

ground. Arafat's answer to this predicament was bewildering: upon assuming leadership of the Palestinian Authority, he issued a decree purporting to restore the legal status that existed prior to the 1967 Israeli occupation.⁹ This meant the restoration of an impossibly eclectic patchwork of British, Jordanian, Egyptian and Israeli pre-1967 laws. It also implied that all post-1967 Israeli orders were to be deemed no longer valid; a logical conclusion which was not, however, followed in practice (some post-1967 Israeli military orders are still implemented by Palestinian courts on the basis that they have not been specifically repealed). The resulting legal framework has been described as a 'salad',¹⁰ with layer upon layer of concomitant legal regimes whose applicability depends – within Palestine itself – on location, subject matter and nationality.

An individual (let's call her Nuzha)¹¹ standing in a street in Jericho¹² may go to a Palestinian court to solve a civil matter according to Jordanian law; may face criminal charges on the basis of the Jordanian Penal Code or the revolutionary Penal Code of the PLO (or tried for 'security offences' by either the Israeli

⁹ For a study of the Palestinian legal system under the British Mandate, see N Bentwich, 'The legal system of Palestine under the mandate' (1948) 2 *Middle East J* 33.

¹⁰ 'The Palestinian legal system can be compared to a tossed salad, with layers of different laws and systems all mixed up into a confused mess. This situation in the Palestinian Territories is perhaps unprecedented in modern history'. See W Muhaisen, 'The Palestinian Legal System' (essay, 2003), *The Palestinian Legal System*, <<http://www.theyap.org/showcase/politicsandlaw/palestinianlegalsystem.htm>> [accessed 17 November 2011].

¹¹ Nuzha may be a national of any country except Israel: as an Israeli citizen 'settled' in Jericho, she would be subjected to Israeli law. Note that even if she were born and lives in Jericho, Nuzha's ability to participate in Palestinian elections is subject to Israel's control: While the Interim Agreement was to have given the Palestinian Authority power to keep and administer registers and records of the population, power was limited to printing changes in the Palestinian Population Registry, common to the West Bank and Gaza, provided that Israel had already approved the changes. See S Bashi & K Mann (Gisha: Legal Centre for Freedom and Movement), *Disengaged Occupiers: The Legal Status of Gaza* (2007) 50-4, <<http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>> [accessed 11 November 2014].

¹² As a major population centre within the West Bank, Jericho is part of 'Area A', where the Palestinian Authority in theory exercises jurisdiction over all aspects of life including internal security (Israel however retains its ability to intervene if it deems it necessary). In 'Area B' (generally the lesser populated towns etc.) Israel has control over security (the Palestinian Authority cannot operate its own security forces in this area). 'Area C' (which consists of major parts of the West Bank territory), for its part, is still under total Israeli control. The Palestinian Authority has no jurisdiction over there. Settlers now outnumber Palestinians in Area C by two to one.

military courts¹³ or the Palestinian Authority's own state security courts);¹⁴ would need to refer to Ottoman law to resolve any land dispute or set up a charitable organisation¹⁵ and may, independently of the above, rely on customary law as a route towards dispute resolution.¹⁶ Nuzha's cousin, standing in an East Jerusalem street (a mere 30-minute drive from Nuzha), will be subjected to a very different set of laws. Israel's unilateral annexation of East Jerusalem effectively means that the 260,000 Palestinians who live there are exclusively subject to Israeli law.

If issued tomorrow, the Palestinian constitution would not necessarily change any of this.¹⁷ As a strategic element in the construction of a state-like apparatus, a Palestinian constitution may have an important role to play in the gradual transition from a *de facto* to a *de jure* state. Yet it is far from clear whether, as things currently stand,¹⁸ the establishment of a Palestinian state is the best way (or even *a way*) of achieving equality of rights for all Palestinians.¹⁹

¹³ Security offenses are defined broadly and may include charges as varied as stone-throwing or membership in outlawed organisations.

¹⁴ The Palestinian Authority's state security courts have come to attract attention (public awareness of these state security courts seems otherwise worryingly low) following the debate triggered by the Palestinian Authority's recourse to the death penalty: a total of 92 different sentences of capital punishment have already been delivered since the inception of the Palestinian Authority, of which 16 have already been executed. In June 2005, the President of the Palestinian Authority issued an order for a retrial by a civilian court of all those sentenced to death under the Revolutionary Penal Code in military courts. No new sentences were delivered in 2006 or 2007, but sentences were again delivered by military courts in 2008 (13), and 2009 (17). See S Nusseibeh, *Capital Punishment under the Palestinian Authority* (Paper presented at the World Congress Against the Death Penalty, Geneva, 24 February 2010), <sari.alquds.edu/doc/capital_punishment%2023-2R.doc> [accessed 22 November 2014].

¹⁵ Until four years ago, the same Ottoman law governed the setting up of charitable organisations in Israel.

¹⁶ Otherwise known as *Urf*, Arabic for 'that which is known', this system of customary law extends to a wide number of Arabic countries. Mainly aimed at preventing further damage within the communities of either of the individuals involved in a dispute, it consists in a set of conflict resolution procedures promoting active community involvement.

¹⁷ One way of negotiating the various pitfalls of drafting a constitution while under occupation would be for the Palestinian drafters to envisage a transitional constitution whose sunset clause would clearly signal its bridging role towards a process that is more comprehensive and hence does not suffer from the same legitimacy deficit.

¹⁸ Geographically, the continuing expansion of Israeli settlements leads some experts (both Palestinian and Israeli) to deem the establishment of a Palestinian state impossible. Politically, the moribund state of the Palestinian National Council leads some to highlight the hazards inherent in the political disenfranchisement of more than half of the Palestinian population.

¹⁹ '[A]s the prospect of a genuine – a sovereign and independent – Palestinian state has receded, another discourse has returned, one with much deeper roots in the Palestinian political

The current layers of concomitant legal regimes may not sit well with the positivist idea that all law must originate in a single power source. In fact, it may be considered a healthy reminder of the possibility of taking a broader (and less Westphalian) view of law, built around a diffuse network of legal norms. From this perspective, the Palestinian legal maze could be deemed an incentive to research ways in which the existing system of customary law may provide for and support the grass-roots advocacy of Palestinian rights in a way of which a formal (written) Palestinian constitution may not be capable.

3 Identifying the subjects of Palestinian rights

Article 2 of the current Basic Law states: '[t]he Palestinian people are the source of all power'. This sounds odd. Are 'the people' not, by definition, the source of all power? Without the political might engendered by a group of individuals pondering ways of living together, there could not be any constitution, let alone any law. Political power, understood as the power to (re)shape social interactions in the light of moral or prudential concerns cannot but emanate from the people.

Article 2 goes on to state that the Palestinian people are the source of all power 'which shall be exercised through the legislative, executive, and judicial authorities, based on the principle of separation of powers, and in the manner set forth in this Basic Law.' The distinction between the 'power' referred to in the first part and the 'powers' (legislative, executive and judicial) that ought to remain 'separated' contributes to the oddity of this English translation. As it turns out, an 's' after the initial reference to 'power' seems to have been lost in translation,²⁰ which suggests that the drafters probably had in mind something like Article 33 of the Belgian Constitution: '[a]ll powers emanate from the Nation'.

The peculiar formulation of Article 2 may well find its roots in what it was trying to avoid saying, for there is one word – 'sovereignty' – whose absence is noteworthy. Most constitutions use the term at one point or another, including

imagination than talk of statehood, and much closer to the ideas that inspired the Arab uprisings. It's often forgotten that until the mid-1970's, Palestinians were looking not to establish a state but to achieve "national liberation", to restore their rights in the land from which they had been driven – beginning with the right of return. Palestinians rarely talk about statehood, but they often talk about their rights; statehood is viewed, at best, as a means to achieve them'. See A Shatz, 'Is Palestine next?' (2011) 33 *London Review of Books* 9.

²⁰ See Basic Law 2009 (Palestinian Legislative Council) Art 2.

the South African,²¹ Egyptian²² and French constitutions,²³ which are all known to have had some influence on the Palestinian drafting process. The relatively recent Iraqi and Afghan constitutions give pride of place to the concept: '[t]he law is sovereign. The people are the source of authority and legitimacy [...]'²⁴ and '[n]ational sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives.'²⁵

Beyond its silent influence on the constitutional draft, the distorting effect of this 'sovereignty issue' can also be seen at work at a more insidious level. When it comes to defining what and *who* constitutes the Palestinian people, its struggle for sovereignty may be seen as a catalyst: religious and cultural differences are meant to retreat (not necessarily successfully) in front of the national liberation campaign.

Who decides who belongs to the Palestinian people and what interests are shared by it?²⁶ An answer formulated predominantly in terms of ending the occupation is bound to be precarious.²⁷ An optimistic reading of the ongoing drafting effort would deem the constitution's extensive human rights provisions, as well as its conspicuous concern for safeguarding the rule of law, to point to a genuine move towards a positive and idealist construction of Palestinian

²¹ Constitution of the Republic of South Africa 1996 (South Africa) Art 1: '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values.'

²² Constitution of the Arab Republic of Egypt 1971 (Egypt) Art 3 as it stood in 2003: '[s]overeignty is for the people alone who will practise and protect this sovereignty and safeguard national unity in the manner specified by the Constitution.' This has since been replaced, in the 2011 Interim Constitution, by '[s]overeignty is for the people alone and they are the source of authority. The people shall exercise and protect this sovereignty, and safeguard the national unity.'

²³ Constitution of France 1958 (France) Art 3: '[l]a souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum. Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice.'

²⁴ Iraqi Constitution 2005 (Iraq) Art 5.

²⁵ Constitution of Afghanistan 2003 (Afghanistan) Art 4.

²⁶ When raised in the context of a conference organised by Al-Quds University on the Palestinian Constitution-making endeavor (this conference, held on 7 and 8 May 2011, was attended by a mix of academics, diplomats and Palestinian officials), the question of what or who 'constitutes' the Palestinian people was notably met with a slightly impatient: 'it's widely agreed that the Palestinian people includes each and every refugee around the globe.' See 'Conference on Palestinian Constitution: Perspectives and Challenges', Al-Quds University, 7-8 May 2011.

²⁷ An answer *à la Schmitt*, inviting a substantivisation of politics and citizenship, which would hence be defined by the sharing of certain physical or moral qualities, is even more dangerous: see generally, for example, C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985). It is of course more than doubtful whether members of a polity can identify any set of qualities, moral or otherwise, which uncontroversially defines them as a political unity.

aspirations.²⁸ Far from being settled or reducible to the refugee question, the ongoing delineating of a Palestinian ‘social spirit’ may be the most important byproduct of this constitution-making endeavour.

For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to have already become the advent of law that which they become as a result of law.²⁹

Now it might seem that acknowledging this circularity – what is presupposed as coming before (the Palestinian people) invariably comes after (if at all) – ‘must be costly to a democracy, or demoralizing: If the [Palestinian] people do not exist as a prior – or even as a post hoc – unifying force, then what will authorize or legitimate their exercises of power?’³⁰ But denial of this issue is costly too.

The cost of shrugging off the inevitably circular (and hence open-ended) process that underlies the collective self-definition at the heart of any constitutional practices probably finds its most powerful theoretical illustration in the works of Carl Schmitt. His endeavour to determine what binds together the members of a community in substantive terms – as a set of qualities shared by ‘the people’ – undeniably topples any hint of circularity.³¹ It also leads to considering any ap-

²⁸ While the Palestinian constitution-making process has already managed to arouse a good deal of public, ‘civic’ debate, it does remain vulnerable to the charge of elitism (a large proportion of the constitution-drafting committee was educated abroad etc.). See N Brown, ‘Constituting Palestine: The Effort To Write A Basic Law For The Palestinian Authority’ (2000) 54 *Middle East J* 25, 25.

²⁹ J Jacques-Rousseau, *The Social Contract* (tr M Cranston, 1968) Book II, Ch 7, 86-7.

³⁰ B Honig, *Paradox, Law, Democracy: Emergency Politics* (2009) 15.

³¹ ‘The people’ unambiguously precedes and conditions the emergence of any legal order. Referring to Sieyès’ theory of the nation’s *pouvoir constituant*, Schmitt emphasises that the word ‘nation’ ‘designates the people as a unity capable of political action, with the consciousness of its political specificity and the will to exist politically [...] The theory of the people’s *pouvoir constituant* presupposes the conscious will to exist politically, thus a nation [...] The conscious choice of a certain type and form of this existence, the act through which “the people gives itself a constitution” thus presupposes the state whose type and form is determined. But for the act itself, for the exercising of this will, there cannot be any procedural rule, no more than for the content of a political decision. Nation willing it will suffice’. See C Schmitt, *Verfassungslehre* (1928) Ch 8, 79 (my translation).

peal to ethics the inevitable and insignificant product of power struggles that are, as such, reducible to 'normative nothingness and concrete disorder'.³²

The task of determining what interests and aspirations are shared by, and constitutive of, a community is always going to be an open-ended endeavour. In a certain (typically Western) understanding of constitutionalism, it is the job of the constitution to preserve this open-endedness through the imposition of limits on divided state powers (these limits are 'a way of acknowledging that a people is never directly present to itself as a unity: whoever claims to speak on its behalf may only do so if the claim can be *questioned* by another power').³³ Yet in some contexts, the strategic (and formalist) drafting of a constitution (whether it be for the purpose of gaining international recognition or otherwise) may well have the opposite effect, stiffening rather than promoting the articulation of socio-ethical aspirations.

Many claim to speak on behalf the Palestinian people. Yet in their present state, Palestinian institutions can hardly be said to foster the connection between political power and its 'source' – the Palestinian people (Article 2). The Palestinian National Council (PNC) is the one body³⁴ that is supposed to represent all segments of the Palestinian population (whether in the Occupied Territories or the diaspora).³⁵ The PLC (which has not been able to convene in recent years), in contrast, only represents Palestinians living in the Occupied Territories. As the Palestinian Authority's legislative arm, its authority (and *raison d'être*) stems from the Oslo Agreements.

The move to secure recognition of statehood at the United Nations (UN) Security Council may be seen as the culmination of a process condoning the gradual transfer of power away from the PNC. Established as a short-term administrative entity charged with the limited governance of a restricted territory,³⁶ the Pales-

³² 'Legally, the sovereign decision is (from a decisionist perspective) neither explained by reference to a norm or to a concrete order, neither inserted in a concrete order; [...] The sovereign decision is absolute beginning, and the beginning (also in the sense of *arche*) is nothing other than a sovereign decision. It springs from a normative nothingness and a concrete disorder'. See J Kervégan, *Hegel, Carl Schmitt: Le politique entre spéculation et positivité* (1992) 44 (translation by author).

³³ H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,' in M Loughlin & N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 9, 22 (emphasis added).

³⁴ There is no definitive list showing who the current members are. Many have died of old age.

³⁵ Because of the high number of Palestinian refugees who are not as yet registered to vote at the PNC elections (these elections have also been criticised for their lack of transparency), representation of those scattered throughout the diaspora is still very patchy.

³⁶ Its five-year mandate was extended in 1998.

tinian Authority has sought to establish all the infrastructure of statehood while still under occupation. Its latest bid to replace the PLO and substitute it with the State of Palestine has been widely criticised as overstepping the mark (aside from being at odds with resolution 43/177).³⁷ As a subsidiary body, competent only to exercise those powers conferred on it by the Palestinian National Council [...] it does not have the capacity to assume greater powers, to “dissolve” its parent body.³⁸

The greatest peril of this Palestinian Authority-initiated move (even if it has the PLO executive committee’s approval), however, lies in its implications for those Palestinians scattered across the globe:

If they are ‘disenfranchised’ and lose their representation in the UN [as a consequence of the PLO’s substitution with that of Palestine], it will not only prejudice their entitlement to equal representation, contrary to the will of the General Assembly, but also their ability to vocalise their views, to participate in matters of national governance, including the formation and political identity of the State, and to exercise the right of return.³⁹

Sharing the concern ‘that any potential move to alter the status of the PLO as the sole legitimate representative of the Palestinian people at the UN may have negative implications on the legal position of the Palestinian people, in particular on the representation of their indivisible and collective rights,’⁴⁰ senior Palestinian lawyers and scholars a few years ago signed a joint statement

³⁷ In its Resolution 43/177 the UN General Assembly acknowledged ‘the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988’ and it decided that ‘effective as of 15 December 1988, the designation should be used in place of the designation Liberation Organization in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system.’ See GA Res, ‘Question of Palestine’, 43/177, 15 December 1988.

³⁸ G Goodwin-Gill, ‘Opinion Re The Palestine Liberation Organization, the Future State of Palestine, and the Question of Popular Representation’ (10 August 2011) 2, para 7, <http://www.alzaytouna.net/english/selections/2011/Plo_Statehood_Opinion-8-11.pdf> [accessed 22 November 2014].

³⁹ Ibid.

⁴⁰ A al-Qasem et al, ‘Palestinian lawyers affirm essential role of PLO at UN’, *Ma’an News Agency*, 1 October 2011, <<http://www.maannews.net/eng/ViewDetails.aspx?ID=425080>> [accessed 17 November 2011]), para 5.

demanding immediate and direct elections to the PNC.⁴¹ Given the huge number of Palestinian refugees who are not currently registered to vote (or registered *tout court*), the amplitude of the challenge underlying such elections prompts some to highlight that this call for elections cannot be more than a symbolic move aimed at denouncing the legitimacy of the UN bid.⁴²

One may wish to dispute such skepticism. In her seminal report⁴³ (instigated by the UN High Commission for Refugees) on refugee participation in 'country of origin's political processes', Katy Long draws on recent instances of 'out of country voting' (OCV), including the 2005 and 2010 Iraqi elections,⁴⁴ to highlight both their challenges and potential limitations. From a logistical perspective, one of the difficulties is to facilitate affordable⁴⁵ travel to and from polling stations in relative safety⁴⁶ (postal/online voting may alleviate that difficulty in countries with an adequate infrastructure) and to safeguard the privacy of voters' information.

Aside from these technical hurdles, the most difficult task consists of setting up the criteria determining one's right to vote. Defining these criteria widely, so as to include the wider diaspora (whether they are registered as refugees or not, and encompassing second generation migrants) has clear development benefits (remittances, skills-transfer etc.) and is likely to lead to a more sustainable⁴⁷

⁴¹ Since 1996, 40% of the PNC (those on the PLC) have been directly elected. According to the (so far tentative, as it has not been signed) Palestinian National Reconciliation Agreement, 'the Legislative, Presidential, and the Palestinian National Council elections will be conducted at the same time exactly one year after the signing of the Palestinian National Reconciliation Agreement.'

⁴² Less often raised, are the grounds on the basis of which one may argue that the definitive power to decide upon statehood in any form (and the likely compromises that have to go with it) ought to belong to those Palestinians suffering the daily consequences of the Israeli occupation in Gaza and the West Bank.

⁴³ K Long, 'Voting with Their Feet – A Review Of Refugee Participation and the Role Of UN-HCR In Country of Origin Elections and Other Political Processes,' *United Nations High Commissioner for Refugees Policy Development and Evaluation Services*, September 2010, <<http://www.unhcr.org/4ca08d249.pdf>> [accessed 22 November 2014].

⁴⁴ For the 2005 Iraqi elections, OCV was (belatedly) provided in 14 different countries.

⁴⁵ The Danish government was the only one to fund the cost of such traveling. See Long, above n 43, 32.

⁴⁶ 'In the Iraqi elections held in March 2010, for example, Sunni insurgents killed 39 people in attacks designed to disrupt polling activities.' See Long, above n 43, 22.

⁴⁷ 'By facilitating refugee and IDP engagement in political negotiations following conflict, these groups are more likely to understand themselves as stakeholders in the peacebuilding and reconstruction processes. This in turn is likely to lead to more sustainable repatriation and return, as refugees and Internally Displaced Persons are both recognized and recognize

and secure peace-building and reconstruction process.⁴⁸ Yet the financial costs associated with such a wide enfranchisement of the diaspora can be significant, as illustrated by the Iraqi experience.⁴⁹ The electoral law which belatedly enfranchised the Iraqi diaspora in 2005 stipulated eligibility criteria that were very broad 'so that estimates of numbers of eligible expatriates included almost anyone who had left the country at any time for any reason' (voter registration totaled only 22 percent of the estimated expatriate population in the 14 countries offering OCV).⁵⁰

Even if one were to adopt much more restrictive eligibility criteria, for instance by conditioning eligibility to vote to an 'intention to return' (a move which would be very problematic given the continuing expansion of Israeli settlements),⁵¹ the sheer number of Palestinian refugees would create unprecedented difficulties. While the international community should nevertheless be able to rise to the challenge, one may ponder the extent to which, in the present circumstances, PNC elections would empower Palestinians not only to articulate, but also to carry through their yearning for equal rights.

The power to bring about those aspirations would require a reversal of the current dynamic, hence a transfer of power away from the Palestinian Authority towards the PLO, a move that would go against vested Israeli interests. As unlikely as it may be, such an institutional revolution is only conceivable if it stems from grass-roots activism; that is, from the bottom up, rather than from some ambitious 'constitutionalist politics' driven by calls for democratic legitimation.

The peril of a constitutionalist strategy that is mainly outward-looking (animated by a desire to build 'all the trimmings of a state' in hope of gaining

themselves to be equal citizens in their country of origin.' See Long, above n 43, 6.

⁴⁸ Long, above n 43, 6, quoting J Milner, 'Refugees and the Regional Dynamics of Peacebuilding' (2009) 28 *Refugee Survey Quarterly* 13-30: 'The overall security of the peace-building process is also likely to increase, as ensuring refugee and IDP access to civil political space will help to prevent the emergence of so-called "spoiler" refugee groups whose failure to engage in reconstruction can undermine a post-conflict settlement.'

⁴⁹ '[V]oting in the 2005 Iraqi elections cost USD \$72 million (with an initial budget of USD\$92 million), or USD \$270 per external voter, a questionable use of international financial resources.' See Long, above n 43, 14.

⁵⁰ J Thomson, 'Iraq: A Large Diaspora and Security Concerns,' in International Institute for Democracy and Electoral Assistance' in A Ellis, C Navaro, I Morales, M Gratschew & N Braun (eds), *Voting from Abroad: The International IDEA Handbook* (2007) 168, 169.

⁵¹ 'Given that the reason for insisting on refugees' right to vote regardless of their non-residency is the fact of their forced displacement, there would appear to be a connection between refugees' enfranchisement during a period post-conflict reconstruction and at the very least their intention to return at a future date.' See Long, above n 43, 26.

international recognition) lies in its alienating from the law-making process the very people it was supposed to empower. If a state is not only triggered by, but remains primarily an answer to, a liberation campaign (rather than a response to the necessity to articulate and coordinate common goals) it is in danger of being reduced to an economic and/or administrative state; a state where the political has been neutralised by legal norms combined with economic welfare and reduced to the mere 'technology of administration.'⁵²

4 Aspirational identities: building 'true home rule' (or 'Swaraj')

[The end of the Raj] may bring mere home rule (the rule of the modern coercive state) but not true home rule (the rule of the just, limited state); in any case it will not bring about self-rule.⁵³

Gandhi's words are increasingly frequently quoted by Palestinian intellectuals⁵⁴ and activists,⁵⁵ and not only because of the:

⁵² C Schmitt, *Legality and Legitimacy* (1932: tr Jeffrey Seitzer, 2004) 5.

⁵³ A Parel, 'Editor's Introduction' in A Parel (ed), *Gandhi: 'Hind Swaraj' and Other Writings* (2009) lxvi.

⁵⁴ 'CI: People call you the "Gandhi of Palestine". What has it meant for you to be held in such high esteem? MA: I have very much difficulty with that, I am not Gandhi. He is in a class by himself. My idea was to promote non-violence and Gandhi's teachings with the hope that someone else would come and pick it up, because I think this is going to take ten to fifteen years before the Palestinians will be able to accept the struggle in a non-violent way'. See C Ingram, 'Interview with Mubarak Awad', in C Ingram (ed), *In the Footsteps of Gandhi: Conversations with Spiritual Social Activists* (1991) 37.

⁵⁵ 'When we joined UNESCO we were practically creating the power of culture against the culture of power. That's how countries in the world liberated themselves. That's how a person like Gandhi who had no military power managed to unify India and get independence. [...] It's the power of the idea, the power of culture, and the power of dignity.' See M Barghouti, 'The UN should accept Palestine as a full member state', *The Palestine Monitor*, 5 January 2012, <<http://www.palestine-monitor.org/details.php?id=26z1esa527yj3cx58fmg>> [accessed 19 November 14]; 'a principled Palestinian leadership would follow the example of Mandela and Gandhi, leading the masses in popular resistance and inspiring effective and sustained international solidarity in order to tip the balance of powers – a necessary condition for exercising our UN-sanctioned rights'. See O Barghouti, 'Virtual Statehood or the Right of Return', *Occupied Palestine*, 14 September 2011, <<http://occupiedpalestine.wordpress.com/2011/09/14/virtual-statehood-or-the-right-of-return-by-omar-barghouti/>> [accessed 22 November 2014].

striking resemblance between the two cases [the creation of Israel and Pakistan] in establishing political boundaries on ethnic or religious grounds in regions with mixed populations. Both Pakistan and Israel, as products of partition, are self-conscious political models based on such grounds, with Pakistan having sought to become an Islamic State and Israel a Jewish State.⁵⁶

Gandhi's words are increasingly quoted primarily because they denounce any attempt to establish 'home rule' from the top-down as delusive: if liberation is assimilated to the mere toppling of external rule and hasty building of a Western-style nation state, then it may not be worth it. 'Independence must begin at the bottom. Thus, every village will be a republic or *panchayat* having full powers.'⁵⁷

If there ever was something approaching this ideal of bottom-up, locally grown independence in post-World War I 'Palestine', it was during the early stages of the first intifada. While it may never have managed to be completely non-violent (it took a definite, violent turn during the Kuwait Crisis),⁵⁸ the seeds of what may properly be termed 'embryonic self-rule' were there nevertheless. In a detailed survey of the legal decision-making structures during the first intifada, Adrien K. Wing outlines the importance of local popular committees:

In the beginning of the *intifada*, each locality formed various popular committees (*lijan sha'biya*) which became involved in day-to-day underground governance. By May 1988, there were 45,000 functioning local committees of various types. The local popular committees elected representatives to larger coordinating committees, which in turn established regional ties, and then linked up with the UNLU [Unified National Leadership of the Uprising].⁵⁹

As the primary legal institution of the intifada, the UNLU sought to control the use of force and coordinated civil society activities: withholding of taxes, boycott of Israeli products, work stoppages and mass resignations of the police

⁵⁶ S Nusseibeh, *What Is a Palestinian State Worth?* (2011) 32.

⁵⁷ M Gandhi, 'Gandhi's Political Vision: The Pyramid vs The Oceanic Circle (1946)' in A Parel (ed), *Gandhi: 'Hind Swaraj' and Other Writings* (2007) 181, 181.

⁵⁸ Growing dissatisfaction with the earlier intifada power structure enabled the rise of Hamas and increasingly bloody internal clashes.

⁵⁹ A Wing, 'Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule' (1993) 18 *YJIL* 95, 119 (citations omitted).

force and tax collectors.⁶⁰ Consisting of a highly decentralised network of committees,⁶¹ it issued leaflets (*bayanat*) containing policies and laws. These laws drew from a variety of legal traditions. Ottoman law (to some extent),⁶² mandate law, and Israeli military and civil law were largely rejected,⁶³ 'either as a symbolic estrangement from the Israeli administered legal order, or because the laws promulgated under those systems have been used to compromise Palestinian rights.'⁶⁴ Along with parts of Egyptian and Jordanian civil law (and some Islamic religious law), customary law (*urf*) had a large influence on the UNLU.

Known as the ancient legal tradition *urf*' ('that which is known'), customary law is still used to resolve conflicts outside the official civil and religious courts (which remain to this day considered by many Palestinians as not only unsympathetic, but illegitimate). Cases that may be handled under *urf* 'include contract disputes, land matters, interfamilial feuds and personal injuries.'⁶⁵ 'Judges in the civil court generally appear to tolerate the competing system, sometimes even consciously accommodating it [customary law] by delaying actions in a case while awaiting a *sulh* [binding settlement].'⁶⁶

While respected elders (always men) have traditionally adjudicated and

⁶⁰ Referring to the above-mentioned 'civil society activities,' Salim Tamari writes: 'are all essential features of the process of the withdrawal of Palestinian society from two decades of dependence on the Israeli colonial state apparatus. The UNLU has exhibited great skill and flexibility in coordinating these acts of civil disobedience among the rural, urban, and refugee segments of the population, and in translating them into a collective national act of rebellion. But they all remain acts of *disengagement*. To transform them from a process of disobedience to a process of affirmation necessitates the forging of alternative economic, social, and administrative structures.' See S Tamari, 'The Palestinian Movement in Transition: Historical Reversals and the Uprising' (1991) 20 *J of Palestinian Studies* 57, 68.

⁶¹ '[L]ocal committees decide when people in their district can sustain demonstrations and/or strikes, raise money and material aid for the neighboring villages and refugee camps which may be under curfew, and pay attention to their constituency's morale'. See G Pressberg, 'The Uprising: Causes and Consequences' (1988) 17 *J Palestinian Studies* 38, 45.

⁶² 'Although Palestinians relied on the Ottoman land code long after the Ottomans left the region, the Israelis' use of Ottoman land law in a manner that disadvantaged Palestinian property holders has delegitimized Ottoman law in the eyes of Palestinians'. See Wing, above n 59, 106-7.

⁶³ As indicated in §1, land law still is (and remained during the intifada) Ottoman and today some post-1967 Israeli military orders are still implemented by Palestinian Courts on the basis of the fact that they have not been specifically repealed.

⁶⁴ Wing, above n 59, 102.

⁶⁵ A Wing, 'Custom, Religion, and Rights: the Future Legal Status of Palestinian Women' (1994) 35 *HILJ* 149, 153 citing G Bisharat, *Palestinian Lawyers and Israeli Rule: Law and Disorder in the West Bank* (1989) 41.

⁶⁶ Bisharat, above n 65, 42.

administered *urf*, public figures came to the fore during the first intifada.⁶⁷ Today, customary law continues to play a major role in Palestinian legal culture, even if it has come under pressure to reform. Women's groups denounce how it perpetuates women's social and legal subordination.⁶⁸ It has been further alleged that 'some customary law judges are illiterate; there are different local versions of customary law and no unified one, and some arbitrators demand emoluments verging on bribery.'⁶⁹ Given the strengthening of Islamic movements since the 1970's, it has become overlaid 'by a facade of Islamic symbols.'⁷⁰

Yet having sustained its authority through four occupations, customary law is still hailed as an example of Palestinian control over Palestinian affairs according to Palestinian custom. Unlike the current Basic Law (and the whole legislative infrastructure that accompanies it), customary law can truly be said to 'reign over the hearts of [Palestinian] citizens':

[t]here will never be a good and solid constitution unless the law reigns over the hearts of the citizens; [...] How then is it possible to move the hearts of men, and to make them love the fatherland and its laws? Dare I say it? Through children's games; through institutions which seem idle and frivolous to superficial men, but which form cherished habits and invincible attachments.⁷¹

The current constitution-drafting effort is anything but frivolous. Some of its more formal dimension may be captured by Nathan Brown when he writes (without irony): '[t]hroughout the world, constitutions have become one of the most important attributes of sovereignty: new states are almost as likely to issue constitutions as they are to print postage stamps and adopt flags.'⁷² Now if the goal is to seek 'a past from which we may spring rather than that from which we seem to have derived',⁷³ it may be worth delaying the issuance of

⁶⁷ Such as Feisal Hussein.

⁶⁸ Wing, above n 65, 157.

⁶⁹ I Zilberman, 'Palestinian Customary Law in the Jerusalem Area' (1996) 45 *Catholic ULR* 795, 804.

⁷⁰ 'For example, the style of debate in the course of arbitration became closer to that prescribed by Islam, and Islamic traditions (Hadith) and Quranic verses were cited more frequently in the written verdicts.' See Zilberman, above n 69, 803.

⁷¹ J Jacques-Rousseau, 'Considerations on the Government of Poland and on its Proposed Reformation', April 1772, (Completed but not published) <<http://www.constitution.org/jjr/poland.htm>> [accessed 22 November 2014].

⁷² Brown, above n 28, 25.

⁷³ F Nietzsche, *The Use and Abuse of History*, (tr A Collins, 1949).

stamps (and a constitution) and ponder the extent to which the burgeoning civic movements⁷⁴ on both sides of the security fence are truly best served by a two-state solution. Some form of federalism,⁷⁵ enabling different communities to live alongside each other and sharing at least one geographical region (Jerusalem – not unlike Brussels today) would arguably have more in common with the regional structure⁷⁶ that existed prior to the dismantlement of the Ottoman Empire (and enabled the peaceful coexistence of various religious denominations) than a two-state solution.⁷⁷

5 Conclusion

Sumud means steadfastness, and it has turned into a strategy: when the imbalance of power is so pronounced, the most important thing to do is to stay put.⁷⁸

Years ago, while visiting Jerusalem East, I was invited to a Palestinian house that had been ‘occupied’ a few days before: a group of young Israeli settlers

⁷⁴ ‘If Israel ends its occupation of the West Bank, and allows it to join with Gaza, the result could be two states – a Palestinian one alongside an Israeli one. But if you accompany that with a civil rights movement inside Israel, the goal could be very different – a secular, democratic state “for all its citizens”, where Jew, Christian and Muslim are equal.’ See D Hearst, ‘Could Arab staying power ultimately defeat Zionism?’, *The Guardian*, 5 August 2011, <<http://www.theguardian.com/commentisfree/2011/aug/05/48-arabs-palestine-abbas-zionism>> [accessed 22 November 2014].

⁷⁵ This is an old idea: ‘[s]ome important voices within Palestine, especially Jewish organisations such as Brit Shalom (Covenant of Peace, founded in 1925) and later Ihud (Union, founded in the 1940s and represented by such prominent intellectuals as Martin Buber and Judah Magnes), argued in favor of some form of federalism or binationalism on both practical and moral grounds. Such voices did not, unfortunately, find resonance in the largely Zionist-driven Jewish population, nor yet in the nationalist-driven Palestinian leadership’. See Nusseibeh, above n 56, 34-5.

⁷⁶ ‘The Ottoman administrative structure consisted of geographic districts called *sanjaks*, each with a central governorship responsible for running local affairs. These governorships were connected to a regional capital, and these in turn to the so-called High Portal in Istanbul. The area that later became Mandatory Palestine comprised three *sanjaks*.’ See Nusseibeh, above n 56, 227, note 6.

⁷⁷ ‘[T]he indigenous Jewish presence in the Arab world made itself felt in politics [...], business [...], and literature. While the Jewish minority did not enjoy a perfect political existence, yet relations never deteriorated to the inhumane and life-destroying levels reached in Europe’. See Nusseibeh, above n 56, 226, note 3).

⁷⁸ Hearst, above n 74.

stormed the house at night, a fight ensued, the (Israeli) police were called. As the settlers had managed to occupy roughly half of the house, it was decided that the house should be split in two. I was shown the dividing line separating the part of the house in which its Palestinian owners could still live, while the other part was vigilantly guarded by the Israeli settlers. The Palestinian family could not at any time leave their part of the house empty for fear of losing it altogether. The settlers, I was told, were invoking ownership rights according to Ottoman law. I did not get the chance to talk to the settlers or to check any of those underlying legal claims. I was so struck by the folly of the Israeli police's 'solution' and the extent to which it resembled, in its absurdity, Solomon's compromise, for surely splitting the house according to the assault's random result (forcing its inhabitants to live in perpetual fear) undermined the very meaning of a property right?

Yet what surprised me most was the relative impassivity with which the matter was presented (among Palestinians). The dispassionate tone that ruled over the discussions that I witnessed left me with the sense that an inconspicuous peril may well be lurking behind the all too visible, quotidian injustices and humiliation. What if they (Palestinians and Israelis alike) get used to it? Is it the case that events that would otherwise arouse powerful emotions can be sunk into the humdrum by the combined weight of decades of occupation?

A lot of dreams have been invested in the Palestinian constitution. Its ambitious provisions promise a socially progressive, inclusive and tolerant state. Yet today these drafts have lost the semantic ambiguity that typically characterises constitutions in the making. It may be tempting to imagine what things may be like had the Oslo Agreements led to a successful constitutional draft (established prior to the Palestinian Authority's coming into existence); or what could have happened had Arafat not believed that he could somehow artificially turn back the legal clock to a pre-1967 legal patchwork. It is equally tempting to imagine what could – still – happen if, instead of being merely tolerated, perduring customary laws were encouraged to lend their full gravity to the moral sentiments that, against the odds, manage to sustain a burgeoning civic movement; one that is capable of establishing 'true home rule' or 'Swaraj.'