

## 5.5 Constitution-Making and State-Building: Redefining the Palestinian Nation

Asem Khalil

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Rainer Grote, Tilmann Röder

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#### Redefining the Palestinian Nation

##### I. Introduction

In modern times, the “constitution” is considered to be the most appropriate legal instrument to perpetuate a political compromise between entities, groups, and individuals composing the state. It intends to guarantee the respect of this “social contract” to which individuals and groups adhere, in order to stop reclaiming rights through violence but rather to obtain them through law. Thus, a modern constitution is often conceived as the last act of a revolution.<sup>1</sup>

In the Palestinian context, drafting a constitution is not a result of statehood but rather part of the package of preconditions for achieving it. In other words, creating a new state, if not by the use of force—thus by imposition, needs now to be merited. The Palestinian case proves the relevance and dangers of dealing with this approach to constitutions and statehood. In order to have their own state, Palestinians must prove to the international community that they are serious about liberal democracy and free market policy. They furthermore need to prove their willingness and seriousness about reform; in other words, they have to merit their state, which is no more considered as part of their right to self-determination.

Drafting a “constitution” was initially related to the “Palestinian state” declared in Algiers in 1988. Nevertheless, initial drafts appeared only after the Oslo Agreements, thus, undertaking the

limitations imposed by the agreements with Israel in the constitutional text, and the new realities that came from them. The Basic Law is not a constitution for a sovereign state; it is transitional and will be replaced by the constitution, once (and if) the state (p. 584) is established.<sup>2</sup> Nevertheless, preparing a constitution is considered as a step toward statehood: three drafts of a Palestinian constitution were prepared and presented for public debate in 2001–2003. The “constitution,” its role, its timing and its objectives were at the center of public debate.

Following the second legislative elections in 2006 and the victory of Ḥamās, political actors increasingly made reference to the “constitution” (or, more precisely to the Basic Law), and when conflict started to escalate between them, the Basic Law was largely used as a standard to delineate respective authorities; but there was no consensus on which binding provisions parties in dispute refer to. In case they do refer to the same provisions, they often do not share the same interpretation of the text. However, one thing was becoming increasingly clear: there was an urgent need to resolve internal conflict by dialogue and through permanent functioning institutions, in order to avoid clashes between individuals and groups that may have different ideologies, priorities, and interests.

Besides, there was an urgent need to find a way out of the political impasse that resulted from the different agendas of the international community and the Palestinian people. In fact, the Palestinian choice of Ḥamās at the helm of the Palestinian Authority’s (hereafter PA) institutions had proven the fragility of the equilibrium between international and internal legitimacy of political leaders. Here as well existed an urgent need to find a solution, in order to ensure a minimum of legality of the new holders of power that was not based exclusively on majority choice but also on the way people would be governed, namely through the respect of individuals’ and minorities’ rights and by encouraging a peaceful coexistence between nations and states.

Following the Mecca agreement between the main Palestinian factions in February 2007, Palestinians opted for a solution “outside the law,” and outside constitutional arrangements: reference was often made to what is called “national unity” or “national concordance,” a quasi-tribal arrangement between factions, based on repartition of the public sphere between political factions. The expected reform and change seemed to mean the rehabilitation of old and odd attitudes in new disguises. The results here were very dangerous on the Palestinian system and institutions. From one-party institutions, civil servants, and security forces, Palestinians passed to more diverse but still heavily politicized public institutions. Professionalism and public interest, in both situations, were not the relevant criteria.

This article argues that the constitutional and institutional anomalies described above contributed to the cracks among Palestinian factions, territories, and narratives in 2007, following Ḥamās control by force of occupied Gaza Strip. Since then, reference to the same Basic Law, often interpreted differently, was made to justify respective actions and decisions. Law was used—as often was the case in Palestinian modern history—to accommodate political objectives, causing damage to the process of state-building. However, the clash between Palestinian factions is not only about political objectives but also, this chapter argues, related to their national aspirations, objectives, and visions.

## II. “We the [Palestinian] People”

In order to explain the fact of the establishment of a legal order *ex novo*, there is a need to return a step backward, to the originating power, and the act behind the establishment of (p. 585) that order. This is the simple conclusion that was formulated by Sieyès—the first to present a sophisticated and revolutionary theory of constituent power— “*une constitution suppose avant tout un pouvoir constituant,*” as distinguished from other constituted powers created by the

constitution itself.<sup>3</sup> However, the same fact (and here is the contradiction) of having an act of *self*-constitution, means that “someone” pretends he is talking for or in the name of that self. In other words, the presence of a self is revealed through the representation.<sup>4</sup> The question, accordingly, converts from what or who are the “We,” in the “We the [Palestinian] People” to what or who represents that “We.”

This author argues that the Oslo process and the creation of the PA over parts of the occupied Palestinian territory revitalized this question. The term used here (revitalized) insinuates that this is not the creation of the Oslo process. In fact, the Palestine Liberation Organization (hereafter PLO), as sole legitimate representative of the Palestinians, was challenged throughout decades by different actors, pretending to represent the Palestinian people, starting with the international community (mandate over Palestine, Partition Plan, etc.) and ending with Arab states (especially Jordan, and indirectly Egypt, through Arab nationalism that took different forms and shapes). Besides, the PLO was challenged as representative of the Palestinian people with the eruption of the first intifada as a genuine reaction of the Palestinian people of the occupied Palestinian territory toward the brutality of occupation in which Islamic groups like *ās* which were not represented in the PLO played a central role

With Oslo the PLO entered, through the PA, in direct contact, and for the first time, with the Palestinians of the occupied Palestinian territory and with their legal system. However, the recognition of the state of Israel meant indirectly the recognition of Israeli citizenship that is enjoyed by more than one million Palestinians, thus excluding them from that “We” that the PLO represents. Besides, Oslo institutionalized most of the illegal acts undertaken by Israel in violation of international law. The PLO acceptance of leaving the issues of refugees, Jerusalem, borders, and Israeli settlements for a later stage meant the acceptance of the fragmentation of Palestinian land, people, and legal system. This fragmentation challenged the claim of the PLO to be the sole representative of the Palestinian people as it demonstrated that the inability of the organization to represent the wishes and needs of the Palestinian people in a convincing and effective manner.

The following paragraphs shall prove how the kind of relationship that existed between the PA and PLO passed from complete hegemony to timid separation, then to the prevalence of PA institutions over the PLO. The reference to “relationship” instead of “separation” is justified by the fact, as will be shown, that the PLO tried not to separate itself from (p. 586) “its baby,” the result of the strange couple (PLO and Israel). Probably the PLO did not have another option as a complete separation between the PA and the PLO would have implied the *de facto* extinction of the latter. Some may even go further, suggesting that the peace process as a whole was the only way out for the “dying PLO” in the early nineties, for various reasons that are outside our consideration here. However, as shall be shown, the PA gradually substituted the PLO in many domains.

The second legislative election in February 2006 signaled the second revitalization of the issue of PLO–PA. However, what followed the election was a return to the origins, i.e., to the PLO. This return was due to the will to escape the PA institutions, dominated by *Ḥamās*. It also signaled increasing requests for the reform of the PLO, its substitution, or even its dissolution. However, what followed the second elections was not due to the electoral results. Rather, the reality that followed this election showed symptoms of an earlier sickness in the body of the PA, and showed that the gaps in the PA legal system, combined with the flawed constitutional mechanisms, proved overall to be inadequate for ensuring cohabitation between both institutions.

Some believed that the PA was not intended to, did not,<sup>5</sup> and shall not<sup>6</sup> replace the PLO as the sole legitimate representative (political entity and institution) of the Palestinian people, both in

the occupied Palestinian territory and the Diaspora. However, despite the absence of discourse calling for the replacement of the PLO by the PA's institutions, certain facts on the ground suggest that the Palestinian leadership (regardless of their intentions) has guided the PA in this direction.<sup>7</sup> Four main trends have begun to take shape in the emerging system created in the occupied Palestinian territory following the signing of the Oslo Accords: 1) a shift in the center of Palestinian political life from "outside" (i.e., abroad) to the occupied Palestinian territory itself; 2) a growing conflict between the formulas governing Palestinian politics in exile and those appropriate to the "new" situation inside the occupied Palestinian territory; 3) a shift in the goal of demanding the right to a state on all of historic Palestine to the more "modest" goal of recovering territory occupied by the Israelis since 1967; and 4) the end of the "revolutionary" stage of the national liberation struggle and the political structures that accompanied it.<sup>8</sup>

However, the PA, at least from the PLO perspective, was not intended to substitute the PLO unless all legitimate rights of the Palestinian people have been realized.<sup>9</sup> There is no sufficient ground to believe that this moment was realized with the establishment of the PA. The objectives of the PLO will not necessarily be exhausted even with the establishment of a state.<sup>10</sup>

Accordingly, the PLO remains the reference point for the PA. It is true that it was possible to establish the PA to govern parts of the occupied Palestinian territory only thanks to (p. 587) or because of the agreements with Israel,<sup>11</sup> however it was the PLO Central Council that agreed on the formation of the PA in Tunisia October 10–12, 1993.<sup>12</sup> The resolution entitled the PLO Executive Committee to form the PA Council and nominated the chairman of the PLO Executive Committee (Yāsir 'Arafāt at the time) as President of the PA Council.

Despite the above, the center of Palestinian political gravity de facto has shifted away from the PLO toward the PA.<sup>13</sup> In this sense, the PA increasingly plays the role of "state in waiting" thus influencing and shaping the Palestinian political system and institutions.<sup>14</sup> The PLO presence has become increasingly symbolic<sup>15</sup> as a political convenience to be utilized as required<sup>16</sup> and whose role is limited to the signing of agreements on behalf of, and for the benefit of, the PA. This tendency was consolidated by the international community, which preferred the PA as an authority governing Palestinians of the occupied Palestinian territory, rather than the PLO, a liberation movement. The most relevant example of this was the presentation of the Road Map peace plan by the Quartet (i.e. the EU, the U.S., Russia, and the UN) to the PA Prime Minister,<sup>17</sup> Maḥmūd 'Abbās, the first prime minister nominated after the introduction of this office, following the amendments to the Basic Law in 2003. (Abbās resigned shortly thereafter, after less than six months in office.)

Some authors observed this tendency with suspicion, and some even considered it almost a conspiracy,<sup>18</sup> while others saw the PA's increasing centrality as a natural phenomenon commensurate with its (limited) territorial jurisdiction and administration of those Palestinians living in the occupied Palestinian territory. The transference of most of the PLO institutions and leadership to the territory under PA control initiated the gradual marginalization of PLO institutions as key departments, such as the PLO Political Department, which remained outside the occupied Palestinian territory. According to some authors, this process is irreversible<sup>19</sup> and the PLO will never recuperate its initial role.<sup>20</sup>

The role of the PLO was discussed in talks on forming a National Unity Government following the second legislative elections and subsequent victory of Hamās.<sup>21</sup> For Abrash<sup>22</sup> the arrival of Hamās in power has consequences not only for the separation of powers within the PA itself but also for the Palestinian political system as a whole and particularly for the representativeness of the PA. In other words, the participation of Hamās (whose (p. 588) members are not members of the PLO) in the PA elections gives the PA institutions an increasingly representative role. For

the same author, Hamās has always presented itself as an *alternative* representative of the Palestinian people, as it is a religious-motivated group rather than the nationalistic-secular PLO.

The reconstruction of the PLO to potentially include religious parties such as Hamās and Islamic Jihad would primarily resolve the question of the “secularism” of the PLO (which the two Islamic groups categorically oppose) in addition to resolving the question of quotas for these groups in the Palestinian National Council (hereafter PNC), the parliament-like body of the PLO.<sup>23</sup> On the other hand, the refusal of the PLO Executive Committee to endorse the program of Hamās Prime Minister Ismā’īl Haniyyah’s first government reignited discussion at the highest levels on the relationship between the PA and the PLO. The PLO Executive Committee further criticized the lack of reference to the PLO as the sole legitimate representative of the Palestinian people.<sup>24</sup>

Khalīl Shikākī<sup>25</sup> suggested, as early as 1997, two areas of possible conflict between the PLO and PA: first, the “ratification” of treaties, such as the “Hebron Protocol” of 1997, which the Palestinian Legislative Council (hereafter PLC) asked to review but was refused by President ‘Arafāt, who determined that it was a matter for the PLO. The second area of possible conflict was the drafting of a “nationality” law, which would have inevitable repercussions on the Diaspora despite the fact that the Charter had already attempted to define who is a Palestinian. However, the participation of (West Bank and Gaza Strip) refugees in the legislative, presidential, and municipal elections (thus treating them effectively as “citizens”) should not be interpreted as a renunciation of their right to return.<sup>26</sup> Several other examples can be presented concerning possible conflicts between the PLO and the PA, such as the reference to the PLO in the Basic Law, the need of the PLO Executive Committee’s approval on certain laws, the membership of the PLC deputies in the PNC, and the nomination of delegates to foreign countries.

### III. The Process of Constitution-Making

Those entitled to constituent power, as appears in the classical theory of constituent power, remain the people, who exercise that inner power through legitimate institutions. It can be a council or an assembly constituted or elected ad hoc, or the same legislative body also empowered to practice constituent power, or directly, through referenda. Nevertheless, the way the constitution is adopted, and the level of popular participation, reflects the degree of democracy in those procedures, and provides legitimacy for the text that has been approved. In other words, if the elaboration and redaction of the same constitutional text is left to a group of specialists or to a commission, it is necessary, to be qualified as democratic, that the constitution, once ready in its final shape, is presented to the people for final approval.

The way the constitution is elaborated is important, but the way it will be adopted is also important; for this reason, the way constituent power is exercised, and the organs doing so, are in reality much more important than knowing, theoretically, who is entitled to (p. 589) that power. In fact, the “temporary government” that organizes the drafting process usually exploits the situation for its own benefit.

The participation of the Palestinians from West Bank and Gaza Strip in the process of drafting the Basic Law and, at a later stage, in drafting the constitution for the Palestinian state, acquires additional significance. Palestinians showed enthusiasm in that they would be contributing to the Basic Law through their participation in the public conference that had been organized.

An important question inevitably arises: Will Palestinians, through the PLO institutions, continue to have constituent power regarding amendments to the constitution, in the process of creating the State? Will it be exercised by Palestinians of West Bank and Gaza Strip and citizens of the future Palestinian State—new arrivals included? Will the PLO participate in legislation principally affecting the situation of the inhabitants of the West Bank and Gaza Strip?<sup>27</sup>

When the PNC declared the Palestinian State in Algiers in 1988, it also decided that the new State would require a constitution or a basic law; the first attempts to prepare a basic law, then, were related to the State. A committee was appointed by PLO Executive Committee and given the task of preparing the first drafts of Basic Law in December 1993, and in February and December 1994; these drafts were the object of public discussions inside and outside the Palestinian territories but not by the Central Council of the PLO.

The situation changed after the Oslo Agreements, when the attempts to prepare a Basic Law were related to the PA, a temporary authority administering the autonomous territories until a final agreement was reached. In fact, the PA started to effectively exercise its authority directly on Palestinian territory and people. After election of the PLC in 1996, the structure of the PA was changed and the draft Basic Law needed to accommodate those changes; the committee prepared four other drafts that were never under consideration by the president of the PA.

The elected PLC showed immediate interest in drafting a Basic Law for the transitional period. Despite the original plan that the Basic Law would be endorsed by the PLO Central Council, the PLC insisted on its power to discuss and endorse the Basic Law. Drafting Basic Laws (in plural) was possible under the Interim Agreement; in fact, those Agreements detailed most of the provisions that the Basic Law had to include (concerning the structure of the Council). Besides, the same agreement provides that the Basic Law shall not contradict the Declaration of Principles and other agreements (between the government of Israel and the PLO), otherwise it would be rendered null and void. The preamble to the Election Law of 1995 confirmed that drafting a Basic Law was the PLC's main task.

It should be noted that the nomination of that constitutional text with "basic law" (*qānūn asāsī*) or "basic system" (*nizām asāsī*) but never "constitution" (*dustūr*) was never questioned by PLO or PLC legal committees. It is a way to distinguish that constitutional text from the constitution to be endorsed after the state is established. What was rather the object of disagreement within the PLC was the adoption of different Basic Laws as appear in the Interim Agreement text (and as it is the case in Israel, where there is no constitution, but Basic Laws) or the adoption of one unique and complete Basic Law.

(p. 590) The PA minister of justice transmitted the draft prepared by the PLO legal committee, but the PLC rejected it and commissioned its own legal committee to prepare a new draft.<sup>28</sup> It is true that the final draft the PLC legal committee had presented adopted most of the articles the PLO legal committee had prepared, but what is significant here is the power struggle between PLO and PA institutions regarding who is entitled to adopt the constitutional text. The PLC approved almost unanimously the Basic Law draft in its third reading (Law No. 1/96) on October 2, 1997.

It should be noted that the Basic Law contains provisions similar to most of the Arab world constitutions. This is the case of the reference to Islam and Sharī'ah (Islamic law). According to the Basic Law (Art. 4), the principles of Sharī'ah are a primary source of legislation in Palestine and Islam is the official state religion. This reference to Islam and Sharī'ah in a constitutional text does not create per se a religious or an Islamic state. It simply means that, even in a secular state, religion may not be totally absent from public affairs. Such interpretation of the constitutional reference to Islam and Sharī'ah is more concerned with constitutional mechanisms aiming at protecting individuals' and minorities' rights. Accordingly, the reference to Islam in the constitution should not create any unnecessary perplexities. The same applies to Sharī'ah, which is confined to the remit of positive law, as expressed in a legislative text issued by state authorities, mainly confined to personal status issues. In other words, the binding character of the Sharī'ah in the above sense is nothing else but the free will of human authority.

The empowerment of Sharī'ah through the Basic Law means that a "secular will" is the origin of its nature and not "divine will."

Regardless of the way constitutional texts refer to Islam and Sharī'ah, the important thing is to ensure the supremacy of the constitution. Sharī'ah is not a source of law but rather of legislation. This means that, if not codified by the legislature, it does not constitute a source of law. The Basic Law, immediately after referring to Islam and Sharī'ah, provides that other monotheistic religions, Christianity and Judaism, should have their sanctity respected and maintained. The respect is not enough if not translated into granting to every citizen, regardless of his religion, the same rights and duties. The above position is not shared by Palestinians and foreign observers who commented on this provision, starting from complete rejection to absolute support. Some even considered that the provision was too soft, in that it referred only to "a" source instead of the "the" and to "legislation" instead of the "law."<sup>29</sup>

Putting aside the above discussions, some considered the Basic Law as being the most liberal of Arab world constitutions, especially the list of rights and freedoms that it contains. Besides, the PLC's main preoccupation was to approve a Basic Law that would define the relations between the Council and the executive, and the transparency of PA members on the one hand, and the protection of basic human rights, the implementation and respect for the PNC, and the independence of the judiciary, on the other.

The President of the PA refused for many years to endorse the Basic Law, creating more tension between the PLC and the Executive Authority in general, and the President of the PA, in particular, pretending that adopting a Basic Law is not the task of the PLC but of the (p. 591) PLO, because a constitutional text is not a matter of only West Bank and Gaza Strip Palestinians but of all Palestinians.<sup>30</sup>

President 'Arafāt endorsed the Basic Law of the PA for the Transitional Period on May 29, 2002, which came into force on the date of its publication, July 7, 2002, in the official Gazette.<sup>31</sup> Signing the Basic Law came in a very controversial political context, as a step toward reforms, according to the 100-day Reform Plan. This late endorsement of the Basic Law contains a clear contradiction: on the one side it is the constitutional text that entered into force in 2002 and was to apply during the Interim Period, while on the other side the Interim period was theoretically already over since 1999. The Basic Law was amended in 2003 to introduce the office of Prime Minister<sup>32</sup> and in 2005 to introduce changes in the electoral system and to limit the mandate of both President and PLC to four years rather than for the interim period.

The PLO Executive Committee created a (new) legal committee in 1999, different from the one that was nominated earlier, after the declaration of independence in 1988, to draft a Palestinian constitution in preparation for statehood, and Yāsir 'Arafāt appointed Minister Nabīl Sha'th as its chairman. This committee was composed of qualified Palestinian constitutionalists and jurists, following an agreement with the Arab League to form an advisory committee of experts. The Draft of a Palestinian Constitution was completed on February 14, 2001,<sup>33</sup> while negotiations with Israel totally collapsed. The same text was the object of revision in 2003 (a second and third draft were subsequently published) and of interest in the international arena, as important groundwork toward statehood.

As appears in the preamble of the Third Draft of the Palestinian Constitution, the draft was submitted to the Palestinian Central Committee on March 9, 2003. The Council approved the draft and voiced appreciation for the work of the committee, its experts, and advisors. The Council advised the committee to pursue its work and meet with the legal committee of the Central Council and other committees to discuss the draft in view of its final discussion and approval at the next Central Committee meeting.<sup>34</sup>

The preparation of a Palestinian constitution was part of the reforms requested by the internationally-backed Road Map for Peace, which called for reforms and the establishment of a Palestinian State by 2005 (later postponed). It was also conceived as one of the steps (p. 592) necessary for statehood. The way the constitution will be adopted in the Palestinian context is of extreme importance. According to Art. 185 of the Third Draft of the Palestinian Constitution, there are different steps necessary to take, before adopting the constitution. First, the PNC (or the Central Council if the PNC were unable to convene) would approve the draft constitution, before the establishment of the State. Second, a two-thirds majority in the first elected House of Representatives would approve the draft, after the creation of the State. Third, in the case where the absolute majority decided to submit the constitution to a referendum, the constitution would be adopted if it obtained the simple majority of votes.<sup>35</sup>

#### **IV. International Impact on the Palestinian Constituency**

Modern constitutionalism has shown that the enactment of a nation's fundamental law can no longer be seen as a matter of purely domestic concern, although it is rightly considered as the first act (in terms of importance, and not necessarily in chronological terms) of national or popular sovereignty. States and international organizations become central actors in constitution-making, while the people, those entitled to sovereignty, remain, at least theoretically, those entitled to constituent power also, and adopt (or reject) the constitution *in toto*. The people are "free" to accept that constitution with the political and economic system it represents. This legal fiction is necessary since popular adherence is needed to ensure legitimacy for the state and the authority, and not only to provide a legacy for that text.

The international impact on the Palestinian constitutional system can be measured by three major aspects:<sup>36</sup> first, by the adoption of norms that are directly inspired from occidental democratic constitutions; second, by the adoption of similar institutions based on occidental models; and third, by taking part in, and the incorporation of, theoretical debates about the new democracies.

The international community stresses the incorporation of a series of rights and liberties protecting individuals within the constitutional documents of the newly formed states. These demands are part of the movement of universalization of human rights that dates to the pre-World War II concepts. Yet, it seems that there is more than one theory of human rights that can acquire the constitutional status in the Western legal jurisprudence today; (p. 593) the classical rights also called formal, or the rights of the first generation, in addition to other sets of rights such as the social rights, bioethics, and environmental rights.

The Palestinian constitutional documents have largely incorporated those different sets of rights. However, the inclusion of those rights in the constitutional texts, although an important step, may be insufficient or even counter-productive. It may be insufficient because constitutional texts are often not accompanied with constitutional and legal mechanisms to enforce, protect, and guarantee those constitutional rights. It may be counter-productive because states often misinterpret the inclusion of those rights in the constitutional texts as authorization for the state to discard them, since created by it, through the inclusion in the constitutional text.

On a different note, it seems that the French presidential model has particularly seduced the Palestinian constituent in the same way it seduced many Arab neighboring states. In Palestine there is a parliamentary system, but with two executive heads, a President directly elected and a Prime Minister sharing some of his functions with the President. Yet it seems that the Palestinian constituent had additional models of inspiration concerning the way the powers are separated, as more "orthodox" parliamentary choices were made based on the German or the English model, such as cabinet meetings, or the motion of no confidence against the government.

The Palestinians seemed also to integrate some parts of the American model and to even go further; the United States was one of the first systems that created independent agencies to deal with matters that should be kept separate from the bureaucratic system, in order to ensure their partiality and independence. Palestinians seemed to adopt this model by constitutionalizing certain agencies, especially concerning the protection of citizens' rights, and financial transparency. The two main examples are the Palestinian Independent Commission for Citizens' Rights, which is the Palestinian ombudsman, and the Financial and Administrative Control Bureau.

It seems like the jurisprudential discussions about the shape of modern democracies have also been a matter of a Palestinian constitutional debate. Is Palestine going to follow the continental European vision of democracy or the Anglo-Saxon?

According to the European approach, specialized institutions are given the task to review the legality and constitutionality of acts taken by the state authorities (through specialized administrative bodies and even courts). A special tribunal is even given the power to control the parliament's actions, ensuring its conformity with the supreme law, the constitution. On the contrary, according to the monist approach to law and justice individuals, as much as state apparatus, are under the scrutiny of the same judge, applying the same common law.

The continental approach ensures the respect of the law by all institutions of the state via the procedure of judicial review, including parliament. This possibility of review gives the *state of law* its meaning, where every normative creation by the state abides by the supreme legal document that is the constitution; thus there must be a clear hierarchy of norms in which the inferior act acquires its validity from the higher, a document that contradicts the norm that validates it must be annulled.

It seems that Palestinians, by creating a constitutional court, have chosen the continental Europe approach. This choice might constitute some legal problems in Palestine as long as the transitional situation is not over yet, because a clear hierarchy must be established to norms created by different entities, such as the relationship between the PA's institutions and those belonging to the PLO.

In addition, the Palestinian legal system is separated between one set of law applicable to state's actions in its capacity as public authority (administrative law) and another set applying to equal individuals (civil law). The Supreme Court in its capacity of High Supreme Court is entitled to judge all administrative disputes as first and last instance court.

## **(p. 594) V. Conclusion**

Palestinian constitution-making is no different from other constitution-making experiences that followed World War II. It shows and proves what was referred to in the constitutional literature as the internationalization of constituent power.<sup>37</sup> In this sense, it may be considered as a healthy phenomenon that contributes to developing constitutional law and enhancing constitutional movement in contemporary states.

This phenomenon, nevertheless, may have negative symptoms. The international community may confuse the need of constitutions for new-born states with the imposition of a particular constitutional model. The foreign and cooperation policy of certain democracies may be partially determined by the adherence of new and weak states to such a model. The risk here is to suffocate the local population, its particularities and its culture. This may have a boomerang effect, with negative consequences, even as far as complete rejection, since the constitution may be considered as an outside product.

Modern constitutions, in fact, tend to convert from a highly desired expression of self-determination to a highly rejected self-limitation (or rather, a pseudo self-limitation). Modern constitutions become the domestic legal instrument to “impose” international conditions and limits. In this sense, the constitution becomes an instrument to impose on new-born entities wishing to be part of the “club of states,” a minimum of rules considered as the basis of the international community: the pacific coexistence between territorially defined states. In this direction, several international resolutions were made concerning a solution for the Palestinian-Israeli conflict. Several bilateral and multilateral treaties were signed by the PLO with the Israelis and some other countries; all these treaties seem to aim for a solution based on the creation of two separate states.<sup>38</sup>

While reviewing existing literature on what can be called largely the “Palestinian constitution,” one can notice that there is not a consensus on what is being scrutinized exactly. This is reflected in the analysis made by Palestinian authors. This difference explains many of the existing dichotomies in conclusions and positions.

Scholarships related to Palestinian constitution reflect three different kinds of assumptions. Some perceive the PA as central authority of sovereign state. For this group, a constitution refers simply to the Basic Law, adopted by the PLC in 1997, endorsed by President ‘Arafāt in 2002, and amended later on in 2003 and 2005. Others refer to the “Palestinian state” in the abstract, outside of the current status of the Palestinian people and land. Such vision is expressed in the PLO charter of 1968 and the Declaration of Independence in Algiers in 1988. Finally, others refer to what can be called the “official version” of the state. This vision is the one of the draft(s) Palestinian constitution, prepared by a constitutional committee in 2001 and 2003.

The discussions on the constitutional framework of the PA (thus, taking into account the Basic Law’s provisions and limitations of the Oslo Accords) indirectly contribute to an (p. 595) understanding of how a future State of Palestine would look. This approach can be considered pragmatic and realistic. Some look at the existing institutions and *imagine* the possible political system of their future state,<sup>39</sup> while others look at the PA and simply *see* the state (at the same time seeing Palestine as an existent reality under occupation or *in status nascendi*).

One may argue, rightly, that a “state” refers to a totally different experience from that of the PA with its limited powers, jurisdiction, and related uncertainties of the interim period: indeed the Basic Law was enacted for the interim period, although there is always the possibility that the transitional will become permanent. This is not to argue, however, that the particular experience of the PA need not be considered, and the reason is simple; the nascent PA institutions and laws will most likely serve, at least in the beginning, as the new institutions of a new Palestinian state. The state will not start *ex nihilo* because it will inherit existing PA institutions and laws,<sup>40</sup> including those pre-PA legislation that remained in force during the interim period, and even some PLO-produced texts (such as the PLO Penal Code and Procedures of 1979, still applicable on military courts).

In this sense the Palestinian state does not represent a clearcut departure from pre-existing concepts and institutions. The Palestinian state is not a new building; rather, it is a new floor in the same building. In fact, the Basic Law created constitutional and political arrangements, as well as interests and institutions that will be difficult to dislodge.<sup>41</sup> The State of Palestine, therefore, will necessarily absorb these preceding institutions while abiding by the legal and political texts produced by them. In fact, each historical/political period has impacted on the development of the Palestinian legal system.

In fact, the tendency of the authorities that controlled Palestine, or part of it, since the early 1990s, was always to build on the existing legal system, making the necessary adaptations to

accommodate the new regime. In this sense, there has never been a complete rejection of previous laws and regulations but rather they have been maintained until amended by new ones. In 1994, PLO Chairman Yāsir ‘Arafāt issued Decree No. 1—“Continuation of the Laws, Regulations and Rules Operative in the Palestinian Territories (West Bank and Gaza Strip) before and since 5 June 1967”—until such time as it may be replaced by a unified PA legislation. The same technique was adopted by the Basic Law (Art. 119) and also the Third Draft of a Palestinian Constitution (Art. 187), thus linking the current PA with a future Palestinian state.

The Palestinian state may also be viewed in abstract terms as a *historical entity* that either already exists (without knowing where it is precisely) or which ought to exist (without deciding where it should be). Such a state is based on religious, moral, or cultural considerations, or on international law and legitimacy, or is simply a reflection of imagined or recognized “rights.” This image is then compared, analyzed, and enriched by the experiences of other countries. In other words, this group sees other states, including neighboring Arab states, and then they imagine how the Palestinian state looks or what it shall look like, irrespective of the facts on the ground. This is the vision of the PLO Charter, successive resolutions of the PNC, and several declarations of Palestinian leaders. This vision of the state clashes with realities on the ground.

(p. 596) The Draft of a Palestinian Constitution was prepared largely in response to the PA’s international obligations under the Road Map peace plan but also as a step toward preparation for statehood, considered by Palestinians as the final objective of the interim period, the core of final status negotiations. The lack of legal value of such a text before its adoption and endorsement must surely be noted. However, the Draft of a Palestinian Constitution, and the discussions about it, may provide a vision of how Palestinians conceive the state, the way powers will be separated, and the principles that will guide public institutions, and most importantly, how the new constitution would be adopted. They best express the vision of the state prevailing among Palestinians.

The publication of the three drafts initiated several discussions and studies at different levels, although arguments were presented according to party political affiliations.<sup>42</sup> The most important characteristic of these discussions concerns the difference between the “official” version and “unofficial” version of events. The official version comes from the declarations of various PA personnel and/or from members of the Constitutional Committee, which was nominated by President ‘Arafāt in 1999, consequently leading to allegations of impartiality and unwarranted control by the executive.<sup>43</sup> For Palestinian civil society, notwithstanding the importance of PA obligations to the international community, the importance of the constitution stems from its role in determining the social contract between the state and the individual.<sup>44</sup> The Draft of a Palestinian Constitution, in comparison to the Basic Law, does not introduce any substantial changes to the legal and political system under the PA.

In this chapter, the discussion turned around the way constitutional documents were drafted, the way the Basic Law was adopted, and the way the Draft of a Palestinian Constitution will be endorsed. Shall constitution-making lead to the creation of viable and democratic institutions, and contribute to state-building, or shall it contribute to its demise? In all circumstances, this chapter has argued, constitution-making and state-building contribute to and urge for the redefinition of the Palestinian nation and of those who represent it.

## Footnotes:

<sup>1</sup> U.K. Preuss, “Constitutional Powermaking of the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution” in M. Rosenfeld

(ed), *Constitutionalism, Identity, Difference, and Legitimacy Theoretical Perspectives* (Duke University Press, Durham-London 1994) 145.

<sup>2</sup> Art. 115 of the amended Basic Law of 2003 reads as follows: “The provisions of this Basic Law shall apply during the interim period and may be extended until the entry into force of the new Constitution of the State of Palestine.”

<sup>3</sup> Cited in K. Gözler, *Pouvoir Constituant* (Ekin Kitabevi, Bursa 1990) 2. Emmanuel Joseph Sieyès (1748–1836) is a French revolutionary and statesman. He was a clergyman before the Revolution and was known as Abbé Sieyès. For more information about the theory he developed cf. A. Khalil, *The Enactment of Constituent Power in the Arab World: The Palestinian Case* (PIFF 47, Helbing & Lichtenhahn, Fribourg 2006); G. Jellinek, *L’Etat Modern et son Droit* (first part *Théorie Générale de l’Etat*, Paris 1911); P. Comanducci, “Ordre ou Norme? Quelques Idées des Constitution au XVIII siècle” in M. Troper and L. Jaume (eds), *1789 et l’Invention de la Constitution (Actes du colloque de Paris organisé par l’Association Française de Science Politique 2,3 et 4 mars 1989)* (Bruylant, Bruxelles 1994) 23–43; Claude Klein, *Théorie et Pratique du Pouvoir Constituant* (PUF, Paris 1996); R. Carré de Malberg, *Contribution à la Théorie Générale de l’Etat* (Vol. II, CNRS, Paris 1922).

<sup>4</sup> Hans Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood” in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press, Oxford 2007) 17–21.

<sup>5</sup> Khalīl Shikākī, “Mustaqbal Ad-dimuqrāḥīr al-filasṭīniyyah wa al-sulṭah al-waṭaniyyah” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 60.

<sup>6</sup> M. Nawfal, “Nushū’ wa taṭawwur ishkāliyyat al-‘alāqah bayna al-sulṭah wa al-munazzamah” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 83.

<sup>7</sup> *Id.* 89; T. Qubba‘ah, “Fī ishkāliyyat al-‘alāqah bayna munahḥīr al-filasṭīniyyah wa al-sulṭah al-waṭaniyyah al-filasṭīniyyah” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 73.

<sup>8</sup> Ali Jarbawi, “Palestinian Politics at a Crossroads” (1996) 25 (4) *Journal of Palestine Studies* 29–39.

<sup>9</sup> Aḥmad M. al-Khālīdī, “alāqat Munahḥīr bi-l-sulḥlāl?” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 49.

<sup>10</sup> Yazīd ṭan” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 67.

<sup>11</sup> Qubba‘ah (n 7) 73.

<sup>12</sup> Nawfal (n 6) 85.

<sup>13</sup> Nawfal (n 6), 86.

<sup>14</sup> Ṣāyigh (n 10) 63.

<sup>15</sup> Jamīl Hilāl, “Munahḥīr wa al-sulṭah al-filasṭīniyyah: al-mua‘ādalāh al-Maqlūbah ‘alā ra’sihā” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 98.

<sup>16</sup> Bilāl al-ḥasan, “Li-mādha yuḥasiru al-‘ālam ḥukūmat Ḥamās? l’ādat Binā’ al-mashrū’ al-waṭanī al-filasṭīnī aw al-Mawt wa talāshī” (2006) *Majallat al-dirāsāt al-filasṭīniyyah* 67, 38.

<sup>17</sup> Mu‘īn al-Tannānī, “ḥarakat ḥrīr al-filasṭīniyyah” (2006) *Majallat markaz al-takhṭīṭ al-filasṭīniyyah* 22, [http://www.oppc.pna.net/mag/mag22/new\\_page\\_1.htm](http://www.oppc.pna.net/mag/mag22/new_page_1.htm), accessed April 24, 2009.

<sup>18</sup> Qubba‘ah (n 7) 68, 73.

<sup>19</sup> S. Shubayb, “Al-Sulḥrī: ishkāliyyat al-‘alāqah al-idāriyyah wa al-waṭaniyyah” (1997) *al-siyāsah al-filasṭīniyyah* 15–16, 54–55.

<sup>20</sup> Şāyigh (n [10](#)) 66.

<sup>21</sup> Al-Tannānī (n [17](#)).

<sup>22</sup> I. Abrash, “al-intikhābāt wa al-mas’alah al-dimuqrāḥaql al-siyāsī al-filasṭīnī” (2006) *Majallat al-dirāsāt al-filasṭīniyyah* 66, 43–45.

<sup>23</sup> A. S. Qāsim, “Al-ḥarakah al-islāmiyyah, al-sulḥtilāl al-Isrā’īlī” in: *Al-Islām fī Filasṭīn al-Mu’āṣirah* (PASSIA: Acts of Conference—August 2004) 15.

<sup>24</sup> Abrash (n [22](#)) 50.

<sup>25</sup> Shikākī (n [5](#)) 61.

<sup>26</sup> N. Jarrār, “al-lajī” al-filasṭīnī: Mushārakatuhu fī al-intikhābāt wa atharuhā fi huqūqihi” (1998) *Majallat al-dirāsāt al-filasṭīniyyah* 33, 77–90.

<sup>27</sup> It is of great importance to keep in mind that the PLO Charter remains a document in force, but would officially cease to be effective if or when the same power that endorsed it (the PNC) declared its suspension. It has had an influence on Basic Law and the constitution but remains separate, since those who intend to regulate power relations within the PA or the Palestinian State are distinct entities of the PLO.

<sup>28</sup> Feras Milhem, *The Origins and Evolution of the Palestinian Sources of Law* (VUB, Ph.D. Thesis 2004) 184.

<sup>29</sup> For complete presentation and analysis of positions related to Islam and Sharī‘ah, cf. A. Khalil, *Constitutional Framework of the Future Palestinian State*. Synthesis of Leading Palestinian Thinking and Public Perceptions (UNSCO & Institute of Law, Birzeit University, Birzeit 2009) and ‘Azīz Qayyid, *Ishkāliyyat mashrū‘ dustūr al-dawlah al-filasṭīniyyah* [Arabic] (Palestinian Center for Policy and Survey Research, 2004), <http://www.pcpsr.org/arabic/domestic/books/2004/azizkayed.pdf>, accessed April 24, 2009.

<sup>30</sup> Milhem (n [28](#)) 184.

<sup>31</sup> The Official Gazette of PA (called “al-Waqā’i’ al-filasṭīniyyah”) was distributed to journalists in a press conference in Gaza on July 8, 2002.

<sup>32</sup> President ‘Arafāt nominated Mr. Maḥmūd ‘Abbās as Prime Minister on March 10, 2003. The PLC voted 64:3—with 4 abstentions—in favor of creating the office of Prime Minister, an amendment to the Basic Law, which did not include this office, and the number of ministers was extended to a maximum of twenty-four, not nineteen as originally stated in the Basic Law. Mr. ‘Abbās became the Secretary General of the PLO Executive Committee. He headed the PLO’s Negotiations Affairs Department created in 1994 to oversee permanent status negotiations, but resigned from the post and Abū ‘Alā’ was designated Prime Minister.

<sup>33</sup> The English version is on the Palestinian Centre for Policy and Survey Research (PSR) website: <http://www.pcpsr.org/.main.html>, accessed December 2, 2009, in cooperation with the Konrad Adenauer Foundation. The first and second chapter of the Constitution can be found respectively at: <http://www.pcpsr.org/domestic/2001/conste1.html> and <http://www.pcpsr.org/domestic/2001/conste2.html>, both accessed December 2, 2009.

<sup>34</sup> See [http://www.mofa.gov.ps/arabic/key\\_documents/constitution\\_new2.asp](http://www.mofa.gov.ps/arabic/key_documents/constitution_new2.asp), accessed December 2, 2009.

<sup>35</sup> Nathan Brown commented, rightly, that “[t]here are three glaring omissions from this article. First, it is not clear if any amendments can be made in the draft, and if so, how and by whom. The second omission is a provision for possible rejection at any of these stages. The third omission is of any body to review the draft.” Nathan Brown, *The Third Draft Constitution for the Palestinian State: Translation and Commentary* (Palestinian Center for Policy and Survey Research 2003), <http://www.pcpsr.org/domestic/2003/nbrowne.pdf>, accessed April 24, 2009. It should be noted that here also is a blatant contradiction in the common sense and logic. How would Art. 185 regulate the way the draft constitution will be adopted while it is part of the text still to be adopted? In other words, Art. 185 is part of the still-to-be-endorsed text, thus, without any legal and binding value. For more information concerning the way the Draft of the Palestinian Constitution will be endorsed cf. N. Al-Rayyis and R. Sanyūrah, “Mafāhīm asāsiyyah ḥawla al-dasātīr wa anwā’ihā wa ṭuruq inshā’ihā wa ta’dīlihā” in: *Al-Dustūr al-filasṭīnī wa mutaḥallabāt al-tanmiyah (Research and Working Papers*, Birzeit University, DSP 2004) 51; Khalil (n [3](#)) 296.

<sup>36</sup> This part was elaborated in collaboration with Yarā Jalājil while effectuating research at the Institute of Law.

<sup>37</sup> The examples of the internationalization of constituent power are multiple. For more details cf. Khalil (n [3](#)).

<sup>38</sup> Has this been the option taken by the Palestinian constituent? To what extent has he considered himself abiding by the international obligations in which the Palestine representatives have engaged? This brings on two main questions: what is the legal value of the international law according to the constituent; is it higher than the internal laws? And did the constituent include norms in respect of the treaties abiding the Palestinians, and how? Did the Palestinian constituent make a clear choice about the two state solutions, or did he avoid the question? Those and other questions need further research that goes beyond the limitations and scope of this chapter.

<sup>39</sup> Qubba‘ah (n [7](#)) 97.

<sup>40</sup> A. ‘Aṭā’ Allah, “Al-Ta‘addudiyyah al-siyāsiyyah fī munazzamat al-tahrīr al-filasṭīniyyah” (2003) 1 *Tasāmuḥ* 4, 47.

<sup>41</sup> Nasser H. Aruri and John J. Carroll, “A New Palestinian Charter” (1994) 23 (4) *Journal of Palestine Studies* 5, 8.

<sup>42</sup> Nādir Sa‘īd, “Muqaddimah mafāhīmiyyah hawla ‘amaliyyat i’dād al-dustūr al-filasṭīnī” *Hawla al-dustūr al-filasṭīnī al-muqtarah (Conference Papers: Beirut 10/10/2003*, Birzeit University, DSP 2004) 5–10, <http://home.birzeit.edu/dsp/arabic/research/publications/2004/76.pdf>, accessed April 24, 2009.

<sup>43</sup> Al-Rayyis and Sanyūrah (n [35](#)) 51.

<sup>44</sup> Sa‘īd (n [42](#)) 7.