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Anis Kassim, "Legal Systems and Developments in Palestine," Palestine Yearbook of International Law, vol. I (1984): pp.19-35; Anis Al-Qasem, "Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period," Palestine Yearbook of International Law, VII (1992/1994): pp.187-211; Anis Al-Qasem, "The Draft Basic Law for the Palestinian National Authority," in The Arab-Israeli Accords: Legal Prospective, CIMEL Book Series No.1, edited by Eugene Cotran and Chibli Mallat (London-The Hague-Boston: Kluwer Law International, 1997), p.101-135.

(9)

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(11)

(5) Pactet, Institutions politiques, Droit Constitutionnel, 15 éd., Coll. U, Série Droit (Paris: Armand Colin, 1996), 69.

(6) Jean Gicquel, Droit Constitutionnel et Institutions Politiques, 16^{ème} éd. (Montchrestien, 1999), p.162; Claude Klein, "A Propos Constituent Power: Some General Views in a modern Context," in: National Constitutions in the Era of Integration, edited by Antero Jyränki (The Hague: Kluwer International Law, 1999), 32-33; I. Shiba, "Le pouvoir constituant," in The Modern Constitution (Fribourg-Switzerland: University Press, 1988), p.107-114.

(7) " : " .39-32 :(2005) 63

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Ulrich K. Preuss, "Constitutional Powermaking of the (16)

New Polity: Some Deliberations on the Relations
Between Constituent Power and the Constitution," in
Constitutionalism, Identity, Difference, and Legitimacy
Theoretical Perspectives, edited by Michel Rosenfeld
(Durham: Duke University Press, 1994), pp.157-159;

(12)

Jon Elster, "Constitutional Bootstrapping in
Philadelphia and Paris," in Constitutionalism, Identity,
Difference, and Legitimacy Theoretical Perspectives,
edited by Michel Rosenfeld (Durham: Duke University
Press, 1994), p.62.

2007

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.2005 14
Preuss, "Constitutional Powermaking," pp.150,160. (18)

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¹ Klein, "A Propos," p.34. (20)

François Preuss, "Constitutional Powermaking," p.161; (21)

(13)

Venter, "Constitution Making and the Legitimacy of the
Constitution," in National Constitutions in the Era of
Integration, edited by Antero Jyränki (The Hague:
Kluwer International Law, 1999), pp.10-12.

Shiba, "Le pouvoir constituant," p.70. (22)

(23)

- (35) (24)
- (25)
- (36)
- (26) "The power to make a constitution is the power to create a political order ex nihilo". Preuss, "Constitutional Powermaking," p.143.
- (27) ¹ Pactet, Institutions politiques, p.70, 334-337.
- (28) 1996
- (37) 6 88
- (29) Ioan Ceterchi and Ioan Muraru, "Le pouvoir constituant," in *Modern Constitution (Fribourg-Switzerland: University Press, 1988)*, pp.80-81.
- (30) Pactet, Institutions politiques, p.70
- (31) Shiba, "Le pouvoir constituant," p.107
- (32)
- (33) Venter, "Constitution Making," p.10-12.
- (34) (2) 1971
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2004

- Khalil, Asem. 2006. *The Enactment of Constituent Power in the Arab World: The Palestinian Case*. Publications of the Institute of Federalism (PIFF), Etudes et Colloques no.47. Fribourg: Helbing and Lichtenhahn.
- _____. 2003. *Which Constitution for the Palestinian Legal System?* Thesis ad doctoratum in Utroque Iure, Rome: Ponteficia Universita Lateranense.
- Klein, Claude. 1996. *Théorie et pratique du pouvoir constituant*. Paris: Presses Universitaires de France, 1996.
- _____. 1999. A Propos Constituent Power: Some General Views in a modern Context. In *National Constitutions in the Era of Integration*, edited by Antero Jyränki, 31-43. The Hague: Kluwer International Law.
- Maus, Didier. 1999. The Influence of Contemporary International Law on the Exercise of Constituent Power. In *National Constitutions in the Era of Integration*, edited by Antero Jyränki, 45-57. The Hague: Kluwer International Law.
- Maziau, Nicolas. *Les constitutions internationalisées, aspects théoriques et essai de typologie*. Available at: http://www.unisi.it/ricerca/dip/dir_eco/COMPARATO/mazi_au.doc
- _____. L'internationalisation du pouvoir constituant. Essai de typologie: le point de vue hétérodoxe d'un constitutionnaliste. *Revue générale de droit international public*, tome 106 (2002/3): 549-579.
- Pactet, Pierre. 1996. *Institutions politiques, Droit Constitutionnel*, 15^e éd., Coll. U, Série Droit. Paris: Armand Colin.
- Preuss, Ulrich K. 1994. Constitutional Powermaking of the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution. In *Constitutionalism, Identity, Difference, and Legitimacy Theoretical Perspectives*, edited by Michel Rosenfeld, 140-170. Durham: Duke University Press.
- Schulz, Helena Lindholm. 1999. Identity Conflicts and Their Resolution: The Oslo Agreement and Palestinian National Identities. In *Ethnicity and Intra-State Conflict, Types, Causes and Peace Strategies*, edited by Hakan Wiberg and Christian P. Scherrer, 229-247, Aldershot: Ashgate.
- Shiba, I. 1988. Le pouvoir constituant. In *The Modern Constitution*, 97-114. Fribourg-Switzerland: University Press.
- _____. 2004. *La Constitution de la Palestine*. Available at: <http://www.pcpsr.org/arabic/domestic/books/2004/esamabdin.pdf>
- _____. 2004. *La Constitution de la Palestine*. Available at: <http://www.pcpsr.org/arabic/domestic/books/2004/azizkayed.pdf>
- Al-Qasem, Anis. Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period. *Palestine Yearbook of International Law*, VII (1992/1994): 187-211.
- _____. 1997. The Draft Basic Law for the Palestinian National Authority. In *The Arab-Israeli Accords: Legal Prospective*, CIMEL Book Series No.1, edited by Eugene Cotran and Chibli Mallat, 101-135. London-The Hague-Boston: Kluwer Law International.
- Brown, Nathan. *Drafting a Palestinian Constitution: Hope for Democratic Governance?* Available at: <http://www.palestinecenter.org/cpap/pubs/20010301ib.html>
- Ceterchi, Ioan and Muraru Ioan. 1988. Le pouvoir constituant. In *Modern Constitution*, 73-95. Fribourg-Switzerland: University Press.
- Cristi, Renato. 2000. The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution. *Cardozo Law Review*, 21: 1749-1775.
- Djordjevic, Jovan. 1988. The Modern Constitution. In *The Modern Constitution*, 25-28. Fribourg-Switzerland: University Press.
- Elster, Jon. 1994. Constitutional Bootstrapping in Philadelphia and Paris. In *Constitutionalism, Identity, Difference, and Legitimacy Theoretical Perspectives*, edited by Michel Rosenfeld, 57-84. Durham: Duke University Press.
- Gicquel, Jean. 1999. *Droit Constitutionnel et Institutions Politiques*, 16^{ème} éd. Montchrestien.
- Kassim, Anis. 1984. Legal Systems and Developments in Palestine. *Palestine Yearbook of International Law*, I: 19-35.

the Era of Integration, edited by Antero Jyränki, 9-29. The Hague: Kluwer International Law.

Venter, François. 1999. Constitution Making and the Legitimacy of the Constitution. In *National Constitutions in*

The Process of Preparing the Palestinian Constitution and the Way It's Being Adopted, Why? How? Why Now?

*Asem Khalil**

ABSTRACT

Modern constitutional movement reveals an increasing interest and participation of the international community in the constitution-making process of new-born states. The Palestinian experience does not diverge from this overall development, which considers the constitution as the best adapted legal instrument to eternalize the political compromise of the two-state solution, and to consecrate the transformation of the Palestinian national identity towards state-for-all-its-citizens (only). The problem here is that one may end up injecting contradicting priorities and interests in the constitution, to the point it is reduced to a symbolic document with political objectives rather than a comprehensive constitutional project which enables the construction of a state governed by law. This study shall critically follow up and analyze the Palestinian constitution-making process on the light of the classical theory of constituent power, in order to redress the Palestinian constitution-making within the overall development of international law and relations in order to have a more comprehensive vision of the Palestinian constitution, its role and its importance.

Keywords: Constituent Power, Palestinian Constitution, Identity, Democracy, Rule of Law.

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