Disintegrating and Reconstituting Palestine: The Powerful Strength of Law

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I. Introduction

The assumption on which this paper is based is an idea that has exerted a particularly powerful influence on recent sociologically-oriented approaches to the study of law – namely that the law does not only regulate but also constitutes or creates social phenomena. (Cotterrell 2001, 8497) In a sense, the law is used as a mechanism to shape consciousness, and it establishes frameworks of thought and evaluation that structure social life. This proposition that law frames consciousness, which derives from Marxist sources, is a central tenet of the modern critical legal studies movement that has sought to challenge the old belief that law merely passive reflects other social forces. In taking this proposition as its basis, this thesis will test the proposition that, irrespective of the success of the law-maker in regulating social phenomena, law has the potential power to shape political assumptions.[1]

Section II will show how law was used to disintegrate Palestine and fragment Palestinians.

The historical dimension of this section does not require extensive explanation: law-makers target Palestine and Palestinians and, through law, they change their visage while determining what/who is in and what/who is out. Arbitrarily, and often without the involvement of the Palestinians themselves, Palestine is fragmented and Palestinians are dispersed. Their legal statuses determine the kind of connection they have with Palestine and shape the way they interact with it.

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[1] For further insight into the theoretical framework that holds the law is constitutive, see: Cotterrell (2001, 8497-8). In accepting the premise that law has constitutive power, care should be taken not to advance in the direction of two proposition that are arguably exaggerations. The first exaggeration holds that law is a magic stick and that legal words are 'performatives' that bring about social effects. The second 'exaggeration' maintains that the idea of law is a discourse that normatively only constitutes itself (Cotterrell 2001, 8598-9).

The paper will then engage the impact of the creation of the Palestinian Authority (*hereafter* PA) and the establishment, for the first time in modern Palestinian history, of a *national* law maker, that exercises direct jurisdiction over historical Palestine (section III). Palestine is again targeted through law but this time with a completely different objective in mind – that of reconstituting Palestine. But the underlying assumption is still the same. Law, in shaping political assumptions, helps to clarify what Palestine is (or is not) and who the Palestinians are (or not).

II. Disintegrating Palestine

There is no state currently known as Palestine. Although it was declared by the Palestinian National Council (PNC) in Algiers in 1988, it has never progressed from political aspiration to legal reality. Before 1948, Palestine was subject to the British mandate. Contrary to the situation that prevailed under the Ottomans, when Palestine was composed of several administrative units, the mandate was a single political unit brought into existence with the intention of concretely manifesting the Balfour Declaration; and thereby establishing a Jewish national homeland.

The British Mandate endorsed several legislative acts in order to achieve this objective. For example, it enacted migration laws and policies that sought to reduce the number of Arab Palestinians while increasing the number of Jews. The Palestine Mandate specifically stated that a nationality law should be adopted with the intention of facilitating "the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."[2]

The Palestine Order-in-Council referred to the Palestine Mandate as the source of the authority of the British High Commissioner, which was particularly apparent when he was exercising his power to decree, legislate or to block legislation that was held to be contrary to the Mandate.[3] The British Mandate Palestinian Nationality Order (1925) and its amendments embodied this vision of a arbitrary power by encouraging access to Palestinian nationality through naturalization and contributing to the loss of this nationality – in both respects, needless to say, power rested in the hands of the British High Commissioner (Khalil 2007,

[2] Article 7 of the Palestine Mandate, which was adopted by the League of Nations in 1922.

[3] *See,* e.g., Articles 5 and 18 of the Palestine Order-in-Council (1922)

20-22). To this extent, law was a political tool that was applied with the intention of realizing mandate/colonial objectives.

After the 1947-1948 war, Palestine was divided into three territorial/political entities: 1) the state of Israel was created, including under its sovereign jurisdiction a territory that covered more than 78% of historic Palestine; 2) the Gaza Strip fell under Egyptian control; and 3) the West Bank came under Jordanian control, before later (in 1950) unifying with Transjordan and forming the Hashemite Kingdom of Jordan. The war and the creation of these territorial/political entities had many consequences for the Palestinian people. In each case, law was used to realize the objectives of the state-regime that exerted control over 'its' territory.

Following the establishment of the state of Israel, more than half of the Palestinians left their homeland, and became refugees. Israel used the law, and in particular laws regulating entry to Israel and access to nationality to forbid Palestinians from returning, and encouraged Jews from all over the world to 'return' to the newly established state – as a consequence, the law of return became directly opposed to the right of return. Israel claimed that Palestinian refugees could not enter Israel because they are not citizens, and simultaneously claimed they could not be citizens because they were not in the country! Israel used law to distribute rights differently and discriminate on the basis of national belonging, ethnicity and religion. It enabled the State to create new citizens and excluded others while setting aside their entitlements rules of international law that applied during succession of state or to stateless people or refugees.

The Palestinians of the West Bank and Gaza Strip were also affected by the war, as populations in both territories were respectively subject to the control of Jordan and Egypt. They were also subject to state law, although a partial mitigation was provided by the fact that the state was Arab and Muslim, albeit not Palestinian. Palestinians of the West Bank, who included refugees who were forced to leave their villages and cities in what later became the state of Israel, became Jordanian citizens. The Palestinians of the Gaza Strip remained *de jure* Palestinians, who were ruled under British mandate nationality regulations, but they were *de facto* stateless.

Jordan sought to use law to enhance the unity and the assimilation of both previous entities into the new state; meanwhile, in the Gaza Strip, which remained subject to Egyptian control, law enhanced the *status quo* and sought to preserve the Palestinian identity. In both cases, Palestinians had partial or limited access to legislative processes and the law was a foreign product that was often applied by force, with limited or non-existent participation by local population.

Following the 1967 war, Israel took control of the West Bank and Gaza Strip and annexed East Jerusalem. The United Nations (*hereafter* UN) adopted (and still adopts) the position that these are occupied Palestinian territories.[4] Israel, for its part, claims that these territories are "disputed" and Israel exerts its presence and control in the absence of other sovereign authorities. Israel uses the 'law' (through military orders and declarations) to change the legal and judicial system, expropriate lands, build settlements, and to control Palestinian markets and subjugate them to the Israeli economy. Law, again, was used by the occupation authority, not to serve local population interests but instead to realize Israeli colonial interests in the West Bank (in particular East Jerusalem) and Gaza Strip.

The disintegration of Palestine's territorial and political integrity was accompanied by the fragmentation of the Palestinian population, a fragmentation that has been, it should again be reiterated, brought into effect by the manipulation of the law and its techniques. Most Palestinians are stateless[5] while others have obtained the citizenship of the state where they reside.[6] Palestinians are also divided in accordance with their status as refugees and non-refugees, and a third category includes those internally displaced by the 1967 events.[7] Refugee and non-refugee populations in the West Bank and Gaza Strip are residents (*hereafter* 'resident Palestinians', who both possess ID numbers issued by the Israeli authorities. They are distinguished from those Palestinians who do not possess the right to visit areas under

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[4] See, Resolution 242 of 1967, available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement

[5] This applies to Palestinian refugees of Lebanon, Egypt and Syria. Palestinians of the West Bank and Gaza Strip are also stateless, although they are distinguished by their physical location in the territories of historical Palestine, which international law now recognizes as occupied Palestinian territory.

[6] This was the case for the majority of Palestinian residents of Jordan and most Palestinian refugees who left for European countries and the Americas. Palestinians who remained in Israel became Israeli citizens.

[7] Most of the Gaza Strip's Palestinians and part of the West Bank's Palestinians are refugees, although the former also has a number of displaced persons. Many still reside in refugee camps – there are 19 camps in the West Bank and eight in the Gaza Strip.

PA control without a visa that is issued by the Israeli authorities, who still control the borders of the occupied Palestinian territory. When Israel grants residency status to Palestinians, it applies the same regulations that apply to foreign nations who obtain legal residency. (Shiblak 1996, 31).

It will be noticed that a different residency status applies to Palestinians within the West Bank, East Jerusalem and Gaza Strip. Each possesses a type of residency that does not enable legal movement or stay of any duration in other Palestinian areas. Since the First *Intifada* broke out in 1987, Israel has imposed an increasingly restrictive policy on Palestinian movement. The peace process did not change the situation on the ground and it was actually the opposite – restrictions on Palestinian movement were further extended and exacerbated by restrictions on movement that included sieges and curfews that were largely imposed following the *Al-Aqsa Intifada*, which broke out in 2000. In its aftermath, Palestinians were hardly granted permits to enter Israel.

The Israeli Supreme Court recently rejected a petition against the temporary order of 2003 (the Nationality and Entry into Israel Law, which was published on 6 August 2003) that restricts Palestinians from the OPT entering Israel, thus complicating family reunifications between Palestinians based in Israel and the OPT (Al-Mukh 2006, 9). A new military order (No.1650) entered into force in April 2010, which made it illegal for Gazans and East Jerusalemites to stay in the West Bank without an Israeli permit – it granted the Israeli military governor the power to deport any violating person/s.

Palestinian refugees in host countries were subject to legal regimes that varied in accordance with the host country. They were excluded from the protections provided by international refugee law, and were sometimes even excluded from the rules that applied to foreign residents. Palestinian refugees in each host country are treated as foreigners in other countries – this applies because there is no unique and common legal regime that applies to Palestinian refugees who live in host countries.[8]

Some Palestinian refugees in host countries migrated to third states after obtaining a Refugee Travel Document from the host state or UNRWA (United Nations Relief and Works

[8] For comprehensive presentation of legal status of Palestinian refugees in Arab states, see Takkenberg (1998) and Khalil (2009).

Agency), and some were denied re-access to the country of first refugee, as was the case for Palestinian refugees deported from Kuwait or Libya during the 1990s. Since the establishment of the PA, resident Palestinians can travel abroad using PA passports, which are, in almost all instances, recognized as a valid travel document.[9] These passports, however, are nothing more than travel documents or 'slightly upgraded Israeli identity cards'. (Hammami and Johnson 1999, 317) The granting of a PA passport is not an expression of Palestinian citizenship, although it may be considered as its embryo, and only resident Palestinians are entitled to a PA passport.

III. Reconstituting Palestine

The PA, which was established by the Oslo Agreements and a very unharmonious union between the PLO and Israel, exercised jurisdiction in matters transferred by Israeli Military Commander, and applied this authority in areas from which the Israeli army had redeployed. In all circumstances, this new entity did not exercise jurisdiction over Israeli citizens. Circumscribed by those functional, territorial and personal limitations from the outset, the PA exercised its power to legislate for the NEW Palestinians and the NEW Palestine.

The new Palestinians are the 'citizens' of the PA – that is, Palestinians who are residents of the West Bank and Gaza Strip, who obtained an ID number through an agreement with Israel, or who entered the OPT for purposes of family unification. The new Palestine extends to those areas where the PA exercises its authority – theoretically to the West Bank and Gaza Strip, although in reality to disconnected portions of bot territories. While it is true that the Oslo agreements refer to West Bank and Gaza Strip as a single territorial unit,[10] two qualifications should be noted – firstly, the status of Jerusalem was left to final status negotiations, and secondly Palestinians Israeli military forces only gradually redeployed from the 'areas'.

Palestinians will limit their territorial claims to territories occupied in 1967 – quite clearly, territories assigned to the Arab state by the partition plan and historical Palestine are off-

[9] The status of Jerusalemites is further complicated by Israeli annexation of the city, and their treatment as permanent residents of the state of Israel. The issue of Jerusalem requires further analysis that assesses Israeli laws and policies that sought to reduce the number of Arab Jerusalemites while also increasing the number of Jews in the city. This concern, however, falls beyond the parameters of the current research.

[10] See article XI-1 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995).

limits. The Oslo agreements can of course be reconciled with the two-state solution and the idea of a *Palestinian* state (to be called Palestine, as the PNC established in Algiers in 1988) that would be formed within historical Palestine. This is why PA laws (especially those related to elections) indirectly limit this political right to Palestinian residents of the West Bank and Gaza Strip and explicitly exclude Israeli citizens – this is why Arab Palestinians who have Israeli citizenship are not entitled to participate in PA elections.

The Palestinian Authority started a policy of legal unification by adopting unified legislations that applied to the West Bank and Gaza Strip. More than 100 laws were adopted by the PLC during the first 10 years of its life (1996-2006) – multiple decree laws were adopted by the two PA presidents (Arafat and Abbas), and more than a thousand decrees, bylaws and regulations came into effect. All were adopted within the spirit of the first decree adopted by Yasser Arafat in 1994, which was passed even before his triumphal return to areas under PA control. This unification through legislative enactments was accompanied by the unification of the judicial system and the creation of a High Court, High Court of Justice and a Supreme Constitutional Court (SCC).

The endorsement of the Basic Law in 2002, which was referred to as the PA's "constitution" during the Interim period, was lent an added significance by the fact that the Interim Agreements were supposed to end a year earlier. In practical terms, this meant that narratives of legal and constitutional *legitimacy* came to replace those of negotiation and liberation. The creation of the post of Prime Minister (in 2003) and the 2005 e constitutional amendment, which enabled second legislative elections, further strengthened this predisposition to refer to the Basic Law and other legislated laws as sources of authority.

In 2007, HAMAS seized control of the Gaza Strip after it had failed to successfully establish its rule in the aftermath of the 2006 parliamentary elections. The exact circumstances of this bitterly contested event are not relevant to the current paper. The essential point to register is that a process of law-making has since consolidated in the West Bank and Gaza Strip that has reinforced the *de facto* separation of the two entities, a reality that stands in stark contrast to repeatedly reiterated calls for Palestinian unity. This political and legal fragmentation of Palestinian territory has been accompanied by diverse interpretations of the same legal texts, a tendency that has been particularly pronounced in the case of the Basic Law – but this has not been accompanied by the rejection of this Law or other PA laws, or the contestation of

their appropriateness as sources of authority for PA or HAMAS officials when they respectively exercise their powers in the West Bank and Gaza Strip. This establishes that PA law in particular did not only shape the political expectations of concerned political actors, rather it also extended to their assumptions, for the simple reason that this law is the source of their authority in the first instance.

IV. Conclusion

The argument that this paper has advanced is simple and straightforward. It nonetheless becomes increasingly complex when attention turns to its underlying premises and takes on the appearance of ambivalence when consideration is given to the conclusions it may help to attain. This paper has consistently argued that law has a power that goes beyond that which has been traditionally ascribed to it: in stressing the centrality of its *constitutive* role, it has reiterated that law shapes the political expectations of those who are – *inter alia* – entitled to make it. 'Palestine' was suggested as an ideal case study, although it was recognized that this term suggests a certain ambiguity because it refers to completely different entities, experiences and geographical/historical dimensions. This case study affirmed that, after being disintegrated through law, Palestine is now being reconstituted again through this same means.

This feature clarifies why the title of this paper refers to the 'powerful strength' of the law. Being powerful does not mean that the law is not detested and resisted – quite the contrary, the former often elicits the latter. Upon this basis, it is possible that law will be – rightly – perceived as a colonial tool and that it will be rejected on this basis. Others may instead take the view that it is a natural development of human affairs or a consequence of the current world order – this will not change their hatred but it will at least make them predisposed to accept it until things change. This paper did not engage with this question because it did not propose to offer any *moral* judgment of the intentions and interests that motivated the law-maker(s) or the project he/she/they had in mind when they made law; similarly the extent to which this law realized or undermined the Palestinians' right of self-determination was also off-limits. Instead, this paper restricted itself to the question of how law shaped both Palestine and the Palestinians, while also influencing Palestinian political assumptions.

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