

## Decolonisation, dignity and development aid: a judicial education experience in Palestine

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### ABSTRACT

Taking Palestine as the focus of inquiry, and drawing on our experiences as co-directors of Karamah, a judicial education initiative focused on dignity, we reflect on the attributes of colonisation and the possibilities of decolonisation in Palestine through development aid. We conclude that decolonisation is possible even within development aid frameworks. We envision the current colonial condition in Palestine as a multi-faceted, complex and dynamic mesh that tightens and expands its control over the coveted colonial subject but that also contains holes that offer opportunities for resistance or refusal. We turn to Karamah to illustrate how some judges have insisted on a professional identity that merges the concepts of human dignity and self-determination and ultimately rejects the colonial condition inherent in both occupation and development aid. We conclude that in this process of professional identity (re)formation, members of the Palestinian judiciary have helped reveal the demands of decolonisation by demonstrating their commitment to realising human dignity through institutional power, and bringing occupation back into international development discourse.

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For two-thirds of the people on earth, this positive meaning of the word 'development'...is a reminder of *what they are not*. It is a reminder of an undesirable, undignified condition. To escape from it, they need to be enslaved to others' experiences and dreams (Emphasis is in the original).<sup>1</sup>

## Introduction

Is it possible to participate simultaneously in development aid and decolonisation? Several decades of development aid have produced significant disappointments. Indeed, far from liberating and benefiting the Global South, development aid can entrench colonial forms.<sup>2</sup> Aid is ultimately a problematic construct that should be replaced with solidarity. But praxis scholars cannot ignore development aid in anticipation of new South–North engagement frameworks. Rather, emancipatory actors need strategies to harness existing frames against

their colonial tendencies, remaining critical but not overly sceptical about the possibilities of decolonisation.

Given that occupation has produced de-development in Palestine, the withdrawal of development aid has significant consequences, including the risk of economic collapse. The possibility of participating in development aid in Palestine thus creates tensions for those committed to praxis and decolonisation. Ignoring or refusing to participate in development aid simply cedes space to those who will take it up without a critical lens or a commitment to decolonisation. But engaging on the terms set by development aid orthodoxies amounts to neo-colonial co-optation.

In this paper we reflect on the attributes of colonisation and decolonisation through development aid in Palestine. Borrowing from studies of indigenous assimilation,<sup>3</sup> we envision the current colonial condition in Palestine as a multi-faceted, complex and dynamic mesh. This mesh tightens and expands its control over the coveted colonised subject, but it also contains holes or spaces that offer up opportunities for resistance and refusal. We examine the requirements of decolonisation in the Palestinian context and draw on some of our experiences with the Karamah initiative to illustrate ways in which members of the judiciary have helped advance decolonisation through a dignity lens. Karamah, which means 'dignity' in Arabic, was a judicial education initiative organised by Birzeit University, Palestine and the University of Windsor, Canada that focused on promoting dignity in the Palestinian justice system through judicial education. We are of course not suggesting that judicial references to dignity have exhausted the decolonisation project in Palestine. Far from it. We argue that members of the Palestinian judiciary, through the various ways and sites in which they invoked dignity, helped make visible the parameters of the decolonisation project in Palestine against the intentions of colonial actors whose assumptions and agendas work towards denying the existing colonial condition in Palestine.

## The colonial condition in Palestine

While we cannot completely map the elements and consequences of the colonial condition in Palestine, we highlight the basic features of the colonial terrain in this section. We do so for several reasons. An expansion of the colonial condition over the past several decades has made decolonisation more complicated. Ending the occupation no longer encapsulates this struggle, although, of course, it remains a vital part. By unravelling and naming the elements of the colonial condition in Palestine we identify the nature and scope of required decolonisation responses and emphasise the urgency of taking up opportunities for decolonisation.

The current colonial condition in Palestine includes traditional colonial structures as well as neo- and postcolonial forms perpetuated by a multiplicity of actors. Israeli occupation represents colonialism in its classic form. While its modalities and effects have varied over time and across Palestinian geography, Israel's occupation has consistently aimed at territorial imperialism using military might. As an occupying state, Israel has, for example, annexed Palestinian land and resources; built walls, settlements, roads, checkpoints and other structures that divide Palestine into enclaves resembling 'bantustans'; governed Palestine through a legal system that is largely bereft of justice or due process; used military weaponry against the West Bank and Gaza; and systematically defied Palestinian individual and collective human rights.<sup>4</sup>

Israel also relies on neo-colonial practices to discipline and control Palestine. Neo-colonialism is evident in Israel's relationship with the Palestinian Authority. Israeli leaders imagine the Palestinian Authority as the long arm of Israeli occupation and work to keep the Authority under Israeli control. Critics point to security cooperation between Israel and the Palestinian Authority as the quintessential example of neo-colonialism at work. They describe the ways in which Palestinian security forces have been deployed against Palestinians, ostensibly as part of an effort to support peace negotiations, but ultimately to the benefit of Israel's security at the expense of Palestine and Palestinians.<sup>5</sup>

The Palestinian justice system offers another example of the ways in which Israel assumes neo-colonial control over Palestinian institutions. Like their counterparts in other jurisdictions, Palestinian judges need to travel to attend court, engage in education and other professional development activities, manage justice institutions and promote strategic development at the institutional level. Unlike most judges around the world, however, Palestinian judges must receive permission to travel – whether abroad, to or from Gaza or, given checkpoints and closures, within the West Bank – from the occupying power rather than their own national institutions. The Palestinian justice system, like the larger project of Palestinian public institution building, has thus remained directly dependent upon permission from Israel for its vitality. Similar measures of Israeli control mark the Palestinian forensic system, the police and the Prosecution.

Occupation's classic colonial and neo-colonial forms are bound together through Israel's legal system, particularly its courts, which rationalise the individual and collective violence perpetrated against Palestinians by Israeli policies and practices. For example, Israel's Supreme Court has ruled in favour of the wall.<sup>6</sup> Moreover, Israeli judges, most often military judges sitting in military courts, dispense violence against Palestinians from the bench. For example, military judges sentence Palestinian youth who throw stones at the wall to harsh punishment.<sup>7</sup> Military courts retain broad jurisdiction over Palestinian life, particularly in matters involving Jerusalem, family reunification, taxation, permits, Israeli settlers or security.<sup>8</sup> Notwithstanding the existence of the Palestinian Authority, the Israeli legal system thus ensures that Israel retains control over structures that sustain the occupation and that affect the daily lives of Palestinians, regardless of where they live.

Israeli occupation also assumes the colonial forms identified by Edward Said and others: stereotypes, biases and images of the other as less knowledgeable, less moral and less worthy.<sup>9</sup> The ontology of Israeli occupation posits a hierarchy of being or worth between Israelis and Palestinians and translates this ontology into politics through policies and practices that subjugate Palestinian rights and interests to Israeli rights and interests. Imagination thus proves inextricably linked with the conventional violence of colonialism and its neo-colonial counterparts.

Beyond the occupation development aid provides another vehicle for the neo-colonial project in Palestine. Development aid entrenches colonialism in various ways. Sometimes, development aid buttresses the occupation. For example, development aid has helped Israel cover the financial cost of its occupation. As an occupying state, Israel has obligations under international law to the Palestinian community, including obligations to maintain infrastructure and civilian services. By offering development assistance to the Palestinian Authority the international community has *de facto* relieved Israel of its obligations without simultaneously requiring the end of occupation.

Development aid has also created 'facts on the ground', which have helped cement the occupation. Roads financed by USAID, for example, are built to bypass settlements and make travel between West Bank enclaves more bearable for Palestinians. While they make life easier in the short run, these roads extend the 'facts on the ground' strategy that has been employed by Israel for decades as part of its territorial expansion campaign. The roads entrench settlements, one of the main barriers to the creation of a contiguous and viable Palestinian state.

Significant development aid also goes to Palestinian security apparatuses, which police and control Palestinians, again relieving Israel of the cost of doing so.<sup>10</sup> And development assistance presents an opportunity to expand the security apparatus and bureaucracy beyond formal state agents. Since international donors prohibit aid-implementing agencies from hiring individuals or organisations listed on domestic or UN-designated terrorist lists, aid workers are solicited into the security agenda without additional costs to Israel or to international donors.<sup>11</sup> Overall, to put it colloquially, Israel gets to have its cake and eat it too. It comes as no surprise therefore that Israel welcomes development aid to the Palestinian Authority.<sup>12</sup>

Development aid has also deflected attention away from the occupation *qua* occupation. Aid thus has a direct relationship with classical colonialism, helping further Israeli imperialism and even abetting its military aggressions. This link between development aid and colonialism is nuanced and multifaceted; it exists as a hybrid between classical and neo-colonial practices. Our experience in Palestine indicates that aid-focused engagement between a donor country and Palestine privileges a discourse that furthers Israel's political aims. In Canada, for example, recent discussions about how much aid to offer Palestine have come to prevail in political and public spaces over the past 10 years. This aid-centred discourse has eclipsed discussions of previous years about whether Canada was living up to its foreign policy *vis-à-vis* Israel and Palestine.<sup>13</sup> Discursive reshaping of donor states' political horizons aligns well with Israel's efforts to refocus attention away from the occupation through a 'rebrand Israel' public relations campaign, and helps it 'define a narrative for the occupation on its own terms: one that refers to an illusory "peace process," "capacity-building" and "development projects" that mask a [colonial] reality'.<sup>14</sup>

Moreover, donor states can rationalise inaction, including failure to act against Israeli political and military aggression, through the aid spectrum. Canada and the USA chose to offer development aid to Palestinians while giving unequivocal political support to Israel, even as the latter stepped up its military assault on the Gaza Strip and the West Bank.<sup>15</sup> Between 2003 and 2014 Canada increased its aid to Palestinians, while justifying heightened Israeli military aggression and continued territorial expansion.<sup>16</sup> Aid to Palestine is also conditioned to further support Israeli occupation. Unlike other peoples, Palestinians have been required to prove their readiness for statehood by building public institutions and negotiating their self-determination with the very state that occupies them – two conditions that are at least implicitly attached to the receipt of international development aid envelopes.<sup>17</sup> The moral dimensions, legal requirements and socio-political conditions of occupation are largely side-lined in this framework, which treats the Palestinian Authority and Israel as entities with largely equal bargaining power, partly on the theory that international aid should equalise the playing field.

Development aid entrenches colonial forms in other ways. Development aid works as a postcolonial force that mirrors the ontology of occupation even as it differs from occupation

in its objectives, impacts and methods. As we discuss below, one can see this postcolonial condition practised in Palestine by examining the modalities of development aid programming and the assumptions of 'the other' on which they are built. A rich body of literature has critiqued the ways in which development aid deems whole groups more or less knowledgeable, moral and worthy, permitting the possibility of redemption when the recipient of aid has been recast into the image made by the centres of control.<sup>18</sup> Donors define development processes to replicate their interests through neo-colonial conventions that ensure their continued control. Development aid programmes establish the frames through which donors deem decisions by local actors legitimate and validate locally valued results.

The basic impulse of seeking control over subjects deemed to be incomplete until they replicate the values and practices of the metropole represents the *sin qua non* of colonisation.<sup>19</sup> At root this hierarchy dehumanises the other and denies responsibility for suffering,<sup>20</sup> tracing an unsatisfactory socioeconomic or political state of affairs back to local rage, strife, corruption and/or the incompetence of those deemed in need of development. Knowledge transfer, technical training and the external consultant represent the main modalities of this postcolonial form.<sup>21</sup> Palestine is no exception.

Within the knowledge transfer paradigm context must be minimised as a necessary corollary of expert knowledge transfer. The implicit assumption is that context is not relevant or that it is only relevant to the extent that it can be gathered and managed by external experts; knowledge is a commodity that can be produced in one place and consumed in another.<sup>22</sup> International consultants thus move from one location to another, imparting knowledge as though time, place, personalities, histories and politics did not matter to the degree that they do.

Given the prevailing donor premise that the end of occupation is to be negotiated with Israel, it should be clear that development aid is rarely given to those who explicitly and directly work towards ending the occupation. Against this complex, shifting and often overwhelming colonial reality, the dilemma for praxis scholars is whether to engage in development aid projects that share in the colonial condition. Can one take development aid and reframe its terms to further decolonisation in Palestine? In particular, can praxis scholars help reveal and disentangle themselves from the postcolonial structures that underlie both occupation and development aid, both of which posit Palestinians as "less than." Is it possible to maintain a focus on occupation as a mischief to be remedied in Palestine even within a development aid project that is not specifically focused on Israel and the occupation? To what extent can development aid programming be used to keep alive and model a vision of Palestine that understands political power as a public good? Our experience with Karamah and judicial education in Palestine suggests that such possibilities exist and can contribute to the decolonisation project.

## **The Palestinian judiciary: between occupation and development aid**

### ***The rule of law and judicial education***

Limited Palestinian self-rule gave the Palestinian judiciary some measure of control over its institutional practices and mandates, even as its jurisdiction over matters pertaining to the occupation remain limited by the Oslo Process and Israeli military jurisdiction. The Palestinian judiciary enhanced efforts in the early 2000s to develop unified judicial institutions, further

professionalise its judiciary through continuing education, define the relationship between the judicial and executive authorities, and enhance public trust in the Palestinian legal system.<sup>23</sup> Around the same time foreign and donor interest in building Palestinian state institutions burgeoned.<sup>24</sup>

As in other parts of the world, building the rule of law became the rallying cry for reform and judicial capacity building formed the core of rule of law programming.<sup>25</sup> Donors supported rule of law programming on the assumption that such programming would: *inter alia*, bring stability to the West Bank and Gaza by promoting good governance;<sup>26</sup> stimulate the economy;<sup>27</sup> promote human rights;<sup>28</sup> support peace;<sup>29</sup> and help prepare Palestine for statehood.<sup>30</sup> But a largely unspoken and hence unresolved conceptual schism in the meanings attached to 'the rule of law' existed. Given that Israeli occupation advanced through law, the rule of law in Palestine invoked images of violence and unbridled power.<sup>31</sup> Scepticism extended to human rights norms and systems.<sup>32</sup> From a community-based perspective credible attempts at building the rule of law through development aid had to address the occupation.

International donors, however, tended to understand the rule of law problem largely as an institution-building or capacity-building problem, stripped away from the context of Israeli occupation and the larger colonial condition. The way in which problems are conceptualised defines their purported solutions and structures implementation activities. The development aid solution to the rule of law problem thus emphasised filling capacity gaps with knowledge, or presumed knowledge; since such knowledge did not exist in 'the field', it would have to be imported from abroad. Consistent with historical colonial practices, education became a favoured instrument of development's civilising mission.<sup>33</sup> Development aid programmes in Palestine reached into familiar development aid toolkits and picked up knowledge transfer as the main response to the rule of law problem as they perceived it. The external or foreign consultant thus becomes central to the development aid response. The consultant, who often knew little about the local context but was willing to share the information s/he had picked up in other contexts, usually for significant financial profit, was presented as the solution to the capacity gap. The consultant embodied and signified the continuous flow of information (as opposed to knowledge) to Palestine from abroad. To complete the tautology, Palestinian judges were imagined as largely empty vessels to be filled with external knowledge.<sup>34</sup>

Reliance on knowledge transfer as the main modality of judicial education in Palestine had practical, ethical and political consequences. Judges quietly complained that the education offered to them by external consultants was of limited use or relevance to the issues that confronted the bench. Judicial education offered significant information but not necessarily knowledge, in part because programming too often ignored the fact that, while knowledge can be gained across contexts, information without context is not knowledge. Moreover, given its reliance on knowledge transfer, programming tended to replicate occupation's hierarchical ontological structures: it placed the Palestinian judge in a colonial relationship to the foreign trainer who was positioned as the expert-knower while the judge was to be the passive recipient of whatever information the expert had to dispense. Finally, judicial education programming assumed political significance; the emphasis on capacity building helped mute the occupation as a subject of discussion in favour of emphasising the places and spaces in which Palestinian judges lacked capacity. In short, occupation

figured in international development programming primarily as a logistical challenge to activity planning.

Shaped by development aid and knowledge transfer orthodoxy, much of the early judicial education programming in Palestine proved impractical to implement, because those with authority lacked knowledge and those with knowledge had insufficient authority. It was also conceptually incoherent because it purported to curb arbitrary power while side-lining the occupation as a source of the rule of law problem in Palestine and it was ethically suspect because it assumed a colonial stance towards Palestine and Palestinians. Despite the significant funds funnelled to judicial education efforts throughout the late 1990s and early 2000s, Palestinian judges largely resented judicial education programmes and Palestinian human rights organisations continued to complain about the judiciary and the judicial system.

### *Towards a new judicial education model*

Karamah sought to respond to the shortcomings of the knowledge transfer paradigm. In 2010 Karamah and the Palestinian Judiciary launched the Candidate Master Trainers (CMT) model of judicial education as an alternative to the prevailing knowledge transfer paradigm. Karamah rejected knowledge transfer because it implied hierarchical relationships between Canadians and Palestinians.<sup>35</sup> Instead, Palestinian interdisciplinary expertise displaced international expertise as the main project modality. Philosophers, lawyers, pedagogues, political scientists and sociologists, mostly from Birzeit University, all played key roles in supporting the development of a locally designed and implemented judicial education programme. Palestinian judges organised themselves into working groups to develop professional education courses for their peers. Combining leadership and learning, the CMT produced curricula in areas such as employment law, landlord–tenant law, juvenile justice and insurance law. These areas were identified as priority areas by the Palestinian judiciary – all 146 judges in the West Bank were surveyed.

Each working group lasted for roughly a year. CMT judges were provided with the resources they needed to develop and deliver educational sessions. Palestinian pedagogues worked with the judges in developing their own teaching skills and visualising learning as a process of self-empowerment. The judges also had the support of a team of Palestinian legal researchers, all from Birzeit University, who effectively took on the role of clerks. Highly skilled and dedicated judges from Canada volunteered ongoing advice, support and exchange of experience. They treated the Palestinian judges as colleagues and interacted with them as participants in a transnational judicial dialogue.

Karamah adopted dignity as its overriding theme. Who could object? To some commentators relying on dignity as a theme was attractive because it meant nothing more than education around the technicalities of human rights. Canadian officials tended to emphasise that Canadian values would be imported overseas, as the Supreme Court of Canada had proclaimed that dignity defined Canada's legal system. Karamah, however, adopted dignity as its unifying theme for different reasons. Dignity in the Palestinian context proved particularly appealing because 'human rights' had become increasingly bogged down with its own form of scepticism, particularly after the failure of the Oslo Accords and the failure of Western governments to counter Israel's occupation.<sup>36</sup> Dignity, moreover, offered a discourse through which popular priorities and aspirations could be articulated beyond the technicalities of



human rights law and dignity stood as antidote to the Palestinian occupation experience, which Palestinians generally experienced as humiliation.

The CMT process allowed the judges the resources and opportunity to examine the status quo from the lens of human dignity. They were given the opportunity to explore various issues of law within their working groups. The approach was not prescriptive. They were not lectured about human rights nor directed towards a particular result. They were simply asked to think about how examining a particular legal problem through the lens of dignity might frame their analysis or decision making. Ultimately the CMT process cemented or, in some cases, introduced an aspect of professional judicial identity that permitted the demand for human dignity to emerge as a personal, professional, communal and national priority rather than a consumable slogan served up by experts from abroad.

Roughly one year after the CMT process ended an independent agency conducted an external evaluation of the CMT programme and confirmed that the CMT judges had adopted human dignity as a lens through which they made their decisions. Though engaged in judicial education in one aspect of the law, CMT judges applied the dignity lens to their analysis across legal subjects and approaches to particular legal problems were documented across several areas of law.<sup>37</sup> As one judge put it, 'my approach to all cases changed'.<sup>38</sup>

### Human dignity, professional identity and collective aspirations

As we point out in the first part of this paper, the colonial condition in Palestine represents a multi-faceted web that is bound together by the notion that those over whom power is exercised are less worthy than those who exercise power. We also point out that the Palestinian judiciary, unlike judges in other jurisdictions, have limited jurisdiction over matters that affect the lives of Palestinians, because Israel has retained authority over vital issues that sustain its occupation. In this section we highlight the ways in which members of the Palestinian judiciary harnessed dignity to their limited institutional power to question the colonial condition in Palestine and model the relationship between dignity and power. Dignity appealed to members of the Palestinian judiciary because dignity resonated with their personal and professional desire to reject the occupation experience, fashion a different relationship between Palestinian people, align their institutional power with recognition of the inherent, equal worth the Palestinian people, and allow them to speak truth to power despite the particular confines of the Palestinian judicial office.<sup>39</sup>

As Robert Cover has so eloquently explained, judges are people of violence.<sup>40</sup> Through their decision making they wield 'power-over' (see below) others and inflict state-sanctioned violence. The bench thus offered the most obvious site from which the CMT judges could demonstrate or model the ways in which dignity can mitigate power over others. Inspired by a deepened sense of personal and professional empowerment, and increasingly aware of their responsibility and ability to exercise power to enhance dignity, CMT judges viewed decision making as an obligation to respect dignity.

They developed new ways to bring a measure of dignity to the legal system, given their power through the judicial office. Several judges emphasised rehabilitation over retribution as the underlying principle in juvenile justice cases and considered the conditions of detention in rendering sentencing decisions.<sup>41</sup> Other examples include:



- ordering *in camera* testimony for witnesses in sexual assault and juvenile cases;
- reducing sentences or offering alternative sentencing for young offenders;
- introducing the 'best interests of the child' analysis;
- assessing the power imbalance between litigants;
- ensuring faster decision making and better case management, especially in cases involving sexual assault and sexual harassment;
- avoiding detention in debtor–creditor cases and attempting to resolve disputes through other means;
- improving treatment of litigants and witnesses by explaining their rights and considering their special needs in the court room;
- applying the human rights provisions of the Basic Law;
- moving away from literal or rigid readings of the law and applying the purpose or spirit of the law to the facts of the case.<sup>42</sup>

Beyond the bench the CMT judges declared in interviews and in public statements that they regarded themselves as social leaders who should help define the aspirations of the Palestinian states. Human dignity, to the extent that it represented an antidote and opposition to the dehumanisation known through occupation, invited a conceptual departure from the colonial past and hinted at a nascent future in which the judges could have some influence on shaping people's lives and the lives of those who came before them.

Dignity thus sparked the emancipatory imagination in Palestine, as it had in jurisdictions such as post-apartheid South Africa and post-Nazi Germany, which sought a break from an undesirable past marred by the dehumanisation of perceived others. CMT judges proposed that the Palestinian people, because they had endured the humiliation of occupation, deserved a legal system that valued and delivered human dignity. The judicial leadership suggested that the Palestinian judiciary could make a positive difference in the lives of ordinary people by taking up the professional mantle of human dignity.

CMT judges encouraged a particular professional identity. As one judge put it, 'We need to see judges as providing a service to society, not as an authority with the right to impose his/her will on parties in court.'<sup>43</sup> Another judge stated: 'We serve to protect human dignity; in our analysis of the case and interpretation of law we need to side with human dignity.'<sup>44</sup> Not surprisingly the professional identity of the CMT judges became inextricably linked with national emancipation, as the appeal to dignity could not ignore the indignities of the everyday. A senior judge, for example, emphasised at Karamah's closing conference that the Palestinian judiciary have an 'additional' reason to ensure justice for the Palestinian people to 'compensate' for a history of injustice:

Building judicial capacity is part of building our state and we are honoured to be chosen for this mission. It is our duty to bring to our society strong and merciful judges, judges who are able to protect the dignity of Palestinian citizens...The Palestinian people have suffered significantly and their dignity has been abused continuously by an occupier that treats the Palestinian people as if they have no dignity and ignores or abuses Palestinian rights without mercy...In this context, we as judges should be the address for human dignity, through our practice at court and through our efforts in building the capacity of new judges...We should remember that we are the servant of the people, not their master. This is how Palestine should be, and this is how the Palestinian judiciary should be.<sup>45</sup>

Dignity was posited as the opposite of occupation. By emphasising that 'we need to see judges as providing a service to society' and insisting that they are 'servants of the people,

not their masters', judges committed to using their institutional power to further the interests of individual justice and collective aspirations.

Judges explicitly tied judgement through a human dignity lens to national self-determination and the desire to break from Israeli occupation by behaving differently from the occupier rather than seeking revenge and reproducing the violence of the occupier. Where occupation is premised on the degradation of the other and relies on dehumanisation at all levels – personal, professional, structural, individual and collective – human dignity invited an examination of the circumstances of a person's life, a search for legal principles that would recognise the humanity of the people before the court, and recognition of the responsibility for law's impact on people's lives.

Several judges explained that their decision making benefited not because they had gained knowledge of new legal rules. They noted that they had instead come to see 'the human side of cases' and linked this perspective to the need for national self-determination.

The CMT programme focused on looking at the human side of cases. This is very important to us as a nation because we went through tough times. It has affected the way I look at all cases and has had a lasting impact on me.<sup>46</sup>

Like other CMT judges, s/he linked a willingness and ability to see the 'human side' to the national struggle for liberation and the move away from structural suffering.

Judges reasoned that treating claimants with dignity not only brought justice to the individual, it would also create positive social bonds. One judge explained this relationship in the context of juvenile justice cases.

Looking at the human side of a case and looking at rehabilitation rather than punishment when dealing with juveniles helps enhance justice... When the juvenile himself recognises that the aim of the decision is rehabilitation and not punishment for the sake of punishment, he will start to look at things differently himself. He will start to appreciate the value of human dignity and justice in society.<sup>47</sup>

The external evaluation of Karamah cited similar examples of judges behaving in ways towards witnesses that helped model social and political respect.

A judge explained how he integrated human dignity in procedures by dealing with each witness and suspect or litigant with respect. He also started to recognize power relations in court and started to make sure not to abuse his power as judge when questioning witnesses.<sup>48</sup>

Journalists and civil society organisations noted that judges treated those who came before them in respectful ways that mirrored desired social outcomes.<sup>49</sup>

## Decolonisation?

Karamah ended its activities in 2012. Because Karamah was a judicial education initiative, resources could not be directed towards advocating the end of occupation, even though we fully understood that occupation represented a negation of dignity in all its forms and even as we continued to speak against occupation in our capacities as scholars and social commentators. We accepted that the struggle to support decolonisation within development aid initiatives in Palestine required strategic compromises, although we were not advocating 'a least of all possible evils' strategy or suggesting that one give up on aspects of self-determination or decolonisation.<sup>50</sup> Rather, we worked on the theory that one must sometimes accept that successes will be limited, while remaining committed to advancing one's ultimate

goals at every opportunity. In this section we examine whether judicial invocations of human dignity as described above furthered decolonisation.

Unlike the capacity-building approach, which would inquire *whether* human dignity had become part of judicial decision making, the decolonisation question focuses on *why* the judges took up human dignity in their professional practice. The decolonisation question focuses on the why in part because judges in jurisdictions around the world have cited dignity without much relevance to decolonisation. Indeed, sometimes dignity is used regressively in that it is attached to a particular group but ignored in relation to the claims of other groups.<sup>51</sup> Alternatively dignity is used narrowly as a substitute for a particular, often narrowly construed human right such as liberty.<sup>52</sup> In both instances the power status quo is preserved. In discussing decolonisation and dignity, therefore, our method is not to simply ask about the instances in which judges used dignity in their decision making. Instead, by focusing on how judges invoked dignity, our methodology requires an examination of the relationship between dignity, colonisation and decolonisation.

In the first part of this paper we demonstrated that occupation and development aid employ their power, to varying degrees, to reinforce a group-based hierarchy of being or existence. Colonial actors, in Kantian terms, perceive the colonised as having price rather than inner worth. The undoing of colonisation thus requires different ways of deconstructing and engaging with power, recognises the interdependence of all actions, and orients actors with relative power towards their responsibility for others. We label the varying relationships between formal power, forms of violence, oppression and dehumanisation as 'power-over' and 'power-for'. Colonisation is inextricably linked with power-over. Those who exercise power as 'power-over' seek to deny the suffering created by their exercise of power, presenting it as either a natural mishap or the fault of the sufferer. By contrast, power-for, because it dissects and rejects the notion that power should be exercised to preserve group-based hierarchies, is an instrument of decolonisation. Power-for recognises that individuals and institutions with power have an ethical and professional responsibility to those over whom they exercise power. Power-for recognises the equal worth of self and other, and challenges the monopoly of institutional power by emphasising that its purpose and legitimacy derives from the populace. Through their invocation of dignity, members of the Palestinian judiciary rejected the exercise of power as power-over and helped make visible the parameters of the decolonisation project in Palestine. Dignity provided the judges with a language that could be spoken to coloniality's power in its various sites.

Members of the judiciary worked away at the knot that binds together occupation and development: the notion that power exercised must be of the power-over variety. Dignity helped unsettle hierarchical notions of being and challenged the power-for relations that define coloniality. Decolonisation re-centres analysis and action on the needs of those over whom power is exercised, regardless of who exercises it. In other words, it involves the whole complex spectrum of life activities, perceptions, values and, of course, relations. The judges who adopted human dignity as an aspect of their professional identity helped build a dignity jurisprudence in Palestine that rejected law and the rule of law as an oppressive, power-over force. They did so in part by self-imposing limits on the way in which they exercised their own power and by seeking to inject dignity analysis into the relationship between the parties in both civil and criminal contexts. They furthered dignity in the lives of Palestinians who found themselves, for various reasons, forced to engage with the legal process in Palestine. But the decolonising move involved more than decision making from the bench. The judges

who harnessed the dignity concept to their decision making helped loosen the colonial mesh in other ways.

Palestinian dignity jurisprudence, even in its nascent form, reflected the view that the national Palestinian struggle is not simply aimed at achieving a state or even a sovereign state and that building state institutions is not, as capacity-building programmes would have it, largely a bureaucratic task of adding up knowledge and skills to power. The national struggle requires the achievement of a just and decent state, and the building of national institutions requires a particular relationship between those institutions and the Palestinian people, one rooted in and aiming at popular dignity. The judges who declare that 'they are the servants of the people, not their masters', are modelling this possibility for the larger judiciary and for the Palestinian Authority more generally. They emphasise that breaking with the colonial past begins with recognising and guarding the equal dignity and worth of the other over whom formal power is exercised.

In the Palestinian context breaking with the colonial past requires a rejection of the relationship between hegemonic power and the community that colonialism engenders, and that Israeli occupation presumes and perpetuates. The judges who accepted dignity as the mediating principle between state power and the Palestinian people over whom they held power exhibited a trend towards recognising the need for an epistemological break with colonial discourse, where the question is no longer a question of struggle over who is dominant, but rather about rejecting domination. The judges who adopted human dignity as their professional identity were also thus affirming a founding principle for Palestine.

Moreover, the development of dignity as a professional identity, and not simply as a legal concept or legal right, by at least some judges opened up the possibility of a judiciary that continues to pursue its independence from other state structures and ultimately proves willing to challenge executive decisions in the name of dignity. Of course, a distance remains between affirming dignity as the founding principle for Palestine and fully bringing that philosophy to bear on the judiciary's relationship with other branches of the state. Palestinians have indicated that they trust the judiciary as compared to other parts of the Palestinian justice system,<sup>53</sup> but the judiciary as a branch of the state continues to be implicated in the Palestinian Authority's shortfalls and abuses.<sup>54</sup> To the extent that decolonisation involves exposing and rejecting abuse of power by the Palestinian state, the adoption of dignity as a professional identity by members of the judiciary offers some hope. Experiences with judges in diverse jurisdictions have demonstrated that professional identity plays a profound and lasting role in defining the ethos and shaping practices of judicial institutions.<sup>55</sup> Simply put, judges who develop a professional identity that links judicial legitimacy to the general will rather than to executive dictates are more likely to think and act independently of the executive branch of the state.

The adoption of dignity as a professional identity by members of the judiciary also furthered decolonisation by giving the judges a platform and a conceptual lens through which they could remain respectful of the limits of their judicial office while still reminding the world of the Palestinian narrative. By invoking human dignity as an antidote to occupation, the judges also insisted on 'speaking truth to power', including to development aid practitioners and Israel. Both have worked to redefine the occupation as nothing more than a neutral back-drop for 'state building' or a 'peace-process'. By pitting occupation against dignity, the judges offer a reminder that the occupation remains a race-based construct that denies the equal worth of individuals because of their identity.

Reminding observers that occupation defiles dignity, the judges were committing a 'profanation' in Agambenian terms. Sacred things, Agamben explained, are removed from common use. 'Once profaned, that which is unavailable and separate loses its aura and is returned to use.'<sup>56</sup> Within donor discourse and development aid programming, occupation had assumed an untouchable, almost sacred status. Occupation had been rendered untouchable by classical colonial violence and its less visible neo- and postcolonial forms. Significantly the judges reclaimed discussions of occupation as a legitimate and necessary subject of development aid projects and the subject of legitimate judicial commentary, even in the absence of formal jurisdiction.

Scholars of colonialism in other contexts have demonstrated the efficacy of speaking truth to power and the insistence on telling one's narrative as a form of resistance.<sup>57</sup> In response to the question, 'whose reality counts?' members of the Palestinian judiciary insisted that the national experience of occupation, which they knew well, would not be side-lined by an imagined rule of law problem that could only contemplate pedagogy stripped of politics as development's contribution to dignity in Palestine.

Notwithstanding their socio-political status, Palestinian judges directly experienced the power-over oppression and humiliation of Israeli occupation. As members of the Palestinian community, Palestinian judges and their families were/are imprisoned, subject to closures, checkpoints, military assaults, home demolitions and confiscations, permits, restrictions on travel, interruptions in education and military violence. But the judges did not limit their invocation of human dignity to their own personal or institutional needs, legitimate as those needs might be. Rather, they used the dignity concept to turn the lens, using the platforms provided by development aid, back onto the Palestinian people.

Palestinian judges emphasised that Palestinians deserve well-functioning and just institutions, including legal systems, in particular, *because of* the occupation experience. Judges thus rejected the 'reality' presumed by international donor agencies that defined the rule of law, rule of law programming and judicial education as activities that take place largely outside the colonial framework. The judges also implicitly refused the notion that Palestinian public institutions should be built to secure Israeli confidence. The rights and interests of the Palestinian people also deserved consideration in assessing the efficacy of Palestinian public institutions. Without stepping outside the confines of their judicial offices, members of the judiciary refused to be framed or disciplined by international development's assumptions. They asserted control over the narrative that they wanted to tell the world, their state and their people.

## Conclusion

Development aid presents a particular dilemma for praxis scholars. Praxis, by definition, demands engagement with colonial conditions in an effort to introduce transformative change. The very act of engaging with colonial contexts opens up the possibility of perpetuating through practice the colonial structures that one rejects in principle. In every context praxis involves risks and a willingness to work with paradoxes. Praxis scholars have not yet clearly articulated, *ex ante*, the concrete conditions that make praxis possible. Indeed, it may not be possible to do so because every context and every engagement is different.

Praxis demands an understanding of the colonial terrain. In Palestine this terrain has become all the more complex and, arguably, entrenched with the rise of development aid programming. While there are of course differences between occupation, state power and

development aid, their hegemonic structures intersect and reinforce each other in multiple ways. But development aid also creates opportunities to undercut the colonial condition even as it partakes in that condition. The Karamah initiative represented an attempt to further decolonisation through praxis by resisting the basic assumptions of development aid and highlighting the depth and the contingency of the dehumanising frames that sustain the colonial condition. By demonstrating how and why power can be exercised through a dignity lens, even in a development aid framework that minimises dignity, members of the Palestinian judiciary helped make visible the parameters of the decolonisation project in Palestine.

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No potential conflict of interest was reported by the authors.

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## Notes

1. Sachs, *The Development Dictionary*, 10.
2. Escobar, *Encountering Development*; Cowen and Shenton, *Doctrines of Development*; and Cooke, *From Colonial Administration to Development Management*, 8.
3. Woolford, *This Benevolent Experiment*.
4. "Occupied Palestinian Territories Homepage"; Playfair, *International Law*; Kretzmer, *The Occupation of Justice*; Shehadeh, "The Lucrative Arms Trade," 25; Weizman, *Hollow Land*; and "Occupied Palestinian Territory."
5. Nafi and Purkiss, "Palestinian Security Cooperation."
6. *International Legality of the Security Fence*.
7. Sedley et al., *Children in Military Custody*.
8. Rayyes, "The Rule of Law and Human Rights"; Kelly, *Access to Justice*; Weill, "The Judicial Arm of the Occupation"; Military Court Watch, "Fact Sheet"; Bahdi, "Phosphorus and Stone," 171; and Hajjar, *Courting Justice*.



9. Said, *Orientalism*; Said, *Culture and Imperialism*; and Cohen, *States of Denial*.
10. Zanotti, *US Foreign Aid to the Palestinians*.
11. See *ibid.*, 4 for an uncritical illustration.
12. Ben-Ari, "Israel's Statement."
13. Engler, "Aid to Palestine or Israel?"; and Ziadah, "What Kind of Palestinian State?"
14. Wildeman, "Why Aid Projects in Palestine are doomed to Fail."
15. Al-Haq, "Briefing Note I." See also Shlaim, "How Israel brought Gaza to the Brink"
16. Kennedy, "The Harper Doctrine"; and "PM Stephen Harper urges World Leaders." On increasing aid to Palestine, see Goodman, "Stephen Harper offers \$66 million in New Aid."
17. See, for example, Canadian Department of Foreign Affairs, Trade and Development, "West Bank and Gaza."
18. Easterly, *The White Man's Burden*.
19. Kothari and Wilkinson, "Colonial Imaginaries and Postcolonial Transformations."
20. Cohen, *States of Denial*.
21. Easterly, "The Ideology of Development," 32.
22. Kothari, "Authority and Expertise."
23. For a discussion of current activities and priorities generally, see the website of the Palestinian High Judicial Council at <http://www.pcpsr.org/>.
24. Rocard and Siegman, *Strengthening Palestinian Public Institutions*; Gompert et al., *Building a Successful Palestinian State*; and Bouris, *The European Union and Occupied Palestinian Territories*.
25. Nicholson and Low, "Local Accounts of Rule of Law Aid."
26. See, for example Gompert et al., *Building a Successful Palestinian State*, 23.
27. The World Bank links justice-sector reforms to economic growth. World Bank, *Sustaining Achievements in Palestinian Institution-building*.
28. Samuels, *Rule of Law Reform*; and United Nations, *Rule of Law Development*.
29. Bouris, *The European Union and Occupied Palestinian Territories*, 15, n. 28.
30. Fayyad, *Ending the Occupation*.
31. Institute of Law, 'Al'Kada' Gayrel Nethamee, 8, 41; and Khalil, "(Rule of) Law and Development in Palestine."
32. Allen, *The Rise and Fall of Human Rights*.
33. Woolford, *This Benevolent Experiment*.
34. For example, see NETHAM, *Rule of Law Program*.
35. Easterly, *The White Man's Burden*, Chap. 1; Sayer and Campbell, *The Science of Sustainable Development*, 77–78; and Cooke and Kothari, *Participation*.
36. Allen, *The Rise and Fall of Human Rights*.
37. Just Governance Group, *Evaluation of the Project on Judicial Independence*.
38. *Ibid.*
39. Uma Kothari reminds us that the political narrative is often stripped away from development undertakings, thus rendering them colonising rather than liberating. See Kothari, 'Authority and Expertise', describing how participatory approaches to development discipline and co-opt those who believe themselves to be acting outside the mainstream.
40. Cover, "Violence and the Word."
41. Just Governance Group, *Evaluation of the Project on Judicial Independence*, 55.
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*
45. *Presentation by Judge Mahmoud Jamous, Head of the First Instance Court, Ramallah and Head of the Judges' Panel on Criminal Cases, at Karamah's closing conference. The full text of Justice Jamous' presentation is available on the website of the Palestinian High Judicial Council.*
46. Judge One, interviewed by Karamah, March 2012.
47. Judge Two, interviewed by Karamah, March 2012.
48. Just Governance Group, *Evaluation of the Project on Judicial Independence*, 54.
49. *Ibid.*
50. See Weizman, *The Least of All Possible Evils*.



51. See, for example, the remarks of former Chief Justice of Israel, Aaron Barak. Barak, *Human Dignity*.
52. See Jordaan, "Autonomy as an Element of Human Dignity."
53. Arab World Centre for Research and Development, *Perceptions of the Palestinian Authority Judiciary*; and Turner, *Public Perceptions*.
54. 'Findings of the third quarter of 2015 indicate that two thirds of the public demand the resignation of president Abbas and two thirds do not believe his current resignation from the PLO Executive Committee is real.' "Palestinian Public Opinion Poll No. 57, October 6, 2015." Palestinian Centre for Policy and Survey Research, <http://www.pcpsr.org/>.
55. Vigour, "Professional Identities and Legitimacy Challenged."
56. Agamben, *Profanations*, 77.
57. Cooke and Kothari, *Participation*, 15, n. 47; Sium and Ritskes, "Speaking Truth to Power"; and Kohn and McBride, *Political Theories of Decolonization*.

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