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**To Karina, Jaser and Baha**

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**ABBREVIATIONS**

<b>Art.:</b>	Article
<b>BL:</b>	Basic Law
<b>CC:</b>	Central Council
<b>CIL:</b>	Customary International Law
<b>DBL:</b>	Draft Basic Law
<b>DOP:</b>	Declaration of Principles
<b>DPC:</b>	Draft Palestinian Constitution
<b>EC:</b>	Executive Committee
<b>4<sup>th</sup> GC:</b>	Fourth Geneva Convention
<b>GS:</b>	Gaza Strip
<b>HoR:</b>	House of Representatives
<b>HR:</b>	Human Rights
<b>IA:</b>	Interim Agreement
<b>ICJ:</b>	International Court of Justice
<b>ICRC:</b>	International Committee of the Red Cross
<b>IHL:</b>	International Humanitarian Law
<b>IPC:</b>	International Penal Court
<b>NATO:</b>	North Atlantic Treaty Organization
<b>NGO</b>	non-governmental organization
<b>OPT:</b>	Occupied Palestinian Territories
<b>PA:</b>	Palestinian Authority
<b>PLC:</b>	Palestinian Legislative Council
<b>PLO:</b>	Palestine Liberation Organization

<b>PM:</b>	Prime Minister
<b>PNC:</b>	Palestinian National Council
<b>PNCh:</b>	Palestinian National Charter
<b>RL:</b>	Rule of Law
<b>SRSG:</b>	Special Representative of Secretary General
<b>UAR:</b>	United Arab Republic
<b>UN:</b>	United Nations
<b>UNGA:</b>	United Nations General Assembly
<b>UNSC:</b>	United Nations Security Council
<b>WB:</b>	West Bank
<b>WBGS:</b>	West Bank and Gaza Strip

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# Introduction

## §1 Short Introduction to the Subject and Thesis

Constituent power is the authority to frame or to amend a particular text, superior to other laws, called the constitution. What distinguishes framing power from amending power is that the latter changes the constitution in ways provided therein, while the former amends it outside any precedent constitutional framework. Most modern states have adopted written and rigid constitutions. According to Sieyès<sup>1</sup> -the first to present a sophisticated theory of constituent power- ‘*une constitution suppose avant tout un pouvoir constituant*’, as distinguished from other constituted powers created by the constitution itself. Since a constitution is the highest Law in the state, constituent power must invest those entitled to sovereignty. To close the vicious cycle, most constitutions provide that those entitled to sovereignty are the people, and consequently, entitled to constituent power.

Constituent power presupposes the ability of a society to develop its capacity to act as a collective, in order to gain (or regain) an active role in the organization of individuals’ lives and their social relationships with each other. Here, several approaches are possible, depending on the concept of nation, and thus on culture. For Arab nationalists, the (Arab) nation exists as a human group with its own characteristics, such as language, history and traditions. Attempts to unite ended in failure, and Arab nationalism began to exist within Arab territorial states. The ethnic concept of nation initially helped to justify a revolution against other Muslims, but it was unable to distinguish individual Arab peoples or justify territorial Arab states. What makes a Jordanian different from a Palestinian, a Lebanese from a Syrian? Adopting the concept of nation as *demos* was indispensable, since the nation embraces all citizens living under the same laws, within state borders.

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<sup>1</sup> Sieyès, Emmanuel Joseph (1748-1836).

Most of those states adopted written constitutions in which they declared that sovereignty belongs to the people. Recently, the Arab world witnessed a development in relation to constitutionalism, and the constitutional movement which began then, has continued to the present day. Nevertheless, one should not be deceived into thinking that the norms contained in the constitution correspond to constitutional law. There is a need, in fact, to study the constitutional text in light of the enforced and applied legislation in every Arab state.

The relation between Arab 'nation' and a single Arab 'people' may not be clearly understood by using concepts such as 'nation' and 'people'. In fact, these two concepts have to be understood in the light of the wider concept of *umma*<sup>2</sup>, originally used to indicate the Islamic community, or the community of believers. There is no Islamic or Arab state that embraces all Islamic or Arab *umma*; those populations need to deal with territorially defined states. In contemporary Arab states, there is a partial return to *shari'a* and an increasing reference to Islam as a justification for the state's authority or its rejection, made respectively by the state apparatus and by fundamentalist groups.

In contemporary Arab states, the relation between these three concepts (the Islamic nation, the Arab nation and the Arab people as a single whole) is becoming increasingly problematic. According to Islamic law, sovereignty belongs to God: no state has the right to exercise authority except in subordination and in accordance with the Law revealed by God and his prophet. The Pakistani, Sayyid Abul A'la MAUDUDI (the founder of the *Jamaat-e-Islami* in Pakistan)<sup>3</sup> invented a new concept: '*al-hakemmeyya*' meaning sovereignty in reference to God, while '*seyyada*' (also translated as sovereignty) referring to the people's power.<sup>4</sup>

I will present, first, the classical theory of constituent power since its inception until recent times. We will notice that this theory was not

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<sup>2</sup> For more details about the concept of '*umma*', see session 8.3.

<sup>3</sup> Sayyid Abul A'la MAUDUDI (1903-1979), the founder of *Jamaat-e-Islami* (*Islamic Party*) of Pakistan.

<sup>4</sup> For complete analyses, see 10.1.2.

arrived at suddenly, but was formed over a period of time and followed the constitutional developments of concerned states. Two different approaches are presented: the formal and the material conceptions: both have their own consistency (Part I).

Knowing that the theory was ‘invented’ in the USA and France and that this was possible only following philosophical and political revolutions that resulted in switching the bearer of sovereignty: the nation became the source of all legitimate power since people are sovereign, not the monarch or God. Now, is it possible to read the theory of constituent power in ‘Arabic’ terms? The principle of popular sovereignty is included in most of the Arab constitutions, which adopted written and rigid constitutions. However, in the Arab world, there is a contradiction: an increasing attachment to territorial states, in spite of a general discontent for the regimes by the people; and the legitimization of the authority, in some instances based on Arab or Islamic nationalist discourses (Part II).

In taking Palestine as a case study (Part III), we find that the Palestinians already had a rich constitution-making process, characterized by local and international interest and support. More than seven drafts of Basic Law (BL) were drafted before being adopted by the Palestinian Legislative Council (PLC) in 1997 and endorsed by the Palestinian Authority’s (PA) *ra’ees*<sup>5</sup> in 2002; besides, three draft constitutions were prepared for the Palestinian state; drafting a constitution was part of the Road Map obligations. The first problem is to discover who is/are that/those entitled to constituent power, what is its legitimacy, and what are the limits of those entitled to that power? Any attempt to enact or elaborate a constitution shall secure the reconciliation of the different processes that are enacted in the Palestinian territories: those of *nation-building*, *peace* and *democracy*.

These instances correspond respectively to the moment of *self-awareness*, awareness of *the other* and awareness of the *international*

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<sup>5</sup> Arabic word that means President and Chairman; it was used in the Oslo Agreements to qualify the person heading the PA. This was as a compromise between the Palestinians (who insisted to use President) and the Israelis (who insisted to use the term chairman).

*community*. The correlation between these three processes is not always peaceful for Palestinians, the competent handling of these issues means an assured peace based on national rights, realised through bilateral negotiations within the norms of international legitimacy.

## §2 Preliminary Clarifications

Before we take a closer look at the classical theory of constituent power, it is necessary to clarify the terminology used in this thesis, and to give two preliminary remarks.

*First*, a difference exists in the English and French terms used to define constituent power. What are usually called ‘framing power’ and ‘amending power’ in English refer respectively to the following French concepts: ‘*pouvoir constituant originaire*’ (original constituent power) and ‘*pouvoir constituant dérivé*’ (derived constituent power). The English terms do not express exactly the same meanings as the French ones, which are in our personal opinion, more appropriate. Accordingly, *original constituent power* and *derived constituent power* shall be privileged. Nevertheless, in this thesis we will use the English and/or French terms interchangeably, as they will have the same connotation; only when a precise definition is required, will the specific terms be utilized.

*Second*, in contemporary use, the reference to Islam is made assuming that it has a universal meaning for everyone. This may lead to its misuse and confusion between its credo and its history. Now, the term *shari’a*, which means ‘the way revealed by God’, has sometimes been translated as *Islamic law*, tout court, may have three different connotations that should be borne in mind. In a very broad sense, *shari’a* means a religious rule, including dogma, rituals, moral and juridical precepts revealed to Jews, Christians, and Muslims, alike. In a narrower sense, it only concerns Muslims, and indicates both the internal and external *forum* by which all Muslims should conduct their lives. Strictly speaking, it means the way or ‘religious rule’ solely

revealed to Muslims for the purpose of regulating the ‘external forum’ only: in this case, *shari’a* coincides with *fiqh*.<sup>6 7</sup>

To avoid misunderstandings, one shall keep in mind the following remarks:

*First*, In no way, does this thesis insinuate that problems regarding democracy or the respect of human rights is linked to the cultural particularity of Arabs; nor does it suggest that the solution to such a situation is the return to pre-Islamic concepts such as ‘*asabeyya* (social cohesion), to which *Ibn Khaldûn* dedicated some of his analyses.<sup>8</sup> The situation in the Arab world is predominantly the result of its recent history, beginning with the four centuries under the Ottoman Empire, but also to European colonialism by the end of the nineteenth century.

*Second*, we refer to Arab countries as if they reflect a general situation. This is partially mistaken. We are conscious that every Arab state reflects a particular history developed over a period of time. In fact, the commonness with other Arab countries in relation to language, culture, history, habits... did not hinder the growth of territorial nationalism; rather it encouraged and favoured its development.

### §3 Methodology

The comparative approach will be adopted in this thesis in order to cover the multifaceted subject of the different analyses. This tactic will

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<sup>6</sup> CASTRO F., *Diritto Musulmano e dei Paesi Musulmani*, p.1.

<sup>7</sup> In Arabic, there is a distinction between *shari’a* and *fiqh*, both translated with ‘Islamic law’, or ‘droit musulman’. As rightly outlined by LAGHMANI, “*Il n’existe pas de concept arabe correspondant exactement à l’expression française « droit musulman ».* Littéralement, cette expression pourrait être rendue par *quânûn islâmi* ou *tashrî ‘islâmi*. Or, si ces locutions correspondent effectivement à un usage courant et contemporain, elles ne font pas partie de « l’appareil conceptuel » de ce qui s’est historiquement établi et constitué comme étant le « droit musulman ». A considérer cet appareil, on découvre deux termes spécifiques: *shari’a* et *fiqh*. Si maintenant on tente une approche interne de ces deux concepts, on se rend immédiatement compte qu’ils ne correspondent pas parfaitement au mot droit dans son acception moderne”. LAGHMANI S., *Les écoles juridiques du Sunnisme*, p.23.

<sup>8</sup> **Ibn Khaldun**, (1332-1406) is best known for his *Muqaddimah* (Prolegomena).

rely mainly on macro comparison, in so far as the basic structure of the states and legal systems will be considered.

Besides, these analyses will use a contextual approach taking into account law and legal theory, together with history, political science and sociology. The contextual background may help us to understand why developments took place at a certain time in a certain way.

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## PART ONE

# THE *INVENTION* OF CONSTITUENT POWER

Most of the manuals of Constitutional law dedicate a small chapter to present the so-called ‘constituent power’.<sup>9</sup> Some authors define it as follows: “*Le pouvoir constituant dérivé [est] le pouvoir des organes compétents pour modifier la constitution, par opposition au ‘pouvoir constituant originaire’, celui des organes qui ont adoptés la constitution*”.<sup>10</sup> Prof. Claude KLEIN<sup>11</sup> says it differently: “*Constituent power deals with the Power to frame a very particular norm, namely the Constitution as well as with the power to amend that norm*”.<sup>12</sup> Some other authors consider a Constitution as a human being, where framing power signs the very beginning of the constitution.<sup>13</sup>

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<sup>9</sup> BURDEAU G., HAMON F. TROPER M., *Droit Constitutionnel*, p.40; PACTET P., *Institutions politiques Droit Constitutionnel*, p.69; HAURIAOU A., GICQUEL J., *Droit Constitutionnel et Institutions Politiques*, p.332; GUCHET Y., CATSIAPIS J., *Droit Constitutionnel*, p.18; GICQUEL J., *Droit Constitutionnel et Institutions Politiques*, p.162; PORTELLI H., *Droit Constitutionnel*, p.22; JOSEPH-BARTHÉLEMY, DUEZ P., *Traité de Droit Constitutionnel*, p.189.

<sup>10</sup> BURDEAU G., HAMON F. TROPER M., *op. cit.*, p.40. In this thesis, the expression ‘op. cit.’ sends back to a reference that was already cited. In case two references are done to the same author, the terms ‘op. cit.’ refer to the last reference (backward) that was done for the same author. The term ‘*idem*’ sends back to the same author and book cited in the precedent footnote; the term ‘*ibidem*’ sends back to the same page and reference cited in precedent footnote.

<sup>11</sup> Claude Klein, Professor. Former dean of the faculty of Law at the Hebrew University of Jerusalem (1978-1981); former Chairman of the Israeli Association for Public law (1995-2001); dean of the faculty of Law at Ramat Gan (since 2001). Research interests include constitutional theory and comparative law. Recent books include: *Theorie et Pratique du Pouvoir Constituant*, Paris Presses Universitaires de France, 1996; *La Démocratie d’Israël, Le Seuil*, Paris, 1997; *Israël, Etat en quête d’identité*, Castermann, Paris, 1999. Source: <http://law.mscc.huji.ac.il/>

<sup>12</sup> KLEIN C., *Théorie et Pratique du Pouvoir Constituant*, p.4.

<sup>13</sup> GICQUEL J., *op. cit.*, p.162.

It is not easy to define constituent power in a way that satisfies everyone, since the terminology is misused.

*Some authors, for example, use the term to refer to the power of the organs that adopt and amend the constitution and others to the organs themselves.<sup>14</sup> Others speak about constituent power and constituted powers without really distinguishing between them.<sup>15</sup>*

In fact, there are two doctrinal approaches to constituent power: the first proposes a formal criterion of distinction that is represented by positivist authors such as Raymond Carré de MALBERG,<sup>16</sup> Georges Burdeau and Roger Bonnard while the other proposes a material criterion represented by non positivist authors such as Carl SCHMITT<sup>17</sup> and more recently Olivier Beaud.

The positivists distinguish between framing power and amending power by the form: if it is enacted outside a constitutional framework it is a (constituent) framing power, while it is a (constituent) amending power when it is enacted inside a constitutional framework. On the contrary, the non-positivists distinguish between the two concepts by their objectives: if it changes the constitution or the national sovereignty of the people, it is a constituent power; otherwise it is the amending or revising power.

This part is divided in four sections. In the first we will consider the classical theory of constituent power, its origins and implications. The second and third sections are totally dedicated to present the two approaches that can be made in relation to constituent power (the material and formal conceptions). In the last section we will endeavour to make a comparison between them, followed by our personal appreciation of both theories.

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<sup>14</sup> BURDEAU G., HAMON F. TROPER M., *op. cit.*, p.40.

<sup>15</sup> See e.g. JOSEPH-BARTHÉLEMY, DUEZ P., *op. cit.*, p.189.

<sup>16</sup> Raymond Carré de Malberg (1861-1935).

<sup>17</sup> Carl Schmitt (1888-1985).

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## §4 Classical Theory of Constituent Power

The phenomena of written and rigid constitutions have spread all over the world. It is true that a written document has no greater force than that to which persons in authority are willing to attribute to it.<sup>18</sup> Nevertheless, it was thanks to the adoption of written and rigid constitutions that it was possible to speak about the theory of constituent power, because it was originally related to the power that creates a particular document called the constitution, which has superiority over other laws. Consequently, it is imperative to distinguish between ordinary laws and constitutional laws, and in the procedures to amend both of them.<sup>19</sup>

*Accordingly, if there is no written constitution there is no place for a framing power; and if the written constitution is not rigid, then there is no place for amending power.*

In this section we will begin by presenting the different concepts of constitution for an obvious reason: if constituent power is to frame or to amend a constitution, it is necessary to define constitution. Only after that can the different concepts of 'constituent power' be explored; in order to do that, it will be necessary to present the origins of that doctrine and the differences between the positivist and naturalist schools.

### 4.1. The Definition of the Constitution

There are two different approaches to the constitution: *To begin with, the Constitution, in its material sense, refers to "[t]he whole system of government of a country, the collection of rules which establish and regulate or govern the government"*.<sup>20</sup> According to this definition,

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<sup>18</sup> WADE E.C.S., PHILLIPS G.G., *Constitutional and Administrative Law*, p.2.

<sup>19</sup> In any case, the spread of written and rigid constitutions did not prohibit development, other than the formal constitution or against its provisions, for an unwritten constitutional law. In other words, besides the formal constitution, the development of unwritten constitutional rules continued. JELLINEK G., *L'Etat Modern et son Droit*, p.214.

<sup>20</sup> WADE E.C.S., PHILLIPS G.G., *op. cit.*, p.1.

constitutional law is that part of the legal system which regulates the structure of the principle organs of the state, their relationship to each other and to the citizen, and determines their main functions.<sup>21</sup> *Second*, the constitution, in its formal sense, means a document having a special legal inviolability which sets out the framework and the principal functions of the organs of the state, and declares the principles by which those organs must operate.<sup>22</sup>

For JELLINEK, every state needs a constitution that guarantees the minimum of unity; otherwise, there is anarchy, and therefore no state.<sup>23</sup> In this case, the wider (material) sense of constitution covers also the narrower (formal) one but not *vice versa*; besides, every state by definition has a constitution in its material sense (a comprehensive system of government) but it may not have a constitution in its formal sense (one document declared to be supreme).<sup>24</sup>

#### 4.1.1. Origins of the Constitution

It is commonly admitted that it was only in the late eighteenth century that the word 'constitution' first came to be identified with a single document, mainly as a result of the American and French Revolutions;<sup>25</sup> nevertheless, its origins are much older. According to JELLINEK, it was in the sixteenth century that the concept of *lex fundamentalis* appeared; the *lex fundamentalis* was more powerful than

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<sup>21</sup> *Idem*, p.5. The authors use the expression 'organs of the government'. We prefer to use 'organs of the state'. The government is distinguished from the state; now, the constitution regulates the organs of the state, and not of the government.

<sup>22</sup> *Idem*, p.1.

<sup>23</sup> For the same author, the constitution in the material sense was first known by the Greeks. The Romans also distinguished between the constitution of the state, called '*rem publicam constituere*' and particular legal dispositions. The power to modify the constitution, in decisive moments of Roman history, was assigned to constituent power of extraordinary magistrates who concentrated in them the unlimited powers of the community. JELLINEK G., *op. cit.*, pp.169-171.

<sup>24</sup> Consequently, although a state such as the United Kingdom does have a constitution in the material sense, it does not have one in the formal sense. WADE E.C.S., PHILLIPS G.G., *op. cit.*, p.1.

<sup>25</sup> WADE E.C.S., PHILLIPS G.G., *op. cit.*, p.2.

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other laws since the king himself was bound by it and could not amend it of his own will.<sup>26</sup>

Even so, according to Hobbes, it was not possible at the time to find any definition for the so-called ‘fundamental law’ that was related to an idea of a contract between the *rex* and the *regnum* (the transportation of the ecclesiastic image of alliance between God and his people, as it was taught by Calvin).<sup>27</sup> In England, there was a tentative move to impose a written constitution in 1647, called the *People’s Agreement*. For the first time, the idea of a fundamental contract appeared –which would serve as a constitution- and which would have a more relevant nature rather than other laws based on that contract.<sup>28</sup> In harmony with the sense of democracy of that period, such contract is based on unanimity, a repudiation of the majority system.<sup>29</sup>

JELLINEK traced the doctrinal origins of modern constitutions; for him it was the theory of natural law that initiated, for the first time, the examination of fundamental law, and England was the first country to make this study. Nevertheless, it was in the American colonies that the idea of a written fundamental law, and a constitutional charter was of practical importance.<sup>30</sup>

Hobbes admits the existence of a fundamental law; for him, the destruction of that law means the destruction of the social body; and therefore, leads to complete anarchy. For him, fundamental law is nothing more than a contract on which the state is based; that contract remains as long as the state exists. This contract obliges the people to obey and submit themselves to the prince which the majority has chosen. Locke gives to that same idea a democratic tone saying that

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<sup>26</sup> JELLINEK G., *op. cit.*, p.174.

<sup>27</sup> Based on these ideas, the American colonies, for example, entered into contracts of colonization that were signed by masculine adults. *Idem*, p.175.

<sup>28</sup> *Idem*, p.177.

<sup>29</sup> *Idem*, p.179.

<sup>30</sup> *Idem*, p.182.

individuals have to obey the will of the majority as if it was their own will.<sup>31</sup>

A different idea of fundamental law was developed in the German school of natural law; for Pufendorf, only those who subscribed to the union contract were obliged to recognize the *decretum* of the majority. This idea was further developed by Bohmer and Wolff. For them, fundamental law is not only the constitutional law but it is also the limitation of power for the prince; changing those fundamental laws requires the decision of the people and the consensus of the king.<sup>32</sup>

For Rousseau, ideas developed differently; according to him, there is no conception of limitation to the sovereign, since the general will can not make an obligation to itself. Based on this premise, individuals remain free since they obey their own will; therefore, for Rousseau, all laws should be unanimous and equal; effectively, admitted that a simple majority was sufficient for ordinary legislation. Only the social contract needed unanimity and this idea touched on constitutional laws.<sup>33</sup>

For the same author it was in France, influenced by the American experience and brothers-in-arms that agreed with the idea for the need of a written constitution that would serve as the foundation of the state. This idea was based on the concept of popular sovereignty reformulated also by Sieyès, in the theory that constituent power resides in the people.<sup>34</sup>

According to ESMEIN, the eighteenth century concept of constitution as a fundamental and systematic written law is based on three ideas: *first*, The superiority of a written law over a customary one was generally agreed on at the time: the same should apply to constitutional

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<sup>31</sup> Idem, pp.179-180.

<sup>32</sup> Idem, p.180.

<sup>33</sup> Idem, pp.181-182. JELLINEK concludes: "*Ainsi, se combinant d'une part la doctrine à la fois religieuse et politique qui fait du Covenant la base de l'Etat et d'autres part les conceptions du droit naturel, répandues par la littérature; l'on aboutit ainsi à la conclusion que l'Etat tout entier repose sur une constitution issue de la volonté populaire*". Idem, p.185.

<sup>34</sup> Idem, p.193.

law; *second*, the people of the eighteenth century Revolution considered a new constitution, edited by national sovereignty, as a true renewal of the social contract: as such, it was necessary to register the clauses of that contract in the most solemn and complete form; *third*, they thought that a clear, systematic presentation of such a document in a clear and systematic way would provide an excellent means of political education, since it would provide the citizens with the knowledge and desire for their rights.<sup>35</sup>

The American and French model of a written constitution was adopted by states worldwide; nevertheless, that constitutional law was distinguished from ordinary law in its particular nature and obligatory character. The constitution, in fact, was considered the initial act of national sovereignty, while the other acts were only the consequence.<sup>36</sup>

The first European constitutional charter was the French Constitution, painstakingly prepared and voted for during the years 1789/1791; it was finally produced as a single Act and promulgated on 3 September 1791.<sup>37</sup> For JELLINEK, the French Constitution was modelled on the American one, but certain differences distinguished them: for example, France was a unitary monarchy while the USA was a Federal Republic; in fact, the position of the king in France was less favoured than the President of the Republic or a Governor, in the new American federation. Both Constitutions declared that the separation of powers constituted the basis of the constitution. Nevertheless, in France, executive power was totally subordinate to legislative power. Besides, the legislature was composed of one Chamber and it was the unlimited sovereignty of the Parliament that won. According to the theory of

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<sup>35</sup> ESMEIN A., *Eléments de Droit Constitutionnel français et comparé*, pp.603-604.

<sup>36</sup> According to JELLINEK: "*C'est en Amérique qu'il faut chercher l'origine de notre constitution écrite actuelle; on devrait donc étudier d'une manière plus attentive les constitutions américaines. La Révolution française reçoit l'idée américaine et cette idée se répand de la France dans les autres Etats européens*".<sup>36</sup> Idem, p.607.

<sup>37</sup> Although the Polish Constitution was introduced on 5 May 1791, it was not preceded by any other institutions and it was mostly based on French constitutional laws that were already published. Besides, it was the 1791 French Constitution which influenced other European constitutions, including successive French ones. Idem, pp.194-196.

Montesquieu, it was forbidden for the members of the National Assembly to become ministers. This contributed to the acceleration of anarchy and the collapse of the constitution in France.<sup>38</sup>

For JELLINEK, constituent power in France was not attributed to the general assembly of the people, but exclusively to the Parliament. Nevertheless, they were anxious to give the constitution some stability and for this reason, people were given the opportunity of participating in the revision process of the constitution: it was forbidden to change the constitution for two subsequent legislatures; in fact, the changes to the constitution were adopted by a more numerous assembly, elected for that purpose, during the fourth legislature. Successive revolutionary constitutions emphasized the logic of popular sovereignty, requiring a popular vote for every new constitution. Accordingly, the substance of constituent power, inherent in the nation itself, and not only the exercise of it, is also considered here.<sup>39</sup>

For Carré de MALBERG, the most efficient way to limit the sovereignty of Parliament is through the subordination of the power and the activity of the assemblies to a superior law, “...*fixant et arrêtant leurs pouvoirs, une loi qu'il ne dépende pas de ces assemblées de modifier par elles-mêmes. Cette loi supérieure c'est la constitution*”.<sup>40</sup>

In fact, if sovereignty resides in parliament, then, there is no need to establish a constitution, since there is no need to limit parliament by a law that determines its powers. If, on the contrary, the sovereignty of the state is shared by the three powers, which are separated and not necessarily hierarchically graded, then a constitution is necessary to limit those powers and establish the relationship between them. This is why, in a country like England, there is no need for a constitution, whereas in countries like France and the USA, it is essential.

Consequently, it is completely logical that in the English system there is no need for constituent power, since the power to issue laws,

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<sup>38</sup> Idem, p.195.

<sup>39</sup> Idem, pp.195-196.

<sup>40</sup> AVRIL P., *La Séparation des Pouvoirs Aujourd'hui*, p.299.

organize the state and limit the power of its organs, is totally left to parliament.<sup>41</sup>

#### 4.1.2. The Constitution as an Order or as a Norm

According to Paolo COMANDUCCI,<sup>42</sup> there are three constitutional models: 1) axiological – in which the constitution is conceived as a natural order; 2) descriptive – in which it is conceived as an artificial order; and 3) descriptive – in which it is conceived as a law (norm).<sup>43</sup>

For the same author, there is a difference between being the norm and being an order. Constitutional law is (and shall be) the expression or the reflection of constitutional order; constitutional law forms and determines -and must do so- constitutional order.

**The constitution as a natural order:** the constitution here refers to the social phenomenon which may have intrinsic value, or may be the only creator of norms which are referred to indirectly. On the other hand, it does refer directly to a system that is a structure of the society and/or of the state. That system creates norms that are fundamental (hierarchically superior). Here, the constitutional law is the expression

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<sup>41</sup> Carré de MALBERG wrote: “*Le droit public anglais ne connaît pas de pouvoir constituant. On peut dire qu'en Angleterre, cette question du pouvoir constituant, qui, en France, a soulevé tant de discussions, n'existe même pas. Chez les Anglais, le Parlement possède, dans toute sa plénitude, l'exercice de la souveraineté législative, qu'il s'agisse de lois ordinaires ou de lois relatives à l'organisation des pouvoirs. Il y a un dicton anglais qui spécifie, à cet égard, que « le Parlement peut tout faire »: ce qui signifie, en particulier, que les Chambres, agissant avec la sanction du roi, peuvent modifier les lois concernant les pouvoirs publics, au même titre qu'une loi ordinaire. Les Anglais se sont, en effet, placés à ce point de vue que le Parlement est, en tout temps et en toutes choses, l'organe étatique chargé d'exprimer la volonté nationale*”. CARRE DE MALBERG R., *Contribution à la Théorie Générale de l'Etat*, Tome II, p.541.

<sup>42</sup> Paolo COMANDUCCI is a Professor of Philosophy of Law and General Theory of Law at the University of Genova (Italy). He published an article within the acts of the colloquium held in Paris (2-4 March 1989), on the occasion of the bicentenary commemoration of the American and French Constitution under the auspices of the French Association of Political Science. The colloquium was entitled: 1789 and the invention of the constitution.

<sup>43</sup> For more details, see COMANDUCCI P., *Ordre ou Norme? Quelques Idées des Constitution au XVIII siècle*, pp.23-43.

of a constitutional system, but it cannot and should not determine the constitutional system.

**The constitution as an artificial order:** the constitution here refers to the gathering of social phenomena, but it does not have any intrinsic value, neither is it a creator of norms. It merely means a stable situation of the social and political relations of power in a given moment; the constitution is simply the crystallization of the fundamental structure of the society and/or the state.

**The Constitution as a norm:** the constitution here refers to the gathering of positive juridical rules which are expressed in a document or customary laws that are fundamental in their relation to other juridical rules. This concept of constitution is that of the liberals and the democrats of the nineteenth and the twentieth centuries. Here, the constitution refers to a particular normative text: the formal constitution, or the constitution in its formal sense.

COMANDUCCI continued in his attempts to trace the doctrinal origins of those three different concepts of constitution in the eighteenth century. The constitution as a natural or artificial order can be found in the writings of the traditional and anti-revolutionary philosophers, such as Burke and Maistre. It can be also found in the significance of fundamental laws in its original meaning and in some interpretations of the 'spirit' of the nation of Montesquieu and in some interpretations of Rousseau 'spirit of the laws'.<sup>44</sup>

For Burke, the constitution is the fundamental structure of a society and of a state; an artificial structure, conforming to the nature that was developed over long periods of history.<sup>45</sup> Consequently, the English Constitution is: a) An order which conforms to its nature;<sup>46</sup> b) An order

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<sup>44</sup> Idem, p.35.

<sup>45</sup> Idem, p.29.

<sup>46</sup> He wrote: "*Our political system is placed in a just correspondence and symmetry with the order of the world and with the mode of existence decreed to a permanent body composed of transitory parts*". Cited in: Idem, p.30.

that endures for a long period.<sup>47</sup> As for Maistre, the constitution is presented as a natural order that was formed slowly over time. He wrote:

La philosophie moderne est toute à la fois trop matérielle et trop présomptueuse pour apercevoir les véritables ressorts du monde politique. Une de ses folies est de croire qu'une assemblée peut constituer une nation, qu'une constitution, c'est-à-dire l'ensemble des lois fondamentales qui conviennent à une nation, et qui doivent lui donner telle ou telle forme de gouvernement, est un ouvrage comme un autre, qui n'exige que de l'esprit, des connaissances et de l'exercice; qu'on peut apprendre son métier de constituant, et que des hommes, le jour qu'ils y pensent, peuvent dire à d'autres hommes: Faites-nous un gouvernement, comme on dit à un ouvrier: Faites-nous une pompe à feu ou un métier à bas.<sup>48</sup>

As such, the constitution as a norm is only a lifeless piece of paper. Contrary to that, a natural constitution refers to those laws that one shall discover - not invent - and record in a document; he wrote:

Étant données la population, les mœurs, la religion, la situation géographique, les relations politiques, les richesses, les bonnes et les mauvaises qualités d'une certaine nation, trouver les lois qui lui conviennent.<sup>49</sup>

It is clear that this model of constitution is in complete contradiction with the concept of constitution as the norm which began to appear, following the American and the French Revolutions. This first model of the constitution finds its origins in traditional philosophers such as the Aristotelian model of politics, in contradiction to the model of Hobbes. According to that model, some philosophers considered that every law –and as such the constitution as norms- is bad whenever it is opposed to the fundamental structure of the society, constituted over time. This position can be found in some interpretations of Montesquieu, such as those made by Louis Althusser, who wrote: "*Dans l'Esprit des lois le*

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<sup>47</sup> He continued: "*Old establishments are tried by their effects. If the people are happy, united, wealthy, and powerful, we presume the rest. We conclude that to be good from whence good is derived*". Idem, p.29.

<sup>48</sup> Cited in: Idem, p.31.

<sup>49</sup> Cited in: Idem, p.32.

*«principe» de chaque gouvernement détermine en dernier ressort la «nature» du gouvernement même, et l'essence du «principe» est constituée par ce que Montesquieu appelle l' «esprit» d'une nation".<sup>50</sup>*

Now, the spirit of the nation which determined the form of government and legislation, had the same characteristics of constitution as 'order', similar to that presented by Burke and Masitre. According to COMANDUCCI, the same can be said about the concept of fundamental laws, at least at the time of its appearance in the fifteenth and the sixteenth centuries.<sup>51</sup>

On the other hand, the third model of constitution, as a positive juridical norm, had developed mainly in North America and France. One of the most exhaustive definitions of the constitution in the eighteenth century, as a written fundamental norm, is that presented by Thomas Paine, in his response to the reflections made by Burke. For Paine, the standard significance that one should attribute to the word 'constitution' is the following:

A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the Government shall be established, the manner in which it shall be organised, the powers it shall be, the mode of elections the duration of Parliaments, or by what other name such bodies may be called; the powers which the executive part of the Government shall have; and in fine, everything that relates to the complete organisation of a civil Government, and the principles on which it shall act, and by which it shall be bound.<sup>52</sup>

In North America, the concept of 'constitution' began to have a specific content at the same time as the Federal Constitution was adopted. Authors outline the role of the foundation of the state that the constitutions accomplish; sometimes they refer to the goals constitu-

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<sup>50</sup> Idem, p.33.

<sup>51</sup> Idem, p.35.

<sup>52</sup> Cited in: Idem, p.38.

tions have to realize; sometimes they make the connection between *frame of Government* and *Bill of Rights*, envisaging that the state structure shall guarantee respect for the *Bill of Rights*.

According to COMANDUCCI, the emergence of the third model of constitution in the documentation and doctrine came a little bit later in France. The author makes different citations of Sieyès to prove his thesis.<sup>53</sup> In fact, in his '*Qu'est-ce le Tiers Etat?*', Sieyès does not deny the existence of an English Constitution; now, the English Constitution is not –or at least, not only- a collection of norms, but also a system or an order of society and state. In fact, the author made different citations in which the constitution refers sometimes to an order, and at other times, to norms.<sup>54</sup>

Since the eighteenth century, the diffusion of modern, written constitutions, based on the American and French examples, has extended all over Europe. Nevertheless, between law theorists, there were different ideas that helped that diffusion. For COMANDUCCI those ideas are:<sup>55</sup> *first*, *lex naturae*, as perceptions that contrive to regulate human behaviour, including that of those who exercise political power; *second*, Social Contract, as a pact that is in conformity with natural law, which contrives to regulate the organization of the state, the relationships between citizens and the state, and fundamental relations among the citizens.

#### 4.1.3. Why Write a Constitution?

According to Dieter GRIMM, the act of promulgation of a constitution served to separate sovereignty from the governing power; these two concepts were considered as being identical. Sovereignty is no longer a right to govern but rather the legitimate source of governing power.<sup>56</sup>

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<sup>53</sup> Idem, p.40.

<sup>54</sup> Idem, p.39.

<sup>55</sup> Idem, p.41.

<sup>56</sup> GRIMM D., *Souveraineté et Checks and balances*, p.228.

Claude KLEIN dedicated an article to answer one question: '*pourquoi écrit-on une constitution?*'<sup>57</sup> For him, there are three situations in which this question may be posed and need to be answered: 1) at the moment of the creation of a new state; 2) after a revolutionary interruption of the existing constitutional order; and 3) when a historical situation that determined the absence of the constitution is questioned.<sup>58</sup>

**Writing a constitution when a new state is born:** the question of writing or not writing a constitution is posed immediately when a new state is born; nevertheless, KLEIN poses another question: is it necessary for a new state to adopt a written constitution? In the case of the English ex-colonies that gained independence, the problem is different since they had had constitutions before their independence; in other words, the constitution is anterior to the state; accordingly, the question is whether to maintain the anterior constitution or to write a new constitution. Besides, the new born state shall take much urgent decisions related to the new legal system; these decisions may be expressed already in the same declaration of independence. In this case, writing a constitution may be deferred. Nevertheless, the new born states continue to pose the question of the constitution and give it symbolic attributes that is related to sovereignty.

KLEIN mentioned some reasons why a new state adopts a constitution: it can be related to the Will to affirm the existence of the new state, its political regime and its ideology. Here there is sometimes confusion between the constitutive act of the state and constituent power. In a Federal State, such as the USA, it is difficult to dissociate the two acts. So, what happens in the case of unitary states? For him, nothing prevents a state from simply deciding not to adopt a written constitution: this decision can be made for historical reasons (United Kingdom) or accidentally adopted (Israel).

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<sup>57</sup> This article was published within the acts of the colloquium held in Paris (2-4 March 1989), on the occasion of the bicentennial commemoration of the American and French Constitution, under the auspices of the French Association of Political Science. The colloquium was entitled: 1789 and the invention of the constitution.

<sup>58</sup> KLEIN C., *Pourquoi écrit-on une Constitution?* pp.89-99.

KLEIN concludes that today, unitary and federal states may decide not to write a Constitution. Nevertheless, it seems difficult not to do so. In fact, new states have the tendency to search for a high degree of recognition, stability, continuity and respectability: a written Constitution, with its solemnity, seems to offer precisely that.<sup>59</sup>

**Writing a Constitution in a case of a new political regime succeeding another:** here, the constitution is revised totally or partially in a different way than that provided by the constitution; writing a constitution serves to proclaim a new legal and political order. Writing a constitution provides a new legitimacy and regulates the enactment of constituent power and precise the interpretation of the new order. A written constitution seems indispensable for new regimes in order to oppose preceding regime and to confirm the new one. Besides, a written constitution has a kind of pedagogic role.<sup>60</sup>

**Writing a constitution in a system where there is no written constitution:** the question here is different since we have a comprehensive system of government, without a written constitution: why then write a constitution? In the classical case of Great Britain, the main problem is that of Parliamentary sovereignty. According to this principle, Parliament cannot tie itself and its successor without touching its sovereignty.

For KLEIN, writing a constitution may occur only after achieving a legal revolution (*révolution juridique*). For Israel it is not so; when the first Knesset was elected as a *Constituent Assembly*, it was dissolved without adopting a constitution, in fact, it left that task for successive Assemblies. Successive sessions of the Knesset had adopted different fundamental laws, which may constitute the main core of the future constitution of Israel.<sup>61</sup>

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<sup>59</sup> Idem, pp.93-94.

<sup>60</sup> Idem, pp.94-96.

<sup>61</sup> Idem, pp.96-98.

## 4.2. The Origins of the Theory of Constituent Power

The theory of Constituent Power appeared almost simultaneously in North America and in France. Although it is true that it was the American Constitution that gave birth to *constituent power*, jurists have no doubts that Sieyès, with his book “*Qu’est-ce que le Tiers Etat?*” (1788-1789), is the real father of the *theory of constituent power*.<sup>62</sup> Indeed, the American precedent is related to the terms and reality of things; according to ESMEIN, the idea on which this theory rests is much older, and only received its first positive application in North America. The first constitutions of the emancipated English colonies were redacted in this way; the same can be said for the constitution of the Confederation from 1787-1789.<sup>63</sup>

Still, Sieyès’s contribution was in making a sophisticated presentation of the theory of constituent power, making the distinction between *constituant-constitué*.<sup>64</sup> Sieyès himself considers it as the product of French national genius.<sup>65</sup> According to Carré de MALBERG, Sieyès was wrong when he considered the distinction between constituent-constituted as having its origins in France; according to *Les Mémoires de la Fayette* it was first practiced in America although the French Revolution helped only in its worldwide manifestation.<sup>66</sup>

Sieyès was the first one who explored the concept of constituent power and distinguished it from constituted powers; nevertheless, he is not the father of the distinction between the *pouvoir constituant originaire* and the *pouvoir constituant dérivé*. In fact, one can not find any reference to the distinction between the two concepts in his book; furthermore, Sieyès’s theory does not conceive of a constituent power (*dérivé*) that is subject to the limits of the same constitution since the nation may not

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<sup>62</sup> KLEIN C., *Théorie et Pratique du Pouvoir Constituant*, p.8.

<sup>63</sup> ESMEIN A., *Op. cit.*, p.613.

<sup>64</sup> KLEIN C., *op. cit.*, p.15.

<sup>65</sup> Discours à la Convention du 2 thermidor an III (*Réimpression de l’ancien Moniteur*, t. XXV, p.293), ESMEIN A., *Op. cit.*, p.613.

<sup>66</sup> CARRE DE MALBERG R., *Op. cit.*, p.511.

be subject to any constitution. As such, the nation is totally free and independent of any legal limitations to change the constitution whenever it deems it necessary. For him, there is only the *pouvoir constituant originaire* and this power is permanent.<sup>67</sup>

The ‘discovery’ of the distinction between the *pouvoir constituant originaire* and *pouvoir constituant dérivé*, in fact, dates to the twentieth century only, with the systematic developments made by Raymond Carré de MALBERG; still, he is not the inventor of this terminology. It was in 1942, when Roger Bonnard denominated these two constituent powers: *pouvoir constituant originaire* and *pouvoir constituant institué*.<sup>68</sup> Since then, it became classical in French doctrine of Constitutional Law, although the *pouvoir constituant institué* was re-baptized as the *pouvoir constituant “dérivé”* by Georges Vedel.<sup>69</sup>

### 4.3. Constituent power and Constituted Powers

The origins of constituent power were related to the necessity of limiting the legislative power and to protect fundamental rights. This theory distinguished between constitutional laws and ordinary laws. Constituent power, in fact, is what makes the constitution; the other powers are those created by the constitution and include the three main powers of the state: the executive, the legislative and the judiciary. According to this distinction: *first*, constituent power comes prior to constituted powers; *secondly*, constituent power creates the constitution wherein constituted powers find their origin in the same constitution; *thirdly*, constituent power is hierarchically superior to constituted powers; *fourthly*, constituent power is the only sovereign, not constituted powers.<sup>70</sup>

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<sup>67</sup> GÖZLER K., *Pouvoir constituant*, p.8.

<sup>68</sup> This is also the position of Prof. MAZIAU. See e.g. MAZIAU N., *Les Constitutions Internationalisées, Aspects Théoriques et Essai de Typologie*, p.1, footnote 5.

<sup>69</sup> GÖZLER K., *Op. cit.*, p.9.

<sup>70</sup> *Idem*, p.3.

According to Carré de MALBERG, “*la théorie de la séparation des pouvoirs ouvrait la voie à la théorie du pouvoir constituant*”.<sup>71</sup> In fact, the separation of powers has no explanation without admitting the existence of a power that is superior and anterior to them, and which may operate the division between these powers.<sup>72</sup> The separation of powers, in its turn, finds its origin in the ideas of Montesquieu rather than in Rousseau although, Montesquieu admits and requests the separation of the state powers, but he decomposes it, *ab initio*, into three powers, without showing any preoccupation for the state unity from one side and the necessary association that the three separated powers have with the unique power of state, from the other.<sup>73</sup>

For this reason, Sieyès comes to a simple –but a revolutionary– conclusion: “*Une Constitution suppose, avant tout, un pouvoir constituant*”. For him, the separated powers created by the constitution are multiple but find their unity in constituent power which is superior and unique since “*tous, sans distinction sont une émanation de la volonté générale, tous viennent du peuple, c'est-à-dire de la nation*”.<sup>74</sup>

Accordingly, constitutional laws are not fundamental because they become independent from national sovereignty but because the bodies created and organized by them can not affect them.<sup>75</sup> In his *Droit des Gens*, Vattel says: “*c'est de la Constitution que ces législateurs tiennent leurs pouvoirs. Comment pourraient-ils la changer sans détruire le fondement de leur autorité?*”<sup>76</sup>

Carré de MALBERG analyzes the theory of organs made by M. Duguit. For him, the organs that are created by the constitution, cannot explain the constitution itself.<sup>77</sup> Now, the logical result of such a theory is the

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<sup>71</sup> CARRE DE MALBERG R., *Op. cit.*, p.515.

<sup>72</sup> GÖZLER K., *Op. cit.*, p.1.

<sup>73</sup> CARRE DE MALBERG R., *Op. cit.*, p.515.

<sup>74</sup> GÖZLER K., *Op. cit.*, p.2.

<sup>75</sup> ESMEIN A., *Op. cit.*, p.608.

<sup>76</sup> *Idem*, p.607.

<sup>77</sup> CARRE DE MALBERG R., *Op. cit.*, p.484.

immutability of the constitution; this immutability cannot be absolute since history pushes towards progress and necessary changes to the constitution. The theoreticians of the revolutionary era did not join an agreement; there are different options which will be examined in the following paragraphs including the ‘discovery’ of amending power, which is a constituent power in nature and a constituted power in function.

Furthermore, the second logical consequence of such a theory is the necessity to protect the constitutional laws through judicial review, that includes the control of laws and acts of government that are in contradiction to constitutional laws. Here, ESMEIN presents the two different systems; in North America, it was through the judicial branch, headed by the Supreme Court, in which, a judge does not nullify the laws or the acts of government but simply refuses to apply them.

In Europe, in order to emphasize the separation of powers, judges are usually prevented from appraising them since they are there to apply the laws not to judge them; the Europeans, in fact, do not want to give the judges a kind of ‘political’ role, as it is in America; neither do they want the judges -unelected individuals- to limit the representatives of the nation; what should they do then? The solution was in finding a kind of *constitutional Jury* that was, for Sieyès, the conservator Senate.<sup>78</sup> Other constitutions adopted different means to control the constitutionality of laws and the acts of government but this is not our main subject under consideration here.

#### **4.4. Framing Power and Amending Power**

A dilemma existed which the theoreticians of the eighteenth century tried to resolve: constituent power is the origin of the constitution; the constitution provides the foundations for constituted powers; constituted powers (legislative, executive and judicial) could not change constitutional laws; constitutional laws required amendment; so, *who* was/were that/those entitled to do so, and *how*?

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<sup>78</sup> ESMEIN A., *Op. cit.*, p.626.

#### 4.4.1. The Constitution needs to be amended

Aside from the changes made to the constitution through interpretation or adaptation, what is of interest here is the way in which the constitution could be officially and solemnly amended. ESMEIN, in his '*Eléments de Droit Constitutionnel français et Comparé*' distinguished the following three options:<sup>79</sup>

*First*, in order to change constitutional laws, unanimity of all citizens is required. Here the constitution is assimilated with the Social Contract. Of course, unanimity is impossible to realize, consequently, the constitution would be eternal and immutable. Some authors (such as Vattel) moderated this absolutist theory, recognizing the right to change the constitution for the majority of citizens, with the right of minorities to leave that society if the fundamental pact is not respected.

*Secondly*, this option is developed by Sieyès; for him constitutional laws regulate and limit constituted powers but not the nation from which it emanates. The nation, in other words, is free from any form; the Will of the nation is the supreme law and the source of every other law. Now, the Will of the nation may be expressed by those elected to the Assembly, to change the constitution; as such, those elected representatives have to be free of any form and limitations. In other words, Sieyès did simply change those entitled of sovereignty; what was the prerogatives of the monarch were switched to the nation.

*Thirdly*, this is the option that became largely accepted with the passing of time. The constitution may be amended only by the authority and the procedures provided by the constitution itself. The originator of this idea is Jean Jacques Rousseau.<sup>80</sup> After long deliberations, the French

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<sup>79</sup> Idem, p.608.

<sup>80</sup> Not in his *Contrat Social* but in his *Considérations sur le Gouvernement de Pologne et sur la Réformation Progettée en 1772* wherein he wrote: "Il faut bien peser et méditer les points capitaux qu'on établira comme lois fondamentales, et l'on fera porter sur ces points seulement la force du liberum veto. De cette manière on rendra la Constitution solide et ses lois irrévocables autant qu'elles peuvent l'être; car il est contre la nature du corps sociale de s'imposer des lois qu'il ne puisse révoquer; mais il n'est ni contre la nature ni contre la raison qu'il ne puisse révoquer ces lois qu'avec la même solennité qu'il mit à les établir. Voilà toute la chaîne qu'il peut se

Constitution of 1791 adopted this position and dedicated a chapter to revision of the constitution; in fact, in the name of national sovereignty, those who defended this option justified the inclusion of clauses that would regulate the revision.

What distinguishes, then, legislative power from amending power? The difference is mainly in the function: the first amends ordinary laws, the second amends constitutional laws. It is clear that there is no need to establish a distinct Assembly from legislative power, although it is always a possibility; nevertheless, the same Assembly may acquire legislative power once it has amended ordinary laws and may acquire constituent power once it amends the constitutional laws. Both are regulated by the form and procedures provided by the constitution. There is also a difference in the nature: the first is a constituent power, since it creates new constitutional laws, the second is a constituted power, since it creates ordinary laws.

#### 4.4.2. The Distinction between Framing and Amending Power

Constituent power is different regarding the elaboration of a constitution in a legal vacuum (framing power) and modifying a stipulation of the existing constitution (amending power).<sup>81</sup> Framing power is the establishing power of fundamental rules in relation to the devolution and the existence of political power. In other words, it concerns elaborating the constitutional text that will form the foundation of a new legal order. That is why it is presumed that the previous legal order has disappeared or collapsed, and become a legal vacuum.<sup>82</sup>

**Framing power is possible only when there is no constitution in force** as in the case of a newly born state, or when independence is recently obtained, or **when there are dramatic regime changes**, following a coup d'état or a revolution as in the case of Russia in 1917, and Egypt in 1952.<sup>83</sup> In other words, revolutions change political

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*donner pour l'avenir". Considérations sur le gouvernement de la Pologne*, ch. IX, p. 377, 388 cited in: Idem, p.611.

<sup>81</sup> GUCHET Y., CATSIAPIS J., *Droit Constitutionnel*, p.18.

<sup>82</sup> PACTET P., *Op. cit.*, p.69.

<sup>83</sup> SHIBA I., *Le Pouvoir Constituant*, pp.99-101.

institutions in ways that are not sanctioned by those institutions; whereas constitutional amendments change political institutions in ways authorized by the constitution.<sup>84</sup> In fact, **amending power is the one competent in amending the constitution**; it presupposes the existence of a constitution that empowers constituent power -rightly known as derived or amending power- to modify the constitution, following a procedure which may vary from one country to another, but which has in common, a precise regulation in order to avoid an indefinite constitutional revision process.<sup>85</sup>

Although division of constituent power is generally accepted, there is no unanimity with regard to the nature of the two constituent powers, and this fact explains the different denominations given for this concept.

*In the French constitutional doctrine for example, the first type of constituent power is usually called 'pouvoir constituant originaire' but some other authors use alternative expressions such as 'pouvoir constituant initial' or 'pouvoir constituant stricto sensu', or 'pouvoir constituant' tout court. The second type of constituent power is usually called 'pouvoir constituant dérivé'. Other authors prefer 'pouvoir constituant institué', 'pouvoir constituant constitué', 'pouvoir de révision constitutionnelle', 'pouvoir de révision de la constitution' or simply 'pouvoir de révision'.<sup>86</sup>*

Regardless of the terminology, the real problem is to be aware of the criteria distinguishing them which depend essentially on different concepts of constituent power: this will be the subject of the following paragraphs.

#### **4.5. Constituent Power: is it Permanent?**

The main question here is the existent connection between the original constituent power and the derived constituent power or amending

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<sup>84</sup> PREUSS U.K., *Constitutional Powermaking of the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, p.157.

<sup>85</sup> SHIBA I., *Le Op. cit.*, pp.107-114.

<sup>86</sup> GÖZLER K., *Op. cit.*, pp.7-8.

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power (the power to revise the constitution). If the permanency of original constituent power is acknowledged, then there is no place for the other. At the first beginning of a state, when it is established, there is no problem because there is no constitution, and the only power that is enacted, inevitably, would be the original constituent power. Nevertheless, once established, a constitution would need to be revised and adapted to new circumstances. Here, there is a problem: which power would be enacted, the original constituent power or the derived constitutional power?

Four possible answers that express the different types of interrelation between framing and amending power:<sup>87</sup>

*i) The existence of framing power and the absence of amending power*

It was the theory defended by Sieyès which does not admit the existence of an amending power, different from (original) constituent power that is sovereign, permanent and exclusive. According to this conception, there is no possibility of limiting constituent power since it is sovereign; consequently, 1) those entitled to constituent power (the people) can never be subjected to the constitution; 2) amendments to the constitution are always free of any legal limitations.

Sieyès wrote:

A nation can neither alienate nor waive its right to will; and whatever its decisions, it cannot lose the right to alter them as soon as its interest requires. Secondly, with whom would this nation have entered into such a contract? I see how it can bind its members, its mandataries, and all those who belong to it; but can it in any sense impose in itself duties towards itself? What is a contract with oneself? Since both parties are the same will, they are obviously always to free themselves from the purported engagement.<sup>88</sup>

The reference to the Convention of the American Constitution and to the French Revision Assembly is meant to show that constituent power

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<sup>87</sup> Idem, pp.52-55.

<sup>88</sup> PREUSS U.K., *Op. cit.*, p.158.

does not fully vanish through the very act of constitution making. Nonetheless, it is domesticated; it loses its unfathomable and formless character and acquires a quasi-constituted status.<sup>89</sup> In other words, the constitution is not a suicide pact. It must be possible to release itself in an emergency: society must not be constricted.<sup>90</sup>

This first position cannot be accepted for the simple reason that most constitutions provide the way for their own revision.

**ii) *The absence of framing power and the existence of amending power***

This answer excludes the permanence of the original constituent power and considers it as temporal. In other words, the original constituent power disappears when it establishes the constitution and leaves a place for amending power in order to revise it when necessary, following the procedures that the same constitution provides.

This option has not solid basis since the constitutions themselves do not -and can not- prohibit the exercising of framing power since this act – by definition- is outside any constitutional framework.

**iii) *The existence of a framing power and the existence of an amending power***

This means the coexistence of the framing and amending power; consequently, both are permanent. In this case, this solution responds to the need of stability for the institutions without putting limits on the original constituent power.

This position can be easily criticized asserting that a co-existence of framing power and amending power has no solid foundation, since in exercising the first obviously means the disappearance of all constituted powers included framing power.

**iv) *The absence of framing power and amending power***

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<sup>89</sup> PREUSS U.K., *Op. cit.*, p.159.

<sup>90</sup> ELSTER J., *Constitutional Bootstrapping in Philadelphia and Paris*, p.62.

This fourth possibility is irrelevant here since we would have no object for our study.<sup>91</sup>

Dr. Kemal GÖZLER, a Turkish researcher, dedicated part of his Ph.D. thesis to this question.<sup>92</sup> After having exposed the different options, he concludes as following:

Quel que soit le bien-fondé de ces trois thèses, pour nous, il y a un pouvoir constituant originaire et un pouvoir de révision constitutionnelle. Le pouvoir constituant originaire, après avoir fait une nouvelle constitution, se retire de l'exercice, mais il ne disparaît pas éternellement. Il pourrait toujours réapparaître. Pour cela il lui suffit d'abroger ou de déconstitutionnaliser la constitution en vigueur, ainsi que d'anéantir le pouvoir de révision constitutionnelle en place. Alors, tant que la constitution n'est pas abrogée ou déconstitutionnalisée, elle ne peut être révisée que par le pouvoir de révision conformément à la procédure prévue par la constitution à cet effet. Mais une fois que la constitution a été abrogée ou déconstitutionnalisée, le pouvoir de révision constitutionnelle disparaît, seul le pouvoir constituant originaire reste. Comme on le voit, en tout état de cause, le pouvoir constituant originaire subsiste. Ce pouvoir est donc permanent, même s'il n'est pas toujours en exercice.<sup>93</sup>

#### 4.6. Constituent Power: is it Unlimited?

The classical theory of constituent power considers framing power as unlimited by definition, since it does not follow a legal order, but rather creates a new one *ex nihilo*.<sup>94</sup> This theory contradicts with new realities and new constitutions. Constituent power is, in fact, increasingly limited, especially by international law. According to VERGOTTINI, every time a constitution is adopted, the deciding organ is not legally bound by precedent legal rules. This does exclude limits which have a

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<sup>91</sup> GÖZLER K., *Op. cit.*, p.77.

<sup>92</sup> The thesis was published in a book *Pouvoir Constituant*, Bursa, Ekin Kitabevi, 1990. We had used part of his analyses in the limits of our research interests.

<sup>93</sup> GÖZLER K., *Op. cit.*, p.77.

<sup>94</sup> "The power to make a constitution is the power to create a political order *ex nihilo*". PREUSS U.K., *Op. cit.*, p.143.

political nature.<sup>95</sup> Still, for him, there are some shared principles and values in some systems of liberal derivation which a constitution includes in its text but always reflect a decision of the constituency.<sup>96</sup>

Besides, amending power may be limited by the same framing power, in its form (delays, circumstances, procedures...) and in its substance (limits in amending special provisions of the constitution).<sup>97</sup>

*For some authors, substantial limits are not restrictive since the clauses that prohibit the amendment of the republican form of the state, for example, can be amended first, and followed by subsequent ones like adopting the monarchy for example.<sup>98</sup> Rightly, others may urge that in case this happens, they can be challenged as fraudulent amendments to the constitution.*

The constituent power is either original or derived. As such we may divide the question into two: *first*, is original constituent power unlimited? *Secondly*, is amending power (either considered as derived constituent power or simply the power to revise the constitution) also unlimited? Therefore, it is necessary to study those two questions separately. This oneness of constituent power does not contradict the distinction between original constituent power and derived constituent power.<sup>99</sup>

#### **4.6.1. Original Constituent Power: is it Unlimited?**

Again, there are two possibilities: either it is limited or it is unlimited. Authors are divided in to two groups: the jus-naturalists who consider the original constituent power as limited and the jus-positivists who consider it as unlimited.

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<sup>95</sup> VERGOTTINI G., *Diritto Costituzionale Comparato*, p.166.

<sup>96</sup> *Idem*, p.168.

<sup>97</sup> BURDEAU G., HAMON F. TROPER M., *Op. cit.*, pp.40-41.

<sup>98</sup> *Idem*, p.41

<sup>99</sup> Accordingly, it must be kept in mind, that constituent power is one, although, it is once original and other derived. In this sense, it is clear that the limits to constituent power will depend on the approach that authors have towards it (formalist or materialist).

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**Original Constituent Power is Limited:** the authors who consider the original constituent power as limited do not explain why and how it is limited but rather they present what limits it. Some speak about the principles of natural law, others about Human Rights (HR) and the general principles of law. These limits, in other words, will have a supra-constitutional value.<sup>100</sup> Others see in the same existence of amending power a limit to the original constituent power. This is not true because the original constituent power when it establishes a constitution guarantees its respect but not its indefinite maintenance.<sup>101</sup>

**Original Constituent Power is Unlimited:** the unlimited character of the original constituent power means that it has not an obligation to conform to any precedent legal rule when it establishes or creates a new constitution. This happens when there is an existing legal vacuum when one is created: *first*, when it creates the first constitution of the country, then the original constituent power is unlimited because there is no precedent constitution; *second*, when it abrogates an existing constitution, then the original constituent power is unlimited because the precedent constitution is no longer in force.<sup>102</sup>

According to such reasoning, authors finish up by confirming that the original constituent power –by definition- is unlimited since the original constituent power can not be limited by any precedent legal rule because it is the creator of these rules; the creator can not be limited by his creation.

#### **4.6.2. Amending power: is it Unlimited?**

Here also we have two possibilities: either we consider amending power as unlimited or we consider it as limited.

**Amending Power is Unlimited:** The authors who consider amending power as unlimited are presenting their approaches on two different and contradictory bases: those who deny the constituent nature of an

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<sup>100</sup> GÖZLER K., *Op. cit.*, p.81.

<sup>101</sup> *Ibidem*.

<sup>102</sup> *Idem*, p.82.

amending power and those who do not deny its constituent nature but deny the possibility to limit it.

*A. Those who deny the constituent character of amending power*

Some authors deny the existence of a derived constituent power that is the power to amend or to revise the constitution rather than the original constituent power. Since the original constituent power is unlimited, then, the power to amend the constitution is unlimited.<sup>103</sup>

*B. Those who deny the limitations to amending power*

Other authors do not deny the existence of an amending power but they refuse the possibility to limit it since it will be no longer a constituent power. Besides, there are different arguments such as: there is no way for a generation to limit the future generations; there is no way to prohibit a revolution; the limitation of amending power is in contradiction to popular sovereignty; the constitution, like every law can and needs to be adapted to new circumstances; there is always the possibility to surpass the limitations imposed by the constitution through double revision (by first amending the clause that disallows the amendment).<sup>104</sup>

**Amending Power is Limited:** those who accept the existence of two constituent powers and make a distinction between them have no problem in considering the second as limited since it is in fact limited by the original constituent power; the last provides the modalities, the procedures and the institutions necessary to amend the constitution. Those authors consider this limited character as logic and normal since amending power is, as for its organization, a constituted power and, consequently, it is limited by the original constituent power.<sup>105</sup> The problem here is to determine the content of these limits; this will depend on the concept of law that is adopted: the jus-positivist and the jus-naturalist authors.

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<sup>103</sup> Idem, p.84.

<sup>104</sup> We do not share this position; we will expose the reasons in the conclusion of Part I.

<sup>105</sup> Idem, p.86.

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### A. *The Jus-Positivist Foundation*

For these authors, amending power is limited only by those limitations included in the constitution; this was the position of Carré de MALBERG for example that considered amending power as an organ of the state, and as such, limited by the constitution itself.<sup>106</sup> A similar position was adopted by Georges Burdeau (in his doctorate thesis); for him, amending power was subordinate to the conditions that were imposed by the first Constitutional Act since amending power is a state power and as such is organized by the constitution.<sup>107</sup> Now, what are *in concreto* the limits to amending power? For the previous authors, it was necessary to refer to the constitution of every state in order to find these limits. Nevertheless, there is a tendency to distinguish between formal limits and material limits. For the above authors, amending power is materially unlimited although these limits are present in the same text of the constitution.<sup>108</sup>

### B. *The Jus-Naturalist Foundation*

The main point here –which is what essentially distinguishes these authors from positivists authors- is that they defend the thesis in which there are limits to amending power not only within the text of the constitution but also external to it. For them, there are principles or norms that are superior to other norms present in the constitution, generally referred to as supra-constitutionality, or the ‘spirit’ of the constitution for example. Some of those jus-Naturalist authors are: Maurice Hauriou, Georges Burdeau (in his treaty), Carl SCHMITT and d'Olivier Beaud.<sup>109</sup>

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<sup>106</sup> Idem, p.88.

<sup>107</sup> Idem, p.89.

<sup>108</sup> Idem, pp.89-92.

<sup>109</sup> Idem, pp.92-99.

## §5 The Formal Conception of Constituent Power

A general presentation of the Formal conception of constituent power will be made, followed by that of the doctrine of Carré de MALBERG.

### 5.1. A general Presentation

According to the formal conception of constituent power we can distinguish between framing power and amending power as follows:

*First*, framing power (*pouvoir constituant originaire*) is the power that establishes a constitution when there is no constitution or *no longer* a constitution in force; in other words, framing power appears in a legal vacuum while the amending is the power to revise the constitution under the fixed rules that the constitution itself establishes.

*Secondly*, framing power is a pure fact; it has, by definition, no legal nature and it is unlimited while amending power has a legal nature since found its source is derived from the same constitution itself.

*Thirdly*, the determination of those entitled to framing power and the methods of exercising it depend on the circumstances of force whilst those entitled to amending power and methods of exercising it are determined by the same constitution.

*Fourthly*, framing power knows no limits since it works externally from the existing legal order whilst amending power is limited by the same conditions imposed by the constitution.

*Fifthly*, framing power is not limited by a specific modality in order to enact it whilst amending power follows the modalities established in the constitution.<sup>110</sup>

For the positivists, framing power and amending power are materially identical since both produce constitutional laws which have the same value. In fact, both framing and amending powers creates constitutional laws; as such, they, both, form constituent power although the first acts outside a constitutional framework whilst the second acts within it. Besides, framing power can be considered a constituted power for its

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<sup>110</sup> For more details, see: Idem, pp.10-24.

organization whilst it is to be considered a constituent power regarding its function. For this reason, it is of great importance to keep clear the formal distinction between the framing and amending powers.

Le pouvoir constituant originaire est celui d'établir une Constitution alors qu'il n'y a pas ou qu'il n'y a plus de Constitution en vigueur. Ce pouvoir apparaît dans le vide juridique. Il est de nature non juridique et illimitée. Son titulaire et les modes de son exercice se déterminent par les circonstances de force.<sup>111</sup>

Le pouvoir constituant dérivé est le pouvoir de réviser la Constitution suivant les règles fixées par celle-ci à cet effet. Ce pouvoir s'exerce dans le cadre d'une Constitution en vigueur. Il est de nature juridique. Son titulaire et les modes de son exercice sont déterminés par la Constitution<sup>112</sup>.

The distinction between framing power and amending power made by positivists in a formal concept can be illustrated as follows:

	<b>FRAMING POWER</b>	<b>AMENDING POWER</b>
<b>Origin</b>	The power that establishes a constitution when there is no constitution or <i>no longer</i> a constitution in force	The power which revises the constitution following the fixed rules that the constitution itself establishes.
<b>Nature</b>	A pure fact; it has, by definition, no legal character and it is unlimited	has a legal nature, limited by the constitution itself
<b>Entitled and methods of exercising it</b>	depend on the circumstances of force	are determined by the same constitution
<b>Limitations</b>	Knows no limits since it acts externally from any legal order	Limited by the same constitution
<b>Modalities</b>	Knows no specific modality to enact framing power	Follows the modality established by the constitution

<sup>111</sup> Idem, p.21.

<sup>112</sup> Idem, p.22.

## 5.2. Carré de MALBERG

Already in 1922, Carré de MALBERG, in the second tome of his book, *Contribution à la Théorie Générale de l'Etat*, had dedicated a section to 'le pouvoir constituant'. He explained the reasons for this, in the first few paragraphs. For him, personified in the state, the nation is the only subject of the public power; the constitution is the only canal through which the power of the nation can be communicated.

The problem here is the following: who has the power to make the constitution; in other words who is entitled to constituent power. He wrote:

En principe, la nation seule, unifiée et personnifiée dans l'Etat est le sujet de la puissance publique: mais la constitution est le canal par lequel cette puissance se communique, quant à son exercice, aux divers organes étatiques. De fait et en droit positif, tout pouvoir s'exerçant dans l'Etat prend sa source dans une dévolution faite par la Constitution.

Mais alors, un nouveau problème s'élève, auquel vient aboutir toute la théorie de l'organe d'Etat: A qui appartient-il de faire la Constitution elle-même? Qui aura qualité pour déterminer les organes étatiques et pour répartir entre eux l'exercice de la puissance nationale? En d'autres termes, en qui réside le pouvoir constituant?<sup>113</sup>

Carré de MALBERG began with a brief presentation of the different theories regarding the origin of constituent power: Duguit's theory of the organs, Rousseau's social contract and Sieyès's popular sovereignty, followed by his own theory.

### 5.2.1. Different Theories regarding the Origin of the Constitution

Carré de MALBERG refers to the theory of organs, as presented by M. Duguit. According to that theory, the organs presuppose the constitution but they cannot explain and justify it. For Duguit the state, the personification of the national collective, has its own Will; a Will that results from the constitutional organization of the collective. Here, there is a dilemma: the will of the state cannot logically exist when

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<sup>113</sup> CARRE DE MALBERG R., *Op. cit.*, p.484.

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there is not yet a state; that is, at the moment of accomplishing the first, primordial and supreme act of dominating power: at the moment of the creation of its own legal system. In the moment of giving itself an original constitution, the state has no constitution; more precisely, the state does not exist as a legal entity, at the moment of the creation of the state, with an accomplished organization of the national collective.<sup>114</sup>

Consequently, there is no way to explain the origin of that first constitution by referring to the organs. It is necessary to refer to something outside the state, a Will that is not of the state itself; a Will, or a power that refers to the Will of individuals, a Will that generates the state, that appears prior to and superior in relation to the state; the constituent Will, that is at the origin of the constituted will of the state, which is only the consequence and the product of the first will, which, in its turn, is the sovereign and the original Will. Therefore, the sovereign power resides outside the state; that is in the individuals, and in their will.<sup>115</sup> The dilemma is suddenly resolved: “*Une fois transportée sur ce terrain, la question du pouvoir constituant se résout, pour ainsi dire, d'elle-même*”.<sup>116</sup>

Now, if the rules of private law concerning the creation of an association that is ruled by its corporative statute are considered, it may be discovered that the organization was the product of a primary Will; that primary Will is not the Will of the social organization, but the Will of the founders of that group, as individuals. Authors make these same argumentations in relation to the state.<sup>117</sup>

Le statut organique par lequel une pluralité d'hommes, concourant à former une même nation, se constituent en un corps étatique unifié, doit logiquement être l'œuvre de ces hommes eux-mêmes. En d'autres termes, la souveraineté

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<sup>114</sup> Idem, pp.484-485.

<sup>115</sup> Idem, p.485.

<sup>116</sup> Ibidem.

<sup>117</sup> Ibidem.

primaire, le pouvoir constituant, réside essentiellement dans le peuple, dans la totalité et dans chacun de ses membres.<sup>118</sup>

Carré de MALBERG saw in this the principles that characterize the doctrine of *social contract*. The constitution, according to that doctrine, is the act, with which the citizens agree to create a national organization, which is a contractual act. The logical result of that doctrine is the following: every constitution is a type of new social contract. In that contract, there is a need for the participation of all the individuals in the formation of that Will, and the reorganization of the national association. Rousseau confers a great influence on this.

Carré de MALBERG criticized that doctrine; the theory of social contract –he argued– means first of all that the creation of a constitution necessitates a social pact. That pact has to follow the Declaration of Rights, since it has to find its value in the principles of natural law that are recognized by such a declaration. The dilemma here is the following: the social pact –which has to be adopted unanimously– has to exist prior to any constitutional act –which will be adopted by the majority– and not the opposite.<sup>119</sup>

According to Carré de MALBERG, it is to consider Sieyès is the originator of what he calls ‘*souveraineté constituante du peuple*’, that is the constituent sovereignty of the people. Sieyès, in fact, considers the sovereignty as essentially consisting of constituent power. Via the constitution, the people give some of their power to constituted powers; nevertheless, for him the people retain constituent power.

This has two consequences: *first*, the sovereignty, as for its exercise, is divided into different constituent authorities, but it keeps its unity and indivisibility through the people, that is, the unique common constituent source of the public powers; *second*, the people, by keeping in their hands constituent power, cannot be limited by the constitution; the constitution only imposes limits on constituted powers.

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<sup>118</sup> Ibidem.

<sup>119</sup> Idem, p.486.

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Nevertheless, Sieyès followed the representative principle and defended it in the National Assembly; with the introduction of this principle, he attenuated his theory of popular sovereignty. In fact, he was on the side of popular sovereignty but requested that constituent power should be exercised by special representatives, as opposed to ordinary representatives. In other words, the distinction between constituent power and constituted powers had to function within the representative regime.<sup>120</sup>

Carré de MALBERG considered this extension of the representation to the constituency as illogic, for two reasons: *first*, it is the constitution that sanctions the representative principle; through the constitution, the people accept not to govern themselves directly but through representatives; consequently, the representation presupposes the constitution and it cannot serve as a basis for its establishment. *Second*, if it is true that a new constitution means a new Social Contract, there is one reason to exclude representation from that pact: the people, at the moment of concluding that pact, are in a non-organic state. The people have no representatives and no body is entitled to represent them. The revolutionary constitutions understood that, for this reason always asked for a popular vote, that is the constituent sanction of the people; the 1971 Constitution was an exception since it was adopted by a Special Assembly.<sup>121</sup>

Carré de MALBERG criticized this theory in that it was based on the constituent sovereignty of the people; he argued that this doctrine tried to explain the very first constitution and tried to give it a juridical basis; that juridical basis is the individual Will of those persons composing the nation. Here, there is an error right from the beginning: for Carré de MALBERG, it is not possible to give juridical construction to events and acts that have determined the foundation of the state and its first organization. Otherwise, it is necessary to admit that the law (*droit*) comes prior to the state.

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<sup>120</sup> Idem, pp.487-488.

<sup>121</sup> Idem, p.489.

Admitting this means that the procedures that create the state follow a preceding legal order. The belief of jurists and philosophers of the school of natural law to a previous legal order was proper during the sixteenth to eighteen centuries. It was also the belief of the men of the Revolution who prepared the Declaration of Rights on the basis of natural law and believed that it had to limit the social pact and the constitutional act and serves them as a basis.

Carré de MALBERG concludes, that it is incontestable that there are perceptions of morality and justice that are superior to positive laws; nevertheless, it is not acceptable to consider them, for the only reason of being superior, that they are legal rules; then Carré de MALBERG explains why:

Car, le droit, au sens propre du mot, n'est pas autre chose que l'ensemble des règles imposées aux hommes sur un territoire déterminé par une autorité supérieure, capable de commander avec une puissance effective de domination et de contrainte irrésistible. Or précisément, cette autorité dominatrice n'existe que dans l'Etat: cette puissance positive de commandement et de coercition, c'est proprement la puissance étatique. Des lors, il apparaît que le droit proprement dit ne peut se concevoir que dans l'Etat une fois formé; et par suite, il est vain de rechercher le fondement ou la genèse *juridiques* de l'Etat. L'Etat, étant la source du droit, ne peut pas avoir lui-même sa source dans le droit.<sup>122</sup>

### 5.2.2. The Doctrine of Carré de MALBERG

For Carré de MALBERG, the initial formation of the state, and its first organization, are to be considered as a pure fact; that fact cannot be classed in any existent legal category, since it is not ruled by juridical principles. The formation of the state, then, is not ruled by any pre-existent legal order: the state, in fact, *is* the condition for legal order; consequently, it *is not* ruled by it. Accordingly, it is not possible to confirm that a state exists only when it is born from the consent of all the members of the nation or of the majority. The formation of the state, in fact, may result simply by force, by imposing upon the members of

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<sup>122</sup> Idem, p.490.

that nation, through fear or persuasion. Carré de MALBERG resumed his theory as follows:

En d'autres termes, à l'origine de l'Etat, il n'y a place que pour du fait, et non pour du droit. Tout, ce que peut faire le juriste, c'est de constater que l'Etat se trouve formé à partir du moment où la collectivité nationale, fixée sur un certain territoire, possède, en fait, des organes exprimant sa volonté, établissant son ordre juridique, et imposant supérieurement sa puissance de commandement.<sup>123</sup>

Accordingly, for Carré de MALBERG, it is not a question of tracing the legal procedures through which those original organs were constituted; this is not a problem of public law; more precisely, this is not a legal problem. For him, the theories that traced the origins of constitutions in order to discover the legal source of the state commit a grave error; since -to use his words- "*la source de l'Etat, c'est du fait: à ce fait se rattache ultérieurement le droit*".<sup>124</sup>

Carré de MALBERG then presented his point of view with regards to the other previous varying theories:<sup>125</sup> *First*, critics to the theory of the organs: No body was able to prove how the first constitution had to be the work of regular organs of the collective. In fact, the first creation of the state coincides with its first organization; consequently, it is not possible to think that the first constitution is the work of pre-existent institutions. Besides, the theory of the organs, cannot explain in juridical terms something that is a pure fact. This theory, nevertheless, is very apposite to explain the exercise of constituent power and the constitutional revision in a state that is already established. *Second*, Critics of the theory of Social Contract: when a state exists, it has its own Will; the state can take sovereign acts, including constituent matters, but it is not a question of a new social pact. Changing the constitution does not imply changes in the legal personality of the state, neither in the collective that is personified in the state. A new or amended constitution does not mean necessarily the creation of a new

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<sup>123</sup> Idem, p.491.

<sup>124</sup> Idem, p.492.

<sup>125</sup> Idem, p.493.

state, neither a new nation. A new constitution simply gives the state a new form or new statute, without interrupting its continuity, or changing its identity. In fact, the origin of the state does not depend on constituent power.

For Carré de MALBERG, it is necessary to extend the theory of organs to cover also constituent power. Now, the constitution is the origin of the constituted organs, how can it be changed by them? Carré de MALBERG considers this contradiction as apparent only. For him, there are two different circumstances in which constituent power is called to be exercised.

*First*, there are many historical examples of changes introduced with the force which can be also violent. What is characteristic here is that those changes happen outside the legal order, and outside the provisions of the same constitution; it does not follow the procedures, the form and the limits imposed by preceding constitution. Accordingly, it is not of concern for those entitled to constituent power, since in these situations there are no juridical principles, or constitutional rules. Here, there is no place for law but for force; constituent power is in the hands of the more powerful.

Ainsi, entre la Constitution ancienne, dont il a été fait table rase, et, la Constitution nouvelle, qui reste à faire de toutes pièces, il n'existe pas de lien juridique; mais il y a, au contraire entre elles une solution de continuité, un interrègne constitutionnel, un intervalle de crise, durant lequel la puissance constituante de la nation n'aura d'autres organes que les personnages ou corps, qui, à la faveur des circonstances, seront parvenus à mettre la main sur elle.<sup>126</sup>

Carré de MALBERG believes that this option has to stay outside the consideration of law; in this situation, in fact, the devolution and the exercise of constituent power are not ruled by the law.

The *second* option is to operate changes to the existing constitution that may be partial or total, following the procedures provided by the same constitution. In fact, a preceding constitution remains in force until the time of its abrogation by the new constitution which simply succeeds to

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<sup>126</sup> Idem, p.497.

it without interruption. That is why modern constitutions pay particular attention to the regulations related to the revision procedures. Following those procedures, it would not be necessary to refer the question to the people, or to make a revolution.

Carré de MALBERG concludes with these specifications: constitutional law presupposes a constitution in force; constitutional law does not mean a law that constitutes the state, but a law that may not exist outside a state which already has been constituted; jurists should not look for constitutional principles outside a positive constitutions; nothing legal exists outside the constitution; it is simply a pure fact; every Organ in the state has its origin in the constitution: no Organs exist prior to the constitution; there are not properly constituent organs, but only constituted organs.<sup>127</sup>

For Carré de MALBERG, the juridical notion of Constituent Power implies the pre-existence of a certain order and certain constitutional organization. When an Assembly was elected in 1789 to emanate a constitution, it acted as if it had received the mandate from a pre-existent constitution; for this reason it claimed that it was only for the Assembly to represent the general Will of the nation, based on the idea of receiving the constituent mandate. In other words, the work of the Assembly was simply to express the constitution that already existed, and to ameliorate it. Now, they could do that only because they had constituent power. Consequently, there was a kind of revolution:

Par là, la Constituante s'élevait la conception hardie, qui devait assurer la pleine indépendance de Son pouvoir, et, comme on l'a dit, elle transformait la représentation du peuple souverain en une représentation souveraine du peuple.<sup>128</sup>

For Carré de MALBERG, the Assembly understood that it was a necessary to give a legal basis to its constituent pretensions; it could do that only by referring to previous and existing legal orders.

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<sup>127</sup> Idem, p.499.

<sup>128</sup> Idem, p.504.

La conclusion unique à retenir de ces observations demeure donc simplement que la Constituante, en invoquant à l'origine les clauses des cahiers relatives à l'établissement de la Constitution, avait compris la nécessité de donner une base proprement juridique à ses prétentions d'ordre constituant: elle avait essayé de se poser en organe statutaire d'une nation, qui apparaissait, selon ce concept, comme déjà organiquement constituée; et en cela, elle avait rendu hommage à cette idée, dégagée plus haut, que le pouvoir constituant lui-même ne peut se concevoir comme un pouvoir d'essence juridique qu'autant qu'il prend sa source dans un ordre statutaire antérieur et qu'il s'exerce conformément à cet ordre préétabli.<sup>129</sup>

For Carré de MALBERG, there was no possibility of making reference to a law that was pre-existing to the constitution;<sup>130</sup> after the establishment of the state, entitled to constituent power are those Organs which the constitution designs. Now, can the constitution attribute that power to any Organ? Here, there is another principle in French public law that intervenes and that is the principle of national sovereignty. This will be discussed in the following paragraphs.

### **5.2.3. The Separation of Constituent Power from Constituted Powers**

The principle of national sovereignty is opposed to the idea of giving any of the organs the exclusivity in the process of constitutional revision; this is why, pushed by the strict interpretation of the national sovereignty, the 1791 French constitution specified that the amendments made by the Legislative Assembly would not be submitted to the king. Now, is it possible to give that power exclusively to one of the other organs? For Carré de MALBERG, there are two reasons that lead one to believe that this cannot be the case: *first*, it is difficult to admit that the title of that Organ and the extension of its power can be amended only with its consent; the Nation had no longer the liberty to modify the constitution; *second*, the principle of national sovereignty is opposed to the idea that any of the constituted organs can give to

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<sup>129</sup> Ibidem.

<sup>130</sup> The constitution that Carré de MALBERG is talking about here should be understood in its material sense.

themselves the same power or more. Every constituted authority has to obtain its powers from the national Will that is superior to its own Will.<sup>131</sup>

Now, this question is not relevant in countries where the Will of the monarch is the only reference; the principle of national sovereignty means that it is the nation that is the sovereign; this principle is expressed already in the 1789 Declaration of Rights: “...*nul corps, nul individu ne peut exercer d'autorité qui n'émane expressément de la nation*”. Besides, the preamble of the 1791 constitution mentioned that “*la souveraineté appartient à la nation*” and declared in its first article that “*nul ne peut s'en attribuer l'exercice*”. For Carré de MALBERG, the separation of powers meant that:

Le pouvoir exécutif et le pouvoir législatif doivent être effectivement séparés de façon que le Gouvernement et le Parlement assument chacun pour sa part et sous sa responsabilité la plénitude de leurs attributions.<sup>132</sup>

The interpretation of these texts is that no constituted organ can be at the same time, the constituent organ. The logical consequence of these arguments is the following: it is necessary for the constituent organ to be different from the constituted organs.

*Most of the constituent systems adopted in France for example, had one common point: all of them refused, in fact, to attribute that power to the ordinary legislative body but to a special assembly that had a constituent task. Another principle is the need to separate between the power that creates a constitution and the powers created by it; in other words, the principle of the separation between between constituent power and constituted powers.*

Carré de MALBERG studied this question; he tried to trace the origin of the doctrine and its links with Rousseau's doctrine of popular sovereignty, Montesquieu's separation of powers and individualism, and the national sovereignty.

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<sup>131</sup> CARRE DE MALBERG R., *Op. cit.*, p.506.

<sup>132</sup> AVRIL P., *Op. cit.*, p.296.

### 5.2.3.1. Constituent Power and Popular Sovereignty

Some authors thought that there is only indirect liaison between the theory of the separation of constituent power and the theory of popular sovereignty; for the following reasons: according to the social contract, the sovereignty is absorbed by the legislative body; essentially sovereignty here means the power of the people to pronounce the general Will; consequently, there is no place in Rousseau's teaching for a constituent power that is distinguished from the legislative power. Besides, it is not a question of thinking that a supreme organ is superior to the ordinary legislator for a simple reason: the constitution limits the constituted organs; the legislator is the people and the people are not a constituted organ; the constituent cannot be superior to the people nor can the constituent be superior to the legislative body.<sup>133</sup>

In fact, the theory of the separation of constituent power from constituted powers, was intended to limit the legislative power, especially in relation to those individual rights, inviolable and untouchable; now, the Social Contract excludes such an idea, for the following two reasons: *first*, the social contract implies the complete absorption of the individual by the community and therefore, there is no place for individual rights; *second*, in the case where there are some individual rights, they can be extended, suspended or limited by the sovereign at any time; and for Rousseau, the sovereign is the legislator.

Carré de MALBERG continued his analysis, and considered a second option. In fact, if the origin of the separation of constituent power cannot be found in the doctrine of Rousseau, where to go, then? The option that some authors present is Montesquieu's theory of *separation of powers*. According to Carré de MALBERG, the precedent theory fits in very well with the theory of national sovereignty.<sup>134</sup>

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<sup>133</sup> "C'est pourquoi ROUSSEAU même déclare qu'il ne peut exister pour le peuple aucune loi fondamentale qui l'enchaîne, car la volonté générale ne peut point se lier elle-même". CARRE DE MALBERG R., *Op. cit.*, p.514.

<sup>134</sup> He wrote: "La solution proposée par Montesquieu en vue de limiter la puissance respective de chacun des titulaires de la puissance nationale cadre très heureusement avec ce principe (de la souveraineté nationale), car, en n'accordant à chacun de ces titulaires qu'une partie fragmentée de la puissance souveraine, elle

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Montesquieu in fact, considered the three powers of the state as if they were divided from the beginning, so the unity of the three constituted powers may have their same origin in constituent power that is the people. This is the basis of the separation of constituent power as taught by Sieyès. For him, in fact, “...*le mot Constitution est relatif à l'ensemble et à la séparation des pouvoirs publics*”. Constituent power, for Sieyès, is the unity principle of the multiple constituted powers. Popular sovereignty therefore, appears as the logical consequence of Montesquieu's theory; without popular sovereignty, Montesquieu's theory becomes unintelligible and unacceptable. This is why, according to Carré de MALBERG, it can be rightly assumed that Sieyès's theory is the synthesis of Rousseau's theory of popular sovereignty and Montesquieu's theory of the separation of powers.<sup>135</sup>

Furthermore, Montesquieu is highly liberal. His intentions are, in fact, to protect and to secure the respect of individual rights that the Social Contract oppresses; those rights are the reflection of an objective law that is established by and for the community, and the idea of constituent power intends to guarantee those rights. For this reason, Sieyès took a position that is in complete contrast to Rousseau's (total alienation of every associated, with all his rights) considering that the union of the associated is for their gratification, consequently, it is an advantage, not a sacrifice. Individuals do not have to sacrifice their liberties to the state; on the contrary, the state is there to guarantee them.<sup>136</sup> For this reason, Sieyès considered some rights as untouchable, and are guaranteed by the constitution itself; those rights in fact are not limited by constituted powers, but they can not be limited neither by constituent power itself.

It is for constituent power itself to recognize and to declare those rights in order that they become operative. The same constitution, also, shall specify the ways in which those rights have to be guaranteed in order to

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*met obstacle à ce qu'aucun d'eux acquière et puisse conserver un pouvoir complet et vraiment souverain en ce sens; et ainsi elle laisse intacte la souveraineté exclusive de la nation*”. AVRIL P., *Op. cit.*, p.301.

<sup>135</sup> CARRE DE MALBERG R., *Op. cit.*, p.515.

<sup>136</sup> *Idem*, p.519.

make them effective. Besides, it is the same constitution that has to protect those rights from being tampered with in the future.

### 5.2.3.2. Constituent power and National Sovereignty

For Sieyès, the constitution may bind constituted powers but not the nation, declared sovereign. In fact, the doctrine of Sieyès is based on two ideas: *first*, Bodin's doctrine, in relation to the prince who was considered as *suprà leges* and remained *legibus solutus*; Sieyès took this concept, and gave it to the nation; *second*, the idea of the nation as it is in the state of nature, as vulgarized by Rousseau in relation to the individuals. Sieyès wrote:

On doit concevoir les nations sur la terre comme des individus hors du lien social, ou, comme l'on dit, dans l'état de nature. Et cela, par la raison qu'à la différence du Gouvernement qui ne peut appartenir qu'au droit positif, la nation se forme par le seul droit naturel. Elle est tout ce qu'elle peut être, par cela seul qu'elle est. En effet, s'il lui avait fallu attendre, pour devenir une nation, une manière d'être positive, elle n'aurait jamais été.<sup>137</sup>

Accordingly, the nation can not be limited by the constitution and the nation can not be limited in its exercise of constituent power by pre-established form. Sieyès said expressly:

L'exercice de la volonté des nations est libre et indépendant de toutes formes civiles. N'existant que dans l'ordre naturel, leur volonté, pour sortir tout son effet, n'a besoin que de porter les caractères naturels d'une volonté. De quelque manière qu'une nation veuille, il suffit qu'elle veuille; toutes les formes sont bonnes, et sa volonté est toujours la loi suprême. Une nation ne sort jamais de l'état de nature, et n'a jamais trop de toutes les manières possibles d'ex-primer sa volonté. Ne craignons point de le répéter: une nation est indépendante de toute forme; et de quelque manière qu'elle veuille, il suffit que sa volonté paraisse, pour que tout droit positif cesse devant elle, comme devant la source et le maître suprême de tout droit positif.<sup>138</sup>

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<sup>137</sup> Idem, p.521.

<sup>138</sup> Idem, p.522.

Sieyès, nevertheless, admitted a representative regime also in constituent matters. In fact, the representatives of a sovereign nation are in themselves sovereign and cannot be limited. They can also be ordinary representatives of the nation who legislate and they can be extraordinary.

According to Carré de MALBERG, the theory of Sieyès finishes in having great affinity with the theories of Rousseau. Here are the reasons why: *first*, both, in fact, believe that the people or the nation can not be limited by the constitution; still, for Rousseau, this unconditioned liberty of the nation is less absolute than it is for Sieyès. In fact, he admits the possibility of limiting that liberty with the form; that condition is, in fact, in the form: the revision process has to have the same solemnity as its establishment; *second*, constituent power, according to Sieyès, finds its content in the theory of Rousseau. That constituent power, in fact, is nothing else but the popular sovereignty that is treated in the *Contrat social*. Still, Sieyès tries to reconcile the sovereignty with a representative regime; for this reason, Sieyès introduced the theory of delegation. For him, the Assembly that is in charge of adopting a constitution is that entitled to the plenitude of powers of the nation.

The problem here is that Sieyès, in the same presentation of his theory of the separation of constituent power from constituted powers finishes by destroying that separation, since the same legislative body is that entitled to constituent power! According to La Fayette, this idea (that constituent power has the plenitude of all powers) has its origin in the doctrine of Sieyès and not in the American convention which is simply delegating the nation to examine and to modify the constitution.<sup>139</sup>

Now, theoreticians of popular sovereignty believe that the legislative body and not constituent power, which received the mandate to

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<sup>139</sup> La Fayette criticized Sieyès saying that this doctrine: “*bien loin de faire faire, sur ce point, un pas a la science (comme le prétendait Sieyès dans son discours du 2 thermidor an III), l'a plutôt fait rétrograder par le mélange des fonctions constituante et législative dans l'Assemblée constituante et dans la Convention nationale, tandis qu'en Amérique ces fonctions ont toujours été distinctes*”. Idem, p.535.

legislate only; accordingly, during their legislative mandate, they cannot revise the constitution. The task to revise the constitution is left to a special assembly with the extraordinary delegation of the people. This means that, the same power cannot be simultaneously constituent power and a constituted power. Nevertheless, constituted powers can only start and put in to effect constituent power.

The consequence of this reasoning is to admit that the constitutional law has an intrinsic distinguishing nature from Ordinary Law; the constitution is superior, it is the primary law that constitutes the legislative power itself. Besides, the constituent act is to be considered the first act of sovereignty that is superior and prior to ordinary acts of sovereignty, that are accomplished by the constituted authorities. Now, this cannot be exercised by ordinary legislative body but by a special organ, that is the Constituent Organ.

This is why a number of constitutions provide for a special and extraordinary assembly with a higher number of representatives; other constitutions leave this task to the Legislative Assembly but these Assemblies have to be renewed and re-elected; others ask only that the revision is adopted by the Assembly with a strong majority.

For Carré de MALBERG, this reasoning concludes by dividing the sovereignty in to two: the first is that initial, extraordinary and prior act of the constituent organ and the other is that of the constituted organs. For him, this division cannot to be accepted since the sovereignty of the nation is unique and resides in its power to impose its Will through regular organs.<sup>140</sup>

For Carré de MALBERG, the organs that express the sovereign Will of the nation are those entitled to do the same with the constituent question. Now, that organ is the legislative body since the constitution is nothing more that one of those laws regulating the nation, although it is distinguished by its exceptional importance; it is nevertheless, a legislative act.

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<sup>140</sup> Idem, p.539.

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Now, considering the constitutional laws as a distinct branch of legislation, it is based mainly on the necessity to justify those powers, by referring to the people, according to the doctrine of Rousseau; in the French concept of state, the sovereignty for the people and its members is not primitive and anterior to the constitution; it is their, only in the measure that it is recognized as such by the same constitution.

Accordingly, the French constitutional law that is based on national sovereignty and not popular sovereignty can explain how the citizens themselves are those entitled to constituent power; for this reason, Carré de MALBERG found that the theory of separation of constituent power cannot prevent the admission of the possibility that constituent power can be exercised by ordinary Legislative Assembly. The establishment of an extraordinary constituent assembly is full of dangers since that assembly, called to examine and to amend all constituted powers, may end by thinking that it has all those powers in itself, finishing up by being an omnipotent, despotic assembly.<sup>141</sup>

This problem does not exist in England, where there is no necessity for constituent power. In fact, Parliament is the only entitled to adopt laws and to make the necessary changes to the organization of the state. Parliament is the only entitled of the sovereignty in England, and there is no need for another Organ or Assembly, to adopt these changes. Now, by adopting this system in France –that is leaving for the ordinary legislative body the capacity to revise the constitution- historically meant instability. In this sense, the adoption of the theory of constituent power, distinct from constituted powers, was a wise step since it offered real and practical advantages for a country that is tormented by the constituent mania.

For Carré de MALBERG, the separation of constituent power is not only a convenient and recommended precaution; it is also the logical consequence of the principle of national sovereignty that is distinguished from the popular sovereignty. He wrote:

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<sup>141</sup> Idem, pp.540-541.

La séparation du pouvoir constituant ne forme pas seulement, en France, une précaution utile ou une mesure recommandable: elle semble bien s'y imposer, comme une conséquence directe et nécessaire du principe de la souveraineté nationale.<sup>142</sup>

For Carré de MALBERG, there are three motivations why to consider the theory of the separation of constituent power as the consequence of the French concept of national sovereignty: *first*, national sovereignty is not a positive principle that makes from the citizens those entitled of the sovereignty. Accordingly, no member of the nation can repose the power as emanating from its own Will; *second*, when constituted authorities have constituent power, the extension and attribution of their powers cannot be amended without their consent; in other words, the Nation does not keep the total freedom to change its constitution for itself; *third*, if the Nation is the sole sovereign, there is no place for unlimited power by one of the constituted organs; accordingly, the powers of the constituted organs have to be determined and limited by a different one from themselves, that is by the constitution, or by the work of a more superior authority to constituted organs.<sup>143</sup>

The principle of separation of constituent power has an American origin in that, contrary to the English system, it has adopted the idea that the people, the original sovereign, are the source and the creators of the other constituted powers. Besides, the principle of national sovereignty does not admit the absolute sovereignty of one of the organs; as such, it necessitates the separation of constituent power. This principle of national sovereignty finds its limitation in the same constitution that is the work of a distinguishable constituent organ or of all the constituted organs.

On the other hand, constitutions that are based on the principle of popular sovereignty may easily finish up by admitting that one of the organs has all the powers in itself and therefore finish up by being omnipotent; while those accepting the basis of national sovereignty, considers the sovereignty as the prerogative of the Nation exclusively;

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<sup>142</sup> Idem, p.545.

<sup>143</sup> Ibidem.

accordingly, no organ can pretend to absorb that sovereignty. The consequences are two: *first*, the legislative body can not pretend to have constituent power; and, *second*, the constituency cannot pretend to have legislative powers.<sup>144</sup> For Carré de MALBERG, it is a grave error to consider the constituency contains all sovereignty and all powers; he wrote:

L'idée qu'une Constituante concentre en elle toute la souveraineté et réunit tous les Pouvoirs... est, au point de vue du principe de la souveraineté nationale, l'une des plus grandes erreurs qui aient été commises en France, depuis 1789.<sup>145</sup>

Nevertheless, Carré de MALBERG made a distinction between monarchic and democratic systems (in the original sense of the terms) from one side and national sovereignty from the other. In the first, constituent power created constituted powers that were originally contained in them; according to the principle of national sovereignty, the constituency has only constituent power, and not constituted powers that were simply established by it; accordingly, the constituency cannot pretend to have legislative, executive and judicial powers.<sup>146</sup> Here is the importance of national sovereignty that is not to be considered as a principle without direct implications: in fact, in a country of national sovereignty, only the nation, represented by all its organs is sovereign; no organ, taken alone, is sovereign; neither the constituent organ. That organ can be considered the supreme, but is not sovereign since it is not unlimited.<sup>147</sup>

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<sup>144</sup> Idem, p.549.

<sup>145</sup> Ibidem.

<sup>146</sup> Idem, p.550.

<sup>147</sup> Carré de MALBERG wrote: “*Dans un pays de souveraineté nationale, la nation seule, agissant par l'ensemble de ses organes, est souveraine: aucun des organes, pris en particulier, pas même l'organe constituant, ne peut être souverain. L'organe constituant peut bien apparaître comme l'organe suprême, en tant qu'il exprime la volonté la plus haute, dans l'Etat: il n'est cependant point souverain, car il n'a pas un pouvoir de volonté illimitée. La souveraineté de la nation exclut celle de l'organe. Toute négative que soit cette signification du principe de la nation souveraine, ce principe n'en est pas moins susceptible de produire des effets considérables: l'un de ces effets est d'exclure le système des Constituantes omnipotentes*”. Idem, p.551.

Carré de MALBERG resumes the distinction between the two concepts of the separation of constituent power: the first one is based on popular sovereignty and the second on national sovereignty. Both in fact, admit the existence of a distinguishing power that is constituent power as opposed to constituted powers. Nevertheless, when based on popular sovereignty, constituent power is mainly superior to constituted powers; besides, if combined with the representative principle, we may have a constituents' regime with unlimited powers. To the contrary, the concept of the separation of constituent power, which is based on national sovereignty, implies the limitation of the constituency itself; since it is directed against both the constituent organ and the constituted organs; besides, there is no danger that the organ called to constitute the others has an absolute and unlimited power.<sup>148</sup>

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<sup>148</sup> Idem, pp.551-552.

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## §6 THE MATERIAL CONCEPTION OF CONSTITUENT POWER

A general presentation of the material conception of constituent power will be made, followed by that of the doctrine of Carl SCHMITT.

### 6.1. General Presentation

The material concept is presented by non-positivists authors such as Carl SCHMITT who defended the thesis by saying that there is only one constituent power which he calls the ‘constituent power’ *tout court*, since ‘the power of the constitutional revision’ is not a constituent power. For SCHMITT, the confusion between constituent power and the power of the constitutional revision is the result of another confusion that is between the constitution and the constitutional Laws; these two concepts, in fact, had two different ‘objects’, they are respectively related to the constitution (*Verfassung*) and to the constitutional Laws (*Verfassungsgesetz*). In this sense, the power of the constitutional revision can change the constitutional laws, and not the constitution.<sup>149</sup>

Schmitt’s essentialist constitutionalism can be described as a distinction between two different concepts of ‘Constitution’: the first, *Verfassung*, represents the pre-constitutional political unity or, in other words, the “very political essence and ‘identity’ of the Constitution which cannot become subject to any amendment”. The second, *Verfassungsgesetz*, which could be translated as ‘constitutional law’, represents “merely the provisions about more or less inferior issues which, as a result of compromises between pluralistic social groups, had been incorporated into the Constitution in order to protect particularistic interests against social and political change through the barrier of the two-thirds majority required for constitutional amendments”. In brackets, it is interesting to see that for Schmitt it is the ordinary law that recognizes pluralism, while the level of higher law (i.e. constitutional law) demands unity. Schmitt’s constitutional approach maintains a clear differentiation between law and will. No “formalized” procedure or institution can capture the essence of the sovereign people,

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<sup>149</sup> GÖZLER K., *Op. cit.*, p.25.

because formalization is incompatible with the willful, unrestrained nature of the *pouvoir constituant*. “The *willfulness* of constituent power simply cannot be subjected to the mundane everyday *lawfulness* of the *pouvoir constitué*, given the radically different principles at hand. The attempt to do so, for Schmitt, is akin to transforming fire into water – in short, a native fantasy of liberal constitutional alchemists”.<sup>150</sup>

Now, it is clear that the concept ‘constitution’ here has a specific meaning; in fact, SCHMITT defines the constitution as being

la volonté politique dont le pouvoir ou l'autorité sont en mesure de prendre la décision globale concrète sur le genre et la forme de l'existence politique propre, autrement dit déterminer l'existence de l'unité politique dans son ensemble.<sup>151</sup>

In other words, the constitution is the fundamental political decision of those entitled to constituent power.<sup>152</sup>

Legitimacy ultimately can refer to nothing more than the efficacy of a particular set of political power holders or decision makers. Legitimacy, which refers to the political essence of the Constitution, is thus essentially a question of power.<sup>153</sup>

Hence, a constitutional system is valid only when it rests on an authoritative ‘decision’ made by a concrete ‘will’. And a constitution is legitimate “*when the power and authority of constituent power...is recognized*”.<sup>154</sup> More recently, Olivier Beaud more recently adopted the theory of SCHMITT and considered these two concepts –which he called *le pouvoir constituant* and *le pouvoir de revision-* as hierarchical. The first is sovereign the second is not. The difference between him and

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<sup>150</sup> LERNER H., *The people of the Constitution: Constitution-making, legitimacy and identity*, p.37.

<sup>151</sup> GÖZLER K., *Op. cit.*, p.24.

<sup>152</sup> *Idem*, p.25.

<sup>153</sup> SCHEUERMAN, *Carl Schmitt: The End of Law*, p.68, cited in: LERNER H., *op. cit.*, p.38.

<sup>154</sup> SCHMITT, *Verfassungslehre*, in: Scheuerman, *Carl Schmitt: The End of Law*.p.67-8; cited in: LERNER H., *op. cit.*, p.38.

SCHMITT is that he considers the criteria of distinction in the national sovereignty of the people; in fact, for Beaud, the only competent body to change affairs related to national sovereignty of the people is the one of constituent power, and never that competent for constitutional revision.<sup>155</sup>

Disregarding the form of state to which they are connected, VERGOTTINI suggests that contemporary constitutions are derived from an initial decision that provides the founding power of a certain system.<sup>156</sup> For the same author, constituent power is only framing power (*potere costituente*) which is distinct from constituted powers (*poteri costituiti*) which does not include the executive, legislative and judiciary powers only but amending power (*potere di revisione*) since the latter are subjected to limits of the same constitution. The importance of the division between framing power and amending power is that the former indicates the discontinuity with a precedent constitution while the later indicates its continuity.<sup>157</sup>

## 6.2. Carl SCHMITT

Carl SCHMITT made an interesting comparison between the ‘constituant-constitué’ de Sieyès, and that of Spinoza distinction between *natura naturans* in its relation to *natura naturata*, and concluded that “[T]ous les concepts prégnants de la théorie moderne de l’Etat sont des concepts théologiques secularisés”.<sup>158</sup> The concept of constituent power, invented by a theologian (Sieyès), is a famous example of what has been called political theology: constituent power is the secularized version of the Divine power to create the world *ex nihilo*, to ‘create’ an order without being subject to it.<sup>159</sup>

The doctrine of supra-constitutionality that finds its origin in Carl SCHMITT, supposes two levels of constitutional Rules: *first*, the

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<sup>155</sup> GÖZLER K., *Op. cit.*, p.27.

<sup>156</sup> VERGOTTINI G., *Op. cit.*, p.166.

<sup>157</sup> *Idem*, pp.166-167.

<sup>158</sup> KLEIN C., *Théorie et Pratique du Pouvoir Constituant*, pp.2-3.

<sup>159</sup> PREUSS U.K., *Op. cit.*, p.144.

constitutional laws, which contains technical rules, and are related to the organisation of public powers, to their competences, and their mutual relationships, and, *second*, the constitution in itself which includes all the fundamental political principles of the state, which can not be modified.<sup>160</sup>

In that sense, the formal constitution, as all legal texts, can change not only when constitutionally amended but also suffers an evolution that may be considerable, regarding the conditions in which it is applied in other words, in reason to its interpretation.<sup>161</sup>

### 6.2.1. Carl SCHMITT's Concept of Constitution

According to SCHMITT, “...a Constitution is valid because it emanates from a constituent power... and is posited by its will”.<sup>162</sup> Constituent Power is the absolute substance, the *natura naturans*, from which a constitution emanates. Constitutional order and authority are based on that same constituent power.<sup>163</sup> A positive constitution is not an absolute constitution, but rests on it as the firm foundational core that protects its identity, and guards it from wholesale and indiscriminate reform.<sup>164</sup>

The point of departure of SCHMITT's argument in his *Verfassungslehre* is the fundamental distinction between an absolute conception and a relative conception of the constitution; in other words, the distinction between constitution and constitutional law.<sup>165</sup> The relative conception reduces constitutions to a set of constitutional Laws, to “*several, various or many legal determinations of a certain type*”... SCHMITT adopts the expression used by Barthelemy-Duez to refer to the French Constitution of 1875: “*Il n’y a pas de Constitution; il y a des*

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<sup>160</sup> BURDEAU G., HAMON F. TROPER M., *Op. cit.*, p.42.

<sup>161</sup> *Ibidem*.

<sup>162</sup> CRISTI R., *The Metaphysics of Constituent Power: SCHMITT and the Genesis of Chile's 1980 Constitution*, p.1749.

<sup>163</sup> *Idem*, p.1750.

<sup>164</sup> *Ibidem*.

<sup>165</sup> *Idem*, p.1756.

*lois constitutionnelles*”. In contrast, the absolute conception discerned in chapter one presupposes the distinction between constitution and constitutional laws. It emphasizes constitutional unity as opposed to a random plurality of laws.<sup>166</sup>

The substantive unity of SCHMITT’s absolute constitution manifests itself in three ways. *First*, the absolute substantive constitution refers to the sovereign state itself... SCHMITT defines the constitution as the “*concrete amalgamation of political union and social order that belongs to a determined state*”; the constitution is the state. This means that the state does not *have* a constitution; it *is* the constitution. SCHMITT’s metaphysical disposition appears in full swing when he declares that the state is “*a really existing situation [ein seinsmäßig vorhandener Zustand], a status of unity and order*”, and the constitution, in the words of Socrates, is its “soul”.<sup>167</sup> *Second*, the absolute constitution privileges its essential over its existential meaning; the essential constitution defines the particular mode of the state’s existence. The constitution appears now as “*a particular mode of the political and social order*”...“*A successful revolution brings about a new status and eo ipso a new constitution*”.<sup>168</sup> *Third*, the essential constitution is not merely an authoritative status, but also a “*principle of dynamic development*” (*dynamischen Werdens*). The unity of the state is forever being generated and is not stable or static.<sup>169</sup>

Refusing to abandon the metaphysical “*sphere of being and existence*,” SCHMITT sees the constitution as more than a general rule or basic norm “*under which one subsumes*” particular rules or cases:

The Constitution is the active principle of a dynamic process of effective energies... but definitely not a regulated procedure consisting of normative prescriptions and imputations.<sup>170</sup>

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<sup>166</sup> Idem, p.1751.

<sup>167</sup> Idem, p.1752.

<sup>168</sup> Idem, p.1753.

<sup>169</sup> Ibidem.

<sup>170</sup> Idem, p.1754.

When SCHMITT declares that “*a constitution is valid because it emanates from a constituent power*”, he defines constituent power as an empirical act of the will.<sup>171</sup> That unified will of the people is the foundation of the real legal system is somehow similar to Kelsen’s notion of the basic norm and serves for both to explain the possible relation between the constitution and the political. For both, this was inevitable since they tried to examine the moment *before* the constitution in order to be able to justify the constitution itself as a unified legal order.<sup>172</sup> In fact,

Schmitt believes that the construction of the Constitution cannot be as unrelated to the political identity of the people who write it. Yet, Schmitt contends that identity does not influence Constitutions in a slow gradual fashion but in a decisive manner. The fundamental concept that underpins his approach is not the historical but the political.<sup>173</sup>

Now, ‘The political’ is viewed by SCHMITT in terms of the distinction between friend and enemy. SCHMITT writes:

Rationally speaking, it cannot be denied that nations continue to group themselves according to the friend and enemy antithesis...that this is an ever present possibility for every people existing in the political sphere.<sup>174</sup>

Accordingly, the united identity of the people is present before any institutional manifestation of it. The shared feeling of a society’s oneness is the preceding condition on which the state rests. In his very first sentence of *The Concept of the Political*, SCHMITT confirms that “*the concept of the state presupposes the concept of the political*” and “[*a*] *people [Volk] must already exist as a political unity if it is to become the subject of Constitution-making*”.<sup>175</sup>

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<sup>171</sup> Idem, p.1755.

<sup>172</sup> LERNER H., *op. cit.*, p.34.

<sup>173</sup> Idem, pp.32-33.

<sup>174</sup> SCHMITT C., *The Concept of the Political* (Chicago: University of Chicago Press, 1996), p.28; cited in: LERNER H., *Op. cit.*, p.33.

<sup>175</sup> Cited in: Idem, p.34.

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Constitutions are born and may even die, but constituent power that sustains them cannot be destroyed, changed, or altered in any way. It persists as the extra constitutional ground of constitutions. *Pouvoir constituant* is a substantive entity that is not exhausted by its exercise, and is capable of “*persevering in its existence*”. The constitutions that arise from this metaphysical matrix are accidents posited and supported by this substantive power. Positive constitutions are born, suffer alterations, and eventually die, but over and above them the *pouvoir constituant* continues to exist.<sup>176</sup>

The distinction between absolute and positive constitutions denotes the relativity of the latter. This is implicitly acknowledged by SCHMITT when he writes:

The [positive] Constitution is not something absolute, because it is not self-generated. Again, it is not valid by virtue of its normative rectitude, or by virtue of its systematic closure. It is not granted by itself, but for a concrete political union... The [positive] Constitution is valid in virtue of the existing political will of whoever grants it.<sup>177</sup>

The Constitution, in its positive meaning, is generated by an act of constituent power. Constituent power is the bridge that links the absolute Constitution with the positive Constitution -a narrow bridge indeed.<sup>178</sup>

The decision that creates the political form of this positive constitution is made only once. But this “*only once*” is in reference to this particular positive constitution. The decision itself can change. This means, SCHMITT admits, that “*the form can change*”; new forms can be introduced without substantially changing the political union itself. In no case does the absolute constitution – that is the political union cease to exist.<sup>179</sup> What really counts in terms of continuity and identity is the absolute constitution.<sup>180</sup>

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<sup>176</sup> CRISTI R., *Op. cit.*, pp.1755-1756.

<sup>177</sup> Ibidem.

<sup>178</sup> Ibidem.

<sup>179</sup> Idem, p.1757.

<sup>180</sup> Idem, p.1758.

When such violations and measures are taken in the interest of the political existence of the whole, the supremacy of the existential [*des Existentiellen*] over mere normativity shows forth.

By the “*political existence of the whole*” and the “*supremacy of the existential*,” SCHMITT means the prior existence of an absolute constitution.<sup>181</sup> According to SCHMITT, this ideal concept of constitution comes to light when the contenders in a “*political struggle*” try to impose the “*constitution that corresponds to their political demands*” as the “*true constitution*”.<sup>182</sup>

The founding of a new state does not require the immediate adoption of a positive constitution. One ought to distinguish the founding of a state by means of a social contract from the conferring of a constitution. The state or social contract (*Staats-oder Sozialvertrag*) gives rise to a political union; a constitutional contract (*Verfassungsvertrag*) presupposes an already-existing political union. In accordance with his metaphysical design, SCHMITT asserts that “*a political existence precedes the giving of constitution (Verfassunggebung)*”.<sup>183</sup>

According to Schmitt, as well, the political precedes the Constitution because the pre-institutional political oneness of the people is the foundation of the Constitution. ‘The political’ is prior to any constitutional or legal order in a transcendental sense. The pre- or nonconstitutional political energies are constantly present and threaten the Constitution from within. Hence, they could never be encompassed or regulated by the written Constitution.<sup>184</sup>

### 6.2.2. Carl SCHMITT’s Ethnicity Concept of democracy

What is essential in this interpretation is the introduction of an ethnic understanding of democracy, the substitution of the *ethnos* for the *demos*. For SCHMITT, the political character of a democratic order was not characterized by good rules but by good rulers, whereby *good* represents the pre-normative existential quality of the people. In a

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<sup>181</sup> Idem, p.1759.

<sup>182</sup> Ibidem.

<sup>183</sup> Idem, p.1762.

<sup>184</sup> Cited in: LERNER H., *Op. cit.*, p.34.

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purely empirical sense, the people are only a multitude of individuals within a distinct territory; but in the political sense, the people exist in the ethnic and cultural oneness of the multitude, which entails its capacity to realize its otherness in relation both to other peoples and the liberal-universalist category of mankind. For him, the essence of the political, in a democratic order, is the will of the people to preserve their distinctive property and oneness, and to impose this will on the economic, social, and political cleavages of the modern society.<sup>185</sup>

It comes as no surprise that SCHMITT regarded the constitutionally non-alienated people, in their ethnic and national sameness, as the ‘true’ foundation of democracy. Democracy is the rule of the people’s will, whose essence is collective authenticity; this quality cannot be achieved by mere aggregation of private individuals’ will, the attribute of elections in liberal democracies.<sup>186</sup>

Within the institutional framework of mass democracy, the utmost attainable degree of authenticity and congruity of the people’s will, with its very essence, is to be achieved through representation. By representation, SCHMITT does not mean the complex process of constitutional aggregation of the many divergent and antagonistic interests and opinions, channelled and processed through rights, procedures, institutions, associations, et cetera, which are characteristic of constitutional democracy; rather, he suggests a kind of symbolic reappearance of the essential qualities of the people and their incarnation in a person who has the capacity to express the “true” self of the people.<sup>187</sup>

The concept of democratic representation clearly reveals the close connection between democracy and the authoritarian rule – an affinity which led SCHMITT to the contention that a true dictatorship can only be founded on democratic bases. According to this view, democracy and dictatorship are not essentially antagonistic; rather, dictatorship is a

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<sup>185</sup> PREUSS U.K., *Op. cit.*, pp.153-154.

<sup>186</sup> *Idem*, p.154.

<sup>187</sup> *Ibidem*.

kind of democracy if the dictator successfully claims to incarnate the identity of the people.<sup>188</sup>

Besides, some may –rightly- criticize SCHMITT’s existentialist interpretation of the democratic decision-making process, which is understood as the collective self-affirmation of a people. SCHMITT emphasizes in his *Verfassungslehre*: “*What the people want is good just because the people want it*”.<sup>189</sup> By removing any rational content from the guiding political will, and by construing it merely in terms of the expressive content of a naturalized *Volksgeist*, SCHMITT’s political will-formation “*does not need to be generated through a public discussion, participation in which is guaranteed by civic rights*”.<sup>190</sup>

More important for our contemporary problems is the question of whether the constitutional state presupposes some minimum degree of pre-political sameness and homogeneity of constituent power.<sup>191</sup> The idea of modern constitutionalism is the separation of fellow-feelings of a nation from the structure of government and the rights of individuals given from the constitution.<sup>192</sup> This subject will be treated in next chapters.

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<sup>188</sup> *Ibidem*.

<sup>189</sup> Cited in: LERNER H., *Op. cit.*, p.39.

<sup>190</sup> HABERMAS, *On the Relation between the Nation, Rule of Law, and Democracy*, p.135, cited in: LERNER H., *Op. cit.*, p.39.

<sup>191</sup> PREUSS U.K., *Op. cit.*, p.163.

<sup>192</sup> *Idem*, p.164.

## §7 CONCLUSION TO PART ONE

Opting to this or that approach of the constituent power had direct implications on the way the constituent power is conceived. Here are some elements that can distinguish the two schools.<sup>193</sup>

	<b>Formal conception</b>	<b>Material conception</b>
<b>What matters is</b>	The form of the exercise of framing power	The object on which that power is exercised
<b>Those entitled to original constituent power</b>	This depends on the circumstances of force, regardless of who is those entitled since it is pure fact and outside any legal consideration.	Those entitled to constituent power is the people in a democracy and the monarch in a real democracy (SCHMITT). The people are the only entitled to exercise constituent power (Beaud)
<b>The exercise of the original constituent power</b>	It is, by definition, outside of every constitutional framework. It is a mere fact.	When it touches the constitution (SCHMITT) or the national sovereignty (Beaud) even though it may follow constitutional revision procedures.
<b>Limits of the derived constituent power</b>	Only by the form and the procedures for the amendment	Materially limited.
<b>Relation between framing and amending power</b>	Identical in their function distinct in their organization and origin;	Distinct and opposed, there is only one constituent power.
<b>Conception of the constitution</b>	Formal conception	Material conception
<b>The constitution &amp; the constitutional laws</b>	The same value	Hierarchical

The passionate literature related to constituent power express those two different approaches; choosing one of those two options means also the determination of all the rest: the relevance of knowing who is entitled to constituent power; his legitimacy and limits; the nature of amending power; the nature of the constitution; the distinction between

<sup>193</sup> For more details, see detailed analyses in: GÖZLER K., *Op. cit.*, pp.28-40.

constitution and constitutional laws... all questions that we have treated in details in the second and third chapters, when we presented the formal and material approaches.

Let us take an example of two authors that had made a choice; consequently, their conclusions were totally in opposite direction. In his article, Prof. Nicolas MAZIAU, of the University of Nancy II, presented the two concepts of constituent power considering that:

Le pouvoir constituant originaire est ainsi communément défini comme la puissance dont dispose une personne ou un organe constitué spécialement afin d'introduire une nouvelle Constitution tandis que le pouvoir constituant dérivé ou institué serait celui de modifier le texte constitutionnel dans les formes prescrites par celui-ci.<sup>194</sup>

For MAZIAU, this definition creates a problem: the necessity to find out those entitled to sovereignty, and the authority of those that are charged to elaborate the constitution.

The second definition of original constituent power considers these questions as irrelevant for the jurists since they are pure facts; according to O. Pfersmann:

Le pouvoir constituant originaire ne peut être, par hypothèse, un phénomène juridique. Si l'on établit une Constitution en rupture avec celle qui existe jusqu'alors, on n'exerce pas un droit, on institue un nouveau système juridique. Le résultat est ce que nous avons appelé la Première Constitution historique. (...) L'établissement d'une Constitution ne relève pas du droit, il fonde le droit. (...) Puisqu'il n'y a pas de normes juridiques, il s'ensuit que la manière dont il convient de mettre en place une Première Constitution relève de la théorie politique non du droit.<sup>195</sup>

For those who adopt such positions, it is more important to know who actually exercise that fundamental competence than to know who is/are nominally that/those entitled to it: this depends actually of the provisory government that will determine the organ –or organs- that would

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<sup>194</sup> MAZIAU N., *Op. cit.*, p.1.

<sup>195</sup> Cited in: *Idem*, p.2.

activate framing power. It is possible that the government, although declares his attachment to democratic procedures, would try to use that in order to have some advantages.<sup>196</sup>

It is not easy to adhere to either of those two schools since none is completely satisfying: *First*, no doubt that the material conception is particularly complicated since many divisions can arise relating to the nature of the constitution (in opposition to constitutional laws) and its contents: what is its content exactly? Who can decide that? What is the best way to determine popular will? Besides, the material approach is also dangerous since it is easily the object of manipulation; *second*, the formal approach seems to be sometimes very simplistic. Jurists consider those entitled to constituent power as irrelevant since the enactment of original constituent power is, by definition, out of any legal limits. For those who opt for such a pure positivist approach, they may finish up by considering legitimate whatever follows the legal procedures. For them there is nothing legal outside the state, and anything inside the state that is in accordance with the legal norm, is considered as legal.

Nevertheless, the reconciliation between both schools is possible. In fact, the framing and amending power both have a constituent nature but are enacted in different contexts: the first is enacted in contradiction to the procedures provided by the same constitution, while the second is enacted within the limits of the provisions of the constitution: regardless of the nature of the constitutional reform and whether the people participated in the process of constitutional amendment.

Material limitations to the amending power can be easily surpassed by a double amendment: starting by amending the article that limits the amending possibility of certain constitutional provisions and then by amending the same provisions previously protected. The only limitations are procedural: the 'constituency' in charge of amending the constitution must respect the delays, and the procedures provided by the same constitution and the majority required. Also the procedures can be surpassed in double amendments. Accordingly, the only limitations that

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<sup>196</sup> PACTET P., *Op. cit.*, p.70

may exist to constituent power may be of a political nature that can be translated by self-binding provisions. Accordingly, the original constituent power may impose material or formal limitations on the framing power, but a double amendment will resolve the problem: for those who support this position, the amending power is unlimited.

We don't share this position; for us, changing those limits by double amendments imposed by the original constituent power shall be considered as enactment of the original constituent power. In other words, those entitled to exercise amending power commit a legal revolution against the constituent fathers, and against their will. They act formally in respect of the constitution (amending first the limiting article, and then amending what was first protected) but in fact, they do not. This can be considered as a 'constituent revolution', made by those entitled to exercise the framing power since those no longer comply with the limits imposed by the constituent fathers.

*Let us take the example of the limitations regarding the 'Republican form' of a state. Changing this kind of provision does not mean necessarily the enactment of original constituent power: all republics may convert one day to be monarchies and vice versa. Now, if a constitution provides that it is out of the constitutional amendment, then the double amendment to surpass this provision shall be considered as an enactment of the original constituent power and no longer the framing power, exactly as in the case of a revolution and a coup d'état; accordingly, those organs which effectuate such changes should seriously consider the consequences of their acts. As in a revolution, they may take the risk of failing, with the possible negative consequences in term of institutional stability and the pacific relationships between individuals and groups may be threatened.*

The enactment of the original constituent power is not completely out of any legal consideration since there is a need to distinguish between formal and material constitution. The material one, in fact, means a comprehensive system of laws and organization of power that every state, by definition, has. Accordingly, in the case of a new state -or an old one that has suffered drastic changes- the new (material) constitution reflects necessarily, the new force relationships and the

will of the new bearer(s) of supreme powers. The new system also reflects their ideology, their priorities, and their interests... which justified their 'revolt' (peaceful or bloody) on the preceding regime. In this case, the constituency (ordinary assembly, assembly ad hoc, or simply a committee nominated by the executive) is given the charge to establish a (formal) constitution. They have nothing to invent but only to codify the material constitution, already enacted in the new state. In case of a state existing already, and the original constituent power is enacted (changing the constitution by disregarding constitutional provisions) then it can be considered that this reflects a change in the *ethos* of the interested population or of the state institutions and organs. Again, the formal constitution had a tendency to reflect the material constitution that has concretely applied supreme norms, not simply those included in a text, called the constitution. Accordingly, jurists cannot simply ignore the original constituent power as irrelevant. The 'legal' character cannot be the exclusivity of 'state' production.

*Two examples at least to prove this assertion: first, the international law (we put aside the different reserves expressed by authors in relation to the nature of such a 'law'); second, the acts of entities (with legal effects) that are not completely sovereign (thus not compelling statehood conditions) but exercise prerogatives towards a group of persons and/or territory; this can be the case of non-states subjects of international law which can be international organizations and liberation movements.*

Original constituent power is distinguished from amending power. On this point, formal and material conceptions agree (although they do so, following totally different reasoning). What is not always clear is whether constituent power is separated from the *other* powers (mainly the legislative, judicial and executive). We may confirm here (as outlined by Carré de MALBERG) that constituent *power* is not the exclusivity of any of the powers of the state, but it does not cover all the other powers either. Constituent power cannot have another task but to enact a constitution. Constituent power is neither the legislative power nor the judicial or executive powers, nor all of them collectively. They are simply separated. The constituency should not be tempted to

play another role other than that for which it has been designed: frame a constitution.<sup>197</sup>

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<sup>197</sup> The question of the entitled to constituent power is much more complicated and is tightly related to another two questions treated to some extent in this first section, but will be considered in detail in the second and third parts: the question of limits and the question of legitimacy. In fact, many authors determine the limits in the light of pre-existent elements such as culture, ethnicity, religion... these elements can determine the identity of the people: the holder of constituent power. The reflection of the constitution on such identity may determine the legitimacy of such a document, since all (or at least the majority of) those making part of the people and living in the territory where the constitution is enacted, will consider it as their own.

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## PART TWO

### THE NATIONALIZATION OF CONSTITUENT POWER

Quoting GROTIUS, who contented that a people may give itself up to a king, J. J. Rousseau argued:

...according to Grotius a people is *people* even before the gift to the king is made. The gift itself is a civil act; it presupposes public deliberation. Hence, before considering the act by which a people submits to a king, we ought to scrutinize the act by which a people become *a people*, for that act, being necessarily antecedent to the other, is the real foundation of society.<sup>198</sup> It is this absolutism of individual's self-commitment which leads Rousseau to the conclusion that the sovereign who originates from this act cannot violate anybody's rights.<sup>199</sup>

Consequently, studying the foundation of the legitimacy of the constitution, one should inevitably consider the social contract as the basis of its legitimacy. Social contract means that popular sovereignty is expressed by the constituent assembly. J.J. Rousseau wrote:

Each one of us puts into the common stock his person and all his power, under the supreme direction of the general will; and we receive as a body each member of an indivisible part of the whole.<sup>200</sup>

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<sup>198</sup> PREUSS U.K., *op. cit.*, p.161.

<sup>199</sup> *Idem*, p.162.

<sup>200</sup> Nevertheless, one shall distinguish between the foundation of the society and the the constituent power. As explained by PREUSS: "*Rousseau speaks of the foundation of civil society, not of the process of constitution making. We must distinguish both steps, although empirically they will normally coincide. It is hardly conceivable that in real life the formation of a group out of multitude of individuals, and the determination of the structure according to which the group is enabled to act as an entity, can be separated from each other. However, the distinction is analytically important because the generation of a constitution for a group presupposes the very*

Some modern constitutions express this, in the same constitutional document: the 1949 German *Grundgesetz* states that the “*German nation has given itself this Basic Law, and that it applies to the whole of the German Nation...*”; the 1946 Japanese Constitution: “*We Japanese people... do proclaim that sovereign power resides with the people and do firmly establish this constitution*”; The 1996 South Africa Constitution: “*We the people of South Africa... through our freely elected representatives, adopt this Constitution as the Supreme law of the Republic*”. Hanna Lerner wrote,<sup>201</sup>

We live in an era of constitution making. Of close to 200 national constitutions in existence today, more than half have been written or rewritten in the last quarter of a century. Many of these constitutions begin with some version of the four famous words: “We the People of...” Yet it is surprising how limited and narrow the theoretical discussion is concerning the meaning of that “We”, and the nature of the relationship between the constitution and the people who draft it. The “We” issue is particularly problematic in the context of deeply divided societies, which are grappling with the very definition of their unity.<sup>202</sup>

For her, the people are the authors of the constitution and, accordingly, the constitution shall reflect also their specific identity.<sup>203</sup> Yet, there are different social contract approaches: *first*, the British approach – which did not need a written constitution -emphasizes the political self-government of society through parliament; *second*, the French approach

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*existence of the group. Hence, before the group gives itself a constitution, it must clarify who is subject to this constitutional determination, and who is entitled to participate in this decision. In other words, who is a member of the group*. Idem, p.161.

<sup>201</sup> Hanna Lerner is Ph.D. candidate in Columbia University. She presented this paper at the mini-APSA, Department of Political Science, Columbia University, April 30, 2004. The paper is not published yet, but I had obtained her approval for citing her in my thesis.

<sup>202</sup> LERNER H., *Op. cit.*, p.2.

<sup>203</sup> “*I refer here to the issue of the people who are the authors of the constitution, their values, their shared norms and beliefs, their identity. Constitutions, I wish to argue, do not only establish the structure of a political regime or set limitations on governmental power. They also delineate the highest principles and ultimate values shared by the citizens of the state*”. Idem, p.6.

– which had few scruples in replacing its constitutions- emphasizes the nation as it is manifested in the state; *third*, the American social contract approach reflects the American concern with a society consisting of a multitude of individuals whose mutual contract is contained in the Supreme Constitution.<sup>204</sup>

Now, the feeling of belonging together can be created by different means; consequently, there are different concepts of nation which influence and determine the concept of ‘constituent power’.

The German nation excluded all those who did not share the German culture. In the United States the exclusion of culture from politics was the means that created national unity. France created the nation based on political will by creating an own national culture and by suppressing divergent cultures.<sup>205</sup>

National identity played a necessary role in the emergence phase of the nation-state, by making possible a new mode of secular legitimization to the state based on a new form of social integration.<sup>206</sup> This is also the case of contemporary new states. The problem is to understand whether a constituent power will necessarily reflect a pre-existent identity,

The idea of constituent power seems to presuppose a capacity on the part of society to act together as a collectivity. However, it is not clear whether the collectivity of the people must exist prior to the constitution or if the very act of constitution making –of practicing the constituent power – which creates the collectivity. Does the constituent power of the people only exist if ‘the people’ represents an ethnically homogenous collectivity, or does it essentially mean that a pluralist and diverse society has the capacity to govern itself? Is the constitution the manifestation of the national identity of a particular people or is it an act of political self-organization of a civil society?<sup>207</sup>

The answer is simple (at least theoretically): both cases are possible. It depends in fact, on the country and the particular context in which the

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<sup>204</sup> VENTER F., *Constitution Making and the Legitimacy of the Constitution*, pp.10-12.

<sup>205</sup> TÖPPERWIEN N., *Nation-State and Normative Diversity*, p.3.

<sup>206</sup> LERNER H., *op. cit.*, p.19.

<sup>207</sup> *Idem*, p.11.

constitution is enacted. Nevertheless, the second question is, then, to know if there is any connection between the constitution and the collective who holds the constituent power. Here there are two options: *first*, there is no connection at all between the two. This is the position of Hans Kelsen; with his legal positivism, he solves the paradox of constitutional legitimacy by separating the legal from the political; *secondly*, there is a direct connection between the constitution and the people. Here there are three alternatives: a) the identity of “*We the people*”<sup>208</sup> derives from the making of the constitution itself; b) the people as well as their constitution emerge simultaneously in a gradual and incremental manner; or c) the constitution does not create the collectivity but mirrors a pre-political unity while recognizing the pre-constitutional exercise of a homogeneous nation’s general will.<sup>209</sup>

Although the constitution does not always express a predefined identity, it is nevertheless important that the constitution be felt as the result of the act of all those who compose the ‘we’ of the constitution. Otherwise it will lack necessary legitimacy. The constitution shall be considered by the majority of the polity (as individuals or as groups—ethnics, religious, linguistic...) as being their own and they shall identify themselves with the document.<sup>210</sup> In other words, the importance of the constitution does not lie in its expression of political identity, but in its ability to transform it into a civic one.<sup>211</sup> Besides, the constituent power is tightly related to the question of constitutional

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<sup>208</sup> Quoting Bruce Ackermann’s reflection in his volume: *We the People. Foundations*, Cambridge, Mass. /London, 1991.

<sup>209</sup> *Idem*, pp.13-14.

<sup>210</sup> LERNER H., *op. cit.*, p.12.

<sup>211</sup> As confirmed by PREUSS, “*the constituent power is simultaneously the creator of the constitution and the permanent threat to it. Yet, both functions are necessary for the vitality of the constitution. What matters is not the pre-constitutional shared –or unshared– identity, but the new political identity based on the constitution itself... The constitution although created by the constituent power, must always fight against the tendency of its own creator to infuse pre-political elements into the structures of politics...The constitution gives birth to the people in the sense in which this notion has been developed for the concept of democracy that is in the sense of the demos*”. Cited in: LERNER H., *op. cit.*, p.26.

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legitimacy. In contemporary times, the constitution that is adopted through democratic means is considered legitimate.<sup>212</sup>

Now, many authors expressed serious criticisms towards the social contract as the foundation of legitimacy of the constitution. For them, justifying law by social contract is fiction; law has to be justified by something outside itself. The constitution, indeed, has to be effective. It must be adopted and put into operation with authority. In a constitutional state, authority is characterized by democratic legitimization to which also the democratic minority acquiesces.

The origin supremacy of the constitution is therefore founded in the authority of the constitution-writing entity, but this does not explain the perpetuation of its predominance. In fact, predominance of the constitution is maintained by the operation of the legitimately established devices of the constitution itself, which can remain effective only as long as citizenry and the states' organs of authority – which are governed by the constitution, continue to lead legitimacy in its institutions through the due employment of the mechanisms and procedures provided by the constitution. The force outside the constitution, which ensures its primacy, is its practical legitimacy, when it gives reasonable and realistic expression to the principles and needs of the legal community that it serves.

In a constitutional state, revolution, civil war, and the amendment of the constitution shall be considered as a changing of the ethos and/or the will of the citizens. Accordingly, a legitimate constitution can be considered a solemn codification of basic rules for the operation of the

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<sup>212</sup> Idem, p.11. *“To be fully legitimate, political institutions must be perceived by citizens as democratic forums of self-rule, where debate is inclusive and comprehensible, representatives fully accountable, and decisions publicly justified. A well functioning public sphere of this sort would seem to require something more than a shared commitment to universal principles, something which motivates citizens to feel that particular institutions are somehow theirs, in a meaningful sense, so that they are in a position to adopt what Habermas calls the ‘we perspective of active self-determination’ ”.* LABORDE C., *From Constitutional to Civic Patriotism*, in: *British Journal of Political Science*, n. 32, 2002, p.601, cited in: LERNER H., *op. cit.*, p.12.

state. It tends to reflect national customs and usages that the legal culture of the state is strongly influenced, if not determined thereby.<sup>213</sup>

Now, most Arab countries have a constitution; the way the constitution is adopted and the role it plays done for it depends also on the way it is conceived by interested members of a population and those in power. The particularity of Arab States will be presented here, in the light of national movements and ideals and the influence it may have on those who have the power to elaborate the constitution in those states.<sup>214</sup>

After a general presentation of different concepts of nation, state, and nation-state, and the influence a nation has to constituent power, we will refer to Arab-Muslim particularity. We need examine if and how the reconciliation with the theory of constituent power will be possible.

In section two, we will present internal challenges facing contemporary Arab States: Arab nationalism and Islamism. This section will be followed by a brief presentation of the characteristics of early Caliphate, and the successive political and doctrinal divisions that occurred. After that, a presentation shall be done to different attempts to answer main doctrinal problems of that time which manifested themselves in the early schools of law, followed by the presentation of the doctrine of *Al-Fārābi* in his 'ideal city-state' and the political theory of *Ibn Khaldūn* and his *chef d'oeuvre*: the introduction to universal history (*al-muqaddimah*). The last section is dedicated for comparative presentation of some Arab constitutional provisions in relation to the internal challenges presented in the previous sections.

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<sup>213</sup> VENTER F., *Op. cit.*, p.12.

<sup>214</sup> Since "Constitutions are not "one-size-fits all" items. Their particular elements are of importance... On the other hand, one should be wary of reducing constitutional discourse to merely relativistic terminology. Thus, despite the dominance of the liberal constitutional perception, the notion of a constitution is not painted with only one particular cultural colour. That is, constitutions are not merely a product of Western civilization, or a new form of domination, which does not fit non-western societies. Moreover, constitutions should not be conceived merely in contextual terms which prevent any generalization. Albeit the variety of places and times in which they have grown, the range of documents identified as 'constitutions' do share some principles, standards, and symbolisms". LERNER H., *op. cit.*, p.43.

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In considering the problems of ‘authority’, the treatment of various arguments such as the Caliphate, the question of ‘power’, and the relationship between the governor and the ‘governed’, will need to be made. How can one or more have authority over the others? This is the main question posed in this part. *Ibn Khaldûn* addresses this in his long introduction, and modern writers such as Ghassan SALAMÉ,<sup>215</sup> took *al-muqaddimah* as a lesson for modern Arab states, where there is a real and continuous challenge for the states in order to establish and to justify their authority on their peoples.

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<sup>215</sup> Ghassan SALAMÉ, author of: *Appels d'Empire. Ingérences et résistances à l'âge de la mondialisation*, Paris, Fayard, 1996; *Démocraties sans démocrates. Politiques d'ouverture dans le monde islamique*, (dir.), Paris, Fayard, 1994; *Proche-Orient. Les exigences de la paix*, Paris, Complexe, 1994; *The Foundations of the Arab State*, Londres, Croom Helm, 1990; *The Politics of Arab Integration*, Londres, Croom Helm, 1990.

### §8 Different Concepts of Nation

The idea of constituent power presupposes the capacity of the society to develop its ability to act as a collectivity in order to gain (or regain) an active role in the organization of the lives of individuals and their social relations with each other.<sup>216</sup> According to Sieyès, the constitution is not based or dependent upon tradition, historical legacy, or religious revelations, but originates in a secular willpower... the concept of the constituent power of a nation implies that the empirical subject of this power is the people, not a monarch or an aristocratic *elites*.

The nation is prior to everything. It is the source of everything. Its will is always legal; indeed it is the law itself...Not only is the nation not subject to a constitution, but it cannot be and must not be...the manner in which a nation exercises its will does not matter... any procedure is adequate, and its will is the supreme law.<sup>217</sup>

As such, the nation's will is a pre-constitutional source of the constitution, and the constitution is the institutionalization of the nation's will.<sup>218</sup> At this point, the question arises regarding the meaning of a nation; according to Sieyès, the nation is a "*body of associates living under common laws and represented by the same legislative assembly*",<sup>219</sup> In other words, the nation consists of the totality of its citizenry.<sup>220</sup> This reflects the French idea of the nation. According to the German and Eastern Europe Concept, the nation is a pre-political community, which is constituted by the commonness of such properties as origin, race, language, religion, culture, history and the like. In this sense, a nation must be distinguished from a nation-state, which is a

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<sup>216</sup> PREUSS U.K., *Op. cit.*, p.148.

<sup>217</sup> *Idem*, p.149.

<sup>218</sup> *Ibidem*.

<sup>219</sup> *Ibidem*.

<sup>220</sup> *Idem*, p.150.

political organization that incorporates a nation. In this understanding a nation can exist independently of a state.<sup>221</sup>

*There are different interpretations of constitution: the radical-democratic form (France can be cited as an example) that refers to the people to resolve problems; a constitution is a continuous revolution, and as such is unstable. The other interpretation is the institutionalized form which creates institutions that would allow people to return to their normal lives (the new states following 1989 revolutions can be cited as examples).<sup>222</sup>*

According to Prof. MAZIAU, there are two approaches in relation to the constituent power, the first one he calls ‘*essentialiste*’ and the second he calls ‘*formaliste*’. The *first* approach nationalizes the constituent act and finds its origins in the doctrine of Sieyès, developed further by SCHMITT. According to such an approach, constituent power derives from the nation, the first subject of the law, from which the state and the constitution are originated. While the *second* approach finds its origins in the American constitutionalism, which is less dogmatic and considers the constitution as a group of mechanisms of division of power and institutional organization.<sup>223</sup>

### **8.1. Nation, State, and Nation-State**

Authors used to distinguish between the term of people as *demos* or as *ethnos*. *Demos* (*staatsvolk*) refers to the totality of citizens while *ethnos* (*Volk*) is a community based on the belief in a common descent or culture.<sup>224</sup> When a nation substitutes the people as an element of the state, we have a nation-state. The term ‘nation’ is accepted as a central political concept of recent times; sometimes it is synonymous with a

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<sup>221</sup> Ibidem.

<sup>222</sup> Idem, 145.

<sup>223</sup> MAZIAU N., *Op. cit.*, pp.7-8.

<sup>224</sup> TÖPPERWIEN N., *Op. cit.*, pp.4-5.

state, with its inhabitants, or with a human group bound together by loyalty and common solidarity.<sup>225</sup>

The nation is a community of people united in solidarity who believe in a common identity and who decide or want to decide about their own destiny through concreted political action. The political action is directed at gaining, preserving, or strengthening statehood.<sup>226</sup>

Now, if those entitled to constituent power are the people, then, they who have the right to limit themselves in a constitution are the sovereign people, considered as the totality of the citizens. In case the people *as demos* do not coincide with the people *as ethnos*, a problem exists: what is the relation between them? It is clear that vital decisions need to be taken and those entitled to sovereignty needs to make a kind of legal fiction, acting as if they represent the people in their totality - including those who are not or not yet the citizens of the state (the post World War II Germany, for example).<sup>227</sup>

The paradox of constituent power originates in the very definition of the term “the people”. The ancient Greek concept of the *demos* already had several possible interpretations: it could mean either the entire body, the many, the majority or the mob. This diversity is still reflected in the modern language: while the Italian term *popolo*, the French *peuple*, the German *volk*, and the Hebrew *am* (*am*), all convey the idea of a singular entity, the English word *people* indicates a plural. This diversity has generated a variety of approaches

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<sup>225</sup> VATIKIOTIS P.J., *Islam and the State*, p.35. For us, ‘nation’ is used mostly in sociological terms, while ‘people’ is more appropriate for legal use. Accordingly, we do not share the position of some authors who distinguish between nation and people by the existence or not of sovereignty. Nevertheless, it is true, as some authors put it that a people/nation as *demos* is a sovereign people while the nation/people as *ethnos* means a unique people based on a unique culture (for example, TÖPPERWIEN N., *Op. cit.*, p.5).

<sup>226</sup> TÖPPERWIEN N., *Op. cit.*, p.57.

<sup>227</sup> In the Palestinian case, the citizens of the future state of Palestine would exercise their constituent power and would adapt a constitution. This constitution needs to discuss some key arguments which regulation interests all the Palestinian people, not the Palestinian citizens only.

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aiming at understanding the interrelations between constitutions and the people who make them.<sup>228</sup>

In fact the *father* of the constituent power (l'Abbé Sieyès) defines the nation exclusively as *demos* (the French concept of nation). According to the definition given by Sieyès –as we have previously asserted- every *demos* is a nation. This was partially the position held by Dominique Schnapper who defines the nation as *demos* but then denies that nations exist as *ethnos*, although some nations began as ethnic groups. For her, in fact, once the state exists, all citizens are members of the nation.<sup>229</sup> Now, defining the concept of nation is essential for the state-building (in the case of a non-existent state) or for preservation of the state (if the state exists already); in fact the nation provides identity for the individual and legitimacy for the state.

Nation-building, as a reaction to a profound identity and legitimacy crises, went hand in hand with the internationalization and application of theories of popular sovereignty.<sup>230</sup> The definition of the state adopted here is a legal one: cumulatively, as constitutive elements, a state has a people, a territory, and sovereignty, and they must be interrelated.<sup>231</sup> This is called a minimalist definition because it is open to most existent regimes although illegitimate, authoritarian or non-democratic. The people are considered as subjects over whom the state exercises its sovereignty;<sup>232</sup> the sovereignty must encompass a people based on a

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<sup>228</sup> LERNER H., *op. cit.*, pp.10-11.

<sup>229</sup> *Idem*, p.45.

<sup>230</sup> *Idem*, p.23.

<sup>231</sup> This is the legal definition made given by Jellinek, in: *Idem*, p.21.

<sup>232</sup> Contemporary state's sovereignty is no more absolute. In fact, the state can impose self-limitations as for example when the state limits itself by the law and stop to be arbitral (rule of law). Besides, contemporary state is conceding elements that were always under its *domestic jurisdiction* in favour of international or regional organizations.

territory.<sup>233</sup> A similar definition of the state is presented by Carré de MALBERG, who wrote that:

Tout, ce que peut faire le juriste, c'est de constater que l'Etat se trouve formé a partir du moment où la collectivité nationale, fixée sur un certain territoire, possède, en fait, des organes exprimant sa volonté, établissant son ordre juridique, et imposant supérieurement sa puissance de commandement.<sup>234</sup>

## 8.2. The Different Concepts of Nation

The French concept of nation, based on the idea of citizenship, is an example of a *state* nation (the nation is the *demos*). In contrast, the German perception includes the idea of a *culture* nation (the nation is the *ethnos*). A nation based on common citizenship is necessarily a state-nation, whereas the culture-nation can be entirely stateless<sup>235</sup> and can be politically organized in a plurality of states.<sup>236</sup> In fact, in contemporary states, it is very rare –even impossible– that one homogeneous *ethnos* is politically organized in a nation; normally the *ethnos* and the *demos* of a state are incongruous.<sup>237</sup> This has serious consequences, as it has for the concept of self-determination, for example, as shown by PREUSS,

In Western Europe it (*self-determination*) meant that the demotic nation took over the government of an existing sovereign state, thereby safeguarding its self-determination. In the freedom movement that spread from Germany east and south, however, the term “self-determination” meant the liberation of a pre-established ethnic society from alien influence and foreign domination.<sup>238</sup>

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<sup>233</sup> The borders of the territory is not necessarily definitively delimited; this is the case of the state of Israel that has never defined its territory or delimited its borders. For a different position, TÖPPERWIEN N., *Op. cit.*, p.14.

<sup>234</sup> CARRE DE MALBERG R., *op. cit.*, p.484.

<sup>235</sup> Such as the Polish Nation between 1795 and 1918. PREUSS U.K., *Op. cit.*, p.150.

<sup>236</sup> Like Germany before the foundation of the Bismarck Reich in 1871, and between 1949 and 1990. See Idem, p.150. Many Arab nationalists believe that Arabs form a unique nation (in its ethnic sense) which is divided politically in indifferent modern Arab states.

<sup>237</sup> PREUSS U.K., *Op. cit.*, p.150.

<sup>238</sup> *Ibidem*.

In fact, different concepts of nation would have serious consequences on the concept of ‘constituent power’.

*For example, according to the French concept of nation, the constituent power is the power of a collective body, which, by the very act of constitution-giving, exercises its right to self-rule. The constituent power of a nation presupposes the notion of a demotic entirety of individuals –the citizenry- an entirety which originates from this very act of creating common laws and a common representative body.<sup>239</sup>*

It is generally accepted that the French Monarchy had already claimed to embody the French nation, but evidently, this claim did not refer to entire population living within the boundaries of the kingdom, nor did it refer to a pre-political entity such as the linguistic community of all Frenchmen.<sup>240</sup> In a political sense, there was no French nation before the Revolution nor was there one before its establishment through the exercise of the constituent power by the third estate.<sup>241</sup> Therefore, it was not the commonness of the language that constituted the nation, but, conversely, it was the nation that required and created the commonness of the language.<sup>242</sup>

According to the German concept of nation, the meaning of nation-state is that a nation, (in its ethnic sense, defined in terms of commonness of language and/or religion, culture, origin, etc.), acquires its political existence in its own state. The nation is a pre-statal, pre-political, existential and almost an eternal entity, whereas the state is a quasi-accidental and ephemeral phenomenon, which supports the survival of the nation in the history, but is not really the embodiment of the essence of the nation. However, the political self-determination of a nation requires statehood; but it is a statehood based on ethnic homogeneity.

It is the self-determination of ethnos, directed against alien influence, rather than the political self-rule and freedom of demos, which is

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<sup>239</sup> Ibidem.

<sup>240</sup> Idem, p.151.

<sup>241</sup> Ibidem.

<sup>242</sup> Idem, p.152.

directed against political pressure and social inequality.<sup>243</sup> What is most relevant in the debate regarding the affinity between constitutions and constituent power, is the conclusion that in the framework of the ethnic conception of a nation the constituent power of the nation does not coincide with the principle of democratic sovereignty (just as national self-determination is not the same as democratic freedom).

In her recently published doctorate thesis (*Nation-State and Normative Diversity*) Nicole TÖPPERWIEN dedicated the second part to the American, French and German concept of nation. For her, these different experiences present three diverse ways of considering culture, and in the final part an alternative to these is presented in the Swiss concept. For her, nation and culture are not linked in the USA; culture *is not* relevant for the state because it *was not* relevant for the nation whereas in France the nation creates and defines the culture; accordingly, the culture is relevant to the nation and to the state although it was not relevant to nation-building. On the other hand, in Germany, the culture defines the nation; consequently, culture is relevant to the nation and the state, and was already relevant for to nation-building.<sup>244</sup> The different concepts of nation determine the idea of a state, and its relation to individuals and civil society.<sup>245</sup>

### 8.3. *Sha'ab or Umma?*

It is clear that there is not one definition of the concept of nation, people and state. Actually, these terms are often used as synonymous, while they are not.

As an example of that confusion, we will mention the charter of the United Nations (UN). In fact, we read in its first beginning: “we the **peoples** of the United **Nations**...” while the organization membership is limited to **states**. Peoples subjectivity, in fact is limited to the recognition of people’s right to self-determination, which is not

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<sup>243</sup> Ibidem.

<sup>244</sup> TÖPPERWIEN N., *Op. cit.*, pp.68-69.

<sup>245</sup> The particularities of each system are related to their constitutional history, however, due to the limitations of this research, a detailed investigation cannot be made.

interpreted pacifically, especially when it does mean the right to statehood, since the UN is based on sovereignty of member states.

The same confusion occurs in the Arabic terminology. The concept *umma* (translated as a nation) is used when it refers to Islamic and/or Arab nation, while *sha'b* (translated as people) refers to single Arab peoples and *dawla* (translated as state) refers to the territorial Arab states (*dawla qutryya*). The term *dawla* is relatively modern and refers to ruler's (or dynasty of rulers) administration in the recent past, similar to the concept of Sultanate in the Ottoman Empire. The concept of *ard or arady* (territory or territories) refers to all the Arab territories as one unit or to the territory of single Arab states, while the concept *qutur* refers only to the territory of a single state.

In addition, the adjective of the word 'nation' (translated as 'national') is *qawmiyya* when it refers to the Arab nation, while it is *wataniyya* (also translated as 'national') when it is related to the territorial Arab nationalism, also meaning patriotism. While the concept of *muwatana* refers to the citizenship; this concept has its origin in *watan* that is homeland, although sometimes it is used to refer to Arab land, *alwatan al-arabi!*

Consequently, it is necessary to take in consideration these different concepts, and understand them in their historical context and actual application, in order to understand the relation between nation-people in the Arab perspective.

In his book, *Az-Zahir fi ma'ani Kalimat an-Nas*, Ibn al-Anbari notes that the term *umma* (nation) occurs in eight different senses in Arabic. Some of these meanings are: a community or a group of people; a religion; time...<sup>246</sup> Besides, the terms nation (*umma*) and mother (*umm*) prove by virtue of their being derived from the same linguistic root, that 'nation' is an extension of one's family – indeed it is the bond of brotherhood par excellence. 'A nation is a uterine experience', says *al-Arsuzi*, meaning that it is an extension of foetal life.<sup>247</sup>

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<sup>246</sup> BENSALD S., *Al-Watan and Al-Umma in Contemporary Arab Use*, p.150.

<sup>247</sup> Idem, p.167.

In the *al-muheit* dictionary the term *umma* means a group of people (*nas*)<sup>248</sup> united by common land, language, tradition, interests, emotions and aspirations; Accordingly, the Arabs would be considered as one complete *umma* although they may be distributed in different states, each holding its own political independence.

In the *al-Ghany* dictionary the term *umma* means a group of people (*nas*) united by common historical liaisons that may be composed of language, religion or the economy and have the same goals in their beliefs, the politics or in the economy. It is used to indicate the Arabic *umma* and the *Islamic umma*. The same term is used in plural *umam* to indicate, for example the United Nations.

By contrast the semantic field of the term *watan* (fatherland, or patrie, in French), is much narrower than that of the *umma*. According to *Ibn Manzur*'s (*Lisan Al-'Arab*, Vol.XIII: 451) *watan* is “*the house in which one lives; one's residence or native place; the place where these animals lies down to rest*”.<sup>249</sup>

The word *istawtana* means ‘to settle in a country’.<sup>250</sup> Still, there is a difference in contemporary use:

There is a wide difference between the meaning of *watan* used by Ibn Manzur and the meanings which the term conveys in contemporary Arab use, where both *watan* and its derivative form *wataniyya* (Patriotism), are highly charged emotionally. Besides, with reference to national territory itself, the term, in contemporary Arab usage implies the existence of linguistic, racial and cultural ties between different groups and individuals living in the same geographical area.<sup>251</sup>

<sup>248</sup> As the French concept ‘*gens*’ and not ‘*peuple*’; both these French terms are translated into English as ‘people’.

<sup>249</sup> Personally, I believe that the main difference between *umma* and *watan* is that the first is related to **persons**: a community or group of people at the centre of relations between the governors and the governed at the beginning of Islam, as in the case of medieval Europe. The second, on the contrary, refers to the **place**, where one (human or animal) lives, and rests. The term *watan* in contemporary Arabic reflects the evolution of the concept of state in Arab and Islamic culture.

<sup>250</sup> BENSALD S., *Op. cit.*, p.151.

<sup>251</sup> *Ibidem*.

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In the *al-Ghany* dictionary, the word '*sha'ab*' means a group of people (*nas*) united by common liaisons and speaking one language. Here the concept of *sha'ab* is not distinguished from *umma* since this definition does not distinguish Palestinian *people* from the Jordanian *people* for example, considered in this definition as one Arab *sha'ab*. The term *sha'ab* here is equivalent to *umma*. The only difference is that *sha'ab* can be used to indicate distinct Arab populations (thus, it also can be used in the plural) when referring to all Arab people considered as a single entity, while the concept of *umma* can be used only in the singular and in reference to the Arab nation as a single unit.<sup>252</sup>

#### 8.4. The Powerful Concept of Homeland

The power of the homeland concept to shape ethnicity, nationalism, citizenship, and immigration is well illustrated by the Israeli/Palestinian case, in which two opposite homeland narratives are told: Palestinian-Arab and Jewish-Zionist. The former is premised on the continuous long-term residence as an indigenous people of the country, while the latter rests on ancient sacred texts and Diaspora longings for a 'promised land'. Both Jews and Palestinians claim to be the rightful owners of the land on historical grounds, but refer to different historical periods to justify their claims.<sup>253</sup>

The 'homeland' is a powerful mobilizing force behind ethnic and national movements and identities. Homeland ethnicity is distinct from immigrant ethnicity, and forms the basis for homeland nationalism. Ethnic homeland territoriality was transformed during the modern period, and was gradually elevated to state level, becoming increasingly separatist and absolute. This came about because the homeland territory constituted a central foundation of modern ethnic nationalism and embodied much of the nation's cultural and political assets.<sup>254</sup>

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<sup>252</sup> The Arab terminology does not coincide necessarily with the terms used usually in English.

<sup>253</sup> *Encyclopaedia of Nationalism*, p.376.

<sup>254</sup> *Idem*, p.381.

In Arabic, homeland is translated as *watan*. This concept will be presented with reference to Arab and Muslim culture and usage, and then applied to the Palestinians. For them, in fact, it was this concept that related their nationalism to a specific land called Palestine, which they considered their homeland and the realization of their nationalism. Palestinian nationalism involves the specific identity of Palestinians in their relation to their homeland. It seeks to exhibit national characteristics, to emphasize them, and to deepen people's awareness of them.<sup>255</sup> It is a return to the people, as the only source of legitimacy and power, as *Mustapha Kamel* (the Egyptian nationalist leader) put it:

The people are the backbone of the *watan* and the source of its prosperity, its glory and its happiness.<sup>256</sup> The people are the only real power, to whose will even the greatest and mightiest men submit.<sup>257</sup>

The notion of *watan* was used to justify the rebellion against Turkish occupation, even though the occupier professed the same religion as the occupied.<sup>258</sup> The same concept was used to justify the rebellion against western colonialism under the mandate.

*At-Tahtawi* says that 'one's *watan* is the home in which one was born and brought up, the home of one's family and relatives, the land whose soil, food and air have contributed to one's growth'.<sup>259</sup> In fact, the notion of *watan* acquired a new dimension and became connected to nationalism and patriotism. *At-Tahtawi* writes:

The devoted nationalist is the one who scarifies every thing, even his life, to protect his *watan* against any potential harm-doer, just as the father would protect his child from evil... therefore, the citizens' intentions regarding their *watan* should always be virtuous and honorable.<sup>260</sup>

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<sup>255</sup> BENSALD S., *Op. cit.*, p.162.

<sup>256</sup> *Idem*, p.164.

<sup>257</sup> *Ibidem*.

<sup>258</sup> *Idem*, p.153.

<sup>259</sup> *Idem*, p.155.

<sup>260</sup> *Idem*, p.157.

Only since *at-Tahtawi's* time it was common to read that

Fellow-countrymen are always united, sharing the same language system, having the same ruler, and obeying the same ruler, and obeying the same laws under the same political system.<sup>261</sup>

Before his time, membership consisted of belonging to the Islamic community, or to the land of Islam, regardless of language and political differences. As *ad-Duri* has pointed out, *at-Tahtawi* must have been influenced by the notion of a national state.<sup>262</sup> It is clear that the concept of nation switched to its civic dimension here. This is the position of *Adib Ishaq* who repeatedly pointed out that the worth of a *watan* resides in its citizens, that is, in the people who are 'equal in rights and duties in front of their *watan*'. The totality of these citizens constitutes the people.<sup>263</sup>

In *at-Tahtawi's* view, the primary characteristic of a compatriot is that 'he/she enjoys the rights of citizenship, the most significant of such rights being *total freedom* in society'. Finally,

the citizen will not be considered to be free unless he submits himself to *the laws of the country*, and helps in its application. The individual citizen's submission to national law necessarily entails that, in return, the country guarantees the citizen's civil rights as well as certain municipal privileges and services.<sup>264</sup>

The *watan*, as political philosophers define it, is "*the place you descend from, toward which you have well defined obligations, in which you have sacred rights, and in which you, your kin and your property are secure*".<sup>265</sup> According to *Adib Ishaq*, "*The watan is the individual's place of residence. Traditionally, it is the country in which the great majority of a nation (umma) has struck roots and grown in number*

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<sup>261</sup> Ibidem.

<sup>262</sup> Idem, pp.155-156.

<sup>263</sup> Idem, p.163.

<sup>264</sup> Idem, p.156.

<sup>265</sup> Idem, p.158.

*through the process of creation*".<sup>266</sup> Quoting La Bruyère, Adib Ishaq writes:

What use is to me to have a great *watan*, if in it, I'm unhappy, despised, living in perpetual humiliation, misery, and fear of imprisonment? Consequently, a *watan* is meaningless unless it is a place where one can live with dignity and respect... as La Bruyère put it, 'there is no *patrie* where there is despotism'. Or, as the ancient Romans defined it, 'one's fatherland is that in which one enjoys political rights and performs political duties'.<sup>267</sup>

From the fundamentalist point of view, there is no connection between *watan* and territory. This had been the case since the dawn of Islam. According to Sayyed Qutb,

Since that day, the fatherland of a Muslim ceased to be a portion of land. Instead, his *watan* became the home of Islam, the land in which Islam and Islamic law are the sole authority.<sup>268</sup>

Sayyed Qutb considers that a "*Muslim's watan is not a piece of land, and his nationality is not that of a government*".<sup>269</sup>

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<sup>266</sup> Ibidem.

<sup>267</sup> Ibidem.

<sup>268</sup> Idem, p.172.

<sup>269</sup> Idem, p.173.

### §9 Arab nationalism, Islamism and Territorial States

The relation between Arab nation and single Arab peoples is an interesting study case and of significance in this research. The relation between the two concepts may not be properly realized by using concepts such as 'nation' and 'people'. In fact, these two concepts have to be understood in the light of the wider concept of the *umma*, which was originally used to indicate the Islamic community, or the community of believers. It is noted, in fact, that a return to *shari'a* has been made, and an increasing reference to Islam as a justification of the State's authority and of the state's rejection at the same time, made respectively by the state apparatus and the fundamentalist groups of Arab States. In contemporary Arab States, the relation between these three concepts (the Islamic nation, the Arab nation and the single Arab people) is becoming increasingly problematic.

This apparent incompatibility explains the popular diffidence towards their regimes from the one side and the diffidence of Arab regimes towards movements promoting HR and democracy (especially with regards to the liberty of thought and expression), on the other. Still, most of Arab regimes justify their same authority by 'elections' or by popular legitimacy and representation, which are the basic elements of democracy.

In order to define people and nation in general, and in the Arab and Muslim context, the terminology will be clarified, followed by an introduction to Arab nationalism, in relation to existing Arab States and to Islamism.

After considering the concept of nation in general, the concepts of Arab nationalism, territorial nationalism and Islamism will be taken into account.<sup>270</sup> The term nationalism will be reviewed, and then

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<sup>270</sup> Some authors advocate that nationalism is a European invention carried to the Middle East by Napoleon. It became precarious because it clashed with older, deeper loyalties, and remained insignificant in determining and directing political identity under Islam. Consequently, a country under Islamic history is a place, while a nation is a people or *umma* and the community is determined by religious belief. Accordingly, identity remained based on religious belief and loyalty developed, by

consideration will be given to Arab nationalism, its genesis and the relation between pan-Islamism and Pan-Arabism, followed by Arab States and territorial nationalism in the final section, then the question of Islamism in relation to Arab nationalism and territorial nationalism will be evaluated.

### 9.1. Arab Nationalism

The term *umma*, throughout the Islamic era, has referred to the universal Muslim community. Around the end of the nineteenth century, however, the term *umma* began to appear in political literature of the time with reference to the universal Arab community, thus acquiring a preponderantly secular meaning.<sup>271</sup> Not only that; Arab nationalists insist that the Arab nation is the only 'true' nation, either in *Sati' al-Husri's* rather assertive way or in *'Abd al-'Aziz ad-Duri's* more subtle prose. For 'Aflaq, *umma* is the Arab nation; since a nation exists when the population believes that they constitute a nation, and not according to the increment or reduction of numbers.

According to 'Aflaq, 'a nation is an idea, a matter of will': a nation is not a matter of numbers, but an idea embodied in the totality of its members or in part of them. Therefore, there is no relation between this idea and the increase and decrease in the number of individuals, because a nation does not perish when its population decreases in number. Rather, it dies out if the idea itself ceases to exist among the population. The total number of people is not holy in itself; rather, its holiness depends on its ability to embody the idea of *umma* in the present and in the future.<sup>272</sup>

The proponents of an Islamic *umma* overshadowing all these territorially, linguistically or ethnically defined '*asabiyyas* (group feelings), tend to view these loyalties as pre-Mohammedan and thus anti-Islamic *Jahiliyya* concepts, which should have disappeared when the Mohammedan *Da'wa* (Call) emerged.<sup>273</sup> In fact, some authors

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force of historical circumstances, to a state, a government, or a ruler. VATIKIOTIS P.J., *Op. cit.*, p.36.

<sup>271</sup> HARIK I., *The Origins of the Arab State System*, pp.20-21.

<sup>272</sup> BENSALD S., *Op. cit.*, pp.166-167.

<sup>273</sup> SALAMÉ Gh. (ed.), *The Foundations of the Arab State*, p.5.

outlined that the concept of community (*umma*) in Islam is an expression of a religious ideology. The community exists in order that the believers may actualize the Islamic ideal: God's revealed pattern for the universe.<sup>274</sup>

One has also to bear in mind that if nationalism has rapidly 'invaded' Arab mentality, it has not been met with a clear definition of where the nation is.<sup>275</sup> This nation is based on the same unified high culture that was generated from language and religion throughout the ages, which bequeathed a sense of collective identity.<sup>276</sup> This united culture is also enforced by a similar history through the centuries and does not deny the particularities of a single Arab population. GHALIOUN<sup>277</sup> wrote:

[P]arler d'une seule et même nation ou des nations différentes, implique pour les instants des discours nationaliste la reconnaissance de l'homogénéité ou de la cohésion interne des populations arabes ou régionales propres. Dans ses conditions toute tentative visant à mettre en doute cette homogénéité est considérée par les nationalistes arabistes ou régionalistes comme une manœuvre tendant à saper les fondements de l'entente nationale. Elle ne peut avoir pour origine que les manipulations extérieures ou l'émergence des solidarités archaïques pré-nationales ou anti-nationales.<sup>278</sup>

I shall urge here that the question of Arab nationalism used in modern Arab states is related to the question of legitimacy; political regimes in fact, require justification beyond raw power through an appeal to such things as tradition, charisma, or nationality.<sup>279</sup> The 'agents' of nationalism can either be states -after achieving independence, national

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<sup>274</sup> VATIKIOTIS P.J., *Op. cit.*, p.29.

<sup>275</sup> SALAMÉ Gh. (ed.), *Op. cit.*, p.4.

<sup>276</sup> HARIK I., *Op. cit.*, p.20.

<sup>277</sup> Burhan GHALIOUN, author of *Le Malaise Arabe: l'Etat contre la Nation; Islam et Politique: la Modernité Trahie; Crise de la Politique: l'Etat et la Religion* and *La Culture Arabe: Entre Modernisme et Traditionalisme*.

<sup>278</sup> GHALIOUN B., *Le Malaise Arabe L'Etat contre la Nation*, p.38.

<sup>279</sup> *Encyclopaedia of Nationalism*, p.385.

movements, or both.<sup>280</sup> Nevertheless, in contemporary Arab states there is a new phenomenon: the switch to Islamism. In effect, political regimes justify their power by the reference to Islam; simultaneously, Islamic movements combat those same regimes in the name of Islam.

### 9.1.1. The Genesis of Arab Nationalism

The Ottoman Empire ruled in the name of Islam and demanded the loyalty of both their Muslim and non-Muslim subjects on that basis.<sup>281</sup> In fact, there was a fostering of collective identity and loyalty to the Ottoman Empire based on citizenship regardless of creed or race. This was essentially a form of patriotism.<sup>282</sup> Patriotism originally refers to the love of *Patria*, which in turn derives its meaning from Latin *pater*, that is, 'father'. *Patria* is thus the fatherland: place of birth and the soil in which one's ancestors were buried; a soil characterized by a commonality of memory.<sup>283</sup>

According to some authors, Arabs under Ottoman rule did not perceive themselves as subject of foreign rulers. They identified with the Ottomans and looked upon the Sultan as the Muslim head of a Muslim commonwealth of which they were a part.<sup>284</sup> The wave of patriotism in the Ottoman Empire was followed by the growth of an organic or ethnic nationalism, which concerned itself with fostering a common identity and the realization of an intrinsic spirit of the collectivity, rather than with forms of governance that could ensure the rights of the individual citizen.<sup>285</sup>

In the late nineteenth century, the Ottoman Empire claimed the loyalty of Muslim peoples outside the Empire, and attempted to mobilize them for political purposes in order to meet the political and cultural

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<sup>280</sup> Idem, p.488.

<sup>281</sup> *Encyclopaedia of Nationalism*, p.486.

<sup>282</sup> Idem, p.485.

<sup>283</sup> Idem, p.407.

<sup>284</sup> HARIK I, *Op. cit.*, p.35.

<sup>285</sup> *Encyclopaedia of Nationalism*, p.487.

challenges posed by the West, an ideology known as Pan-Islamism.<sup>286</sup> Even the most prominent modernizing and nationalist leaders of modern Turkey, *Mustafa Kemal Atatürk* rose to power professing his service to Islam and commitment to nationalist ideas in equal measure. In fact, only two years after Atatürk abolished the Sultanate (1922) he abolished the Caliphate as well.<sup>287</sup>

The first wave of nationalist thinkers were much more concerned with the issue of how to govern empires and states rather than forging a new identity, although they did that as well. The ideas and ideologies being voiced were liberal and constitutional, emphasizing a patriotic loyalty on the basis of residing in a given territory, and the focus of loyalty based on genealogical, cultural or racial ties; a distinction made by Bernard Lewis who called the former patriotism and the latter nationalism.<sup>288</sup>

For some authors, the substance of national movements may be better explained as a domino-like chain reaction towards neighbouring national ideology, state, or national movements, which were usually corrupt, or, either excluded a group from the nation or wrested territory away from another group. Turkish nationalism began outside the Empire and in turn stimulated the growth of Arab nationalism in the second decade of the twentieth century, just as Palestinian nationalism –according to the same author- emerged in the 1920s, mainly as a reaction to Zionism.<sup>289</sup>

In fact, being conscious of being Arab and defining oneself on that basis rather than as a Muslim subject of the Empire was most probably in reaction to the first stirrings of Turkish nationalism and the policies

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<sup>286</sup> Idem, p.485.

<sup>287</sup> Idem, p.486.

<sup>288</sup> Idem, p.487.

<sup>289</sup> Idem, p.486. In my opinion, this idea is not completely true; in fact, if it is undeniable that Zionism may have helped the crystallization of Palestinian identity, it is also unrefutable to prove that Palestinian nationalism existed also before it; in other words, Palestinian identity would have developed without the clash with the Zionist claims on Palestine, and their nationalism would have developed as much as other territorial identities or nationalisms in nearby Arab countries.

that the new rulers of the Ottoman Empire, the Committee of Union and Progress, adopted after coming to power in 1908.<sup>290</sup>

With Turkish nationalism replacing Islam as the motivational force in the Anatolian remnant of the Ottoman Empire after 1918, many Arabs (both Muslims and Christians) who did not want the imposition of French and British control looked increasingly towards nationalism as a rallying force to coordinate resistance. It was only midway through World War I that the first successful “nationalist” revolt took place when *Sharif Hussein bin ‘Ali* declared the Arab revolt in 1916 and declared himself king of the Arabs. The revolt was motivated by the British promises of establishing an Arab state that was to stretch from the eastern part of Syria to the Persian Gulf and Palestine.<sup>291</sup>

Authors differ in their opinion regarding the ideological origin of Arab nationalism. The first group considers it a creation of Lebanese and Syrian Christian minorities; the second group considers it a development of Islamic modernism.<sup>292</sup> The arguments presented by each group are consistent; however, it would be wrong to conceive the origins of an Arab national identity as an exclusive preoccupation by Christian minorities before 1908, since before that date, many Islamic cultural societies emerged, promoting the Arab language and uniqueness of Arab culture.<sup>293</sup>

Nationalism here, concerns the crystallization of a modern collective identity focusing on language, culture and history with a special relationship in defining a territory, and had a crucial effect on other important social processes in the area such as modernization, the crystallization of a territorial state, and the impact and role of religion, and was in turn affected by them.<sup>294</sup>

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<sup>290</sup> Idem, p.492.

<sup>291</sup> Idem, p.493.

<sup>292</sup> Idem, pp.491-492.

<sup>293</sup> Ibidem.

<sup>294</sup> Idem, p.486.

According to GHALIOUN, Arab nationalism is an ideology that replaced Islamism; for the same author, Arab nationalism was formally inaugurated at the Arab Conference held in Paris on 18 June 1913.<sup>295</sup> Besides, he considers the renaissance of Arab nationalism, after a thousand years, as a miracle. For him this was due to two factors: religion and modern rationalism with which Muslims were familiar in the nineteenth century.

Ce miracle est également dû au travail lent et continu de deux facteurs fondamentaux, en apparence contradictoires, à savoir la religion, dans la mesure où elle a constitué le dernier refuge de la langue et de la culture Arabes, sans laquelle celles-ci auraient éventuellement disparu, et le ferment du rationalisme moderne qui ébranle profondément la pensée musulmane au XIX<sup>e</sup> siècle.<sup>296</sup>

The dissolution of the Ottoman Empire was important to the growth of Arab nationalism;<sup>297</sup> still, the diffusion of Arab nationalism was possible in the 1930s and 1940s with the dissemination of the works of nationalist secular scholars such as *Sati' al-Husri* (from Iraq), and the writings of *Michel 'Aflaq* (from Damascus), *'Abd al-Rahman al-Bazzaz* (from Baghdad) and *Costantine Zuraik* from Beirut. Arab nationalism began to advocate the creation of a unitary Arab state stretching from the Moroccan coast in the west to the 'Arab Gulf' in the east.<sup>298</sup>

*Jamal 'Abd el-Nasser* took the lead in opposing Western attempts to integrate Arab States into the Cold War schemes to contain the Soviet Union by announcing the nationalization of the Suez Canal. Arab nationalism swept throughout the Arab world, following the attack by British, French and Israeli troops in 1956. In fact, the creation of the United Arab Republic (UAR) in February 1958 between Egypt and Syria was possible because of popular pressure, motivated by Arab nationalism since the union was supposed to be the nucleus of a future

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<sup>295</sup> GHALIOUN B., *Op. cit.*, p.26.

<sup>296</sup> *Idem*, p.15.

<sup>297</sup> *Encyclopaedia of Nationalism*, p.486.

<sup>298</sup> *Idem*, p.493.

Arab nation-state. The dream was shattered when a *coup d'état* by Syrian officers in 1961 spelt the end of the UAR.<sup>299</sup> In addition, Israel's victory over Egypt, Syria and Jordan in the Six-Day War in June 1967 dealt a major blow to Arab nationalism.<sup>300</sup>

### 9.1.2. Pan-Islamism and Pan-Arabism

In contemporary Arab thought, three major views underlie the systematic use of political notions: nationalism, pan-Arabism, and pan-Islamism. However, the distinction between the three is not always clear-cut.<sup>301</sup> The first regards single Arab people; the second, Arab *umma*; the third, Islamic *umma*. It is clear that territorial nationalism of a single Arab people had to face these two powerful currents:

Contemporary Arab nationalist, though, has had to resist two powerful currents, both striving to contain and subsume it. On the one hand, there was the pan-Islamist movement which called for a kind of Islamic renaissance, together with unification of political power around the exhausted Ottoman Caliphate or around a central Islamic consultative system. In both cases, the movement's slogan was the Islamic *umma*. On the other hand, there was the pan-Arab movement which, whether seeking autonomy from Ottoman domination or calling the Arabs to resist Western colonization, always brandished the slogan: *watan*. It follows, therefore, that Arab nationalist discourse brought out and reinforced the notion of nationalist discourse brought out and reinforced the notion of *watan*.<sup>302</sup>

Pan-Islamism and Pan-Arabism are the most important pan-nationalist movements in the Middle East. Adherence to pan-Islamism or to pan-Arabism has resulted in different conceptions of the notions of *umma* and *watan*.<sup>303</sup> Pan-nationalism refers to movements whose primary goal has been to organize individuals and groups inhabiting two or more states into one nationality. In fact, nationalist ideologies, whether

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<sup>299</sup> Idem, p.495.

<sup>300</sup> Ibidem.

<sup>301</sup> BENSALD S., *Op. cit.*, p.153.

<sup>302</sup> Idem, p.159.

<sup>303</sup> Idem, p.153.

promoted by states or by national movements, have not always recognized state borders.<sup>304</sup> In other words, Pan-nationalism is an ideology calling for the unification of a people living across existing state borders into one organic political entity, usually a sovereign state.<sup>305</sup>

The Turkish Sultans have promoted Pan-Islamism as a vehicle for holding together their disparate subjects throughout the Middle East and insulating the Empire against revolution. Later on a notion, of Pan-Arabism emerged in the Arab world, which underscored the idea that there is such a thing as an Arab nation, speaking a common language, sharing a common culture and history, and encompassing the peoples of the Arab states.<sup>306</sup> According to GHALIOUN, Arab nationalism does not mean the disappearance of Ottoman Islamism; rather, it rendered possible, some decades later, the appearance some decades later of Islamism with rival political claims:

Sous sa forme initiale et confuse, l'idéologie arabe a surtout à rendre plus aisée, politiquement et psychiquement, la sécession, l'effondrement de l'idéologie ottomane vieille d'environ cinq siècles et le dépassement de l'échec politique du réformisme islamique incarné par le projet de la Ligue musulmane. Elle se veut le support d'une conscience nouvelle, susceptible d'offrir une vision cohérente à l'action collective, des objectifs réalisables et, par conséquent, un sentiment d'appartenance à un seul et unique peuple. Cela n'a pas empêché l'islamisme de continuer d'exister, mais plus comme la source d'une conscience religieuse, morale et culturelle. C'est d'ailleurs cette transformation effective de la base d'identification politique, marginalisant la religion sur ce plan, qui rend possible par réaction, la naissance. Quelques années plus tard, de l'islamisme comme support d'une revendication politique concurrente.<sup>307</sup>

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<sup>304</sup> *Encyclopaedia of Nationalism*, p.487.

<sup>305</sup> *Idem*, p.485.

<sup>306</sup> *Idem*, p.397.

<sup>307</sup> GHALIOUN B., *Op. cit.*, p.28.

### 9.1.2.1. Pan Islamism

Pan-Islamism is a trans-ethnic and trans-national political movement that started in the nineteenth century. Its aim was to raise the political awareness of Muslims to create a unified front and protect the interests of the Muslim community against colonialism. The concept of *Islamic umma* has become the main religious source of this political movement. It is evident that the concept of an Islamic nation existed before the nineteenth century since Islam was an element of unification between nations and ethnicities that made up part of the Muslim empires. In fact, Pan-Islamism does not negate the ideas of nationalism or ethnicity but rather seeks to consolidate them.<sup>308</sup>

Pan-Islamism was articulated by some Ottoman intellectuals such as *Jamal al-Din al-Afaghani* (d.1897), *Namik Kemal* (1840-1888), *Ali Suavi* (1838-1878). It was inherently a defensive ideology against the penetration of European colonialism but was formulated later as counter-colonial ideology against colonial expansion.<sup>309</sup> It transferred the concept of *Islamic umma*, which reflected the Muslim sense of communal-religious identity into a political one. In other words, it politicized the concept of *umma* and *Caliphate*. As a result of Pan-Islamism, the Muslims of the Ottoman Empire believed that the state was their own and that the rulers were concerned for their well-being.<sup>310</sup> In practice, Pan-Islamism became a powerful vehicle for secularization and internalization of the modern concepts of homeland (*watan*) and nationalism.<sup>311</sup>

With the abolition of the Caliphate, the Pan-Islamic movements lost their centre of gravity and the age of Pan-Islamic congresses started: Mecca, 1924; Cairo, 1926; Jerusalem, 1931; and Geneva, 1935. In reaction to the Palestinian-Israeli conflict, the Muslim states formed the

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<sup>308</sup> *Encyclopaedia of Nationalism*, p.398.

<sup>309</sup> *Ibidem*.

<sup>310</sup> *Idem*, p.399.

<sup>311</sup> *Ibidem*.

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Organization of Islamic Conference in 1969 to protect the interests of Muslim states to coordinate and promote cooperation between them.<sup>312</sup>

### 9.1.2.2. Pan-Arabism

Pan-Arabism thought is dominated by one sole and constant dream, the dream of a single Arab state or Arab unity. There is always one constant element, the Arab *umma*.<sup>313</sup> Still, there is no consensus regarding what pan-Arabism exactly is. Is it an expression of anti-colonial resistance against France and Britain? Is it opposition to the new, semi-colonial governments in the mandates that followed the collapse of the Ottoman Empire? Is it some kind of renewed pan-Islamism? Or is it something else?<sup>314</sup>

Pan-Arabism was promoted mainly by movements such as *Al-Fatat al-'Ahd* or *Hizb al-Istiqlal al-Arabi*, in opposition to existing empires and state regimes before their ideologies were adopted by ruling regimes of Egypt, Syria, and Iraq. In fact, movements which promoted Arab nationalism -such as the Arab Nationalists, *al-Qawmiyyun al-Arab*-continued to exist in most Arab states, or at least influenced their regimes long after achieving independence.<sup>315</sup>

In Egypt, a powerful national movement, the *Wafd* led by *Sa'ed Zaghlul*, emerged after World War I, embracing a liberal outlook. Egyptians rejected patriotic identity either for a cultural Arab nationalism or for a more pronounced Islamic identity, or one that combined both. The same was true in the post-World War II states that emerged out of the mandate system. Syria and Iraq continued to promote a radical pan-Arabism long after a more geopolitically secure Egypt abandoned it after the death of President *Jamal 'Abd el-Nasser*, in 1970; but even during Nasser's rule, the regime fostered a more moderate version of pan-Arabism than did the leaders of Syria and

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<sup>312</sup> Ibidem.

<sup>313</sup> BENSALD S., *Op. cit.*, p.166.

<sup>314</sup> *Encyclopaedia of Nationalism*, p.397.

<sup>315</sup> Idem, p.488.

Iraq.<sup>316</sup> In fact, the *Ba'thi* party which ruled these two countries, promoted the creation of one single Arab state that would encompass an Arab nation, while *Jamal 'Abd el-Nasser's* vision was that Pan-Arabism should involve solidarity among Arab governments.<sup>317</sup>

Pan-Arabism renders the term *watan* vague and indefinable and gives more importance to the concept of nation. The territorial nationalists give more importance to the *watan* as it refers to a specific area that constitutes the homeland of citizens.

The pan-Arab model, however, both reduces the scope of this notion (*watan*) and diminishes its significance. In general terms, pan-Arabism gives much more importance to the notion of nation. In the nationalist model, the term *watan* is used to refer to a specific geographical area that constitutes the homeland of citizens bound to each other by legal and emotional ties, and who belongs to a sovereign state, or to a state which is struggling to recover its sovereignty. In the pan-Arab model, however, the notion *watan* is used in the sense of union, or league. Legally speaking, the notion *watan* refers to a league comprising a group of states, with their respective residence being identified in relation to their respective fatherlands. Consequently, the meaning of *watan* loses its precision and becomes somewhat obscure and abstract. It refers to one or several emotional ties.<sup>318</sup>

Az-Zahrawi describes the *watan* as follows: “*Our watan is our union because we either happen to be neighbours, or speak the same language, or have the same aspirations and interests*”.<sup>319</sup> This means that the term *watan* adopted by pan-Arab nationalists although used in singular in form is plural in meaning and reference since it does not refer to a given geographical province, but rather to a group of provinces that share the same boundaries. According to *Marlène NASR*, this same concept of *watan* is reflected in *Jamal 'Abd el-Nasser's* writings, who considers the *watan* as ‘a geographical space, stretching

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<sup>316</sup> Idem, p.487.

<sup>317</sup> Idem, p.397.

<sup>318</sup> BENSALD S., *Op. cit.*, pp.164-165.

<sup>319</sup> Ibidem.

from the Atlantic Ocean to the Gulf'. Furthermore, as pointed out by *NASR*, although Nasser uses the notion of Arab territory, the former notion does not refer to any territory in particular.<sup>320</sup>

It is also true that this concept of *watan* in Nasser's writings is different in his earlier works (*Falsafat ath-Thawra*) from his later ones (*al-Mithak*, the Manifesto), in the sense that there is a clear movement from a nationalist position in the former to a pan-Arab position in the latter. In Nasser's *Falsafat ath-Thawra*, the term *watan* is used frequently to refer to Egypt; however, when he talks about great fatherland, the term *watan* not only loses its expressive and referential meanings, but is replaced by a new idiom, that is, the Arab nation.<sup>321</sup>

### 9.1.3. The Failure of Arab Unification

It is evident that Arab unification failed but Arab nationalism is still prevalent in the Arab world. Many Arab authors and intellectuals, such as Fawzi Mansour, believed that:

[L]'échec de l'unification arabe ne signifie pas pour autant que la nation arabe est disparue... Mansour considère que les peuples arabes constituent aujourd'hui une seule nation dont l'homogénéité se manifeste à travers la langue arabe commune, la religion Islamique majeure, l'unité du climat, la référence aux mêmes structures culturelles, et avant la colonisation, la grande et intense mobilité au plan politique et humain.<sup>322</sup>

In this part of the analyses the various attempts to unify the Arabs into one state will be reviewed, even though they all failed. A negative role was played by Europe as we will show here, explains the clash between the Arab world and the contemporary Western world. A Palestinian intellectual, *Naim Khader*, will be cited; he treated the argument "Europe and the Arab world" in his various writings.<sup>323</sup> It is clear that

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<sup>320</sup> Idem, p.165.

<sup>321</sup> Idem, pp.165-166.

<sup>322</sup> Mansour's book "Nation, State and democracy in the Arab world" was cited in: GHALIOUN B., *Op. cit.*, p.43.

<sup>323</sup> Naim Khader was born in 1939 in the WB. He was the PLO representative in Belgium and was assassinated by the Israeli *Moussad* in 1981. These citations were

the end of the Ottoman Empire signaled a turning point in the history of Arab nationalism. However, I shall illustrate the bid to unify Arabs under one authority, and the idea of forming a nation distinct from others, which preceded the end of the Ottoman Empire.

For *Naim Khader*, the first quest to unify Arabs under the same authority was done by Mohammed Ali of Egypt when he began his war against the Ottoman Empire in November 1831 in order to “*liberate the Arab populations and to unify them in an Arab Empire*”. Europe (Britain and France) encouraged him since their interests lay in the weakening of the Ottoman Empire, but restrained him with the *Kutahia Agreement* on 4-5 May 1833, and initiated the protectorate system over the ‘sick man’ (a euphemism given to the Ottoman Empire, by this time).<sup>324</sup> The first failure to unify Arabs in the Middle East was due to direct European interference. This experience served to clarify how Arab unity would be dangerous to European interests in the Middle East, since Europe believed at that time in its mission to civilize and its right to colonize.<sup>325</sup>

The second bid to unify the Arabs was during the First World War. The allies began the war against the Ottoman Empire on 30 November 1914. *Sheikh Hussein* of Mecca declared a revolution against the Ottomans on 5 June 1916, following a promise that independence would be granted at the end of the war (according to correspondence between Hussein and McMahon). However, the Europeans had different plans for the Arab territories; they had decided secretly in the Sykes-Pico Treaty of 1916 to share the Ottoman Empire. In the famous Balfour Declaration, Britain also promised the establishment of a homeland in Palestine for the Jews.<sup>326</sup>

GHALION describes the situation after the end of the Ottoman Empire as following:

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taken from a presentation given during the Arab-European conference in Paris on 20-22 September 1977.

<sup>324</sup> ABU-SAHLIEH R., *Naim Khader Rasoul Falasteen*, p.62.

<sup>325</sup> Ibidem.

<sup>326</sup> Idem, pp.65-66.

Ainsi à la place de la réforme souhaitée et de la souveraineté espérée, les Arabes se sont trouvés, à la veille de la disparition de l'un des plus grands empires de l'histoire, au début du XX<sup>e</sup> siècle, dans la confusion générale. L'Afrique du Nord est soumise à une politique coloniale des plus agressifs; l'Arabie abandonnée des troupes turques, est livrée à une guerre civile sans merci, et en partie occupée par les étrangers; quant au croissant fertile, il est partagé entre des Etats artificiels et distribué en zones d'influence aux colonialismes antagonistes anglais et français, tandis que la Vallée du Nil à un vaste champ de manœuvre pour l'empire britannique.<sup>327</sup>

The third attempt to unify Arabs under one state was made by *Jamal Abd el-Nasser* of Egypt; this failed due to the defeat of Arab armies by Israel in 1967 and the internal conflicts between Arab regimes. Arab unification did not seem to be envisioned in the contemporary Arab world.

## 9.2. Territorial Arab States

### 9.2.1. The Origin of Arab States

According to some authors, the conception of state is alien to Arabs since originally they were a tribal society, not citizens –they were only kinsmen united by blood ties.<sup>328</sup> This was in substance the vision of *Ibn Khaldûn* about Arabs. Still, the *Umayyads* (who are Arabs) created a stable centralized state (AD 660-750) with an administration more elaborate than anything that Arabs had previously known. The *Umayyads* Caliphate in Damascus gave way to the *Abbasid* in Baghdad in 750. This instigated the spread of the Arab language as the new *lingua franca*.<sup>329</sup>

The collapse of the Arab civilization is due *first*, to the collapse of the Caliphate and the disintegration of political unity of the Islamic dominion; and *secondly*, the transformation of the military system by the introduction of that institution so unique to Islam: slave armies and praetorian garrisons, which rendered the Caliphate an otherwise

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<sup>327</sup> GHALIOUN B., *Op. cit.*, p.24.

<sup>328</sup> VANTILOTIS P.J., *Op. cit.*, p.19.

<sup>329</sup> *Ibidem*.

powerless spiritual office. The Sultanate, a secular institution, was inaugurated, based strictly on power,<sup>330</sup> and was accepted in lieu of the Caliphate for the sake of social peace (*Ibn Jamaa, Mawardi, al-Ghazali*).<sup>331</sup>

Some considers Arab states as the result of colonialism and others confirm that before the impact of Western powers, political identity was religious or dynastic, or a mixture of both.<sup>332</sup> For those authors, the west, during the mandate and after its end, imposed its notion of state over the populations. The most successful nationalist movements were based on the colonial or traditional territory even if they did appeal to ethnic identities, which made little sense within those boundaries.<sup>333</sup>

Nationalism of the populations met the western concepts of territorial statehood. Authors differ in considering this imposition of Western concepts of state, economy and society upon non-Western peoples as a form of domination –exploitation or westernization- or modernization.<sup>334</sup> BREUILLY wrote:

What does seem to be the case is that the idea of nationalism takes hold in such societies not as “natural” form of resistance or opposition, nor as an imitation of western political ideas. Rather it is a fairly obvious response to the importation of the western political model of a clearly defined public territorial state ruling over a private society.<sup>335</sup>

Others repudiate this position:

An important question should then be explicitly raised: if the contradictions of the Arab territorial state are closely related to its foreign origin, does this

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<sup>330</sup> *Idem*, p.20.

<sup>331</sup> *Idem*, p.34.

<sup>332</sup> *Encyclopaedia of Nationalism*, p.486.

<sup>333</sup> *Idem*, p.789.

<sup>334</sup> *Idem*, p.782.

<sup>335</sup> *Ibidem*.

foreign origin provide sufficient and necessary reasons also to explain its continuing consolidation and supremacy?<sup>336</sup>

The debate over the origin of the Arab state has never ceased. SALAMÉ wrote:

This particular debate, concerning the original sin of state creation, was never closed in the Arab World. To what extent these Arab states were created by a foreign, alien, and hostile will?<sup>337</sup>

According to GHALIOUN, the state became at the core of the debate over nationalism:

L'épuisement du débat sur l'identité a ouvert en grand... celui de l'Etat, sa nature, ses origines, ses stratégies et son avenir. Les analystes dans ce domaine... n'ont jamais été systématiques dans le Monde Arabe. Et même si le débat sur la nation continue à exister, son objet véritable n'est autre que l'Etat, dans sa morphologie ou dans les structures de ces pouvoirs.<sup>338</sup>

According to *Iliya Harik*, Arab states are not the creation of colonialism. In fact, tracing the origin of various Arab states, he identifies their structure, power base, legitimacy, and traditions by proposing five different types of states. (1) the *imam*-chief system as in the case of North Yemen, Oman and Morocco. (2) the alliance system of chiefs and *imams* as in Saudi Arabia. (3) the traditional secular system in which authority is invested in a dynasty, free from religious attributes as in Lebanon and the smaller Gulf States. (4) the bureaucratic-oligarchy type in which authority is basically in the urban caste of garrison commanders, assisted by an extensive administrative apparatus as in Egypt and the North Africa States. (5) the colonially-created state system, comprising the Fertile Crescent States (with the exception of Lebanon), carved from the defunct Ottoman Empire by the European colonial powers.<sup>339</sup>

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<sup>336</sup> KORANY B., *Op. cit.*, p.73.

<sup>337</sup> SALAMÉ Gh. (ed.), *The Foundations of the Arab State*, p.3.

<sup>338</sup> GHALIOUN B., *Op. cit.*, p.53.

<sup>339</sup> SALAMÉ Gh. (ed.), *Op. cit.*, pp.5-6.

Nevertheless, the same author recognizes the fact that colonialism did affect the borders of contemporary Arab States:

Colonialism affected the boundaries of Arab states, but it did not, with the exception of the Fertile Crescent case, create them. Colonialism gave more definitive form to the indigenous states and introduced elements of modern administration to them.<sup>340</sup>

Other authors differ in their opinions, considering Arab territorial State as a Western invention:

The present demarcation of the Arab territorial state is indeed a phenomenon made in Europe. Three historical phases are traced: a) the rise and the characteristics of the Westfalia system of 1648 which ended Europe's wars of religion and initiated an international system of sovereign states; b) dismemberment of the Ottoman empire and its integration into the European system; and c) the rise of the mandate system in its place and the resulting Arab territorial states.<sup>341</sup>

As far as the boundaries are concerned, it can be agreed that external factors predominated in the territorial definition of some Arab states.<sup>342</sup>

Some authors went so far as to consider the states of the Fertile Crescent, shaped after the end of the Ottoman Empire, as artificial: “[Q]uant au Croissant Fertile, il est partagé entre des Etats artificiels distribués en zones d’influences aux colonialismes antagonistes anglais et français”.<sup>343</sup>

Territorial Arab states have yet to face internal strains as well as territorial conflicts with their similarly created, similarly evolving neighbours.<sup>344</sup> The result of this evolution is Arab states that are becoming increasingly entrenched and naturalized. The rise of the state

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<sup>340</sup> Idem, p.6.

<sup>341</sup> KORANY B., *Op. cit.*, p.48.

<sup>342</sup> SALAMÉ Gh. (ed.), *Op. cit.*, p.6.

<sup>343</sup> GHALIOUN B., *Op. cit.*, p.24.

<sup>344</sup> SALAMÉ Gh. (ed.), *Op. cit.*, p.6.

of Israel and the oil phenomenon are equally serving this purpose.<sup>345</sup> A further issue is to assess the extent to which these internationally recognized countries have taken root in the hearts and minds of their inhabitants.<sup>346</sup>

### 9.2.2. Territorial Nationalism

States subscribed to Arab nationalism but only to serve their own interests.<sup>347</sup> Why does this gap exist between discourse and reality?

The gap between 'said' and 'done' is a reflection of a contradiction between indigenous grass-roots political culture (which is 'pan'- or particularistic ethnic) and the imported élite culture, which emphasizes the nation-state as the frame of reference.<sup>348</sup>

Heading into the 21<sup>st</sup> century, nationalism in the Middle East has neither the stridency nor the ability to mobilize that it had between the 1930s and the 1960s; there are simply many intra- and inter-state conflicts that fuel organic nationalism.<sup>349</sup> Scholars and intellectuals began to ask whether Arab nationalism was dead. If Arab nationalism is construed as the idea of the one Arab state, then it probably is; but if Arab nationalism is construed more modestly as one Arab nation comprised of many states, it remains a powerful ideology. Arab nationalism might have been politically defeated, but it is very much alive as an ideal.<sup>350</sup>

Pan-Arabism was not capable in defying international and local forces, which protected the Westphalia division of territory into internationally sanctioned territorial states. Most Arab states do not tolerate the violation of sovereignty of Arab states for the sake of Arab nationalism; the Kuwaiti invasion and the following coalition demonstrated that. The

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<sup>345</sup> *Idem*, pp.6-7.

<sup>346</sup> *Idem*, p.3.

<sup>347</sup> *Encyclopaedia of Nationalism*, p.790.

<sup>348</sup> KORANY B., *Op. cit.*, p.49.

<sup>349</sup> *Encyclopaedia of Nationalism*, p.504.

<sup>350</sup> *Idem*, p.495.

same concern for maintaining the inviolability of existing states also protected Iraq from disintegration after its first defeat.<sup>351</sup>

The Arab territorial state is becoming increasingly implanted and naturalised. It is not an indigenous phenomenon and yet it no longer seems a foreign import. It is thus a hybrid product. Though its form represented the primacy and globalisation of the modern European political culture at the basis of the Westphalia inter-state order, its content is increasingly nationalised. Despite this contradiction between form and content, acceptance of it as 'normal' is growing. People have become accustomed to its presence; it is now the order of the day, the standard frame of reference.<sup>352</sup>

Many newly established countries in the region (Kuwait, Qatar) retain the word 'State' in their official name, as if their statehood was too vulnerable not to be systematically reasserted. It also explains the Palestinians' emotional investment in a state of their own (a flag, a passport, a national anthem) without a detailed view of this potential state in relation to the Palestinians as a people.<sup>353</sup>

In fact, some consider the consolidation and supremacy of the territorial Arab state could also be a problem by default, a victory facilitated by the absence of an alternative; the failure until now, to elaborate an operational formula of the 'pan' state, Islamic or Arab nationalist.<sup>354</sup> According to GHALIOUN, the Arab state is not the embodiment of the oriental or Islamist state, but is the reaction or fear of archaism in the Arab world. Arabs in fact felt the necessity to adapt themselves to the new world order.<sup>355</sup>

Arab nationalism, which for much of its history was used to justify the need for a larger political entity than the Arab states, was bound to be in conflict with its political environment. As it rose in superiority over its ideological enemies, the territorial state, it consolidated itself, often

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<sup>351</sup> *Idem*, p.488.

<sup>352</sup> KORANY B., *Op. cit.*, p.72

<sup>353</sup> SALAMÉ Gh. (ed.), *Op. cit.*, p.2.

<sup>354</sup> KORANY B., *Op. cit.*, p.74.

<sup>355</sup> GHALIOUN B., *Op. cit.*, pp.53-66.

under leaders employing Arab nationalist rhetoric. Most Arab nationalists in Egypt still spoke of an Arab alliance or an Arab bloc: an Arab union of states rather than a single state. It was this vision that was indeed institutionalized in Cairo with the establishment of the British-inspired Arab League in 1945. Article 8 of the League's Charter was, in the long term, probably the most important factor upholding the principle of non-intervention. The organ of Arab unity institutionalized the nation's Balkanization.<sup>356</sup>

Questions remain as to whether a less radical Arab nationalism can be the ideological vehicle for a more revolutionary framework of integration based on a territorial state, along the lines of the European Union.<sup>357</sup> In fact, the state is losing part of its sovereignty in favour of regional, supra-national and international entities and organizations. The unity of Arab states in these terms can be envisioned and encouraged.<sup>358</sup>

### **9.3. Islam as an Alternative**

To begin with, presentation of the relation that exists between Islamism and Arab nationalism will be made, followed by an attempt to explain the phenomenon of the return of Islamism in contemporary Arab countries, concluding with a final section dedicated to the relationship between state and religion in the Arab world, according to contemporary writings.

#### **9.3.1. Islamism and Nationalism**

Some researchers have conceived Pan-Arabism as an outgrowth of Western thought; many others think now that it was engendered by attempts to reform Islam. Nevertheless, Arab nationalism, while not vociferously secular, was certainly part of secular enlightenment and a modernization project.<sup>359</sup> Pan-Arabists were almost all avowed secularists thinkers; Islam, they concurred, was the Arab's greatest

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<sup>356</sup> *Encyclopaedia of Nationalism*, p.494.

<sup>357</sup> *Idem*, p.491.

<sup>358</sup> KORANY B., *Op. cit.*, p.55.

<sup>359</sup> *Encyclopaedia of Nationalism*, p.489.

achievement, but their primary goal was the creation of a political entity that would produce a sense of fulfilment in Arabs as people, rather than the creation of a state that would enable Muslims to realize their religious obligations as a community and as individuals. Islam was a mean to a nationalist end.<sup>360</sup> In fact, the *Ba'thi* radical concept of Pan-Arabism (envisioning the creation of one Arab state) and the Nasser's less radical concept of Pan-Arabism (solidarity between Arab states) while not denying an Islamic dimension, emphasize the secular character of Pan-Arabism.<sup>361</sup> In fact, religion was always crucial to status in the Middles East.<sup>362</sup>

The relationship between Arab and Islamic *umma*, or Arabism and Islamism was subject to different interpretations. For instance, in 1938 *Amin ar-Rihani* emphasized that the Arabs antedated both Christianity and Islam and that Arabism comes first and foremost. A year later, *Sami Shawkat* –Director of Iraqi Education- confirmed the pre-Islamic civilisation of the Arabs. 'Ali Nasser was even more explicit: “*Religious atheism is relatively unimportant, whereas denial of Arabism is a crime*”.<sup>363</sup>

The relationship between religious movements and radical religious thought and nationalism has frequently been characterized by political and doctrinal tension. The Muslim brotherhood clashed with Nasser in the 1950s and 1960s and with the Syrian regime in the 1970s. However, many Arab nationalists tried squaring nationalism with Islam while the Islamists often highlighted the tensions that are inevitable between a man-made ideology that demands ultimate sacrifices in the name of the nation and a political-religious order which demands much the same in the name of revelation.<sup>364</sup>

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<sup>360</sup> Idem, p.493.

<sup>361</sup> Idem, p.397.

<sup>362</sup> Muslims were dominant from the arrival of Islam until the end of the Ottoman Empire, but Christians and Jews were granted considerable freedom, as long as they paid a poll tax, *Jizya*. Idem, p.22.

<sup>363</sup> KORANY B., *Op. cit.*, p.53.

<sup>364</sup> *Encyclopaedia of Nationalism*, p.489.

Although Arab nationalism continues to exert an emotional appeal in the region, its power has been sapped by some of the very factors, which aided its earlier genesis. Today, Islamism seems to enjoy the vigour that once marked Arab nationalism.<sup>365</sup> In fact, the efforts to create one Arab state failed (the UAR failure was a tragic demonstration of the weakening and ineffectiveness of solidarity between Arab states). Besides, the continuous loss of wars against Israel had diminished faith in Pan-Arabism, and it was relegated to the sidelines of Middle Eastern politics, as political Islam became more appealing and powerful.<sup>366</sup> The growing strength of fundamentalist Islam at present is a continuous reminder of the precarious status of the state system and secularist trends.<sup>367</sup>

In fact, many call this 'Islamic nationalism' but others consider it more anti nationalism since Islam is proselytizing world religion. Its holy writings are in Arabic, considered as a sacred language. Islam does not recognize a distinction between state and church of the kind developed in Christendom. If nationalism regards the nation-state as the supreme institution and focus of loyalty, it would appear that Islam negates such a view.<sup>368</sup> Islamism threatens the secular regimes of Arab and non-Arab states and has a vision of a different political order that can provide both motivation and direction.<sup>369</sup> Other authors have dissimilar opinions, and consider Arab nationalism as an ideology, more so than Islam, which denies legitimacy to the state system.<sup>370</sup>

Two ways to read the Islamic nationalism: as a reformist movement aiming to transform the existing state, above all by removing its secular features or *simply as* an anti-western reaction, or maybe both.<sup>371</sup> For

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<sup>365</sup> Idem, p.22.

<sup>366</sup> Idem, p.397.

<sup>367</sup> HARIK I., *Op. cit.*, p.20.

<sup>368</sup> *Encyclopaedia of Nationalism*, p.790.

<sup>369</sup> Ibidem.

<sup>370</sup> HARIK I., *Op. cit.*, p.20.

<sup>371</sup> *Encyclopaedia of Nationalism*, p.790.

some authors, this antagonism towards the West expressed sometimes by rebellion or attraction is explained by some authors as the result of the Muslims taking account of their backwardness since they lack the humanist and scientific tradition.<sup>372</sup>

Islam distinguishes between the land of Muslims and that of non-Muslims, the first being called *Dar-es-Salam* (abode of peace), whereas non-Muslim political entities represented *Dar-al-Harb* (abode of war).<sup>373</sup> According to the *Ibn Manzur's Lexicon (Lisan al-Arab)*, the land of Islam is the Muslim Community:

As pointed out in Ibn Manzur's lexicon, the only strong bond, which the Muslim Arab is ever conscious of is his sense of belonging to the land of Islam. Ibn Manzur's view, the land of Islam is represented by 'the Muslim Community' which necessarily constitutes one *umma* (or nation) which includes every country in which Islam is freely accepted as a religion and where Islamic laws reigns over Muslim as well as over non-Muslim citizens who enjoy protection by paying *Jizya* (capital tax). In short, the land 'where the Sunnis are not oppressed by heretics', as the Muslim theologian 'Abd al-Qahit al-Baghdadi, has put it.<sup>374</sup>

In an interesting article, Olivier Roy<sup>375</sup> concluded that:

C'est par l'inscription de leur action politique dans le cadre territorial de l'Etat-nation que les mouvements islamistes sont devenus nationalistes, ou du moins nationalisés, à l'encontre de leur idéologie d'origine, qui se voulait internationaliste. En ce sens les grands mouvements islamistes ont été des facteurs de renforcement de l'Etat-nation... A l'inverse, le radicalisme violent est le propre des mouvements dé-territorialisés...<sup>376</sup>

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<sup>372</sup> VATIKIOTIS P.J., *Op. cit.*, p.22.

<sup>373</sup> KORANY B., *Op. cit.*, p.57.

<sup>374</sup> BENSALD S., *Op. cit.*, pp.151-152.

<sup>375</sup> Olivier Roy is senior researcher at the National Center for Scientific Research in Paris. He is the author of numerous books, including *The Failure of Political Islam* and *The New Central Asia: The Creation of Nations*.

<sup>376</sup> ROY, R., *Islamisme et nationalisme*, p.53.

### 9.3.2. Return to Islam in Modern Arab States

One of the most salient features of contemporary Middle Eastern politics is the ‘resurgence’ of ‘political’ Islam, not necessarily as a replacement for secular nationalism, but as an integral component of personal and collective identity that has been ignored, suppressed and crudely manipulated by the state.<sup>377</sup> This introduces us to the presentation of the fundamentalist movements and their position towards nationalism (territorial and pan-Arabism).<sup>378</sup>

Islamist thinkers accept the basic principles of a constitutional system on the grounds that such principles not only agree with, but also are derived from Islam.<sup>379</sup> *Rashid Rida* takes a different position. For him, the system of government (that is, what a government should be like) in the Arab world was thanks to European influence:

Let no Muslim claim that this type of government has its origin in Islam, and that we have learnt it from the Koran and the Caliph’s tradition. In fact, the type of government we aspire to is the result of our interaction with Europeans. Indeed, had we not learnt such a lesson from political life of these Europeans, it would never have occurred to us that the political justice is part of teachings of Islam.<sup>380</sup>

According to BENSAID, the Islamist attitude towards the European political model is more open and positive than the Pan-Arab attitude:

It is amazing to note that the Islamist attitude towards the European political model is more open and positive than the pan-Arab attitude. The latter rejects the Occident and refuses to import foreign political notions that do not reflect the genuine authenticity which the Arab nation seeks to recover. Contrary to

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<sup>377</sup> EICHELMAN, *Changing Perceptions of State Authority: Marocco, Egypt and Oman*, p.200.

<sup>378</sup> It should be pointed out here that the history of fundamentalist thought began with the appearance of al-Afghani’s doctrine. BENSAID S., *Op. cit.*, p.173.

<sup>379</sup> *Idem*, p.170.

<sup>380</sup> *Idem*, p.169.

this introverted attitude, the Islamist attitude is marked by openness and even willingness to borrow from the Occident.<sup>381</sup>

But Islamists does not recognize state's borders, as *Hasan al-Banna*, the spiritual father of the Muslim Brothers, puts it:

Islam does not recognize geographical frontiers and does not take into account racial differences. On the contrary, it considers all the Muslims as one *umma* and regards all Muslim countries as one *watan*, regardless of the distance and boundaries which separate them.<sup>382</sup>

At the same time, *al-Banna* shows an interest to the principles that direct a constitutional government since they correspond with Islam:

When one considers the principles that guide the constitutional system of government, one finds that such principles aim to preserve in all its forms the freedom of the individual citizen, to make rulers accountable for their actions to the people, and, finally, to delimit the prerogatives of every single authoritative body. It will be clear to every one that such basic principles correspond perfectly to the teaching of Islam concerning the system of government. For this reason, Muslim brothers consider that, of all the existing systems of government, the constitutional system is the form that best suits Islam and Muslims.<sup>383</sup>

According to '*Ali Oumlil* in his '*Fundamentalist Movement and National State*'<sup>384</sup>,

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<sup>381</sup> Idem, pp.169-170.

<sup>382</sup> Idem, p.171.

<sup>383</sup> Idem, p.170.

<sup>384</sup> There is a tendency to confuse fundamentalism or radicalism with Islamism. One can exist without the other. In fact, fundamentalism is not limited to Islam, and Islamism does not mean necessarily fundamentalism. Fundamentalism as an ideology or movement may exist in any religion (and it is not limited to religion) and consists in the return to the origins, and become radicalism when it is accompanied by refusing the 'others' by considering themselves as the owners of the truth. The Islamist movement can be considered also a reform process or its opposite: a reaction to such tendency to reform; returning to origins may be also positive since the acceptance of others is based on the discovery of oneself and one's particularity, without necessarily ending up in a clash with the others.

*Al-Banna* adopts the notions of *watan*, *umma*, and constitution, but tries to translate them islamically. Therefore, there is no inconsistency in al-Banna's view which considers that one individual can at the same time be a citizen of a *watan* like Egypt, for instance, and a member of Islamic *umma*.<sup>385</sup>

Reference to Islam to justify the Arab state identity differs from one state to another, in fact, in recent decades the Egyptian State has made only general claims to its Islamic identity, in part, because of the presence of a significant Christian minority there. In contrast, the popular legitimacy of the Moroccan monarch is firmly rooted in Islamic tradition as it is understood locally; the Omani monarch must invoke religious tradition with more caution because of the country's multiple sectarian identity.<sup>386</sup>

In contemporary Arab states, appeals to Islam can be used to justify anti-constitutional measures, which can assist authoritarian rulers against difficulties to control parliaments. Conversely, political opposition appealing to Islam invokes democratic methods (for example, the elections in Algeria) against secular regimes, which lack popular support.<sup>387</sup>

In fact, all fundamentalist literature insists that the West owes its progress to the supremacy of liberty and law and to a system of government, which treats all members of society on an equal basis. Fundamentalist thinkers are unanimous in attributing the backwardness of the Arabs to dictatorships, which spread ignorance and suppress individual freedoms.<sup>388</sup>

This link between civilization and justice is present in *Ibn Khaldûn's* writings, is also observed in the works of other authors who preceded him:

The fact of linking civilization with justice and security is something that is not specific to Ibn Khaldun, for other ancient Arab historians anticipated him

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<sup>385</sup> BENSAID S., *Op. cit.*, p.171.

<sup>386</sup> EICHELMAN, *Op. cit.*, p.181.

<sup>387</sup> *Encyclopaedia of Nationalism*, p.790.

<sup>388</sup> BENSAID S., *Op. cit.*, p.168.

by establishing a close link between the rule of great kings and the reign of justice, and democracy.<sup>389</sup>

Still, this idea of social justice is not confined to the allocation of material resources alone.

There is a growing expectation that a just government is an Islamic one, an expectation perceived to be at the odds with the practical scope of the actual state despite state effort to co-opt both religious values and leadership.<sup>390</sup>

### 9.3.3. Islam and State in Contemporary Arab writings

In 1922, the National Turkish Assembly issued an edict requiring the separation of the Sultanate from the Caliphate. This edict was accompanied by a manifesto entitled 'The Caliphate and the Peoples Power', in which he justifies and explains this separation.

The manifesto distinguished between a genuine and non-genuine Caliphate on the ground that the former satisfies all the conditions that are necessary for the official instatement of the Caliph, and specifically that the Caliph is voted into office by the nation; whereas the latter lacks these conditions, as the Caliph is brought to office by conquest and use of power. The rule of the latter is a reign but not a Caliphate... 'a government could be established and a person inaugurated without the former being called a Caliphate, nor its head a Caliph, and without any harm coming to the Islamic nation from that' ('Abd al-Ghani Sani Bey).<sup>391</sup>

The manifesto concluded that a genuine Caliphate cannot be restricted, because it is one of prophecy, but a nominal Caliphate may be.

Since the Caliphate has become synonymous with authority and reign, i.e. it has become a purely political matter conducted in an arbitrary manner, it is imperative, in these 'later times', to restrict it so that the power will be placed in the hands of the nation, its true owner. This formulation, in fact, was a

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<sup>389</sup> Idem, p.169.

<sup>390</sup> EICHELMAN, *Op. cit.*, p.202.

<sup>391</sup> JADAANE F., *Notions of the State in Contemporary Arab-Islamic Writings*, pp.112-113.

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preparation for the radical edict that was issued in March 1924 officially abolishing the Caliphate and instituting a 'civilian' rule and a secular state.<sup>392</sup>

In Islam, the concept of *sovereignty* corresponds to Islamic political thought with *hakimiyya* and with *Siyada*. The term *Siyada* is used in contemporary Arab constitutions as the prerogative of the people. The concept '*hakimiyya*' was invented by Abu 'Ala al-Maududi the founder of *al-Jama'a al-Eslamiyya* in Pakistan and considers *Siyada* as God's prerogative only, while people have authorities. In fact, *hakimmiyya* means that God is the source of legislation as revealed to His Prophet, while the people are the source of the authorities which they delegate to a ruler, who may exercise his authorities and issue legislations; the people have to obey him unless he contradicts the *God's* law; thus, the ruler can be justified as necessary for the perpetuation of the *umma* (Sura xxii: 22).<sup>393</sup> This means that God –at least theoretically- remains the only provider of civil organization; God is the sole sovereign and legislator.<sup>394</sup>

Contemporary theoreticians of political Islam believe that sovereignty (*hakimiyya*) only belongs to God, and that the Caliph is 'his shadow on earth'; still, they are less indifferent to that form of political power than the classical Muslim theologians who recommended the acceptance of the prevailing political power, whatever its form, provided it was in the hands of a Muslim, in order to avoid any discord (*fitna*).<sup>395</sup> This is why some authors consider that the only political theory of Islam since the eleventh century, has been that of passive obedience to any *de facto* authority, government by consent remains an unknown concept; autocracy has been the real and, in the main, the only experience.<sup>396</sup>

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<sup>392</sup> Ibidem.

<sup>393</sup> VATIKIOTIS P.J., *Op. cit.*, p.34.

<sup>394</sup> Idem, p.31.

<sup>395</sup> BOTIVEAU B., *Contemporary reinterpretations of Islamic Law: The Case of Egypt*, p.261.

<sup>396</sup> VATIKIOTIS P.J., *Op. cit.*, p.22.

In different ways today, law systems in the Arab states have become positive sets of principles, with a status comparable to those of Western countries, and Islamic law has become a 'branch of positive law' (e.g. personal statute); this is why Islamic radicalism denounces the almost forgotten Islamic *shari'a*.<sup>397</sup> Contemporary Arab States include in their constitution the article that Islam is the state religion and *shari'a* is 'a' or 'the' principle source of legislation: a symbolic concession to the ideology of political Islam according to some and a step towards the re-evaluation of its judicial system, according to others.

In this part, we will consider the different positions taken in the last century by Muslim-Arab intellectuals, regarding the relation between religion and state; the main question being: is Islam a religion, a state or both? It is clear that there is a difference between Islam serving as a guide and inspirational ideal of authority or political order, and Islamic law: *shari'a* being the constitution of the state.<sup>398</sup>

It is apparent that the term 'Islamic State' mentioned here, does not refer to a determined feature. In fact, nobody knows exactly what an Islamic State is; only Muslim States are known. The Islamic State therefore, remains an ideal.<sup>399</sup>

- ***Islam is only a religion***

'Ali 'Abd al-Raziq, wrote in his book *al-Islam wa 'Usul al-Hukm* (Islam and the Principles of Government, 1925)

Islam has nothing to do with the kind of Caliphate known to Muslims, with the desire, awe, glory and power with which they surround it, with any legal system or any other function of government, or state positions. All of these are purely political schemes which have nothing to do with religion. Religion neither acknowledges nor denies them. It was left for us to tackle by resorting to rationale principles, the experiences of nations and the rules of politics. The falsehood that has been spreading among people. Concerning the Caliphate being a part of religion and of 'monotheistic beliefs', is the

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<sup>397</sup> BOTIVEAU B., *Op. cit.*, p.262.

<sup>398</sup> VATIKIOTIS P.J., *Op. cit.*, p.30.

<sup>399</sup> *Ibidem*.

fabrication of kings and sultans who used it to defend their interests and thrones. There have been dire consequences of this for the Muslims. Thus, there is nothing in religion to prevent Muslims from competing with other nations in all social and political spheres, and from destroying the old system to which they submitted and through which they became degraded, establishing the rules of their reign and the system of their government on the basis of modern reasoning and the most solid aspects of what the experience of nations have shown to be the best rules of government.<sup>400</sup>

*Khaled Muhammed Khaled* wrote a book *Min Huna Nabda'* (From Here We Start). In his opinion, religious government is nothing but an instrument of dictatorship creating only disasters and suffering for humanity. The renaissance of society, as well as the survival of religion itself, is not possible without limiting the power of priesthood and separating civilian from religious power. In this way, religion can achieve the ends for which it was revealed: love, the glorification of God, and the unification of the people.<sup>401</sup>

*Ibn Badis* supported Khaled's opinion and considered the nation as the source of all power. For him, no nation should be ruled except in accordance with the law that it chooses for itself, and to the execution of which it commits its rulers. This is necessary for the progress of the Islamic nation; this is the will of God:

The day the Turks abolished the Caliphate... they did not abolish the Islamic Caliphate in its Islamic meaning, but abolished a system of government peculiar to them and removed a fictitious symbol that needlessly captivated the Muslims and turned against them fanatical Western states frightened by the spectre of Islam... the Caliphate is a dream that won't come true... there are two aspects to the Muslims: a political aspect connected with state affairs, and a social-educational aspect... to the extent of almost coming behind all other nations... They, as a result, lost their worldly goods, having gone against God's will, and were condemned to the low and degraded state they are in. The best medicine for the backward Muslim's fascination with the advanced

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<sup>400</sup> JADAANE F., *Op. cit.*, p.114.

<sup>401</sup> *Idem*, p.115.

non-Muslim is to realise that his being a Muslim is not the cause of his backwardness.<sup>402</sup>

- ***Islam is religion and State***

The strongest voice opposed to 'Abd al-Raziq's theses, namely that of *Shaykh Muhammad Bakhit al Muti'i*, ultimately set aside the idea that the power of the Caliph is directly derived from God, arguing that the nation is the source of the Caliph's power and that Islamic rule is democratic, free and consultative, with the Koran and tradition acting as its constitution.

Influenced by this vision, the Islamic states began to introduce in their constitution that Islam is religion of state or that Islamic law is one basic source of legislation in the state. In response to 'Abd al Raziq's provocative claims, *Hasan al-Banna* headed a new movement, inspired by the traditionalism of *Rashid Rida* and contemporary events: the Muslim Brotherhood formed in *Isma'iliya* in Egypt in 1928. *Al-Banna* and 'Abd al-Qadir 'Awdah's writings represent the primary source for the understanding of Islam as a political system. Later on, *Sayyid Qutb* and *Yusuf al-Qaradwi* reflected the practical radicalism related to the application of principles more so than to innovation in theoretical concepts.<sup>403</sup>

*Hasan al-Banna* spoke of a dual task for Muslim Brothers: gaining independence and joining other nations by challenging them in the field of social perfections. He did not urge the re-establishment of the Caliphate but a genuine Islamic government, since Islam does not accept chaos and disorder and does not permit the Islamic group to remain without a leader (*imam*).<sup>404</sup>

The way of Islam and its rules and principles, is the only way we must take and to which we must guide the whole nation, now and in the future... [Islam is] a comprehensive system embracing all aspects of life: it is a state and a country, a government and a nation: it is morality, power, mercy and justice;

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<sup>402</sup> Idem, pp.116-118.

<sup>403</sup> Idem, pp.119-120.

<sup>404</sup> Idem, pp.120-121.

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it is culture, law, knowledge and legislation; it is material good, wealth, profit, and richness; it is a struggle, a message, for an army and an idea; in as much as it is a true doctrine and religion... [Anybody] who thinks that religion, or more accurately, Islam, does not deal with politics or that politics is not of its concerns does injustice to himself and to his knowledge of Islam.<sup>405</sup>

For *Al-Banna*, it is not sufficient to declare in the constitution that Islam is the religion of state (as it was the case in Egypt at that time), it is necessary to establish an Islamic government based on the following: responsibility of the ruler, social and spiritual union of the nation within a fraternal framework, and respect for the nation's will and commitment to its opinion. This system does not include parties necessarily, but only a limited representative electoral system that permit the elected to become the holders of real power without external influence, and subject to moral criteria and restrictions. For him, there is nothing in the parliamentary system that contradicts the rules of the Islamic system of government; and the head of state holds the powers and can delegate them to others (a modern counterpart in modern constitutions, such as that of the USA!)<sup>406</sup>

'*Abd al-Qadir 'Awdah* is considered the greatest political theoretician of the Brotherhood and dedicates an entire book to the political question. For him, the main question is: 'who rules?'

God rules and his commands' and human beings whom God has delegated, have no choice but to obey His command, refrain from what He prohibits, and resolve differences by reference to what He revealed, for their being delegated is subject to their abiding by the law of God. The Koran, which was revealed to become the ultimate law of mankind, and whoever refrains from judging by what God revealed is an 'infidel', is 'unjust' or is disobedient to God... Islam is not merely a doctrine but also a system, and it is not merely a doctrine but also a state... It is required that an Islamic state be established that founds Islam within its limits. [The ideal state in Islam is the state] where

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<sup>405</sup> Idem, p.121.

<sup>406</sup> Idem, pp.121-122.

religion cannot exist without the state, nor can the state be sound without religion.<sup>407</sup>

For 'Abd al-Qadir a government arises for social reasons, but it needs to be Islamic, which is possible when it refers to Islam, and when then Koran is the constitution of the ruler and the ruled. The function of the government is to do what God commands; otherwise the ruled would renounce their obedience to the government.

For him, an Islamic government can be distinguished by three characteristics: *first*, koranic government (the Koran is the ultimate law); *second*, a government of *Shura* limited by Islamic law; *third*, a Caliphate or *imam* government that is synonymous with the higher presidency of the state. The *imam* is the representative of the *umma* and its interests, but he has to observe God's law.

The *umma* can check the *imam* and prevent him from overstepping the limits of his position. The difference between Islam and democracy, according to al-Qadir, is that the first does not leave to human beings to set the criteria determining the limits of justice, equality and the rest of human virtues.<sup>408</sup> This system is different from monarchy since the nation chooses its ruler but differs from a republic since it permits a ruler for life.

'Abd al-Qadir position on the Caliphate does not deviate from what was determined by legal experts, such as *Ibn Khaldûn*. For him the function of the Caliphate was 'to uphold Islam'. The *imamate* is based on the choice of key powerful figures and the acceptance of the chosen; as such, the Caliph is an individual representing the nation. His power is derived from the fact that he represents the Islamic nation.<sup>409</sup>

*Shura* is essential to Islamic rule, but is not absolute, since it is limited by the provisions and spirit of Islamic legislation.<sup>410</sup> As such, the members who provide *shura* are familiar with Islamic law; still they are

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<sup>407</sup> Idem, pp.122-123.

<sup>408</sup> Idem, pp.123-124.

<sup>409</sup> Idem, p.126.

<sup>410</sup> Idem, p.127.

chosen by the nation, and have in it the source of their power. According to the same author, there are five powers in the Islamic State: 1) executive; 2) legislative; 3) judiciary; 4) financial; and 5) the power of observation and evaluation which is held by the people as a whole towards the rulers. Councillors, learned men and jurists represent the nation in this task.<sup>411</sup>

- **Radical Islamism**

Several writers like 'Abd al-Karim al-Khatib, Taha 'Abd Baqi Suru, Muhammad Yusuf Musa, Muhammad al-Mubarak and Yusuf al-Qadrawi, followed the line originally stated by Hasan al-Banna. These writers openly stated that Islam is a religion and a state that it is obligatory for a Caliph or *imam* to execute Islamic law, that the nation is the source of the state power and sovereignty that the function of an Islamic state is to act as a guardian of the faith. For them, the Islamic system is unique: it is neither theocratic nor monarchic, it is merely Islamic.<sup>412</sup>

Islam, however, does not impose a form of government that is well-defined and detailed. Rather, it represents, according to *al-Mubarak*, general principles and rules which constitute ideal goals that mankind aspires to achieve, leaving the details and practical applications that lie supported by these principles and rules for peoples' interpretation according to their various states, environments and circumstances.<sup>413</sup> For the same author, there are three component parts of the state: 1) the authority or government apparatus; 2) the people governed by this authority; 3) and the territory within which the rule of this authority prevails.<sup>414</sup> He adopts the distinction between the legislative, the judiciary and the executive power as functions of the state to

ensuring internal security and external defense, establishing legal justice, achieving financial and economic sufficiency for the individual and society;

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<sup>411</sup> Idem, pp.127-128.

<sup>412</sup> Idem, p.128.

<sup>413</sup> Idem, pp.129-130.

<sup>414</sup> Idem, p.130.

spreading the doctrine of Islam through jihad and safeguarding it against any deviant behaviour.<sup>415</sup>

For the same author, the term Islamic *umma* refers to human society based on common beliefs. This humanistic concept of the nation was adopted in opposition to the backward, static nationalistic one. For him, the nation, as a basis for the state has rights protected by it, as rulers speak for or represent the nation.<sup>416</sup>

*Al-Mubarak* also adopts the old distinction between *Dar al-Islam* and *Dar al-Kufr*, namely the home of Islam and the home of disbelief, and considers the two mutually exclusive. People belonging to the second, are either in a 'state of peace' or in 'state of war', depending on they have or they have not concluded a treaty with Muslims. *Dar al-Kufr* may become *Dar al-Islam* when its people convert to Islam or its territory is conquered by Muslims.<sup>417</sup> He concludes that the state in Islam is: 1) an ideology; 2) system of laws emanating from Islam; 3) a unique system; 4) a morality; 5) a culture; 6) humanistic; 7) universal; and finally, 8) that the Islamic State is based on solid foundations and forms, according to the evolution of social and cultural conditions.<sup>418</sup>

#### - *Islam as a System of Government*

The Palestinian intellectual *Taqi ad-Din an-Nabhani* (1908-1977) founded a political party in 1952 in the true sense of the word aiming at establishing an Islamic state, restoring the Caliphate and declaring unrelenting war against all established political systems in the Arab world. The party was called *Hizb al-Tahrir al-Islami* (the Islamic Liberation Party). He issued two books: *Ad-Dawla al-Islamiyyah* (The Islamic State) and *Nizam al-Islam* (The Islamic System), in which he presents a complete scheme for the state and its system.<sup>419</sup>

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<sup>415</sup> Ibidem.

<sup>416</sup> Idem, pp.130-131.

<sup>417</sup> Idem, p.131.

<sup>418</sup> Idem, p.132.

<sup>419</sup> Ibidem.

Islamic rule, in *an-Nabhani's* opinion, rests on the following bases: 1) the predominance of Islamic law; 2) the government should be by the people; 3) people's obligation to instate one Caliph for all Muslims, as their representative in government; 4) people have the right to *ijtihad* and to propose legal rulings required to deal with the problems of everyday life.

According to him, the pillars of the state are seven: *shura*, the head of state, the executive body (assistants), the administrative apparatus, the rulers (*wulat*), the judiciary and the army.<sup>420</sup> In his view, legislation is only the competence of the Caliph and of the people; and therefore, the Caliph has to consult the people (*shura* is an obligation). The council of *shura* –and this is new- is not appointed, but elected from people of different regions.

An-Nabhani crystallised his position by proposing a constitution. The nation for him constitutes the practical means on earth of putting Islam into effect, by scrutinizing and judging the ruler.<sup>421</sup> The ideas of *an-Nabhani* affected *Sayyid Qutb* (1907-1966) who was a member of the Egyptian Brotherhood, and began to concern himself with the question of social justice in Islam. He distinguishes between pre-Islamic (*jahiliyya*) and Islamic societies. The first can never pursue solutions to their social problems because they are not ruled by Islam. *Qutb* refused moderate solutions under the concept of Islamic law as a main source of legislation. This radical position is also expressed by *Yusuf al-Qardawi* who presents the 'Islamic solution': the establishment of an Islamic state based on pure Islamic rule, which has in Islamic legislation its 'one and only guide' and 'reference' for all its rulings.<sup>422</sup>

- *The legislative aspect of Islamic shari'a*

This position can be considered as the middle point between the two extreme positions of *'Abd al-Raziq*, who reduced religion to the realm of spirit, pushing politics away from its domain and that of *al-Banna*

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<sup>420</sup> Idem, p.135.

<sup>421</sup> Idem, p.138.

<sup>422</sup> Idem, p.139.

position who considered the restoration of an Islamic state and the Caliphate as extremely necessary. The former consider Islam as only religion, the latter considers it a religion and state.

In 1905 *'Ali Abu al-Futuh* argued that the established principles of *shari'a*, marked by civilization and development, are appropriate for modern times.<sup>423</sup> *'Abd al-'Aziz Jawish* and *'Abd al-Razzaq as-Sanhuri* held the same opinion, the latter calling for the modification of Egyptian legislation, following the end of British occupation, adapting it to Islamic law. For him, legislation refers to Muslim *fiqh* in such a way that it accords civilization and the spirit of the age.<sup>424</sup>

In 1939, the lawyer *Ahmad Husayn*, also called for the revision of constitutional laws in the light of Islamic *shari'a*, maintaining that Islam is the source of legislation. In 1940 the Iraqi *'Abd al-Rahman al-Bazzaz* condemned those who disown *shari'a* from the constitution of their country and confirmed the doctrine that Islamic legislation is opened to evolution and does deny canonical change.<sup>425</sup>

*'Alla al-Fasi*, the historic leader of the *Istiqlal* Party in Morocco, agrees in general terms with the thesis of *al-Bazzaz*. He condemned *'Abd al-Raziq*, since religion cannot be put outside the domain of socio-political life, for such a separation would imply the estrangement of the 'highest ideal which Islamic *shari'a* lays down for the people' and that is the 'realization of the divine will to build life on this earth and achieve justice among people'.<sup>426</sup>

Still, a new conception of the priority of national solidarity over Islamic solidarity was formulated by *'Allal al-Fasi*:

It is necessary to adopt a constitutional form of government, based on the rule of the people through competent elected representatives. However, this goal will not be achieved unless Muslim countries are liberated from foreign domination, both physical and moral. Therefore, action for independence is a

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<sup>423</sup> *Idem*, p.139.

<sup>424</sup> *Idem*, p.140.

<sup>425</sup> *Ibidem*.

<sup>426</sup> *Idem*, p.141.

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necessary condition for the recovery of freedom which is essential for assuming responsibility.<sup>427</sup>

For him, it is God who enjoys the ultimate sovereignty and order in the ruling system; then it is equally true that political and practical sovereignty is left to the people who are entitled to elect and dismiss legislators and members of the government. In other words: ordinance for God, power for the nation.<sup>428</sup>

'*Abd al-Hamid Mutwalli* discussed these when considering the controversy of Islamic *shari'a* as *the* main source of legislation or just *a* source, among others, of legislation, in the Egyptian Constitution.<sup>429</sup> For him Islam contains the general basis for a state ruling system in the state (he does not agree that Islam is only a religion, nor is it a complete ruling system). For him, Islam is a religion and a state, without a specific system of government.<sup>430</sup>

- ***The Humanistic Islam***

This vision is represented by *Muhammad Ahmad Khalafallah* in his book, *The Koran and the State (1973)* and by *Muhammad 'Amarah* in his *Islam and religious power*. Both agree that Islam does not embrace a specific political government and both believe that government is left for men, and called for a *distinction* –not separation- between religion and state. They both proposed that the state is national in nature committed to the rulings of *shari'a*, but that, in the human field, legislation is effected through the will and power of the community.<sup>431</sup>

For them, religious questions are a divine matter in which human beings have no say. Worldly questions, on the other hand, such as the policies of the nation, are delegated by God to Muslims... this means

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<sup>427</sup> BENSALD S., *Op. cit.*, p.161.

<sup>428</sup> ADAANE F., *Op. cit.*, p.141.

<sup>429</sup> *Ibidem*.

<sup>430</sup> *Idem*, p.142.

<sup>431</sup> *Idem*, p.143.

that “*He has given us full freedom and independence in our worldly affairs and social interests*”.<sup>432</sup>

The legislative council would be elected by the nation and would act freely; its authority would be limited to worldly affairs. These affairs include the choice of the head of state that is elected and not appointed.<sup>433</sup>

The function of a Koranic state -for him a welfare state- is to direct the life of every member of the community towards the achievement of public good, irrespective of sex, race, language or religion.<sup>434</sup> ‘*Amarah*’s main concern was to separate political power from that of religion, thereby stripping the ruler of the sanctity and infallibility implied in endorsing religious power.<sup>435</sup> The real Islamic attitude, in ‘*Amarah*’s opinion, is that a separation of religion from the state is to be rejected as much as a union between religious and political power.<sup>436</sup>

However, as outlined by some authors, declaring Islam as the religion of state, although tolerated, has repercussions on non-Muslim citizens:

Most of the constitutions of these states today proclaim Islam as the official state religion. One can point to the practice of the toleration of religious minorities as a tradition in the Islamic polity. It is not the same however as defining full citizenship without reference to religion or its tolerant attitude. One of the difficulties is that Islam does not recognize an existence for man independent of religion, because it does not entertain a Law of Nature that can be discovered by human reason, nor does it distinguish between nature (physis) and law (nomos)...

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<sup>432</sup> Ibidem.

<sup>433</sup> Ibidem.

<sup>434</sup> Idem, p.145.

<sup>435</sup> Idem, p.146.

<sup>436</sup> Idem, p.147.

It is difficult, therefore, when the official religion of the state is Islam, for non-Muslims to enjoy secularly based rights beyond those allowed by the traditional practice of toleration of the 'People of the Book' ...<sup>437</sup>

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<sup>437</sup> VATIKIOTIS P.J., *Op. cit.*, p.27.

## §10 CULTURAL & RELIGIOUS JUSTIFICATION OF THE STATE

For BUTTERWORTH, the problems of ‘state’ and ‘authority’ have not been discussed *per se*, in the Arab world until recently.<sup>438</sup> Many Arabs are still asking questions regarding to the reasons behind their discrepancy in power. They sense their senility and watch the modern models of power growing.<sup>439</sup> SALAMÉ dedicates an article to the concept of ‘strong’ and ‘weak’ states, with a qualified return to the *al-muqaddimah*,<sup>440</sup> in which he addressed the problems of contemporary Arab states thus

Perceptions of the state’s strength and/or weakness are substantially marked, in the Arab world, by a tradition of authoritarian rule where the military *ghalaba* (domination) has preceded and practically made possible a generally unrestrained plunder of the society’s available resources<sup>441</sup>.

Then he added:

*Ibn Khaldûn* asserts that the rise of the state is based on the necessity of deterrence (*wazi*) and is therefore equivalent to the appearance of a leader who enjoys superiority (*ghalaba*) over others. The persistence of that leader in power is based on the strength of blood ties (*‘asabiyya*) among the people, whose defence and protection are successful only if there are closely knit groups with common interests. This strengthens their stamina and makes them feared since everybody’s affection for his family and group is more important than anything else<sup>442</sup>.

*Ibn Khaldûn* distinguishes between two ingredients of the state’s strength. There are, on the one hand, the actual capabilities of the state

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<sup>438</sup> SALAMÉ Gh. (ed.), *Op. cit.*, p.11.

<sup>439</sup> SALAMÉ Gh., *Strong’ and ‘Weak’ States, a Qualified Return to the Muqaddimah*, p.238.

<sup>440</sup> In the book ‘*The Foundation of the Arab States, 1987*’ that he himself was the editor. SALAMÉ Gh., *Op. cit.*, pp.205-240.

<sup>441</sup> *Idem*, p.207.

<sup>442</sup> *Idem*, p.207.

and, on the other hand, the recognition by others of those capabilities.<sup>443</sup> The ‘natural’ state must possess the means to control each part on its own, and in turn must recognize the state’s power over it. This is because leadership (*ri’asa*) exists only through superiority (*ghulp*) and superiority only through group feeling (*‘asabiyya*). Following that, and in accordance with the new authority, the whole society must be coalescence (*iltiham*):

Natural authority is derived from group feeling through the continuous superiority over competing parties. However, the condition for the continuation of this authority is for the subservient parties to coalesce with the group who controls leadership.<sup>444</sup>

The *‘asabiyya* and *iltiham* form the foundation of authority. *Ibn Khaldûn*, treating the question of the Caliphate, wrote

If we try to understand the *raison d’être* of this condition (that the Caliph shall be *qurayshi*), we shall find that it is based on the *‘asabiyya* which allows protection and ambition. This is its foundation and not –as many authors have claimed- the *Qurayshis*’ closeness to the Prophet through direct lineage’. In other words, the *Qurayshis* do not possess the political legitimacy forever, but as long as they constitute a strong *‘asabiyya*. *Ibn Khaldûn* could not accept the idea of a ‘divine right’ to rule.<sup>445</sup>

This authority based on *asabiyya* and *iltiham* is stronger than that based on attachment to a specific location, which is alien to Arab culture and may threaten the blood ties and consequently the very existence of the state. *Ibn Khaldûn* prefers national and/or religious ties but not to patriotism related to a territory.<sup>446</sup>

<sup>443</sup> Idem, p.208.

<sup>444</sup> Idem, p.207-208.

<sup>445</sup> Cited in: Idem, p.209.

<sup>446</sup> Idem, p.210. According to SALAMÉ, belonging to a group is a source of power. This is exactly what Israel, for example, feared from the Arab minority within its borders: they are a menace to the Jewish State. For this reason, Israel pursued a policy of direct control over the Arabs living within the pre-1967 borders through a mixture of segmentation, co-option, and economic dependence. As an Israeli anthropologist convincingly pointed out: “*Arabs in Israel do not constitute a united, integrated community. They are divided on many lines which tend to overlap, rather*

As an introduction to this argument, SALAMÉ will be cited again; his revelation in a very practical way, of the challenge that represents the feeling of belonging to the same group and to a defined territory in modern Arab states:

The rise of the modern state represents a real challenge to the individual, a challenge to his feeling of belonging to a group and to the security of having a defined place within it. The transfer of loyalty from the traditional group to the modern state cannot be easily completed, and anyway takes place in a clearly alienating manner. It is doubly alienating when not only the form the state is unfamiliar but when those commanding it are strangers as well. This could be due to the leader's allegiance to an external power (during periods of colonialism), or to his membership in another traditional group (much as Shi'ites would look at a Sunni-dominated state or a Berber at a state dominated by the Arabs), or his belonging to a social group that is unfamiliar to the rest of the citizenry (such as technocrats or professionals).<sup>447</sup>

Then SALAMÉ continued:

Thus, suddenly the citizen is given an identity card or a passport specifying for him a new exclusive identity. He is either Lebanese or Syrian, Tunisian or Libyan, Qatari or Bahraini.<sup>448</sup>

Identity is a cultural product that is not exclusively shaped by those who are going to bear it; foreign powers, in fact, have been able to intervene substantially in this process.<sup>449</sup> Then SALAMÉ cites Erich Fromm:

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*than cut across each other. There is the broad division into Bedouin, village dwellers, and townsmen, with hardly any links between these divisions. Furthermore, each of these divisions is divided internally, etc". Idem, pp.224-225. "I should like to know how long residence in a town can help (anyone to build loyalties to his person), if he does not belong to a group that makes him feared and causes others to obey him". Idem, p.210.*

<sup>447</sup> Idem, p.223. Some Insiders Palestinians did have similar feelings towards the new Palestinian elites (called the Outsiders) who have the key command powers within the PA.

<sup>448</sup> Idem, p.223.

<sup>449</sup> Idem, p.224.

The loss of the self and its substitution by a pseudo-self leaves the individual in an intense state of insecurity. He is obsessed by doubt since, being essentially a reflex of other people's expectations of him; he has in a measure lost his identity. In order to overcome the panic resulting from such loss of identity, he is compelled to conform to seek his identity by continuous approval and recognition by others.<sup>450</sup>

According to Lucian Pye:

The stable modern state cannot be realized without a clear feeling of identity: that is, without solving the problem of co-existence of traditional culture forms with modern practices and factional allegiances with cosmopolitan lifestyles. It is as if the individual is torn between two worlds without having roots in either of them.<sup>451</sup>

Yet the Lebanese civil war was also to reveal the failure of Lebanese *iltiham*, which was meant to rise within the modern state in defence of its borders and institutions<sup>452</sup>. Indeed, the Arab State seems to be caught between the combined fires of sub-state in the face of greater nationalities transcending their limits.<sup>453</sup> Some authors believe that this modern Arab State had failed to achieve the major objectives it has set for itself. This failure will be a motivation of Arabs to move towards pan- ideals:

All appearances point to the spread of the phenomenon of the state in the Arab world. But, in spite of these appearances, the failure of the Arab State – despite its slogans, flag, national anthem, university, plan and national museum- in achieving true independence and in eliminating all kinds of dependence, or in liberating the occupied Arab territories in Palestine, not to mention the failure to accomplish national security on the part of all states, will sooner or later strengthen the Arab citizen's conviction that the state has failed to achieve the major objectives it has set for itself. Consequently, this same Arab citizen will be inclined to work at a national [pan-Arab] level and

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<sup>450</sup> Idem, p.223.

<sup>451</sup> Idem, p.222.

<sup>452</sup> Idem, p.225.

<sup>453</sup> Idem, p.226.

transcend the local state phenomenon. (Hasib, k. Kalimat al Mustaqbal Alarabi).<sup>454</sup>

In fact, Arab nationalism, as it is understood in its early stages, is the main enemy of the existing Arab states since they are ‘too small clothes for the Arabs to wear’. Their goal is to eliminate them and to substitute them with a unique Arab state that encompasses the Arab *umma*. Less challenging are the proponents of Islamic *umma*, who generally seem to accept the independent existence of current Islamic States, as long as they adopt the Islamic *shari’a* and its laws, and seek active ‘solidarity’ with other Islamic countries.<sup>455</sup>

Modern Arab States face another challenge presented by some minorities, who find these states too large or completely unsuitable.

*The Kurds, for example, may well believe that borders were drawn with the specific intention of dispersing them into a number of states.*<sup>456</sup>

According to SALAMÉ:

Whether Kurds, Maronites, Berbers or south Sudanese, these groups often reject the states in which they find themselves. Even when they adopt a more rational and realistic attitude and recognize that existing states cannot be easily destroyed, they prefer them to be a weak and fragile, allowing ethnic groups the largest possible autonomy.<sup>457</sup>

For SALAMÉ, these problems and challenges of Arab states have one solution: unity. This unity remains irrelevant without the creation of *iltiham* based on an identity; furthermore, in fact, it has no real impact on society:

A short cut remedy to all these problems is ‘unity’... Too often ‘unity’ appears as a panacea, whatever the political cleavage. This reveals this ‘remedy’s’ highly ideological nature and hence its extreme vulnerability. In

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<sup>454</sup> Idem, p.226.

<sup>455</sup> Idem, pp.226-227.

<sup>456</sup> Idem, p.226.

<sup>457</sup> Idem, p.227.

so far as the identity remains debatable, and in so far as those in control of the state have not established a strong social *iltiham*, unity remains an empty shell. This widespread obsession with unity is so 'tribal' (Arendt) that it becomes a sort of 'political religion' (Apter), with no real impact on the society. It probably also hinders a more rational search for state strength, outside the old Khaldunian realm.<sup>458</sup>

The economic activity has an interesting role in strengthening the state. According to *Ibn Khaldûn* every state has five stages, the third one of which being economic, and the last, in which the ruler has full authority:

It is the stage of leisure and tranquillity in which the fruits of royal authority are enjoyed: the things that human nature desires, such as acquisition of property, creation of lasting monuments and fame. All the ability (of the ruler) is expended on collecting taxes; regulating income and expenses, keeping books and planning expenditure; erecting large buildings, and constructions, spacious cities and lofty monuments; presenting gifts to ambassadors of nobility from (foreign) nations and tribal dignitaries; dispensing bounty to his people. In addition, he supports the demands of his followers and retinue with money and positions. He impacts his soldiers, pays them well and distributes their allowances fairly every month. Eventually, the result of this (liberality) shows itself in their dress, their fine equipment, and their armor on parade days.<sup>459</sup>

*Ibn Khaldûn* points out two basic factors:

First, that the economy (actually economic capability) is related to actual political and military strength; thus, when superiority is achieved and the authority of the ruler is established, wealth comes as a natural bonus to whoever is in control. Second, that economic activity is not so much related to production as it is to spending. That is why this stage does not lead to more strength, but actually leads to the stage of senility. *Iqtisad*, in contrast to the

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<sup>458</sup> Ibidem.

<sup>459</sup> Idem, p.228.

usual meaning of the word (that is, to cut down on expenses), is based on spending.<sup>460</sup>

Some modern authors make similar conclusions over the industrial efforts of modern states industrial efforts.<sup>461</sup> Another example is the Gulf countries where political leadership is clearly based on 'asabyya. This leadership has ruled from the outset that the oil is state property. But what is the state? The state was then more a cover for a ri'asa (leadership) than an 'autonomous' apparatus. Now, ri'asa is basically achieved by military means.<sup>462</sup> Money which essentially means immense oil revenues was controlled by the governing families, that is, by small groups of brothers and cousins who headed the ruling families and, in turn, ruled the rest of the people. For the state, the issue is not about the means of production or its actual development, nor about the identity of controlling it, but rather, it is about the way the oil revenues are distributed, about the identity of those controlling this process, about the amount of money that is being distributed and the identity of the beneficiaries.<sup>463</sup>

According to some authors, this reality in the Arab world had influenced their political culture. People do not view the economic and financial resources as being necessary elements of power since wealth is the reward received by the powerful and not the source of this power. This makes easier for foreign economic domination.<sup>464</sup>

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<sup>460</sup> Ibidem.

<sup>461</sup> Michel Seurat, considering the Syrian case, wrote: "*It is not necessary to be an expert in economic anthropology to discover that a factory in the public sector there does not function like a similar one in France, as the real reason behind its presence is not the achievement of profits, as much as it is to provide a means of spending. This spending represents a part of a strategy of the political authority and provides it with a new source of strength*". Idem, p.229.

<sup>462</sup> Idem, p.232.

<sup>463</sup> Idem, pp.229-230.

<sup>464</sup> Idem, p.232.

### 10.1. Religious Justification of the State

Nowadays, is it really necessary to refer to early Islam in order to understand contemporary territorial Arab states? Is it really indispensable to make reference to the Arab particularity in a context of general acceptance of modern state structure? Is it really necessary to know who is the bearer of sovereignty (or if there is another entity, rather than God) in the first Islamic *Umma*? How will it be possible to find reconciliation between these positions and the constitutions of most of Arab states who declare the people as the only sovereign and that all power derives from popular will?

Many believe that it is a waste of time and energy to return to such period but others –rightly- do not agree since they notice a kind of *nostalgia* in some groups (sometimes, but not only, called Islamist, or fundamentalist) to such period of Islam. Such groups may dedicate concerted political efforts to restore an Islamic state by ‘democratic’ means (through popular legitimacy and elections) or clandestinely by opposing those governments that do not follow the ‘true teachings’ of Islam.<sup>465</sup>

The Muslim community had already organized itself into a state-like system already before the death of the Prophet, and the question of the head of Islamic *umma* was not relevant before his passing since he ensured that role. On the other hand, after his death, the Islamic *umma*, similar to other social group, needed a leader, a chief to handle the *affaires d'état*, but also they needed an *imam* to guide the Muslims in their prayers and to defend Islam. Those roles were entrusted to the same person in the beginning: the Caliph. This necessitated particular qualities in a chief, which the philosophers tried to enumerate. There are nevertheless common points that will be analyzed in the following paragraphs.

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<sup>465</sup> It is not the intention here to present or to analyze the political system and power in early Islam since it is an extensive subject and not of direct interest here. Reference is made to early Islam as predicated by some fundamentalist groups who regard the past with nostalgia and work towards the realization of an Islamic state similar that of early Islam.

Should the chief violate or infringe his duties, a problem of legitimacy would arise which, in Islamic and Arab history, sometimes meant his loss of power (and his life!) Nevertheless, he could continue as the leader by imposing his authority by force. This would explain the phenomenon that any observer may readily notice in the history of Arab-Islamic empires: many Caliphs were assassinated and replaced by another by force. Transference of power was accompanied by bloody events, especially when it was made from one tribe or family to another; of course, this meant that the new holder of power could be usurped in the future, for the same reason. This may suggest that the real motive behind such events was not being necessarily the zeal for Islam or faith but rather for power. In other words, it was mostly a struggle for power between individuals, families or clans rather than a question of faith, morality or culture.<sup>466</sup>

### 10.1.1. The First Islamic State

There are different narratives regarding the first Muslim community and the way power was transferred to the *Khalifat Rasul Allah*.<sup>467</sup> The appellation was not neutral, as Hicham DJAÏT, a Tunisian historian, puts it:

L'appellation de successeur de l'Envoyé de Dieu est à elle seule tout un programme de continuité du pouvoir prophétique, non pas dans sa part supra-humaine liée à la Révélation mais dans sa part transmissible, lié au pouvoir temporel pour l'essentiel. Le Calife est le chef de la communauté islamique, il a hérité du prophète le commandement.<sup>468</sup>

Nevertheless, the Caliph's power was in practice political, personal and quasi-absolute, as DJAÏT puts it,

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<sup>466</sup> Saying that, no judgments are made on the morality or legitimacy of such events since perhaps some may have acted with pure zeal for faith.

<sup>467</sup> Normally translated as 'vicar of the Prophet of God' (in French: *le Vicaire de l'Envoyé de Dieu*).

<sup>468</sup> DJAÏT H., *La Grande Discorde (religion et politiques dans l'Islam des Origines)*, pp.52-53.

Son pouvoir n'est religieux qu'en tant que le religieux est le fondement de l'être de la communauté, que tout ce qui est politique est teinté à la base de religieux, que tout ce qui justifie l'action des hommes s'enracine dans le religieux. De la même manière, l'autorité dans son essence revient à Dieu qui l'a déléguée à son prophète dont le calife n'est que le successeur: l'autorité a un fondement sacré, et le calife n'est que le dépositaire par la médiation du prophète. Dans la pratique, son pouvoir est politique et rien que politique. Il est personnel et quasi absolu, étant limité seulement par la parole de Dieu et l'exemplarité de l'action de son prophète (la *Sunna*), mais aussi par les conseils de l'élite des musulmans, soit les *muhajirun* soit les *ansar*.

The Prophet left behind him an achieved religion and a state that covers the Arabia.<sup>469</sup> The real problem which remained, after the passing of the Prophet, was to maintain the relation between religion and state, as, during his life time, he ensured that role since his authority was based on the Word of God and in his concrete command of the Muslim community.<sup>470</sup> Things were different for his successor who was compelled to impose his authority upon the clans who were possibly contemplating dissociation from the state, as they considered the liaison with the Prophet as personal and, consequently, dissolvable after his death. For this reason, one of the main challenges of the Caliph was to crack down on apostasy that was not necessarily related to the refusal of the Islamic message but rather of paying the *sadaka* or *zakat*,<sup>471</sup> which, although of a religious nature, was the most visible aspect of their subjection.<sup>472</sup> For *Abu Bakr* (632-634), things should remain as

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<sup>469</sup> For some authors, such as Abdou Filali-Ansary (who support the reflections of Ali Abdel-Raziq), considering that the idea that the Prophet had created in the *medina* the first nucleus of the Islamic state is based on a confusion between two forms of organisation that need to be distinguished since their respective natures are totally different: the state and the religious community. For both, in fact, it is normally used to refer at with the term *umma* that is translated sometimes community and others nation. FILALI-ANSARI A., *Islam, laïcité, démocratie*, p.8.

<sup>470</sup> DJAÏT H., *op. cit.*, p.47.

<sup>471</sup> Zakat: Arabic term meaning purification; Islamic religious tax, one of the five basic requirements (*arkan* or pillars) of Islam.

<sup>472</sup> DJAÏT H., *op. cit.*, p.53.

they were left by the Prophet, and accordingly, for him, state and religion are one and the same thing.<sup>473</sup>

The rapid election of *Abu Bakr* can be explained by various factors, such as the role played by the new religion which unified different clans that were previously in continuous war; basically it depended also on the way *Abu Bakr* was able to impose himself but also on the support of 'Umar whose impelling personality made him one of the most influential consultants of the Prophet, who created him into a top-rank *muhajirun* (emigrant).<sup>474</sup> Pushed by the example of 'Umar, the *ansar* and *muhajirun* gave allegiance (*bay'a*) to *Abu Bakr* and the Caliphate was founded.<sup>475</sup>

Still, the condition in which *Abu Bakr* was elected was the origin of several bouts of trouble, which the first community surpassed, not without difficulties.<sup>476</sup> The circumstances were favourable for *Abu Bakr*, not so for his successors. In fact, the other three 'Right-going' (*al-khulafa' al-rashedun*) were all killed, causing civil war which lasted for many years. The third Caliph, *Uthman Ibn Affan* (644-656), replaced 'Umar, who, in turn, was replaced by 'Ali Ibn Abi Taleb (656-661).<sup>477</sup>

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<sup>473</sup> Idem, p.54.

<sup>474</sup> Idem, p.51. *Muhajirun* means the emigrants while *ansar* means the auxiliaries.

<sup>475</sup> Idem, p.48.

<sup>476</sup> Idem, p.52.

<sup>477</sup> The *Umayyads* governed for 90 years (661-750) and the Caliph's office became hereditary. They were then defeated by their cousins, the *Abbassids* (the descendents of the Prophet's uncle *Abbas*), who killed most of the *bayt* (family) of the *Umayyads*, but *Abd-elrahman I* escaped to Spain and was the first Umayyad Caliph of Cordoba. There were seventy-three Abbasid Caliphs, based in Baghdad, and the dynasty remained in power for almost five hundreds years (750-1258). Nevertheless, it was under their authority that the Islamic State began to lose its unity, especially after the beginning of military chaos in what the historians call the second Abbasid era (847-1258). It should be noted that some of the Abbasid first-era Caliphs, and most of the second era, were replaced by force or killed. With the end of the Abbasid dynasty, the *Mamelukes* seized power (1250-1217). The difference between them and their predecessors was that they were not Arabs, but rather good soldiers, originally slaves, taken from central Asia. After their replacement by the Ottomans

With the death of 'Ali, his son, *al-Hassan*, accepted the passing of power to *Mu'aweyya Ibn Abi Sufian*; thus ending a long civil war, started when *Uthman* was killed and replaced by 'Ali. In fact, the first divisions in the Islamic *umma* began then. Those who consider the first four Caliphs as legitimate, are called the *Sunnis*; they were (and are) the majority of Muslims, who had accepted the *fait accompli* and accepted the defeat of 'Ali by *Mu'aweyya*. *Sunnism*, in fact, opposes *shi'ism* and *kharajism* in regard to the political-theological question of Caliphate. The *Shi'ites*<sup>478</sup> are those who took the side of 'Ali while the *khawarij* are those who left (*kharaja*) the ranks of the followers of 'Ali after he had accepted the arbitration between him and *Mu'aweyya*, during the battle of *Siffin*.<sup>479</sup>

### 10.1.2. Why Early Islam seems attractive?

The 'nostalgia' to the origins, motivated the fathers of Islamist groups to write and to study early Islam. They presented the principles that can be considered as the basis of political theory of early Islam. This was the case of Abul Ala MAUDUDI. For him, the assumption of political power in Islam was founded on certain clear-cut principles such as:<sup>480</sup>

*First*, sovereignty belongs to God. An Islamic state has no right to exercise authority except in subordination and in accordance to the Law revealed by God and his Prophet. This presents a problem: most Arab

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(1281-1921), they continued to govern Egypt until they were defeated by Muhammad Ali in 1811.

<sup>478</sup> For the *Shi'ites*, the *imamat* (similar to a Caliph) represents divine law, and his power is simultaneously temporal and spiritual. Accordingly, as confirmed by Ahmad Beydoun, "*Le Chiisme partage le malaise qu'éprouvent les doctrines religieuses du Pouvoir face au principe démocratique de souveraineté populaire*". BEYDOUN A., *Chiisme et démocratie*, p.43.

<sup>479</sup> *Idem*, pp.21-22.

<sup>480</sup> SHARIF M.M., *A History of Modern Philosophy*, p.656. The other principles are: those least suited to positions of responsibility, in general, and for the Caliph's position in particular, are those who covet and seek them; the foremost duty of the Caliph and his government is to institute the Islamic order of life, to encourage all that is good, and to suppress all that is evils; it is the right, and also the duty, of every member of the Muslim community to check the occurrence of things that are wrong and abhorrent to the Islamic State.

and Muslim countries had adopted a constitution and declared the people as sovereign; however, it was then that the MAUDUDI invented a new concept that contains the sovereignty: *al-hakemmeyya* which refers to God, while *seyyada* (translated also as sovereignty) refers to the power of the people.

*Second*, all Muslims have equal rights. No distinction should be made between Muslims (as individuals or as groups) in the name of race, colour or speech. Another problem presents itself: the 'equality of all Muslims' does not know territorial limits or borders. In fact, Islamist groups envisage the instauration of an Islamic state for all Muslims. The membership to Islamic *umma* is based on *jus religionis* and not *jus sanguinis* nor *jus solis*.<sup>481</sup> So, what of the presence of non-Muslim communities?

*Third*, *shari'a* is the Supreme Law. Every one –the Head of State included- is to be governed by it. Problem: any law that contradicts the *shari'a*, including the constitution, is, thus, illegitimate, and Muslims shall not obey it. There is a problem in finding of the game's rule of the living together.

*Fourth*, the government, its authority and possessions are a trust of God. No one has the right to exploit them in any way not sanctioned by or abhorrent to the *shari'a*. Problem: authority is a trust of God; in the case that the governor misuses it by contradicting the *shari'a*, he loses his *raison d'être* and may be removed from his position, resulting in instability of the state.

*Fifth*, the Head of State should be appointed by mutual consultation concurrence of the Muslims. He should run the administration and undertake legislative work within the limits prescribed by the *shari'a* and in consultation with them. Problem: the consultation does not mean necessarily free elections or the participation of all citizens in the decision making process directly or indirectly since consultation may be limited to the 'wise people' that know and are able to distinguish the truth, as revealed by the Koran and the Hadith.

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<sup>481</sup> VATIKIOTIS P.J., *Op. cit.*, p.31.

*Sixth*, the Caliph or the Amir is to be obeyed ungrudgingly in whatever is right and just (*ma'rūf*), but no one has the right to command obedience in the service of sin (*ma'siah*). Problem: the governor may pretend obedience only in the case of right and just commands (*al-amr bel ma'rūf*); the problem here is that justice or rightness remains general concept that have not necessarily a precise content.

Such a system seems attractive to MAUDUDI, especially in the case of the first four Caliphs who did not impose themselves by force but rather were elected by the people, of their own free-will.<sup>482</sup> These early Caliphates –also called the ‘Right-going’ Caliphates- had some characteristic features that MAUDUDI summarizes as follows: the Caliphate was an elective office; the first four Caliphs performed their administrative and/or legislative functions through consultation; the treasury (*Bait al-Mal*) was entrusted to them by God and the public; the ruler had to obey God and the Prophet and no-one could pretend obedience, in defiance of God; the first Caliphs did not see themselves as above the law, and the society of those days was free from all kinds of tribal, racial or parochial prejudices.<sup>483</sup>

It is clear that behind such presentation there is a hidden message: the current governments in the Muslim and Arab world are not following the example of the early Caliphs. Such authors seem to have one foot in the present and the other in the past. Not only is it a contradiction but diametrically the opposite.<sup>484</sup>

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<sup>482</sup> SHARIF M.M., *Op. cit.*, p.659.

<sup>483</sup> *Idem*, p.659.

<sup>484</sup> There seems to be a hidden message behind all the writings of *Maududi*. As he seems saying: the current governments are serving evil and Muslims should not obey them. The real Islamic State is the pure one of the first four Caliphs or better still, it is exactly the way we –or I- predict or present it. The real problem with these groups –and all religious fundamental groups in general- is that they pretend to the exclusiveness to the truth. In fact, the real problem is to know who will be in charge of deciding what is right or just. Some may say that it is the *shari'a*, but then another question arises: What is *shari'a*? Is there one *shari'a*? In fact, the Koran, considered by Muslims as God's Word dictated to his prophet, cannot be put into question. Nevertheless, there are many situations that need an answer that may not be directly mentioned in the Koran nor in the *Hadith*. What should be done, then? There are different interpretations for the same text. This explains the existence of different

## 10.2. The Return to Cultural Particularities

In contemporary use, the reference to Islam is done as to a simple reference, as it has the same meaning to everyone. This may lead to misuse and therefore, confusions between the credo and history. In fact, a distinction is made between Christendom and Christianity, yet reference is made to a Muslim religious credo, various rituals and practices, and events and attitudes separated by centuries of history as if they were one thing, Islam. In fact, there are three levels intrinsically associated with the definition of Islam today: *first*, the values presented by the Koran; *second*, the historical practice principally based on religious thinking and its components: *tafsir*: the commentary of the texts; *kalam* or *usul al-Fiqh*: the theology; *fiqh*: the law; *third*, the belief or faith of an individual, where it is influenced by personal character and outside context, taking into account that the conditions during early Islam were different from those of the Middle Ages and the present.

Other possible amalgams are thus made between moral principles and political systems, the religious community and the state, religious commandments and the law. As an example, *shura* (principle of consultation) and *ta'a* (obedience) are considered by the Koran as virtues that have to determine orientate the actions of Muslims who live within a community. Nevertheless, the way those values have to be enacted is not mentioned in the Koran. Now, as (rightly) confirmed by *Abdou Filali-Ansary*,

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schools of the Law of Islam, besides the different secessions within the Islamic community (*Sunni* and *Shi'is* for example) and the multiple Islamic sects that developed throughout, history complicate this task. Accordingly, it would be preferable to speak about multiple Islamic concept, and a multiple *shari'a*, rather than one, unique, collection of precise and clear principles. Some may then suggest leaving the task of interpreting the *shari'a* to a group of specialized persons: the Muslim "theologians". Now, the same fact that this task is given to competent and informed personalities means that *shari'a* does not have a stable and precise content but rather, is adapted to new and unattended circumstances, related to a specific context (time and place), and as such need interpretation and explanation; but, these people are human beings, and as such, not infallible. Their view may then reflect their own will and not necessarily that of God. What is the solution? Not forgetting that in the meantime, the state needs to be governed and decisions need to be taken.

La confusion entre ces deux niveaux, celui des principes et celui –disons- des règles d'application de ces principes, a conduit de nombreux auteurs à croire que l'Islam offre, ou contient, à l'état implicite, une véritable « constitution » définissant le mode de fonctionnement de l'Etat Islamique.<sup>485</sup>

The theologians tried to make analogies to the enunciations made in the Koran and Hadith, and prevailed sometimes *ta'a* over *shoura*. This meant the prevalence of obedience as the basis of the Islamic state: obedience is imperative even when the governor is unjust; on the condition he ensures public order, does not forbid the basic rituals and does not openly attack the symbols of Islam.<sup>486</sup> The work of theologians, then, was to answer questions that arose in the Muslim community and that needed an answer.

### 10.2.1. Abu Hanifah

Together with many others, MAUDUDI presented *Abu Hanifah* who was the first person to lay down a perspicuous *Sunni* point of view regarding matters of divergence with the doctrines of others sect, in his famous work, *al-Fiqh al-Akbar*.<sup>487</sup> *Abu Hanifah* was born in *Kufah*, capital of Iraq, in 699 A.D, tried to answer the main questions and doubts of his time, one of which may shed light on the ultimate query raised in the preceding paragraph:

Whether, in a Muslim State governed by the sinful and the wrong-doer, it was possible to perform correctly such religious duties as the Friday prayers in particular and other prayers in general, or political functions, like dispensing justice or participating in war? For *Abu Hanifah*, prayers can be offered behind any of the faithful, good or bad. He distinguished between Caliphs *de iure* and Caliphs *de facto*. For him, if at a time the Muslims were deprived of a Caliph *de jure*, the functions

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<sup>485</sup> FILALI-ANSARI A., *Op. cit.*, p.7.

<sup>486</sup> In recent times there is a tendency to reverse priorities in favour of consultation that is understood as 'popular consultation'. *Idem*, p.8.

<sup>487</sup> He is the founder of the Islamic law school which took his name. For the first fifty-two years of his life, he lived under the *Umayyad* regime, and the latter eighteen under *Abbassid*. SHARIF M.M., *Op. cit.*, p.673.

of their society could continue to be exercised lawfully under a Caliph *de facto*, even though his right to the Caliphate may be disputed.

Nevertheless, in MAUDUDI's opinion on this issue, *Abu Hanifah's* position is similar to the basic view of Islam: the true sovereign is God; the Prophet is to be obeyed as God's accredited vicegerent, and *shari'a*, that is, the Law of God and His Prophet, is the supreme Law to which all must submit without demur or reservation. He regarded the *Qur'an* and the *Sunnah* as the final authority. Legal sovereignty, according to him, rested with God and the Prophet; and reason and judgment (*giyās* and *rā'y*) were to be employed in the service of legislation only in matters where no instructions had been given.

According to *Abu Hanifah*, to seize power by force and later regularize it by exacting allegiance under duress was no lawful mean of selection. A Caliph should be chosen after consultation and in conference with 'the wise people' (*ahl al-rā'y*) of the community who were entitled to give their opinion.<sup>488</sup> According to *Abu Hanifah*, maintained that oppression and the illegitimate use of public money by a ruler rendered the entitlement to the Caliphate null and void. Not only that; he even did not allow the tokens of good-will and gifts received from foreign States, to become the personal property of the Caliph.<sup>489</sup>

Another important question that baffled the people of those days was whether or not it was lawful for the Muslims to rise in revolt against a ruler who perpetrated tyranny or transgressed the limits of *shari'a*. *Abu Hanifah's* ruling in this matter was that the Caliphate of an despotic incumbent was basically wrong and insupportable, and deserved to be overthrown; that people not only had the right, but it was their duty to rise in rebellion, and that such a rebellion was not only allowed but obligatory, provided, however, that it promised to succeed in replacing the tyrant or transgressor with a just and virtuous ruler, and not fizzle out in mere loss of lives and lose of power.<sup>490</sup>

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<sup>488</sup> *Idem*, p.683.

<sup>489</sup> *Idem*, p.685.

<sup>490</sup> *Idem*, p.688.

### 10.2.2. Al-Fārābi

*Abu Nasr al-Fārābi* was born in about 870 and he died in 950 A.D.; eminent founder of a philosophical system as he was, he devoted himself entirely to contemplation and speculation and kept himself aloof from political and social disorder.<sup>491</sup>

In his famous book 'Opinions of People of the Perfect State', *al-Farabi* dedicated chapter twenty six to the human needs of society and cooperation, and the two successive chapters to the need for a chief/s and his/their qualities.<sup>492</sup> Human societies, for him, are either perfect or imperfect; the perfect society may be great, middling, or small. A great human society (*ma'moura*) is the one consisting of several *umam* (plural of *umma*) united and mutually supportive. A middling one is the society of one nation (*umma*) in some part of the world, and the small is the society of the people of a city (*madina*). It is interesting to note that only *madina* is defined territorially, since the *umma* refers to a community of people,<sup>493</sup> while *ma'moura* refers to the world as a whole.

The *madina* is compared to a human body, in which different organs have different roles. There is a dissimilarity that is outlined: in a human being, the collaboration between organs is natural, in a *madina*, this cannot be other than voluntary.<sup>494</sup> Although considered as the smallest (perfect) society, the *madina* constitutes the basic one. In fact, the ideal City-state is the city in which the members of the society cooperate to attain happiness. The same applies to *umma*, but the collaboration is not

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<sup>491</sup> Idem, p.450. He left a considerable amount of literature, such as: 1) *Kitāb Ara' Ahl al-Madīnat al-Fddīlah* (Book on the Views of the People of the Excellent State); 2) *Kitāb al-Siyāsāt al-Madaniyyah* (The Book on the Civic Administration); 3) *Kitāb Tahsil al-Sa'ddah* (The Book on the Achievement of Happiness); 4) *Kitāb al-Tanbih 'ala Sabil al-Sa'ddah* (The Book on Caution on the Path of Happiness); and 5) the Bodleian manuscript of his *Fusūl al-Madīni* (Chapters on the Civilian). Idem, p.704.

<sup>492</sup> AL-FARABI, *Opinions of people of the Perfect state*, pp.112-126.

<sup>493</sup> Idem, p.113.

<sup>494</sup> Ibidem.

between imperfect societies<sup>495</sup>, nor is it between individuals but rather, it is between the *mudun* themselves. The ideal *ma'moura* then is the one in which different *umma* (distinguished by its natural character, temperament, habits, and language) cooperate to attain happiness. Accordingly, the *madina* is not a closed society; it cooperates with other *mudun* (the same principle of voluntary will can be applied by analogy here). The same is valid for *umma*.

Now, for a similar existence of the *al-madina al-fadela* there is a need for a chief who cannot, by definition, be so if he is subjugated to someone else. The chief cannot be just anyone, nor is anyone excluded *a priori*. The only condition is to have the qualities of a chief (the ideal chief, the *imam*, according to *al-Farabi*, has twelve characteristics).<sup>496</sup> It is however, impossible to have all these qualities in one man; therefore it is necessary to consider the second option: a chief who has at least six of these.<sup>497</sup> *Al-Farabi* calls this ruler the traditional king. Accordingly, it is not necessary that this role is ensured by one physical person; these qualities, in fact, may be distributed in different persons who constitute then, perfect chiefs.<sup>498</sup> If these characteristics are present in more than one person, together they form ideal chiefs for a state. If

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<sup>495</sup> The imperfect society is that of the people of a village, a locality, a lane, or a house, the last being the smallest.

<sup>496</sup> Sound health; Intelligence and sagacity; Good memory; Prudence and talent; Eloquence; Devotion to education and learning; No greed for food, drink, and sex; Friendliness towards truth; Bigness of heart; Indifference to *dirham* and *dinar* and other forms of wealth; Devotion by nature to justice; Strong resolution. SHARIF M.M., *Op. cit.*, p. 712.

<sup>497</sup> (1) He should be wise and philosophical; and (2) learned and abreast with the laws, customs, rites, and rituals adopted by his predecessor to discharge the function of the ideal State with all perfection. (3) He should be an expert in deriving principles in case he does not find airy law, and (4) farsighted, possessing an insight to frame rules and regulations in accordance with the conditions and circumstances he finds himself in, and capable of keeping up the reforms he introduces. (5) He should also be well experienced and eloquent in giving directions to urge the people to follow him in accordance with the *Sari'ah*. (6) In addition he should be skilful in physical display of exercises needed in warfare, and in the use of arms, ammunition, and other equipments. *Idem*, p.713.

<sup>498</sup> AL-FARABI, *Op. Cit.*, p.126.

these characteristics are not present in anyone, then there would be no sovereign and the state would be exposed to destruction.<sup>499</sup>

For *al-Farabi*, the sovereigns of an ideal state, who succeed one another and the group of people who administer that state, are considered as one and sovereign. The people of an ideal state have something in common, although they may enjoy happiness in different ways. The excellent state as explained above is the state administered by the best and most talented, who aim at prosperity and happiness. If its constitution fails to provide the people with prosperity, and the rulers do not possess the qualities of ideal rulers, then the state ceases to be excellent and is called the state of evil-doing (*al-madinat al-fāsiqah*), the ignorant state (*al-madinat al-jāhilah*) or the state of astray-going (*al-madinat al-dāllah*).<sup>500</sup>

To conclude, here are three remarks: *First*, there is only a description *a posteriori*, of the qualities of a perfect chief, not the way he is chosen or designated. Accordingly, the consequence of not having a perfect chief for the perfect *madina* will be the destruction of the *madina* itself. Perhaps it is a kind of justification for regime changes and the destruction of monarchies/rulers, and not the way they are to be preserved. *Second*, the qualities presented are all human qualities and not related to religion, gender or a particular dynasty. Nevertheless, it is not easy to have a perfect chief (these qualities are rarely found in one person, unless he is a prophet or philosopher).<sup>501</sup> In this case, a king is enough to guide the affairs of the perfect *madina*. His qualities are of a different order: he just needs the wisdom to follow in the steps of his predecessor. *Third*, governance is not related to the *umma* but to a *madina* that is territorially defined.<sup>502</sup> Accordingly, wherever a perfect

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<sup>499</sup> Ibidem.

<sup>500</sup> SHARIF M.M., *Op. cit.*, p.964.

<sup>501</sup> AL-FARABI, *Op. Cit.*, p.14.

<sup>502</sup> According to some authors, the post-medieval idea of a state –a territorially defined entity apart from a ruler or a dynasty organized in accordance with man-made rules was alien to Muslim political theory. Ottoman theories of state and government were derived from the Muslim concept that God is the source of all authority and law and that government exists to enable the community of true believers (Muslims) to fulfil

chief exists, he will be the head of the *madina*, and the *umma* and also the *ma'moura*. Nevertheless, this is often difficult to realize, so the other qualities may be held by different persons who shall reign collectively as the perfect chief.

### 10.2.3. Ibn Khaldûn

According to some authors, the death of *Ibn Khaldûn* (1406) signalled the end of Arabic Political philosophy, and was followed by five hundreds years of political thought, whose sole exponents were jurists and theologians.<sup>503</sup>

It was through the examination of culture that *Ibn Khaldûn* investigated the phenomenon of government which is considered to be the constituent part and form (e.g. the organizing principle) of culture.<sup>504</sup> This particular and independent science of *Ibn Khaldûn*, that is, the science of culture, is not an art concerned with how man ought to live, or how society should be rightly governed, or how the multitude should be convinced, but a scientific inquiry into how humans beings have actually lived in the past; the natural causes determining the modes of human association which necessitate those activities and ways of life, pursued in diverse human societies; historical reports afford the opportunity to correctly judge their soundness (or not).<sup>505</sup>

*Ibn Khaldûn* presented various political theories of his predecessors, but he did not do that merely as a historian; he severely criticized them, basing his criticisms on theoretical and practical considerations. In fact, he demonstrates the necessity for social organization and a ruler, but in order to do that, some philosophers refer to divine law. For *Ibn Khaldûn*, this is evidently false, since a ruler can rule by virtue of royal

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its obligations to God. The community, not the state, constitutes the basic Muslim policy transcending all boundaries. KORANY B., *Alien and Besieged Yet Here to Stay: the Contradictions of the Arab Territorial State*, p.75.

<sup>503</sup> BUTTERWORTH Ch. E., *State and Authority in Arabic Political Thought*, p.109.

<sup>504</sup> SHARIF M.M., *Op. cit.*, p.962.

<sup>505</sup> *Idem*, p.966.

authority alone, and even a poorly educated persons know that there have been innumerable rulers without divine authority.<sup>506</sup>

Of the Muslim philosophers, it was precisely *Ibn Rushd* who (like *Ibn Khaldûn*) was a recognized religious judge (*qādi*), and a philosopher who criticized *al-Farabi* and *Ibn Sina* for imitating the dialectical theologians; he who wrote the most celebrated treatises on religion and philosophy, the main theme of which is in defense of the legitimacy of religion and philosophy in their proper spheres - a devastating attack upon the combination of religion and philosophy in the form of theology.<sup>507</sup>

According to *Ibn Khaldûn*, humans cannot live without social organization and solidarity, since these are indispensable in procuring basic nourishment and objects of primal necessity. This absolute human need for social organization is fundamental to civilization (*umran*).<sup>508</sup> For him, the efficient cause of the movement to be a specific property of the human soul, that is, social solidarity (*‘asabiyya*, translated often as ‘group feeling’). For him, it is a specific property of the human soul, a combination of the natural feeling for one's relatives and friends, and the need for defense and means of survival. It cements a group together, dictates the need for a ruler, leads to conflicts with other groups, and generates the power of conquest leading to victory over others; its initial power determines the extent of this conquest; the fulfillment of appetites and desires, and finally, weakens it and leads to the disintegration of political power.<sup>509</sup>

Political life, as practiced by all human communities, has to take into account the nature of all humans, and should be directed to the common good of the multitude. This requires a ruler and a law based on the rational understanding of their common needs and interests in this world, or a divine Law based on their common good in this world and

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<sup>506</sup> *Idem*, p.968.

<sup>507</sup> *Idem.*, p.937.

<sup>508</sup> IBN KHALDÛN, *The Muqaddimah, An Introduction to History*, pp.45-48.

<sup>509</sup> *Idem.*, pp.160f.

the next. Accordingly, for every social organization, political government is necessary; human beings require a person who will make them do what is good for them, and who will forbid them by force (if necessary) to do what may harm them. However, obeisance to a superior depends on his being good and fair; he is so, when he does not oppress the population with unjust laws, and treats everyone equally.

In the case of a holder of authority despising his own people, he will be rejected by them, and, after ascertaining the qualities of a successor in the spirit of the clan, he will be removed, and his authority given to another. In fact, the allegiance oath, *albaya*, consists of paying homage to obeisance. The person who takes the oath, binds himself in contract to his emir, and in doing so, confers upon him the government of his affairs and those of Muslims; he is bound to recognize his emir's authority and to execute his instructions, whether he is in accordance with him, or not. Similar to a buyer being bound by a contract with a seller, those who take the oath of allegiance to, and enter into a contract with an emir, put their lives in his hands.<sup>510</sup>

The first form of government was the Caliphate. The origin of the word means 'to replace' because the Caliph is the one who represents the Prophet, in Islam. The Caliph is like the vicar of the Lawgiver (Mohammed).<sup>511</sup> *Ibn Khaldūn* distinguishes between the objectives of natural royal power and those of the Caliphate: the exercise of the first consists in making it possible for the masses to operate in harmony with their projects and destinies; that is, allowing them to safeguard their material interests and avoid what may harm them, in accordance with reason. As for the second, it is the guidance of people according to divine law, in order to ensure their happiness in this world and the next.<sup>512</sup>

When the prophet died, his companions took their oath of allegiance to *Abu Bakr* and charged him with directing their affairs; people were never left open to anarchy. Governmental functions depended on the

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<sup>510</sup> *Idem.*, pp.166-167.

<sup>511</sup> *Idem.*, p.170.

<sup>512</sup> *Idem.*, pp.154f.

Caliphate, which is simultaneously, a spiritual and temporal institution. This is why the Caliph is also called *imam*, since he is the one who guides Muslims in their prayers. The *imamate* was a necessary institution: the proof lies in the fact that the agreement was unanimous. The dignity of the *imam* is part of religious law since it is in the service of a public good; nevertheless, it is a grave error to consider the *imamate* as one of the Pillars of Faith; it has only the function of public interest; those entitled are empowered by delegation.<sup>513</sup>

Nevertheless, the characteristics of Caliphate had disappeared - all that remained was the name - and the regime became purely and simply an autocracy. The Power became absolutist and served the vanities of this world, including the use of force, and the satisfaction of arbitrary desires and passions.<sup>514</sup> Some began calling this institution *sultanate*, in reference to the powers and prerogatives of those who pretended the same powers, or in relation to the allegiance that was made to the Caliph, when it was imposed by force.<sup>515</sup>

### 10.3. Constitutional Provisions Regarding Religion and Nation

In the Arab world, constitutions may describe a variety of political structures: federal, as in the United Arab Emirates and the Sudan; unitary, as in Tunisia; a constitutional monarchy, as in Jordan; a republic, as in Egypt; or a traditional hereditary monarchy, as in Saudi Arabia. While most Arab constitutions are documents with roughly similar provisions, some constitutions are noteworthy products of historical and political circumstances. In Saudi Arabia, for example, the Koran itself is considered the constitution, accompanied by a series of royal decrees compiled to function as a manual for the application of its principles. In Libya, the Constitutional Proclamation, the Green Book written by *Muammar Qaddafi* and the People's Declaration together constitute the BL of the land.<sup>516</sup> Procedures for constitutional

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<sup>513</sup> *Idem.*, pp.156f.

<sup>514</sup> *Idem.*, pp.181f.

<sup>515</sup> *Idem.*, p.155.

<sup>516</sup> See Constitutions in Arab World, in the website of the Program of Governance in the Arab Region (POGAR).

amendments vary; sometimes requiring direct referenda or legislative action, while in some countries, the head of the state may issue amendments by decree.

The comparison of constitutions in different regions of the world, uncovers a remarkable variety of fundamental texts, since they are the 'product of their unique history and geography', as stated by Eric CANAL-FORGUES in the introduction to the collection of Arab constitutions, edited by him.<sup>517</sup> This is also the case of other collections in which Arab constitutions have been studied as if they were identical (which they are not), in which we may find common features and some similarities, since they might have reproduced information from the same sources; nevertheless, every Arab state has its own constitution, and its own constitutional history.

If we set aside the so-called 'Constitution of Medina', the first 'Arab' constitution -the Constitution of Tunisia adopted in 1861- was written in French! Since then, the constitutional movement began, and never stopped, in the Arab world. The Arab world was familiar with evolution in relation to the constitutionalism; the democratization process experienced a relatively pacific transformation. There is also a brand of creativity in the Arab world, wherein new techniques and institutions that are unknown elsewhere are invented.<sup>518</sup>

Most Arab states adapted written and rigid constitutions, of which some have common characteristics. Many Arab states adapted constitutions after independence: Algiers gained independence on 5 July 1962, and adopted its Constitution on 10 September 1963 (suspended in 1965; the second Constitution was adopted in 1976 and amended in 1979, 1988, 1989, 1996); Bahrain gained independence on 15 August 1971, and adopted its Constitution on 6 December 1973 (suspended in 1975 and adopted the National Charter in 2001 after a popular referendum); the

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<sup>517</sup> CANAL-FORGUES E., *Recueil des Constitutions des Pays Arabes*, p.X.

<sup>518</sup> *Idem*, p.VII. Nevertheless, in no way can we will elude ourselves in thinking that the law of the constitution corresponds to the constitutional law. There is a need, in fact, to study the constitutional text in the light of the law in force, in every Arab state. Nevertheless, studying the constitutions of the Arab countries may give us an idea, albeit incomplete, of the constitutional situation of those countries.

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United Arab Emirates gained independence on 2 December 1971 and adopted a provisional constitution on the same date (that became permanent in 1996); Kuwait gained independence on 19 July 1961 and adopted its constitution a year later; Mauritania adopted its constitution immediately after independence in 1961. Some other constitutions were adopted before independence, such as the Lebanese one in 1926, while Lebanon gained independence on 22 November 1943. Other were adopted because of new circumstances; such as that of Jordan in 1952, after the unification of the two banks of the river, and Iraq in 1968, after the *Ba'thi* revolution.

There are states with a special constitutional history such as Egypt, which enjoyed certain autonomy within the Ottoman Empire, and began very early on, the codification process. Egypt was also familiar with different constitutions. Some systems are related to special circumstances such as Saudi Arabia, which has no constitution but the *shari'a*; and Libya which has a Constitutional Proclamation – The Green Book and a popular Proclamation. There are Unitarian States such as Tunisia, and Federal States such as Sudan. Besides, there are different political systems such as constitutional royal hereditary (Jordan) and republican (Egypt).

### **10.3.1. Arab Nation and Single Arab People**

It is obvious that Arab nationalists have the same German ethnic concept of nation. The nation exists as a human group with its own characteristics such as language, history and traditions (Islam also is important in conserving the Arabic language from total decadence after four centuries under the non-Arab Ottomans). The Arabic nation made its first attempts to a revival in the nineteenth century, and began political activities in order to establish a united state for all Arabs.<sup>519</sup>

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<sup>519</sup> In order to avoid discussions about which state should be considered Arab, all members of the Arab League are usually considered so. There are twenty-one states, all members of the Arab League, plus the PLO (the state of Palestine became a full member on 9 September 1976). Although the State of Palestine is part of the Arab League, it is not yet independent and sovereign, nor yet does it consist of the three basic elements of a state: territory, people and sovereignty. When the PLO was

The first attempt of unification was when *Mohammad Ali* of Egypt, encouraged by France, revolted against the Ottomans in 1831 in order to “liberate Arab peoples and gather them in one Arab Empire”. The second attempt was when *Ash-Shareef Hussein* declared a revolution against the Ottomans, encouraged by the British government, who promised the establishment of a united Arab state under the authority of Hussein.

These two attempts failed, and the concept of Arab nationalism as a motivation for creating one Arab state, had lost its roots and started to live together with the Arab territorial states. Arab nationalism became the incentive or enticement for further collaboration and coordination between existent Arab states. In the beginning, the ethnic concept of nation, helped to justify the revolts against other Muslims. Arabs became ethnically recognized and formed a nation that was distinguished from other Muslim nations; as such, and according to the new concepts of modern nations of that time, they sought to have their political independence in one state.

Although Arab nationalism legitimized rebellions against other Muslims, it could not provide elements distinguishing single Arab people, nor could it justify territorial Arab states. What makes an Algerian different from a Moroccan, a Jordanian from a Palestinian, an Egyptian from a Sudanese, a Lebanese from a Syrian? Can borders be sufficient to legitimize actual Arab states or are they only a foreign imposition? In fact, it was crucial to leave the concept of nation as ethnicity, in order to adopt the concept of nation as *demos*; this concept covers all the citizens of one state who live within its borders and under its laws, and distinguishes them from others.

The preambles of the Arab constitutions may provide a brief vision of the single Arab state, regarding the relation between the people and the Arab nation. Some submit that the *state* is part of the *Arab world*, and others that *the people* of a single Arab state are part of the *Arab nation*. Here we will take three study cases: the Jordanian constitution of 1952

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admitted into the Arab League, it was considered the sole representative of Arab Palestinians and their interests.

and National Charter of 1990, the 1971 Egyptian constitution and the 1996 Algerian constitution.

**The 1952 Jordanian Constitution** was applicable to the WB since it was part of the Kingdom of Jordan, until its occupation by Israel in 1967 and the formal separation between the two banks in 1987. In its first article, The Jordanian Constitution states that Jordan is a sovereign Arab state. The same article states that the people (*sha'b*) of Jordan are part of the Arab nation (*umma*). The sovereignty of the state and its independence from other countries is emphasized in that constitution, and this can be understood in its historical context of rivalry between Arab leaders, especially in relation to the Palestinian territories that were unified with (or annexed to) the Transjordan. The Jordanian constitution has a particularity: it refers to the Jordanian people as *umma*. This is the case of

Art. 24: (i) The *Nation* is the source of all powers. (ii) The *Nation* shall exercise its powers in the manner prescribed by the present Constitution.

Art. 29: The King shall upon his succession to the Throne take an oath before the National Assembly, which shall be convened under the chairmanship of the Speaker of the Senate, to respect and observe the Constitution and be loyal to the *Nation*.

Art. 93: The Prime Minister and Ministers shall, before assuming their duties, take the following oath before the King: "I swear by Almighty God to be loyal to the King, uphold the Constitution, serve the *Nation* and conscientiously perform the duties entrusted to me."

Besides, the Jordanian constitution refers to the Jordanian Parliament as '*Majles al-umma*'. This term is usually translated as the National Assembly. Now, the National Assembly is the translation of '*al-majles al-watane*' where *watane* refers to homeland (*watan*) and not to nation as *umma*. This confusion in terms disappears in the Jordanian National Charter of 1990 where the term *umma* (nation) refers to the Arab nation and *sha'b* (people) refers to the Jordanians: "*The Jordanian people are part of the Arab nation*".

**The Algerian constitution** is an interesting case study. We read in the preamble that the Algerian people are a free people and relate their

identity to Islam and Arabism: *Amazighity*.<sup>520</sup> In fact the Algerian preamble provides that Algeria is an Arab land of Islam and is an integral part of the Great Maghreb. Still, it refers to its people as the only source of authority. The Algerian people are distinguished from other Arab peoples and are entitled to sovereignty. Article 6: “*The people are the source of any power. The national sovereignty belongs exclusively to the People*”.

While we read in the **Egyptian constitution** of 1971 that the Egyptian people are part of the Arab nation. The amendment of 1980 introduced the interesting concept of *comprehensive unity* in the Constitution’s first article: “*The Egyptian people are part of the Arab Nation and work for the realization of its comprehensive unity*”. What does this comprehensive unity mean? It may be a constitutional adaptation to and harmony with the actual territorial divisions of Arab states; few would envision a united Arab state in the near future, but most Arabs encourage Arab unity that is based on the actual division of Arab states. This unity would envision special relations between these states that have a common culture, language and history. In fact, sovereignty of a single Arab people is enhanced in all the Arab constitutional documents and no state would compromise it; in the Egyptian Constitution, Article 3: “*Sovereignty is for the people alone they are the source of authority. The people shall exercise and protect this sovereignty, and safeguard national unity in the manner specified in the Constitution*”.

### 10.3.2 State-Religion relationship in Arab Constitutions

Is it possible to read the theory of constituent power in Arabic terms? In fact, this theory was ‘invented’ in the USA and France, following philosophical and political revolutions. The nation became the source of all authority since people are sovereign, and not the monarch or God. The principle of popular sovereignty is included in most Arab Constitutions which adopted written and rigid Constitutions; this is

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<sup>520</sup> The Amazighity distinguished the cultures of the three countries of the *Magreeb*. The name is given to the original inhabitants of Maghreb. An interesting study was made by Rania Zabaneh for a Master degree at the University of Birzeit: “*Algeria under Scope*” (Arabic-2004) under the supervision of Dr. Abdalla Eid.

obvious since popular sovereignty and the modern concept of self-determination is the basis of modern nationalism. This fact is not enough to embrace the conviction that this popular sovereignty is the legitimization of the state and its institutions in the Arab world. In fact, in the Arab world, a contradiction exists: there is an increasing attachment to territorial states although not without general scepticism from actual regimes (considered the reason for under-development in Arab States), while the legitimization of the authority is based on Arab or Islamic nationalist discourse.

The following table shows Arab constitutions refer to Islam. It gives a comparative idea of the constitutional documents in the Arab world.<sup>521</sup>

State	Islam	<i>Shari'a</i>
<b>Algeria</b>	Religion of State (Art.2) Candidate to the presidency: Muslim (Art.107)	National Charter 76, and 1986 (Art.6); Freedom of conscience (Art.53)
<b>Bahrain</b>	Islam shall be the religion of the State (Art.2)	Islamic Sharia (Islamic Law) 'a main source' of legislation (Art.2) Freedom of conscience is absolute (Art.22)
<b>Egypt</b>	Religion of State (Art.2) The person to be elected President of the Republic must be an Egyptian born to Egyptian parents and enjoy civil and political rights. (Art.75)	Islamic jurisprudence is the principal source of legislation (Art.2 and 11) The State shall guarantee the freedom of belief and the freedom of practice of religious rites (Art.46)
<b>Emirates</b>	Official religion of the Union (Art.7)	<i>Shari'a</i> = a principle source (Art.7); Freedom of religion, in accordance with the customs, and in the limits of the public order (Art.32)

<sup>521</sup> Source: *Islam (L') Religion de l'Etat*, pp.129-130.

<b>Jordan</b>	Islam is the religion of the State (Art.2)  Legitimate child for a Muslim mother and father. (Art.28)	The State shall safeguard the free exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom, unless such is inconsistent with public order or morality (Art.14)
<b>Koweit</b>	The religion of the State is Islam (Art.2)  Legitimate son of Muslim parents (Art.4,5)	The Islamic Shari'a shall be a main source of legislation. (Art.2)  "...Without distinction as to race, origin, language or religion..." (Art.29)  Freedom of belief is absolute. (Art.35)
<b>Morocco</b>	Religion of state (Art.6)  The king: Amir al-mu'minin (Art.19)	Freedom of worship (Art.6)
<b>Saudi Arabia</b>	Unique religion	Hanbalite school, <i>Ibn Taymyya</i>
<b>Syria</b>	The religion of the President of the Republic has to be Islam. (Art.3)	Islamic jurisprudence is a main source of legislation. (Art.3) (1) The freedom of faith is guaranteed. The state respects all religions. (2) The state guarantees the freedom to hold any religious rites, provided they do not disturb the public order. (Art. 35)

## §11 Conclusion to Part Two

The relation between *authority*, *power* and/or *force* is subtle, as seen in Arab literature and terminology. In fact, the word ‘force’ is translated as *kuwwa* and ‘authority’ as *sulta* while ‘power’ can be translated as *sulta* and *kuwwa*. However, the term *authority* may have connotations related to legitimacy while the use of the word *power* (as *sulta*) may have connotations of legality. Accordingly, not all those who are in power enjoy *sulta*; rather, the imposition of *sulta* (*power*) may be done by *kuwwa* that is by force, in the name of *sulta* (*power/authority*), which is legally enjoyed. Therefore, *sulta* is mostly related to legality rather than to legitimacy, and may endure as long as it can be imposed by *kuwwa*.

The main subject in this thesis is the constituent power. Accordingly, reference to the first Islamic *umma* and the first Islamic State, and later to contemporary Arab States, may be of help to understand how can the state apparatus pretend the obedience or the consensus of its subjects without being attacked or rejected by citizens for lacking legitimacy (although they may apparently being ‘democratically’ elected). How can those entitled to constituent power and those who use it express that popular will that is not only the *volonté générale* that ignore individuals will, neither is the sum of individuals’ will that act in egoistic and individualistic way without any consideration to the rules of living together, necessary for the maintenance and the unity of any social group, including the political ones, but rather a combination of both of them.

Arab countries have at least one thing in common: they are all rooted in the Arab and Islamic culture that is *distinguished* from other cultures, but not necessary in opposition to or in conflict with any other. In western countries, particular historical events had occurred, that changed and influenced political systems, even to the present day. The same is true for Arab countries: the end of the Ottoman Empire and the particular experience of colonialism and/or mandate are turning points in the Arab modern history.

Arab and European political thinkers took their bearings from Plato and Aristotle, but the European tradition soon began to discuss the fundamental differences between the demands of the secular rule and those of divine rule. This European distinction led to a modern realistic approach towards politics by authors like Machiavelli, Bacon and Hobbes, and to the emergence of the Locke-Rousseau principle of popular sovereignty. According to some authors, a similar rupture with the medieval philosophy did not occur in the Arab tradition.<sup>522</sup>

This absence also led, in BUTTERWORTH's view, to a 'quietistic acceptance' by the citizens in the Arab countries of their non-democratic governments.<sup>523</sup> The same author continues, "*The absence of an unquestioned, perhaps unquestionable belief in the fundamental need for popular sovereignty is what primarily explains why political life in the Arab World differs so markedly from political life in the West*".<sup>524</sup>

Effectively, western countries had had two revolutions: the American and the French; those were preceded by a number of theories that justified the power of the state by popular will rather than that of God or the king. This was possible in a context of (initially partial, then complete) separation between Church and State. Nevertheless, the consequences of these Revolutions are not limited to western countries: the establishment of modern states and the dispersion of nationalism and theories of popular sovereignty all over the world are convincing proof.

In fact, power has no more its origin in God than in his representative on earth (the Pope). Consequently, it was necessary to find out who were the newly entitled to sovereignty. Bodin (1530-1596) answered that the bearer of this indivisible and unlimited sovereignty was the

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<sup>522</sup> BUTTERWORTH Ch. E., *Op. cit.*, p.91-92.

<sup>523</sup> Ibidem. This position is somewhat exaggerated although not totally void of logic. I do not share BUTTERWORTH's point of view in relation to Arab countries although his analyses of modern developments in western countries are excellent.

<sup>524</sup> SALAMÉ Gh. (ed.), *Op. cit.*, p.11.

monarch.<sup>525</sup> Hobbes (1588-1679) said that it was the highest representative of the state who had the undivided and unlimited sovereignty since the people formed a social contract and every person cedes his freedoms and powers to one person and community.<sup>526</sup> While John Locke (1632-1704) proposed that it was the representative(s) of the state who had the undivided power, but it was not ‘unlimited’ since it was bound by natural law.<sup>527</sup> Rousseau (1712-1778) related the sovereignty to the people which expressed ‘*volonté générale*’; as such a rational and just state was governed by direct democracy.<sup>528</sup>

Simplified, the shift in sovereignty can be expressed in the following way: while Bodin still relied on the notion of the *rule over the people*, Hobbes and Locke introduce the *rule for the people* and Rousseau argued in favor of the *rule for the people by the people*.<sup>529</sup> As Gérard Mairat puts it: ‘the concept of nation was a revolutionary notion’, perhaps because it meant the abolition of absolute monarchic power and its replacement by the power of the people.<sup>530</sup>

Accordingly, the concept of popular sovereignty was possible in Europe only in a context of a separation from the Church and the subsequent approaches to the new bearer of sovereignty and not -as some may think- to the French or the American Revolutions. In fact, those two Revolutions gave birth to the new modern states, based on the separation and balance between the three powers (legislative, executive and judicial) but the concept of popular sovereignty is much older; these two Revolutions changed only the way that sovereignty may be exercised and controlled.

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<sup>525</sup> TÖPPERWIEN N., *Op. cit.*, pp.24-25.

<sup>526</sup> *Idem*, pp.25-26.

<sup>527</sup> *Idem*, pp.26-27.

<sup>528</sup> *Idem*, pp.27-28.

<sup>529</sup> *Idem*, p.28. Interesting to notice that some Arab countries adopt the Rousseau’s vision in their constitution such as the 1996 amended Algerian constitution which states in article 11 that “[t]he State takes its legitimacy and its *raison d’être* from the People’s will. Its motto is ‘By the People and for the People’. It is exclusively for the service of the people”.

<sup>530</sup> BENSAID S., *op. cit.*, p.149.

In the Arab context, a similar experience occurred but much earlier: Muslim (and Arab) philosophers tried to justify royal power. They did that without necessarily referring to religion, though it remained important as an element in helping diverse populations (or clans) remain cohesive under one political organization. As *Ibn Khaldûn* conceived it, Islam served as a unifying element of the various communities in the Islamic Empire.

Besides, by the end of the First World War, a similar turning point occurred in the Arab world history, when *Sheikh Hussein* of Mecca declared a revolt against the Ottomans, justifying his allegiance with Christian Europeans against the Muslim Ottoman Caliph, by the need to establish a modern state for Arabs. This revolution may be compared to those of France and America, but not for the substantial consequences in term of the realization of the goals of the revolution, but rather to the principles and ideas behind it. What prevailed for *Sheikh Hussein* was the realization of a political unity of Arabs (or most of them) in one state rather than of allegiance with other Muslims. To do that, he pledged allegiance to non-Muslims against the Muslim Ottomans, in the name of an Arab nation. This was the *revolutionary* objective of that unsuccessful and incomplete revolution.

The end of the Ottoman Empire signaled the end of the Caliphate and the beginning of new theories of the legitimacy of state in the Arab world. Arabs, in fact, needed to justify their revolution and their right to statehood by referring to the concept of 'Arab nation' and/or to the concept of 'popular sovereignty', based on the people's right to self-determination. These two concepts helped Arabs and single Arab States to justify their authority within and to the outside world. The first concept provided the internal legitimacy and the other, international legitimacy. In other words, Arabs justified their revolution against other Muslims by the concept of an 'Arab nation' as opposed to other nations, albeit Muslims, while Arab territorial states justified their territorial autonomy and independence by the concept of popular sovereignty.<sup>531</sup>

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<sup>531</sup> Among many others, Palestinian nationalism is the strongest national movement in the Middle East, and the only one which has not yet been realized as a state in its

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Contemporary societies are much more complex than ancient societies since they had adapted the methods and techniques of positive law in order to function. This was possible after the end of traditional doctrines that were attached to religion and its replacement by elaborate concepts and based on modern science and modern thinking. Religious law was then confined to a limited sphere, such as personal status. This was the case in most Arab countries. The problem is that there is sometimes confusion between religious commandment and religious law, two concepts that always have to be always distinguished in order to avoid an amalgam.<sup>532</sup>

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own. It developed closely with Arab nationalism: in the beginning, in its extreme sense (finalized with the construction of an Arab State for all – or at least, the majority of Arabs), or, later, in a moderate and pragmatic sense, whose intention was coexistence with the current Arab territorial States. However, these modern Arab States undergo the most serious and dangerous crisis for their stability and very existence. However, it is precisely in this continual search for a proper Arab identity, and a Palestinian one in particular, that the Palestinian people intend to take their first steps towards statehood.

<sup>532</sup> FILALI-ANSARI A., *op. cit.*, pp.7-8.

## PART THREE

### THE *INTERNATIONALIZATION* OF CONSTITUENT POWER

Any attempts to elaborate or adopt a Constitution for the Palestinian State cannot ignore three facts: *First*, the existence of a comprehensive system of law in the Palestinian occupied territories, which is an accumulation, or a mixture, of several legal systems that succeeded each other. In fact, Palestine (as a historical or territorial unit) had been governed by different legal systems: the Ottoman, the British, the Jordanian -in the WB- and the Egyptian -in Gaza Strip (GS); the Israeli, in WB and GS (WBGS), and the Palestinian (after the establishment of the PA); each left a legal heritage in the Palestinian territories. *Second*, the existence of the Palestinian National Charter (PNCh), two Declarations of Independence and other documents made in exile by representative organizations of the Palestinian people, especially by the Palestine Liberation Organisation (PLO), present for more than four decades. *Third*, the existence of international law that guarantees people the right to self-determination. As for the Palestinian people, this right was recognized several times and was intended to guide the Palestinians towards statehood.

Accordingly, any attempt to enact or elaborate a constitution shall take in consideration the precedent elements, and as such, secure the reconciliation of the different processes in the Palestinian territories; the constituent organ shall take in consideration previous documents and declarations that were issued by those who used to represent the Palestinian people and who expressed the evolution of the people self-awareness (related to the nation-building process). In addition, it shall take in to consideration the agreements with Israel (related to the peace process); and, it shall not ignore the principles and values recognized as

universal by the international community (related to the democracy process).

Observers may notice here three moments: the moment of the *past*, of the *present* and of the future; these moments correspond respectively to the moment of the awareness of *one-self*, in relation to *the other* and to the *international community*; that is, *nation building*, *peace* and *democracy* processes. The relation between these three processes is not always conciliatory but for Palestinians, handling these issues competently, means a secured peace, based on national rights that are realised through bilateral negotiations within international legitimacy. The process of nation-building in the Palestinian context faces serious challenges, especially in relation to two other processes: those of peace and democracy. Palestinians are trying to handle these three challenges without specific orientation: this may have negative consequences on all those processes.<sup>533</sup>

Now, the Constitution is not merely the result of a certain political development.<sup>534</sup> It could be seen as a technique, a strategy, for achieving a certain goal, which is to provide an institutional as well as normative framework for the exercise of a shared stable democratic life, but also to formalise a peace agreement in the post-conflict areas.

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In previous chapters we have asserted that a state does not exist unless three elements are there, and interrelated (People, territory and sovereignty) and if there is no direct relationship or interconnections between those three elements. We have also asserted that a constituent power, conceived as the power to frame or to amend a particular text, called the constitution, exist only in relation to a state. Said differently, the constituent power owe his life to the state but, as the state, does not exist *ex nihilo*, but are the state (and the constitution) of a particular people and territory. The constituent power, is thus, conceived as the

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<sup>533</sup> SHIKAKI K., *The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine*, pp.5 f.

<sup>534</sup> LERNER H., *op. cit.*, p.43.

First Act of sovereignty (in terms of importance and not necessarily in chronological terms) and its internal expression and exteriorisation.

In this part, we will make the way backward: the constituent power, once enacted, has to delimit, within many other things, the content and the meaning of those three indispensable elements: *people, territory and sovereignty*. The constituent power shall decide who makes part of the people of the state, but also shall be the expression of the people (individuals and groups), in order that all those who make part of the nation can see themselves represented and expressed by the constitution, that they will consider as their own: the legitimacy of the constitution consists of the consensus of those who are governed by it to consider it as binding on them.<sup>535</sup> The constituent power shall determine the best way to minimise any possible clashes between individual and group interests within the state. It shall find the best way to accommodate national members with those who are called to make part of the citizenry. This is why we will start with constituent power and the people (§12).

Later, the *territorial* element of the constituent power will be considered. It is within a specific territory, that the constitution is considered the supreme law. In fact, it is the supreme *domestic* law. Outside this territorial delimitation, the constitution has no value. In the internal level, the judge will apply the constitution and may refuse the application of national laws or regulations, or either international law, unless in accordance with the constitution. The supremacy of the constitution will be fictive in the presence of an occupation of the land, where the occupier imposes unilaterally their decisions on local populations and the institutions representing them. This is why, we need to consider the relationship between the constituent power and the territory (§13). How can the constituent power treat the law applicable on the land, and the institutions that used to represent the Palestinian population? One of the main questions that will be answered here is who is representing the Palestinians? The answer to this question will determine, within other things, the entity (or entities) who will

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<sup>535</sup> VERGOTTINI G. De, *Op. cit.*, p.100.

effectively be involved in the process of constitution-making, and thus, in the enactment of the constituent power.

Once clarified those two elements, we have to present the possible relationship between the claimed sovereignty of states, and the necessity to adopt a constitution that shall not violate rights and freedoms of individuals and groups. The tendency/risk of international implication is to show the constitution as a limitation to the national freedom rather than its main expression. The equilibrium between national and international priorities will determine the effectiveness of the constitution (§14).

## §12 Constituent Power and the People

Of all the territorial or particularistic ideologies of nationalism to have emerged in the Arabic-speaking areas of the Middle East, Palestinian nationalism can be considered as by far the most developed and articulated. Yet, despite affirming its distinctive Palestinian identity in the Palestinian national Covenant, the movement has never severed its ties with Arab nationalism.<sup>536</sup>

Palestine had never been a distinct political entity until the British Mandate was enacted by the League of Nations Council in 1922.<sup>537</sup> Nevertheless, most contemporary countries in the Middle East are the consequence of developments at the end of the nineteenth and beginning of the twentieth centuries. The establishment of a British-ruled Palestine was explicitly in relation to the promise of securing a homeland for Jews in Palestine. As such, Zionist nationalism, since its creation was in direct contradiction to Palestinian nationalism, given that both considered Palestine as their homeland.

Palestinian nationalism reached a critical point with the establishment of an independent state of Israel in 1948, which forced many Palestinians (almost half) into continuous exile, and the creation of widespread refugee camps in which families have lived for more than a generation.<sup>538</sup> A Palestinian awareness of their identity emerged in the refugee camps and was later promoted by Palestinians studying in Arab universities.

This stage of Palestinian nationalism was followed by the creation of the PLO that was engaged in guerrilla raids into Israel. Since the re-emergence of Palestinian nationalism in the late fifties and early sixties,

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<sup>536</sup> *Encyclopaedia of Nationalism*, p.496.

<sup>537</sup> *Idem*, p.394.

<sup>538</sup> *Idem*, p.394. This position was systematically refused by the Israelis, who considered it a voluntary departure. In the meantime, the so-called 'new-historians' in Israel began revising their history and have admitted that the theories defended by Israel regarding the departure of the Palestinians, have not always been consentient.

and in particular, following the dominance of the largest faction, Fatah over the PLO in 1968-69 (four years after the establishment of the Organization), Palestinians felt that they had to play a leading role in the liberation of Palestine.<sup>539</sup>

The acceptance of the PLO of the two states' solution, officially adopted by the Declaration of Independence in Algiers can be considered as a tuning point in the Palestinian national history. In 1993, the PLO and Israel signed the Declaration of Principles (DOP) that put an end to the Palestinian *Intifada*. Subsequent Accords gave birth to the PA, which began functioning in the autonomous territories; Palestinians added the term *national* in between (the Palestinian *National* Authority), to emphasize their role as the continuation of the Palestinians national movement. The status of the Oslo Accord is unclear after the second *Intifada*.<sup>540</sup>

### 12.1. Palestinian Common Identity

*A nation is constituted by the belief of belonging together.* This belief of belonging together shall be accompanied by a *strong solidarity* between members of the nation.<sup>541</sup> If a nation exists, it is possible to trace its origins since every nation is the product of a nation-building process. The concept of nation-building suggests two elements: *first*, a common identity and, *second*, a concerted political action.<sup>542</sup> The contents of these two elements depend inevitably on the definition of nation. The solidarity and the belief of belonging together can be studied in two contexts: the Palestinian self-awareness of constituting a nation, and the international recognition of them as such.

#### 12.1.1. Palestinian Self-Awareness of being a Nation

As previously mentioned, the subjective approach of common identity is constituted by a shared belief and solidarity, clear in the Palestinian

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<sup>539</sup> *Idem*, p.496.

<sup>540</sup> Many events happened since then. They will be presented in details in successive chapters.

<sup>541</sup> TOPPERWIEN N., *Op. cit.*, p.53.

<sup>542</sup> *Idem*, pp.41-57.

case. The problem of self-awareness of the Palestinian people is important, and may influence the same concept of citizen in the future Palestinian state. The documents under consideration here are the Palestinian Charter of 1964 and 1968, the Declaration of Independence of 1988, the DOP of 1993, BL and the Draft Palestinian Constitution (DPC).<sup>543</sup>

- **The Palestinian Charter**

The Palestinian conference which created the PLO, adopted the PNCh in 1964. The participants in that conference, as representatives of the Palestinian people, put forward a charter which every Palestinian considers his/her own. The Palestinian National Council (PNC) amended this charter twice: *first* in its 4<sup>th</sup> session in 1968, following the 1967 War; *second*, in 1996, during a special session, following the Oslo Agreements.

The PNCh does not explain or justify the fact that the Palestinians are a people, but presents it as a *fait accompli*, but this fact does not seem to be so evident to others. Nevertheless, with time, Palestinians consolidated their conviction of their specific identity, being internationally recognized, despite all their lost wars with Israel; despite internal conflicts and those with other Arab countries, and despite differences among the Palestinians themselves.

In the 1964 PNCh<sup>544</sup>, the word 'people' is used nineteen times when referring to Palestinians. It also mentioned: 'The Palestinian Arab People' seven times; 'the people of Palestine' five times; and 'the Palestinian people' seven times. Before listing the twenty-nine Articles, the participants in that conference stated: "*We, the Palestinian Arab People, dictate and declare this Palestinian National Charter and*

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<sup>543</sup> Palestinian self-awareness is not expressed only by the documents analyzed here; by studying these documents, an example emerges which reflects the Palestinian awareness of its own identity. More documents of a different nature will be scrutinized later.

<sup>544</sup> The 1964 PNCh is used to distinguish it from the 1968 PNCh. In the case where PNCh only is mentioned, it refers to the 1968 text.

*swear to realize it*". This is a curious sentence which brings to mind the prologue of other constitutional documents.

The amendment of the PNCh in 1968 came about after the Arabs had lost the war with Israel, and reflected the guerrillas' emphasis on armed struggle based on popular support. What concerns us here: the concept of 'Arab Palestinian people' does not change. In fact, it was increasingly emphasized: the PNCh mentioned the term 'Palestinian people' or the 'the Arab Palestinian people' twenty-nine times! The reference to the Arab Nation is also more frequent since it stresses the *national (qawmi) mobilization* (in relation to Arabs) in order to realize *national (watani) unity and liberation* (in relation to Palestinians).

The concept of Palestinian people (*sha'b*) is mentioned in the singular form regarding the Arab peoples (used in the plural) or in relation to other peoples in the world with whom they share the right to self-determination. The Palestinian people are part of the Arab Nation (used in the singular, *al-umma al-arabyya*): "*The Palestinian people... are an inseparable part of the Arab Nation. It shares the suffering and aspirations of the Arab Nation and its struggle for freedom, sovereignty, progress and unity*". This Palestinian position in relation to the Arab nation reflects the Pan-Arabism of the Egyptian Jamal Abd El-Nasser, the real supporter (fabricator?) of the PLO at its inception.

The *oneness* of the Palestinian people is outlined in order to defend their right to their homeland in the mandatory Palestine and also against Zionist claims. In fact, in terms of the PNCh, the Jews are not one people with an independent personality just because they are citizens of their states. The same article of the PNCh provides that "*Judaism, because it is a divine religion is not a nationality with independent existence*" (Art. 35 20)

As such, Jews who normally resided in Palestine until the beginning of the Zionist invasion were considered Palestinians. This vision has totally changed now, following the Palestinians' recognition of the right to existence of The State of Israel. This recognition explains the amendment to the PNCh in 1996 by the PNC in a special session (21<sup>st</sup>), which, for the first time, was conducted on Palestinian territories, and in the presence of President Clinton.

Still, *Palestinians have never recognized the right of the Jewish people on a homeland in Palestine, but rather the right of Israel to exist*. Israel, in this sense, is considered as a *de facto* entity that enjoys international recognition as an independent and sovereign state, whose territory is part of historical Palestine. This is the reason why Palestinians declare independence in 1988, also basing their rights on UN Resolution 181, as they considered it a *historical injustice* towards the Palestinian people; it seems that the Palestinians accepted the existence of Israel, based on the principle of the two-State solution, as a pragmatic step. On some occasions, Palestinians recognize the liaison that exists between Judaism, or the Jewish people, and Palestine. This recognition was never translated in to an acceptance of the Zionists' rights to Palestinian land.<sup>545</sup>

The text mentions Arab Palestinians in relation to a lost 'homeland' which Palestinians intend to 'restore'. The term *watan* used here (translated as homeland) refers to that territory, as a part of the land belonging to Arabs, where a specific and distinguished Arab people live. In other words, the term homeland in modern Arab culture refers to a specific territory belonging to a specific Arab people. Others use the same term, *watan*, when they speak of an Arab homeland (*alwatan al-arabi*). Certainly, the term here has different connotations, and the indiscriminate use of it refers to that pan-Arabism ideology that still has its proponents in the Arab world.

#### - **The Declaration of Independence of 1988**

The Declaration of Independence in Algiers in 1988, the first formal indirect recognition of Israel's right to exist, was based on the Palestinian right to self-determination and to Statehood in terms of the same UN General Assembly (GA) 181 Resolution. This recognition

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<sup>545</sup> Nevertheless, many elements push us to believe that there would be no permanent settlement in the Israeli-Palestinian conflict, if Palestinians do not recognize the particular Jewish attachment and liaison Palestine, considered also as their homeland that had justified a lot of sacrifices. Otherwise, any permanent settlement of the conflict may be considered as a step towards something else (the liberation of all Palestine, for example). Any settlement will be a pragmatic decision but no one will be sure about the future.

could be possible because of the internal shift in the PLO, following the 1974 Arab-Israeli war. The 12<sup>th</sup> PNC in fact, advocates the establishment of a national authority over every area of the Palestinian territories. This visualization was in conjunction with the Arabs' recognition of PLO as the only representative of the Palestinian people, and its international recognition expressed by the General Assembly of the UN (UNGA). As the Chairman of the PLO, *Yasser Arafat* was invited, to address a speech to the Assembly in November 1974.

In its 19<sup>th</sup> session, the PNC declared the independence of the State of Palestine which was followed by the recognition of the State by a hundred of states, and the change from 'PLO' to 'Palestine' in the UN institutions. This event did not change the 'observer' position of Palestinian representatives to the UN since *full membership is exclusively the right of a State*. A state, according to the international public law definition, is a community of people established in a territory with a sovereignty that is autonomy towards the outside and independence towards the inside. That was not the case with the All-Palestine government because it lacked sovereign jurisdiction over the population and the territory; nor was it the case with the PLO and the PA; the former lacked a territory and the latter, sovereignty.

*A Palestinian State exists, only hypothetically; for its realization it requires a sovereign authority over the Palestinian people and their territory (or at least a part of it).* On the other hand, it is true that a modern state's sovereignty is seriously challenged. Sovereignty is no more an absolute element of the modern state now, than it was in the beginning. In reality, the state concedes part of its sovereignty in favour of regional integration. Besides, international humanitarian intervention limits a state's sovereignty regarding its domestic affairs such as the treatment of minorities, especially when serious violations of international law are committed by the state. Therefore, a state may exist with limited sovereignty.

Now, the Palestinian people – as reflected in the Declaration - have the right to statehood, and that PNC declared the state in the name of God and the Palestinian Arab people. The difference with previous documents (such as the Charter) is that the historical or mandatory

Palestine is not mentioned. On the contrary, there is a vague concept of 'Palestinian territory'. Palestinians in fact, adapted their request and expressed their will to accept part of the Palestinian territories in which to build the State. The Declaration, as previously mentioned, is in harmony with previous PNC sessions.

A very interesting image is presented in the Declaration of Independence: the Palestinian peoples are shown as a human being: born in Palestine, where it was nurtured, developed and excelled. The image offered here is to enhance the Palestinian peoples' oneness and unity, as a human. The disintegration of the Palestinian peoples means its death, as it would for a human being.

One's life is related to a land and to a history, and as in the case of the Palestinian peoples; it is related to a specific land and history, continuously and without interruption. As such, the Palestinian Arab peoples forged its national identity throughout history, in its constant relationship to a land and to a history, despite external invasions that deprived it of its political independence. This identity is related then, to the Palestinians battle to liberate the Palestinian homeland. The idea of 'a land without people' was a mere pretence, since a people did exist - the Palestinians - who are the (original) Jewish, Christian and Muslim residents of Palestine.

The UNGA 181 Resolution is a historical injustice – in terms of the Declaration - because it deprives Palestinians of their right to self-determination. Still, it does provide international legitimacy for their enjoyment of sovereignty and national independence. The International Charter in fact, recognizes – in terms of the Declaration - Palestinian national rights that include the entitlement to return and to independence.

The precise reference that Palestinian national rights are related to sovereignty over 'territory (*ard*) and homeland (*watan*)', made by the PNC, is not mere rhetoric. It means that Palestinian national rights are not related to any land (any Arab land for example) but to a specific one, their homeland/fatherland. This relationship to a specific territory - the Palestinian homeland - is emphasized here, since some people in recent history, suggested that Palestinians could establish their State in

one of the other Arab countries (such as Jordan!); but the Palestinians (and the Arab countries) categorically refused these proposals.

The various battles, wars, and occupation of the Palestinian territories, enhanced and consolidated the identity of the Palestinian people. Their identity and the awareness of that identity, were given full support through the Palestinian popular uprising (*Intifada*), and the resistance of the Palestinians living in refugee camps.

This national identity forged itself in a political embodiment known as the PLO: the Palestinian people's sole, legitimate representative. This immanent role of the PLO was related to the Palestinian people's inalienable rights; Arab national (*qawmi*, linked to pan-Arabism) consensus; and international recognition. Palestinian national rights, in terms of the Declaration, are natural and historical.

Their rights are as such legal, and are related to international recognition consolidating their rights on these different bases, the Palestinian people, represented by the PNC, declared the independence of the State of Palestine on Palestinian territory. However, this Declaration does not specify which territory, and Palestine remains a State without a specified territory, without citizens and without its own jurisdiction.

The realization of these entitlements necessitates the end of the Israeli occupation. International law is clear on that point, but still incapable imposing its will on Israel. The only solution that Palestinian would be prepared to consider was a bilateral negotiation with Israel. This led to secret negotiations between the PLO and Israel, which culminated in the Oslo Agreements. The key result of these Agreements was the creation of the PA, a non-sovereign Palestinian entity over parts of WBGS.

#### - **The Declaration of Principles**

The Palestinian people were mentioned indirectly in the Declaration of Principles, signed in Washington DC on 13 September 1993. The recognition of PLO by Israel and the decision to commence negotiations between the two were the main Palestinian achievements

of the Declaration (in fact, PLO recognized Israel indirectly, in the Declaration of Independence of 1988).

The PLO represents the Palestinian people, and as such, constitutes a legitimate partner in the negotiations with Israel in resolving the question of the 'disputed territories' (an Israeli term), or the occupied Palestinian territories, that is, WBGS (Jerusalem will be considered in the final negotiations). The parties to this Declaration (PLO and Israel) decided that bilateral negotiations, and not violence, would be the best option in order to resolve the conflict.

After the Declaration of Principles, a fragmentation occurred, not only in the Palestinian territories, but also in the concept of Palestinians as a united and one people. In fact, Palestinians were now divided, and the PLO negotiations with Israel were limited during the transitional period of transfer of powers in the WBGS, where some of the Palestinians were living. The Palestinians of Jerusalem were partially included in that process, and the Palestinian refugee problem was left for final agreement's negotiations. Besides, Palestinians with Israeli citizenship were indirectly excluded from any PLO and Israeli negotiations.

Now, this division of the Palestinian people aggravated the problem. If it was clear that the PLO (especially the PNC, in the guise of a Parliament acting on behalf all Palestinians) represented the Palestinian people wherever they lived, the question is not clear after the Oslo Agreements. Still, theoretically nobody had put the PLO status (as the only legitimate representative of the Palestinian people) under question. Nevertheless, it seemed clear that the PLO was rendered practically void of its prerogatives, especially as the PA apparatus was continually being given an increasingly powerful role with institutions, government and departments, assuming a state-like aspect.

The PLO remained the only representative of the Palestinian people, when they were considered as one and united. It gradually lost this position, especially regarding the Palestinians in WBGS, who increasingly found themselves under the jurisdiction of the PA, although neither members of the PA institutions nor the people living in the WBGS would doubt or attack the liaison with the PLO. Rather,

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most PA institutions source their legitimacy in the PLO rather than in the Oslo Agreements (at least, before the 1996 elections).

The liaison (overlap or confusion) of PA with PLO is still clear, at least through its president, who is the Chairman of the PLO's Executive Committee (EC) and the President of the Palestinian State. We must stress here that these three positions would not necessarily be held by the same person, in the future.<sup>546</sup>

Israel recognizes that the Palestinians do have some rights; this was mentioned when considering the election as a step towards the realization of Palestinian legitimate rights. Now, what are those rights? The parties agreed to negotiate the details. Actually, the method followed by the parties in the Oslo Agreements provoked the comments of numerous critics. For many Palestinians, it consisted of negotiating Palestinian rights, rather than how to render them effective. It should be noted here, that those same rights were already recognized and legitimized by International Law and UN Resolutions.<sup>547</sup>

- **The Basic Law for the Palestinian National Authority**

The BL would regulate the relations between the powers in the PA during the transitional period. It was approved by the PLC, and its implementation would also be applicable to the Palestinian autonomous territories. A Constitution for the State would replace it and would regulate many arguments that BL could not – and cannot - because they are out of the competency of the authority from which they emanated. The BL was passed by the Legislative Council on 2 October 1997, and ratified on 29 May 2002. It was further amended by the PLC on 18 March 2003, in order to include the office of PM and to regulate its duties and powers.<sup>548</sup>

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<sup>546</sup> With the election of Mahmoud Abbas as president of the PA, Palestinians have opted for unity rather than separation of the two institutions representing the Palestinians: the PLO and the PA.

<sup>547</sup> The criticisms appeared to be logical and reasonable; in fact, the collapse of negotiations with Israel in 2000 proved their validity.

<sup>548</sup> The Articles mentioned here are those of the BL as endorsed by the President of the PA in 2002, unless otherwise specified.

In its first article, the BL declared that the Palestinian people are part of the Arab nation, without specifying who is to be considered Palestinian. The Israeli-Palestinian agreements granted the election of a Palestinian council (the PLC), whose duty was to prepare a BL. This clause was also mentioned in the same election law. The PLC rejected that it had its origins in the Oslo agreements, and refused to consider the PA authorities as originated by the transfer of powers from the Israeli military governor or civil administrator. In fact, in its second article, the BL declared that the Palestinian people are the source of authorities.<sup>549</sup>

The concept of a Palestinian people usually refers to all Palestinians, However, in the BL, this same concept sometimes refers to the Palestinians of WBGs only.

*For example: in Article Nos. 5 and 51, the BL states that the President shall be elected by the people;<sup>550</sup> in this case, those who elected the president were the Palestinians of WBGs and East Jerusalem. The same president would swear to preserve the rights and interests of the people and the nation (Art. 36). The people here refer inevitably to the Palestinians of the WBGs, since he is their President, elected to represent and govern them; and what of nation: does it mean all Palestinians considered as a nation?*

The same thing occurs when the BL states that the police and security forces must serve people; they already do so in the Palestinian territories, and their powers extend to the Palestinians in the WBGs. Article 88 states that the rulings shall be announced and executed in the name of the Palestinian Arab people; the source of jurisdiction, of judicial authority, is the Palestinian people (Art. 2). Now those powers

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<sup>549</sup> A reference to recent German history can be made here, wherein the state did not incorporate all members of the German nation, and as such, it adopted a Basic Law; a constitution would only be adopted when all Germany was united; this occurred in the 1990s, and the Basic Law became applicable to all Germans. The same case seems to apply in the Palestinian context, the only difference being that Palestinians state (in terms of the various proposals to a final agreement) shall sign the end of the Palestinian claims and the end of the conflict with Israel.

<sup>550</sup> References to articles are made in the order of the originally adopted BL, that is before the amendments made by PLC in 2003.

are exercised in the name and for the benefit of the Palestinians of WBGS.

*A further example is: the Attorney General assumes public office in the name of the Palestinian people (Art. 98), and the laws shall be promulgated in the name of the Palestinian Arab people (Art. 107).*

In brief, the consideration of the Palestinian people switches from a 'people' as an *ethnos* (Volk), that is, a community based on the belief in a common descent or culture, to a 'people' as a *demos* (Staatsvolk), that is, citizens in their entirety.<sup>551</sup>

In this instance, the Palestinians of WBGS are considered as one unit, as they are in the drafts of the Palestinian Constitution. This 'theoretical' unity is challenged by the legal and administrative division between the WB and the GS that followed the war of 1948; Gaza, in fact, was under Egyptian control, which left the situation almost as it was in the Mandate period, while WB was controlled by 'Transjordan', and united with it in the Hashemite kingdom of Jordan. These legal divisions and differences were maintained after the Israeli occupation in 1967. Moreover, the WB cities were under Israeli siege from 2000 and were divided in to different zones and sections. The wall/fence under construction by the Israel, in the name of security, further divided and disintegrated the WB in to various cantons and ghettos.

The PA's first challenge was to unify the legal systems of WBGS, a task not without complications. In fact, the unification of the legal systems of WBGS into one was done by adopting laws that would be applicable to both WB and GS; however, this unification through the law was not sufficient. Geographically speaking, GS is separated from the other Palestinian territories, and the Israeli occupation aggravated its isolation. This isolation of GS meant a consolidation of the division, which some critics consider as also being cultural, social, and economic! This is partially mistaken, since there are real differences between the WB and GS, but they were produced by accidental circumstances and did not respond to ethnic divisions; in fact, the

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<sup>551</sup> For an in-depth explanation of the concept of people as *ethos* and *demos*, see TÖPPERWIEN N., *Op. cit.*, p.4.

Palestinians, wherever they lived, had always believed that they constituted one people.

An observer of Palestinian society may notice that it is like a multi-colour mosaic. Its unity is challenged by the distinction between outsiders and insiders Palestinians; between refugees and non-refugees; between townspeople and country people; between Gaza inhabitants and West Bankers, between Christians and Muslims. This heterogeneity of the Palestinian population means that any future Palestinian entity would have to respect this diversity in its entirety, including religion, the legal systems, the social and economic situation, customs, traditions, and recent history.

This Palestinian entity –a perpetually limited, autonomous authority or a State- will be challenged by this existing diversity among the Palestinian people. At the same time, its unity may be reinforced by this diversity. It is clear that we are speaking about a unity that is based on heterogeneity and not on homogeneity; a unity that respects these differences and diversities without attempting to assimilate them in one amalgam. The politics of the future new entity will have to respect this diversity in the Palestinian society.<sup>552</sup>

#### - **The Draft Palestinian Constitution**

A special Palestinian committee, within the framework of the PLO institutions and with a high PA implication, prepared three drafts for the Palestinian Constitution. The first was ready on 14.2.2001, the second on 09.2.2003, and the third on 14.5.2003.<sup>553</sup> The concept of 'people' in the Draft Constitution is the same as that adopted in the BL: 'people' refers to that portion of Palestinians living in the Palestinian territories and/or those who will enjoy citizenship of the State of Palestine. The same examples and arguments made above can be

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<sup>552</sup> As for Christian Palestinians, they are not different culturally than other Palestinians who are Muslim, since they enjoyed and constructed the same Arab culture together. This argument will be treated in detail later on.

<sup>553</sup> The context in which these different drafts were prepared, and the changes made, will be considered in a different chapter. Here, we will limit our research to the concept of 'people' in the third draft, with reference to previous drafts in the case where there are drastic changes.

repeated here (election of the State President, the swearing-in on behalf of the Palestinian people, rulings and laws in the name of the people of Palestinian).

Now, the concept of segmentation of the 'Palestinian people' in the BL can be tolerated, since the BL is a temporary document. On the other hand, a Palestinian State will mark the end of the conflict and the end of Palestinian claims, and as such, the concept of a people previously divided, will be consolidated within the State; this would be unacceptable.

The State of Palestine will be the State of its citizens. Now, Palestinian nationals (according to the PNCh definition) will not necessarily coincide with Palestinian citizens (according to the Constitution); as such, the state of Palestine will represent only its citizens.<sup>554</sup> In this sense, it seems clear that the PLO role will always be necessary since it represents all Palestinians.

In the terms of the draft Constitution, the Palestinian State would incorporate the PLO and the PA. Palestinian nationals who are not citizens will be represented by (150) members of the Advisory Council and their duties will be specified in the Constitution. Now, does the PNC approval of the Constitution equivalent to its automatic self-relinquish? There are good reasons to believe that this shall not happen, for a simple reason: the constitution needs to be legitimized by popular approval directly or through their representatives (PLC). Now, this needs time and the PNC cannot relinquish itself before the constitution is adopted. Besides, there is always a chance that the constitution is not accepted and may necessitate to work on a new draft; accordingly, the two moments shall be distinguished.

### **12.1.2. International Recognition of the Palestinian People**

After considering the Palestinian self-awareness of their identity as a people, we will consider some documents produced by non-Palestinians which demonstrate the progress in the consideration of the Palestinians.

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<sup>554</sup> The way the draft Constitution treated the question of *citizenship* will be detailed later on.

We will reflect on some documents written before the establishment of the UN and some written after. As examples of the first category we will consider the Balfour Declaration and the Mandate over Palestine. As examples of the second, we will consider the Partition Plan, Resolution 242 and others which recognize the Palestinian people's right to self-determination. These changes in the international consideration of the question of Palestine and the Palestinians will explain the invitation extended to the President of the PLO to make a speech to the UNGA in 1974.<sup>555</sup>

- **The Balfour Declaration of 2nd November 1917**

The so-called Balfour Declaration was made by the British Foreign Office in the name of 'His Majesty's Government' and approved by the Cabinet. This declaration was the object of the letter to Lord Rothschild, signed by Arthur James Balfour on 2 November 1917.

His Majesty's Government view with favour the establishment *in Palestine* of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of the object, it being clearly understood that nothing shall be done which may prejudice the civil and religious' rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

It is clear that this declaration ignores the rights of Palestinians as indigenous inhabitants of Palestine; however, it does not adopt Zionist propaganda about Palestine being a land without a people. In fact, in the same declaration of sympathy towards the Zionist request to establish their homeland in Palestine, it is confirmed that the rights of existing non-Jewish communities will not be prejudiced by this declaration, nor by its execution. The Palestinians mentioned in the declaration are mentioned in negative, they are simply referred to as existing non-Jewish (Muslim and Christian) communities.

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<sup>555</sup> The selection of these documents among many others was motivated by being representative of a shift in the consideration of the Palestinian people, following an extraordinary event (such as a war). This selection intends to show the changes and the progress in the international awareness of the Palestinians as a people. These documents can be found in the United Nations Information system on the question of Palestine <http://domino.un.org/UNISPAL.NSF/>

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### - **The Mandate over Palestine**

Article 22 of the League of Nations (28 June 1919) provided that some nations would be under a temporary Mandate: “*peoples not yet able to stand by themselves under the strenuous conditions of the modern world*”. The Palestinians were indirectly recognised to establish a community or as a part of those communities mentioned in the same Article; in other words, those communities formerly belonging to the Turkish Empire which

have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

In the Mandatory text and in the different reports made by the British Mandatory power, Palestine was regarded as a territorial unit, set apart from others. Its inhabitants were called the Arabs of Palestine and were considered as being part of, or a community within, the inhabitants or population of Palestine. Each time the Mandatory mentioned the Arabs of Palestine it did so in relation to the Jewish community in Palestine; this can be explained by the fact that the Mandate over Palestine was established in order to fulfil the Balfour Declaration and the creation of a homeland for Jews in Palestine. Palestinians as a people, whose identity is distinct from other Arab peoples, was not yet clear, in the terms of the Mandate.

### - **The Partition Plan of Palestine of 1947**

The British government sent a letter to the UN, on 2 April 1947, requesting the question of the future of Palestine, to be included in the agenda of the General Assembly. Later on, many Arab governments (Egypt, Iraq, Syria, Lebanon, and Saudi Arabia) sent letters to the Secretary General requesting the question of termination of the Mandate and the independence of Palestine, to be included in the agenda. A hearing was granted to the *Jewish Agency* and the *Arab Higher Committee* in the first session of the GA.

The terms used by the special committee on Palestine and in the General Assembly Resolution 181 of 29 November 1947 were no different from those in previous documents. In fact, the above-mentioned Resolution refers to Palestinians as ‘those Arabs of Palestine’. Moreover, the Resolution opted for the partition of Palestine in to two States: *Arab* and *Jewish*.

- **The Security Council Resolutions 242 of 1967, and 338 of 1973**

Following the war of 1967 the the Security Council of the UN (UNSC) asked the Israeli armed forces to withdraw from *territories occupied* in the recent conflict. In the English version, these territories were mentioned in indefinite form (the text does not use ‘*the*’ to indicate the Palestinian territories occupied after the 1967 war).

The Resolution required parties to respect the integrity and sovereignty of every state; it did not mention the Palestinians or the Arabs of Palestine, but asked for a just solution for the refugees. The same occurs in the SC Resolution that followed the 1973 war, in which the same Council calls upon parties to cease-fire, without any reference to the Palestinians.

- **The General Assembly Resolutions 3070 of 30 November 1973, and 3175 of 17 December 1973**

Based on the UN Charter, the UNGA Resolution 3070 underlined the importance of a universal realization of the right of a people to self-determination and the rapid granting of independence to colonial countries and their peoples, for the effective guarantee and observance of HR.

It also reaffirmed the legitimacy of a peoples' struggle, by whatever means, for liberation from colonial and foreign domination, including armed struggle, and condemned all Governments which did not recognize the right to self-determination and independence of their peoples, notably the peoples of Africa still under colonial domination, and *the Palestinian people*.

The UNGA Resolution 3175 mentioned the terms *Palestinians of the Occupied Territories*, and affirmed the right of the Arab States and peoples whose territories were under foreign occupation, to permanent sovereignty over all their natural resources.

- **The General Assembly Resolution 3210 of 14 October 1974**

A shift in the UN consideration of the Palestinian question was observed in Resolution 3210, when the UNGA invited the PLO as 'the representative of the Palestinian people' to participate in the plenary sessions of the GA, on this question. This invitation was motivated by the realization of the same Assembly to the fact that the "*Palestinian people is the principle party to the question of Palestine*". The Palestinians are considered as distinct from other Arabs, and the PLO was their legitimate representative in the General Assembly.

*Yasser Arafat* made his speech in the UN general plenary meeting of 13 November 1974. He spoke "*in the name of the people of Palestine and as the leader of its national struggle, the Palestine Liberation Organization*". *Yasser Arafat* outlined the fact that

neither the Palestinian's allegiance to Palestine nor his determination to return had waned; nothing could persuade him to relinquish his Palestinian identity or to forsake his homeland. The passage of time did not make him forget, as some had hoped he would.

Then he explained the source of the PLO legitimacy, as the representative of the Palestinian people:

The PLO has also gained its legitimacy by representing every faction, union or group as well as every Palestinian talent, either in the National Council or in the people's institutions. This legitimacy was further strengthened by the support of the entire Arab nation, and it was consecrated during the last Arab Summit Conference, which reiterated the right of the PLO, in its capacity as the sole representative of the Palestinian people, to establish an independent national State on all liberated Palestinian territory.

In Resolution 3236 of 22 November 1974, the UNGA reaffirmed the inalienable rights of the Palestinian people in Palestine, including: (a) the right to self-determination without external interference; and (b) the

right to national independence and sovereignty. Later on, the UNGA Resolution 3237 of 22 November 1974 invited the PLO to participate in the sessions and the work of the General Assembly in the capacity of observer.

- **The General Assembly Resolution 54/152 of 17 December 1999**

The right of a people to self-determination, when it means a right to statehood, is controversial. The right of Palestinians as a people to statehood was clearly mentioned in the above Resolution: “*the right of the Palestinian people to self-determination, including the option of a State*”. The same Resolution expressed the hope that the Palestinian people would soon be able to exercise their right to self-determination, which would not be subject to any veto, in the current peace process.

### **12.2. Those entitled to Constituent power**

As we have concluded in first part, the question of those entitled to constituent power is relevant for jurists and cannot be considered in a simplistic way as a pure fact since it may give a justification of the supremacy of the constitution itself. Although the predominance of the Constitution is accepted as axiomatic,<sup>556</sup> one may ask: is it really justifiable to consider supreme the modern Constitutions because they elevate themselves to a position of predominance?<sup>557</sup> Is it necessary to go back to the genesis of the constitutional document and in the authority of its authors?<sup>558</sup> Since it can be considered the higher power of the State, constituent power invests those entitled to sovereignty.<sup>559</sup>

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<sup>556</sup> Presuming that predominance means that there is no higher juridical norm in the state than the constitution. VENTER F., *Op. cit.*, p.9. François Venter is a professor of Law, Potchefstroum University for Christian Higher Education, Potchefstroum, South Africa.

<sup>557</sup> This constitutional superiority, any way, becomes entirely theoretical in the absence of judicial review. KLEIN C., *A Propos Constituent Power: Some General Views in a modern Context*, p.34.

<sup>558</sup> VENTER F., *Op. cit.*, p.10.

<sup>559</sup> SHIBA I., *Op. cit.*, p.107.

In democratic countries, people are those entitled of sovereignty,<sup>560</sup> this is why the concept of constituent power is an important part of the doctrine of popular sovereignty.

Constituent power can be considered as the internal phase of self-determination, as opposed to the imposition or the revelation of an order. Modern Constitutions, in fact, can only be understood as institutional devices that embody the self-binding capacity of a group. Self-determination and self-binding are by no means incompatible.<sup>561</sup>

The meaning of Constitution is the guarantee of rights and the separation of powers, and this is why only the non-constituted, namely the people, can own constituent power.<sup>562</sup> There is still a paradox that has to be resolved in the coming two chapters; this paradox is very well presented by Hanna Lerner,

the question of constituent power and the legitimacy paradox it incorporates: can a Constitution be regarded as legitimate only if it reflects a pre-constitutional shared identity or is the making of the Constitution tantamount to the construction of 'the people'?<sup>563</sup>

Lerner continued her analysis, with special regards to deeply divided societies. In fact, contemporary States had to face the challenge of diversity: cultural, ethnical, linguistic and religious. She wrote:

The difficulty of making a legitimate Constitution is especially evident in cases of deeply divided societies, which are characterized on the one hand by lacking the preconditions of national homogeneity that facilitate unified action and enable the manifestation of sovereignty through the realization of constituent power. On the other hand, segmented polities, which are still struggling over their shared identity, lack the capability of individualistic

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<sup>560</sup> PACTET P., *Op. cit.*, p.70.

<sup>561</sup> PREUSS U.K., *Op. cit.*, p.156. Constitutions represent a mechanism of self-binding, but they also serve as an expression of self-determination. A Constitution, in this sense, is a "technique for the creation of durable, viable and civilized polity". LERNER H., *op. cit.*, p.7.

<sup>562</sup> PREUSS U.K., *Op. cit.*, p.160.

<sup>563</sup> LERNER H., *Op. cit.*, p.3.

societies to act together on the basis of their civil commonalities and to write a liberal identity-neutral Constitution.<sup>564</sup>

Sheldon Wolin contends that “[a] Constitution not only constitutes a structure of power and authority, it constitutes a people on a certain way. It proposes a distinctive identity and envisions a form of politicalness for individuals in their new collective capacity”. However, the fundamental problem of divided societies is exactly that they lack consensus regarding their shared identity and their ultimate ideals and values. Thus, how can a Constitution constitute a people under circumstances of acute disagreements and profound cleavages? In other words, who is "the people" who is making the Constitution in divided societies?<sup>565</sup>

### 12.2.1. The Palestinian Concept of Nation

The Palestinian case is similar to the German one in that the nation and the culture justify the state; the state here would be related to the nation as is the *accident* to the *substance*. The state is an accident in an historical moment of the nation; the nation exists with or without a state; a state enhances and reinforces a nation. Thus, the cultural liaison which includes a common Palestinian history, language and traditions will be an important element in the future State.

However, according to the agreements being negotiated between the Palestinians and Israel, the self-awareness of the Palestinians and their vision of their own state is changing, leaning towards the possible adoption of the civic concept of nation, similar to the French one, which consists of creating its own national culture, and suppressing diverse ones. The problem here is that the same French concept of nation is no better: in fact, modern states, including new-born states, are facing real challenges in relation to diversity and multiculturalism. This challenge is not different in the Palestinian case.

Although the Palestinian State will have many things in common with other Arab countries, it remains a particular case for different reasons that we will present here below. As such, the concept of nation will be

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<sup>564</sup> Ibidem.

<sup>565</sup> Idem, p.10.

influenced by these particularities: *first*, the Palestinian people are the only Arabs without their own State yet; *second*, the Israeli occupation gave them an identity connected to their struggle for independence; *third*, the Israeli occupation and the sense of injustice and delusion by Arab and Western countries; *fourth*, the huge number of refugees living abroad or in refugee camps.

Sovereignty is the original, supreme, and unconditional power of absolute authority that, together with the people and the territory, represents one of the constitutive elements of a state. The Constitution of the future Palestinian State will not be much different from other Arab States constitutions, which are an imitation of western constitutional documents. Sovereignty, as provided in most Constitutions (included some Arab ones), belongs to the people. The people are part of the Arab and Muslim nations, and as such, have their particular way of understanding sovereignty. Sovereignty, therefore, belongs to the Palestinian people. The problem is to know who makes part of this 'people'.

At this point, we have to consider an important concept: that is, what makes Palestinians different from other Arab peoples? I will argue that, with time, Palestinians changed their concept of 'nation' or 'people'. In fact, this switch from people or nation as 'ethnos' to people as 'demos' is necessary in order to justify the Palestinian State, and to establish it on parts of historic Palestine to be the homeland of the Palestinian people. This concept of nation or that determines the content, and those entitled to Constituent power.

Now, what makes Palestinians different from other Arab peoples, and what makes them one people? The answer to those two questions is inevitably the same: what makes Palestinians different is what makes them one distinguished people, although they are not homogeneous. In fact, Palestinians can be Muslim, Christian or Jewish, according to the 1968 PNCh (religious diversity); Palestinian territories experience different legal systems which reflect the actual distinction between the Gaza system - rooted in the Anglo-Saxon one; Egyptian tradition and the WB system - rooted in French civil law; and the Jordanian tradition (legal diversity). Besides, Palestinians live in villages, cities or in

refugee camps; refugees are dispersed in WBGs and in Lebanese, Jordanian, Egyptian and Syrian camps, with different legal status and rights (social and economic diversity).

According to the non-official Geneva Accord, the Palestinian State will signify the end of Palestinian claims (Art.7.7); this means that the struggle for liberation, which legitimated Palestinian nationalism for almost a century, will face serious crises. This is without doubt, related to Palestinian (and Zionist?) identity, as we will show in the next paragraphs.

In fact, Palestinians distinguished and sharpened their own identity through their struggle with the Zionists in order to liberate their homeland. Still, Palestinian nationalism existed independently and long before. Rashid KHALIDI, in his book *'The Palestinian Identity'*, dedicated many paragraphs to defend this position and wrote:

Although the Zionist challenge definitely helped to shape the specific form Palestinian national identification took, it is a serious mistake to suggest that Palestinian identity emerged mainly as a response to Zionism... As part of this universal process, moreover, Lebanese, Syrians, Egyptians, Iraqis and Jordanians all managed to develop their respective nation-state nationalisms during the same period without the dubious benefit of a Zionist challenge.<sup>566</sup>

...most elements of Palestinian identity – particularly the enduring parochial, local ones - were well developed before the climatic events of 1948, although they continued to overlap and change both before and after that date.... These local loyalties served as the bedrock for an attachment to place, a love of country, and a local patriotism that were crucial elements in the construction of nation-state nationalism.<sup>567</sup>

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The trauma of 1948 reinforced pre-existing elements of identity, sustaining and strengthening a Palestinian self-definition that was already present. The shared events of 1948 thus brought Palestinians closer together in terms of

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<sup>566</sup> KHALIDI R., *Palestinian Identity, the Construction of Modern National Consciousness*, p.20.

<sup>567</sup> Idem, p.21.

their collective consciousness, even as they were physically dispersed all over the Middle East and beyond.<sup>568</sup>

When this image of other as ‘enemy’ disappears, once there will be a permanent resolution, other elements shall be encouraged to replace it; in other words, the fact that the ‘enemy’ of yesterday would be the ‘friend’ and ‘neighbour’ of tomorrow will have serious effects on Palestinian self-identity.

According to Helena SCHULTZ, nationalism differences do not lead necessarily to conflict, on the contrary, it is only in relation to an ‘Other’ that it becomes meaningful to identify a ‘Self’.<sup>569</sup> The Israeli-Jewish / Palestinian conflict is

ultimately a clash between two nationalist movements colliding on the same territory. One, Zionism, has been able to create a strong state on part of that territory and the other, Palestinianism is struggling to do so, implying a grossly unequal relationship and struggle.<sup>570</sup>

This struggle has become almost an ‘archetype’ of modern national/nationalist conflict. It has plagued the peoples of both sides for almost a century.<sup>571</sup> The consequence is evident:

Israeli and Palestinian societies and identities are mirror images of each other, and part of each other, although it needs to be pointed out that Zionism was initially formed as a European phenomenon, i.e. as a reaction against nationalism in Europe, anti-Semitism and pogroms, persecution and annihilation. There is today no Israeli society which ‘exists’ completely independent of the Palestinian and vice versa. It is as though both societies carry with them the other, as a perceived burden but also a potential asset.<sup>572</sup>

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<sup>568</sup> Idem, p.22

<sup>569</sup> SCHULZ H. L., *Identity Conflicts and Their Resolution: the Oslo Agreement and Palestinian National Identities*, p.231.

<sup>570</sup> Idem, p.229.

<sup>571</sup> Idem, p.233.

<sup>572</sup> Ibidem.

Israeli-Jewish and Palestinian identities thus in fact constitute twin concepts and mirror images in a very concrete sense. Both are centred around the poles of victim-warrior/struggler... perhaps this is one of the most crucial aspects of the Palestinian-Israeli conflict as such, i.e. the way that identities are manifested through the duality of insecurities and strain.<sup>573</sup>

For the author, what distinguishes Palestinians is: homelessness, insecurity, catastrophes narratives and (armed) struggle:

Homelessness and insecurity constitute the main representations of Palestinian identity, and it seems reasonable to claim that politicized identities, in general terms, arise out of peril and anxiety.<sup>574</sup>

Catastrophes have become crucial in structuring Palestinian narratives of identity... Armed struggle has been a basic foundation of Palestinian nation-building.<sup>575</sup>

It is in the *action*, in participation in resisting the occupation, that one becomes Palestinian. Palestinians perceived themselves as having inherent right in their resistance.<sup>576</sup>

The same author considers the DOP, as a “*mutual expression of peaceful intention*”. The most important gain for Palestinians was that “*Palestinian identity was recognised, that in the eyes of the world the Palestinians had become somebody*”.<sup>577</sup> This process – and any other future peace agreements - would have an affect on Palestinian identity:

One of the main effects of the peace process was thus the beginning of a deconstruction of enemy images... Israel was now to assist in Palestinian institution-building and to create economic bases for the agreements, and the Palestinians were to defend Israelis from violence and terror... when the

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<sup>573</sup> Idem, pp.236-237.

<sup>574</sup> Idem, p.235.

<sup>575</sup> Ibidem.

<sup>576</sup> Idem, p.236.

<sup>577</sup> Idem, p.239.

stereotype change in character, it might actually provide problems since it is no longer as clear how to act and behave vis-à-vis the ‘Other’.<sup>578</sup>

### 12.2.2. Palestinians and the Arab Nation

The Palestinian people are a part of the Arab nation. In Arabic, Arab states (*al-duwal al-arabyya*) are always used in the plural, while Arab nation (*al-umma al-arabia*) is always in the singular. The same word is used to indicate the Muslim nation (*al-umma al-eslameyya*).<sup>579</sup>

So, if we consider people, with the Italian jurist Vergottini, as “*insieme della generalità dei cittadini*” (the gathering of the generality of citizens) and the Nation “*in quanto persona giuridica unitaria*”<sup>580</sup> (as a legal and unitary personality), sovereignty shall belong to the Palestinian Nation, since the Palestinian refugees living abroad (excluded from Palestinian citizenship) will be represented by a National Council (first DPC, Art.70) or by a type of second Chamber. In the light of this consideration, some constitutional Articles will have to be reformulated.

The DPC follows in the steps of other Arab countries considering the Palestinian state as ‘Arab’. For example, the Egyptian Constitution is entitled: ‘the Constitution of the Arab Republic of Egypt’, followed in the first article by: “*Egyptian people are part of Arab Nation and work for the realization of its comprehensive unity*”. In Art.1 of the Jordanian Constitution it states: “*the Jordanian people form a part of the Arab Nation*”.

The same applies to Syria (Art.1). Special attention should be drawn to Lebanon and Tunisia: in Lebanon, the Constitution refers to the Arabic language as being the official language (Art.11) without any reference

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<sup>578</sup> Idem, pp.240-241.

<sup>579</sup> However, nation is used in the plural since the article speaks about Arab and Muslim Nations. To prove this, we can take a look at the Articles previously mentioned. We notice that Arab Nation is always considered in the singular, in the Arab Constitutions.

<sup>580</sup> VERGOTTINI G., *op. cit.*, p.100

to an Arab Nation, and according to the Tunisian Constitution, the people are part of the great Arab Maghreb (Art.2).

Furthermore, the DPC considers Arabic as being the official language of the state, which is the case in all Arab countries: Egypt, (Art.2); Syria, (Art. 4); Tunisia, (Art.1), Lebanon<sup>581</sup>, (Art.11). In different drafts of BL and Constitutions, some state: “*Islam is the official religion of Palestine and Arabic is its official language*”. This article is similar to articles 2 and 1, respectively of the Egyptian and Tunisian Constitutions.

Now, what makes a state an Arab one? Is it the language? The English, French, and Spanish languages are common spoken in different countries; this does not mean that those countries constitute or are part of a single nation. Although important, language then is not sufficient. If we consider different elements such as history, culture, language, traditions...they suggest the existence of an Arab nation. To some extent, religion is also relevant, since the majority of Arabs are Muslim (mostly Sunni). Nevertheless, not all Arabs are Muslims, nor are all Muslims Arab.

The existence of such an Arab nation means that it is one divided in to different Arab States (not the first time it has been historically so); consequently, Arab States would simply be a transitory experience on their passage to the consolidation of an Arab Nation. Nevertheless, this assertion contradicts the reality of Arab peoples who are attached to their states and to their individuality, even though they may not be happy with the achievements of their rulers. This can be one of the effects on the existence of single Arab States. The dream of Arab unity switched to a new sense: it does not call for the establishment of one centralized state that eliminates all particularities; rather it means a tendency towards collaboration and harmonization of their positions. Unity in this sense -similar to that in Europe- becomes the future, when the future is intended to be prosperous, secure, and progressive.

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<sup>581</sup> It is interesting to note that the law determines when the French language should be used, in the Lebanese Constitution.

In the approved BL the two provisions are mentioned in different paragraphs in the same Article (BL Art.4.1 and 4.3). In the first DPC it is divided into two Articles (Arts. 5 and 6). Nevertheless, the same DPC introduced a new concept of 'Islamic nation', providing that the Palestinian people would be a part of the *Arab and Islamic* nations. This connection between the Arab language (as the official language) and Islam being the State religion should not create confusion. As previously mentioned, not all Arabs are Muslims and not all Muslims are Arabs. On the other hand, it is true that the Arab-Muslim culture is the heritage in the hand of all Muslims (including non-Arabs) and all Arabs (including non-Muslims). To say it with GABBUR, "*Most Arab intellectuals consider the Arabic language the foundation of Arab Nationalism (al-Qawmyya al-arabyya)... Islam encompasses many nationalities, including Arab Nationality*".<sup>582</sup>

### 12.2.3. Constituent power and the Right to Self-Determination

Self-determination is a relatively recent phenomenon with dubious historical origin. This also explains the fact that this right is potentially easy to manipulate and suffers from a high degree of practical and normative confusion.<sup>583</sup> In fact, sometimes self-determination can refer to the outside (related to colonization) and at other times to the inside (related to democratization). Self-determination of the Palestinian people refers to the former, with the intention of liberation from foreign and hostile occupation.

Nevertheless, the right to self-determination as a general principle of international law is no longer seriously disputed; in fact, it can, without hesitation, be confirmed that it is also recognized as *ius cogens*.<sup>584</sup> The problem begins when it is necessary to know *who* has the right to self-determination and *how*. In other words, the question is to know who forms a people, and which of them can assert the right to a State. This

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<sup>582</sup> GABBUR G., *Arabism and other Aspects of Belonging in the Constitutions of Arab Countries {Arabic}*, p.32.

<sup>583</sup> DREW C., *Self-Determination, Population Transfer and the Middle East Peace Accords*, p.120.

<sup>584</sup> *Ibidem*.

contradicts another fundamental principle of international law: the sovereignty of States, which forms the basic pillar of the so-called 'international community'.

The principle of self-determination becomes a legal right the moment it is called upon, by a group recognized as constituting a people, and in relation to a territory which can be deemed a unit for self-determination; according to DAJANI, the Palestinian people meet these two criteria.<sup>585</sup> The same author specifies Palestinians were, at the beginning, defined by what they were not (non-Jewish communities of Palestine); later, and following the *nakba*, the Palestinian question was particularly regarded as a question of refugees, in other words, as individuals who have rights and not a community. During the 1960s, multiple factors played an essential part in the recognition of Palestinians as a people, well distinguished from others.<sup>586</sup>

It is thus, not a question of States accepting recognition to the right of self-determination for all those who pretend to form distinct people. Nevertheless, self-determination was the legal principle on which the fight for national independence of the Palestinian people is completely based.<sup>587</sup> In fact, the definition of colonization - in the first paragraph of the Declaration of Colonization 1960 - is extensive and can easily include the two *sui generis* situations: Palestine and South Africa.<sup>588</sup> Moreover, it can be seen that there is international recognition of the existence of the Palestinian people, and an acknowledgment of the fact that these people are entitled to inalienable rights. For this reason, States enter into relationships with those who represent these people, in this case, the PLO, who is able to negotiate with Israel to participate in a final agreement, and thus, put an end to the Israeli-Palestinian conflict.

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<sup>585</sup> DAJANI B., *Stalled between Seasons: the International Legal Status of Palestine during the Interim Period*, p.33. Omar M. Dajani, at that time was Law Clerck to Judge Dorothy Nelson, United States Court of Appels for the Ninth Circuit. He is now teaching at the University of the Pacific, McGeorge School of Law.

<sup>586</sup> *Idem*, pp.33-45.

<sup>587</sup> *Idem*, p.29.

<sup>588</sup> DREW C., *op. cit.*, p.125.

The Palestinian people believe in their right to practice self-determination. In the case that the DPC will be adopted after the creation of the Palestinian State, some may consider this principle superfluous. It is not so, since the actual political situation requires this proclamation to be considered on every occasion in order to avoid any misunderstanding: the Palestinian people cannot accept eternal self-government without total sovereignty. The right to this claim by the Palestinian people should not be at the expense of anyone else; they claim equality with every other people.<sup>589</sup>

In the DOP, there is no mention of the Palestinian people's right to self-determination, although Isaac Rabin recognised the PLO as the legitimate representative of the Palestinian people; we read in the DOP: "*The Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process*". The DOP was entitled: 'The Declaration on Self-government Arrangements'. It was the first step in the following agreements which led to the creation of the PA.

In the PNCh, this right to self-determination was continuously repeated in different forms. It considered the right of the Palestinian people to their homeland, and therefore, the right to determine their own destiny. Based on the right to self-determination, the Palestinian people also have the right to sovereignty of their land; we need to point out that Israel is the only state in the world without defined borders; consequently, the territory which is to make up part of the Palestinian State has not yet been defined and will be the object of future political negotiations.

According to the DPC, sovereignty belongs to the Palestinian people; they are the source of authority and their will is the basis for the Constitution. A similar principle is present in the Constitution of Egypt (Art.3§73), Syria (Art.2§2), Libya (Art.1) and Tunisia (Preamble,

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<sup>589</sup> See Yasser Arafat's Speech at UN General Assembly, Geneva, General Assembly 13 December 1988.

Art.3). The Constitution of Turkey, on the other hand, declares that sovereignty is for the Turkish Nation (Preamble, Art.6)

The sovereignty of people is pitched in two directions: *first*, towards the outside, that is, independence within the international community; *second*, towards the inside, that is, originality. The sovereignty of the Palestinian people shall be exercised through permanent representatives and must be the source of legitimate, political power.

#### **12.2.4. The Constitution and Citizenship**

In the PNCh (Art.5), a Palestinian was every Arab who normally resided in Palestine until 1947; this Article was included in earlier drafts of BL but the approved BL and DPC did not define who was a Palestinian. For this reason, we believe that the PNCh definition regarding Palestinian nationality should still be considered valid.

We would point out that several Arab Constitutions leave the task of considering who is part of the nation, to the law; for example, Egypt, Art.6: “*The Egyptian Nationality is defined by the Law*”; Jordan, Art.5: “*Jordanian Nationality shall be defined by law*”; Lebanon, Art 6 (nationality in this Article appears to be synonymous with citizenship): “*The Lebanese Nationality... shall be determined by law*”; Syria, Art.43: “*The law regulates Syrian Arab citizenship*”.

The DOP is also tacit on this question. In fact, we find recognition of the Palestinian people in their ‘totality’, without providing a definition of who is to be considered Palestinian. This can be explained by the difficulties encountered in the problem of refugees, which will be resolved during the final negotiations for a Palestinian State. Now, this can be accepted as the ‘logic’ consequence of a simple fact: the question of Palestinian nationality is out of the hands of the DOP (and, as such, of the BL); nevertheless, the Constitution cannot ignore resolving this point, since theoretically, it is the second step to statehood, and achievement of statehood means that certain arguments, such as the refugees, should have already been discussed.

The first DPC established who had the right to Palestinian citizenship, within the Palestinian State (first DPC, Art.25): “*Palestinian citizenship is secure and permanent for any Arab who lived in Palestine before*

*May 1948*". While the BL provided that the question of Palestinian citizenship shall be regulated by law (BL, Art.7).

According to PNCh Art.5,

The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or stayed there. Anyone born after that date to a Palestinian father –whether inside Palestine or outside it - is also a Palestinian.

According to the first DPC, Art. 25 states:

Palestinian citizenship is secure and permanent for any Arab who lived in Palestine before May 1948. It is passed down from father to child. It endures and is not cancelled by the passage of time. The law shall determine the ways of gaining and losing it and the rights and duties of multinational citizens.

If we compare the Article relating to Palestinian nationals, and the one relating to Palestinian citizenship, we notice the following:

*First*, in the first DPC the year-limit is extended to May 1948, the month of the proclamation of the State of Israel, and not 1947 (as in PNCh), the year of the UN Repartition Plan. This apparently meaningless change totally alters the concept of Palestine: in the PNCh, Palestine is only synonymous with historical Palestine, since Israel had not yet been created by 1947 (in other words, Palestine here is synonymous with Israel + the occupied territories of WB and GS in its totality). In the DPC, on the contrary, Palestine could be considered simply the rest of historical Palestine, excluding the State of Israel. This could have been the resolution to the question of Palestinians with Israeli citizenship; but in reality, those Arabs, contrary to what may be deduced from the PNCh, would not have the right to Palestinian citizenship. Nevertheless, this argument is dangerous since it excludes all those Palestinians who had been living within the territories since May 1948 (the new date applied in the Article), which then became part of the newly created State of Israel, and they were forced to leave it. Those Palestinian nationals would not have the right to the Palestinian citizenship.

*Second*, in various Articles, the PNCh called for the destruction of Zionism and the liberation of Palestine (that covers also the actual Israel), considered by then as the Palestinians' exclusive homeland; nevertheless, it established that "*Jews who had normally resided in Palestine until the beginning of the Zionist invasion would be considered Palestinians*" (Art. 6). This Article can be considered as superfluous in the DPC, since the Palestinians now recognize the existence of the Israeli State; in fact, the State of Israel, in harmony with Zionist beliefs, decided to give Israeli citizenship to every Jewish man or woman who requested it, as they would be considered members of the Israeli nation.<sup>590</sup>

*In order to understand the problem, we offer the following example: The Old City of Jerusalem was occupied only in 1967; the Jews there were an indigenous population, who had been living in Palestine before 1947. According to the terms of PNCh those Jews would be considered Palestinians, but according to DPC they would not have the right to Palestinian citizenship. They would be excluded simply from any possibility of obtaining Palestinian citizenship, blatant discrimination. This is only hypothetical, as those Jews enjoy full Israeli citizenship and would not be interested in a Palestinian one.*

*Third*, according to the first DPC the right to citizenship is transferred from father to son. All sons of Palestinian women and daughters of Palestinian fathers would be excluded. This further limitation on who had the right to Palestinian citizenship was limited to those Arabs who lived in Palestine before May 1948. After that date, Palestinian sons or daughters of Palestinian fathers and mothers would be considered Israeli or Palestinian citizens, according to their place of birth. This citizenship permanent, and cannot be cancelled with to passage of time. Ways of losing or gaining Palestinian citizenship would be determined by law. The Palestinian refugees living abroad have the same right to participate in designing national public policies as the Palestinians living in the Palestinian State.

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<sup>590</sup> The same thing is for sons and daughters of Jewish parents. In case of mixed marriages, the sons and daughters of a Jewish woman are considered to be Jewish.

*Fourth*, according to the first DPC, not all Palestinians would automatically be considered Palestinian citizens. They would only be considered such, subject to two conditions: 1) they had to be Arab, regardless of sex or religion; 2) they would have to have lived in Palestine before 1948. When the DPC refers to 'Arab', would it include national minorities; according to the strict interpretation of that Article they would have no right to Palestinian citizenship.

These points were put before the committee in charge of re-drafting the Constitution. The 2<sup>nd</sup> and 3<sup>rd</sup> DPC took in to consideration some of these and have reformulated the relevant Articles as follow:

Art. 12: Palestinian nationality shall be regulated by law without prejudice to the rights of those who legally acquired it prior to May 10, 1948 or the rights of the Palestinians residing in Palestine prior to this date, and who were forced into exile, or departed from there and denied return thereto. This right is passed on from fathers and mothers to their progenitor. It neither disappears nor lapses unless voluntarily relinquished. A Palestinian cannot be deprived of his citizenship. The acquisition and relinquishment of Palestinian citizenship shall be regulated by law. The rights and duties of citizens are founded in the Constitution and governed by law.

Art. 13: Palestinians who left Palestine after 1948 and who were denied return there to shall have the right to return to the Palestinian State and bear its nationality. It is a permanent, inalienable, and irrevocable right. The State of Palestine shall strive to apply the legitimate right of return of the Palestinian refugees to their homes and villages, and to obtain compensation, through negotiations and political and legal channels, in accordance with the 1948 United Nations General Assembly Resolution 194, and the Principles of International Law.

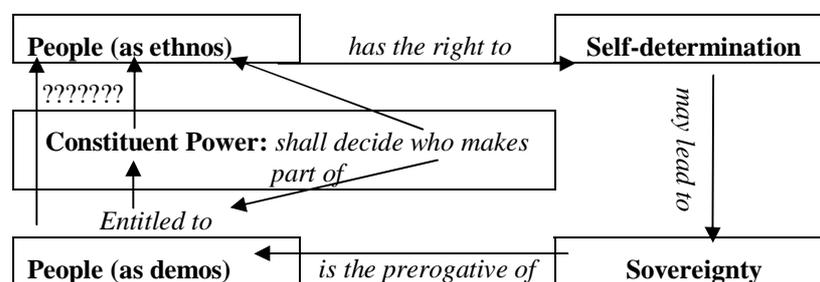
#### **12.2.5. Who is/are that/those entitled to Constituent Power?**

Self-determination can be expressed in statehood; a Palestinian State may exist when the organs that represent the indigenous people practice sovereign powers over a territory. Now, constituent power is related to popular sovereignty. As such, it is not possible to practice it without the existence of the State, which is the only way to express popular sovereignty. When a state exists, popular sovereignty refers inevitably

to the people as *demos*, who effectively have the political rights, and practice them through the state's institutions:

In the context of the legitimacy issue, a paradox of constituent power is evident: Constitutions on the one hand draw their legitimacy from the sovereign power of the people, yet on the other hand define who "the people" is and how its will is to be expressed. If constitutional legitimacy stems from the principle of popular sovereignty, then the source of political legitimacy of a democratic constitution is not clear: Is it prior to the constitution, resting on the factual will of a presumably homogenous political entity which has the capacity to act as a collectivity; or does constitutional legitimacy derive from the constitution itself, i.e. from the legal order which itself serves as the source of the shared identity, so that 'the people' are in effect formed through the making of the constitution?<sup>591</sup>

The dilemma that arises here is the following: A *People* (as *ethnos*) has the right to *self-determination*; the right to *self-determination* may lead to *sovereignty*; *sovereignty* is the prerogative of the *people* (as *demos*); the last is entitled to *constituent power*; and constituent power has to decide on who makes part of the *people* (as *demos* and as *ethnos*):



Accordingly, those entitled to constituent power, being that they reflect the totality of the Palestinian nationals, cannot be the same as those who effectively will exercise constituent power. Nevertheless, most local observers of the constitutional movement in the Palestinian territories, asked the Palestinian leadership to include all national

<sup>591</sup> LERNER H., *op. cit.*, pp.12-13.

factions and authorities: social, political and civil, including those representing the Palestinian people from the inside and the outside, in their attempts to elaborate and adopt a constitution.

According to Sieyès, constituent power is distinguished from constituted power, in that constituent power is permanent since the people cannot be limited in his right '*to want*'. We distinguished also between original and derived constituent power through the context in which each is exercised, their function, those entitled to it, the content and the ways in which they are exercised. Original constituent power can be enacted in a legal void that existed or is created. Derived constituent power is exercised within the limits provided by the constitution itself.

However, there are different cases, which cannot be classified by either definition. The Palestinian being one: the constitution-making is conceived as a step towards statehood, not a consequence of it. Statehood is no more the outcome of a factual reality but rather the summation of a negotiated solution of a conflict between Israel and Palestinians. Moreover, a legal vacuum can be the result of a regime change; now, in the Palestinian case, there is no new regime, but there would be a new State for a pre-existing people that had been subjugated to occupation. On the other hand, it is not a derived constituent power, since there is no precedent constitution in force. The draft constitution is an original one for a new state which has no prior existence.<sup>592</sup>

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<sup>592</sup> The Palestinian case proves that classical theory of constituent power does no more fit new realities in the twenty first century states. Indeed, this was one of the reasons that justified this thesis.

### §13 Constituent Power and the Territory

In the Palestinian case, there is a rich history of constitution-making which resulted in confusions and overlaps in different texts. At the moment of writing, there is an approved BL and a non-approved Constitution being prepared by a committee (three different drafts), as a step towards statehood; the PNCh is still valid unless abrogated by the same authority that emanated it. A statehood that is non-evident or seems in doubt of ever being realized in the near future, but in which the Palestinians, with international approval, seem to see a step towards the resolution of the Israeli -Palestinian conflict and the attainment of peace in the Middle East.

In this context, the history of Palestinian constitution-making can provide an insight in to how Palestinians view their right, as a people, to existence and to self-determination. This right of self-determination requires a State wherein the Palestinians, as a people, may exist as a sovereign entity, where every Palestinian may have shelter.

#### 13.1. Palestinian Constitutional Developments

##### 13.1.1. The Constitutional History of Palestine

During the Ottoman period,<sup>593</sup> Palestine was part of the empire, although not an administrative unit but part of different administrative units called *Sanjaks*.<sup>594</sup> Within the extensive reform movements, the Ottoman Sultan, *Abd al-Hamid I*, adopted a written Constitution, influenced by those of the West; a second Constitution was adopted, after the revolution of young Turks in 1908, and was not explicitly abolished but suspended implicitly.<sup>595</sup>

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<sup>593</sup> For more details about the Palestinian legal system within the Ottoman Empire, see KASSIM A., *Legal Systems and Developments in Palestine*, p.19-20; AL-QASEM A., *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, p.188; *The Draft Basic Law for the Palestinian National Authority*, p.102.

<sup>594</sup> See SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p.74.

<sup>595</sup> NATALONI C., *Per una Analisi del Concetto di Popolo nell'Islam*, pp.44-45.

The League of Nations adopted the Mandate for Palestine that included Balfour Declaration. Britain accelerated legal changes. Under the British Mandate, for the first time, Palestine became a unique entity, with legislative, judicial and executive powers, concentrated in the British High Commissioner. In 1922, the British government issued the Palestine Order-in-Council, also known as the Constitution for Palestine, but it was not a rigid Constitution, since the same authority whence it emanated (the High Commissioner) had the authority to amend it.<sup>596</sup>

The period that followed the British Mandate was the beginning of the division of Palestine in to three zones (Israel, WB and Gaza), which explains, the legal differences which now exist in these areas. The WB was annexed to Jordan, and the Jordanian parliament, including an equal number of representatives from the two banks of the Jordanian River, adopted a new Constitution in 1952 which replaced the Palestine Order-in-Council of 1922. This unity between the two sides of the River continued theoretically after 1967 also, until the two banks were officially separated in 1988.<sup>597</sup>

GS fell under Egyptian administration but was never really annexed to Egypt as it was always considered a separate entity.<sup>598</sup> The Egyptian government adopted BL for GS in 1955 but did not abolish the

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<sup>596</sup> For more details about the Palestinian legal system under the British rule, see KASSIM A., *Legal Systems and Developments in Palestine*, pp.21-24; AL-QASEM A., *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, pp.188-190; AL-QASEM, *The Draft Basic Law for the Palestinian National Authority*, p.102-103.

<sup>597</sup> For more details about the Palestinian legal system in the West bank for the period 1948 to 1967, see KASSIM A., *op. cit.*, pp.27-28; AL-QASEM A., *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, p.191; AL-A'SALY W., *The Legal System in the West Bank 1948-1967 {Arabic}*, pp.11-20.

<sup>598</sup> For more details about the legal system in Gaza strip from 1948 to 1967, See ALAGHA R., *The Legal System in Gaza Strip 1948-1967 {Arabic}*, pp.21-26; ASSORANY R., *The Legal System in Gaza Strip 1948-1967 {Arabic}*, pp.27-32; KASSIM A., *op. cit.*, pp.28-29; AL-QASEM, *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, pp.190-191.

Palestine Order-in-Council, unless it was in direct contradiction to the BL but was replaced by a second BL issued in 1962.

The Palestinians, who convened in Gaza, under the auspices of Egypt, in September 1948, refused the division of Palestine which they expressed through their self-declared All-Palestine Government. Nevertheless, this government had not had real jurisdiction over the land and soon forgotten after the death of its PM, *Ahmad Hilmi Abdul Baqi*, in 1963.<sup>599</sup>

In 1964, some Palestinians were invited to convene in Cairo to establish the PLO and declare the PNCh; this was amended twice: once, in 1968 after defeat in The Six Day War and again in 1996, following the Oslo Agreements. The Arab League (in 1964) and the UN (in 1974) recognized the PLO as the only legitimate representative of the Palestinian people.<sup>600</sup>

The years that followed the war of 1967 was (and still is) the period of WBGs occupation. Israel is the occupying power and as such, has the obligation to practice its authority by respecting the international laws of occupation. Nevertheless, Israel maintained – and intensified - the division between WB and GS, and established distinct military governments and civil administrations for each. All three powers were concentrated in the Military governor, and used them for the benefit of Israel and not necessarily the benefits of the local population.<sup>601</sup>

The PNC declared the independence of the state on 15 November 1988, without creating any particular authority over the land. Although considered favourably and recognized by a large number of States, it

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<sup>599</sup> For more details about the All-Palestine Government, see: SHLAIM A., *The Rise and Fall of the All-Palestine Government in Gaza*, p.37.

<sup>600</sup> For more details about PLO origins and status, see KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, pp.1-33.

<sup>601</sup> For more details about the legal system after Israeli occupation, see QUBTY M., *The Military Orders in the West Bank 1967-1994 {Arabic}*, pp.33-43; U'AIDA N., *The Military Orders in Gaza Strip 1967-1994 {Arabic}*, pp.45-51.

was only a political recognition since it did not effect or create any legal changes towards the land.

At this point, we may outline some of the characteristics of Palestinian legal and constitutional history:

*First*, most of the time, Palestinians were excluded from the process of constitution- and law -making. This was the case with the British Order-in-Council of 1922, and the Egyptian BL for Gaza in 1955 and 1962, for example. As for the Ottoman Constitutions, they were the consolidation of a previous legal and constitutional system, imposed by the *Sultan*, within a larger process of reforms in the Ottoman Empire. We have to take in to consideration that some Palestinian notables participated in the activities of the ‘Ottoman parliament’. Palestinians of WB participated partially in the legislation and adoption of the Jordanian Constitution of 1952 as numerically equal representatives in the Jordanian institutions. Many expressed serious reserves regarding the unification of the two Banks, considering it an annexation rather than the expression of the will of WB Palestinians. This may be true, and as such may have influenced the legitimacy of such unification. Nevertheless, this does not exclude the fact that Palestinians did participate in the efforts of *constitutionalization* of the new state. However, it was the Jordanian parliament, together with the king, which had the authority to frame a new constitution.

*Second*, the origin of these constitutional documents is related to specific events in Palestinian history, or to drastic changes to the State, by those exercising authority on Palestinian territories.

*For example, the British Palestine Order-in-Council was related to the Mandatory system established by the League of Nations; the 1952 Jordanian Constitution was necessary after the unification of the two Banks of the River Jordan; the 1962 Egyptian BL for Gaza was related to Egyptian internal problems, after the dissolution of the United Arab State.*

Nevertheless, most constitutional documents did not completely abolish previous legislation; this was the case for example, with the two Egyptian Basic Laws for Gaza. Nevertheless, they were intended to be

the highest laws of the land: former legal documents which contradicted them were considered null and void. On the hand the Jordanian Constitution totally substituted the Palestine Order-in-Council.

*Third*, the first and second Declarations of Independence (1948 and 1988) did not have a direct or immediate influence on the constitutional system of the Palestinian territories, although they did express the big lines and major principles that guided the Palestinians in their struggle for independence; consequently, they would influence any constitutional efforts regarding the Palestinian territories.

*Fourth*, the PNCh is not a constitution since the PLO, as a liberation movement, is not a state but rather a subject of international law. It influenced, and was in its turn influenced by the situation in the Palestinian territories. This means that Palestinian efforts to establish their own constitution would be related to the State rather than to the PLO; as such, the PLO Charter would remain in force until it was amended, suspended or abrogated by the same authority which adopted it, the PNC.

*Fifth*, Israeli military orders and declarations became the sovereign 'law' in the land, following the occupation of the WBGS in 1967. They do not abrogate former laws, unless they are contradictory to the military occupation orders and declaration. Those orders and declarations were indirectly accepted by Palestinians through the Oslo Agreements, since they agreed to postpone some arguments until the final negotiations; furthermore, the PA declared that any current law would continue to be in force unless amended or abrogated; according to the Oslo Agreements, Palestinians would have to submit any draft legislation made by the PLC, during the transitional period, to their Israeli counterparts for their approval.

In sum, the constitution, as a formal written document, do not make *tabula rasa* of the precedent legal documents in act in the Palestinian territories. The constituent power (as the principle author of the formal constitution) is then limited by the constituent power (as the author of the material constitution) that is nothing else but a comprehensive system of laws, in complete evolution in time and in space.

### 13.1.2. The Israeli-Palestinian Agreements

Negotiations between Israel and the Palestinians began on 30 October 1991 at the Middle East Peace Conference held in Madrid, Spain, sponsored by the United States and Russia. The U.S.-Soviet letter of invitation to the Madrid Conference included the agenda and terms of reference for the talks: “*Negotiations will be conducted in phases, beginning in talks on Interim-Self government arrangements*”. In a joint Palestinian-Jordanian delegation, Dr. Haidar Abdul Shafi headed the Palestinian delegation.<sup>602</sup>

Palestinians elaborated different drafts and proposals that reflected the way in which they imagined their negotiated Interim Self-Government Authority to be. The key issue for Palestinians was to extend its jurisdiction to all territories occupied in 1967, that is, a single territorial unity.<sup>603</sup> The Israeli side proposed different drafts for their discussions. They insisted that negotiating territorial jurisdiction “*starts from the premise that issues relating to the exercise of sovereignty are outside the scope of the Interim status negotiations*”.<sup>604</sup>

Negotiations between the two delegations continued in Washington while others were held secretly in Oslo, between Israel and PLO. The Government of Israel and PLO, ‘the representative of the Palestinian people’, signed the DOP on Interim self-Government in Washington D.C on 13 September 1993 (better known as Declaration of Principles, or simply Oslo I). The Israeli Knesset ratified the agreement by a vote of 61-50 with 8 abstentions, on 23 September 1993. The PLO Central Council (CC) approved the DOP on 11 October 1993, at the meeting in Tunis, 63-8 with 8 abstentions (27 out of the 107-member council did not attend). This gave birth to a phased ‘peace process’: the interim

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<sup>602</sup> Some may consider the Oslo Peace Process as dead. They may be right. Nevertheless, the consequences of this uncompleted process are still evident, in particular, the PA, the main creation of those agreements, as the administrative authority – within geographical, functional and personal limits – over the so-called ‘autonomous territories’ that were re-occupied. Thus the reference to Oslo is still relevant.

<sup>603</sup> For more details about early negotiations see SHEHADEH R., *Op. cit.*, pp.103-131.

<sup>604</sup> *Idem*, p.114.

period and the permanent status settlement. It may be useful to mention here that the first time projected, was in the Camp David Agreement between Egypt and Israel.<sup>605</sup>

### **13.2. Preparing a Basic Law and Drafting a Constitution**

When the PNC declared the State of Algiers in 1988, it also decided that the new State would require a Constitution or a BL; the first attempts to prepare a BL, then, were related to the state. The situation changed after the Oslo Agreements when the attempts to prepare a BL were related to the PA, a temporary authority administering the autonomous territories until a final agreement was reached. A committee was appointed and given the responsibility of preparing the first drafts of BL in December 1993, February and December 1994; these drafts were the object of public discussions inside and outside the Palestinian territories but they were not submitted to the CC. The PA began to operate and commenced exercising some authority on land and people. Many changes occurred after the election of the PLC; the committee prepared four other drafts which were not immediately considered by the president of the PA. The PLC approved the BL draft in its third reading (Law No.1/96) on 2<sup>nd</sup> October 1997. The BL was approved almost unanimously; according to Article 111, amendments to the BL required a qualified PLC majority of two thirds. Here we need to outline the following:

*First*, the BL contains provisions similar to most of the Arab world Constitutions; nevertheless, some considered the BL as being the most liberal of Arab world Constitutions, especially the list of rights and freedoms that it contains. *Second*, the PLC's main preoccupation was to approve a BL which would define the relations between the Council and the Executive, and the transparency of PA members on the one hand, and the protection of HR, the implementation and respect for the RL, and the independence of the judiciary, on the other.<sup>606</sup> *Third*,

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<sup>605</sup> We dedicated parts of our thesis for Dottorato in Utroque Iure at the University of Lateran to Israeli Palestinian Agreements: See Khalil, A., *Which Constitution for the Palestinian Legal System*, pp. 34f.

<sup>606</sup> For more details about the PLC election and its significance, see ABDUL HAMID R., *Legal & Political Aspects of Palestinian Elections*, IPCRI, 1995.

drafting a BL was possible under the IA; in fact, those Agreements furnished, in detail, most of the provisions that the BL had to include; besides, the validity of the BL shall not contradict the DOP and other agreements, otherwise it would be rendered null and void. *Fourth*, the preamble to the Election Law confirmed that this was the PLC's main task. The President of the PA refused to sign the law, creating more tension between the PLC and the Executive Authority in general, and the President of the PA in particular.

The President of the PA had endorsed the BL for the Transitional Period on 28 Mai 2002, which came into force on the date of its publication, 7 July 2002, in the official Gazette. Signing the BL came in a very controversial political context, as a step towards reforms, according to the 100 days reform plan. Meanwhile, the PLO EC created a legal committee in 1999, to draft a Palestinian Constitution in preparation for statehood, and *Yasser Arafat* appointed Minister *Nabil Sha'ath* as its Chairman. The Draft of the Palestinian Constitution was completed on 14 February 2001,<sup>607</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 towards statehood.<sup>608</sup>

The preparation of the 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

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<sup>607</sup> The English version is on the Palestinian Centre for Policy and Survey Research (PSR) website: <http://www.pcpsr.org./main.html>, in cooperation with the Konrad Adenauer Foundation. The first and second chapters of the Constitution are respectively in: <http://www.pcpsr.org/domestic/2001/conste1.html> and <http://www.pcpsr.org/domestic/2001/conste2.html>

<sup>608</sup> As mentioned in the introduction to the 3<sup>rd</sup> DPC “*This draft was submitted and expounded to the Palestinian Central Committee on March 9 2003. In response to the queries of the participants, Dr. Nabeel Sha'ath, head of the drafting committee gave complete clarification. The Council approved the draft and voiced appreciation for the work of the committee, its experts and advisors. It extended gratitude to the personalities and countries that participated in support of this project and effort. It advised the committee to pursue its work and discuss with the legal committee of the Central Council and other committees to discuss this draft in view of its final discussion and approval at the next Central Committee meeting*”.

(later on postponed). The following table shows similarities and differences between BL and DPC<sup>609</sup>:

	<b>BL FOR THE PA</b>	<b>DPC</b>
<b>Prepared by</b>	Revised by Legal Commission of the PLC, based on different drafts of different commissions.	Committee created by the PLO EC, and presided by Mr. Nabil Sha'ath.
<b>For</b>	The PA	The Palestinian State
<b>Period</b>	Transitional period, until adoption of the Constitution. "This BL is enforced in the Interim Period, and can be extended until the introduction of the new constitution for the Palestinian state". (106)	Once adopted it will replace the BL and will remain in force until amended.
<b>Competent</b>	PA (PLC + President).	PNC + PA (PLC + president)
<b>Status</b>	<ul style="list-style-type: none"> <li>- The PLC had approved the draft of BL in its third reading (Law No.1/96) on October 2, 1997.</li> <li>- Mr. <i>Arafat</i> endorsed it on Mai 28, 2002.</li> <li>- Enforced the date of its publication in the official Gazette, on July 7, 2002</li> <li>- Amended twice: in 2003 and 2005.</li> </ul>	<ul style="list-style-type: none"> <li>- The draft was completed on 14/2/2001.</li> <li>- The draft is revised on 2003 in preparation for statehood.</li> </ul>

Different points can be outlined here:

*First*, Palestinians began to prepare a BL in relation to the 'State', after the Declaration of Independence in 1988. During the transitional period after the DOP, and within the limits of the Israeli-PLO agreements, these efforts were switched from the focus on the State in favour of the preparation of a BL for the Palestinian Authority. This groundwork for

<sup>609</sup> References done here to BL and to DPC refer to the BL before its amendments and to the first DPC, unless specifies differently.

the Constitution was conducted by the PLO institutions, with remarkable influence on those of the PA.

*Second*, as a step towards preparation for statehood, the first DPC was prepared by a CC committee under the auspice of the PLO. It was completed in 2001 but almost immediately forgotten by the end of the transitional period because of the bloody conflict between Palestinians and Israel. Since then, the Palestinian State has not been established and the conflict with Israel rendered the situation complex for the PA.

*Third*, the violent conflicts in the Palestinian territories augured the end of negotiations between the parties. The status of the Israeli-Palestinian agreements was uncertain and the provisions established were once again violated. Criticisms to the Oslo agreements were made both from the inside and the outside. However, it should not be forgotten that the PA and the 'Autonomous Territories' exist and remind of those agreements considered as already died, especially in the light of international consensus on the necessity to resolve the Israeli-Palestinian conflict, based on the two-States solution.

*Fourth*, reform in the PA was a condition imposed for the resumption of negotiations. Although this reform was initially requested by the Palestinian people, it was not the real reason for conflict, as some may think. In this context, the PA began the changes according to the 100-Days Plan for Emergency Reform, presented on June 23<sup>rd</sup>, 2002 by the Ministerial Committee for Reform, appointed by the Palestinian president.

*Fifth*, formulating a Constitution for the Palestinian State (still to create) and in the meantime amending the BL, recently endorsed by the President, would be necessary to guarantee the respect of the above principles. The *first* step was to create the office of PM, not provided for in the BL. The creation of that office was in response, first of all, to Palestinian popular demand, and *secondly*, to the International press to reorganize the PA.

President *Arafat* nominated *Mr. Mahmoud Abbas* as PM on 10 March 2003.<sup>610</sup> The PLC voted 64-3 (with 4 abstentions) in favour of creating the office of PM, an amendment to the BL which did not include this office, and the number of ministers was extended to a maximum of 24, not 19 as originally stated in the BL. He resigned from the post less than six months later and *Ahmad Qure'i (Abu Ala)* was designated PM.

At this point of the analysis, it seems important to outline the distinguishing elements of both constitutional documents:

*First*, the Declaration of Independence followed two events: the *Intifada*, the popular insurrection against occupation, on the one hand, and the declaration of separate administration of the two Banks by King Hussein. In this sense, the constitution was intended to accompany the birth of the new State; the constitution would be enacted in the name of the Palestinian people the legitimate entitled to sovereignty, and in the name of their inner right to self-determination. BL, on the contrary, was not the fruit of a sovereign act; it consisted of a law of a higher level than others, but subordinate to the agreement between PLO and Israel. Theoretically, it would be the highest law of the land, on an internal level, since judges would apply only the BL and any other laws, decrees, decisions and regulations subordinate to it. Discordance with the Oslo agreements would be considered unlawful and as a violation of a treaty or agreement.

*Second*, the BL is a temporal law that designed to govern the relationships between the authorities during the transitional period; it was approved by the PLC, which represented only Palestinians in WBGS, including Jerusalem. The destiny of the constitution was to substitute the BL, which would remain in force until revised by the empowered body as provide the same draft constitution.

*Third*, adopting the constitution for the Palestinian State is not a matter that would involve only Palestinians of WBGS, and as such, the PA institutions (PLC and the Presidency) as they are not empowered to

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<sup>610</sup> *Mr. Abbas* was the Secretary General of the PLO Executive Committee. He headed the PLO's Negotiations Affairs Department created in 1994 to oversee permanent status negotiations.

adopt it. On the contrary, the BL's interest would be the Palestinians who would be governed by it, that is, the Palestinians of WBGS.

*Fourth*, the constitution is intended coincide with the birth of the new State of Palestine. With a delegation from the CC, a commission was appointed to prepare a constitution, in complete accordance with the PNC Declaration of Independence and its new policy of a Two-States solution. The PNC is not an elected body although, since the PLO was created, it always represented most of the political parties and commercial unions reflecting the different Palestinian classes. All Palestinians have the right to participate in the framing power, since it is inner to the Palestinian people, those entitled to self-determination, although not all Palestinians, as part of an inevitable compromise, would have the right to Palestinian citizenship. As such, the PLO, since it represents the Palestinian people, is competent to participate in the constitution making and adopting process for the Palestinian State. The PLO remains the only representative of the Palestinian people. The PNC is empowered to adopt the constitution for the State of Palestine, already declared in 1988.

### **13.2.1. Is There an Emerging Palestinian State?**

In an article published in the *European Journal of International Law*, Professor Francis BOYLE of the University of Illinois, presented his point of view on the Palestinian State, following the Declaration of Independence made by the PNC. He said that four elements: territory, people, government, and capacity to establish relations with other States, must operate together in order to create a state and that these four elements should be co-functional with regard to the State of Palestine. The author remarked that one hundred and fourteen countries had recognized, at that time, this new State, and that UNGA, by its Resolution 177/43 of 15 December 1988, had recognized 'the State de Palestine', conferring upon it the status of Observer, with a majority of one hundred and four votes against two hundred and forty abstentions.<sup>611</sup>

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<sup>611</sup> BOYLE F. A., *The Creation of the State of Palestine*, pp.301-306.

This opinion was criticized by Professor James CROWFORD of the University of Sidney in his article in the same Journal: ‘The Creation of a Palestinian State: too much, too soon?’ He concluded –rightly- that the arguments presented by BOYLE were weak and unconvincing.<sup>612</sup>

There are several definitions of the State, but the simple legal definition is the following: “*A state has cumulatively - as constitutive elements - a people, territory, and sovereignty and they must be interrelated*”.<sup>613</sup> Accordingly, the existence of the PLO, the Palestinian people, and the territory (WB + GS) are not enough individually, There must be a direct inter-relationship between them. This condition did not exist before the Proclamation of Independence, nor did Proclamation make any significant changes to this established fact.<sup>614</sup>

Besides, the recognition of other countries does not represent a component of Statehood: it is only an expression of the desire (or refusal) of the other countries to collaborate with the new State (in so far as it exists); in fact, the majority of the countries recognized the new State of Palestine more as a legitimate aspiration than an existing reality. It is true that GA took note of the proclamation of the Palestinian State by the PNC, and agreed to replace the designation ‘PLO’ to that of ‘Palestine’. However, this change of name did not alter its legal status as Observer, since the adherence to the UN system is reserved for States only.

In the Palestinian case, the nation therefore, existed prior to the State and independently of it, and can therefore justify the creation of a State. The Declaration of Independence remains a reflection of the mental attitude of the people, their sufferings, their vision of a state which they want to create, and the engagements that they would to undertake, in order to become members of the international community.<sup>615</sup> At this

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<sup>612</sup> CARRE DE MALBERG R., *Op. cit.*, p.484.

<sup>613</sup> This was the definition made by the German jurist Georg J. JELLINEK (1851-1911). TÖPPERWIEN N., *op. cit.*, pp.20-21.

<sup>614</sup> DAJANI B., *op. cit.*, p.60.

<sup>615</sup> AL-QASEM A., *Declaration of State of Palestine: Backgrounds and Considerations*, p.327.

point, the importance of such a declaration did not lead to the independence of the State of Palestine, but contributed towards it.

Moreover, one needs to put the Declaration in its context: it should be considered as a concrete gesture in support of the *Intifada* which, by that time had celebrated its eleventh month,<sup>616</sup> and as an epic symbol of affirmation that the Palestinian cause was reasonable and attracted international legitimacy.<sup>617</sup>

Throughout the twentieth century, the Palestinian people made considerable attempts to obtain national independence, by seeking international recognition of their right to freely determine their political status in the territories which they claim to be theirs.<sup>618</sup> Despite all the sacrifices, the Palestinians did not succeed in establishing a State.<sup>619</sup> The reason behind this failure is the Israeli military occupation of the Palestinian territories which has lasted from 1967. Palestine is not yet a State, but it remains the homeland of millions of Palestinians who continue to consider themselves as such.

The State of Palestine does not exist indeed (because of Israeli occupation); however, this fact does not diminish the right of the Palestinian people to self-determination, since the exercise of this right is not limited to those who make a part of a State, nor does it necessarily lead to the establishment of a State.

Now, if Palestinians are asked their opinion on the State they wish to have, many answers are given, together with all conceivable solutions (and even contradictions). The Palestinians have not been able to decide in favour of any defined objective for their national fight. Some want a Palestinian State extending to all the territory of historical Palestine; some do not want a Palestinian State at all, but aspire to the establishment of an Arab or Islamic State; some would be satisfied with a Palestinian State within the framework of the 1967 borders, even if a

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<sup>616</sup> DAJANI B., *op. cit.*, p.58.

<sup>617</sup> *Idem*, p.59.

<sup>618</sup> *Idem*, p.27.

<sup>619</sup> KHALIDI R., *op. cit.*, pp.208-209.

few of those consider that this solution is only a strategic and transitory solution, whilst awaiting the recovery of all of historical Palestine; and others think that a State which would be completely dependent on the Jewish State, would be acceptable.

Nevertheless, there is one common issue: the desire to establish a State. This has always been of extreme importance to the Palestinian national movement; besides, for the movement, the State has always represented - and continues to do so - the only means by which Palestinians are able to preserve their territory, and continue to exist as a [united] people. According to AL-QASEM, the Palestinian people have never abandoned the idea of having their own independent State, which has been their demand since the British Mandate period.<sup>620</sup>

This explains the changes in the position of the Palestinian leadership in relation to the State. Initially, it evoked a democratic Palestinian State (a government for all Palestine, as in the Palestinian Charter). Following the war of October 1973, they started to speak about a fighting national authority, as the first strategic step towards a democratic State; and when the PNC proclaimed the independence of the State of Palestine in 1988, the State had become synonymous with 'The WB, GS, and Jerusalem East as the capital'.

Within the framework of the Oslo Agreement, the Palestinian leaders returned to the idea of an autonomous (National) Authority, as a transitional solution, even if the intentions of the two parties differed in regard to the contents of such transitional period and its objectives. This explains the current contradiction: on one hand, the continuing Palestinian preparation for Statehood -within the framework of the 'two States solution' adopted by the Quartet in the 'Road Map', which was applauded by the UNSC and UNGA. On the other, Israel continues to construct the wall and multiply colonies that make it impossible to have a viable Palestinian State in the future.<sup>621</sup>

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<sup>620</sup> AL-QASEM A., *op. cit.*, p.315.

<sup>621</sup> Now, let us imagine that one gives Palestinians the possibility to choose between living in ghettos created by the Separation wall and the return to the project of bi-national State: it is almost certain that good majority would prefer this second solution. Of course, if that means their return to their homes, from where they were

### 13.2.2. The legal Status of the Palestinian Territories

Notwithstanding Judge Dillard's assertion in the *Western Sahara Case*: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people".<sup>622</sup> The territory, however, has proved to be significant in determining whether and how a given people will exercise self-determination - as put forward by DAJANI<sup>623</sup>. Consequently, it is necessary to qualify those territories that constitute the core of Palestinian claims. What is, therefore, the status of the Territories conquered by Israel in 1967? The answer to this question is important because it determines, in the short term, the applicability of International Humanitarian Law (IHL), and in the long term, it can decide the entitlement to sovereignty of these territories, since the right of the people to self-determination depends also on the status of the territories to which they lay claim. According to BASSIOUNI:

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driven out, and their accession to equal rights as other citizens, without discrimination related to the ethnicity or religion, in relation to voting system, social rights and of health care, that would be guaranteed for them and for their children. It is a simple assumption, since the logic of the separation wall goes completely in opposite direction!

In his article published in Yedout Ahronot, Uri Avnery had quoted *Marwan Barghouti*, who declared in front of the Israeli judges: "If Israelis do not adopt the two-state solution soon, Israel will disappear. The whole country will become one state, and in this state the Palestinians will soon constitute the majority". See: *one State solution Ploy too dangerous*, in: *Yediot Ahronot*, 9 Jan. 2005. La version anglaise disponible sur internet sur <http://www.palestinechronicle.com/story.php?sid=20031002151855765>

Thus, the creation of the Palestinian State is not considered as priority of only Palestinians, but also of interest for those who believe in the right to the existence of Israel, and in the fact that Israel must be the national homeland for Jews. As if they were saying: who loves Israel must support the creation of a Palestinian state! The separation wall 'condemns to death' the viable Palestinian State in the very short term, but will sign for the long term the 'death certificate' of the State of Israel, as national homeland for Jews. This conclusion is curious, but it is not stripped completely of logic. It is clear, that there is no doubt that the creation of the State of Palestine answers, first of all, to the right of the Palestinian people to self-determination on its own territory.

<sup>622</sup> DAJANI B., *op. cit.*, p.31.

<sup>623</sup> *Ibidem*.

In the abstract, people determine their goals regardless of geographic limitations; however, realistically, [self-determination] is exercisable only when it can be actuated within a given territory susceptible of acquiring the characteristics of sovereignty.<sup>624</sup>

In other words, it is not enough that there is a Palestinian people; that people are entitled to self-determination, it is also necessary that the occupied territories are able to form a viable unit for the exercise of that right; Israel's intention was to place obstacles in the way, the opposite, illustrated by Israeli policy towards the settlements in the occupied territories, and more recently, to the policy behind the Separation Wall.

For the Palestinians, the territories conquered by Israel in 1967, are occupied territories; the UN Resolutions and the States official statements, had adopted this position. The only protagonist who refused -and still refuses- this concept is the State of Israel, which considers these as disputed territories! However, it is the status of these territories which is disputed rather than the territories themselves, which are indeed occupied territories, following the Six Day War, and recognized as such, by the international community. In fact, a territory is considered occupied - according to The Hague Regulations Article 42 - when it is placed under the authority of a hostile army.<sup>625</sup> On 22 November 1967, the UNSC adopted Resolution 242 which called for the withdrawal of Israel from 'occupied territories' without the definite article 'the'; Israel regards this omission as an adoption of its own version in relation to the status of the occupied territories, following the Six Day War. Though, it is necessary to read this Resolution in the light of all other UN Resolutions, including the SC Resolutions.

*By way of example, SC Resolution 338, adopted on 22 October 1973, calls upon parties to stop fighting, to respect the cease-fire and to apply Resolution 242. In these two Resolutions, SC underlines the inadmissibility of the acquisition of territories by the war.*

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<sup>624</sup> DAJANI B., *op. cit.*, p.45.

<sup>625</sup> GASSER H.P., *The Geneva Conventions and the Autonomous Territories of the Middle East*, pp.291-292.

In 1979, SC joined a conclusion regarding the establishment of the settlement colonies in the occupied Palestinian territories: in Resolutions 446 and 452, it condemned the Israeli policy and the practice of establishing settlements in the ‘occupied Arab territories’ and

*Calls once more upon Israel, as the occupying Power, to abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.*

The GA dedicated most of its Resolutions to the question of Palestine.

*Suffice to mention here, by way of example, Resolution 3236 of 22 November 1974, where the GA “reaffirms the inalienable rights of the Palestinian people in Palestine, including: (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty”.*

Moreover, the International Committee of the Red Cross (ICRC) confirmed, on several occasions, the applicability of the 4<sup>th</sup> Geneva Convention (4<sup>th</sup> GC) in the territories occupied by Israel in 1967. At the time of the 24<sup>th</sup> International Conference of the Red Cross (Manila 1981), a Resolution was passed in which it reaffirms the applicability of 4<sup>th</sup> GC to the occupied territories in the Middle East.

*On different occasions, the ICRC confirmed that the conditions for the application of 4<sup>th</sup> GC were fulfilled in the case of the territories occupied by Israel, including the WB, East Jerusalem, The GS and Golan. This was also the case in the ICRC reports of 1988, 1989 and 1991, for example.*

From 1997 to 2001, a multilateral process was set up, on the initiative of UNGA. The purpose was to convene a Conference to decide the measures to be taken in order to impose the 4<sup>th</sup> GC on the occupied Palestinian territory, and to ensure that it would be respected.

Following the Report of the UN Secretary-General, during meetings attended by experts, the process was led, by a Conference of Member States to the 4<sup>th</sup> GC, which was held in Geneva on 5 December 2001. The ICRC participated actively in this process, and in particular, made a declaration that was annexed to that formulated by the High Contracting Parties at the end of the Conference, in accordance with various Resolutions adopted by the GA, SC, and the ICRC, reflecting the position of the international community:

Le CICR a toujours affirmé l'applicabilité de jure de la IVe Convention de Genève aux territoires occupés depuis 1967 par l'Etat d'Israël, y compris Jérusalem Est. Cette Convention, qui a été ratifiée par Israël en 1951, reste pleinement applicable et pertinente dans le contexte de violence actuel. En sa qualité de Puissance occupante, Israël est également lié par d'autres règles de droit coutumier relatives à l'occupation, qui sont énoncées dans le Règlement annexé à la Convention de La Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre.<sup>626</sup>

In an official declaration, the humanitarian organization condemned the suicide attacks and recognized the need for Israel to take measures to protect its population; however, these measures - in terms of the ICRC - must respect the IHL.<sup>627</sup> Besides, the IHL, either customary or conventional, is applicable in a situation which is, by definition, serious and critical; in case a State or armed groups unilaterally decide to excuse themselves from applying them each time they think it is necessary, then the IHL would be useless.

In fact the 4<sup>th</sup> GC envisaged only *one exception* to the general rule – *military necessity* (the application of the 4<sup>th</sup> GC Regulations during international or civil war, or during a military occupation). This clause derogates from the general rule because it was intended to create a balance between the sense of justice and humanity from the one side, and the necessary adherence by States to the terms and conditions of the general rule, on the other.

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<sup>626</sup> The declaration can be consulted online [http://www.aidh.org/Droit\\_Humanitaire/actu01-decla-finale.htm](http://www.aidh.org/Droit_Humanitaire/actu01-decla-finale.htm)

<sup>627</sup> Published on the official site of the ICRC.

In its Resolution ES-10/14 of 8 December 2003, the GA decided to submit a request to the International Court of Justice (ICJ) for an advisory opinion on the legal consequences of construction by Israel of a wall in the occupied Palestinian territories. The ICJ issued an advisory opinion on 9 July 2004 on the request of the GA regarding the 'legal Consequences of the construction of a wall in the Occupied Palestinian Territories. According to ICJ,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law.

Accordingly, it can be confirmed without hesitation, that it was not a question of justifying the Separation Wall in the name of military necessity, nor was it necessity, *tout court*.

### 13.2.3. The Israeli/Palestinian Borders

A number of commentators use the expression 'the occupied territories' to indicate those territories which were occupied by Israel in 1967 (The WB, Jerusalem East, The GS and other Arab territories), undoubtedly, because they are territories which were conquered *manu militari*, by the war.

The only official borders of the State of Israel -according to International Law- are those which the Partition Plan declared (the Jewish State would cover, on Palestinian territory, a surface slightly larger than that of the Arab state, and Jerusalem would remain as an international city) and not the 'Green Line' -which merely indicated the line of cease-fire -in which case Israel would cover 77.5% of territory of the historical Palestine. The war could not in any case, create territorial rights and modify borders, whatever the time lapse since the conflict.

In his article, 'The Legal Boundaries of Israel in International Law', Professor Anthony d'AMATO, a specialist in International Law, stated that the Mandate is a concept close to that of 'Trust', in the Anglo-Saxon system. He went on to quote Article 22, in which it stated that although Palestine was considered as one of those Mandates which was 'provisionally' recognised as an independent nation, it would,

nevertheless, require the “*administrative advice and assistance*” of a Mandatory Power on its road to statehood, and also that this would be in the interests of the inhabitants of Palestine. Great Britain was appointed for this purpose in the capacity of Mandatory Power – Trustee.<sup>628</sup>

On the dissolution of the League of Nations in 1946, its mandate responsibilities were transferred to the UN, founded in the previous year. In the case of a Trusteeship, the mandated territory remains intact, following the replacement of the League of Nations and the subsequent withdrawal of the Mandatory Power (Great Britain). The administration ends only when the goals fixed by the Mandate have been achieved, that is, when the people of Palestine are (considered) competent to govern themselves. Consequently, the withdrawal of Great Britain from Palestine meant only that the Mandate on Palestine was, de facto, once more entrusted to the UN, or more precisely, to the UNGA, which had adopted the Partition Plan for Palestine, in its Resolution No. 171, of 29 November 1947.<sup>629</sup>

The Jewish State was proclaimed a month later. No Arab State has ever been established in Palestine (this should have been the concern of various Arab countries and by their omission therefore, are to some extent responsible). Hence, the Mandate never actually ended in Palestine, since its objectives were never realized. Palestinian leadership seems to ignore this point or maybe they avoid referring to it, as it was the case when *Arafat* spoke in front of UNGA, in 1974 for example. In fact, *Arafat* did not formulate any request to create a Palestinian State, and did not require the General Assembly to assume its responsibilities as a Mandatory Power.<sup>630</sup>

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<sup>628</sup> D’AMATO A., *The Legal Boundaries of Israel*, in: *Jurist official Web site*. Anthony d’AMATO is the Leighton Professor of Law at Northwestern University School of Law.

<sup>629</sup> Our analyses here are related to international *legality* and not *legitimacy*. We refer to the legal borders of Israel according to International Law, and not to the legitimacy on which the Partition Plan was based. It is not our intention to discuss here the *legitimacy* of the UN institutions in adopting such a Resolution.

<sup>630</sup> As pointed out by *Salafeh Hajawi* in her comments published in *Majallatu-d-dirâsâti-l-filistîniyyah* – n° 53, Beyrouth, 2003.

After the Six Day War, Israel proceeded with the occupation of the remaining Palestinian territories, and it commenced to colonize them, in spite of this action being considered illegal by the UN and the majority of countries. Some suggested that the Israelis were only defending themselves; for them, the aggression of the Arab countries was the cause of the Six Day War and consequently, of the expansion of the State of Israel; but, as outlined by professor d'AMATO,

the undeniable fact that the Kellogg-Briand Peace Pact of 1928, as definitively glossed by the International Tribunal at Nuremberg in 1948, has abolished forever the idea of acquisition of territory by military conquest.<sup>631</sup>

The war itself was illegitimate; and if self-defence is legitimate, it cannot exceed self-defence as, by doing so, it then becomes a new military aggression, by definition. If self-defence had continued until this military aggression, the occupation of territories during a certain period (the conflict) by no means confers on the attacker the right to retain these territories, nor, *a fortiori*, to annex them. D'AMATO concludes his analysis in these terms: "*The legal boundaries of Israel and Palestine remain today exactly as they were delimited in Resolution 181*".<sup>632</sup> However, it is also true that the PLO, on several occasions, considered the WB (including Jerusalem) and Gaza, as the territories forming the objective of its territorial claims, that is, the future Palestinian State; a position officially adopted by the Declaration of Algiers in 1988.

#### **13.2.4. The constitution: the End of Revolutionary Justification?**

If the Palestinians are a people, and if they are those entitled to the right of self-determination until the establishment of an independent State, and if this right is not in fact satisfied because of an Israeli military occupation, how can the Palestinians carry out this right? Some Palestinians believe that force is the only solution. Some do not rule out force, but think it has to be a last resort. Others still reject violence on principle.

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<sup>631</sup> D'AMATO A., *op. cit.*

<sup>632</sup> *Idem.*

Law does not exclude the use of force, but it attempts to keep it within certain bounds. On the domestic level, the State appropriates the use of violence against those who break the law or harm others. On the international level, the use of force can only be carried out by the international community as a whole, within the framework of existing organisations, especially the UNSC. A state, while having a natural right to self-defence, has to exercise this right according to the UN Charter and through UN organisations, or in coordination with them.

The right of self-determination for nations under occupation means, above all, the right to resist. Force is permissible, but resistance comes in other forms as well. The use of force should be within the framework of commitments to IHL. In other words, self-determination does not grant those living under occupation the right to violate humanitarian principles. On the contrary, the use of force should be based on these principles and should draw from them much needed strength and legitimacy. Alternatively, when the occupying state, acting on grounds of security, military necessity or self-defence, resorts to force, it has to do so within the bounds of IHL. The end does not justify the means.

Israel's breach of IHL (the violations committed by the Israelis, during the occupation) does not entitle the Palestinians to commit breaches of that law (suicide attacks against unarmed civilians). The opposite is also true. Suicide operations do not absolve Israel from the provisions of humanitarian international law.

*For example, Israel does not have the right to bomb civilian areas, use civilians as human shields, attack ambulances, and kill without trial). These legal principles are binding on everyone, irrespective of the situation, ius cogens.*

Many believe that the Palestinian cause is just, and that force is the only option. But the Palestinians have a primary duty not to undermine their own cause. They are those entitled to fight for freedom, but only within the law, particularly IHL. However, it shall be reminded that Israel is the one occupying Palestinian lands. The occupation imposes facts on the ground and is an illegal and unjustified state of affairs. Israel's

occupation of Palestinian lands is at the heart of the conflict, not religion, culture, or ethnicity, as some claim.

Many believe that the use of force may not be the most appropriate option for the Palestinians at present, and accordingly call on Palestinians to confine themselves to peaceful expression. This position is called pragmatic by some and capitulation by others. Regardless of how one looks at it, however, the Palestinian cause belongs to the Palestinian people as a whole. Their right to self-determination is the only reference point worth considering. It is impermissible for any Palestinian group to hijack the cause and 'excommunicate' (*takfeer*) the others. The Palestinians need to put their house in order, according and agree on a common plan of action for all national and Islamist factions.<sup>633</sup>

Now, the Palestinian Constitution will have to take in to consideration all these questions and issues, since the constitution cannot simply ignore the conflict with Israel, the necessity for peace, the internal divisions among the Palestinians regarding the methods used in achieving the objectives of their struggle.

Among some Palestinians, there are those who consider that using force, in international and internal contexts, is an erroneous choice because of the significance of force. They prefer non-violent means, diplomatic and political.

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<sup>633</sup> Moreover, following the attacks of September 11, and the successive total war against terrorism, there is confusion at the international level, between two concepts which should well be distinguished: resistance and terrorism. In fact, there is a serious risk which falls on the Palestinians, that is the risk to be converted, in the eyes of the world, from a people who seek his independence to cruel gangsters and 'terrorists'. Now, the suicide attacks contribute to diffuse and worsen this confusion; consequently, we can confirm that such acts are also to consider as counter-productive with regards to legitimate aspirations of the people Palestinian and its national interests. In an article published in March 2004 (On... Resistance), Dr. *Eyad Sarraj*, a Palestinian humanitarian activist, wrote: "*The real victory over evil is not by killing; but rather, through the victory of moral values that we adopt and are set in all religions... Our duty should be to unmask the Israeli practices and its HR violations and its determined attempt to destroy peace... but we have to be careful not to slide into their shoes*". The article of Dr. *Eyad Sarraj* (On... resistance) was published in the Webpage [www.amin.org](http://www.amin.org) following the assassination of Dr. *Al-Rantissi*.

Palestinians take part in the activities of **UNGA** (as an observer) which, on several occasions, condemned the Israeli military occupation. However, its resolutions are not legally binding. The **UNSC**, the only UN institution able to take measures against a State which threatens international peace and makes serious violations of HR, is easily blocked because of its voting system which affords permanent members the possibility of blocking resolutions that they may consider as 'inappropriate', according to their national interests. That explains the existing double measures: rapid reaction of the SC following the occupation of Kuwait by Iraq, while Israel continues to occupy Palestinian territories since 1967.

While the **ICJ** has two competences: a) to make judicial decisions on disputes that are subject to interested States and, b) on request of GA, SC, and other institutions and specialized agencies of UN, to provide advisory opinions. The advisory opinions are, by definition, non-binding neither for the States nor for the UN institutions; historically however, the UN institutions had always treated the advisory opinions of the ICJ with great respect, similar to the higher international legal institution; but this is not enough to ensure the application of international law to the Palestinian case, and thus, recourse to the ICJ will not lead to satisfaction of the aspirations of the Palestinians.

The development of the IHL led to the creation of the **International Penal Court** (IPC) which signalled perhaps, the beginning of a centralised system of international penal justice, intending to persecute those suspected of committing international crimes. However, its jurisdiction is limited by: a) the nature of the crimes: only international crimes stipulated in the statute of the IPC can be considered; b) the time factor: only crimes committed since 1 July 2002, the date when the Treaty of Rome was enforced can be considered, and especially, c) the recipients of such norms who are Member States.

Israel did not sign or ratify the Treaty of Rome; it is thus outside the jurisdiction of the IPC. The status of IPC envisages the possibility of citing, under the premise of justice, a state which is not a member: but only on the request of SC. Then again, the procedure can be blocked by the SC voting system. The IPC does not represent, therefore, an

interesting option for the Palestinians. It is not at all clear how Israel can be obliged to withdraw from the occupied Palestinian territories (OPT) and to stop putting obstacles in front of the realization of the Palestinians' right to self-determination; however, it is clear that it would not be possible through the current international institutions. What are, therefore, the alternatives that can be proposed? Palestinians should not underestimate the role of Israeli public opinion: its power to exert enormous pressure over the Israeli government; its power to encourage the application of IHL; and its power to end occupation of Palestinian territories. An important role can also be played by the Israeli Supreme Court, which could change its passive position.

Here the problem remains in the way the Israeli Supreme Court apply international law, especially the Humanitarian Law. According to Anis Kassim, Article 35 of Order No 3, issued by the Israeli military governor on 7 June 1967, states that

the Military Court... must apply the provisions of the Geneva conventions dated 12 August 1949 relative to the protection of civilians in time of war with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail.

According to Kassim, this article was deleted by virtue of Order No 144 of 22 October 1967, hence stripping the Palestinian population of the protection of the 4<sup>th</sup> GC of 1949.<sup>634</sup>

Following the common law tradition, Israeli courts distinguish between customary international law, considered part of domestic law –binding without transformation by statute, unless in conflict with existing statute– and treaty-based law, which has no legal effect unless incorporated by statute. As such, the Hague regulations of 1907 are enforced by the Israeli Supreme Court with respect to governmental action in the occupied territories, whereas the 4<sup>th</sup> GC, of 1949, deemed a constitutive treaty, is not enforced by the court. At the same time, Israel's official position of refusal to apply *de jure* the Hague

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<sup>634</sup> KASSIM A., *Legal Systems and Developments in Palestine*, pp.29-32. Dr. Anis Kassim, Attorney, Member of the Bar of the Hashemite Kingdom of Jordan. Member of Palestine National Council.

regulations in the “territories” of 1967 is explained by its assertion that the Israeli presence is not an occupation but an administration in absence of sovereignty.<sup>635</sup>

Still, the Israeli Supreme Court recognises the necessity to apply de facto the humanitarian provisions of the 4<sup>th</sup> GC.<sup>636</sup> The de facto application is different from *de jure* since there are no possibilities to persecute government violations of these acts judicially. In fact, the international community has through various resolutions and recommendations urged Israel to recognise the de jure applicability of IHL in the OPT in line with UNGA resolution 58/97 of 17 December 2003.

According to Eyal BENVENISTI, the Israeli Supreme Court’s rationale can be found in the same principle as the separation of powers.<sup>637</sup>

The decision of the Supreme Court to invoke doctrine with respect to the status of the treaties, rather than with respect to the government’s ratification power, is a political decision aimed at granting the government more leeway in the international arena... The Supreme Court was quite willing in the early days to embrace international norms by adopting a monist approach to international law. Later, though, security considerations came to the fore, altering the court’s attitude.<sup>638</sup>

We believe that Israeli courts may impose the applicability *de jure* of IHL, including the Geneva conventions and their protocols, without necessarily renouncing its dual approach towards international law, at least for two reasons:

*First*, while many treaties are binding only on states that take part, some treaties and conventions are the codification of customary

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<sup>635</sup> DORNIER N., *Rapport: Audience du 21 Novembre 1988 devant la Haute Cour de Justice de Jérusalem Relatif à la Fermeture de l’Association In’Aash El-Usra*, pp.32-33.

<sup>636</sup> BENVENISTI E., *The International Law of Occupation*, pp.110-111.

<sup>637</sup> BENVENISTI E., *The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights*, pp.207-221.

<sup>638</sup> *Ibidem*.

international law (CIL), which is applicable to all states, including those not participating. In other words, the codification of CIL aims to enhance its application rather than to excuse those states not participating. Still, the problem is how to distinguish between regulations that are part of CIL and convention-based regulations. It is of great importance not to leave this task to unilateral decision-makers in each state but rather to international law experts.

*Second*, a (relatively) new phenomenon is the codification of international law in multilateral treaties that helps to spread and to enhance certain international regulations to the point that they are considered binding by almost all states, for a period of time, independent of the treaty. In other words, the codification of international law may include customary international law and may create new laws. This is happening with the application of IHL on civilians during armed conflicts.

### **13.2.5. Legitimate Palestinian Representatives**

The Declaration of Algiers is not the first Declaration of Independence. Since 1 October 1948, some Palestinians brought together in Gaza, have proclaimed independence and the establishment of a so-called government of 'All Palestine' (*hukumat umum falasteen*). The above-mentioned declaration did not lead to the establishment of a Palestinian State because The historic Palestine, following the *nakba* (the *Independence*, for the Israelis) was divided, *de facto* into three parts: *first*, the territory of the new State of Israel; *second*, the WB (hereinafter called), unified with (or rather, annexed to) the Emirate of Transjordan, thus forming the Hashemite Kingdom of Jordan; and, *third*, the GS, even though it was never officially annexed, was administered by Egypt.

The Declaration of Algiers is not even meant to be the last declaration of independence! The date of 4 May 1999 (five years after the IA) was fixed as the date for the Declaration of the Palestinian State. *Yasser Arafat's* decision to postpone this Declaration to an unspecified date was not only related to Israeli protests and her threats to stop the negotiations, but also because the IA had not been implemented and no final arrangements had been agreed. Nevertheless, the deterioration of

the situation in the Palestinian territories was accompanied by an increasing international conviction for the need to find a peaceful solution to the Israeli-Palestinian conflict; 'two peoples, two States' was the magic formula presented by the international actors, later adopted as the Road Map.

The international community shares -by general consent- the conviction that a resolution of the Israeli-Palestinian conflict is necessary for stability in the region. The so-called Peace Process, started at the beginning of the nineties between the Israeli Government and PLO, and formalized through several agreements, in particular the Declaration of Principles, should not be considered as a peace agreement, but rather, as a declaration of peaceful intentions by the legitimate representatives of the two entities. This means a recognition by one of the existence of the other, and of its right to existence, and thus to security and development.

The failure of the Oslo Peace Process added confusion to the already complicated situation. One of the most important -but least considered- effects of the Oslo Agreement was the stressing of the distinction between the Palestinians of the WB and GS on the one hand, and the other Palestinians dispersed throughout the Middle East, especially those who still live in the refugee camps, and the rest of the world. This is the inevitable consequence of a distinction between transitional and permanent.

On the other hand, there is a quasi-unanimous recognition of the Palestinian people (through the recognition of the PLO as a liberation movement) as subjects of International Law, in spite of the fact that a Palestinian State does not exist. This recognition is expressed in different ways: for example, through the exchange of diplomatic delegations or representatives and through the stipulation of international agreements. However, the only legitimate body that is entitled to represent the Palestinian people remains the PLO and its institutions even if -admittedly- the PA is playing an increasing role in the international arena.

Thanks to the agreements with Israel, but legitimated first by the PLO Mandate and then by the popular elections of 1996, the PA was created

and exists and functions as a quasi-State, even though it is deprived of real sovereign jurisdiction. This caused a certain overlapping between the institutions of the PA and those of the PLO. Confusion arose, which meant an increased authoritarianism in the territories under Palestinian jurisdiction and a lack of transparency. This confusion was also reflected in the way the BL for the PA was approved and the elaboration of the Palestinian Constitutional Drafts.

In fact, adopting a constitutional document in the Palestinian case was seen to be a complicated task. As for the international community, it had shown an exceptional interest with regard to these efforts; an interest that meant financing these efforts or simply providing consultations with highly qualified constitutional specialists. The international community desired an active part in the efforts to construct a transparent and qualified administration in the Palestinian territories, which would respect the PNCh, Humans Rights, accountability, democracy and good governance.

These principles are in harmony with the aspirations of the Palestinian people who took part in the efforts to constitutionalize the Palestinian entity, through numerous conferences organized by the public and, especially, through the work of many different international and local, non-governmental organizations (NGOs), that are present in the Palestinian territories, either preparing BL for the PA, or the Constitution for the Palestinian State.

#### **13.2.6. Who Exercises Effective Constituent Power?**

In the classical theory, the people are those entitled to constituent power. The people exercise that inner power through legitimate institutions. It can be a *council* constituted *ad hoc*, or the same legislative body also empowered to practice *constituent power*, or directly, through referenda. Sometimes a constituency prepares and debates a constitution, and then presents it to the people for approval. 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 addition, the elaboration and redaction of the same constitutional text is normally left to a group of specialists or to a commission, as it did in the Palestinian case. In fact, the task of preparing a Constitution for the Palestinian State was given to a commission composed of highly qualified individuals. It included academics, jurists, politicians, various specialists and some international constitutionalists.

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, is in reality much more important than knowing, theoretically, who is/are that/those entitled to that power. In fact, the 'temporary government' who organizes the enactment of constituent power, usually exploits the situation for its own benefit. For these reasons, the way the committee in charge of preparing the Palestinian Constitution was established (full executive control) may affect the same constitution.

In fact, many criticized the Constitution because they think it reflected an alien will, rather than that of Palestinians. For some Palestinians, the Constitution did not answer Palestinian needs, but reflected the interests of other States.<sup>639</sup> The participation of the Palestinians from WBGS in the process of drafting the BL and the constitution is also relevant. Palestinians showed -at least in the beginning- enthusiasm in that they would be contributing to the BL through their participation in the public conference, which had been organized. This was a matter of course, since the BL -and also the Constitution- would be of interest in the first instance, to all the Palestinians of WBGS, whence the PA was operating and in which the Palestinian State would be established.

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<sup>639</sup> Palestinian jurists from Al-Haq Institute (Palestinian NGO) presented the possible 'dangers' of an elitist executive: the content of the constitution would reflect the executive interest as having more authority; objectivity and neutrality are impossible, since the committee would inevitably reflect the group in government; the committee may refuse to include suggestions which do not correspond with its ideals; citizens would have the last word, but they would judge what the constitution would offer, rather than what it has to be; in order to adapt the constitution, the executive authority would use mass media to influence citizens effectively. This paper was presented to the 'Palestinian Conference on the Constitution and Sustainable Human Development', organized by Development Studies Program of the University of Birzeit [www.birzeit.edu/dsp](http://www.birzeit.edu/dsp)

An important question would inevitably arise: 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 the competence of Palestinians of WBSG and citizens of the future Palestinian State (new arrivals included), will the PLO participate in the legislation, whose principle objective must be the inhabitants of the WBSG?<sup>640</sup>

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<sup>640</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 which endorsed it (the PNC) declared its suspension. It has had an influence on BL 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. These and other questions will be addressed in the following sections.

### §14 Constituent Power and Sovereignty

In the final decade of the twentieth century, and mostly due to the collapse of the Soviet Union, 29 new countries gained independence and became states. Up until 1990, member states of the UN were 159. After the independence of East Timor in 2002, member states rose to 191; this means that there was a 20% increase in 12 years.<sup>641</sup> This vast number of new states gave constitutionalism renewed significance and importance.<sup>642</sup>

According to Prof. Nicolas MAZIAU<sup>643</sup>, there is a modern phenomenon that consists in transferring constituent power to international organizations, leading to a kind of *internationalization of constituent power*. Prof. MAZIAU distinguished between two types of sovereignty, to the inside and to the outside:

La théorie du droit enseigne qu'il existe deux formes de souveraineté: la souveraineté interne dont le détenteur est le monarque, ou dans les formes modernes de démocratie, le peuple ou la nation; la souveraineté internationale qui est la capacité dont jouit l'Etat de s'engager par un acte de volonté internationale, c'est à dire de "n'obéir qu'à des règles à l'effet desquelles (l'Etat) a consenti, expressément ou par acquiescement".<sup>644</sup>

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<sup>641</sup> The following States became members of the UN: 1990, Liechtenstein, Namibia; 1991 Democratic People's Republic of Korea, Estonia, Federated states of Micronesia, Latvia, Lithuania, Marshal Islands, Republic of Korea; 1992 Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Kazakhstan, Kyrgyz Republic, Republic of Moldova, San Marino, Slovenia, Tajikistan, Turkmenistan, Uzbekistan; 1993 Andorra, Czech Republic, Eritrea, Monaco, Slovak Republic, The Former Yugoslav Republic of Macedonia; 1994 Palau.

<sup>642</sup> VENTER F., *Op. cit.*, p.9

<sup>643</sup> Nicolas Maziau is a professor at the University of Nancy II. The article cited here was the reproduction of a course given in January 2002, in the seminary of Prof. Tania Groppi, at the University of Siena, in Italy. The article is published in *Agorà* online Review of the Research Centre of Comparative Constitutional Law of the University, and can be consulted at the following address: [http://www.unisi.it/ricerca/dip/dir\\_eco/COMPARATO/maziau.doc](http://www.unisi.it/ricerca/dip/dir_eco/COMPARATO/maziau.doc)

<sup>644</sup> MAZIAU N., *Op. cit.*, p.2.

Accordingly, nothing prevents a state from renouncing part of its internal sovereignty but it can never give up its international sovereignty. Therefore, transferring constituent power to an international organization does not contradict the principles of sovereignty of states. The same author suggested that there are multiple reasons that would warrant internationalization of constituent power. According to D. MAUS, there are three hypotheses in which contemporary international law influences constituent power:

D'abord, des situations où il y a désormais une véritable obligation de conformité entre les règles du droit international public et les constitutions nationales, donc une très forte intégration... deuxième hypothèse: la nécessité d'une compatibilité entre des règles internationales et les constitutions nationales... troisième situation: une incitation à l'harmonisation entre des règles internationales et les constitutions.<sup>645</sup>

The reasons behind this, according to Prof. MAZIAU, are the following: *first*, the evolution of international law and international society and the relationship between states altered the notion of sovereignty; *second*, the weakness of Third World States and the burgeoning crises, both political and economical, and the resolve of developed countries to act against these crises, led to the changing of the *raison d'être* of peace keeping operations. Previously, it was intervention between parties in conflict, with their consent and in deference to their domestic affairs; latterly, it is in line with creating stable political regimes which are also democratic.<sup>646</sup>

The consequence of this was that the UN and international laws in general, were indifferent to the political nature of the states. This is in contradiction to the Declaration of Friendship relations entered into between the states, which confirmed the constitutional autonomy of states in their internal affairs. According to Thomas FRANCK, This was an irreversible evolution of international law:

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<sup>645</sup> MAUS D., *Le nouveau constitutionnalisme, mélanges en l'honneur de Gérard Conac*, Economica, 2001, p.87, cited in: MAZIAU N., *op. cit.*, p.5, footnote 20.

<sup>646</sup> MAZIAU N., *op. cit.*, p.3.

This emerging law – which requires democracy to validate governance, is not merely the law of a particular State like the United States under its constitution. It is also becoming a requirement of international law, applicable to all, and implemented through global standards with the help of regional or international organisations.<sup>647</sup>

The ‘internationalization of constituent power’ is related to another phenomenon: the ‘constitutionalization of international law’; in fact, any international commitments that contradict constitutional law necessitate the amendment of the constitution. This means an increasing demand of states to apply international law in their internal order, which would give it a constitutional value. According to SCHMITT,

Si le contenu de *certaines* accords internationaux est reçu par les lois constitutionnelles d’un pays en vertu d’obligations internationales, cela n’implique pas nécessairement une suppression ou une diminution de l’indépendance politique de l’État qui par ce moyen garantit des obligations internationales par la forme de lois constitutionnelles relevant du droit public interne. (...) Le contenu de ces traités internationaux est protégé en droit public interne par la rigidité constitutionnelle. (...) Mais ces dispositions ne sont pas des actes constitutifs d’un peuple. Elles ne suppriment pas la souveraineté d’un État et n’utilisent, dans l’intérêt d’une obligation internationale, que la notion relative de loi constitutionnelle comme un moyen technique et formel d’obtenir une validité accrue à l’intérieur de l’État.<sup>648</sup>

Now, the problem is the substitution of the people or the nation, considered as those entitled to constituent power, in the elaboration and the adoption of an instrument of government, led to a heteronymous constitution; an imposed constitution rather than voluntarily adopted, which leaves a question of legitimacy of such enactments. In the international law, there is no dilemma, but in constitutional law, this is

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<sup>647</sup> FRANCK Th., *The emerging right to democratic governance*, in: *AJIL*, 1992, vol. 86, no 1, p.47; cited in: MAZIAU N., *op. cit.*, p.4.

<sup>648</sup> SCHMITT C., *Théorie de la Constitution*, PUF, coll. Léviathan, 1993, p.208; cited in: MAZIAU N., *op. cit.*, p.5.

not acceptable since the people, or a constituent assembly, does not participate effectively in the preparation and adoption of such a constitution, causing a setback regarding internal sovereignty of the state. S. PIERRE-CAPS noticed that:

C'est précisément (la) création radicale de la constitution, en vertu d'une *décision* du pouvoir constituant de la nation, qui tend à être remise en cause aujourd'hui. Et, paradoxalement, cela tient aussi au succès rencontré par la *conception normative* de la constitution. (...) En privant ainsi le pouvoir constituant de son caractère dynamique et volontaire, et sans pour autant remettre en cause l'idée même du pouvoir constituant du peuple ou de la nation, cette intrusion normative dans le pouvoir constituant laisse entrevoir la possibilité d'une constitution détachée de son substrat national, désincarnée, 'dénationalisée' en un mot, pur engrenage de normes hiérarchisées...<sup>649</sup>

Now, to resolve the question of the legitimacy of such constitutions, the international constituent continues to refer to the people and the nation. The reference to the people, who may have limited participation in the process of constitution making, seems to be indispensable to obtain internal legitimacy for that text.

La fiction juridique par le mode de raisonnement dérivé sur lequel elle s'appuie (...) remplit une fonction de légitimation idéologique (...) et traduit (...) le jeu des rapports de puissance au sein de la Société internationale (...) on objectera peut-être que seules les grandes puissances peuvent user du procédé fictif avec quelque chance de succès et modeler ainsi la règle de droit à leur convenance en la dotant d'une nouvelle positivité.<sup>650</sup>

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<sup>649</sup> PIERRÉ-CAPS S., *Le constitutionnalisme et la nation*, in: *Le nouveau constitutionnalisme, mélanges en l'honneur de Gérard Conac*, Economica, 2001, p.72; cited in: MAZIAU N., *op. cit.*, p.6.

<sup>650</sup> M-F. LABOUZ, *L'ONU et la Corée: recherches sur la fiction en droit international public*, PUF, 1980, pp.21, 314; cited in: MAZIAU N., *op. cit.*, p.7.

La fiction est une technique (...) remplissant une certaine fonction dans le rapport de forces: elle peut le consolider ou le renverser.<sup>651</sup>

According to MAZIAU, those archaic concepts of constituent power which a nation considers the only justification and legitimacy of the constitution, ignore the fact that that legitimacy can also be found in the international community, based on the priorities of the UN charter whose legitimacy is universally accepted; in principle, nothing prohibits the internationalization of constituent power.<sup>652</sup>

Now, the interference of the international law in questions related to the constituent power can be of two types: 1) the internationalization of derived or instituted constituent power; 2) the internationalization of original constituent power.

*There are many examples of the first type of influence: the treaties of minorities of 1919-1920 in central and oriental Europe; the Agreements of Gasperi-Gruber signed in 1946, between Austria and Italy; the agreements of Northern Ireland in 1998.*<sup>653</sup>

On the other hand, we are assisting in a relatively recent phenomenon regarding a constitutional movement, which is related to its continuous development being adapted to new circumstances: how? This is possible through what VERGOTTINI calls “*potere costituente guidato o assistito*”.<sup>654</sup>

<sup>651</sup> CHEMILLIER-GENDREAU M., *Origine et rôle de la fiction en droit international public*, in: *Archives de philosophie du droit, Le droit international*, Tome 32, Sirey, 1987, p.160; cited in: MAZIAU N., *op. cit.*, p.7.

<sup>652</sup> The authors cited here seem to be fervent defenders of international law and international involvement in the constitution-making process. All the examples presented here reflect more the reasons that may justify such intervention rather than covering the problem from all its aspects, especially in terms of equilibrium between internal and international legitimacy of the constitution.

<sup>653</sup> MAZIAU N., *op. cit.*, p.10.

<sup>654</sup> VERGOTTINI G. de, *Le transizioni costituzionali, sviluppi crisi del costituzionalismo alla fine del XX secolo*, Il Mulino, 1998, p.164; cited in: MAZIAU N., *op. cit.*, p.10.

According to MAZIAU, the number of internationalized constitutions multiplied following the substitution of international law by constitutional law. The international legislator(s) may control the process of elaborating and adopting the constitution, or simply impose conditions to its content or form. The conditions on the structure may be by imposing a special vote on the constituent assembly guaranteeing the rights of minority groups; this is necessary for constitutional legitimacy. The conditions in substance are related to the wish of the international community to impose principles that would guarantee democracy. However, sometimes western democracy does not necessarily correspond with local cultures and political traditions.

While conversely, totally internationalized constitutions imposed limits on the amending power in order to guarantee its observance. This was the case in the peace treaties. Some may regard this phenomenon with suspicion, nevertheless, as confirmed by MAZIAU:

Toutefois, comme nous avons tenté de le montrer, la fiction de l'affirmation de la souveraineté de l'Etat, ou celle du consentement du peuple, ne sont que des techniques juridiques de justification d'une démarche politique de la communauté internationale qui sollicite la normativité internationale en appui au droit constitutionnel.<sup>655</sup>

#### **14.1. The Partial or Total Internationalization of Original Constituent Power**

The guidance role is played by international organizations, universal or regional. The internationalization of original constituent power is either complete or partial. It is complete when constituent power is exercised by an international authority; it is partial when an international community assists the state in respecting certain principles. In the next two sections, we will present some examples of partial and complete internationalization of original constituent power.<sup>656 657</sup>

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<sup>655</sup> MAZIAU N., *op. cit.*, p.35.

<sup>656</sup> MAZIAU N., *op. cit.*, p.11. The following cases are mostly those mentioned in the study prepared by Nicolas MAZIAU. The limit of my approach is that, although it may give a panoramic vision of new constitutional developments in contemporary

### 14.1.1. The Partial Internationalization of Original Constituent Power as a Result of a Treaty or an Act of International Law

This occurs as a result of a treaty or an act of international law, or as a result of a *de facto* situation. There are different examples that show that international law increasingly covers affairs that are usually those of constituent power. This is because it is based on a more activist conception of international law; and it reflects the specific situation of states and territories that were compelled to accept international intervention.

Here we may distinguish between the territories that were being granted independence, and which the international community had judged opportune to decide their self-determination (Palestine in 1947, Namibia in 1990, East Timor in 2001); and States that in a specific moment in their history, found themselves obliged to put their sovereignty under custody. This is the case of Cambodia in 1991 and Macedonia in 2001.<sup>658</sup>

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and new-born states, it lacks first-hand information and sometimes is at risk of being superfluous.

<sup>657</sup> Iraq's recent constitutional developments can also be considered as an interesting case study, but we will not examine it here for two reasons: first, the situation is still unstable; second, the subject needs much more in-depth exploration than a simple reference can make. Nevertheless, we may just recall some of the elements: On 1/3/2004, the Iraqi Governing Council (IGC) announced that it had completed and approved a 'Transitional Administrative Law', an interim Constitution to govern Iraq, following the restoration of sovereignty on 30 June 2004, until a permanent one is adopted. That date was the deadline established by the agreement between the Coalition Provisional Authority (CPA) and the IGC on 15/11/2003. According to that agreement, the election for a constituent assembly would follow in 2005. That assembly would promptly draw up and seek ratification of a permanent Constitution; elections would be held, under the terms of the new constitution, by the end of 2005. That constitutional document took a considerable time to prepare and amend, and the signing of it was postponed many times. Elections were held in January 2005 in a particularly unstable environment. The source of the above information is mainly based on a commentary and analysis made by Nathan BROWN, Professor of Political Science and International Affairs, at the George Washington University, and Adjunct Scholar at the Middle East Institute.

<sup>658</sup> Nevertheless, the examples will be presented in a chronological order.

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### - **The Case of Palestine in 1947**

This is the first example in which international law intervenes directly in the original constituent power of a state, on its road to independence. In fact, the GA adopted Resolution No. 181 (II), on 29 November 1947. Under section “B”, the Resolution proposes some preparatory steps towards independence. Under Part 10, there are a series of principles which the constituencies of both Palestine and Israel shall observe. It is written that:

The constituent assembly shall redact a democratic constitution and elect a provisory government to succeed the interim government named by the commission;

Every Constitution shall include Chapters 1 and 2 of the Declaration that is mentioned in section C of the Resolution (related to Holy sites, and religious and minority rights);

The Constitutions shall include other dispositions that the new regimes shall respect such as: the obligation to create a legislative chamber elected by universal suffrage and by secret ballots based on proportional representation, and an executive council, responsible to the legislative assembly.

The obligation of the two states to guarantee equal rights for every person in civil, political, economic and religious affairs, without discrimination, and the enjoyment of HR and fundamental freedoms.

The resolution imposes on the new states the requirement to establish and to maintain the freedom of circulation and visits for the residents and the citizens of the two states, in Palestine and Jerusalem.

### - **The Case of Namibia in 1990**

The case of Namibia is also an example of partial internationalization of constituent power; in fact, the constituent assembly was obliged to follow the principles imposed upon it by foreign powers, with the support of the UN. Those principles were already expressed by the representatives of Germany, Canada, USA, France and the United Kingdom, in the UN. Those principles were binding on the constituent assembly and inspired the Constitution of independent Namibia.

According to the Secretary General of the UN, these principles are obligatory.

The Constitution was to be adopted with a majority of two-thirds of the members of the constituent assembly, and it should endorse the eight principles that ensure the state of law. These principles were transmitted to the South-African General Administrator governing those territories, in order to guarantee their implementation. Those principles are: respect of the principle of free elections; the responsibility of the government to parliament; the recognition of fundamental rights, especially the right to constitute political parties, the right to hold meetings, and the right to workers' syndicates; the principle of non-retroactive punishment for crimes; the recognition of a unitary and sovereign state; and the necessity to establish police and defence services that represent the population.

However, the foreign powers imposed limitations to the amending power; in fact, Art. 131 forbade the amendment of the constitutional dispositions which guaranteed the respect of fundamental rights. Art. 132 provided complicated amending procedures. Some may question the obligatory effect of those clauses today, since they were imposed by foreign powers. According to MAZIAU, it should be considered in that light, since they are included in the constitution, which leaves the problem of their validity, as they were imposed by foreign powers.<sup>659</sup>

#### - **The Case of Cambodia in 1991**

Sometimes, states require international assistance in order to return to their normal exercise of sovereignty, and in this case, Cambodia can be cited as an example. Here also, the intervention of international powers on arguments related to the constituency intends to ensure the return to peace, through the RL.

The Cambodian factions entered into negotiations and accepted the sharing of power, in accordance with the Paris Agreement of 23/10/1991, between the different Cambodian political factions and the nineteen States which participated in the peace process.

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<sup>659</sup> MAZIAU N., *op. cit.*, p.12.

Annex V of the Agreement contained the general principles which would inspire the Cambodian constituent assembly. Those principles are: formally establishing a political regime, subject to constitutional norms; the protection of HR and fundamental freedoms, such as the right to life, personal freedom, freedom of movement, religion, association, the freedom to freely constitute political parties and syndicates, and so on. Art. 4 imposed a system of liberal democracy, based on pluralism and the respect of free and periodic elections. According to article 5, the independent judiciary shall guarantee the respect of fundamental rights. And in addition, the agreement stipulates that the constitution shall be adopted by two-thirds of the members of the constituent assembly.<sup>660</sup>

#### - **The Case of East Timor in 2001**

Since UNSC Resolution 1272 of 25/10/1999, East Timor was placed under a transitory international administration which received a mandate to exercise executive and legislative powers, and to ensure justice and public order (UNTAET). It also had the task of controlling humanitarian aid and ensuring the reconstruction of the country. It also had another important role: to create democratic institutions for the future. The international administration took over power, after the Indonesian administration had left East Timor in anarchy, following the referendum for self-determination on 4/9/1999. The Secretary General's Special Representative headed the administration of East Timor until the Declaration of Independence.

The international administration rendered self-determination possible for that population, in strict consultation with the local independence movement (FRETILIN).<sup>661</sup> The international administration took the necessary measures in organizing the election of constituent assembly. The international administration adopted Regulation 2001/2 of 16/3/2001 to a constitution for an independent and democratic East Timor. In accordance with that Regulation, the constitution could be

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<sup>660</sup> *Idem*, p.18.

<sup>661</sup> FRETILIN: Frente Revolucionaria de Timor Leste Independente (Revolutionary Front for an Independent Timor)

adopted with at least 60 out of 88 members of the constituent assembly (considerably more than a two-thirds majority), in order to ensure the respect of minorities. In addition, the Regulation provided for the constituent assembly to take in consideration the results of the consultations conducted by all the specialized constitutional commissions. Regulation 2001/11 of 13/7/2001 continued in the same vein, providing more conditions in the way the elections to the assembly shall be held.

Accordingly, the international administration did not substitute the local population; It is a transitory administration that is guiding that territory towards independence. According to CAHIN,

L'administration directe du territoire par l'ONU affecte (...) notablement la portée internationale de l'exercice du pouvoir constituant. (...) L'assistance constitutionnelle fournie dans le cadre de cette administration permet (...) d'opérer avec une efficacité certaine la constitutionnalisation de l'acquis démocratique de l'ordre juridique transitoire (...).<sup>662</sup>

#### - **The Case of Macedonia in 2001**

During the dissolution of Yugoslavia between the years 1991-2, Macedonia suffered considerably on an internal level. The crisis in Kosovo and the persecution of the Albanese population in that Serbian province were fatal to its fragile political balance. This necessitated an active involvement of the international community, especially the European Union and the North Atlantic Territorial Organization (NATO), in order to disarm the Albanese militia, and to make constitutional arrangements for better representation of the Albanese community in the central institutions.

The participation of those international organizations in the constituent process was limited to proposing solutions to the problem of communitarian cohabitation and leaving the Macedonian parliament to make the necessary adaptations to the Constitution. In fact, the representatives of the Macedonian government and the Albanese

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<sup>662</sup> CAHIN G., *L'action Internationale au Timor Oriental*, AFDI, 2000, CNRS éditions, Paris, p.165, cited in: MAZIAU N., *op. cit.*, p.16.

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community, under the international auspices, joined a framework agreement in 13/8/2001. The Macedonian parliament adopted some amendments to the Constitution, touching on fifteen dispositions, including suppressing the reference to the Macedonian people, in the preamble, the suppression of the reference to the privileged status of the Orthodox Church, in the Article dedicated to the freedom of religion, and the equal recognition of Albanese and Macedonian as the official language. However, the parliament did not recognize the Albanese community as equal to the Macedonian people, and they did not establish a federal state, as requested by the Albanese parties.<sup>663</sup>

#### **14.1.2. The Partial internationalization of Original Constituent Power by a *de facto* Situation**

In this case, it was different from the preceding examples. The partial internationalization of the constituent power did not follow any agreement or the decisions of some international authorities, but was the direct result of the will of the 'powers' which participated directly in the constituent process of the defeated countries. The classical examples are those of Germany and Japan after World War II. In this case, the winning powers (USA, France and the United Kingdom in Germany; USA in Japan) controlled the Constitution-making process, and imposed new Constitutional norms in a regime of occupation; less pressure was made on Italy, in relation to the exercise of constituent power.

##### **- The Case of Germany**

Nazi Germany lost the war in 1945, and the allies decided to de-Nazify Germany; the Constitution would have served this purpose. As outlined by I. STAFF,

Between 1945 and 1948 the three western occupying forces embarked upon creating democratic administrations, starting at the local level. Having remodelled the western territories of the former Reich into the Länder, they

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<sup>663</sup> Idem, p.19.

instructed their Land prime ministers to draw up a constitution, which would join together the three western zones on a federal basis.<sup>664</sup>

In 1948, a parliamentary council was established; the *Parlementarische Rat* was composed of 65 members from the different *Landtage*, and was charged with adopting a new democratic and Federal Constitution for Germany. Under the authority of the allies, the parliamentary council adopted a draft BL on 8 May 1949 that was first presented to the Allies Council and then to *Landtage*.

Their approval was required because, while the allies had consciously refrained from annexing German territory in 1945, their Berlin declaration of 5 June 1945 clearly stated that Germany's sovereign rights had been forfeited with capitulation. The Basic Law received indirect democratic legitimisation when accepted by the necessary majority in the Land parliaments (...).<sup>665</sup>

According to MAZIAU, the strict control of the allies in the process of redacting the constitution did not forbid the German people from exercising its constituent power. In fact, the same preamble of the BL for the Federal Republic of Germany enforced on 23/5/1949, provided that the German nation had adopted this BL. The treaty was signed on 12/9/1990, gave a definitive regulation for the statute of Germany, followed by its full sovereignty, and reunification was re-established.<sup>666</sup>

#### - **The Case of Japan**

In Japan, the situation was again, slightly different; in fact, it was only the USA, as an occupying power, which exerted pressure. In fact,

sa base a été préparée en une courte période par le 'Grand Conseil Général Allié' sous la direction du Général Mac-Arthur. (...) Le gouvernement et les

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<sup>664</sup> STAFF I., *The Basic law: genesis, scope and international context*, in: *Basic law for the Federal Republic of Germany, Introduction*, Press and Information Office of the Federal Government of Germany, Bonn, 1999, p.12; cited in: MAZIAU N., *op. cit.*, p.22.

<sup>665</sup> Ibidem.

<sup>666</sup> MAZIAU N., *op. cit.*, p.21.

parlementaires, élus directement au suffrage universel, n'ont que peu retouché ce projet.<sup>667</sup>

The result was that demilitarization was imposed on Japan and the establishment of a mono-parliamentary regime in which the emperor had no real power. Besides, a very complicated revision system was imposed which forbade the revision of that constitutional pacifism. This remedy used by the Americans in Japan, realized its objective since the Constitution had never been amended since its adoption.

#### - **The Case of Italy**

The case of Italy is particular, as it had lost the war, but the victorious allies did not want to be involved nor participate directly in the constituent process, although they observed its developments. In fact, Article 15 of the Peace Treaty signed in 1947 provided that:

L'Italia prenderà tutte le misure necessarie per assicurare a tutte le persone soggette alla sua giurisdizione, senza distinzione di razza, sesso, lingua o religione, il godimento dei diritti dell'uomo e delle libertà fondamentali, ivi compresa la libertà d'espressione, di stampa e di diffusione, di culto, d'opinione pubblica e di pubblica riunione.<sup>668</sup>

This resulted in some influence to but not really internationalization of the constituent power, which follows a treaty or as a result of a *de facto* situation;

Con riferimento all'esperienza italiana prevale la convinzione che la nuova costituzione sia comunque rimasta il frutto di scelte dei costituenti nazionali in quanto gli indirizzi e i condizionamenti degli occupanti stranieri potevano essenzialmente ricondursi a forme di condizionamento politico della decisione costituente.<sup>669</sup>

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<sup>667</sup> YAMAMOTO H., *Constitution, pacifisme et droits fondamentaux au Japon*, in: *Revue française de droit constitutionnel*, no 24, 1995, p.824; cited in: MAZIAU N., *op. cit.*, p.22.

<sup>668</sup> VERGOTTINI G., *Diritto Costituzionale Comparato*, p.21.

<sup>669</sup> *Idem*, pp.21, 23.

### 14.1.3. The Total Substitution of National Constituent Power by International Actors

The total internationalization of constituent power means that the elaboration process of the constitution is entirely left to international actors, since the same constitution makes part of an international treaty. In all the following cases that will be mentioned below, international intervention in constituent power is total, although sovereignty may not always be contested, such as the case of Bosnia-Herzegovina in 1995, or it can be considered as a preamble to the effective exercise of sovereignty, such as the case of Trieste in 1947, and Cyprus in 1960. Finally, the example of Kosovo, and its particular statute will be presented.<sup>670</sup>

#### - The Case of Trieste in 1947

The UNSC adopted Resolution 16 10/1/1947 related to the free territory of Trieste, in order to resolve the territorial dispute between Italy and Yugoslavia. The solution of that question was through the internationalization of the city and placing it under the surveillance of the SC. According to A. GRAVIS, the idea was to create

Une entité autonome d'apparence étatique mais étroitement soumise à des normes internationales et à une intervention directe de l'autorité internationale (...) pour la transformer en Service public international de paix.<sup>671</sup>

The City-State of Trieste, in fact, would have all the appearances of a state (borders, nationality, national assembly...) but it would be limited by the SC and its representative, the Governor of Trieste, who would supervise the application of the statute. It was envisaged that the adoption of a constitution would have completed the statute.

The question of Trieste is interesting because the internationalization of the city was not put into effect, because of the opposition of the two most important countries involved, Italy and Yugoslavia. The

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<sup>670</sup> Here also, the cases are presented in chronological order.

<sup>671</sup> GERVAIS A., *Le statut du territoire libre de Trieste*, AFDI, 1947, CNRS éditions, p.138; cited in MAZIAU N., *op. cit.*, p.26.

international community had envisaged a binary internationalization: territorial and functional. The territory would have been put under international surveillance with an international status, and the local institutions would have to adopt a constitution, which would have been within the limits of the above mentioned statute; as such, it would be considered as a material constitution that would have limited the exercise of constituent power by the people of Trieste.<sup>672</sup>

#### - **The Case of Cyprus in 1960**

The Constitution of Cyprus was elaborated under the supervision of the United Kingdom, Greece and Turkey and the representatives of the two principle communities, Greek and Turkish. The Constitution was an element of a treaty between all the interested parties, under the direction of the United Kingdom, which had sovereignty over the island at that time.

The agreement of Zurich of 11/2/1959, completed by the Lancaster House Agreement of 19/2/1959, included a document regulating the basic structures of the Republic of Cyprus; it included the principles that would have served as a reference for when a constitution was adopted. A subsequent treaty between the Republic of Cyprus, the United Kingdom, Greece and Turkey was agreed, in which every party was committed to respect the treaty, and the independence of Cyprus and its Constitution.

According to D.G. LAVROFF, "*L'Etat cypriote n'a pas pu choisir sa Constitution qui a été définie par un traité international*".<sup>673</sup> In fact, the Lancaster House Treaty imposed 27 principles, including the Constitution of Cyprus,<sup>674</sup> whose intention was to organize the sharing of power between the two communities, on a constitutional basis. The agreements were adopted by the Parliaments of the United Kingdom, Greece and Turkey, without associating the representatives of the two

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<sup>672</sup> MAZIAU N., *op. cit.*, p.26.

<sup>673</sup> LAVROFF D.G., *Le statut de Chypre*, in: *RGDIP*, 1961, no 3, p.527-545; cited in: MAZIAU N., *op. cit.*, p.28.

<sup>674</sup> As confirmed in principle 27: All the above Points shall be considered to be basic articles of the Constitution of Cyprus.

communities, although it is stated in the preamble of the agreement that it was accepted by them.

Les représentants des communautés ne pouvaient qu'accepter ou refuser en bloc le projet de règlement sans avoir la possibilité de présenter des amendements. La procédure suivie constitue incontestablement une anomalie au droit international.<sup>675</sup>

According to that agreement, the State was limited by the clauses sanctioned the revision of the Constitution. In fact, the agreements distinguished between ordinary dispositions and fundamental articles. The ordinary clauses could be amended by a two-thirds majority of the members of a Greek and Turkish assembly, while the fundamental articles could not be amended.

The exclusive source of the Constitution of Cyprus was in an international deed. It was not elaborated by a constituent assembly but in the forum of international negotiations in which the representatives of the two communities were formally associated. The United Kingdom signed the Constitution on 6/4/1960, and it was adopted on the day of independence, 1/10/1960.

#### - **The Case of Bosnia-Herzegovina in 1995**

This is an example of total internationalization of the original constituent power, with the preservation of the fiction that is the implication of constituent that is the people. In fact, following the 1995 war, Bosnia-Herzegovina was put under custody of the international community. The constitution was part of the Agreements of Dayton (annex 4 of the General Framework Agreement) that were signed in Paris, on 14 December 1995. In order to elaborate the new constitution, the international community substituted the sovereign peoples. The origins and power of the constitution, therefore, have a direct source in international law. The Dayton negotiations which were held between the parties were in conflict with the direct implication of the powers which participated in the resolution of that conflict; nevertheless, it was

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<sup>675</sup> LAVROFF D.G., *op. cit.*, p.28.

the foreign powers that decided the modalities of that international treaty.

The treaty stressed the legal continuity of Bosnia-Herzegovina (Art.I.1), and that the new constitution should revise and replace the previous one (Art. XII.1). Signing the treaty of Dayton meant the end of a preceding constitution and a kind of legal revolution. Despite the fact that the constitution itself declares that it amends and supersedes the Constitution of the Republic of Bosnia and Herzegovina<sup>676</sup>, the way the constitution was adopted, as rightly shown by Sienho YEE, a member of the New York Bar, is not the normal amendment procedures provided by the old constitution. Accordingly all the old institutions are gone and new ones (political and legal) operate under the authority of the new constitution. The same author presents the two possible justifications of such an abandonment of the old constitution: i) the revolutionary theory (the people can always change their government in order to meet the needs of the nation) and ii) the theory of necessity (where the niceties of normal procedures may be sacrificed. For him, each in itself is sufficient to legitimize it.<sup>677</sup>

The constitution of the Dayton treaty set the basis for a new regime, and the new constitution provided new mechanisms for its amendment and the provision that it would be established by the constituent peoples: a notion that would assist the grant of legitimacy, which in reality, was in opposition to that imposed by the treaty. In fact, it was an international 'constituency' which imposed the constitution, in rare consultations with local representatives. Some may justify this clear 'undemocratic origin' of the new constitution simply recalling a kind of *de facto* blessing of the people that would probably sanitise it. For them, this blessing is expressed by the '*gratuitous*' approval of the new constitution by the legislatures of the Federation of Bosnia and Herzegovina and *Republika Srpska*.<sup>678</sup>

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<sup>676</sup> Art.XII (1).

<sup>677</sup> YEE S., *The New Constitution of Bosnia and Herzegovina*, pp.176-192. The article is also consultable on line: <http://www.ejil.org/journal/Vol7/No2/art3.pdf>

<sup>678</sup> Idem.

According to Paola Gaeta, professor at the European University Institute in Florence, the constitution that was adopted was partly-internal and partly-international:

It is beyond dispute that the constitutional law-making process was unmistakably anomalous. For in this case the constitutional Charter of an existing State was drafted and agreed upon in an international forum and subsequently entered into force by virtue of international transactions:(...) the Constitution was negotiated at international level by the Republic of Bosnia and Herzegovina with on one side, two insurrectional groups, and on the other, a group of foreign States.

The Constitution is not the outcome of an internal constitution-making process. Nor has it been the upshot of a totally external process either, as it is often the case with those States that have forfeited their sovereign rights following *de bellatio*, as well as with many colonial countries acceding to independence.

The new Constitution originates from a law-making process in which the authorities of the Republic of Bosnia and Herzegovina did participate. Nor can the hammering out of the Constitution at issue be equated with the conclusion of an international treaty setting out the Constitution of a federal State.<sup>679</sup>

In fact, as outlined by the same author, there are two political factors behind the Dayton Agreement:<sup>680</sup>

[O]n the one side, the will of all the parties concerned to put an end to bloodshed and devastation and, on the other side, the keen desire of the United States Government to exercise its political leadership in a serious European crisis thus achieving a resounding diplomatic success.<sup>681</sup>

The reasons behind this ‘anomaly’ -GAETA concludes- are the political factors and practical difficulties that have found their reflection at the

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<sup>679</sup> GAETA P., *The Dayton Agreements and International law*, in: *European Journal of International Law*, pp.147-163 (section V).

<sup>680</sup> The Symposium title was ‘The Dayton Agreements: A Breakthrough for Peace and Justice?’ The papers were published in the *EJIL* vol. 7 (1996), n.2.

<sup>681</sup> GAETA P., *op. cit.*.

legal level.<sup>682</sup> The international involvement to strengthen the agreements concluded at Dayton, can be justified by the engrained hatred among the conflicting parties, as well as the inherent difficulties of a lasting political settlement.<sup>683</sup> Nevertheless, the success of such agreements depends on the will of the interested populations that may turn those legal potentialities into reality.<sup>684</sup>

#### - **The Case of Kosovo in 2001**

In mid 1998, In mid-October 1998, NATO threatened to attack Yugoslavia unless it withdrew its police and security forces from the Serbian province of Kosovo, the population of which is more than 90 percent ethnic Albanian. By then, Kosovo was legally a province of the Republic of Serbia within the Federal Republic of Yugoslavia (FRY). The Constitution of the Socialist Republic of Serbia of 1974 specified that the Socialist Autonomous Province of Kosovo was a 'constituent part' of the republic (Art. 1), and the Constitution of Kosovo of 1974 similarly stated that the province was a "*constituent part of the Socialist Republic of Serbia and the Socialist Federal Republic of Yugoslavia*" (Art. 1). Finally, the Yugoslav federal Constitution of 1974 also characterized Kosovo as a 'constituent part' of Serbia (Arts. 1 and 2). Slobodan Milosevic's regime eliminated Kosovo's autonomy through amendments to the Serbian Constitution in 1989, which were then consolidated into the Constitution of the Republic of Serbia of 1990.<sup>685</sup>

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<sup>682</sup> For detailed analyses (i) on the role of the NATO (especially in military related issues): FIGÀ-TALAMANCA N., *The Role of the NATO in the Peace Agreement for Bosnia and Herzegovina*, in: *EJIL*, vol. 7 (1996) No. 2, pp.164-175; and (ii) on the delicate question of repatriation: ANDERSON E., *Promoting Safe and Peaceful Repatriation under the Dayton Agreements*, in: *EJIL*, vol. 7 (1996) No. 2, pp.193-206.

<sup>683</sup> GAETA P., *op. cit.*

<sup>684</sup> *Idem.* mainly see the Conclusion.

<sup>685</sup> For complete analyses: Hayden R.M., *American proposals for the constitutional and political status of Kosovo, the State as a legal fiction*, in: *East European Constitutional Review*, Fall 1998, n°4, pp.83-92. The article is consultable online: <http://www3.law.nyu.edu/eecr/vol7num4/index.html>

Passive resistance of the Kosovo Albanians emerged between 1989 and 1997. In February 1998, the army of the liberation of Kosovo declared the beginning of the struggle for the independence.<sup>686</sup> Political repression by the government of Belgrade, forced the international community to intervene through NATO. The war declared by NATO which ended by adopting the Peace Plan presented by UNSC Resolution 1244, put an end to the Kosovo crisis. In agreement with the Federal Republic of Yugoslavia, Resolution 1244 decided on an international military and civil presence. The Secretary General was that entitled to enforce military power in order to establish a transitional administration which would guarantee substantial autonomy for the province of Kosovo, those entitled to sovereignty in that territory, within the Yugoslav federation. Resolution 1244 also provided that, in the attempt to adopt a definitive statute for the province, it should take the Rambouillet Agreement of 27/5/1999 in to consideration. The latter agreement, largely inspired by a peace plan presented by the USA, was not enacted as it was found to be unacceptable by Belgrade; nevertheless, it constituted a reference in the search of a definitive solution for Kosovo, and would influence the Special Representative of the Secretary General (SRSG) in the endeavour to elaborate the constitutional framework for an autonomous Kosovo.

The new Constitution of Kosovo was presented in the form of a Regulation promulgated by the SRSG on 15/5/2001, which was based on UNSC resolution 1244; according to that Regulation, a decentralized autonomy would be established, with large portions of power allocated to lower levels, whilst some competences would be retained by the SRSG. It was hoped that this transitional administration would prepare the province towards complete sovereignty. The status of that country at the time was that sovereignty had been transferred to an international body, with the presumed consent of the Republic of Yugoslavia.

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<sup>686</sup> MAZIAU N., *op. cit.*, p.30.

The Regulation imposed some principles that were binding on the lesser authorities in order to promote the state of law, the respect of HR, the rights of the communities and their members, and the separation of powers. Moreover, the Regulation was made by the SRSG on behalf of the people of Kosovo; it was transitional and a higher law than the others. Nevertheless, the SRSG could use his discretion in revising the Constitution at any given moment. Accordingly, it may be argued that the transitional, constitutional act is not a true constitution; in fact, it is not hierarchically the highest norm of Kosovo.

In an attempt to take control of international relations, public security and judiciary-related issues, the Kosovo parliament discussed proposals to amend the province's Constitution, in July 2004. Furthermore, they would have enabled local authorities to hold a referendum on independence from Serbia. According to the UN Mission in Kosovo (UNMIK), the parliament was not competent to make changes to the constitutional framework, since only the UNSC had the authority to do so (based on Resolution 1244 of 1999). Accordingly, the UN administrators rejected those proposals.<sup>687</sup>

#### **14.2. Constituent power and the Dilemma of Legitimacy**

For the Palestinians, the Constitution must reflect their history, identity, and struggle to gain liberation-independence; this inclusion is necessary to give the document the legitimacy it needs. In fact, it is the people who justify the state; popular sovereignty justifies the constitution and gives it the required legitimacy. The Constitution in this sense, intends to consolidate principles of self-rule and shared rule, between central authority and local authorities, in such a way that it will secure a direct relationship between state authority and the citizens' needs, and the good use and fair sharing of state resources and experiences between central authority and local level.

It is clear that this legitimacy remains theoretical lest the state institutions and citizens do not consider and follow the provisions of the Constitution, in other words, if the Constitution is not effectively

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<sup>687</sup> See <http://www.euractiv.com/Article?tcaturi=tcm:29-128620-16&type=News>

applied. Furthermore, the Constitution requires international legitimacy or recognition; for this reason, modern constitutions provide long lists of individual and community liberties and freedoms. In other terms, modern constitutions have to take seriously the diversities within a society, accepting them and encouraging them, provided that they are not detrimental to the unity of the state.

#### **14.2.1. Adopting a Written Constitution for Palestine**

##### **14.2.1.1. Opting for a Written and Rigid Constitution**

Modern society is characterized by the occurrence of many new constitutions and of certain similarities and differences between them. From the juridical point of view, modern constitutions surpass classical democratic traditions of constitutionalism and its techniques although the constitution remains as the fundamental law; they contain juridical norms which seek to offer legal guarantees and judicial protection. In the political sense, modern constitutions institutionalize power and political relations, establish rules that are binding on everyone, and ensure institutional continuity. They are deemed the highest law of the country and aspire to set –though not always achieved - the principles of the RL (contrary to political opportunism).

The written form and the innovation in the structure of the constitution itself, characterize modern constitution. Modern constitutions are longer than those written in the nineteenth century; they not only express the organization of power, but also the political and social philosophy of a given society. Besides, there is no unity between theory, ideology of the normative, and the real in modern society and constitutions.

The relation between the ‘visible’ and the ‘invisible constitution’ raises not only the question of its value and its influence, but also the question of unavoidable changes and correction of theoretical and ideological principles. The modern constitution contains many innovations such as the introduction of economic regulations (property and planning structures), the expansion of the classical scale of human freedoms and rights (socio-economical and cultural), the protection of its constitutionalism and legality, and the revision of procedure for

changes to the constitution (more concise and simpler).<sup>688</sup> Generally, a constitution contains three types of clauses: (i) those governing the machinery of government; (ii) those controlling the assignment of rights; and (iii) procedures for amending the constitution itself.<sup>689</sup>

Most modern states have a written constitution, and almost all of them adopt the system of rigid constitution.<sup>690</sup>

A formal constitution has become a requisite condition – a democratic credential– for new nations and new regimes that seek recognition by international political, financial, aid and trade organizations. Hoping to benefit from the advantages of the West, many states adopt the notions of popular sovereignty, citizenship and rights, influenced by American liberal constitutional thought. American scholars and consultants tend to dominate the “constitution advice business” and to promote the liberal constitutional ideal around the world.<sup>691</sup>

The diffusion of written and rigid constitutions has different sources: *first*, the American source: colonies could adapt charters that did not contradict British statutes and customs; *second*, the philosophical and French source: it was necessary to initiate a new order, considering the constitution as the initial act of the national sovereignty and the renewal of the social contract, in order to distinguish between ordinary and constitutional laws; *third*, the federal source: in order to organize relations between the federal state and federated states and to protect the pact from arbitrary changes in the future, without unanimous approval of all those concerned, and following precise procedures.<sup>692</sup>

#### **14.2.1.2. The Way Modern Constitutions are adopted**

There are different forms of exercising framing power: *first*, the non-democratic or authoritarian way, which excludes the people’s

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<sup>688</sup> DJORDJEVIC J., *The Modern Constitution*, pp.25-28.

<sup>689</sup> ELSTER J., *Op. cit.*, p.58.

<sup>690</sup> JOSEPH-BARTHÉLEMY, DUEZ P., *Traité de Droit Constitutionnel*, p.188.

<sup>691</sup> LERNER H., *Op. cit.*, p.8.

<sup>692</sup> JOSEPH-BARTHÉLEMY, DUEZ P., *op. cit.*, pp.188-191.

participation; and, *second*, the democratic way. The first can be openly authoritarian: the charters granted by (a) Louis XVIII in 1814, and (b) by Nicolas II to Russia in 1905, or veiled such as when the people apparently participate in ratifying a constitution that has been prepared by a non-elected group of people appointed by the executive, that continues to exercise political pressure on that designated committee. Democratic ways are those which confer the election of the constituent assembly upon the population, and may request their ratification.<sup>693</sup> The distinctive point here is the existence or absence of a *consensus* by the people who will be governed by that same Constitution.

Others proposed different types of constitutions, which were the results of a transaction or compromise between strong political forces, as for example, the 1830 charter negotiated by M. Thiers (who represented Parliament) and Louis Philippe, or the Belgian Constitution of 1831 that was a *modus vivendi* between republicans and monarchists.<sup>694</sup>

People exercise this sovereignty through representatives, a special assembly or referenda.<sup>695</sup> The constituent assembly can then be specific, created *ad hoc*, or generic, with constituent and legislative powers.<sup>696</sup> In certain circumstances, the executive claims or makes it possible to recognize it as having the right to draw up a constitution, in order to solicit different opinions, but mostly to submit it to the people for ratification, through referenda or plebiscites.<sup>697</sup> In the case of a hypothetical democracy, the framing power is effectively in the hands of the autocracy, which can be one person, or a group of people.

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<sup>693</sup> PACTET P., *Institutions politiques Droit Constitutionnel*, p.70

<sup>694</sup> HAURIAOU A., GICQUEL J., *Droit Constitutionnel et Institutions Politiques*, pp.334-335.

<sup>695</sup> SHIBA I., *op. cit.*, p.107

<sup>696</sup> HAURIAOU A., GICQUEL J., *op. cit.*, pp.335-337.

<sup>697</sup> In the case of a Plebiscite, the text submitted is only a formality. The main point here is that people manifest confidence in and allegiance to the person who represents them, and not to confirm the constitution itself. HAURIAOU A., GICQUEL J., *op. cit.*, p.337.

The constituent assembly usually has full dominance of internal procedures in order to elaborate the constitution.<sup>698</sup> By definition, the constituency is not linked to precedent laws, but rather has enough margins of liberty which justifies using the term 'originaire'<sup>699</sup> to qualify it:

*Du passé faisons table rase, chant l'Internationale. Il en va de même mutatis mutandis, quand, pour une raison quelconque, une constitution est élaborée. Le pouvoir des constituants, en d'autres termes est inconditionné. Il se situe dans une perspective de rupture par rapport à l'ordre juridique déchu. Il est sensé, en bref, se déployer sur un terrain vierge.*<sup>700</sup>

Some may argue that the constituent assembly may be limited by its electoral law,<sup>701</sup> but others may protest confirming that the electoral law is the expression of constituted powers, or the provisional executive itself; as such, these organs cannot limit the origin of their own authority. At the same time, it is true that in exceptional circumstances, the constituent assembly may limit itself, under political duress.<sup>702</sup>

Now, there is no universal modality in adopting a constitution.<sup>703</sup> It depends mostly on the economic, social and political development of the country in question on one hand, and the governing regime and the strength of the relationship between classes and categories, on the other.<sup>704</sup> Nevertheless, a number of decisions have to be made in the convocation and constitution of the constituent assembly: there shall be a call to create the assembly; a procedure for selecting and/or electing delegates must be adopted; the mandate of the assembly and of the delegates must be defined in terms of constraints on what needs to be included, and what cannot be included, in the final document; once the

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<sup>698</sup> PACTET P., *op. cit.*, p.70

<sup>699</sup> HAURIAOU A., GICQUEL J., *op. cit.*, p.332.

<sup>700</sup> *Ibidem.*

<sup>701</sup> *Idem*, pp.335-337.

<sup>702</sup> *Idem*, p.334.

<sup>703</sup> CETERCHI I., MURARU I., *Le Pouvoir Constituant*, p.80.

<sup>704</sup> *Idem*, p.81.

delegates have convened, their credentials have to be verified so that the assembly can be formally constituted; an internal decision-making procedure for the assembly, must be specified; a mode of ratifying the constitution must be specified.<sup>705</sup>

When considering the authority that invokes, defines, and limits the constituency, a paradox arises. On one hand, it seems to be a general principle that: if *X* brings *Y* into being; then *X*'s authority is superior to that of *Y*. On the other hand, if *Y* is brought into being to regulate, among other things, the activities of *X*; then *Y* would seem to be superior.<sup>706</sup>

In modern terms, constitution means the active making of a new order, as opposed to its gradual emergence in the course of a continual historical development. Constitution making involves the idea of an authority and a creator whose willpower is the ultimate cause of the polity.<sup>707</sup>

The will of the constituent power aims at transforming itself into an objective and enduring incarnation: a constitution, but it cannot simultaneously submit itself to its own creation without losing its character as the supreme secular power.<sup>708</sup> The experience of the last two hundreds years has proved that the leading forces of the revolution endeavour to congeal the achievements of the revolution, particularly the new distribution of political power, in a constitution - a legal document which bears the unequivocal authority of a written text superior to all other laws of the land. However important the character of the constitution as a written text may be... its lasting authority depends on the persistence of its authority of its creator.<sup>709</sup> By making a constitution, the revolutionary forces are digging their own graves; the

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<sup>705</sup> ELSTER J., *Op. cit.*, p.66.

<sup>706</sup> *Idem*, p.66.

<sup>707</sup> PREUSS U.K., *Op. cit.*, p.143.

<sup>708</sup> *Idem*, p.144.

<sup>709</sup> *Ibidem*.

constitution is the final act of the revolution.<sup>710</sup> Constitution-making is an act of self-liquidation of the revolution.<sup>711</sup>

#### **14.2.1.3. The Way the Palestinian Constitution will be Adopted**

The way the constitution will be adopted in the Palestinian context, is of extreme importance.<sup>712</sup> According to Article 185 of the Third Draft of the Palestinian Constitution, there are different steps necessary to take, before adopting the Constitution: the PNC (or the CC if the PNC were unable to convene) would approve the Draft Constitution, before the establishment of the State; the approval of that Draft by a two-thirds majority in the first elected House of Representatives, after the creation of the State; In the case where the absolute majority decided to submit the Constitution to a referendum, the constitution will be adopted if it obtains the simple majority of votes. Nathan BROWN commented:

There 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.<sup>713</sup>

According to Article 186 of the third Draft of the Palestinian Constitution, there are no substantial limits to the amending power but only formal and procedural limits, such as: the legitimate persons who may propose an amendment are the President, the PM, or one-third of the House of Representatives (HoR); two-thirds of the HoR shall

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<sup>710</sup> *Idem*, 145.

<sup>711</sup> *Ibidem*.

<sup>712</sup> Normally, it is the constituent assembly that decides on its internal procedures but also it decides on the way the constitution will be adopted (Iraqi case can be cited as an example). In the Palestinian context, there was no constituent assembly but a nominated committee that decided, within many other things, the way the constitution will be adopted, and it did that through the same draft constitution. This presents a clear contradiction: the draft constitution contains the procedures of its own adoption; accordingly, its provisions are considered binding before being adopted! Where can we trace the origin of its superiority and obligatoriness, before being in act? The draft constitution contains the germs of its superiority to other laws before being in force.

<sup>713</sup> Comments to the Third Draft that Nathan Brown made, can be consulted on his page: [www.geocities.com/nathanbrown1/](http://www.geocities.com/nathanbrown1/)

approve the request for amendment; the HoR shall discuss the request within 60 days of approval; the approval of two-thirds of the HoR (it is not clear whether the endorsement of the President, and publication in the official Gazette, would be necessary); in the event that an absolute majority of HoR accepts the submission of the Draft to a Referendum, a simple majority of participants is necessary.

It is curious to notice that the Draft mentions the possibility of amending an article or some articles, but do not consider the hypothesis of totally changing the Constitution or of creating a ‘constituent assembly’, once the situation is stabilized. In other words, the Draft is not considered to be a temporary Constitution, but permanent and excluding the possibility of change to all or part of it.

This was not the case for example, in a divided Germany, after the Second World War, when the Federal Republic of Germany adopted a BL on 23/5/1949. That Constitution was intended to be a temporary “constitution” (for this reason it was called BL, in order to distinguish it from *the* Constitution) until the unification of Germany and of the German people. Once the unification became effective on 3/10/1990 (through the accession of the German Democratic Republic to the Federal Republic of Germany) the BL became applicable to all German people, without adopting new Constitution. Article 146 provides that “*The Basic Law, which, since the achievement of the unity and freedom of Germany, applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect*”.

#### **14.2.2. The Constitution and Islam**

The principles of Islamic *shari’a*, we read in the approved BL and DPC, are a primary source for legislation in Palestine, wherein Islam shall be the official religion, and for that reason, *shari’a* principles should be considered as one of the foundations of the state-in-waiting, or at least, the most important one. In the BL we read similar provisions. Why did constitutionalists introduce these clauses? Why in these words? Where is the originality here? What does this mean?

Islam is considered the State religion (*al-islam din al-dawla*), in most of the Constitutions of the Arab States (Egypt Art.2, Jordan Art.2, Tunisia Art.1). In the Constitution of Syria it is mentioned only that “the religion of the President of the Republic shall be Islam” (Art.3 §1), whilst the Constitution of Lebanon, because of the unique relations between the communities, makes no reference to Islam.

The reference to a religion of state is not particular to the Arab or Muslim world; until very recently, some western democracies declared Christianity or Catholicism as the official religion of the state, without necessarily infringing the sensibilities and rights of others.<sup>714</sup> On the other hand, Arab States have shown different ways in assimilating Islamic principles, depending on their particular geographical, historical, and political context. Besides Arab States, including Saudi Arabia and Oman who actually pretend that they exercise exclusively administrative governmental activities, *do* have the power to legislate.<sup>715</sup> Nevertheless, it is obvious that the degree of ‘*Islamisation*’ changes considerably from one state to another.<sup>716</sup>

There is no mention of Islam as the “religion of Palestine” in the PNCh (1968), nor in the Declaration of Independence (1988). This was also the case in earlier drafts of the BL. It was the 7<sup>th</sup> Draft BL that stated for the first time that Islam is the official religion of State.<sup>717</sup> As previously mentioned, the BL included this Article, which was approved by the PLC, but not promulgated or ratified by President *Arafat* until 2002, as we already mentioned. In Art.5 §A of the 7<sup>th</sup> Draft Basic Law (DBL), in fact, we read: “Islam is the official religion of Palestine...”

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<sup>714</sup> For the confessional states in Europe in the beginning of the 20th century, see CARDIA C., *Manuale di Diritto Ecclesiastico*, II° ed., Il Mulino, Bologna, 1996, p.139-141.

<sup>715</sup> CASTRO F., *op. cit.*, p.14.

<sup>716</sup> *Islam (L') Religion de l'Etat*, p.1.

<sup>717</sup> Drafted by the Legal Committee of the PLC, 9 July 1996. It was published and commented on by the European Commission for Democracy through Law.

Similarly, in the BL article 4.1 and the in the (first) DPC article 6, not only the Palestinian constitutionalists added the concept of *Muslim nation*, which most Arab Constitutions had avoided because of its ambiguities; in fact we read the Palestinian State is “*part of the Muslim nation*”. In the last few decades we have noticed a growing tendency of conversion to *shari’a*, in Muslim and Arab legal systems. Nevertheless, *shari’a* is imposed legally by the State and not by doctrinal models.<sup>718</sup>

We may refer here to the Islamic Council of Europe, which in 1983, proposed a model for an Islamic Constitution in which the substance of *Islam* “*Religion of State, din al-dawla*” was clearly reflected in most of its articles, although not explicitly.<sup>719</sup> In fact we read: Art. 1.a. “*All power is for God only... sovereignty belong only to His Divine law*”; Art.1.b.: “*Divine law... is the source of legislation and the rule of power*”; Art.1.c.: “*Authority is a sacred deposit: people shall exercise it in accordance with the dispositions of Divine law*”.<sup>720</sup>

In 7<sup>TH</sup> DBL (Art.5.b. of 1996), we read: “*Principles of the Islamic shari’a are the main source of legislation in Palestine*”. It is interesting to read the comments that European experts made about that provision:

It is questionable, or even dangerous, to set out explicitly that the principles of Islamic *shari’a* are the main source of legislation in Palestine. The terms used here are also ambiguous. Do they mean that the principles of *shari’a* are as such, the basis of the law in Palestine or do they simply mean that these principles should inspire the Palestinian legislators? In case the first option is true, then how can we determine exactly those principles, and what is their precise significance? In fact, *shari’a* is both theological and jurisprudential, consequently, to determine those principles would be difficult and uncertain.

Moreover, it would be incumbent upon the High Constitutional Court to examine whether a law challenged before it, is in conformity with the principles of *shari’a* or not. However, the Court competent in interpreting

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<sup>718</sup> CASTRO F., *op. cit.*, p.14.

<sup>719</sup> *Islam (L’) Religion de l’Etat*, pp.9-41.

<sup>720</sup> English version is mine; see the Arabic and French version in: *Idem*, p.13

constitutional texts, would probably be unable to interpret constitutional ones, which appear to have a “supra-constitutional” value.<sup>721</sup>

The Palestinian constitutionalists, seriously worried about the real implications of such constitutional provisions, took into consideration all these issues. In fact, as provided in BL Art.4.2 and DPC Art.7: “*The principles of Islamic shari’a are a primary (or major) source for legislation*”.

Instead of article 5.b, of the 7<sup>th</sup> DBL: “*Principles of the Islamic shari’a are the main source of legislation*”. I believe that those formal changes were made in order to remove the ambiguities and to answer to the misconceptions expressed by western academics and organizations who had analyzed these constitutional documents. Nevertheless, the substance of the problem stays unresolved: what is the superior law of the land, the constitution, or *shari’a*? In other words, in the case of a contradiction, what should prevail, the constitutional provisions or *shari’a*? Let us take the example of women rights and duties. The 1<sup>st</sup> DPC (Art. 63) stated that “*Women are the full sisters of men. They have rights and duties as guaranteed by the shari`a and established in law*”.

Now, in case of a conflict between *shari’a* and Constitution, according to the DPC, the principles of *shari’a* would have priority.<sup>722</sup> This confirms that there is an internal conflict in the DPC that, once adopted, must be resolved. Nevertheless, we may need to wait the birth of a Palestinian State, the promulgation of the Constitution, the institution of a Constitutional Court - and their jurisprudential activities - to discover how the relationship - or conflict - between the principles of *shari’a* the Constitution, will be resolved. The case of Egypt can be cited as an example of such conflict.<sup>723</sup>

In previous study, we have commented those articles as follows:

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<sup>721</sup> See comments made by Political Affairs Committee (Doc.7636), and approved by the Committee on Legal Affaires and HR on 23 September, of the Council of Europe, on the basis of observations by C. Economides (Greece), J. Helgesen (Norway), and JU. Robert (France).

<sup>722</sup> This article was changed in the 2<sup>nd</sup> and 3<sup>rd</sup> DPC.

<sup>723</sup> DUBRET B., *A propos de la Constitutionnalité de la Shari’a*, pp.91-98.

I believe that these formal changes (*Principles of Shari'a are the or a main source of legislation*) were made as an attempt to take off ambiguities and embarrassments that Western academics and organizations may express when they try to study the DPC, while the substance of the problem is unresolved: for example, in reference to women rights, DPC, art. 63 states that “Women rights are those guaranteed by the *shari'a*”. In case of a conflict between *Shari'a* and the Constitution, according to the DPC, the principles of *shari'a* have the priority. This confirms that there is an internal conflict in the same DPC that must be resolved once adopted. On the other hand, we need to wait the birth of a Palestinian state, the promulgation of the Constitution, the birth of the Constitutional Court, and their jurisprudential activities to discover how the relationship -or conflict- between *Shari'a principles* and constitutional principles, will be resolved. The case of Egypt can be an example.<sup>724</sup>

In the 2<sup>nd</sup> DPC, we read:

Art. 19: Citizens are equal in general rights and duties before the law, without discrimination on the basis of sex, ethnicity, religion, color, political views or any other reason.

Art. 22: Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties, and duties as men. The term Palestinian or citizen refers to females and males.

Art. 23: Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The law shall strive to abolish restraints that prevent women from contributing to the building of family and society. The Constitutional and *shari'a* rights of women shall be safeguarded; and any violation of those rights shall be punishable by law. The law shall also protect their legal inheritance.

While in the 3<sup>rd</sup> DPC we read:

Art. 19: All Palestinians are equal before the law, and enjoy same civil and political rights and have the same duties without discrimination. The term Palestinian or citizen refers to females and males.

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<sup>724</sup> This was part of our dissertation for Licenza in *Utroque Iure: The Palestinian Constitutional System*, 2002 (non published document), subchapter §16.

Art. 22: Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties, and duties as men.

Art. 23: Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The law shall strive to abolish restraints that prevent women from contributing to the building of family and society. The Constitutional and Shari'a rights of women shall be safeguarded; and any violation of those rights shall be punishable by law. The law shall also protect their legal inheritance.

Those can be considered as positive changes but not enough to take of the ambiguity in relation to the superiority of constitutional provisions over the *shari'a* in case of conflict regarding women rights or duties.

#### **14.2.3. Freedom of belief or Freedom to Practice Religion?**

In article 7 of the first DPC there is an innovation: after confirming that the principles of Islamic *shari'a* will be a primary source of legislation, the Constitution admits that “*the legislative power shall determine personal status law under the authority of monotheistic religions, according to their denominations*”.

The 3<sup>rd</sup> DPC made some changes to that text:

Civil and religious matters of the followers of monotheistic religions shall be organized in accordance with their religious teachings and denominations within the framework of law, while preserving the unity and independence of the Palestinian people.

In fact, the DPC's intention was to guarantee monotheistic religions their authority and jurisdiction in relation to personal status law, already established by the *Status Quo* since the Ottomans. Nevertheless, nothing remains as before, in fact, the source of monotheistic authority and jurisdiction is no longer any of the previous powers that dominated Palestine, but rather that of the Palestinian legislators.

The fact that Islam is proclaimed as the official religion in Palestine does not raise problems as such.<sup>725</sup> The only question that arises is

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<sup>725</sup> As was confirmed by the Political Affairs Committee (Doc.7636), referred to in above note.

whether, under such constitutional provisions, individuals would enjoy freedom of conscience and religion.<sup>726</sup>

Indeed, if one reads Art. 5 of the 7<sup>th</sup> DBL in the light of Art.22 of the same draft:

Freedom of belief and performance of religious rituals are guaranteed, in accordance with observed customs in Palestine, as long as that does not violate public order and public morals.

The same two articles are repeated in the BL (Art. 4 and 18). In the DPC, on the contrary, there is an important change, since we read immediately after stating that Islam shall be the official religion: “*The monotheistic religions shall be respected*”. In addition, in the DPC the *freedom of belief* is no longer mentioned but simply: “*freedom to practice religion*” (Art.44). Freedom of belief is essential for the realization of a democratic society that Palestinians intend to construct. For the question why Palestinian constitutionalists took a step backwards, some may answer it was due to the influence of the principles of *shari’a* in the Arab world in general, owing to the actual conflict and the influence of Islamic movements on Palestinian society, in particular.

In fact, some Arab countries mentioned that the Constitution guarantees the ‘freedom of belief’. This is the case for Egypt (Art.46) for example. In the Arab world this constitutional provision has a stricter content, similar to that in most of the western democracies. Practically, ‘freedom of belief’ means ‘freedom to practice religion’, exactly as it is proclaimed in the DPC. Consequently, we may consider the DPC as more logical since it tries to reflect a material constitution in the constitutional text. How can this be accepted? We believe that democracy and other concepts shall be understood, not in their western connotations, but in their concrete understanding, acceptance and application in Arab and Muslim societies.

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<sup>726</sup> In that sense, see analysis made by *Law Institute, ALHAQ - BIRZEIT UNIVERSITY LAW CENTER, Human Rights in the Proposed Palestinian Basic Law*, p.30, in relation to HR standards.

Nevertheless, we believe that freedom of conscience and religion has a particular importance in Palestine, for the existence of the Holy Places of the monotheistic religions.<sup>727</sup> This fact was totally ignored by the Palestinian constitutionalists in writing the BL and the DPC which of course, needs to be reconsidered.

The PNCh, already since 1968, confirmed in Article 16 that the war against Israel is not a religious one, but a political one:

The liberation of Palestine, from a spiritual point of view, will provide the Holy Land with an atmosphere of safety and tranquillity, which in turn will safeguard the country's religious sanctuaries and guarantee freedom of worship and of visit to all, without discrimination of race, colour, language, or religion. Accordingly, the people of Palestine look to all spiritual forces in the world, for support.

In the Declaration of Independence we also read:

Governance will be based on principles of social justice, equality and non-discrimination in public rights of men or women, on grounds of race, religion, colour or sex, and the aegis of a constitution which ensures the rule of law and an independent judiciary.

In the first DPC, in fact, all these principles were expressed in many articles: “*The Constitution guarantees the freedom to practice religion and to arrive at the place of worship*” (Art.44); “*Public order and defamation of monotheistic religions are the only limitations for that freedom*” (Art.44); “*These are the same two limits for freedom of public and private education*” (Art.58, 59).

We have to refer to the question of religious minorities in Palestine. Before that we have to outline that Christians, although numerically reduced, are part of Palestinian society, and together with Muslim Palestinians, participate in the process of nation and state building. The fact that Islam is the religion of Palestine does not necessarily contradict the rights and freedom of religion. We can say it differently:

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<sup>727</sup> As confirmed in both agreements that the Holy See has stipulated Basic Agreements with Israel (1993, and 1997) and with the PLO (in 2000).

not stating that Islam is religion of state does not mean necessarily that freedom of religion will be secured.

In fact, the constitutional article that refers to Islam as the religion of state provides that: respect and sanctity of all other monotheistic religions shall be maintained. Besides, the constitution provides that freedom of belief and the performance of religious rituals are guaranteed and that the religious authorities will continue to rule personal status in respect of jurisdiction of religious tribunals and *status quo*. Equality between Palestinians intends to be substantial and not only formal, factual and not only theoretical.

*For example, eight seats of the 1996 PLC were dedicated to religious or nationalistic minorities in order to secure the non-exclusion of minorities members from political and social life.<sup>728</sup> In the second PLC elections, six seats were reserved for Christians.*

Let us take for example, the Palestinian Christians who shall not be considered as foreigners in Palestine or a 'third' part in the actual Israeli-Palestinian conflict as if Palestinians mean only Muslims. Palestinian Christians are one hundred per cent Palestinians; they suffer the same as other Palestinians from the Israeli occupation, the destruction of homes, the siege of cities and the limitation of liberties; they suffer imprisonment and poverty. Accordingly, they participate in the struggle for the liberation of their land, and for freedom, and for the establishment of their own state on their land.

They do so not in contradiction to their religious beliefs, but rather, based on their national and religious feelings of belonging. This does not mean that we need to convert the conflict into a religious one; it is not. The conflict remains a political one, a conflict for the land, and for freedom. Nevertheless, Palestinian Christians and Muslims do not (and should not have to) live their beliefs remote from the time and the place; their belief is converted in social participation, based on their solid political and moral commitments.

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<sup>728</sup> In the first PLC elections, six seats were dedicated for Christians, one for Samaritans, and one for Charkas; in the second PLC elections, only Christians had a quota of six seats.

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Communities' relationships in Palestine were characterized sometimes by reciprocal misunderstandings that may be the result of some ignorance and a lot of prejudices. This can be explained by a *history*, characterized by communitarianism (the system of *milla*) and a *present*, characterized by the increase of religious fundamentalism, in response to the weakness of secular powers and their legitimacy, and a *future*, full of obscurities and doubts in the possibility of establishing states: states respectful of the various religions, which do not distinguish between citizens on the basis of their religious beliefs. Naturally, the best way to avoid such situations is dialogue, both on the popular and institutional level, in order to secure a national unity that is indispensable and vital for Palestinians at this particular moment.

Historically, Arab Christians –although reduced in number- participated in the construction and diffusion of Arab nationalism. It was that concept that put them, together with other Arabs who are Muslim, in the same camp. Once the project of creating one Arab state collapsed, and the attachment to territorial Arab states was deepened, Arab Christians, through political parties and different institutions, participated in the construction and development of their own states.

Christian Palestinians were a vital example of such participation in the process of creating and promoting Palestinian nationalism and identity, through the struggle for the liberation of their occupied territories, the return of refugees and the establishment of a Palestinian State.

Palestinian Christians are not foreign elements in the Palestinian society: a common culture, language and history associate them with other Palestinians. Nevertheless, some believe that Palestinian Christians may suffer two complexes: one of inferiority (due to their reduced numbers), the other of superiority (considering their particularity as being synonymous with supremacy).

Both these complexes are unconstructive regarding peaceful coexistence of the religious communities in Palestine. Resolving them depends on two things: *first*, Palestinian Christians always need to be conscious of their identity; *second*, other Palestinians should not exclude them, legally or otherwise. Palestine is also the country of Palestinian Christians, as much as it is for all other Palestinians,

irrespective of their religious leanings. Besides, the presence of Palestinian Christians can be cited as an instance of peaceful coexistence between different religious communities, and may be an example to the international community the other side of Islam; an image based on historical coexistence rather than prejudice.

Few people do doubt effectively of the belonging of Palestinian Christians. Nevertheless, there were many discussions within Palestinian society regarding the religious question, following the adoption of the clause “Islam as religion of the state” in the BL and in the DPC. The position of an authoritative Christian leader, Msgr. Michel Sabbah, expresses very agreeably our personal position. In a religious manifestation celebration in fact, he asserted:

It is useless to discuss this question if different communities, Muslim or Christian, have the mentality of winning or losing, at the expense of the other, as if we are in different teams, each trying to catch the ball and take to their side or camp, as the victor. Daily life pushes us to be in the same camp, and no one wins if the other loses. We both win if a new Palestine, with a new face, is born, that inspires mutual trust and security for Muslims and Christians... if we nurture this mentality, and we will find the best expressions that reflect this new culture, for the Constitution.<sup>729</sup>

#### **14.2.4. The Constitution and Democracy**

Democracy means literally ‘people’s rule’. Constitutions normally express this principle in the following way: sovereignty belongs to the people and is exercised within the limits of the constitution. The democratic system means giving individuals the freedom of action in various fields, but this liberty is not absolute; one’s liberty sphere ends when the others sphere starts.

Legally speaking, democracy means providing all necessary measures that guarantee the possibility of participating in political decision-making. This participation can be direct (through referenda) or indirect (through ordinary or extraordinary representatives). Of course, these

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<sup>729</sup> The speech was made at the University of Bethlehem, and published in Arabic on the Web. The translation is mine.

measures are not exclusive; new, more appropriate measures can be adopted for certain states, particular and culturally different. On the other hand, these measures can be misused when they do not actually reflect the real will of the people, but are employed in order to consolidate extant rulers. Consequently, democratic practices become a weapon in the hands of dictators.

Now, most Arab countries are ruled by one person or a group of people. Some Arab States have do not have elections; more recently, others have held elections and/or included women in this process. Some Arab States permit elections, but void it from its content. Most Arab States have adopted constitutions, but they can freely amend them to suit the will of the ruler.

Many commentators explain these phenomena as being related to Arab cultural particularities! Democracy is not exclusive to Western countries, and Arab culture does not totally exclude democratic practices; on the contrary, since the earlier centuries of Islam (already mentioned in previous sections), Arabs, and Muslims in general, have practiced different democratic systems, when Europe was in the midst of the dark Middle Ages.

It is true that Islamic history is based on the deposition and replacement of rulers, in a constant desire for power, through various bloody revolutions, uprisings, and military *coups d'état* and this situation did not change until recently. Democracy mean the peaceful exchange of those in power, based on free and honest contests for all those having the right to participate; this liberty should also include the freedom of speech, without persecution.

Nevertheless, we have many reasons to believe that democracy is a two-sided coin. Without the respect of HR, democracy can result in serious crimes to humanity (Hitler and Mussolini were elected by their people and for a while, enjoyed immense popular support!). For us, true democracy, although realised in different ways and through various practices, should be based on key principles: *first*, democracy is not a goal but a means to the realisation of a higher ideal: the respect of individuals' rights and freedoms; *second*, democracy remains a mere formality if the ruler and the governed do not respect the RL which has

been officially sanctioned by a constitution; *third*, democracy does not mean tyranny by the majority, but is a political organisation of mechanisms which have to guarantee the rights and freedoms of ethnic, political and religious minorities.

Democracy should not be a weapon in the hands of the majority to impose its will on minorities, and nor shall it be an excuse for minorities to exclude themselves from applying laws adopted according to the procedures provided by the constitution. Accordingly, a constitution shall reflect the interests of both minorities and majorities in the state; and in the interests of a stable state, everyone should be represented, and his/her interests reflected in the constitution. Democracy, formalised in the light of these principles, can steer citizens towards prosperity and the stability of the state.

Palestinians showed flexibility and will to cooperate in the creation of democratic institutions in the Palestinian territories. Those intentions were not followed usually by concrete acts. It was sometimes related to outside circumstances, mainly the Israeli occupation. Nevertheless, the Israeli occupation was used other times only as a justification to cover corruption and misuse of authority by some individuals. The international pressure on Palestinians on creating accountable authority were clear. They usually presented the financial aids in exchange of such institutional reforms.

#### **14.2.5. Human Rights**

The Oslo II agreement limits the PLC, and as such (at least theoretically) limits the provisions that the PLC can make to guarantee the respect of HR and RL. Indeed, article 19 of the above mentioned agreement states: “*Israel and the Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law*”. Some consider this provision ambiguous: “*The military occupation, indeed, is ruled by international law according to the 1907 Convention of the Hague and the IV<sup>th</sup> Geneva Convention (about*

*civilian protection in war-time)*”.<sup>730</sup> According to such reasoning, Israel will continue to be responsible of the respect for HR in the Palestinian territories ensure its respect by the PA, especially supervise that the PLC respects these provisions in the areas under the jurisdiction of the same council.<sup>731</sup>

Others may go a little bit further, considering that Israel is not only accountable under International HR’s laws for any violation of Palestinian HR in areas under its direct jurisdiction, but also sharing responsibility with PA in other zones under PA direct jurisdiction, since Israel remains the ultimate authority unless final negotiations are terminated and full sovereignty is recognized. Indeed, while BL reflects the concrete absence of effective sovereignty during the Transitional Period, it is out of discussion in the DPC –since it presumes creation of the Palestinian State- that Israeli supervision would be accepted. On the contrary, the DPC as most of constitutions of Arab countries served as an important marker of sovereignty.<sup>732</sup> In the new circumstances and context, it is indispensable that the DPC provides legal mechanisms to guarantee HR and RL, and their respect and application.

Meanwhile, many NGO and independent centres and associations, such as the Palestinian Centre for Human Rights (PCHR), dedicate a lot of their activities and reports to encouraging respect for RL, and promoting development of democracy and democratic institutions in Palestinian society, which are the most efficient guarantees to respect and defend HR.

According to the Palestine Human Rights Monitor (May – June Issue n°3, 1997), the PA public undertakings to respect HR can find expressions in different sources: undertakings made to HR NGO’s, such as Amnesty International;<sup>733</sup> public decrees and declarations made

<sup>730</sup> CHARVIN R., SCHALLER R., DANNA P.P., *Occupied Territories and Law*, p.37.

<sup>731</sup> ALHAQ - BIRZEIT UNIVERSITY LAW CENTER, *Human Rights in the Proposed Palestinian Basic Law*, p.17.

<sup>732</sup> BROWN N.J., *Resuming Arab Palestine*, p.45.

<sup>733</sup> According to the Palestine Human Rights Monitor just cited, Mr. Arafat would have said in a radio broadcast of December 31, 1993,: “*We want the Palestine that is*

by the PA undertaking to comply with HR norms;<sup>734</sup> provisions of the Oslo accords, undertakings under the DBL of the PA; and Responsibilities under International HR law and Humanitarian Law.<sup>735</sup>

The accelerated preparation for a BL that proceeded and followed the creation of the PA was in part the result of the desire that jurists and constitutionalists had to ensure the protection of HR. In fact, the relations between the President and the Legislative Council were very difficult since the PLC has prepared and approved the BL, which has been ignored by Mr. *Arafat* for a long time as already mentioned. Actually, the PLO already confirmed in the declaration of independence in 1988, that the

State of Palestine proclaims its commitment to the principles and purposes of the United Nations, and to the Universal Declaration of Human Rights... It will join with all states and peoples in order to assure a permanent peace based upon justice and the respect of rights so that humanity's potential for well-being may be assured, an earnest competition for excellence may be maintained, and in which confidence in the future will eliminate fear for those who are just and for whom justice is the only recourse.

The BL provides that basic HR and freedoms shall be binding and respected (BL, Art.10.1) and that the PA shall work without delay to join regional and international declarations and covenants which protect HR (BL, Art.10.2). As a guarantee the BL provides the necessity to establish by law an independent commission for HR (BL, Art.31) that is already established as mentioned above.

The PA minister Mr. Nabil Sha'th stated, after first meeting of an Arab League committee to draft a constitution for the coming Palestinian

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*being revised anew to be... democratic, an oasis in which our people will enjoy freedom, democracy, political pluralism, security and safety, the independence of judiciary, the preservation of public freedoms, stability, prosperity, human rights and equality between men and women".*

<sup>734</sup> Such as the PLO decree issued in Tunis on October 30, 1993, right after the Israel-PLO declaration of Principles.

<sup>735</sup> Since the PA, although does not have the character of an independent state, exercises 'state-like' power and authority within its jurisdiction under the May 1994 (Cairo Agreement) and September 1995 (Oslo II) IA.

state that Palestinians are looking forward to having “*a constitution that supports political freedoms, accepts the sovereignty of Law and a multi-party system in an independent Arab Palestinian Republic*”.<sup>736</sup>

The DPC, indeed, states that the principles of justice, liberty, equality and human dignity –on which the Palestinian people believe (DPC, Art.2)- shall be the basis of governance and the motivation of the work of governing authorities (DPC, Art.14). These same authorities have the constitutional obligation to defend public and individual rights and freedoms (DPC, Art. 12). In the DPC there is a continuous reference to HR, in strict relation with good governance, RL, and independence of judiciary, with respect to the International law standards.

HR and basic freedoms, according to international laws, charters, and treaties, will not be immediately applicable in the Palestinian state. In fact, the 1<sup>st</sup> DPC makes vague reference to those rights and freedoms according to international laws, charters and treaties. It may suggest that Palestinians adopt a dualist approach in relation to international law (similar to Israel). International law provisions, including those including rights and freedoms, have to be absorbed by the Palestinian legal system, constitution, or ratified by the legitimate legislative power, in order to make them part of domestic law.

Art. 27: Human rights and basic freedoms according to international laws, charters, and treaties that become part of domestic law are binding and must be respected.

In case of reception by an ordinary law, the HRs and basic freedoms may be changed by successive similar range ordinary law, or special law. The Constitution will guarantee HR and freedoms (DPC, Art.26), that is the right of every person (DPC, Art. 28). The respect of those rights and freedoms should be in accordance with the constitution, the laws issued in application thereof, and the principles of justice (DPC, Art. 28). In case of violation of those constitutional rights and freedoms, any person can pursue a request directly to the Constitutional Court (DPC, Art. 201).

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<sup>736</sup> SAAD R., *State in the Making*, in: *Al-Ahram Weekly* 17-23 June 1999, Issue n° 434.

There is a remarkable change in relation to the applicability of HR and basic freedoms. In article 18 of the 2<sup>nd</sup> and 3<sup>rd</sup> DPC switch the tendency in favor of more responsible Palestinian state that shall seek to join international covenants and charters in order to safeguard HR. This article may suggest rather that international law will be applicable once regularly ratified by competent authorities, in accordance with constitutional provisions.

Art. 18: The state of Palestine shall abide by the Universal Declaration of Human Rights and shall seek to join other international covenants and charters that safeguard human rights.

### §15 Conclusion to Part Three

There is no constituent power if there are no people. Not necessarily in its ethnic sense, but in the sense of a community, a group of persons that live under the same rules and laws; (this is the moment of the *present*). Nevertheless, a people lives normally on specific territories or at least, refer to a homeland that is common to those who are now living and to those who had lived before them (the moment of the *past*). Now, this past and this present may determine the *future* of the members of that people and especially those who continue to live on the territories that form the people's homeland.

Constituent power for us is that which has the power to frame a document with particular sanctity that is the constitution in its formal sense. Now, this happens normally when there is already a community, organized into a state. This means that the enactment of constituent power is possible only in the framework of a previous constitution (in its material sense). There is then no problem of who is/are that/those entitled to constituent power, how it is enacted or who is effectively exercising it, since the same fact that it is already enacted presupposes that, actually, someone already holds the power in his/her hands, and has already decided who should do what, in this complicated process of framing a constitution.

For this reason, it was of importance to know the law in force and the way the power is shared and contained, besides considering the status of the people under international law, and the institutions that represent them. The last question we considered was directly related to sovereignty and legitimacy. All those are presuppositions for the enactment of constituent power: a comprehensive and hierarchical system of laws in the territories, the existence of a people and the existence of political institutions that are representative and express legitimate aspirations.

A state effectively exists when there are organs that exercise sovereign powers over a territory and a people. Now, if those organs are formed by foreigners or imposed by an alien country, we have an occupied

territory or country; if they are formed by co-nationals, but find their origin in the will of a person or group of persons rather than by the people, we have a tyranny. In the case that those organs express the people and are formed in the concurrence of all the members, then we have a democratic state. Although very important, the last point did not interest us here directly. What interested us is the existence of a state, and thus of an effective sovereignty over a territory and a people, that is exercised by the organs of the state and not by an alien state.

One may notice that those three elements (people, territory, and sovereignty) necessary for the enactment of constituent power are the same as for the establishment of a state. Nevertheless, these elements all together are not sufficient; they need to have a connection with each other. In the Palestinian case, the three elements for a state exist but are not connected to each other; in other words, there is no element of sovereignty. Sovereignty is simply the other face of statehood. We may say it differently. There are material elements for statehood that have to exist: a group of persons; a territory; and organs. Now, those elements are not sufficient alone to obtain statehood. They need to be sovereign. Sovereignty means that those elements need to convert into: a people are those entitled to self-determination; a territory that forms a viable unit of self-determination; and political institutions that govern these two preceding elements and base their legitimacy on them.

Now, constituent power may be enacted before the establishment of a state but the constitution of the state has no existence outside the state. In other words, the enactment of constituent power may start before the creation of a state but the adoption of the constitution needs to follow the creation of the state. Said differently, the enactment of the constituent power does not depend necessarily on the establishment of a state but the result of that process, that is, the (formal) constitution has no existence outside the state.

Now, there were several examples of constitutions adopted by occupying or mandatory powers, for the territories under their jurisdiction. Nevertheless, the independence of that state, once achieved, necessitated changes since a real shift of the bearer of sovereignty occurred. This idea can be proved by the phenomenon of the

internationalization of constituent power as already presented in previous sections.

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Palestinian constitution-making attracted the attention of international actors and states.<sup>737</sup> It also had the focus of local and foreign media, although on many occasions they took one or two articles and forgot all the rest (mainly, questions related to *shari'a* or “*Islam is the religion of the state*”).

Preparing a constitution was part of the steps imposed on the Palestinians by the Quartet's Road Map,<sup>738</sup> endorsed by UNSC resolution 1515 in 19 November 2003. In Phase I, the Palestinians had to prepare a draft constitution before May 2003.<sup>739</sup>

In Phase I, the Palestinians immediately implement an unconditional cessation of violence according to the steps outlined below. Palestinians and Israelis resume security cooperation based on the Tenet work plan to end violence, terrorism, and incitement through restructured and effective Palestinian security services. The PA *undertakes comprehensive political reform in preparation for statehood, including drafting a Palestinian constitution*, and free, fair, and open election upon that basis. Israel takes all possible steps to help normalize Palestinian life. Israel withdraws from Palestinian areas occupied from September 28, 2000 and the two sides restore the status quo that existed at that time, as security performance and cooperation progress. Israel also freezes all settlement activity consistent with the Mitchell report.<sup>740</sup>

Not only has it delimited most of its contents:

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<sup>737</sup> The fact that the DPC (and not the BL, for instance) with many related analyses published in Arabic and English on the official Web Page of the PA's *Ministry of Foreign Affairs* is very significant.

<sup>738</sup> The Road Map was amended many times. Texts cited here are taken from the December 2002 version

<sup>739</sup> It is important to take into account that most of the deadlines included in the Road Map were postponed by an American decision, taking into consideration the developments in the Palestinian territories following the Second Intifada.

<sup>740</sup> Cursive is mine. See [http://www.mofa.gov.ps/key\\_documents/road\\_map3.asp](http://www.mofa.gov.ps/key_documents/road_map3.asp)

Credible process for drafting of constitution for Palestinian statehood. As soon as ready. Constitutional Committee circulates draft Palestinian constitution, based on strong parliamentary democracy and cabinet with empowered prime minister, for public comment/debate. Constitutional Commission proposes draft document for submission after elections for approval by appropriate Palestinian institutions.<sup>741</sup>

As for the second phase, the transitional Palestinian state will be governed by the new constitution until there is a permanent status settlement. The second phase was to be extended from June 2003 to December 2003.

In the second phase, efforts are focused on the option of creating a Palestinian state with provisional borders, based on the new constitution, as a way station to a permanent status settlement...

New constitution for democratic, independent Palestinian state is finalized and approved by appropriate Palestinian institutions. Further elections, if required, should follow approval of the new constitution.<sup>742</sup>

Many studies are made to present the BL or the DPC, by Palestinian, Arab and international specialists. The constitutional committee was headed by Dr. *Nabil Sha'ith*, and included many Palestinian academics, assisted by Arab and foreign personalities. It was accompanied by a large popular participation and was the object of various workshops. We read in the introduction to the 3<sup>rd</sup> DPC, interesting elements regarding Palestinian constitution- making:

After great effort, with over two hundred meetings, workshops and discussions, the committee for the preparation of the Constitution, in cooperation with the civil society, academics and politicians, had achieved by the end of December 2000 the first draft of the Constitutional project of the State of Palestine. It was published in February 2001.

This is the third draft, which has been compiled by amending and reformulating the first and the second draft, having taken into consideration comments and

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<sup>741</sup> Ibidem.

<sup>742</sup> Ibidem.

suggestions from Palestinian, Arab and international legal experts, in addition to academics and personalities from the civil society in Palestine and the Diaspora.

This third draft will be widely distributed to enable a greater number of persons to study it and participate in improving the drafting thereof by suggesting amendments, deletions or additions to obtain a valid draft that would be presented to the Palestinian BL when conditions will enable it to convene.<sup>743</sup>

Similar attention was given to the BL, already approved by the PLC since 1997, and endorsed by the president in 2002. Nevertheless, there are many differences between the two texts as we have shown in previous chapters. We would like to recap here only one of those principle differences: *the BL is in force for the transitional period while the DPC will be adopted after the establishment of the state*. From here we start: in fact, if few people doubt the importance of a BL for the transitional period, in order to ensure the separation of the three powers (or better still, to avoid executive interference), to protect liberties and basic rights of individuals, and ensure their equal and non-discriminatory participation of decision-making in the public sphere, many can find dissuasive argumentations against the DPC. In fact, in most of the studies treating the DPC, we find an answer to the first simple question: ‘why a constitution?’ On the contrary, those studies do not satisfy our curiosity if we go further into our analyses and ask another simple question: ‘why now?’ In other words, why draft a constitution *for the state of Palestine* when the *state does not exist yet*? Here there are two ways to resolve this issue:

*First*, some may consider that the Palestinian state exists already, although without sovereignty because of the Israeli occupation; consequently, adopting a constitution is necessary also now.<sup>744</sup> This position is weak since the same constitutional text provides that the constitution shall be adopted only after the establishment of the state!

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<sup>743</sup> See [http://www.mofa.gov.ps/arabic/key\\_documents/constitution\\_new2.asp](http://www.mofa.gov.ps/arabic/key_documents/constitution_new2.asp)

<sup>744</sup> Dr. Ahmad Mubarak al Khalidi, the vice president of the constitutional committee, head of the drafting committee, was of this point of view, for example. See his intervention published in Arabic at the official link of FATAH, <http://www.fateh.net/public/newsletter/2000/151000/5.htm>

*Second*, others refer to the constitution as any other step towards statehood. If others insist on investigating this to be true, they cannot provide convincing answers. They may finish up by admitting that the constitution was imposed on the Palestinians, within the many other conditions of the package called “*Road Map*”. This position is also weak since it does not provide why and how the constitution may contribute to those massive efforts of the international community, especially the Quartet, in a joint agreement between the Israelis and the Palestinians.

We believe that those solutions remain partial and unsatisfying. Considering the Palestinian constitution shall be made within the general context of the constitutional movement worldwide, where the constitution is increasingly becoming a legal instrument to consolidate political agreements, and where power-sharing is strictly assigned to different constituent groups, by the constitution. The international community – sometimes including universal and regional organizations or single states - is becoming principle actors in the constitution-making process. The constitution is becoming the most discreet but direct way, through which the international community intends to ‘impose’ certain rules on new states, in which they will be a part of the community of states, while asserting always that the people choose it freely. This legal fiction can be justified by the defenders of such interference in domestic affairs; by other values, such as protecting the new state succumbing to the risk of chaos, civil war or serious violations of the basic rights or freedoms of individuals or groups.

The so called ‘internationalization of constituent power’ is related to another phenomenon, the constitutionalization of international law. In fact, international law is binding on states, but there are few instruments to impose it. It depends mostly on the adherence and will to apply it, of single states, or on the community of states, or part of them, to impose it on others. Accordingly, the internationalization of constituent power can be considered as a natural development of international law and/or relations, but also of constitutional law itself.

It is thus normal that the international community shows an interest in constitution- making, and supports its preparation as a step towards (or

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as a condition of?) statehood. In other words, if a Palestinian state is to exist one day, the international community wishes to contribute to those efforts of establishing a viable and democratic state that respects fundamental rights and freedoms. Besides, the international community is interested in ensuring a legal apparatus that reflects a peace agreement with Israel. The constitution may be of great help in the realization of those two objectives. Finally, the constitution defines how the Palestinians conceive themselves, and what the intentions are as to how their rights will be realized, similar to other peoples of the region. The danger here is that the constitution is becoming a big bag in which everyone puts something totally different. This is risky since it may finish up, as many other documents have, to be totally perfect to the point it is no longer useable.<sup>745</sup>

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<sup>745</sup> Some consider the efforts to prepare a constitution for the Palestinian state, or approving a BL for the PA in the transitional period as superfluous, meaningless or ridiculous; for them, the first obstacle to Palestinians now, in their efforts to state-building is the Israeli occupation. For others, the BL and the DPC are one of the steps that will conduct Palestinians through the transitional period and the very beginning of the Palestinian state, guided by the principles of good governance and respect of HR, towards the realization of their right to self-determination. Only the future will show who was right and who was wrong.

## General Conclusion

Following the passing of *Yasser Arafat (11 November 2004)*, some started to refer to Max WEBER's phases of legitimacy: traditional, charismatic, and institutional. According to such analyses, traditional leadership is that of Palestinians before 1948 while charismatic leadership no longer existed after Arafat, and the Palestinians began to prepare for a new phase of institutional leadership.<sup>746</sup> In fact, on 9 January 2005, the Palestinians of WB, East Jerusalem and GS, elected *Mahmoud Abbas (Abu Mazen)* as the second president of the PA, ending pacifically the process of power transfer that began with the demise of *Yasser Arafat*. The election was and has been the focus not only of a great deal of diplomatic and media attention from the international community, but also from ordinary Israelis and Palestinians.

Though not necessarily contradictory, the interests shown in the presidential election are multiple. For the international community, popular elections are a necessary step for the establishing democratic and accountable institutions governing the Palestinians of WBGS, and contribute to state-building efforts. While according to regular statements made by Israel, the election of a partner for peace would be a priority, yet a partner already exists: the PLO; in fact, according to international law it is the PLO which is authorized to negotiate and sign international treaties. The PA, created by the Oslo agreements, is a purely administrative authority with limited competence in time, space and persons (the interim period; the autonomous territories; and only regarding Palestinians). According to Oslo Agreements, the interim period would have ended by 1999 without joining a permanent status agreement; besides, most of the autonomous territories were re-occupied by Israel after the second *Intifada*.

However, it is obvious that the centre of Palestinian political gravity is slipping from the PLO to the PA. Simultaneously, a transition has occurred: from a cause concerned with liberation, to that of a quasi-state, which administers the population of occupied territories. The Palestinian cause, which once revolved around the rights of a people -

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<sup>746</sup> For complete analyses, see SAFIEH A., *End of 'Charismatic' Era*, in: *Palestine-Israel Journal of Politics, Economics and Culture*, Vol. 11, Nos 3&4, 2004/2005.

the majority in Diaspora- to self-determination, has increasingly been reduced to a question of territory and/or autonomy.

The developments in the Palestinian territories following the 2006 legislative elections, show how internal Palestinian challenges related to problematic issues we treated in this thesis: who represent the Palestinians? What are the limits and legitimacy of their mandate and power? The answers to those questions have great influence on the Palestinian concept of constituent power.

Mainly, there are two challenges that need to be resolved by the Palestinians themselves: the Fatah/Hamas dilemma that reflects a larger one related to the objective of national struggle, the concept of state, and the methods of resistance.<sup>747</sup> Another internal challenge, completely connected to the first, is the dialectic between PLO and PA institutions.

In addition to its negative effects related to the overlapping of his prerogatives, the fact that Yasser Arafat was simultaneously the leader of Fatah (since its foundation in 1957), chairman of the executive of the PLO (since 1969), president of the State of Palestine (since the Declaration of Independence in Algiers in 1988) and ra'ees of the PA (since its creation; he was initially nominated then elected in 1996), had direct consequences on Fatah because it gained, at the same time, the grace and the disgrace of being Arafat's party. Fatah enjoyed the success and failures of its leader.

When Arafat entered the cities in the 'Palestinian Autonomous Territories', making the victory sign to the excited crowds, he was not alone. A whole team of old companions (largely belonging to Fatah) settled with him, and headed the Palestinian institutions newly created, following the agreements with Israel (and thus, with its indirect approval, either for their return, or for their participation in the new

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<sup>747</sup> To start with, it shall be outlined that the antagonism between Fatah and Hamas seems no longer satisfactory. It does not reflect the richness and the variety of the Palestinian society, their history, and their long struggle for independence. In fact, the population seems wanting changes but also requires an alternative or a third option. Why shall Islamism be the only serious alternative to nationalism? Why shall Islamist movements be the only to claim more democracy and reform? This 'third movement' would have positive effects on the legitimacy of political decisions. Otherwise, Palestinians may risk being captives of the actual bipolarisation.

administration). Those people were known by the WBGS Palestinians (the 'insiders') as the Palestinians of the exterior/outside (or the 'outsiders'). Arafat's policy was to have direct control of everything, either personally or through his faithful 'followers', in particular the 'old companions'. That especially meant the marginalisation of the local leaders who emerged with the first *Intifada*.

The PLO-PA dialectic started since the creation of the later, following the Israeli-Palestinian agreements; the PA was conceived as its administrative arm in the territories evacuated by Israeli military forces. Nevertheless, the elections of 1996 of the President of PA and the PLC members had given to PA institutions popular legitimacy without cutting the liaisons with the PLO, which remained as the only representative of the Palestinian people. The confusion of the personals of PLO institutions and PA characterized that period, with inevitable overlaps and confusions of tasks, powers, competences, and responsibilities.

Since PLO structures and personalities were not adapted to convert to an accountable and transparent administration, the first tensions between the 'insiders' and the 'outsiders' started to appear in the Palestinian political scene. Thus, a request for transparency, respect for the RL and democracy was gradually made by the 'insiders' -supported especially by a strong presence of NGOs- who began to express their deep concerns regarding the situation in the so called 'Palestinian Autonomous Territories'.

Another point needs to be outlined here: the Palestinian political/resistance groups are characterised by their large fragmentation and generally poor degree of institutionalization. This can be explained by the conflict situation in which Palestinian national movement was born and developed. Nevertheless, it was mainly in the Second Intifada where Palestinian different factions had witnessed the emergence of local leaders that defied centralized decisions and complicated the decision-making of their leaders. The emergence of local leaders was strictly related to another phenomenon: the weakness of PA.

It shall be outlined here that there had been no general elections inside different parties for a long time; this fact favoured individuals' self-proclamation as leaders of the Second Intifada and, at certain times, were seen to play a growing role in decision-making at local level that led to a certain popular legitimacy. Besides, during the second Intifada,

Palestinian classical groups had witnessed the emergence of armed groups with local leaders who were supposed to manage particular crisis and to make urgent decisions, which would not necessarily reflect the official position of the party and/or their leaders. This situation had embarrassed the leadership of different movements, including Fatah, who saw their authority undermined from the inside, by belonging groups without following necessarily the line defined by their central bureaus.

Besides, the closure and sieges of Palestinian cities by the Israeli army factored the emergence of local leaders, who never had openly defied the authority of PA president, *Yasser Arafat*, considered by the population as the embodiment of the Palestinian fight. *Arafat* remained the bond that conciliated the multiple differences of the Palestinians and avoided conflicts between the different factions. Besides, an important negative effect resulted from the impotence of the PA, which became the target of Israeli attacks during the second Intifada, and especially the *de facto* prison in the headquarter (the *Muqata'a*) of *Arafat*. This may explain the fact that *Arafat's* disappearance jeopardizes the unity of Palestinian national movement in general and Fatah in particular.

Seen the circumstances, it becomes urgent to distinguish in a clear way between PA and PLO in a very precise legal instrument, in order to clarify their respective roles. Concerning the negotiation with Israel, it is necessary to return to PLO, and once more to give it the priority in the determination of policy guidelines. Here, there is a problem: the PLO, with its old and un-elected institutions, is no longer adaptable, especially since having transferring the seats of most of its institutions to OPT. This meant two things: *first*, it would be impossible for dissidents to participate in their sessions; *second*, this would depend on the goodwill of Israel that could obstruct, at any moment, the PNC to convene. However, returning to PLO will not be easily accepted, because that would be regarded as bypassing electoral or popular legitimacy; obviously, that is mostly Hamas' position, but also new parliamentary blocs that are not represented in PLO institutions. Accordingly, Palestinians need to think of innovative ideas to ensure a fair representation of the Palestinians in the Diaspora, without crushing the legitimately elected representatives of the OPT Palestinians.

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In the Palestinian context, the democratic process is at a crossroad between the need of stability and the need to change; the need of legality and the need of legitimacy; the need of internal adhesion and international recognition. Modern constitutions reflect the equilibrium between domestic and the international legitimacy of the state. There is a tendency to treat the constitution as a birth certificate of the new state that contains essential elements regarding the newborn actor in the community of states. In case the interests of the international community contradict local aspiration, it is most likely that the constitution is misused for the purpose of a group or the other.

In the Palestinian case, the victory of Hamas in 2006 legislative elections showed how fragile that balance between local and international legitimacy was. The three elements that the International Community imposes as pre-conditions to international legitimacy (and the arrival of funds) are related to elements treated in this thesis: renouncing to terrorism, recognizing Israel and accepting the agreements joined until now by those representing the Palestinians. Those elements are inter-related: who make part of the Palestinian people? Who represent them? What are their territorial claims? What is the kind of state they intends to institute? Those elements are related to the nation-building, peace process and transition to democracy: to which extent it is related to Palestinian nationalism when their objective is the instauration of an Islamic state? To which extent they can join a lasting peace when they do not recognize Israel? How can they pretend recognition for their democratic election when they may end up treating Palestinians based on their religion rather than citizenship?

Prior to Hamas victory, many have asserted that the participation of Hamas in legislative elections must be carried out. This position was defended, for two reasons at least:

*First*, involving Hamas in the political process would have positive consequences, since the PNA may absorb this movement into its institutions.

*Second*, the involvement of Hamas in a political life may limit its manoeuvrability, constraining it to make strategic choices that will finish up by weakening it. By then, the Palestinians were living a dilemma (and with them, the Israelis, and the international community): how can they become more democratic, by carrying out free elections, without having Hamas on the head of Palestinian institutions? The

same fear applies to Arab countries where democratization may lead to Islamic groups' resurgence.

However, involving a group in a political process cannot be carried out without conditions. It is of great importance then to find a national consensus on two points at least:

*First*, participating in the political game means accepting its basic rule: decisions shall be taken only through legitimate institutions representing the Palestinians. Unilateral initiatives or decisions done by factions would certainly have negative affects on the Palestinian national cause.

*Second*, no political party can be tolerated if it does not renounce the employment of violence to obtain rights, but rather accept to reclaim rights through law. Here is another dilemma: how could Palestinian factions pretend to play a political party-like role while they are still acting as resistance movements? How can they arbitrate to law in resolving the internal possible disputes while their basic rights as a people are still violated being under occupation? How can they institutionalize their organizations while they are still considered as a liberation movement? In fact, international law recognizes to people the right to resist occupation, in the name of people's right to self-determination. The resistance includes the use of force but is not limited to that. Nevertheless, in case violence is used, it is not exempt of all limits. The problem here is to understand what those limits are: in the absence of an international clarifying document, the IHL provisions may be used as a reference.

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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 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 necessary to ensure legitimacy for the state, and not only to provide a legacy for that text. The internationalization of constituent power means that this supreme national act is not, and cannot be, exclusively a domestic issue. The examples of *the internationalization of constituent power* are multiple. It may be *partial* as a result of a treaty or an act of international law, or

as a result of a *de facto* situation; it can be also *total*, where the elaboration process of the constitution is entirely left for international order and where the constitution makes part of an international treaty.

Many explanations are given for this phenomenon:

*First*, the evolution of international law and international society and the relations between states altered the notion of sovereignty;

*Second*, the weakness of states in the third world and the multiplication of crises situations, and the will of developed countries to act against these crises, had led to the changing of the *raison d'être* of peace-keeping and peace-making operations: the increasing number of states and the fact that the formation of most of them followed a conflict situation.

*Third*, contemporary constitutions, when they are enacted following a conflict situation, are often used to guarantee a peace treaty between new neighbours and to formalize a *modus vivendi* of various ethnic, national, religious, linguistic groups that are 'condemned' to live in the same state.

Rich and democratic countries may confuse the indispensable Constitutionalism of newborn states, with the imposition of a particular constitutional model. Their foreign and cooperation policy may be determined partially by the adherence of new and weak states to such a model. The risk here is to suffocate local population, their particularities, and their 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'.

In fact, nations, formed by human beings, have their individual history and the state should respect it, since it is never born *ex nihilo*, but a state of a people who may have their own history, language and culture and the state structure and institutions should inevitably reflect them. Nevertheless, once a state exists, it should not use those elements to discriminate citizens who are not part of its cultural heritage. The real challenge of contemporary states is their being 'multi' in terms of nations, cultures, languages and ethnicities, that live within their borders.

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The constitution may create the common tent under which all citizens may have shelter. All constituent groups and individuals shall consider the state as their own and shall identify themselves with the document in order to preserve the unity of the state. In other words, the importance of the constitution lies not in its expression of political identity, but in its ability to transform it into a civic one. The remained problem is to understand if and within which limits the will of the nation shall be applied by the state and reflected in the constitution. Is it sufficient that a nation wants something for this will to be considered good? The problem of those who accept this option is that the guiding political status will lose all rationality.

Accordingly, democratic measures (such as elections or the adoption of laws through a majority system), shall be given their valid weight, without being absolute; otherwise, from the oppression of one person (dictatorship) or a few (aristocracy), we may end up under that of the majority (apparent democracy). In other words, there shall be red lines drawn over which the people (or their representatives) shall not cross. These red lines shall be enumerated in a text, with particular legal sanctions that will be difficult (almost impossible) to amend without general consensus, that is not equivalent to majority (easy to realize) nor to unanimity (difficult to obtain).

The constitution is still a necessary tool for the nation to express its will but also for the individuals and communities within the state to protect themselves from the nation itself and from its expression, the state. Modern constitution is the legal demarcation of political compromise to which entities and individuals composing the state adhere.

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The experience of the last two hundred years proved that the leading forces of the revolution endeavour to congeal the achievements of the revolution, particularly the new distribution of political power, in a constitution - a legal document that bears the unequivocal authority of a written text superior to all other laws of the land. By making a constitution, the revolutionary forces are digging their own graves; the constitution is the final act of the revolution. Constitution-making is an act of self-liquidation of the revolution. However, as important the

character of the constitution as a written text may be, its lasting authority depends on the persistence of its authors' authority.

Constituent power remains inherent in the people, and they may enact it through mass mobilisation that may be bloody sometimes, or pacific. The original constituent power is then enacted.

*The examples here are multiple: the Rose revolution in Georgia in November 2003, the Orange revolution in Ukraine in November 2004. The role of international actors and states was decisive to make these popular uprisings succeed and obtain the changes towards democracy.*

It is the case, to some extent, with the Cedar revolution in Lebanon in February 2005, following the assassination of *Rafik Hariri*. In those three 'revolutions', the *Lebanon case* is particular since it is the only 'federal state' and the only Arab state. Besides, it was the only revolution against an outsider country's interference in internal affairs, rather than against electoral irregularities. The challenge was how to permit the changes without returning to the nightmare of civil war. The pacification of the different communities that compose the Lebanese nation was possible thanks to *Ta'ef* agreements that guaranteed a kind of *personal federalism*, should be protected.

Things are different when changes are made following a military intervention. *The case of Iraq* may provide an example where a lot of importance is given to the constitution in order to create a system that reflects the reality on the ground and represents all the communities, ethnicities and religions in Iraq. This is not an easy task in a country that was governed by a dictator for decades and where *national* resistance to occupation is manipulated and confused by *religious* fanatics. The risk here is that the constitution may be considered by local population as a product *made in USA*, a one-size-fits all item. In any case, many interrogatives remain to be resolved: what is the role of the constitution in accommodating ethnical, religious, and national diversities? To which extent the federal system is adapted for Iraq? What is the relationship between religion and state in the new Iraqi state? What is the role played by states and international organizations in the process of constitution making especially with the coalition

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military presence, led by the USA? How were the constituent assembly composed and how the constitution adopted?

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This thesis intends to contribute to those efforts of self-understanding that Arabs are conducting, open to experiences of others. Reciprocal knowledge is the best weapon against prejudices, and the first steps towards trust and cooperation.

Our analyses have many limitations; they do not pretend to be exhaustive although many points on the subject have been covered: going large sometimes means taking the risk of not going deep. Besides, the fast development of constitutional and international laws proves that the conclusions of this thesis are not -and does not pretend to be- absolute. Rather, they shall be always considered on the light of new experiences, since they reflect the understanding of the development of a state itself and the way it intends to conduct its relations with others.

The most important development of the last century was to discover that the state has no *originality* or *sovereignty* on individuals' and groups' rights, consequently, modern states ended up admitting that they may have their sovereignty limited in certain areas since fundamental rights and freedoms owe their existence to a source that is outside the state. This source has nothing to do with an ideal, imaginary city but concerns individuals.

The *raison d'être* of states was to protect humans from the violence of others, from their animal instincts and evil tendencies. These same states ended up by repeating the sins of their creators; like any social organization, the state a tendency towards evil. The modern state's first enemy is itself; if left to itself, the paradise of a State's legality may end up by being worse than the chaos of its absence.