



Drafting a Constitution for a “Country of words”¹

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Abstract

Can words – rather than a State (or army) – constitute a country? It may be made of land, rivers, forests or deserts – yet, without its inhabitants’ words, there would be no map to draw, no tale to sing, no country to speak of. Palestinian tales abound. They speak of departed lands, vanished homes, forfeited livelihoods. They lament internal wrangling, squal occupational anger, seek to whisper away those quotidian checkpoint humiliations. Yet, they also speak of hope. If there ever were such a thing as “authoritative hope”, the ongoing Palestinian constitution drafting process may be it. But hope cannot be formalized, let alone authorized. And there is some danger in pretending otherwise.

Keywords

Palestinian constitution, custom, urf, self-determination, popular representation, sovereignty, legitimacy, Gandhi, home rule, Oslo Agreements, legal pluralism

*We have a country of words. Speak speak so I can put my road on the stone of a stone. We have a country of words. Speak speak so we may know the end of this travel.*²

Can words – rather than a State (or army) – constitute a country? It may be made of land, rivers, forests or deserts – yet, without its inhabitants’ words, there would be no map to draw, no tale to sing, no country to speak of. Palestinian tales abound. They speak of departed lands, vanished homes,

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² Mahmoud Darwish, “We Travel Like Other People,” in *Victims of a Map*, trans. Abdallah Udhari (London: El Saqi, 1984), 31.

forfeited livelihoods. They lament internal wrangling, squeal occupational anger, seek to whisper away those quotidian checkpoint humiliations. Yet, they also speak of hope. If there ever were such a thing as “authoritative hope”, the ongoing Palestinian constitution drafting process may be it. But hope cannot be formalized, let alone authorized. And there is some danger in pretending otherwise.

For years the Palestinian Authority (PA) has sought to build all the trimmings of a (Westphalian) State. This includes a formalized, written constitution. A wealth of ambitious social, economic and moral aspirations underlie the Palestinian “Basic Law”. Passed in 1997 by the Palestinian Legislative Council (PLC), the PA’s legislative arm, it was ratified five years later by Arafat.³ This time lag reflected the public confrontation between the PLC and Arafat, who notably argued⁴ that “the Basic Law was properly a matter for Palestinians everywhere”⁵ and, hence, that it should be taken up by bodies representing all Palestinians,⁶ such as the Palestine National Council (PNC), the PLO’s legislative body.

The PLO’s⁷ own efforts to issue a “Permanent Palestinian Constitution”, initiated in 1988,⁸ led to several drafts. The final 2003 draft (also called “the Third Draft”) differs substantially from the PLC’s “Basic Law”, not only in its content – the latter does not contain any reference to borders⁹ or the right of

³) It has since been amended twice. In 2003, the political system was changed to introduce a prime minister. In 2005, it was amended to conform to the new Election Law.

⁴) Some members of the PLC, including Fatah members, suspected that Arafat’s autocratic tendencies motivated his procedural concerns.

⁵) Nathan J. Brown, “Constituting Palestine: The Effort To Write A Basic Law For The Palestinian Authority,” *Middle East Journal* 54, no. 1 (2000): 25–43, 32.

⁶) The PLC only represents Palestinians in the Occupied Territories.

⁷) The Central committee of the PLO, headed by Nabil Shaath, presented its first draft in 2001. This draft was revised several times, notably following Bush’s “Vision for the Middle East” speech (in June 2002), calling for the creation of a new constitution.

⁸) “In 1988, the Palestine National Council (PNC) met in Algiers and issued a declaration of independence. The declaration called for a ‘democratic parliamentary system’, freedom of expression, equality, a constitution, the rule of law, and an independent judiciary. [...] The PLO itself was to issue, but remain unconstrained by, the Basic Law.” Brown, “Constituting Palestine”, 3 and 28.

⁹) “Palestine is an independent, sovereign state with a republican system. Its territory is an indivisible unit within its borders on the eve of June 4, 1967 ...”. Basic Law, Third Draft, art. 1, trans. Nathan J. Brown (<http://www.pcpsr.org/domestic/2003/nbrowne.pdf>).

return¹⁰ – but also, and most importantly, in its pedigree (and hence legitimacy). While elected, the PLC “is not sovereign in the normal sense of the word”:¹¹ it is restricted partly by the very agreement between Israel and the PLO which brought it into existence, and it is restricted by the nature of the different prerogatives allowed to the Palestinian Authority by Israel in different geographic areas.

As a – supposedly temporary¹² – administrative entity whose law-making powers stem from and are limited by a treaty with Israel, the PA’s claim to having the authority to draft a constitution for the Palestinian People (when it represents less than half of it) has been the subject of much controversy. Yet, the very endeavour to replace the existing, diffuse and largely customary Palestinian “constitution”¹³ with a formalized, written constitution is seldom discussed in those terms (i.e. as a matter of changing the existing constitutional structure, rather than creating it).

An *in the process of being drafted* constitution is expected to be ambiguous in several respects. As a political action that is seeking to appear in words, a draft constitution’s status as a speech act (is it a declarative or performative utterance?) will remain undecidable until the end – until, that is, that draft has become (if it does become) a fully-fledged constitution backed up by enforcing powers. As they stand, the Palestinian constitutional drafts lack such ambiguity: it is all too easy to decide that they are declarative rather than performative¹⁴ statements. This lack of ambiguity signals an important feature of

¹⁰ “Palestinians who were expelled or emigrated from Palestine as a result of the 1948 war, and who were denied return thereto shall have the right to return to the Palestinian state and bear its nationality...”. Basic Law, Third Draft, art. 13, Brown. (<http://www.pcpsr.org/domestic/2003/nbrowne.pdf>).

¹¹ S. Nusseibeh, unpublished manuscript.

¹² It was supposed to be dismantled five years after its establishment to give way to a “proper” Palestinian State.

¹³ “[A]ny persisting legal order *is* a constitution in the Aristotelian or ‘ancient’ sense, whether customary or formal.” J. Tully, “The imperialism of Modern constitutional democracy,” in *The paradox of constitutionalism*, eds. M. Loughlin and N. Walker (Oxford: Oxford University Press, 2007), 318.

¹⁴ A performative utterance is defined by Arendt as a speech act that, in and of itself, “brings something into being which did not exist before”. H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Toronto: Penguin Books, 1968), 99. Referring to the contrast between Arendt and Derrida when it comes to their analysis of the role of performatives in constitutional documents, Honig writes: “Unlike Arendt, Derrida does not see the declaration’s structural combination of performative as incongruous [...] The We hold, on Derrida’s account, is capable of anchoring itself not because of its powerful purity as a performative, but because it

the Palestinian constitution drafting process: since the first intifada and the signing of the first Oslo Agreement, a range of institutions (both formal and informal – see section 3) have mushroomed to form what one may call a “ship” (as in “building the ship at sea”). While one can think of many reasons why one may wish to reform that “ship,” to present the current constitution drafting effort as a necessary element in the process of constructing a State¹⁵ is, I argue, both misleading and perilous. It is perilous because it allows an important premise to go unchecked: it assumes that what Palestinians seek is necessarily a “modern” (Western-style) Nation State. The danger of that assumption becomes apparent once one spells out another ambiguity underlying the concept of constitution, or “nomos.”

“[T]he Greek term for constitutional law, *nomos*, means both what is agreed to by the people and what is customary [...] The ambiguity of ‘constitution’ appears to be resolved in favour of the imposition conception [as a form of association brought into being by imposition] in modern constitutionalism by the tendency [...] to assume that a modern constitution is based on ‘agreement’, while an ancient constitution is based on de facto habit or custom.”¹⁶ Having sustained its authority through four occupations, the importance of customary law (*urf*)¹⁷ to the Palestinian social fabric can hardly be over-stated. Yet, neither of the constitutional drafts makes any reference to it (while they both refer to *sharia* as a source of legislation¹⁸). Were it not for the very

is in fact both a constative and a performative. It is unclear whether independence is stated or produced by this utterance. And its rhetorical force derives in large measure from this unclarity, from the fact that one cannot decide which sort of utterance it is: constative or performative.” J. Derrida, “Declarations of Independence,” *New Political Science* 15 (1986): 9; B. Honig, “Declarations of Independence: Arendt and Derrida on the problem of founding a republic,” *American Political Science Review* 85, no. 1 (1991): 105.

¹⁵ According to this metaphor, a State becomes the ship being built at sea, and the written constitution its front sail.

¹⁶ J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 60-1.

¹⁷ Otherwise known as “Urf”, Arabic for “that which is known”, this system of customary law extends to a wide number of Arabic countries. Mainly aimed at preventing further damage within the communities of either of the individuals / families involved in a dispute, it consists of a set of conflict resolution procedures promoting active community involvement. For more developments, see section 3.

¹⁸ Basic Law, Third Draft, art. 4, Brown. Permanent Constitution, Palestine Liberation Organization, art. 7.

particular history¹⁹ underlying the Palestinian constitution-making endeavor (and its struggle for popular representation), this omission would be unremarkable. Yet, in the Palestinian context, one must ponder whether the supposedly “diplomatically useful” constitution drafting may end up stiffening, rather than enabling, the (local) words and hopes of Palestinians?

This paper starts with a survey of Palestine’s pluralist legal landscape, shaped as it was by history’s twists and turns. The second section springs from article 2 of the current Basic Law and ponders the extent to which existing Palestinian institutions may be said to foster (or hinder) the connection between political power and its “source” – the Palestinian people. This paper concludes by considering ways in which one may draw upon the current system of customary law (above and beyond the drafting of a Constitution) to seed the basis for sustainable “home rule”, drawing on Gandhi’s concept of “Swaraj.”

1. A tossed legal salad

When, in September 1993, the signing of the first of the Oslo Agreements entrusted the Palestinian leadership with limited control over a small territory, the PLO’s Legal Committee hastily drafted a provisional constitutional document that was fiercely criticized both externally²⁰ and internally.²¹ As a result, the Palestinian Authority was established before any Constitution was issued, hence prompting an enduring difficulty given the Palestinian Authority’s limited representativeness (see section 2). It also meant, more importantly, that the emerging Palestinian institutions were left devoid of any clear “non-Oslo” legal ground.

Arafat’s answer to this predicament was bewildering: upon assuming leadership of the Palestinian Authority, Arafat issued a decree purporting to reinstate the legal status that existed prior to the 1967 Israeli occupation.²²

¹⁹) Section 3 will notably expand on the crucial role played by customary law during the first intifada.

²⁰) The draft proclaimed Jerusalem the capital and was clearly aimed at the production of a permanent constitution for a sovereign state. (This is still very much the case in the current 2003 draft.)

²¹) The hasty drafting lacked any publicity and was unlikely to stand in the way of Presidential authoritarianism.

²²) For a study of the Palestinian legal system under the British Mandate, see N. Bentwich, “The Legal System of Palestine Under the Mandate,” *Middle East Journal* 2, no. 1 (January 1948): 33.

This meant the restoration of an impossibly eclectic patchwork of British, Jordanian, Egyptian and Israeli pre-1967 laws. It also implied that all post-1967 Israeli orders were to be deemed no longer valid, a logical conclusion which was not, however, followed in practice. Some post-1967 Israeli military orders are indeed still implemented by Palestinian Courts on the basis of the fact that they have not been specifically repealed.

The resulting legal framework has been described as a ‘tossed salad,’ with layer upon layer of concomitant legal regimes²³ whose applicability – within Palestine itself – depends on location, subject matter and nationality.

An individual (let’s call her Nuzha²⁴) standing in a street in Jericho²⁵ may go to a Palestinian court to solve a civil matter according to Jordanian law; may face criminal charges on the basis of the Jordanian Penal code or the revolutionary Penal Code of the PLO (or tried for “security offenses” by either the Israeli military courts²⁶ or the PA’s own state security courts²⁷); would need to

²³ See, notably, B. Botiveau, “Palestinian Law – Social Segmentation Versus Centralization,” in *Legal Pluralism in the Arab World*, eds. Baudouin Dupert, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), 73-87.

²⁴ Nuzha may be a national of any country except Israel: as an Israeli citizen “settled” in Jericho, she would be subjected to Israeli law. Note that even if she was born and lives in Jericho, Nuzha’s ability to participate in Palestinian elections is subject to Israel’s control. While the Interim Agreement was to have given the Palestinian Authority “the power to keep and administer registers and records of the population”, such power was limited to printing changes in the Palestinian Population Registry, common to the West Bank and Gaza, provided that Israel had already approved the changes. Gisha: Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza*, prepared by Sari Bashi and Kenneth Mann (2007), http://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf, 50-51.

²⁵ As a major population centre within the West Bank (since Israel’s pulling out of Gaza three years ago, Israel’s control in Gaza is limited to borders, though the recent border opening between Egypt and Gaza raises new questions), Jericho is part of “area A”, where the PA, in theory, exercises jurisdiction over all aspects of life, including internal security (Israel, however, retains its ability to intervene if it deems it necessary). In “area B” (generally the lesser populated towns, etc.), Israel has control over security (the PA cannot operate its own security forces in this area). “Area C” (the rural 60% of the West Bank), for its part, is still under total Israeli control and the PA has no jurisdiction over there. Settlers now outnumber Palestinians in Area C two to one.

²⁶ Security offenses are defined broadly and may include charges as varied as stone-throwing or membership in outlawed organizations.

²⁷ The PA’s State security courts have come to attract attention (public awareness of these state security courts seems otherwise worryingly low) following the debate triggered by the PA’s recourse to the death penalty: “a total of 92 different sentences of capital punishment have

refer to Ottoman law to resolve any land dispute or set up a charitable organization²⁸; and may, independently of the above, rely on customary law²⁹ as a route towards dispute resolution. Nuzha's cousin, standing in an East Jerusalem street (a mere 30 minute drive from Nuzha's), will be subjected to a very different set of laws. Israel's unilateral annexation of East Jerusalem effectively means that the 260000 Palestinians who live there are exclusively subject to Israeli law.

If issued tomorrow, the Palestinian Constitution would not necessarily change any of this.³⁰ As a strategic element in the construction of a state-like apparatus, a Palestinian Constitution may have an important role to play in the gradual transition from a *de facto* to a *de iure* state. Yet, it is far from clear whether, as things currently stand,³¹ the establishment of a Palestinian State is the best way (or even *a* way) of achieving equality of rights for all Palestinians.³²

The current “tossed salad,” with its layers of concomitant legal regimes, may not sit well with the positivist idea that all law must originate from a single power source. In fact this pluralist landscape may be considered a healthy

already been delivered since the inception of the PA, of which 16 have already been executed. In June 2005, the President of the PA issued an order for a retrial by a civilian court of all those sentenced to death under the Revolutionary Penal Code in military courts. No new sentences were delivered in 2006 or 2007, but sentences were again delivered by military courts in 2008 (13), and 2009 (17).” S. Nusseibeh, “Capital Punishment Under the Palestinian Authority,” unpublished manuscript (2010).

²⁸) Until two years ago, the same Ottoman law governed the setting up of charitable organizations in Israel.

²⁹) For more details, see section 3.

³⁰) One way of negotiating the various pitfalls of drafting a constitution while under occupation would be for the Palestinian drafters to envisage a transitional constitution whose sunset clause would clearly signal its bridging role towards a process that is more comprehensive and, hence, doesn't suffer from the same legitimacy deficit.

³¹) Geographically, the continuing expansion of Israeli settlements leads some experts (both Palestinian and Israeli) to deem the establishment of a Palestinian State impossible. Politically, the moribund state of the PNC leads some to highlight the hazards inherent in the political disenfranchisement of more than half of the Palestinian population (see section 2).

³²) “[A]s the prospect of a genuine – a sovereign and independent – Palestinian State has receded, another discourse has returned, one with much deeper roots in the Palestinian Political imagination than talk of statehood, and much closer to the ideas that inspired the Arab uprisings. It's often forgotten that until the mid-1970's, Palestinians were looking not to establish a state but to achieve ‘national liberation’, to restore their rights in the land from which they had been driven –beginning with the right of return. Palestinians rarely talk about statehood, but they often talk about their rights; statehood is viewed, at best, as a means to achieve them.” Adam Shatz, “Is Palestine Next?,” *London Review of Books* 14 (July 2011): 9.

reminder of the possibility of taking a broader (and less Westphalian) view of law built around a diffuse network of legal norms. From this perspective, the Palestinian legal maze could be deemed an incentive to research ways in which the existing system of customary law may provide for and support the grass-roots advocacy of Palestinian rights in a way that a formal (written) Palestinian Constitution may not be capable of.

2. The “source of all power”

Article 2 of the English translation of current Basic Law states: “The [Palestinian]³³ people are the source of all power, [...]” This sounds odd. Aren’t “the people,” by definition, the source of all power? Without the political might engendered by a group of individuals pondering ways of living together, there could not be any constitution, let alone any law. Political power, understood as the power to (re)shape social interactions in the light of moral or prudential concerns cannot but emanate from the people.

Article 2 goes on: “[The Palestinian people are the source of all power] which shall be exercised through the legislative, executive, and judicial authorities, based on the principle of separation of powers, and in the manner set forth in this Basic Law.” The distinction between the “power” referred to in the first part and the “powers” – legislative, executive and judicial – that ought to remain “separated” contributes to the oddity of the English translation. As it turns out, an “s” after the initial reference to “power” seems to have gotten lost in translation,³⁴ which suggests that the drafters probably had something akin to Article 33 of the Belgian Constitution – “All powers emanate from the Nation” – in mind.

The formulation of article 2 may well find its root in what it was trying to avoid saying, for there’s one word – “sovereignty” – whose absence is noteworthy. Most constitutions use the term at one point or another, including the South-African,³⁵ Egyptian³⁶ and French

³³ The Arabic text only mentions “the people” (not the Palestinian people). See below.

³⁴ الشعب مصدر السلطات ويمارسها عن طريق السلطات التشريعية والتنفيذية والقضائية على أساس مبدأ الفصل بين السلطات على الوجه المبين في هذا القانون الأساسي, <http://www.plc.gov.ps/ar/default.aspx>.

³⁵ “The Republic of South Africa is one, sovereign, democratic state founded on the following values: ...” South African Constitution, art. 1.

³⁶ “Sovereignty is for the people alone who will practice and protect this sovereignty and safeguard national unity in the manner specified by the Constitution.” Egyptian Constitution

Constitutions,³⁷ which are all known to have had some influence on the Palestinian drafting process. The relatively recent Iraqi and Afghan Constitutions give pride of place to the concept: “The law is sovereign. The people are the source of authority and legitimacy [...]”³⁸ and “National sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives.”³⁹

Beyond its silent influence on the constitutional draft, the distorting effect of this “sovereignty issue” can also be seen at work at a more insidious level. When it comes to defining what and *who* constitutes the Palestinian people, its struggle for sovereignty may be seen as a catalyst: religious and cultural differences are meant to retreat (not necessarily successfully) in front of the national liberation campaign.

Who decides who belongs to the Palestinian people and what interests are shared by them?⁴⁰ An answer formulated predominantly in terms of ending the occupation is bound to be precarious.⁴¹ An optimistic reading of the ongoing drafting effort would deem the constitution’s extensive human rights provisions, as well as its conspicuous concern to safeguard the rule of law, to be pointing at a genuine move towards a positive and idealist construction of Palestinian aspirations.⁴² Far from being settled or reducible to the refugee

(2003), art. 3. (This has since been replaced in the 2011 Interim Constitution by “Sovereignty is for the people alone and they are the source of authority. The people shall exercise and protect this sovereignty, and safeguard the national unity.”)

³⁷ “La souveraineté nationale appartient au peuple qui l’exerce par ses représentants et par la voie du référendum. Aucune section du peuple ni aucun individu ne peut s’en attribuer l’exercice. French Constitution, art. 3.

³⁸ Iraqi Constitution, art. 5.

³⁹ Afghan Constitution, art. 4.

⁴⁰ When raised in the context of a conference organized by Al-Quds University on the Palestinian Constitution-making endeavor (this conference, held on May 7-8 2011, was attended by a mix of academics, diplomats and Palestinian officials), the question of what or who “constitutes” the Palestinian people was notably met with a slightly impatient, “it’s widely agreed that the Palestinian people includes each and every refugee around the globe”.

⁴¹ An answer “à la Schmitt”, inviting a substantivisation of politics and citizenship, which would, hence, be defined by the sharing of certain physical or moral qualities, is even more dangerous. It is, of course, more than doubtful whether members of a polity can identify any set of qualities, moral or otherwise, which uncontroversially defines them as a political unity.

⁴² While the Palestinian constitution-making process has already managed to arouse a good deal of public, “civic” debate (see Brown, note 9), it does remain vulnerable to the charge of elitism (a large proportion of the constitution drafting committee was educated abroad, etc.).

question, the ongoing delineation of a Palestinian “social spirit” may be the most important by-product of this constitution-making endeavor.

In order for a nascent people to appreciate sound political maxims and follow the fundamental rules of statecraft, the effect would have to become the cause; the social spirit, which should be the product of the way in which the country was founded would have to preside over the founding itself; and, before the creation of the laws, men would have to be what they should become by means of those same laws.⁴³

Now, it might seem that acknowledging this circularity – what is presupposed as coming before (the Palestinian people) invariably comes after (if at all) – “must be costly to a democracy, or demoralizing; if the [Palestinian] people do not exist as a prior – or even as a pot hoc – unifying force, then what will authorize their exercises of power?”⁴⁴ But, denial of this issue is costly too.

The task of determining what interests and aspirations are shared by and constitutive of a community is always going to be an open-ended endeavour. In a certain (typically Western) understanding of constitutionalism, it is the job of the Constitution to preserve this open-endedness through the imposition of limits on divided state powers (these limits are “a way of acknowledging that a people is never directly present to itself as a unity: whoever claims to speak on its behalf may only do so if the claim can be *questioned* by another power”⁴⁵). Yet, in some contexts, the strategic (and formalist) drafting of a Constitution (whether it be for the purpose of gaining international recognition or otherwise) may well have the opposite effect, stiffening, rather than promoting, the articulation of socio-ethical aspirations.

Many claim to speak on behalf of the Palestinian people. Yet, in their present state, Palestinian institutions can hardly be said to foster the connection between political power and its “source” – the Palestinian people (art. 2). The Palestinian National Council (PNC) is the one body that represents all segments of the Palestinian population. The PNC⁴⁶ currently comprises

⁴³ Jean-Jacques Rousseau, *Social Contract*, book II, chapter 7.

⁴⁴ Bonnie Honig, *Paradox, Law, Democracy: Emergency Politics* (Princeton: Princeton University Press, 2009), 15.

⁴⁵ Hans Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, eds. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 22.

⁴⁶ There is no definitive list showing who the current members are. Many have died of old age.

669 members, 483 of whom are supposed to represent the diaspora.⁴⁷ It is meant to meet every two years with the purpose of discussing the PLO's overall direction.⁴⁸ The PLC, by contrast, only represents Palestinians living in the Occupied Territories. As the PA's legislative arm, its authority (and *raison d'être*) stems from the Oslo Agreements.

The recent move to secure recognition of statehood at the UN Security Council may be seen as the culmination of a *de facto*, gradual transfer of power away from the PNC. Established as a short-term⁴⁹ administrative entity charged with the limited governance of a restricted territory, the PA has sought to establish all the infrastructure of statehood while still under occupation.

Its latest bid to replace the PLO and substitute it with the "State of Palestine" has been widely criticized. At a strictly procedural level, this bid has been denounced as overstepping the mark (aside from being at odds with resolution 43/177⁵⁰): "as a subsidiary body, competent only to exercise those powers conferred on it by the Palestinian National Council [...] it does not have the capacity to assume greater powers, to 'dissolve' its parent body".⁵¹ But the greatest peril of this PA-initiated move (even if it has the PLO's executive committee's approval) lies in its implications for those Palestinians scattered across the globe. "If they are 'disenfranchised' and lose their representation in the UN [as a consequence of the PLO's substitution with the 'State of Palestine'], it will not only prejudice their entitlement to equal representation, contrary to the will of the General Assembly, but also their ability to vocalise their views, to participate in matters of national governance, including

⁴⁷ Because of the high number of Palestinian refugees who are not, as yet, registered to vote, representation of those scattered throughout the Diaspora is sometimes dismissed as an impossible task, even by those currently calling for immediate elections to the PNC (see below).

⁴⁸ It also elects its executive committee of 18 members.

⁴⁹ Its five years mandate was extended in 1998.

⁵⁰ In its resolution 43/177, the UNGA acknowledged "the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988" and it decided that "effective as of 15 December 1988, the designation "Palestine" should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system..."

⁵¹ Guy Goodwin-Gill, "Opinion Re The Palestine Liberation Organization, the Future State of Palestine, and the Question of Popular Representation" (2011), <http://www.documentcloud.org/documents/238962-final-pdf-plo-statehood-opinionr-arb.html>.

the formation and political identity of the State, and to exercise the right of return.”⁵²

Sharing the concern “that any potential move to alter the status of the PLO as the sole legitimate representative of the Palestinian people at the UN may have negative implications on the legal position of the Palestinian people, in particular on the representation of their indivisible and collective rights,”⁵³ senior Palestinian lawyers and scholars have recently signed a joint statement demanding immediate and direct elections to the Palestine National Council.⁵⁴ Given the huge number of Palestinian refugees who are not currently registered to vote (or registered *tout court*), the amplitude of the challenge underlying such elections prompts some to highlight that this call for elections cannot be more than a symbolic move aimed at denouncing the illegitimacy of the UN bid.⁵⁵

One may wish to dispute such skepticism. In her seminal report⁵⁶ (instigated by the UNHCR) on refugee participation in “country of origin’s political processes,” Katy Long draws on recent instances of “out of country voting” (OCV), including the 2005 and 2010 Iraqi elections,⁵⁷ to highlight both their challenges and potential limitations. From a logistical perspective, one of the difficulties is to facilitate affordable⁵⁸ travelling to and from polling stations in

⁵² Guy Goodwin-Gill, “Opinion” (see note 53).

⁵³ Dr Anis Fawzi al-Qasem et al., “Palestinian lawyers affirm essential role of PLO at UN,” Ma’an News Agency, October 13, 2011, <http://www.maannews.net/eng/ViewDetails.aspx?ID=425080>.

⁵⁴ Since 1996, 40% of the PNC (those on the PLC) has been directly elected. According to the (so far tentative, as it has not been signed) Palestinian National Reconciliation Agreement, “The Legislative, Presidential, and the Palestinian National Council elections will be conducted at the same time exactly one year after the signing of the Palestinian National Reconciliation Agreement.”

⁵⁵ Less often raised are the grounds on the basis of which one may argue that the definitive power to decide upon statehood in any form (and the likely compromises that have to go with it) ought to belong to those Palestinians suffering the daily consequences of the Israeli occupation in Gaza and the West Bank.

⁵⁶ United Nations High Commissioner for Refugees, Policy Development and Evaluation Services, *Voting With Their Feet – A Review Of Refugee Participation And The Role Of UNHCR In Country Of Origin Elections And Other Political Process*, prepared by Katy Long (Geneva: UNHCR PDES, 2010).

⁵⁷ For the 2005 Iraqi elections, OCV was (belatedly) provided in 14 different countries.

⁵⁸ The Danish government was the only one to fund the cost of such travelling. Long, *Voting With Their Feet*, 32.

relative safety⁵⁹ (postal / online voting may alleviate that difficulty in those countries with an adequate infrastructure) and to safeguard the privacy of voters' information.

Aside from these technical hurdles, the most difficult task consists in setting up the criteria determining one's right to vote. Defining these criteria widely, so as to include the wider diaspora (whether they are registered as refugees or not, and encompassing second generation migrants) has clear development benefits (remittances, skills-transfer etc.) and is likely to lead to a more sustainable⁶⁰ and secure⁶¹ peacebuilding and reconstruction process. Yet the financial costs associated with such a wide enfranchisement of the diaspora can be significant, as illustrated by the Iraqi experience.⁶² The electoral law which belatedly enfranchised the Iraqi diaspora in 2005 stipulated eligibility criteria that were very broad "so that estimates of eligible expatriates included almost anyone who had left the country at any time for any reason."⁶³ (Voter registration totaled only 22 percent of the estimated expatriate population in the 14 countries offering OCV).

Even if one were to adopt much more restrictive eligibility criteria, for instance by conditioning eligibility to vote to an "intention to return"⁶⁴ (a move which would be very problematic given the continuing expansion of

⁵⁹ "In the Iraqi elections held in March 2010, for example, Sunni insurgents killed 39 people in attacks designed to disrupt polling activities." Long, *Voting With Their Feet*, 22.

⁶⁰ "By facilitating refugee and IDP engagement in political negotiations following conflict, these groups are more likely to understand themselves as stakeholders in the peacebuilding and reconstruction processes. This in turn is likely to lead to more sustainable repatriation and return, as refugees and IDPs are both recognized and recognize themselves to be equal citizens in their country of origin." Long, *Voting With Their Feet* (see note 58), 6.

⁶¹ "The overall security of the peace-building process is also likely to increase, as ensuring refugee and IDP access to civil political space will help to prevent the emergence of so-called "spoiler" refugee groups whose failure to engage in reconstruction can undermine a post-conflict settlement (Milner 2009)." Long, *Voting With Their Feet*, 6.

⁶² "[V]oting in the 2005 Iraqi elections cost USD \$72 million (with an initial budget of USD \$92 million), or USD \$270 per external voter, a questionable use of international financial resources." Long, *Voting With Their Feet*, 14.

⁶³ Judy Thomson, "Iraq: a Large Diaspora and Security Concerns," *The International IDEA Handbook: Voting from Abroad IFE* (2007), http://www.idea.int/publications/voting_from_abroad/upload/chap7-iraq.pdf, 169.

⁶⁴ "Given that the reason for insisting on refugees' right to vote regardless of their nonresidency is the fact of their forced displacement, there would appear to be a connection between refugees' enfranchisement during a period of post-conflict reconstruction and at the very least their intention to return at a future date." Long, *Voting With Their Feet*, 26.

Israeli settlements), the sheer number of Palestinian refugees would create unprecedented difficulties. While the international community should nevertheless be able to rise to the challenge, one may wish to ponder the extent to which, in the present circumstances, PNC elections would promote “self-rule”⁶⁵ and empower Palestinians to not only articulate but also carry through their yearning for equal rights.

The power to bring about those aspirations would require a reversal of the current dynamic, hence a transfer of power away from the PA towards the PLO – a move that would go against vested Israeli interests. As unlikely as it may be, such an institutional revolution is only conceivable if it stems from grassroots activism, i.e. from the bottom up rather than from some ambitious “constitutionalist politics” driven by calls for democratic legitimation.

The peril of a constitutionalist strategy that is mainly outward looking (animated by a desire to build “all the trimmings of a state” in hope of getting international recognition) lies in its alienating from the law-making process the very people it was supposed to empower. If the creation of a State is not only triggered by, but *remains*, primarily an answer to a liberation campaign (rather than a response to the necessity to articulate and coordinate common goals), it is in danger of being reduced to an economic and/or administrative state: a state where the political has been neutralized by legal norms combined with economic welfare and reduced to the mere “technology of administration.”⁶⁶

3. “Swaraj” and “true home-rule” or “self-rule”

*[The end of the Raj] may bring mere home rule (the rule of the modern coercive state) but not true home rule (the rule of the just, limited state); in any case it will not bring about self-rule.*⁶⁷

⁶⁵ Here, I would side with Susan Marks when she warns us against the insidious effects of a thin, procedural conception of democracy, whereby “self rule is equated to the opportunity to participate in elections and, in turn, the opportunity to participate in elections is assessed by reference to the form of elections.” Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (New York: Oxford University Press, 2000).

See also David Scott’s own sympathetic reference to Marks in this respect in this issue of MELG.

⁶⁶ Carl Schmitt, *Legality and Legitimacy* (Durham: Duke University Press, 2004), 5.

⁶⁷ Anthony J. Parel, ed., *Gandhi: ‘Hind Swaraj’ and Other Writings* (Cambridge: Cambridge University Press, 2009), lxvi.

Gandhi's words are increasingly frequently quoted by Palestinian intellectuals⁶⁸ and activists,⁶⁹ and not only because of the “striking resemblance in the two cases [the creation of Israel and Pakistan] in establishing political boundaries on ethnic or religious grounds in regions with mixed populations. Both Pakistan and Israel, as products of partition, are self-conscious political models based on such grounds, with Pakistan having sought to become an Islamic state and Israel a Jewish State.”⁷⁰ Gandhi's words are increasingly quoted primarily because they denounce any attempt to establish “home rule” from the top down as delusive: if liberation is assimilated to the mere toppling of external rule and hasty building of a Western-style nation state, then it may not be worth it. “Independence must begin at the bottom. Thus, every village will be a republic or panchayat having full powers.”⁷¹

If there ever was something approaching this ideal of bottom up, locally grown independence in post-World War I “Palestine,” it was during the early stages of the first intifada. While it may never have managed to be completely non-violent (it took a definite, violent turn during the Kuwait Crisis⁷²), the seeds of what may properly be termed “embryonic self-rule” were

⁶⁸ “CI: People call you the “Gandhi of Palestine”. What has it meant for you to be held in such high esteem? MA: I have very much difficulty with that, I am not Gandhi. He is in a class by himself. My idea was to promote nonviolence and Gandhi's teachings with the hope that someone else would come and pick it up, because I think this is going to take ten to fifteen years before the Palestinians will be able to accept the struggle in a non-violent way.” (C. Ingram, “Interview with Mubarak Awad,” in *In the footsteps of Gandhi: conversations with spiritual social activists* (Berkeley: Parallax Press, 1991).

⁶⁹ “When we joined UNESCO we were practically creating the power of culture against the culture of power. That's how countries in the world liberated themselves. That's how a person like Gandhi who had no military power managed to unify India and get independence [...] It's the power of the idea, the power of culture, and the power of dignity.” M. Barghouti, “The UN should accept Palestine as a full member state,” *The Palestine Monitor*, January 5, 2012, <http://www.palestinemonitor.org/?p=3347>. See also: “A principled Palestinian leadership would follow the example of Mandela and Gandhi, leading the masses in popular resistance and inspiring effective and sustained international solidarity in order to tip the balance of powers – a necessary condition for exercising our UN-sanctioned rights.” O. Barghouti, “Virtual Statehood or the Right of Return,” *Occupied Palestine*, September 14, 2011, <http://occupiedpalestine.wordpress.com/2011/09/14/virtual-statehood-or-the-right-of-return-by-omar-barghouti/>.

⁷⁰ Sari Nusseibeh, *What Is a Palestinian State Worth?* (New Haven: Harvard University Press, 2011), 32.

⁷¹ Mohandas K. Gandhi, “The Pyramid vs. The Oceanic Circle,” in *Gandhi: ‘Hind Swaraj’ and Other Writings*, ed. Anthony J. Parel (Cambridge: Cambridge University Press, 2009), 181.

⁷² Growing dissatisfaction with the earlier intifada power structure enabled the rise of Hamas and increasingly bloody internal clashes.

there nevertheless. In a detailed survey of the legal decision-making structures during the first intifada, Adrien K. Wing outlines the importance of local popular committees: “[I]n the beginning of the intifada, each locality formed various popular committees which became involved in day-to-day underground governance. By May 1988, there were 45000 functioning local committees of various types. The local popular committees elected representatives to larger coordinating committees, which in turn established regional ties, and then linked up with the UNLU [Unified National Leadership of the Uprising].”⁷³

As the primary legal institution of the intifada, the UNLU sought to control the use of force and coordinated civil society activities: withholding of taxes, boycott of Israeli products, work stoppages and mass resignations of the police force and tax collectors.⁷⁴ Consisting of a highly decentralized network of committees,⁷⁵ it issued leaflets (*bayanat*) containing policies and laws. These laws drew from a variety of legal traditions. Ottoman law (to some extent),⁷⁶ Mandate law, Israeli military and civil law were largely⁷⁷ rejected “either as a symbolic estrangement from the Israeli administered legal order, or because the laws promulgated under those systems have been used to compromise Palestinian rights.”⁷⁸ Along with parts of Egyptian and Jordanian civil law

⁷³ A. K. Wing, “Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule,” *Yale Journal of International Law* 18 (1993): 95, at 119.

⁷⁴ Referring to the above mentioned “civil society activities”, Salim Tamari writes, “Are all essential features of the process of the withdrawal of Palestinian society from two decades of dependence on the Israeli colonial state apparatus. The UNLU has exhibited great skill and flexibility in coordinating these acts of civil disobedience among the rural, urban, and refugee segments of the population, and in translating them into a collective national act of rebellion. But they all remain acts of disengagement. To transform them from a process of disobedience to a process of affirmation necessitates the forging of alternative economic, social, and administrative structures.” S. Tamari, “The Palestinian Movement in Transition: Historical Reversals and the Uprising,” *Journal of Palestinian Studies* 20 (1991): 69.

⁷⁵ “The local committees decide when people in their district can sustain demonstrations and/or strikes, raise money and material aid for the neighbouring villages and refugee camps which may be under curfew, and pay attention to their constituency’s morale.” G. Pressberg, “The Uprising: Causes and Consequences,” *Journal of Palestinian Studies* 17 (1988): 45.

⁷⁶ “Although Palestinians relied on the Ottoman land code long after the Ottomans left the region, the Israelis’ use of Ottoman land law in a manner that disadvantaged Palestinian property holders has delegitimized Ottoman law in the eyes of Palestinians.” (A. K. Wing, pp. 106-07).

⁷⁷ As indicated in section 1, land law still is (and remained during the intifada) Ottoman and, today, some post-1967 Israeli military orders are still implemented by Palestinian Courts on the basis of the fact that they have not been specifically repealed.

⁷⁸ Wing, “Legal Decision-Making”, 102.

(and some Islamic religious law), customary law (*urf*) had a large influence on the UNLU.

Known as the ancient legal tradition “*urf*” (“that which is known”), customary law has evolved over millennia to adapt to multiple dynastic and political turns. “By the tenth / sixteenth Century, it had become obvious that custom had to be accounted for in a manner that adequately acknowledged its role in the law⁷⁹ but which did not disturb the postulates and basic assumptions of legal theory. This was no easy task.”⁸⁰ Today, one would be hard pressed to recognize any of those traditional “postulates and basic assumptions” that were key to the evolution of Islamic Law (until the 19th Century⁸¹) in the Palestinian legal landscape. Yet customary practices, thanks to their remarkable adaptability, have endured. To this day, they are still used to resolve conflicts outside of the official civil and religious courts (which are still considered by many Palestinians as not only unsympathetic but illegitimate). Cases that may be handled under *urf* “include contract disputes, land matters, interfamilial feuds and personal injuries.”⁸² “Judges in the civil court generally appear to tolerate the competing systems, sometimes even consciously accommodating [customary law] by delaying actions in a case while awaiting a *sulh* [binding settlement].”⁸³

While respected elders (always men) have traditionally adjudicated and administered *urf*, public figures⁸⁴ came to the fore during the first intifada.

⁷⁹ “Custom presented a major problem for later Hanafite jurists, since the school tradition of positive law and legal theory left little latitude for customary practices to establish themselves readily as authoritative entities. The difficulty is apparent in the fact that legal doctrine never succeeded in recognizing custom as an independent and formal legal source. [...] The incorporation of custom qua custom seems to have increased some time after the sixth / twelfth century.” W.B. Hallaq, *Authority, continuity and change in Islamic law* (Cambridge: Cambridge University Press, 2001), 217.

⁸⁰ *Ibid.* 217

⁸¹ Decrying the “conceptual, structural and institutional discord that exists between the thoroughly indigenous Islamic/customary laws, and the European-grown imports that were the inevitable concomitant of the nation-state and its modern legal system” (page 360), Hallaq warns us that under “the contaminating influence of the state”, “pre-modern Sharia as a non-state, community-based, bottom-up jural system” is all but “extinct” (549). W.B. Hallaq, *Shar‘i‘a : Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009).

⁸² A. K. Wing, “Custom, Religion, and Rights: The Future Legal Status of Palestinian Women,” *Harvard International Law Journal* 35 (1994): 149, at 150.

⁸³ G. Bisharat, *Palestinian Lawyers and Israeli Rule: Law and Disorder in the West Bank* (Austin: University of Texas Press, 1989), 41.

⁸⁴ For example, Feisal Hussein.

Today, customary law continues to play a major role in Palestinian legal culture, even if it has come under pressure to reform. Women's groups denounce how it perpetuates women's social and legal subordination.⁸⁵ "Allegedly, some customary law judges are illiterate; there are different local versions of customary law and no 'true' unified one, and some arbitrators demand emoluments verging on bribery."⁸⁶ Given the strengthening of Islamic movements since the 1970s, it has become overlaid "by a façade of Islamic symbols."⁸⁷

Yet, having sustained its authority through four occupations, customary law is still hailed as an example of Palestinian control over their affairs according to Palestinian custom. Unlike the current Basic Law (and the whole legislative infrastructure that goes with it), customary law can truly be said to "reign over the hearts of [Palestinian] citizens": "There will never be a good and solid constitution unless the law reigns over the hearts of the citizens; [...] How then is it possible to move the hearts of men, and to make them love the fatherland and its laws? Dare I say it? Through children's games; through institutions which seem idle and frivolous to superficial men, but which form cherished habits and invincible attachments."⁸⁸

The current constitution drafting effort is anything but frivolous. Some of its more formal dimension may be captured by Nathan Brown when he writes (without irony): "throughout the world, constitutions have become one of the most important attributes of sovereignty: new states are almost as likely to issue constitutions as they are to print postage."⁸⁹ Now, if the goal is to seek "a past from which we may spring rather than that from which we seem to have derived,"⁹⁰ it may be worth delaying the issuance of stamps (and a Constitution) and ponder the extent to which the burgeoning civic movements⁹¹ on both

⁸⁵ Wing, "Custom, Religion, and Rights", 157.

⁸⁶ Ifrah Zilberman, "Palestinian Customary Law in the Jerusalem Area," *Catholic University Law Review* 45 (1996): 795, at 802.

⁸⁷ "For example, the style of debate in the course of arbitration became closer to that prescribed by Islam, and Islamic traditions (Hadith) and Quranic verses were cited more frequently in the written verdicts." Ifrah Zilberman, "Palestinian Customary Law in the Jerusalem Area," *Catholic University Law Review* 45 (1996): 795, at 802.

⁸⁸ J. J. Rousseau, "Considerations on the Government of Poland and on its Proposed Reformation", [completed but not published] (April 1772), <http://www.constitution.org/jjr/poland.htm>.

⁸⁹ Nathan J. Brown, "Constituting Palestine: The Effort To Write A Basic Law For The Palestinian Authority," *Middle East Journal* 54, no. 1 (2000): 25.

⁹⁰ Paraphrase from Nietzsche, *On the Use and Abuse of History*.

⁹¹ "If Israel ends its occupation of the West Bank and allows it to join with Gaza, the result could be two states: a Palestinian one alongside an Israeli one. But, if you accompany that with

sides of the security fence are truly best served by a Two States solution. Some form of federalism,⁹² enabling different communities to live alongside each other and sharing at least one geographical region (Jerusalem, not unlike Brussels today) would, arguably, have more in common with the regional structure⁹³ that existed prior to the dismantlement of the Ottoman Empire (and enabled the peaceful coexistence of various religious denominations⁹⁴) than a Two States solution.

Conclusion

A lot of dreams have been invested in the Palestinian constitution. Its ambitious provisions promise a socially progressive, inclusive and tolerant State. Yet, today, these drafts have lost the semantic ambiguity that typically characterizes constitutions in the making. It is all too easy to decide that those constitutional words have lost any hint of their politically – and tentatively – induced performative⁹⁵ force. It may be tempting to imagine what things may be like had the Oslo Agreements led to a successful constitutional draft (established prior to the PA's coming into existence); or what could have happened had Arafat not believed that he could somehow artificially turn

a civil rights movement inside Israel, the goal could be very different: a secular, democratic state "for all its citizens", where Jew, Christian and Muslim are equal." D. Hearst, "Could Arab staying power ultimately defeat Zionism?," *The Guardian*, August 5, 2011.

⁹²) This is an old idea: "Some important voices within Palestine, especially Jewish organisations such as Brit Shalom (Covenant of Peace, founded in 1925) and later Ihud (Union, founded in the 1940s and represented by such prominent intellectuals as Martin Buber and Judah Magnes), argued in favor of some form of federalism or binationalism on both practical and moral grounds. Such voices did not, unfortunately, find resonance in the largely Zionist-driven Jewish population, nor yet in the nationalist-driven Palestinian leadership." Nusseibeh, *What is a Palestinian State Worth?* (see note 73).

⁹³) "The Ottoman administrative structure consisted of geographic districts called *sanjaks*, each with a central governorship responsible for running local affairs. These governorships were connected to a regional capital, and these in turn to the so-called High Portal in Istanbul. The area that later became Mandatory Palestine comprised three *sanjaks*." Nusseibeh, *What is a Palestinian State Worth?*, 227.

⁹⁴) "The indigenous Jewish presence in the Arab world made itself felt in politics [...], business [...], and literature. While the Jewish minority did not enjoy a perfect political existence, yet relations never deteriorated to the inhumane and life-destroying levels reached in Europe." Nusseibeh, *What is a Palestinian State Worth?*, 226.

⁹⁵) For more developments on this declarative / performative ambiguity, see page 3 of this article (introduction).

back the legal clock to a pre-1967 legal patchwork. It is equally tempting to imagine what could – still – happen if, instead of being merely tolerated, perduring customary laws were encouraged to lend their full gravity to a burgeoning civic movement. The sovereignty deficit that plagues the Palestinian constitution-making effort may turn out to be an asset if, by standing in the way of establishing a constitutional democracy from the top down, it has allowed customary practices to flourish. For this customary framework may well prove – once again⁹⁶ – invaluable in constructing “true home rule” or, to use Gandhi’s words, “Swaraj.”

⁹⁶ See section 3 on the important role played by customary law during the first Intifada.