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Palestine's Basic Law: Constituting New Identities Through Liberating Legal Culture†

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I. ABSTRACT

Writing a Basic Law or a Constitution represents a significant moment in defining a country's identity. For Palestinians, it is a particularly complex process as the discourse of the Basic Law is narrated under the limitations of the Oslo Accords and subjected to future negotiations. Thus, the destiny of the Palestinians is far from secure. Despite the postcolonial character of the debates about the Basic Law and the prosaic character of its text, it challenges the Palestinian legacy of colonialism and occupation. Through this engagement with these "Others," the reconstruction of Palestinian identity takes shape.

The process of drafting a constitution is an important moment of self-affirmation for any society, affirming its collective right to

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self-government according to its own laws. In the Fall of 1997, the Palestinian Legislative Council[1] adopted the third reading of the Basic Law and moved Palestine closer toward possessing its own constitution. As the preamble makes clear,[2] adopting the Basic Law for the Palestinian Authority is a phase of the struggle for self-determination led by the Palestine Liberation Organization (PLO). Moreover, it paves the way for adopting a permanent constitution for a Palestinian state.

This article's primary focus is the role that drafting the Palestinian Basic Law plays in defining Palestinian identity. The process of drafting the text has both legal and cultural implications. This article is also concerned with the details of the Basic Law.

The Oslo Accords constructed another Palestine in the twentieth century.[3] Today, the Palestinian National Authority (PNA) represents a new incarnation of people subjected to a series of colonial occupations in the twentieth century.[4] The Oslo Accords, however, presents a double edged sword for Palestine and Palestinian identity because it simultaneously affirms and undermines the rights. The elliptical formulas about "legitimate rights" in the Oslo Accords and general ambiguity regarding the legal character of Palestine, however, leave two credible interpretations of the agreement. The interpretations are either: (1) a step towards self-determination or (2) a betrayal of that right.[5] Whatever the long term consequences of the process, Oslo has opened a new phase in the quest for Palestinian identity. The phase is one in which the

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1. For the powers and the composition of the Palestinian Legislative Council, see THE PALESTINIAN COUNCIL (Jerusalem Media & Communications Center 1996).

2. *See* BASIC LAW FOR THE NATIONAL AUTHORITY IN THE TRANSITIONAL PERIOD (Jerusalem Media & Communications Center, 1996) [hereinafter BASIC LAW].

3. *See* Declaration on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., 32 I.L.M. 1525 [hereinafter Oslo Agreement]; *see also* Israel-Palestine Liberation Organization Agreement on the Gaza Strip and Jericho Area, May 4, 1994, Isr.-P.L.O., 33 I.L.M. 622 [hereinafter Cairo Agreement]; Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (Oslo II), Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 650 [hereinafter Interim Agreement] (further implemented by the Agreement on Hebron and the accompanying "Note for the Record," Jan. 17, 1997). For an Israeli-Palestinian academic exchange on the Oslo Accords, see EUGENE COTRAN AND CHIBLI MALLAT, THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES (1996).

4. For a review of the legal issues of the Palestinian/Israeli conflict, see JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE (1990).

5. *See* Eugene Cotran, *Some Legal Aspects of the Declaration of Principles: A Palestinian View*, *in* THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES 67-77 (Eugene Cotran et al. eds., 1996) (asserting the former); *see also* EDWARD W. SAID, PEACE AND ITS DISCONTENTS (1995) (asserting the latter).

quest for identity has moved from outside Palestine, to inside Palestine.[6] The change in location created space for developing Palestinian self-legitimacy by writing a Basic Law.[7]

Oslo forced the Palestinians to discuss the immediate imperatives of government and the practical issues associated with the development of a legal system.[8] These problems do not, however, arise within the normal context of people taking their first steps towards self-determination. Rather, the Palestinian situation operates in very particular conditions.

Oslo created the PNA, but provided it with a patchwork of territorial and jurisdictional units. Thus, basic assumptions, which governments usually rely on, do not apply. For example, territory that the Palestinians control is divided into small "fully autonomous" areas. Area A consists of approximately 70% of the Gaza strip and 4% of the West Bank.[9] Area B consists of 26% of the West Bank, which has a Palestinian civil administration, but not full security control.[10] These areas are not contiguous, and despite agreements, a safe passage between the areas does not exist.

This territorial layout not only hampers economic life, but also makes simple administrative tasks difficult. For example, school inspectors cannot freely move from one area to another. As a result, Palestine began creating its political and legal institutions in significantly more difficult circumstances than most other ex-colonial territories.

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6. This location change is significant. Until 1993, Palestinians as an occupied people inside Palestine had great difficulty asserting their identity. This was left by force of circumstances to the Palestinian Diaspora. After 1993, the Diaspora was marginalized with the shift of the PLO from an organization in exile to an organization in office in Gaza. For a sensitive reading of the pre-1993 period, see Glenn Bowman, *A Country of Words: Conceiving Palestine from a Position of Exile, in* THE MAKING OF POLITICAL IDENTITIES 138-70 (Ernest Laclau ed., 1994).

7. Many drafts of the Basic Law exist. I am working from two published English texts. *See* BASIC LAW, *supra* note 2; *see also* manuscript draft dated August 28, 1996, and from the text which has received its third reading by the Palestinian Legislative Council (1997).

8. *See* Nabil Sha'ath, *The State in the Making: An Interview*, 3 PALESTINE-ISRAEL J. POL., ECON. & CULTURE 25-34 (1996).

9. The West Bank is divided into Areas A, B and C for the purposes of redeployment. *See* Interim Agreement, *supra* note 3, ch. 2, Annex, *reprinted in* 36 I.L.M. at 650, and accompanying maps.

10. *See id.*

The process has many uncertainties, including whether a State will exist and if so, the location of its boundaries.[11] By drafting a Basic Law under these circumstances, the Palestinians face the task of writing a narrative which has more significance than the usual constitutional instrument. They are both writing a legal narrative and etching a vital part of their identity.

II. CONSTITUTIONS

Societies take command of their own legitimacy by writing a Basic Law or Constitution.[12] Emerging from four centuries of Ottoman rule, followed by the British Mandate and Israeli Occupation, Palestine's Basic Law can become part of the grand narrative of self-determination.[13] To date, Palestinian identity has been submerged under waves of conquests. These conquests have relegated Palestinians to a secondary status in their own home and alienated their land through legal codes imposed by the various occupying powers.[14] The game of imperial power has consumed the people and land, and immersed every aspect of culture in colonial

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11. *See* Jeff Halper, *Resolving the Conflict: The Nation-State and Nation in Israel/Palestine*, PALESTINE-ISRAEL J. POL., ECON. & CULTURE 1997, at 65-72; *see also Netanyahu Presents his "Allon Plus" Final Status Map*, J. PALESTINE STUD., Autumn 1997, at 126-28; Prime Minister Benjamnin Netanyahu, *Address to the Council of Jewish Federations General Assembly in Indianapolis*, THE PRIME MINISTER'S REPORT, Nov. 17, 1997 (discussing the question of boundaries has assumed a greater importance in the Israeli Prime Minister's thoughts, both public and leaked, as he attempts to sell his idea of a Palestinian mini-state).

12. Constitutional law has a position in western jurisprudential lineage often seen as a product of the European enlightenment. A rich jurisprudence of governance beyond the western purview, however, is now coming into vision. *See* R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW (1995). The relevant Islamic jurisprudence can be found in the works of *siyar* and *siyassa*. *See* MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR (1966); *see also* ABDU'L-HASAM AL MAWARDI, THE ORDINANCE OF GOVERNMENT (Wafaa H. Wahiba trans., 1996).

The Islamic revival has produced some important work in this field. For an incisive review of Islamlist ideas, see Ahmad S. Mousalli, *Modern Islamic Fundamentalist Discourses on Civil Society, Pluralism and Democracy, in* 1 CIVIL SOCIETY IN THE MIDDLE EAST 79-119 (Augustus Richard Norton ed., 1995); *see also*, ABDULLAHI AHMED AN-NA'IM, TOWARDS AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW (1992); CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF AND THE SHI'IT INTERNATIONAL (1993) (reviewing the Shi'ite contribution).

13. *See generally* MUSA MAZZAWI, PALESTINE AND THE LAW (1996).

14. *See* Assaf Likhovski, *In Our Image: Colonial Discourse and the Anglicization of Law in Mandatory Palestine*, 29 ISR. L. REV. 291, 299-300 (1995).

values.[15] These values, which take shape in the architecture, literature, administrative systems and law have become so established, they appear as unquestionable formations of Palestinian identity.

Much of the postcolonial debate involves an attempt to grapple with the consequences of a process which conveyed the colonized onto the terrain of the colonizers.[16] This debate margins the topic of law and imbues it with a variety of features, portraying it as an objective system with neutral norms beyond the scope of cultural critique. This apparently un-contested character of Palestinian legal culture makes this objective picture all the more insidious and allows this image of law as a supra-culture to seep into the postcolonial panorama.

European colonial powers knew law was decisive in securing their occupation. They created a legitimizing mechanism more subtle than a direct assertion of power.[17] Given the colonizing role of law, the colonial powers inserted a Trojan horse into their colonies which, by degrees, replaced existing methods for legitimizing governance.[18] For Palestine, European colonialism arrived comparatively late in the form of the British Mandate. Nonetheless, it rapidly occupied the legal culture. Despite its short duration (1919-1948), British colonialism bequeathed an important postcolonial legal inheritance.[19] Palestinian society engages this history by writing a Basic Law which repatriates its legitimacy.

III. PALESTINE

The condition of Palestine makes writing a constitution a *sui generis* affair. Other societies have not faced this situation, and no ready comparisons exist. Former European colonial territories in Africa and Asia also faced the problematic tasks of writing constitutions for virtually new nations created during the late 1940s

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15. *See id.* at 300-01.

16. *See id.*

17. *See id.* at 302-04.

18. *See id.*

19. *See* Likhovski, *supra* note 14, at 292-359 (discussing the role the British Mandate in bringing the direct application of a European legal system to Palestine). Furthermore, it can be argued that the introduction of the Ottoman Land Code (1858) and the *Mejelle* (1874) saw the indirect influence of a European system (French) which inspired the methodology not the norms of those reforms. *See id.*

through to the early 1960s.[20] Their common colonial past and the campaign for independence, however, had a powerful effect in constructing their national identities. Despite political struggle and negotiations, a clear understanding of the objectives and territorial dispensation existed.[21] Palestine has none of these certainties.

South Africa has been compared with Palestine, perhaps because both conflicts reached an important stage in the 1990s.[22] The two cases, however, are radically different.[23] For example, the character of South Africa and its borders were never in doubt. The African National Congress, once legalized, successfully negotiated a transitional constitution and the conditions for the April (Liberation) Election in 1994. This transitional constitution served as a bridge to creating the basis for free South African people to draft their own constitution.[24] The African National Congress argued that South Africans could not freely develop their own political system until they were free from apartheid.[25] After the elections, the people could freely choose their own form of government.[26] This explains the insistence that the pre-election constitution, adopted in 1994, could only be transitional because it's adoption occurred under the previous racist regime.[27] After the elections, the Constitutional Assembly framed the final constitution in conditions free from the tyranny of apartheid.

The legal framework which created the political environment leading up to the South African elections demonstrates the difference in conditions from Palestine.[28] South Africa's transitional phase premised itself on a known starting point and a known des-

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20. *See* Hugh Corder, *Towards a South African Constitution*, 57 MOD. L. REV. 491, 492 (1994).

21. *See id.*

22. *See* Adrien Katherine Wing, *Democracy, Constitutionalism and the Future State of Palestine*, *in* PALESTINIAN ACADEMIC SOCIETY FOR THE STUDY OF INTERNATIONAL AFFAIRS (1994).

23. On the character of South Africa from the liberation perspective, see MARIA VAN DIEPEN, THE NATIONAL QUESTION IN SOUTH AFRICA 4 (1988).

24. For a discussion on the process of drafting the interim constitution of 1994, see Corder, *supra* note 20.

25. *See id.*

26. *See id.*

27. For a discussion of the politics of the negotiations, see HERIBERT ADAM & KOGILA MOODLEY, THE NEGOTIATED REVOLUTION: SOCIETY AND POLITICS IN POST-APARTHEID SOUTH AFRICA (1993).

28. *See* Corder, *supra* note 20, at 506.

tination. Palestine's transitional phase, however, is more complex because disagreements exist on both the point of departure and the object of the journey. Israeli insecurities only recently allowed their leaders to utter the words "Palestine" and "Palestinian." The latter description of the West Bank remains a contested one for the Israeli 'national camp,' which insists on using the designation "Judea and Samaria," or at best, "the territories."[29]

By the 1990s, the South African liberation movement could deal with a white minority which had given consent to a new democratic dispensation within South Africa in the 1992 referendum. The subsequent negotiations concentrated on the modalities of creating an inclusive, multi-national, multi-language and multicultural order. In the Israel/Palestine case, each national narrative attempted to deny the validity of the other. The Oslo Accords created the possibility that in formally recognizing each side, the basis of replacing conflicting narratives with relational ones existed. Inequality between the parties, however, necessarily means the Israeli national narrative tends to be dominant. At each stage, the peace process appears dependent on Israel's unilateral acts and its recognition of Palestine.

Palestinians, however, have taken the initiative outside of this dependency and engaged in a significant discourse of state building by writing a Basic Law. The Palestinian National Council adopted a resolution following the formal Declaration of Independence[30] and asked the Legal Committee to carry out the task.[31] Thus, the Palestinians decided to draft a constitutional document outside the scope of the Oslo Accords. In 1993, the Executive Committee of the Palestine Liberation Organization discussed a draft and initiated a wider discussion.[32] In February 1994, the Jerusalem Media and Communications Center (JMCC) organized a conference to present a second draft.[33] Organizations of Palestinian civil society

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29. *See* NORMAN G. FINKELSTEIN, IMAGE AND REALITY OF THE ISRAEL-PALESTINE CONFLICT (1995).

30. Sometimes called the "Algiers Declaration" and adopted in 1988.

31. For a discussion of the significance of this instrument, see F.A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L L. 301, 302-06 (1990); *see also* J. Crawford, *The Creation of the State of Palestine - Too Much Too Soon*, 1 EUR. J. INT'L L. 307, 308-13 (1990).

32. *See* Anis Al-Qasem, Introduction, *in* DRAFT BASIC LAW FOR THE NATIONAL AUTHORITY IN THE TRANSITIONAL PERIOD 3-4 (Jerusalem Media & Communications Center 1996).

33. *See id.*

such as lawyers, political organizations, women's groups, and the universities, contributed and actively engaged in constitutional discussions.

The Oslo process changed political reality for Palestinians. After establishing the Palestinian Authority,[34] the focus for a constitution went beyond discussions regarding a political campaign for a state to the regulation of a Palestinian central power authority. As a result, formal institutions of the growing Palestinian state, such as the Ministry of Justice, engaged civil society, and made the process part of the formal structures of society. While more conferences were organized after the January 1996 Palestinian Legislative Council (Council) elections, the civil process became the center for debate.

This intersection between Palestinian civil society and the institutions of the incipient Palestinian state reveals the strong influence which drafting a constitution can have in creating a sense of identity. The Council's formal sessions and the seminars, conferences, and commentaries of the various drafts, continue to play a critical role in recasting Palestinian identity and in securing a contemporary reality for Palestinian polity.

IV. THE DRAFT BASIC LAW-NARRATIVE AND TECHNIQUE

The first chapter of the Draft constitutes a bold legal narrative. Article two, which appears straight forward, reads: "The Palestinian people is [sic] the source of all authority and shall exercise this authority, during the Transitional period, through the legislative, executive and judicial authorities in the manner provided in this Basic Law."[35]

This simple statement both includes and possibly excludes Palestinians. Reference to the transitional period and the institutions it creates appears to limit the endowment of authority to the inhabitants of the West Bank and Gaza. In one brief article, the Basic Law asserts and questions national identity. Millions of inhabitants in the Palestinian Diaspora appear beyond its scope.[36] The Basic Law appears hostage to the negotiations which reserved the refugees issue for the permanent status talks. At another level,

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34. After May 4, 1994, the Authority became known as the "Cairo Agreement." *See id.*

35. Draft of the Basic Law for the Palestinian National Authority art. 2 (1996).

36. *See id.*

however, it legitimizes the Palestinians of the West Bank and Gaza as their own lawmakers and radically breaks with the silence of the past. In the assertion of article two, the legal identity of a people finds at least a hesitant voice.

The Basic Law draft consists of seven chapters and provides for the establishment of organs for central and local government, including the judiciary.[37] The Draft also contains sections guaranteeing human rights and the rule of law. The text looks like many regular constitutional documents combining the specification of state organs with citizen rights. A critical aspect of the Basic Law is the apparent limitation of the Palestinian citizens.

While concerned with implementing an interim self-government, the Basic Law re-affirms an unchanged role for the PLO in the wider Palestinian community. Article 56[38] ensures the Palestinian people will retain the benefits of the degree of legal personality gained in the international arena in the past twenty years.[39] Article 56 provides:

This Basic Law shall apply during the transitional period, but shall not affect the powers and duties of the Palestine Liberation Organization and its organs including its powers to represent the Palestinian people in foreign and international relations and relations with foreign governments and international organizations.[40]

This clause indicates the dual legal regime that the Palestinian leadership created in the interim period. It attempts to demonstrate that the Oslo Accord does not detract from the gains the Palestinian people made in their struggle for self-determination, especially in the manner that the United Nations system has recorded.[41] Thus, the apparent restrictions imposed upon the Palestinian Authority in the Cairo Agreement and Oslo II on international relations are overcome.[42]

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37. *See id.*

38. *See id.* art. 56.

39. *See id.*

40. Draft of the Basic Law for the Palestinian National Authority, art. 107 (1996).

41. *See* PAUL J.I.M. DE WAART, DYNAMICS OF SELF-DETERMINATION IN PALESTINE: PROTECTION OF PEOPLES AS A HUMAN RIGHT 145-46 (1994).

42. *See* Cairo Agreement *supra* note 3, art. V(2)(b), (c), *reprinted in* 33 I.L.M at 622. The wording of the Cairo Agreement appears to limit the capacity of the PLO to act on the international stage when doing so "for the benefit of the Palestinian Authority." *Id.; see also* Interim Agreement, *supra* note 3, art. XI(5)(a), (b)-(c), *reprinted in* 36 I.L.M. at 650. The Interim Agreement contains no reference to the PLO, because its purpose is transferring powers to the elected Council. In both agreements, wide areas of interna-

All constitutional instruments have international implications that provide the basis for sovereign expression. The Basic Law in a literary alliance with the Oslo Accords deals with this issue. In general, the Oslo Accords appears successful until the Basic Law addresses human rights obligations.

The third draft contains an important shift in phrasing. The rights and duties assigned to the "Palestinian Authorities," *al sulatat al-falistiniya*, used in the early versions, are now replaced with the definite Palestinian Authority, *al-sulta al-falistinya.*[43] Its use in article 9 removes the previous ambiguity regarding the body assigned to uphold human rights and to whom the citizens can direct claims.[44] Post-Cold War constitutions contain such provisions, and similar clauses appear in the constitutions of Eastern Europe and those of the former Soviet Union.

There is much debate over the exact effect of these provisions. The Palestinian Basic Law leaves room for conjecture because most of the international instruments mentioned in article 8 require states as parties.[45] The effect of such a provision remains an interesting legal question because the permanent status of the territory is yet to be negotiated. The transitional character of the text could undermine this important area of constitutional rights. If international law does not recognize Palestine as a state, article 9 may have little legal reality.

Other drafted clauses include, a grand narrative designating the flag and one establishing Jerusalem as the capital of Palestine. These clauses make the reader aware that the simple legal technique of drafting a constitution reaches beyond drafting, and encodes the narrative of Palestinian statehood.[46] Article III states that, "during the Transitional Period the Palestinian Authorities may set up the government headquarters in any other place in Palestine." Naming Jerusalem as its permanent capital gives Palestine a legal voice to a political struggle. By contrast, few other constitutions name a capital because where such a capital might be is

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tional activity which are usually associated with statehood are accorded to the Palestinian Authority although these activities shall not be considered foreign relations. *See* Interim Agreement, *supra* note 3, art XI(5)(a)-(c).

43. DRAFT BASIC LAW art.9 (1996).

44. *Id.*

45. *See* International Convention on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 360.

46. *See* DRAFT BASIC LAW arts. 8, 3 (1996).

purely a matter of internal decision. The political realities in the case of Palestine, however, necessitate the capital's inclusion in the Basic Law.

The Basic Law perhaps sets out the destination for the Palestinian people which the Oslo Agreements obscures. The Basic Law registers the story of the Palestinian people in the text. For example, it maps out the institutions of a state, its acceptance of international human rights obligations, and names a capital.[47] The document is highly positivistic and seemingly ordinary in its structure, provisions, and institutions. At first glance, the reader might be disappointed that it is not more radical either in content or in methodology. In its ordinariness, however, the reader can begin to appreciate the extraordinary challenge the Basic Law presents to Israel and the Palestinian past.

The contradictory implications of the text's phrasing present a series of theoretical and practical issues, which combine the Palestinian dilemma with constitutional theory. In the period since 1945, the national liberation struggles effectively defeated European colonialism. The states created through colonial occupation have seen a transfer of power, from the imperial elite to local politicians. These postcolonial states gained their independence and adopted constitutions, which their former colonial rulers supported. Their constitutions reflected many social and political characteristics of the constitutions the colonial powers adopted.[48] Imperial powers, such as Britain, talked of how they had exported a Westminster-type constitution. In reality, the former British colonies discovered they adopted a constitutional model which neither existed in Westminster nor was suitable for world-wide purchase. The British-made constitutions eventually collapsed within a few years.

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47. DRAFT BASIC LAW intro. (1996).

48. This goes to heart of postcolonialism and the postcolonial character of the language and knowledge that we use in addressing these issues. The adoption of constitutions, the forms which they take, and the territories and peoples they constitute, affirm colonial power by assigning identity in the contemporary world. The debates about the type of constitutional forms, leaving aside the boundary issue, necessarily constitutes an engagement with the hegemonic postcolonial discourse in which differences to it have been explained as relative to it. It appears that an escape from the postcolonial can be elusive. *See* Stuart Hall, *When was "The Postcolonial?" Thinking at the Limit*, *in* THE POSTCOLONIAL QUESTION: COMMON SKIES, DIVIDED HORIZONS (Iain Chambers & Lidia Curti eds., 1996).

The colonial heritage of the former British colonies includes constitutional theory, legal systems, and most importantly, a new colonial identity which overlays the pre-colonial identity. These two issues become connected as legal cultures and symbols of identity submerged in the new political order. The constitutional instruments reflect the success of the occupying legal cultures, which had been a necessary part of the colonial project. In occupying territory, the colonial power found it imperative to destroy the centers of legitimacy which existed for the colonized people.

The colonization of legal cultures created a fundamental distinction in contemporary jurisprudence between occupying and occupied legal cultures. Edward Said explains how Europe gained a "superior location" through colonial occupation which has Europeanized the location of all culture.[49] In the legal field, the European world views western law as universal, metropolitan and advanced, whereas, non-western law as local, indigenous, and backward.[50] Modernizing society represents the justification for the occupation of legal cultures.[51] This scheme uses fairly neutral terms to describe the process. For example, "received law" politely connotes the direct imposition of the colonial law. Direct imposition is also occasionally described as a "legal transplant," a benign, almost medical term. The occupied people's legal system is more often described as "customary," "traditional," or even "religious." Imposing colonial law was also justified as a remedy for the deficiencies of the host society's legal culture. While some norms of the occupied system may survive, particularly in the area of personal status, the occupier's legal methodology often subsumes these norms.

The invading legal system also frustrates the host culture's development and dynamism. Moreover, the invading legal system draws sectors of the host society into a new legal cadre, which accepts this new methodology and begins to think of its own system as backward. In the case of Arab/Islamic legal narratives, the rich juristic methodology of pluralistic discourse becomes neglected in favor of western rules. Important jurisprudential questions, such

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49. *See* EDWARD SAID, ORIENTALISM 1, 7-28 (1978).

50. This is true for all cultural forms. *See* HOMI K. BHABHA, THE LOCATION OF CULTURE (1994). *See generally* NICHOLAS B. DIRKS, COLONIALISM AND CULTURE (1992).

51. *See* ALI IBN ABI BAKR, THE HEDAYA OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS, at xxvi (Charles Hamilton trans., 1791).

as the concept of self-determination (*umma)* and the discourse on legality (*qanuni*) and legitimacy (*shara'iya*) in the context of the legal regulation of governance, become buried beneath a rigid positivistic exposition of rules.

This effect can be seen in the field of constitutional law, beginning in the late nineteenth century with the importation of European constitutional ideas.[52] For most of the twentieth century, European liberal or socialist doctrine has dominated constitutional discourse in the Arab world.[53] Within Arab/Islamic lineage, it appears as if a governance jurisprudence had never existed. This was confirmed in 1947 when Pakistan declared itself to be an Islamic State, but adopted a "Westminster-type" British constitution.

The same pattern appears in some of the literature on Palestine. These Palestinians seek most examples of exhortations from a range of western constitutions.[54] The idea that Islam can make a contribution to constitutional law or pluralism has generally been dismissed. Adrien Wing contends that "in drafting the Basic Law, Palestinians must confront the inevitable tension between the demands of democracy and Islam."[55] This view has such a long history within western jurisprudence that it is now presented as fact rather than argument.[56] Legal Orientalism[57] developed a narrative of Islamic law which either omits constitutional law and all public law entirely, or construes it as irrelevant or too backward for consideration.[58]

Wing's comparison between Palestine and South Africa overlooks the Islamic contributions to South African liberation. It also fails to recognize the radical Islamic ideas about democracy and freedom that South African Muslims have developed.[59] Where Wing concentrates on a negative balance sheet of women's

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52. *See* ELI KEDOURIE, THE POLITICS OF THE MIDDLE EAST 53-56 (1992).

53. *See id.*

54. *See, e.g.,* ADRIEN KATHERINE WING, DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE 23-30.

55. *Id.* at 25.

56. For a similar viewpoint, see ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS (1995).

57. *See generally* John Strawson, *Islamic Law and English Texts*, 6 LAW & CRITIQUE 21 (1995).

58. *See id.*

59. *See generally* Farid Esack, QUR'AN, LIBERATION AND PLURALISM: AN ISLAMIC PERSPECTIVE OF INTERRELIGIOUS SOLIDARITY AGAINST OPPRESSION (1997).

position in Islam, Farid Esack, the South African Muslim thinker and activist, talks about the "gender jihad." Esack argues that the assault on women's rights comes from the "period of Muslim decline."[60] Thus, Islam as a whole necessarily makes an important contribution to the Palestinian debate, more than the limited program of Islamic organizations such as Hamas.[61]

A. The Intifada Against Postcolonial Law

The problem with writing the Basic Law in the context of Oslo does, however, become clear. Oslo breaks the official silence of a people, and assigns them an identity laced with conditions. While the United Nations unambiguously talks about the unconditional right to self-determination,[62] the Oslo Accord talks coyly of "legitimate rights." It appears to condition the legitimate rights of the Palestinian people on their adherence to the Oslo Accords, framed entirely as an "interim self-government."[63] Thus, writing the Basic Law can be seen either as part of the constitutional process of self-determination, or as an internalization of the conditional right to "interim self-government."[64]

The problem with the interim self-government framework is that it forces people to write a Basic Law which measures up to the Oslo Accords' expectations. This analysis construes the Basic Law not so much as a repatriation of legitimacy, but rather as a postcolonial element of confidence building. In this context, the Basic Law represents an element of negotiations, and is presented to the

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60. *Id.* at 240.

61. *See* ZIAD ABU-AMR, ISLAMIC FUNDAMENTALISM IN THE WEST BANK AND GAZA 128-29 (1994).

62. *See Declaration on the Granting of Independence to Colonial Peoples and Territories*, G.A. Res. 1514(XV), U.N. GAOR, (1960); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations,* G.A. Res. 2625(XXV), U.N. GAOR (1970); Western Sahara, 1975 I.C.J. 12, 28-30 (Oct. 16); *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21). The law on self-determination of peoples in the colonial context is quite settled and has been further clarified by the International Court of Justice in the Namibia Case and the Western Sahara Case. These cases clarify an international consensus that a colonial regime contravenes the right to self-determination, and that the people themselves must choose their own destiny through a free expression of their will. *See generally* ANTONIO CASSESSE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995) (discussing the history, development and operation of the principle of self-determination).

63. *See* Oslo Agreement, *supra* note 3, pmbl., art. III, *reprinted in* 32 I.L.M. at 1525.

64. *See* DRAFT OF BASIC LAW intro. (1996).

Israeli government as evidence of the Palestinian Authority's good governance practices. The Basic Law also serves to sway Israeli public opinion in favor of the Palestinians.

It is precisely at this point that Palestine's colonial heritage becomes quite clear. The British mandate clearly attempted to limit Palestine's constitutional horizons.[65] As Norman Bentwich, the Legal Advisor to the government of Mandatory Palestine, made clear:

> It was recognized by Great Britain and by the Council of the League [of Nations] that, on account of the special purpose of facilitating the establishment of the Jewish National Home, there could not be at once democratic government but the process must be developed in stages. The mandatory therefore directed to secure the development of self-governing institutions and to encourage local autonomy. But the Arab majority could not be allowed uncontrolled legislative power to prevent the fulfillment of the Mandate in relation to the minority Jewish population.[66]

The Oslo Accords' wordings reflect Bentwich's stages approach. The entire interim self-government project is conditioned on steps towards self-government on small plots of land integrated into a specified time frame.[67] The Declaration of Principles (Oslo I) provides for the Palestinian Council election and the transfer of responsibilities from the Israeli Military Government and Civil Administration in these controlled stages.[68] Oslo I provides that Palestinians will be able to gain a measure of control over "education and culture, health, social welfare, direct taxation and tourism."[69] Oslo II provides that these powers will then be extended with the Legislative Council election, which took place in January 1996.[70] This incremental approach, which denies the Pal-

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65. NORMAN BENTWICH, ENGLAND IN PALESTINE 88-89 (1932). This book is consciously evocative of Milner's book on Egypt. *See generally* ALFRED MILNER, ENGLAND IN EGYPT (1892).

66. BENTWICH, *supra* note 65, at 88-89.

67. *See* Oslo Agreement, *supra* note 3, art. VI(2), *reprinted in* 32 I.L.M. at 1525; Interim Agreement, *supra* note 3, arts. IX, XVIII, *reprinted in* 36 I.L.M. at 650.

68. *See* Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, *reprinted in* 32 I.L.M. 1525 (entered into force Oct. 13, 1993) [hereinafter Declaration of Principles].

69. *Id.* art. VI(2), *reprinted in* 32 I.L.M. at 1525.

70. *See* Israel-Palestine Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, with Selected Israel Annexes, Sept. 28, 1995, arts. IX, XVIII,

estinian people full power, even within tiny geographical areas, confirms the Accords' postcolonial character.

These stages of autonomy treat the Palestinian people as if they are not ready to exercise their rights. Moreover, these stages have turned into examinations, which if passed successfully could lead to other, unspecified destinations.[71] These "other matters" are left as subjects for discussion in the permanent status negotiations. They will "cover the remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with neighbors, and other issues of common interest."[72]

The openness of the process increases the conditional pressures on the Palestinians. In the 1930's, the British colonial regime expressed quite freely what this conditionality meant: "The government of Palestine, as in most countries is divided between central and local authorities. In its central aspect it is a benevolent autocracy. In its local aspect it includes representative and self-governing bodies subject to a certain control and supervision of the central authority."[73] Perhaps only the word "benevolent" now appears out of place in what could be contemporary commentary.

Norman Bentwich was not alone in expressing these views about governance and law in the 1920's and 1930's. Similar views can be found in contemporary works and memoirs by colonial officials.[74] On the importance of law to the colonial project, Sir Roland Storrs wrote: "Pleasant as was the uncharted freedom of a military governor and reluctant as any governor would be to circumscribe it, I soon began to feel, that unless I obtained good legal advise, no subsequent Act of Indemnity could cover my irregularities."[75]

Storrs' second legal advisor was Norman Bentwich, of whom Storrs says, "I knew him at Cambridge and in Egypt, and cherished an admiring friendship for an Israelite who, with all his talents, was

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reprinted in 36 I.L.M. 551 [hereinafter Interim Agreement on the West Bank].

71. *See* Declaration of Principles, *supra* note 68, art. V(3), *reprinted in* 32 I.L.M. at 1529-30.

72. *Id.*

73. *See* BENTWICH, *supra* note 65, at 239.

74. *See, e.g.*, HARRY CHARLES LUKE & EDWARD KEITH-ROACH, THE HANDBOOK OF PALESTINE (1922).

75. ROLAND STORRS, ORIENTATIONS 354 (1937).

without guile."[76] The colonial regime saw law as both a practical and ideological requirement. Law clothed the regime's power with at least a thin layer of legitimacy.

Nonetheless, *Palestine Parodies*, a work that three High Court judges "printed for private circulation," reveals the general contempt felt towards colonial people and the legal order.[77] The book discusses legal and administrative themes, depicting both Arabs and Jews as incompetent and corrupt.[78] Furthermore, any claim to freedom by either is seen as absurd.[79] These colonial attitudes persist.

In a Forward to a series of lowly colonial officials' memoirs, Anthony Kirk-Greene comments on their work, "there was a common feeling of a practical and useful task well done, although some thought that more could have been achieved had independence come about more slowly."[80] In 1994, the first series entitled *Pasha of Jerusalem* echoed these sentiments.[81] These attitudes have been secreted within the Palestinian legal system and sustained through educational projects, such as the Jerusalem Law Classes. These classes set out to validate colonialist law at the expense of other legal culture.

These sentiments are linked to the Basic Law discussion because the Oslo Accords are framed with the legal methods of the English common law system. This methodology is particularly flexible. It is rooted in the development of principles through conflicts, rather than in the attempt to use principles as a method to solve conflicts. The Israeli legal system has inherited this methodology. Moreover, it has marked the methodology in the Accords text through the open ended formulas, circular references and general imprecision.[82]

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76. *See id.*

77. MUSTARD & CRESS, PALESTINE PARODIES: BEING THE HOLY LAND IN VERSE AND WORSE (1938). Assaf Likhovski's article contains some discussion of this "work," but it is difficult to understand, as it is written in a style which the authors claim follows A.P. Herbert, Lewis Carroll, Henry Graham and Kipling, which may have meant sense to English public school boys of the 1930s. *See* Likhovski, *supra* note 14.

78. *See id.*

79. *See id.*

80. EDWARD KEITH-ROACH, PASHA OF JERUSALEM: MEMOIRS OF A DISTRICT COMMISSIONER UNDER THE BRITISH MANDATE pmbl. (1994).

81. *See id.* at xv.

82. For example, such phrases as "within the terms of this agreement" are common.

As Shehadeh points out, however, the French Civil Law system has also guided the Palestinian legal community. The French Civil system begins with principles, abstract formulations, and codes which reconstruct the issues of a conflict.[83] Joel Singer, an Israeli legal advisor, explains that the ambiguities of the Declaration of Principles provides Israel with wide discretion.[84] Singer's interpretation illustrates the English legal tradition's usefulness to the stronger party.

The Declaration of Principles fully reflects the studied ambiguities of English law. For example, omitting definite articles in the passages dealing with the Council's jurisdiction demonstrates ambiguity. The jurisdictional provision reads, "Jurisdiction of the Council will cover West Bank and Gaza Strip Territory."[85] This language renders the Council's potential scope of jurisdiction entirely indeterminate.[86]

Further ambiguities intrude into the territorial question over the West Bank's areas A, B, and C, as divided by the Interim Agreement. By creating conditions for the elections, Israel withdrew from area A.[87] The Interim Agreement stipulates, however, that three further stages of re-deployment will occur three months after the elections.[88] The Agreement does not specify the scope of these re-deployments. In addition, the Agreement does not contain an explanation of the significance of the re-deployments for areas B and C. As a consequence, it appears that Israel has complete responsibility for deciding the territorial limits of the Council's jurisdiction and the Palestinian authority. The English language and English law create vagueness in the scope of Palestinian jurisdiction over Palestine. With the Palestinian territories' issue unresolved, Israel's obligations become minimal and apparently unilateral.

Palestine's colonial history is stamped on its institutions and way of thinking. In parts of Palestine, elements of British Mandate

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83. *See* Raja Shehadeh, *The Weight of Legal History: Constraints and Hopes in the Search for a Sovereign Legal Language*, *in* THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES 3 (Eugene Cotran & Chibli Mallat eds., 1996).

84. *See* Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects*, JUSTICE, Winter 1994, at 4, 5-6 (1994).

85. *Id.* at 7.

86. The Council is now the Palestinian Authority and the Legislative Council.

87. *See* Interim Agreement on the West Bank, *supra* note 70, appendix 1, *reprinted in* 36 I.L.M. at 563.

88. *See id.*

law appear to remain in force. Birzeit Law Center indicates that the task of determining the possible legal regime in force has been difficult in both methodological and practical terms.[89] The Center has established an authoritative statement on laws in force at the end of each legal period in the twentieth century. These periods include the completion of the Ottoman, British, Egyptian (for Gaza), Jordanian (for the West Bank) and the Israeli control in Palestine. The Palestinians contribute to their own self-rule only after 1994, and the creation of the Palestinian Authority.

After 1994, the Birzeit Law Center's project poses an important challenge to Palestinian society. The project focuses on what legal system is best in Palestine, rather than on the preferred legal norms.[90] In a contradictory way, the myriad of competing legal systems within Israel offers a chance for Palestinians to take command of developing their own legal system. This occurs because the former occupying powers did not leave behind a single system. Because it is forced to make the choice, Palestine is a fascinating case study of the liberation of law process.

Palestine's legal history has been marked by resistance to the legal regime of occupying powers, particularly during the British and Israeli periods. Since 1967, resistance has taken the form of mass movements and legal challenges in the Courts, especially against the land seizures by the Israelis.[91] This resistance culminated in the "intifada," which began on December 9, 1987 and ended with the signing of the Oslo Accords on September 13, 1993.[92] The intifada provides the basis for the Oslo Accords and the Basic Law. It represents the defining struggle of the Palestinian people, forging a sense of unity between the peoples of the West Bank and Gaza.[93] In their rebellion against Israeli rule, Palestinians created popular sources of legitimacy through the committees and organizations. The rejection of the Israeli occupation

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89. Birzeit Univ. Law Center, Palestinian Self-governing Territories (visited Feb. 22, 1997) <http://www.birzeit.edu/law/Palestinian.html>.

90. *See generally* AY NIZAM QANUNI LI-FILASTIN? [WHICH LEGAL SYSTEM FOR PALESTINE] (1996).

91. *See* RAJA SHEHADEH, THE LAW OF THE LAND: SETTLEMENTS AND LAND ISSUES UNDER ISRAELI MILITARY OCCUPATION (1993); *see also* RAJA SHEHADEH, THE THIRD WAY: A JOURNAL OF LIFE IN THE WEST BANK, at vii (1982).

92. Judith Colp Rubin, *Heavy Turnout Hands Arafat Election Victory*, WASH. TIMES, Jan. 21, 1996, at A1.

93. *See* Sharon Moshavi, *Mideast Tensions Up/Arafat Sets Strike*, NEWSDAY, Aug. 29, 1996, at A7.

and Israeli's largely English legal regime provides the source for a new point of departure towards legitimacy.

V. RECONSTRUCTIONS

While withdrawals from a territory can be monitored and tested, withdrawals from sites of cultural occupation present more complex issues. A legal culture's liberation constitutes a moment in the creation of identity. The legal culture's liberation requires a reconstruction of law, and thus, mirrors and reinforces the process of creating an identity.

The Basic Law's ordinariness rebels against the occupation of a legal culture. By asserting the simple right of the Palestinian people as the source of their own legitimacy, the text begins a critical challenge. It, however, merely provides the basis for reconstructing a legal discourse from the Palestinian diverse history. Thus, it represents a beginning of the process.

The hybridity of Palestine's cultural formation allows for many possibilities. The reconstruction of a Palestinian legal discourse does not involve recapturing an essentialist past.[94] There is no Palestinian avenue of legal lineage which can be walked along. The colonial occupations of legal culture cannot be wiped away leaving the original below. The Basic Law creates a new basis for connection with legal lineage of Palestinian history. It allows a new legal cadre to review the flickering images of those legal pasts and to work with them anew.[95]

Restructuring Palestinian legal structure necessarily causes reconstruction of the Palestinian identity. The legal history includes narratives of many Islamic colonial powers and the PLO. In choosing between these various lineage, or by piecing them together, a Palestinian identity emerges. Constitutional texts do not encapsulate a legal-historical moment which builds on a pre-

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94. *See* Hillel Frisch, *Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families and the Palestinian Authority*, 29 INT'L J. MID. EAST STUD. 341, 353-54 (1997).

95. Many writings address these issues. *See* Fawaz Turki, *Palestinian Self-Criticism and the Liberation of Palestinian Society*, 25 J. PALESTINIAN STUD. 2, 5-20 (1996) (reviewing the days of "national unity"); NATASHA DUDINSKI & YASSER ABU KHATER, THE PALESTINIAN LAW ON FREEDOM OF THE PRESS: A COMPARATIVE SURVEY OF WESTERN DEMOCRACIES (1997); RA'ED ABDUL HAMID, LEGAL AND POLITICAL ASPECTS OF PALESTINIAN ELECTIONS 97 (1995); NATASHA DUDINSKI, RELIGION AND STATE IN PALESTINIAN SOCIETY (1996); ANNE BOURLOND, LEGAL EDUCATION IN PALESTINE (1997).

existing settled identity. Instead, these texts narrate a more dynamic experience articulating, not merely regulation over power, but those who are sovereign over it.[96] It is in the selection of narratives that a contemporary expression of a sense of self becomes apparent.

Emerging from colonial rule and occupation, societies cannot return to an unsullied state of affairs. In the present postcolonial period, former colonies are grappling with the consequences of a system of world domination. This system has created boundaries, assigned identities, and promulgated a system of knowledge. The West has secluded itself firmly and successfully within the globalization of knowledge that it claims to be universal. It accepts the existence of other narratives as exceptions or relative to the "universal." Law as a postcolonial culture becomes symbolic, as indicated by the universal/relativist debate on human rights in the international area.[97] Interest in the other's legal system does not change the overarching dominance of the western discourse. Decision to include or exclude other narratives reinforces its pivotal methodology.

The same processes occur in constitution-making. For Palestine, however, its hybrid colonial history necessitates a re-working of a competing lineage, creating the possibility of what Kevin Robins calls "an interruption."[98] "Cultural experience," he writes, "is always the experience of the others: the others, the real others are indispensable, transformational objects in historical change. History is created out of cultures in relation and interaction: interrupting identities."[99]

In tabulating the layers of different legal cultures, Palestine confronts the other cultures on many fronts. This multiple engagement with the others takes place in discussions within Palestinian civil society and within the state institutions. This popular engagement interrupts the postcolonial impositions of the Oslo Accords. The legal reconstruction redefines Palestinian identity.

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96. *See* Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 A.J. INT'L L. 359 (1996).

97. *See* John Strawson, *A Western Question to the Middle East: Is There a Human Rights Discourse in Islam*, 19 ARAB STUD. Q. 31, 49-50 (1997).

98. *See* Kevin Robins, *Interrupting Identities: Turkey/Europe Questions of Cultural Identity* 59 (Stuart Hall & Pauldu Gay eds., 1996).

99. *Id.*

Moreover, the narrative of the Basic Law reaches beyond the Ottoman Empire, British Mandate and Israeli occupation, and repatriates the legitimacy of Palestine.[100] These imperial powers have constructed a Palestine which can now begin to construct itself.

100. For a discussion of the jurisprudential issues, see Nicola Lacey, *Normative Reconstruction in Socio-Legal Theory*, 5 SOC. & LEG. STUD. 131 (1996).