

## **Governance and the Constitution in Palestine: From the Books to Action, and Back**

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**I. Introduction**

In 2003, Palestinians took to the street in protest against the public disorder and chaos that had reigned in the West Bank and Gaza Strip since the second Intifada as a result of the continuous militarization of Palestinian society and the unlawful actions of many armed Palestinian militias. The ‘prime minister’ of the Palestinian Authority (PA) at that time, Ahmad Qurei, literally joined the demonstration in the street, expressing his support for the protestors’ quest for more public safety and order.

It makes you wonder: who governs the West Bank and Gaza Strip?

In 2006, when Hamas won the legislative elections and formed a government under Ismail Haneyyeh, one of the main sources of conflict between the Hamas-led government and the president of the PA was the government’s level of involvement in the PA’s public finance, foreign affairs, and security and civil service personnel.

It makes you wonder.

In 2012, many Palestinians took to the street to protest against some of the PA’s Prime Minister’s (Fayyad) financial policies; in particular his plans to increase the price of certain basic goods. President Abbas was quoted talking about a ‘Palestinian Spring’ in sight.

It makes you wonder.

Also in 2012, Palestine was referred to by a UNGA resolution as a non-member state, making it possible for President Abbas to ratify many international treaties including the Rome Charter (ratified in 2014). Changes to official symbols were ordered in 2012 to reflect the switch from

the PA to the State of Palestine, but these remained mostly symbolic. Indeed, the travel documents issued by the PA (with pre-approved Israeli ID numbers) continue to refer to the PA as a result of an Israeli threat not to recognize any travel document that refers to the State of Palestine (as Israel alone controls the entry and exit points to and from occupied Palestinian territory).

It makes you wonder.

In 2014, news headlines referred to an ‘historic’ visit (that ended the following day) by the PA’s prime minister, Rami Hamdallah, and a PA cabinet meeting that was held in Gaza after seven years of division between PA-Fatah and Hamas, which since then, theoretically, form a consensus-government, but in reality the situation is very different.

It makes you wonder.

Just recently, a so-called Israeli coordinator in the West Bank and Gaza, ‘Yoaf Poli Mordakhi’<sup>1</sup>, announced that Gaza’s fishing area would be extended for 6 more miles from Gaza’s beach – resulting in an additional 400 million Shekels to the annual income from fishing in Gaza.

It makes you wonder.

This presentation, with its fancy title and sophisticated abstract is an inquiry and investigation into this simple question: Who governs the West Bank and Gaza Strip, and how? While the question is simple, the answer is very complex. This is because it involves territoriality, ethnicity, nationality, religion, services, people, gender, language, IDs and travel documents, citizenship status, areas or residence, etc. I do not promise to provide a comprehensive answer, but in this presentation I hope to provide possible approaches to the inquiry.

There are arguably two ways to look at governance as a process of governing, and as a result, to perceive the role of constitutions as a mechanism of decision-making – indispensable for governance: *Governance is either perceived as government or as effective control.*

Opinions about governance and constitutions affect our views on the place of written constitutions; law and the rule of law; the role of judges and jurisprudence; popular involvement or marginalization; the place of parliament and the role of otherwise neglected institutions such as the presidency; the army or the constitutional court; accountability of the government to its domestic constituency and its dependency on international foreign aid policy etc.

For example, in the literature many criticize the EU's foreign aid policy which is aimed at supporting 'rule of law' in Palestine. This is mainly the case because it subscribes to the Oslo framework (excluding any consideration of the Israeli occupation as an important variable) and because of the increasingly undemocratic character of the PA<sup>2</sup>. Another example is the coexistence of the apparently independent judiciary and the adoption of judicial review by a Supreme Constitutional Court with the consolidation of the authoritarian character of the PA. The schizophrenic approach in legal education to constitutions and governance form another example, where theoretical legal and constitutional studies, as well as jurisprudence, remain completely disconnected from the reality of power relations.

While this paper will not address all of these matters, they are mentioned here just as a reminder that, despite the theoretical and descriptive character of the presentation, they are nonetheless relevant for analytical and comparative purposes, as much as for concrete policy decisions.

## II. Governance as Government

There are typically two ways to consider governance as government. One either studies constitutions or otherwise one observes the behaviour of the main political actors. Constitutions – and, in most countries now, written constitutions – provide a more or less comprehensive guideline on ‘who governs’ and on ‘how government functions’. Because of the nature of constitutional provisions (as legal provisions generally), we often tend to forget that legal and constitutional rules are by definition normative; i.e. instead of describing who governs in reality they include a prescription about who *ought* to govern and how government *ought* to function. This is why interest shifts, as is often the case, to ‘real life’ constitutions, where a different narrative exists about who *ought* to govern based on *who governs* in reality, and about how government *ought* to function, based on how government *actually* functions in reality.

Arguably, these two approaches make sense for a legal positivist and a realist, respectively, with consequences for their methodologies and the results of their analyses. For our purposes, this distinction will be marginal as we will refer to constitutional principles, rules and institutions that are consolidated by the actions of main political actors. Most importantly, I will not attempt to make the distinction between a positivist and a realist approach, because these two approaches fail to provide a coherent and comprehensive account of governance and because ‘governance as government’ simply did not work in Palestine for reasons that I will explore below. The following sections outline the main characteristics of the ‘kind of government’ – which is a larger category than the ‘system of government’ which is prevalent in constitutional studies – that determines the identity of who governs<sup>3</sup>.

### ***2.1. A Unitary Government***

The Oslo Agreements referred to the West Bank and Gaza Strip as one political unit. The PA acted accordingly by declaring ‘legal and legislative unification’ as an overarching policy<sup>4</sup>. The Basic Law<sup>5</sup> of the PA endorses such a unitary-like government when limiting the legislative, executive and judicial powers to unitary organs: one president, one Palestinian Legislative Council (PLC), one government, and one judiciary. Interestingly enough, a federalist structure – or any similar kinds of arrangements for power sharing – between the West Bank and Gaza Strip, for example – was never on the table.

### ***2.2. A Decentralized Government***

The PA adopted ‘decentralization’ and implemented municipalities as the unique level of ‘local government’, as well as establishing a ministry for local government. Elections took place at the local level and a new municipality law was adopted which listed the prerogatives of the municipalities.

### ***2.3. A Territorially Defined Government***

The West Bank (including East Jerusalem) and Gaza Strip are referred to in international law as occupied Palestinian territory. The PA government is not a PLO-like government with a liberation agenda. It does not pretend to be representative of Palestinians world-wide. Instead, it is a territorially defined government. Although the Basic Law does not define the borders, it is assumed that the territory of the PA is the West Bank, including East Jerusalem, and the Gaza Strip – even if in reality its jurisdiction is limited as a result of the occupation.

#### **2.4. *An 'Autonomous' Government***

The Oslo Agreements do not refer to the State of Palestine – there is no evidence that it was even considered by the Israeli side as a possible outcome of the negotiations in the first place. Instead, reference was made to 'self-government' authority and to 'autonomous territories'<sup>6</sup>.

#### **2.5. *Democratic Government***

There is no consensus about what democracy means. It is often the case that a distinction is made between formal and substantial democracy. A formal conception of democracy is narrow and is often presented as meaning a system of government where free elections take place and where decisions in government depend on majoritarian choices. A substantial conception of democracy often includes guarantees for political minorities, where periodic elections ensure alteration in majorities and minorities in ways that justify the consideration of majority choices as a basis for decisions in government. It is safe to argue that – based on the approach of governance as government – the Palestinian Authority passes the test of democracy, formally or substantially conceived.

#### **2.6. *Representative Government***

Democracy is rarely exercised directly by the people, but indirectly through representatives. The PA is no different. Presidential and legislative elections took place in 1996 and in 2005-6. The PLC was mandated with the power to legislate. In cases of necessity, the President can adopt decree-laws, subject to confirmation by the PLC. The government needs the confidence of the PLC and is subject to possible withdrawal of confidence.

### **2.7. *Constitutional Government***

The PA adopted a written and unified constitution called the Basic Law. Despite possible critiques of the way the Basic Law was endorsed, the organ that adopted it, and its contradictory provisions, the intention of the drafters, the content of the text, and the way the main political and judicial actors implemented it, suggest that it is treated as a written constitution; it enjoys a hierarchically superior status compared to other legal sources. Once it came into force in 2002, it was never publically defied as irrelevant or unimportant – although sometimes it was not applied. It was amended twice (in 2003 and 2005) by respecting the procedures for constitutional amendments included in the text of the Basic Law.

### **2.8. *Limited Government***

The Basic Law adopts the separation of powers as a principle and the specific arrangements of government reflect that kind of power sharing – which is the basis of a limited government. It is safe to suggest that the PA’s system of government cannot be considered as a UK-like parliamentarism or a US-like presidentialism. There are similarities with what is often referred to as a semi-presidential regime. In Palestine, however, and contrary to France for example, the president is not part of the Council of Ministers and alone enjoys the power to issue decree-laws. At the same time, the members of the Cabinet can maintain their status as elected PLC members.

### **2.9. *Constitutionalist Government***

While there is no consensus on what constitutionalism means, it is possible to suggest a definition that perceives constitutionalism as a set of theoretical claims with normative content about the kind of limited state – not only the kind of limited government – we adopt.<sup>7</sup> A constitutionalist government is not just any kind of government, but instead a government that

departs from, for example, an egalitarian and non-discriminatory basis. It also departs from an acceptance of the idea that individuals enjoy basic rights and freedoms that are theirs as human beings. Based on the approach of governance as government, it is arguably the kind of system that was largely put in place in the PA.

### **2.10. Liberal Government**

The Basic Law is often referred to as one of the ‘most liberal’ constitutions in the Arab World. Since it was adopted years before the so-called Arab Spring, many commentators were looking at the Basic Law with amazement. The character of the constitution as liberal is largely the result of the inclusion of a rather generous list of rights and freedoms, which are also rendered justiciable – where justiciability refers to “the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur”<sup>8</sup> – through the control of the constitutionality of law and the government’s actions by a ‘Supreme Constitutional Court’.

### **III. Governance as Effective Control**

This second approach to governance departs from what I call here ‘governance as effective control’ – to distinguish it from the first approach of governance as government.

The concept of ‘effective control governance’ departs from the elephant in the room: the ugly ‘leviathan’ of the extraordinary and the exception behind the beautiful face of normality and the ordinary. In other words, the *power* behind governmental *authorities* – i.e. the ‘state’ – which is not used here to refer to sovereign nation states as per public international law. Instead, the state here refers to that ‘entity’ that is in the background whenever we talk about government; to that

‘legal order’ that monopolizes the ‘legitimate’ use of force; to that ‘unity, stability and existence’ that is being protected, valorized and given priority over any other principles of government.

Positivist and realist approaches help to individualize the characteristics of government in a similar way to glasses helping individuals to better see their surroundings – regardless of whether the clear view they see is that of a real world or not. This second approach to governance as ‘effective control’ is instead a panoramic view, from the sky, with the help of a telescope. While harmony, clarity and unity are the characteristics of surroundings that are viewed with the help of glasses, the panoramic view through a telescope does not show unity and harmony, but rather plurality and diversity.

As such, assuming the unity of the legal order as a point of departure for the analysis of governance and constitutionalism, is at best aspirational and at worse misleading. Instead, in this section, ‘pluralism’ will be used as point of departure for the discussion of ‘governance as effective control’. While there are of course differences in the way pluralism is used in legal and social studies, for example to refer to possible variety in interpretations, or normative pluralism, state-legal pluralism or legal pluralism, in what follows ‘legal pluralism’ will be used in this alternative approach to the understanding of legal and constitutional phenomena in Palestine. As such, it is suggested that the place of written constitutions and their role in governance-related decision-making needs to be revisited<sup>9</sup>.

### ***3.1. A Fragmented Government***

Palestine was first divided into three political units following the end of the British Mandate in 1947-8. The state of Israel was established as a result of the war over most of historic Palestine.<sup>10</sup>

Gaza and the West Bank were under two different administrations and received completely different treatments by Egyptian and Jordanian authorities respectively. The Israeli occupation maintained the legal and administrative fragmentation of the two areas, dealing with them as two separate entities under two separate military and civil administrations (as well as separate ID systems). East Jerusalem received different treatment too, as separate from the rest of occupied Palestinian territory.

With the Oslo Agreements, Israel intensified the permits regime and dealt with Gazans in the West Bank as 'foreigners' who needed a permit to remain in this region (and vice versa). The unilateral withdrawal from Gaza was undertaken without coordination with the PA. Israel then declared Gaza Strip as 'enemy territory', which resulted in a much more restrictive regime of entry and exit to and from the Gaza Strip.

The Hamas coup in Gaza in 2007 is accordingly not out of context. It simply makes sense. It is incorrect to suggest that it was the result of a Hamas-Fatah dichotomy or even that it was a fight over power and government alone. Structurally, it is more than that. Since 2007, Hamas controls Gaza and the PA, under President Abbas, controls the West Bank. The 'consensus government' under PA Prime Minister, Rami Hamdallah, does not govern Gaza despite the good and declared intentions of both factions.

It is worth mentioning, however, that the Israeli withdrawal from the Gaza Strip did not put an end to Israel's direct control of Gaza's airspace, sea and land borders (with the exception of one of Gaza's access points, the Rafah Crossing, which is managed by Egyptian authorities).

As for the West Bank, Israel still controls (directly or indirectly) almost every aspect of the lives of the Palestinians who reside there. The Oslo Agreements divided the West Bank into areas A,

B, and C. Area C is completely under Israeli civil and military control. In Area B, services are provided by the PA, but security is under direct (Israeli) military control. Area A is under complete PA control, although Israel maintains the right to enter any part of the area to directly enforce military orders and decisions whenever a 'security' matter is at stake.

The fragmentation of the West Bank and Gaza Strip, the stripping of East Jerusalem, and the division into Areas A, B, and C, coupled with the building of settlements that never stopped but instead intensified after the Oslo Agreements, has rendered the two-state solution impossible. The alternative is not necessarily a one-state solution – as we will see below.

### ***3.2. A De-Concentrated Government***

The governance of the West Bank and Gaza Strip after the Oslo Agreements is more fragmented than ever before. This is despite the fact that the PA never recognized, and in reality always contested, the fragmentation of occupied Palestinian territory, the dispersion of the Palestinian people, and the variety of legal regimes to which they are subjected as being part of a colonial and occupation project. Indeed, a PA minister from Gaza needs an Israeli permit to cross to the West Bank and vice versa. Accordingly, way before the 2007 split, if a minister is running his ministry from the Gaza Strip, a vice minister or a director general is, in reality, administering the ministry's affairs in the West Bank, and vice versa. If the chairperson of a security force is in the West Bank, his vice chairperson is often managing this force in Gaza, and vice versa.

The de-concentration of public services became the rule as a result of restrictions on the movement of Palestinians between West Bank cities during the second Intifada. As it was very difficult to reach Ramallah (the center of PA ministries), PA travel documents, for example, could from then onwards be issued in many other cities in the West Bank.

As for municipalities, and as a result of the 2007 split, a new decree-law was adopted which further restricted the autonomy of the municipalities (in the West Bank), making it possible for the Minister of Local Governance to substitute elected municipal council members with appointed ones. In other words, there was a decrease in the concentration of services and an increase in political centralization (including, but not limited to, an increase of control over possible international foreign aid required to pass through centralized PA offices).

### ***3.3. A Personally defined government***

The PA does not have an exclusively territorial jurisdiction as one may expect. It is always defined by person and/or function, including in Area A. As a matter of fact, the Oslo Agreements explicitly exclude any jurisdiction of the PA (referred to as the ‘Council’) over Israeli citizens (including, of course, Arab/Palestinian citizens of Israel). Palestinians with Jerusalem ID cards are not formally excluded from the jurisdiction of the PA. However, it is impossible for the PA to enforce the decisions of the Palestinian courts (in cases involving Palestinians from East Jerusalem) or to exercise police power over them (i.e. a criminal with a Jerusalem ID is often submitted to Israeli authorities). It is, for example, almost impossible for the Palestinian police forces to issue or enforce a traffic ticket to East Jerusalem residents in the ‘Area A’ city of Ramallah.

### ***3.4. A dependent Government***

Functionally also, the PA is limited to those functions explicitly transferred to it by Israeli military and civil administrations as a result of the Oslo Accords, or subsequent agreements or understandings. Those functions that are not transferred remain exclusively for the Israeli military and civil administration to determine. For example, all issues related to foreign

commerce and exchange are subject to Israeli unilateral control. The Paris Protocol is an example of a bilateral agreement that institutionalizes one-directional dependency of the PA on Israel, as a result of the continuous and exclusive Israeli control of the entry and exit points of the occupied Palestinian territory.

After the unilateral withdrawal of Israel from most of the Gaza Strip, an agreement was reached whereby an EU police mission served as a neutral observer of the implementation of an arrangement that enabled only authorized individuals (i.e. with an Israeli pre-approved ID) to enter Gaza. The borders were supposed to be observed by Israel through closed-circuit cameras. When Hamas came to power in 2006, the EU police force left the Rafah border. Since then, Egypt has unilaterally decided on entry and exit through this crossing point – while most passage of goods and persons took place through tunnels.

ID numbers for Palestinians from the West Bank and Gaza Strip are still issued following Israeli approved procedures and rules. The PA cannot offer an ID number for Palestinian expatriates unless it is obtained through the procedure of family unification – subject to Israeli pre-approval. For example, many Palestinian refugees from Syria – who are stateless – are currently living in difficult conditions in Jordan and Lebanon. However, they are not able to cross the border to the West Bank or Gaza Strip, because they do not – and cannot – have an Israeli-approved ID number for Palestinians. Accordingly they need Israeli-approved permits, which are of course impossible to obtain for Palestinian refugees fleeing Syria.

Gazans in the West Bank still need a special permit from Israel (and Jordan) to use the Allenby Bridge (which is the unique entry point for Palestinians with ID to the West Bank). Entry and exit of goods to and from the West Bank is also under exclusive and direct Israeli control.

The movement of Palestinians (including their leadership, such as PA President, Mahmoud Abbas, or Prime Minister Rami Hamdalla) from one city to another (say, from Ramallah to Nablus), is subject to Israeli jurisdiction (as they pass through Area C). The same rule applies when they travel outside the West Bank, say to London, where they need to pass through the Israeli-controlled Allenby Bridge to Jordan, and then to London, through Jordan’s Queen Alia International Airport. It should be noted that since the second Intifada, travel restrictions have been imposed on Palestinians from the West Bank and Gaza Strip prohibiting their use of Ben Gurion airport in Israel (while at the same time forbidding the construction of an airport in the West Bank and destroying the one that existed in the Gaza Strip).

### **3.5. *Authoritarian Government***

The term authoritarian regime refers to the rule “through strict, intrusive, and violent enforcement of law”<sup>11</sup>. It is used here as the opposite of a democratic regime.

Despite the appearance of democracy, the PA inherited authoritarian legacies from the past. These are the PLO legacy on the one hand, and Israeli military legacy on the other. Although most of the comments below are about the post-2007 coup, authoritarian government characteristics can be found in the PA from its establishment onwards. One example is the establishment of the so-called ‘state security courts’ which are in reality (Palestinian) military courts that apply (PLO) military rules on (Palestinian) civilians, sometimes even for crimes that are not military in nature. Palestinian military courts are still in place and apply laws that have been in force since the 1970s, without the minimum of respect for due process (e.g. there is no right to appeal, even in cases where the sentence is the death penalty).

After the 2007 coup, President Mahmoud Abbas used emergency power in order to suspend some of the Basic Law provisions and appointed an 'emergency government' which remained in place beyond the one-month limit of a state of emergency. More than a hundred decree-laws have been issued since then, and the cabinet has acted as an executive authority accountable to the president alone. Even when Abbas ratified international human rights treaties, he did so arbitrarily. At the same time, the status of rights and freedoms has generally deteriorated while most of the PA budget (which depends on foreign aid) goes towards salaries for civil servants and security personnel. In Gaza, techniques of governance have varied, but the authoritarian approach to government is the same. Hamas has ruled every aspect of the lives of Palestinian in Gaza, whether it is related to aspects of 'public morality' in society or the use of missiles to attack nearby Israeli settlements and towns. The so-called 'informal economy' which depends on smuggling goods and persons to and from Gaza through tunnels, was arguably under the more or less strict scrutiny and regulation of Hamas.

Not to forget that the Israeli military governs the regions under its control in an authoritarian way. Indeed, the Israeli military commander rules these areas through orders, micromanaging the behaviors of the population through prohibitions and permissions. He enforces his orders through the Israeli army and military courts – which apply Israeli military rules to Palestinian civilians. Thousands are put into prison, some without charges, as they are detained administratively and often with the use of secret evidence. As a general rule of government under the Israeli authoritarian regime in the West Bank: all is forbidden unless permitted by the Israeli military commander or by an authorized military officer.

### ***3.6. Minority Government***

The PA was governed throughout its history mostly by governments that were not representative of the whole population of the West Bank and Gaza Strip. In 1994, the first appointed Council of the PA was nominated by Yaser Arafat. It included PLO officials from the Diaspora. In 1996, Hamas and other factions did not participate in the PLC elections. Accordingly, the government enjoyed the confidence of a PLC composed mostly of Fatah members or sympathizers. In 2006, elections resulted in victory for Hamas in the majority of PLC seats. However, Hamas was not able to govern (as a result of the boycott by the Quartet, the international donor community, Israel, and arguably by Fatah itself – who refused (at least initially) to form a unity government with Hamas).

In early 2007, the Saudi-brokered ‘Mecca Deal’ almost imposed a ‘unity government’ - it only survived for few months before the Hamas coup later in the same year. Since June 2007, the PA has been governed by what some call a ‘minority government’ where the president and the government do not enjoy a majority in the PLC – which is not capable of convening anyway. Gaza PLC deputies continue to convene without having the necessary majority for legitimate law making based on the procedures of the Basic Law. Theoretically, however, the Basic Law is still invoked as the source of governmental powers in both areas.

### ***3.7. Dictatorship***

Since the British Mandate, the legacy of successive governments in Palestine, or in parts of it, and in varying degrees, was that of the concentration of all powers in the hands of one person, whether the British high commissioner of Palestine, the Egyptian military, the then civilian administrator – the Jordanian King – or the Israeli military commander. Arafat also established

the basis for dictatorship by making use of his many prerogatives as PLO executive committee chairman, head of Fatah, president of the state of Palestine (declared in Algiers in 1988), interior minister (until 2001), and prime minister (until 2003); not to mention his personal charisma and legacy as a ‘liberation fighter’. Indeed, when he was pushed to assign the title of interior minister to someone else, he established by decree a ‘National Security Council’ – which he of course chaired – thereby monopolizing the appointment of the majority of its members.

The short period that followed the election of Mahmoud Abbas as the head of the PA was promising, as succession was peaceful, and scrupulously followed the Basic Law provisions. However, following the victory of Hamas in 2006, Abbas started to apply Arafat’s past techniques by referring to the PLO as a source of his legitimacy (as he was also the chairman of the PLO) and to its institutions as a source of authority (in particular the PLO Central Council which convened several times to support Abbas’ agenda).

In reality, what has taken place since the election of Abbas in 2005 is a revival of a concentration of powers in the hands of the president. When Arafat was *persona non grata*, the international community wanted him to share powers with a prime minister (the person who enjoyed the support of the international community at the time was Mahmoud Abbas, who also became the first prime minister). However, after Abbas gained power in 2005, and in particular when Hamas won the elections in 2006 and formed a Hamas-led government under Prime Minister Ismail Haniyeh, this trend reversed. The international community encouraged a re-concentration of all powers in the hands of the president (who was perceived as a pro-peace leader) through direct control of the security apparatus, finance, and the monopoly over foreign policy and relations (including negotiation and coordination with Israel).

Since Hamas gained power, the president has nominated many ‘advisors’ for all aspects of government, thereby, in reality, running the PA through his own advisors and not through the Hamas-led government. Since 2007, the PA government has been the president’s executive arm. The president’s power to nominate the chief justice has also been helpful in maintaining control of the judiciary. Control of the syndicates and unions was also used – with the help of Fatah and Fatah sympathizers – after outlawing Hamas military or civil activities in the West Bank by decree.

### **3.8. *President’s Government***

Since the establishment of the PA, the PA government has literally been the president’s government. The president acted as prime minister until the office of the prime minister was first introduced in the amendment of the Basic Law in 2003. However, the procedure for the nomination of the prime minister by the president – which then requires the confidence of the PLC – as well as the prime minister’s responsibility towards the president (as much as it is towards the PLC) enhanced the view that, despite the existence of a prime minister, the PA government is the president’s government.

The cohabitation of the president and the Hamas-led government did not function. The president issued decree laws and the government issued orders, without reciprocal consultation or the need for co-signature to ensure, for example, coherence within the executive branch of government. Indeed, in reality the Basic Law did not forbid this. Since the 2007 coup, again, the government has functioned without a vote of confidence by the PLC – which still has not convened. Instead, it is the president who controls the nomination of the prime minister and every detail related to

the formation of the government and the dismissal of one or more ministers – almost by instructing the prime minister on what to do or not to do.

### ***3.9. Tyrannical Government***

A tyranny is a very harsh qualification of government. However, I suggest that, despite the appearance of legality – such as the issuing of military orders and declarations, as well as the establishment of military courts – Israeli military commanders have enjoyed almost absolute power over the Palestinians since 1967, using excessive force that was often cruel and mostly unjust<sup>12</sup>.

Since 2007, Hamas’ rule of Gaza can also be described as tyrannical due to the lack of any limitations to the power exercised by Hamas and its leadership. Since 2007, there have also been reports about PA mistreatment of prisoners in Palestinian prisons. In the West Bank, the president’s rule of the West Bank is moving towards a tyrannical form of government, if it is not already.

### ***3.10. A ‘Neo-Liberal’ Government***

Since the 2007 coup, the president has nominated ‘technocrats’ in government and not political affiliates, leading to the idea that PA governments consist of managers, rather than politicians.

While the status of rights and freedoms has generally been deteriorating as a result of restrictions imposed since the declaration of the state of emergency in 2007, Salam Fayyad has started a policy of economic and financial development within the framework of building institutions of the state under – and despite – the occupation. This policy eventually failed, but his ‘neo-liberal’

policies have remained in place. The term is used here with its negative connotations of market rules prevailing and resulting in the reinforcement of unjust inequalities in society.

The sense of public good and community decreased. Likewise, the solidarity between Palestinians also decreased. The Paris Protocol refers to a common market with Israel which is in reality one-directional and which serves Israeli financial and economic interests. The efforts to open up the PA to international investment and foreign trade have remained marginal due to restrictive Israeli policies. At the same time, monopolies of basic goods have flourished in the PA territories as a result of the kind of structure that has been created since the Oslo Accords in the occupied Palestinian territory.

#### **IV. A ‘Flexible’ Governance**

The ‘governance as effective control’ approach has complicated the discussion about governance and the constitution, particularly when compared to the rosy picture created by the ‘governance as government’ approach. The latter approach is, however, not conclusive, as in reality it does not help answer the question about who really governs the West Bank and Gaza Strip. In which case, how do we proceed?

I suggest that the problem lies with the initial assumption about governance and constitutions. So far, the point of departure has either been the government or the ‘state’. At the basis of both approaches is either the idea of an *authoritative* government, as a result of a constitution, or a *legal* government, as a result of effective control. Both approaches do not help capture the dynamics of governance in Palestine, because they are both up-down approaches to governance.

In addition, in this paper we have so far addressed constitutional and legal systems assuming their unity and certainty, their hierarchically organized norms, under a supreme constitution, or within the framework of a territory or a state. But in reality, the constitutional system in Palestine is anything but unity, territoriality, harmony, hierarchy, and coherence. It is a matrix of laws, rules, orders, norms and institutions that cannot be truly captured unless we switch our concern from the government to the governed, from the state to the individual, from power to liberties.

In other words, instead of asking ‘who governs Palestine’, the question becomes: how are people’s choices governed and how are their rights exercised and their liberties curbed. The least obvious answer is: it depends!

I suggest that, despite the many details that go beyond the focus of this paper, the answers to the above questions depend to a large extent on what I will here call the ‘three Ws’: ‘Who’, ‘Where’ and ‘What’ (or otherwise stated, the answer depends on a mix of personal, territorial and functional aspects). If for example, the individual we are talking about happens to be an Israeli citizen, the law and protection of the state of Israel, and the jurisdiction of the Israeli courts follow him/her in any part of Israel *and* in any part of the West Bank and Gaza Strip. The PA has no jurisdiction whatsoever over Israeli citizens.

In what follows, I will show what I call the ‘legal matrix’ of governance in which Palestinians live, by giving an example from the daily life of Palestinians<sup>13</sup>. Let’s imagine a British citizen called Smith. He is visiting his four friends who live in the West Bank city of Ramallah (Sarah, Rami, Fatima, and George). Here is how their daily life looks.

	Sarah	Rami	Fatima	George	Smith
<i>What does the name tell us?</i>	Female, who could be Christian or Muslim	Male, who could be Christian or Muslim	Female, Muslim	Male, Christian	Male foreigner, no idea about the religion from the name.
Religion	Christian (Catholic) (1 of 13 Christian communities)	Muslim (Sunni, the only recognized Muslim denomination)	Muslim (Sunni)	Christian (Greek Orthodox)	It doesn’t matter
Where are they from exactly?	East Jerusalem	Ramallah (his family are originally refugees from Jaffa).	Haifa (her parents were born in Haifa when part of historic Palestine)	Gaza Strip	It doesn’t matter
Which ID do they have?	ID card for inhabitants of East Jerusalem	ID card for the West Bank	Israeli citizenship (‘Arab Israeli’)	ID card for the Gaza Strip	UK Passport
Can they live in the West Bank city of Ramallah?	YES, but they risk losing their ID number and (Israeli) health insurance if ‘caught’ living outside Jerusalem	YES	NO	NO, unless they have a permit issued by the Israeli civil administration (change of residence)	YES
<i>Who can they marry?</i>	Rami: YES (with a special permit from church authorities) George: YES	Sarah: YES – she doesn’t need to change religion as Muslim males can marry a Christian or a Jew) Fatima: YES	Rami: YES George: NO (forbidden by personal status law). So? <sup>1</sup>	Sarah: YES Fatima: YES (with a permit from church authorities)	
<i>Hereditary matters decided by?</i>	Catholic tribunal (Jerusalem)	Shari’a court (Ramallah)	Shari’a court (Jerusalem)	Orthodox tribunal (Jerusalem)	He can choose
Which Personal	Catholic Canon	Personal Status	Personal Status	Orthodox Canon	He can choose

<sup>1</sup> At least five options are possible:

- George may convert to Islam; he registers his new religion and gets married to Fatima, based on shari’a law.
- Fatima converts to Christianity and gets married to George in church. However, she *cannot change* her religion, nor can she register her marriage, in state civil affairs.
- Fatima may stay Muslim and marry George (after obtaining permission from church authorities); however, she cannot register her marriage in state civil affairs.
- Fatima and George go to Cyprus and get married there, and then return and register their marriage in a foreign country based on reciprocity clauses.
- Fatima and George forget about it, and do not get married at all.

Status Law applies to them?	Law (Vatican)	Law (Jordanian)	Law (Jordanian)	Law	
What is the source for hereditary rules?	Shari’a law (she is entitled to half of what her brother inherits) <sup>2</sup>	Shari’a law	Shari’a law (she is entitled to half of what her brother inherits)	Shari’a law (it is not clear whether the unequal distribution of hereditary is maintained by the Israeli High Court)	He can choose
<i>What car can they own or drive?</i>	Yellow license plate car (with Israeli flag)	Green license plate car (with ف, for Palestine)	Yellow license plate car (with Israeli flag)	Green license plate card (with ف, for Palestine)	He can choose
Can they import cars?	YES: they pay Israeli customs only	YES: they pay Israeli and PA customs	YES: they pay Israel customs only	YES: they pay Israeli and PA customs	YES: he can choose which kind of car (and pay the customs accordingly)
<i>Which traffic police force can issue them a ticket?</i>	Ramallah: PA police, but they cannot enforce it Area C: Israeli police	Ramallah: PA police and they can enforce it Area C: Israeli police	Ramallah: PA police, but they cannot enforce it Area C: Israeli police	Ramallah: PA police and they can enforce it Area C: Israeli police	Ramallah: PA police, but they cannot enforce it Area C: Israeli police
<i>Can they enter Jerusalem with his/her car?</i>	YES	NO	YES	NO	YES for yellow license plate car NO for green license plate car
Do they need a personal permit to enter Jerusalem?	NO	YES: Issued by Israeli civil administration	NO	YES: Issued by Israeli civil administration	NO: if he has a visa Yes: if he has an entry permit to the West Bank
How do they cross the Qalandia entry point to Jerusalem?	In personal car, taxi or bus (with a yellow license plate)	He has to walk through the checkpoint	In personal car, taxi or bus (with a yellow license plate)	He has to walk through the checkpoint	In personal car, taxi or bus (with a yellow license plate)
Can they work in Jerusalem?	YES	NO (unless with special permission from the Israeli civil administration)	YES	NO (unless with special permission from the Israeli civil administration)	YES (with permission from the Israeli ministry of labor)
Can they stay the night in	YES	NO	YES	NO	YES

<sup>2</sup> Informal social norms often pressurize women into give up all their hereditary rights, regardless of religion

Jerusalem?					
<i>How do they travel abroad?</i>	Israeli issued Laissez-Passer	PA travel document (with an Israeli pre-approved ID number on it)	Israeli passport	PA travel document (with an Israeli pre-approved ID number on it)	UK passport
Which exit points do they use to leave the country?	Ben Gurion airport or the Allenby bridge	The Allenby Bridge	Ben Gurion airport or the Sheikh Hussein crossing point	The Allenby Bridge (provided they have both an Israeli and a Jordanian permit)	Anywhere: Ben Gurion airport, the Allenby Bridge or the Sheikh Hussein crossing
Which hall can they use at the Allenby bridge?	The hall for foreigners	The hall for Palestinians	They cannot use the Allenby bridge	The hall for Palestinians	The hall for foreigners
<i>Can they re-enter the country?</i>	YES (within the three-year validity of the Laissez Passer)	YES	YES	YES (with both Israeli and Jordanian permits)	UK passport: any entry point with a visa or permit.  If he also has a West Bank or Gaza ID: then <b>only</b> via the Allenby Bridge using his ID
Who controls their passports at the country’s exit and entry points?	Israeli authorities	Israeli authorities	Israeli authorities	Israeli authorities	Israeli authorities
Do they need to check in at the PA offices in Jericho when they return?	NO	YES	NO	YES	NO

Based on the above, the governing body is different depending on the area in which the individual concerned is present (Areas A, B, C; East Jerusalem or Gaza) but also on the kind of ID s/he holds. Regarding some issues (such as marriage) religion matters. For other matters, different factors determine the governance structure that applies.

This ‘legal matrix’, as I like to call it, is very complex for outsiders, and is in reality very confusing and subject to (often arbitrary) changes. These changes are often first experienced by Palestinians in person, or are heard about from other people who were unfortunate enough to discover that the rules and procedures had changed. In other words, most rules-like provisions that govern Palestinians are unpredictable. For Palestinians, however, knowing these rules and procedures is not a luxury. It is necessary for their daily lives, their basic needs, in sum: their survival.

For example, Smith may find it difficult to distinguish between Areas A, B and C. If he goes by car with his four Palestinian friends, he will probably know – as is often jokingly said – that they entered Area C (which is under strict Israeli army/police control) because everybody put on their seatbelts. If Smith drives the car, his Palestinian friends will shout at him if he – inadvertently – takes a street (with no specific sign prohibiting him or his Palestinian friends from entering that street) which leads to a settlement in Area C, or if he does not stop at a fixed or ‘flying’ – (as they are often called by Palestinians) Israeli checkpoint.

While waiting at the checkpoint for a security check, Smith’s Palestinian friends may advise him to join the line for yellow license plate cars (even if there is no sign to indicate this), and avoid the long waiting time in the line for green license plate cars (where fellow Palestinians, who happen to be driving green license plate cars, are). If Smith drives his car in Area A, his friends may tell him to ignore the PA policeman – who is unable to enforce even traffic laws to drivers of yellow license plate cars. If Smith has an accident and kills a pedestrian in Area C, his Palestinian friends will tell him which police force to expect, which court he will be judged in, and which law will apply.

In other words, rather than answering the question of who governs Palestine, the answer largely depends on each specific case; where the constitution is not known in advance. This does not mean that it is unknown, but rather that one can only say, case by case, with more or less confidence: ‘I’ll know it when I see it.’

## **V. Conclusion**

I started this paper by asking ‘who governs the West Bank and Gaza Strip’. I discussed the up-down approaches which I considered as misleading and instead suggested a case by case approach, where governance is better understood from the perspective of the governed individual, their existence, and their rights and liberties.

I can now safely conclude that:

- 1) The PA is not the only authority that governs the West Bank and Gaza Strip. It is not always precise to consider the PA – as some tend to do – as a sub-government, subordinate to the Israeli military commander. In reality, despite the upper hand kept by the Israeli military – in particular regarding ‘security issues’ – the PA enjoys autonomous prerogatives in certain areas that are enforced directly by the PA without the need for coordination with Israel. Of course, many other prerogatives are still subject to obligatory coordination, pre-approval or confirmation by the Israeli authorities.
- 2) The Basic Law is only one of the many bases for governance in Palestine. Not only is it of no value regarding the Israeli military and civil administration, it is also not always the source of all the powers exercised within the PA’s West Bank or Hamas’ Gaza. Alternative sources include Israeli military orders, the PLO charter, the Hamas charter,

Islamic shari’a and various international treaties that apply in time of peace or occupation. As a source of authority, the Basic Law is not that useful. In fact, it forms part of the problem that has contributed to reaching a deadlock in the Palestinian political system.

- 3) The transition to dictatorship and the authoritarian character of government in the PA has nothing to do with culture or religion – as is often assumed regarding Palestinians and Arabs, and indeed Muslims more generally. The PA has inherited legacies from the past that are based on the concentration of powers. As such, discussions about the possible reasons for this transition should focus on power relations, structural issues, and the interests of foreign countries as well as local political and economic elites.
- 4) There has been a tendency to blame people for electing Hamas in 2006 (and to blame democratic elections in general) as the cause of all the troubles that followed – in particular following the 2007 coup. While Hamas and Fatah are to blame, other factors played a major role in the deadlock between Palestinian factions, including the international donor community, and Israel.
- 5) Arguably, there is a problem with the way Hamas was integrated into the political system in the first place. Their participation was possible after agreeing to amend the Basic Law (in 2005), where elections became regularized to every four years for the PLC and the Presidency. The electoral system was also amended. In other words, rather than having Hamas accept the Basic Law as supreme law (and arguably, the assumptions on which the Basic Law is built, such as the idea of the two-state vision or the Israeli-Palestinian Accords), the Basic Law was amended to accommodate Hamas. As such, there was no

formal commitment by Hamas to the democratic process – aimed at giving priority to politics and compromise, instead of the decisions by unilateral factions. Similar fears were present in Algiers and Egypt due to the participation of ‘Islamic parties’ in the elections. Their participation was perceived – not necessarily correctly – as aiming to destroy democracy from within.

- 6) It is often the case that the PA is presented as an achievement. The international community and Israel have a vested interest in maintaining the PA as much as the Palestinian leadership does. In other words, the dissolution of the PA was never really an option – even if some academics and politicians called for it, or at least used this as a threat. In reality, the status quo will probably remain as it is – with possible intensification of the fragmentation that may lead to different arrangements for Gaza, separate from the West Bank. With time, the structure of the PA may change with increased dependency on Israel and the international community. This will intensify the need for coordination with Israel.
- 7) Contrary to prevailing narratives about the indispensability of the PA, I argue that it never really governed the West Bank and Gaza Strip (putting aside direct and indirect Israeli control). This is certainly the case regarding personal status affairs which have remained as they are in terms of informal and tribal justice, the lack of unification in most important legislation - such as civil and penalty codes - and the maintenance of local authorities (municipalities) and committees (such as in refugee camps). This change of perspective aims at switching the narrative about the PA: it is not whether the PA will stay as a governing body; the question is how long it can maintain the little control it currently has.



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<sup>1</sup> <http://www.maannews.net/Content.aspx?id=838291>

<sup>2</sup> Khalil and Del Sarto, *The Legal Fragmentation of Palestine-Israel and European Union Policies Promoting the Rule of Law* 2015.

<sup>3</sup> For more about the Basic Law and the system it created, see, generally, Al-Qasem, *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period 1992-1994*; Al-Qasem, *Declaration of the State of Palestine: Background and Considerations* 1987; Al-Qasem, *The Draft Basic Law for the Palestinian National Authority* 1997; Aruri and Carroll 1994; N. J. Brown, *Constituting Palestine: The Effort of Writing a Basic Law for the Palestinian Authority* 2000; N. J. Brown, *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* 2003; N. Brown 2003; Khalil, *Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law* 2013; Khalil, *Constitution-Making and State-Building: Redefining the Palestinian Nation* 2012.

<sup>4</sup> For more, *Al-Eslah Al-Qanuni Fe Falasteen: Tafkeek Al-Estemar wa Bena' Al-Dawla* [Legal Reform in Palestine: Decolonization and State-Building] 2009

<sup>5</sup> The Basic Law plays the role of a written constitution for the Palestinian Authority. It came into force in 2002. A new amended Basic Law was subsequently adopted in 2003 to introduce the office of Prime Minister (besides that of the President) at the head of the Council of Ministers. In 2005, amendments to the Basic Law were adopted in order to introduce regular legislative and presidential elections.

<sup>6</sup> For more about the various accords, see: Cotran and Mallat (eds.) 1996

<sup>7</sup> Waldron 2009.

<sup>8</sup> Courtis 2008, 6.

<sup>9</sup> See, generally, Bisharat 2013; N. J. Brown, *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* 2003; Shikaki, *The Future of Palestine* 2004; Zreik 2004.

<sup>10</sup> Although relevant to this presentation, I will not discuss constitutional and legal matters concerning what is often referred to as ‘Israel Proper’, which indicates Israel within the so-called ‘Green Line’.

<sup>11</sup> Palous 2008

<sup>12</sup> For more about the occupier’s law: see, generally, Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* 1997; Shehadeh, *Occupier’s Law: Israel and the West Bank* 1985; Shehadeh, *Occupier’s Law and the Uprising* 1988.

<sup>13</sup> For more, Khalil and Del Sarto, *The Legal Fragmentation of Palestine-Israel and European Union Policies Promoting the Rule of Law* 2015.