

# **Palestinian Documentary Constitutionalism: A Stalled Project**

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### **I. Introduction**

The drafting and the adoption of a Basic Law for the Palestinian Authority (subsequently PA), which was established following the Oslo Accords,<sup>1</sup> was a drawn-out and laborious process which took almost a decade, occurring between 1993 to 2002.<sup>2</sup> However, the end result was a text that is widely considered to be one of the most ‘liberal constitutions’ in the Arab world.<sup>3</sup> The constitution was a hugely significant achievement: Palestinian political representatives had endorsed the pillars of Constitutionalism,<sup>4</sup> reproducing this commitment within a single written document. This was a single instance of a wider global phenomenon, which is often connected to post-colonial experiences or to independence, which is referenced in the literature as ‘documentary constitutionalism’.<sup>5</sup>

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<sup>1</sup> Nathan J. Brown provides a comprehensive overview of those agreements between the PLO and Israel. See: Nathan J. Brown, *PALESTINIAN POLITICS AFTER THE OSLO ACCORDS: RESUMING ARAB PALESTINE*, 96ff (2003).

<sup>2</sup> Asem Khalil, *THE ENACTMENT OF CONSTITUENT POWER IN THE ARAB WORLD: THE PALESTINIAN CASE*, 210-221 (PIFF, Etudes et Colloques. 47 vols. Fribourg: Helbing & Lichtenhahn, 2006).

<sup>3</sup> For example, Nathan J. Brown, *Constituting Palestine: The Effort of Writing a Basic Law for the Palestinian Authority* 54 *MIDDLE EAST JOURNAL* 25, 33 (2000).

<sup>4</sup> The literature shows that there is a pronounced lack of agreement upon the exact definition of Constitutionalism. In this paper, I align myself with those who consider constitutionalism to be a set of theoretical claims that goes beyond being a normative theory about the form of governance: constitutionalism, in this understanding, contains an idea of control, limitation, and constraint. This applies both to governmental power and the wider state apparatus. This understanding of constitutionalism, in which liberty and equality are the principal pillars, is often referenced in the literature as liberal constitutionalism. See Jeremy Waldron, *Constitutionalism – A Skeptical View*, in *CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY* 267, 267-73 (Thomas Christiano and John Christman, eds., 2009). In this contribution (see Section III), the institutions that are presented as necessary for Constitutionalism (separation of powers, independence of the judiciary, and the state’s protection of basic rights and public freedoms) are tested against the theoretical claim that government ought to be limited and that the state ought to be constrained. For purposes of convenience I refer to those theoretical claims as ‘pillars of constitutionalism’, a term which should be understood to encompass: limited government, rule of law, and liberty and equality.

<sup>5</sup> The term ‘documentary constitutionalism’ is, in modern times, often associated with the establishment of the American Republic in 1789, when the American people formed a new body politic and enshrined its rights in a document which retains the supreme national authority (see C. F. Strong, *A HISTORY OF MODERN POLITICAL CONSTITUTIONS: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORM*, 37 (1963)). Other authors have used “documentary constitutionalism” to refer to globalized constitutionalism, with a particular emphasis upon the post-colonial context. The term is also understood to be equivalent to “written constitution”: this applies in instances where documentary constitutionalism refers simply to the adoption of a single document where fundamental formal law on the major divisions, structures, principles and powers of government, and rights and duties of citizens are stated (see Go, *supra* note 21, at 90). Other authors have instead used documentary constitutionalism in different contexts, most notably with reference to the European Union (see Neil Walker, *The*

It was originally envisaged the Basic Law would apply during the interim period, which was planned to extend till 1999. The Basic Law was one of the first acts adopted by the Palestinian Legislative Council (PLC) in 1997 after national elections took place a year earlier. It was endorsed by Yasser Arafat, the President of the PA in 2002, entering into force in a context of political instability, and at a time when final agreement with Israel had not been reached. The expectations that had been invested into the Basic Law when it entered into force soon evaporated: it exerted a limited influence upon the Palestinian decision-making process appearing as an, at best, marginal consideration and influence. Over time, however, the constitution, which was explicitly anticipated to be temporary in character, came to be treated by the main political actors and the public as a real ‘constitution,’ to which reference could be made during the course of internal political conflicts. In large part, its heightened pre-eminence can be attributed to the changes that occurred in the PA after the death of Yaser Arafat, the figurehead of the Palestinian national struggle who had led both the Palestine Liberation Organization and Fatah for decades. Subsequent political developments (notably the election of Mahmoud Abbas in 2005, and Hamas’s victory in the Palestinian Legislative Council elections of 2006) provided the Basic Law with a reinvigorated impetus and momentum.

I will now, in the following section, proceed to demonstrate why the constitution matters for Palestinians and for the PA in particular. Taking into account the negative impact of written constitutions and written laws in historical Palestine, I will suggest that the Palestinian enthusiasm for a written constitution should be understood with reference to the symbolic appeal and attraction of specific principles and values (see section II). After presenting documentary constitutionalism in more depth and detail (section III), I will then attempt to demonstrate that political practice preceded the entrenchment of rules and institutions necessary for constitutionalism (section IV). Finally, I will argue that Documentary Constitutionalism in Palestine has stalled (section V), losing its momentum and impetus.

## **II. An *Interim* Written Constitution**

In this section I will first attempt to understand why Palestinians opted to support a written constitution. This is particularly important because Palestinian historical experience of written constitutions would instead appear to suggest precisely the opposite response. From the outset, the Basic Law – whether its adoption, content or status – was subject to controversy. I will therefore argue that the Palestinians’ attachment to the written constitution cannot be explained with reference to the legacies of the past, whether of historical Palestine or the Palestine Liberation Organization (PLO) itself. Instead, I will argue that this strong attraction can be traced back to the values that are often encompassed under the heading of ‘constitutionalism.’

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*Place of European Law*, in: THE WORLDS OF EUROPEAN CONSTITUTIONALISM 57, 104 (Gráinne de Búrca & J.H.H. Weiler, eds., 2012)).

## ***The Need for a (Written) Palestinian Constitution***

Even observers with the most superficial knowledge of Palestinian legal and political affairs since the Oslo Accords<sup>6</sup> will have noticed the huge amount of interest and enthusiasm that was generated by a written constitution for the PA. Several drafts of the 'Basic System' or 'Basic Law' were made public as early as 1994,<sup>7</sup> almost at the point at which the first PLO returnees and personnel made their return to Gaza City and Jericho, the first two cities from which the Israeli army had redeployed (subsequent redeployments from all the major cities of the West Bank and Gaza Strip, then followed). President Arafat then appointed a council which would control the so-called 'autonomous territories' within the framework of Oslo Accords (the West Bank in was divided in areas A, B, and C).<sup>8</sup>

In 1996 the first elections in Palestinian modern history were held. Arafat was confirmed as the first elected president of the nascent PA, and 88 elected deputies formed the first Palestinian Legislative Council (subsequently PLC). The Interim period was supposed to come to an end in 1999, with 'final status' talks then addressing hugely contentious issues such as Jerusalem, Palestinian refugees and the final borders of the Israeli state. In the aftermath of Ariel Sharon's hugely provocative visit to the Al-Aqsa mosque in Jerusalem, the second *Intifada* broke out. The Israeli army re-entered Palestinian urban areas, directly targeting the PA's institutions.

The PA nonetheless survived these events. It continues to exert its authority over sections of the West Bank, continuing to provide services to most Palestinians living under occupation. While the PA's agencies and services are similar to those of a sovereign state, it is not the central government of a sovereign state: the Israeli occupation of the West Bank and Gaza Strip was not ended by the Oslo Accords. Similarly, Israel's unilateral withdrawal from the Gaza Strip in 2005 did not end the Israeli occupation.<sup>9</sup>

In 2006, the second legislative elections took place and Hamas won the majority of seats. President Abbas, who had been elected in place of the deceased Yaser Arafat, now had to work with a Hamas government led by Ismail Haniya. The representatives of the international community, in the form of the Quartet (United Nations (UN), European

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<sup>6</sup> Although analysis of the Palestinian constitutional question is often focused upon the 'Oslo years' that followed the Declaration of Principles (1993), it may be more exact to go back to the Declaration of Independence in 1988, the point at which the Palestinian National Council implicitly endorsed the two-state solution. In its aftermath, a legal committee was tasked with preparing the state's constitution. In the aftermath of the Oslo agreements, international and local efforts were directed towards preparing a Basic Law or a Basic System for the newly established PA, which exerted control over portions of West Bank and the Gaza Strip (see, generally, Anis Al-Qasem, *Declaration of the State of Palestine: Background and Considerations*, PALESTINE YBK. INT'L. L. 314, 314-31 [1987]).

<sup>7</sup> For a briefing about the different drafts that were circulated, see Khalil, *supra* note 2, at 216-8.

<sup>8</sup> For more about the territorial subdivision of the Occupied Palestinian Territories (OPT) see Asem Khalil and Raffaella Del Sarto, *The Legal Fragmentation of Palestine-Israel and European Union Policies Promoting the Rule of Law*, in FRAGMENTED BORDERS, INTERDEPENDENCE AND EXTERNAL RELATIONS: THE ISRAEL-PALESTINE-EUROPEAN UNION TRIANGLE 129, 129-54 (Raffaella Del Sarto, ed., 2015).

<sup>9</sup> For further insight into the Gaza Strip's status after the unilateral Israeli withdrawal in 2005, see Shane Darcy and John Reynolds, 'Otherwise Occupied': *The Status of the Gaza Strip from the Perspective of International Humanitarian Law* 15 JOURNAL OF CONFLICT & SECURITY LAW 211, 211-43 (2010).

Union (EU), United States of America and the Russian Federation) boycotted the PA immediately after the formation of the new government – this was justified upon the basis that Hamas did not accept the conditions under which the Quartet provided financial and political support to the PA – including the recognition of Israel.<sup>10</sup> The Israeli government also withdrew its support to the PA, holding back tax incomes.<sup>11</sup>

In early 2007, a deal between Fatah and Hamas was reached in Mecca. This agreement established the basis for the formation of a unity government, which would be led by Ismail Haniya.<sup>12</sup> In June 2007, Hamas violently seized control of the Gaza Strip. The PLC has not convened in the years since then (it should, however, be acknowledged that the PLC rarely convened before this, largely as a result of Israel's imprisonment of most of the West Bank's Hamas deputies).

President Abbas declared a state of emergency and dismissed Ismail Haniya's government immediately after Hamas's takeover of the Gaza Strip. Salam Fayyad was nominated to form a government to 'execute the state of emergency'. Haniya rejected his dismissal and has continued to run the Strip's day-to-day affairs, acting as if he was still the head of a functional government. Fayyad's and then Rami Hamdallah's government ran the West Bank. In the years since, no further elections have taken place and no agreement between the different factions is currently envisaged. The geographical divide between the West Bank and Gaza Strip maps onto the political one which separates PA-Fatah and Hamas.

### ***The Drafting of a Written Constitution***

After the elections of 1996, the PLC turned its attention to the task, which had initially been undertaken by the PLO legal committee but remained incomplete, of drafting the basic law. Within just one year (1997), the PLC had submitted the draft basic proposal to President Arafat. Arafat used his powers to veto legislation and simply ignored the text,<sup>13</sup> leaving the PA without a Basic Law and the PLC without any legal means to bypass Arafat.

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<sup>10</sup> The Quartet announced on 30 January, 2006 that all members of a future Palestinian government must be committed to non-violence, recognition of Israel, and acceptance of previous agreements and regulations. On 29 March 2006 the Quartet froze all donor contributions, stating that the resumption of donor assistance was conditional upon the Hamas-led government's commitment to the Quartet's three conditions. For a discussion of these developments, see Asem Khalil and Jamil Salem, *Legal Framework of Palestinian Economic (under)development*, in *IMAGINING A SHARED FUTURE: PERSPECTIVES ON LAW, CONFLICT AND ECONOMIC DEVELOPMENT IN THE MIDDLE EAST* 171, 171-198 (Koen Byttebier and Kim Van der Borgh, eds., 2011).

<sup>11</sup> *Id.*

<sup>12</sup> See Yezid Sayigh, *Inducing a Failed State in Palestine* 49 (3) *SURVIVAL* 7, 19 (2007).

<sup>13</sup> This action was in conformity with Law n.4 (1995) which relates to the procedure for the preparation of legislation. Available in Arabic (upon registration) at:

<http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1995&MID=9667&lnk=2>.

All websites referred to in this paper, were accessed before 22 February 2016.

While the Basic Law was initially supposed to be a temporary constitution for the interim period,<sup>14</sup> the text only entered into force in 2002 – that is, when the interim period was theoretically over!<sup>15</sup> The Basic Law was amended twice: in 2003 (when the office of prime minister was introduced to the Palestinian constitutional system) and in 2005 (when changes to the electoral system, which derived from the Cairo agreement between Palestinian factions, were introduced).

It should be remembered that the Basic Law was not the first experience that Palestinians had of written constitutions (or of legal codification in general). Looking back over a century, it is possible to distinguish two different kinds of experiences:

Firstly, Palestinians have been ruled by written constitutions (or constitution-like texts) since the Ottoman period. The British authorities also enacted the Palestine Order-in-Council, after the League of Nations approved the British mandate over Palestine. Jordan also adopted a new constitution in 1952; this signaled a new beginning after the unification of the West Bank and Transjordan, which followed on from the creation of the Hashemite Kingdom of Jordan, two years earlier. Egypt also established a Basic Law within the Gaza Strip in 1955, while Jamal Abdel Nasser's Egypt formally declared the establishment of a constitutional system in 1962. The Israeli occupation did not explicitly abrogate these constitutional texts but instead sought to subordinate them to other legislative enactments, Israeli military declarations and Israeli military orders.<sup>16</sup>

Palestinians had also condensed their charters into a written form. The All-Palestine government declared that the state of Palestine extended to all historical Palestine, putting down a Basic Law which was de facto ineffective. In 1964, the PLO adopted its 'Basic System', a constitution-like text that determines the powers of the main PLO institutions. The Palestinian National Council, the main (parliament-like) institution of the PLO, endorsed the Palestinian National Charter. When the state was declared in Algiers, it was decided that the PLO's legal committee should draft a constitution for the

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<sup>14</sup> The Basic Law's preamble reiterates: "Within the framework of the interim period, resulting in the Declaration of Principles Agreement, the establishment of the Palestinian National Authority with its three pillars – the legislative, executive and judicial branches – became among the most urgent of national missions. The establishment of the Palestinian Legislative Council, through free and direct general elections, made the adoption of a Basic Law suitable for the interim period a necessary foundation upon which to organize the mutual relationship between the government and the people. It is a first step on the way to determining the distinguishing characteristics of a civil society capable of achieving its independence. At the same time, it is a basic foundation upon which to enact unifying legislation and law for the Palestinian national homeland."

<http://muqtafi2.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2003&MID=14138>

Article 115: 'The provisions of this Basic Law shall apply during the interim period and may be extended until the entry into force of the new Constitution of the State of Palestine.'

<http://muqtafi2.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2003&MID=14138>

<sup>15</sup> The interim period was supposed to last for five years. It began from the point at which the PA re-entered the Gaza Strip and Jericho in 1994.

<sup>16</sup> Anis Kassim provides additional insight into legal developments in Palestine since the Ottoman era. See Anis Kassim, *Legal Systems and Developments in Palestine*, in PALESTINE YEARBOOK OF INTERNATIONAL LAW, 29-32 [1984]; A Al-Qasem, 'Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period' [1992/1994] Palestine Ybk. Int'l. L. 187, 187-211.

state. Even the Oslo Accords refer to the possibility that the [Palestinian Legislative] Council might adopt 'basic laws'.<sup>17</sup>

A written constitution like text was adopted whenever there was a substantial reform, a change of regime, a change of governmental bodies in control of Palestine or part of it. The Palestinian people have also expressed their national aspirations through written charters. The establishment of the PA leadership and the Palestinian public interest in establishing a written constitution was, in this sense, no different from previous historical experiences. In the contemporary context, it is unsurprising given the interest that contemporary states have in written constitutions.

### ***Constitutionalism Matters***

For the Palestinians, the main significance of the written constitution did not therefore derive from its ostensible form, but rather from the fact that this was the first time in Palestinian history that Palestinians had drafted and endorsed their own constitution, establishing a supreme law that would be exerted over Palestinian land and people, a feature which clearly distinguishes it from the historical examples cited above. Taking this point into account, there are arguably three justifications that can help to explain – from a Palestinian perspectives – the attractions of a *written* constitution:<sup>18</sup>

Firstly, the constitution served a pragmatic purpose. The PA was a newly established political authority. The constitution would serve a pragmatic function by providing the legal basis for the development of a set of associated legal instruments. Secondly, the constitution would serve a political purpose. By virtue of the fact that it was essentially imported from outside, the PA was initially regarded with considerable suspicion. A constitution would provide the basis for open, accountable and responsive governance, further enhancing political legitimacy. A written constitution would make a valuable contribution by providing a basis for the exertion of its authority. Finally, the constitution would serve a juridical function by condensing legal authority within a single document,

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<sup>17</sup> See article XVIII of the Interim Agreement signed in 1995 <<http://www.mideastweb.org/meosint.htm>>

<sup>18</sup> For additional insight into the process of making a Palestinian constitution, see: Lamis Andoni, *The PLO at the Crossroads*, 21 JOURNAL OF PALESTINE STUDIES 54 (1991); Al-Qasem, *supra* note 16, at 187; Jamil Hilal, *PLO Institutions: The Challenge Ahead*, 23 JOURNAL OF PALESTINE STUDIES 46 (1993); Nasser H. Aruri & John J. Carroll, *A New Palestinian Charter*, 23 JOURNAL OF PALESTINE STUDIES 5, 8 (1994); Khalil Shikaki, "The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine," 25 JOURNAL OF PALESTINE STUDIES 5, 5-20 (1996); Ali Jarbawi, *Palestinian Politics at a Crossroads*, 25 JOURNAL OF PALESTINE STUDIES 29 (1996); Omar M. Dajani, *Stalled between Seasons: the International Legal Status of Palestine during the Interim Period*, 26 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 27 (1997); Anis Al-Qasem, *The Draft Basic Law for the Palestinian National Authority*, in THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVE 101 (E. Cotran & M. Chibli eds., 1997); Adrien K. Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE WESTERN RESERVE J. INT'L LAW 383 (1999); Nathan Brown, THE THIRD DRAFT CONSTITUTION FOR A PALESTINIAN STATE: TRANSLATION AND COMMENTARY (Palestinian Center for Policy and Survey Research, 2003); Nathan J. Brown, *supra* note 1; Aruri & Carroll, *supra* note 12; Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLORIDA JOURNAL OF INTERNATIONAL LAW 897 (2004); Asem Khalil, "Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law," 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 34, 34-73 (2013); Asem Khalil, "Constitution-Making and State-Building: Redefining the Palestinian Nation," in: CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 583, 583-596 (Rainer Grote and Tilmann J. Roder, eds., 2012).

unifying the dispersed and highly complex Palestinian legal system (at the time, different constitutional texts were still active in both the West Bank and Gaza Strip), thus simplifying Palestinian jurisprudence.

We can therefore distinguish three different justifications (pragmatic, political and juridical) for a written constitution. I would argue that each, both in singular and cumulative effect, helps to explain Palestinian support for a written constitution. Each of the three justifications relates back to my earlier discussion of constitutionalism. The separation of powers, the rule of law and the protection of rights and freedoms are all intimately related to this reference point and its originating principle that the essential purpose of law is to limit and constrain arbitrary encroachments by the government or the state. Upon this basis, I would assert that it is constitutionalism – and not written constitutions as such – that helps us to explain the broad Palestinian support for a constitution. Palestinian support for a written constitution could therefore be traced back to constitutionalism, which could in turn be broken down into three distinct pragmatic, practical and juridical justifications.

It is only the addition of constitutionalism to the equation that helps us to understand the links between the constitution-making process and Palestinian self-determination. This was the case despite the fact that the PLC lacked representative legitimacy,<sup>19</sup> and despite the fact that the level of popular involvement in the drafting and approving process was extremely limited.. Upon closer reflection, it is constitutionalism that helps us to understand how the Basic Law, as written constitution, was seen as a *real* new beginning and a divergence from previous constitutions that instead derived from Palestinian subjugation to foreign rule.

### III. Constitutionalism before Statehood

The Basic Law enshrined constitutionalism's three pillars: the separation of power, the independence of the judiciary, and the protection of rights and freedoms.<sup>20</sup> This occurred despite the fact that the PA was a non-state actor – giving rise to, to borrow the term that this paper uses, 'documentary constitutionalism'.<sup>21</sup> The endorsement of these institutions establishes the basis for a separation of powers; the regulation of the conduct of government authorities (including legislative bodies), who are to be subject to the rule of

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<sup>19</sup>The PLC does not represent the Palestinian people as a whole. Only Palestinians resident in the West Bank and Gaza Strip could participate in the elections. Its claim to be representative of the local population was further undermined by the fact that many factions (including Hamas) boycotted the 1996 elections.

<sup>20</sup> Refer to the following Articles: *Article Two*: 'The people are the source of power, which shall be exercised through the legislative, executive and judicial authorities, based upon the *principle of separation of powers* and in the manner set forth in this Basic Law.' *Article Six*: 'The principle of the *rule of law* shall be the basis of government in Palestine. All governmental powers, agencies, institutions and individuals shall be subject to the law.' *Article 10*: '1. Basic human rights and liberties shall be protected and respected. 2. The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.'

<sup>21</sup> See Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000*, in CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION 89, 89-114 (Saïd Amir Arjomand, ed., 2007).

law and the scrutiny of the course; and the establishment of mechanisms that uphold and reinforce fundamental rights and freedoms.

### ***A 'Democratic' Form of government***

The PLC acts as a unicameral parliament, and therefore fulfills a legislative function while overseeing and scrutinizing the activities of the government (composed of the Prime minister and his ministers). Its powers mainly reside in its ability to move motions of no-confidence, removing its support from an incumbent government. The President of the PA cannot be removed by a PLC vote of confidence, with his/her powers instead being demarcated by Basic Law. The prime minister is nominated by the President and is responsible for choosing cabinet members. Both the prime minister and cabinet ministers can be chosen from PLC members without being obliged to give up their status as PLC deputies. The President has the power to block legislation; however, this power is not a veto power, and can therefore be by a majority vote (two-thirds) by the PLC deputies. The Basic Law does not explicitly grant the President the right to dissolve the PLC.

The form of government that the PA entrenched in the Basic Law has much in common with the semi-presidential system that is currently in place in France; there are considerably more parallels than with the US (presidential) and British (parliamentary) systems. While it is important to acknowledge various points of divergence,<sup>22</sup> this is probably more attributable to the fact that the French system is one among a number of different possible models that fit within the semi-presidential template.<sup>23</sup> In this respect, it clearly differs from the UK and US systems, both of which are often taken to be prototypes of parliamentary and presidential democracy.<sup>24</sup>

Setting aside questions as to the exact form of the PA and its translation to the OPT, it is first important to recognize that the Basic Law's procedures and institutions did not establish any form of government; it instead establishes the basis for a form of government that functions upon the basis of a the separation of powers. To this extent, the PA represents a progression from previous forms of government that were derived from written constitutions. The British Palestine Order in Council, for example, concentrated all legislative, executive and judicial powers in the hands of the High Commissioner. Similarly the Egyptian administrator of Gaza had had similar concentrated powers. During the Israeli occupation, the three powers were also concentrated in the Israeli Military Commander.

### ***An 'Independent' Judiciary***

Article 98 of the Basic Law clearly establishes that “[j]udges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties.” It further establishes that: “No other authority may interfere in the judiciary or in judicial affairs.” Meanwhile, Article 100 clarifies that the establishment of the high

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<sup>22</sup> For further discussion, see Khalil (2013), *supra* note 18.

<sup>23</sup> Arend Lijphart, Gianfranco Pasquino and Maurice Duverger, *A new political system*, 31 EUROPEAN JOURNAL OF POLITICAL RESEARCH 125, 125 (1997).

<sup>24</sup> For more, about the different political systems, with emphasis on semi-presidentialism, see, Maurice Duverger, Arend Lijphart, & Gianfranco Pasquino, *A new political system*, 31 EUR. J. POL. RESEARCH 125, 128 (1997); Cindy Skach, *The "newest" separation of powers: Semipresidentialism*, 5 INT.L.J. CONST. L. 93, 93-121 (2007).

judicial council' would further enhance the institutional independence of the judiciary. The Judicial Authority Law was endorsed by President Arafat some two weeks before the Basic Law came into force. It had awaited, just as with the Basic Law, the President's signature for a number of years. The Palestinian High Court of Justice was intended to operate as a unique level of administrative adjudication – 'until administrative courts are established,' in the words of the Basic Law (art 102). The Basic Law established, subsequent to the passing of a law (which was passed by the PLC in 2006),<sup>25</sup> for the establishment of a Supreme Constitutional Court, which would have the power to consider, *inter alia*, 'the constitutionality of laws, regulations, and other enacted rules' (art 103).

The PA again distanced itself from previous political authorities by introducing the independence of judiciary clauses and by creating a Supreme Constitutional Court. It is true that the constitutions of many other neighboring countries (such as Egypt and Tunisia) had already established judicial independence, administrative courts and even constitutional courts. In this respect, the size of the Palestinian Constitutional Court's mandate helped to set it apart. Judges nominated by the President operated with a lifetime mandate and for this reason were more likely to resist interference from other branches of the government – subsequent nominations (e.g. in instances where a vacancy arose) are to be made subsequently upon the recommendations of the Supreme Constitutional Court judges.<sup>26</sup>

The established rule of law, whether conceived in its limited (independence of the judiciary) or broader (enabling an independent court to establish the constitutionality of laws and regulations) helped to set the Basic Law apart from previous written constitutions. Again, it was constitutionalism, not the distinctive features of a written constitution that helped to differentiate the PA's approach to constitution-making from other comparable examples.

The adoption of the Basic Law was an important step towards the consolidation of the rule of law, helping to protect individuals from the arbitrary use of power by the state and government, placing particular emphasis upon the need to protect personal freedoms and to guard against arbitrary arrest and detention.<sup>27</sup> The recognition of this right is accompanied by a principle that makes this right justiciable and enforceable by the courts:

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<sup>25</sup> 'Law No.3 of 2006 relating to the Establishment of the Supreme Constitutional Court' (The Constitutional Court Law). Available in English at:  
<<http://muqtafi2.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2006&MID=15122>>.

<sup>26</sup> The PA president nominated the first assembly of judges for the court in 2016 only, ten years after the entry into force of the law, *supra* note 25.

<sup>27</sup> Refer to Article 11: "1. Personal freedom is a natural right, shall be guaranteed and may not be violated. 2. It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of prearrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons." Article 12: "Every arrested or detained person shall be informed of the reason for their arrest or detention. They shall be promptly informed, in a language they understand, of the nature of the charges brought against them. They shall have the right to contact a lawyer and to be tried before a court without delay."

the individual's rights are upheld by judicial review of state actions and administrative decisions.<sup>28</sup>

### ***Protection of Rights and Freedoms***

In addition to establishing the principle of equality and prohibiting discrimination,<sup>29</sup> the Basic Law also outlined a detailed list of civil, political and socioeconomic, thus upholding its claim to be among the most 'liberal' legal frameworks in the Arab world.<sup>30</sup> Those rights and freedoms are not only declaration of good intentions, but are also legal entitlements, although their enforceability is often curtailed by the remit of law. The Basic Law anticipates the establishment of an Independent Commission for Human Rights (art 31), and seeks to uphold certain rights and freedoms by criminalizing any infringement upon them (art 32). It even establishes the enjoyment of a balanced and clean environment as a human right (art 33).

The Basic Law distanced the PA from previous legal regimes by including this list of human rights and establishing mechanisms that would uphold these rights and freedoms. The true significance of this development can be appreciated when it is compared to the Palestine Order in Council or Israeli military orders. Both the Egyptian constitutional documents for the Gaza Strip and the Jordanian constitution did contain a list, although it should be acknowledged that both legal documents were considerably more limited in this respect. The most fundamental change that the Basic Law introduced was to make these rights and freedoms enforceable by the Supreme Constitutional Court. The new Constitutional Court Law establishes that it is now possible for any aggrieved person to take their complaint before the court (art 27, para 1). In addition, the law also establishes that the authority guilty of the unconstitutional act should 'redeem the right to grievant or compensate him or her for the damage or [perform] both together' (art 25, para 3).

## **IV. Constitutionalism First**

I will now argue that Palestinians' interest in constitutionalism preceded the entrenchment of constitutional rules, as embodied by the text of the Basic Law, which came into force in 2002. The separation of powers is defined by a number of attributes. These include: the government's dependence upon the confidence of a legislative body, the separation of the office of prime minister and presidency, and periodic elections. However, other aspects of the constitution, such as the need to guard against unlawful detention only came about due to the pressure which courts placed upon governments. This example clearly illustrates how the court's interest in upholding the law preceded the entrenchment of constitutional rules concerning Habeas Corpus in the constitutional document. In addition, the establishment of a national human rights commission in 1993 (one year before the establishment of the PA and nine years before the Basic Law came into force in 2002) provides further evidence of the Palestinian leadership's intention to establish a system of government that respects basic rights and freedoms.

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<sup>28</sup> Refer to Article 30 of the Basic Law.

<sup>29</sup> Refer to Article 9 of the 2003 Basic Law establishes.

<sup>30</sup> Brown, *supra* note 2, at 33.

## ***A Republic's kind of Separation of Powers***

After the 1996 legislative and presidential elections, Yasser Arafat, the then president of the PA (who was also, in the absence of an office of prime minister, acting also as the head of the Council of Ministers) nominated new cabinet members and submitted a request for the PLC to provide vote of confidence. Despite the fact that the Basic Law was not in force, a cabinet was subsequently formed.<sup>31</sup>

The Basic Law entered into force in 2002 in the midst of calls for reforms in the Palestinian political system. The concerned parties eventually arrived at an agreement which would separate the two offices, thus establishing a government (headed by a prime minister who retains the confidence of the PLC) and a directly elected president (who does not therefore depend upon the PLC's confidence). In 2003, the Basic Law was amended, so as to incorporate the changes that the respective parties had agreed upon.<sup>32</sup>

In November 2004 Arafat passed away and Raouhi Fattouh, the PLC speaker, became the interim President, in keeping with the stipulations of the 2003 Basic Law. He called for presidential elections and Mahmoud Abbas was elected in early 2005.<sup>33</sup> Interestingly, the President *ad interim*, just a few days before the second presidential elections took place in 2005, called for new legislative elections to be held in July of the same year.<sup>34</sup> This was surprising because it clearly contradicted the Basic Law provisions, which established that the mandate of the president and deputies of the PLC extended to the 'Interim period' – which had not, yet, officially concluded.<sup>35</sup> After being elected, President Abbas decided to postpone the legislative elections. In seeking to justify the delay, he referred to the need to complete "legal arrangements and national consultations". He did not, however, reject the proposition of new legislative elections, appearing to entertain this possibility even in the absence of a constitutional duty to hold periodic elections.<sup>36</sup>

In January 2006 the various Palestinian political factions met in Cairo. They reached an agreement, with President Abbas establishing January 2006 as the date upon which elections would be held, a date which was in accordance with the newly established Election Law no.9 (2005).<sup>37</sup> The Basic Law was also amended in 2005, establishing that the Presidency and PLC members would serve for a four-year term.

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<sup>31</sup> The Second Palestinian Cabinet (16/5/1996-9/8/1998) and the third Palestinian cabinet (9/8/1998-13/6/2002) obtained confidence of the PLC before the entry into force of the Basic Law in 2002. After that, cabinet's obtained confidence of the PLC based on the 2002 Basic Law (fourth and fifth cabinet), then based on amended Basic Law of 2003 where the position of the prime minister was introduced to the system (sixth to eleventh cabinet). Since 2007 Hamas takeover in Gaza and the declaration of emergency by the PA, the successive cabinets (twelfth to seventeenth cabinet) did not obtain PLC confidence.

<http://www.palestinecabinet.gov.ps/WebSite/AR/Govs/Default?ID=5>

<sup>32</sup> Khalil (2013), *supra* note 13.

<sup>33</sup> In conformity with Article 37 of the Basic Law that regulates cases of vacancy of the office of President.

<sup>34</sup> Refer to Presidential Decree no. 5 of 2005 *Concerning the Call for the Legislative Elections* <<http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2005&MID=14817&lnk=2>>.

<sup>35</sup> Refer to Article 36 and 47 of the 2003 Basic Law.

<sup>36</sup> See Presidential Decree no. (11) of 2005 *Concerning the Postponement of the Date of the Conduct of General Legislative Elections*. <<http://muqtafi2.birzeit.edu/Legislation/getLeg.aspx?pid=16643&Ed=1>>.

<sup>37</sup> Available at:

<<http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2005&MID=14861&lnk=2>>.

## ***Rule of (Judge's) Law***

Palestinian Courts made the PA accountable to the rule of law, placing particular emphasis upon unlawful detention. It is instructive to note, for instance, that the Palestinian High Court of justice (the unique level of administrative adjudication) consolidated its power to review cases involving arbitrary and unlawful arrest of individuals well before the Basic Law entered into force in 2002.<sup>38</sup> In many instances, the petitioners and even the judges themselves explicitly referred to “unlawful arrest” and “unlawful detention”,<sup>39</sup> thus highlighting irregularities in the way that arrest or detention had been undertaken. Reference was invariably made to rules that had been established by different codes or legislation, such as the (Jordanian) Law no.9 of 1961 (which was in force in the West Bank until 2001)<sup>40</sup> or the PA’s Penal Procedure Law no.3 (2001). The Court sometimes even referenced the PLO Military Procedure Code of 1979!<sup>41</sup>

It should also be noted that legislative legal enactments are not the only legal reference points that judges need to take into account. In many cases, the court – confirming the claims presented by petitioners – held that the case before the court infringed upon what were termed as “natural and legal rights”.<sup>42</sup> However, these ‘natural rights’ were almost never considered in isolation but were frequently developed with reference to other legislated enactments; sometimes, this occurred without the court even clarifying its understanding of what constituted a ‘natural right’.

In other instances, the Attorney General Representative rejected challenges put forward by petitioners upon the basis that their complaints concerned what are referred to as ‘sovereign acts’ of government – this term being understood to establish that these acts are immune from review by the High Court of Justice.<sup>43</sup> In all each of these instances, the

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<sup>38</sup> See, for example, HCJ/Ramallah – Case 38/97; HCJ/Ramallah – Case 26/98; HCJ/Ramallah – Case 40/98; HCJ/Ramallah – Case 57/98; HCJ/Ramallah – Case 14/99; HCJ/Ramallah – Case 15/99; HCJ/Ramallah – Case 20/99; HCJ/Ramallah – Case 77/98; HCJ/Ramallah – Case 18/2000; HCJ/Ramallah – Case 8/2002. In the Gaza branch of the HCJ I could not find decisions in which this right is confirmed. The only decision I could find was adopted in 2003, HCJ/Gaza – Case 78/2003. More empirical research is needed to investigate whether this discrepancy is simply related to the unavailability of courts’ decision or whether it is related to the different legal systems that are in operation in the West Bank and Gaza Strip.

<sup>39</sup> See HCJ/Ramallah – Case 26/98; HCJ/Ramallah – Case 57/98; HCJ/Ramallah – Case 18/2000.

<sup>40</sup> See HCJ/Ramallah – Case 57/98 and HCJ/Ramallah – Case 20/99. Jordanian Law no.9 of 1961) was operational in the West Bank before the entry PA Penal Procedure Law no.3 came into force in 2001.

<sup>41</sup> See HCJ/Ramallah – Case 57/98 and HCJ/Ramallah – Case 20/99. Upon reading through these cases, I frequently formed the impression that the Court did not necessarily agree with the application of the PLO Code; it more frequently, typically with reference to instances of unlawful arrest and detention, invoked this reference point to support its decision. Taking the PLO code as its hypothetical reference point, the court would therefore arrive at the conclusion that the arrest and detention was unlawful.

<sup>42</sup> See, e.g., HCJ/Ramallah – Case 38/97; HCJ/Ramallah – Case 26/98;

<sup>43</sup> It should be noted that the reference to “sovereign acts” of government is not exclusively used in relation to cases involving clearly unlawful arrest or detention, but is also used with reference to other administrative decisions. I identified at least two different instances in which the Attorney General Representative similarly invoked “Sovereign Acts”: First, with reference to cases involving unlawful dismissal of civil servant (police officer) by the Director-General of the Police (see, e.g., HCJ/Gaza – Case

court rejected the attorney's objections, citing 'sovereign acts' as its justification. In some instances, the court expanded upon this term, while simultaneously establishing that an administrative act involving arrest and detention cannot be appropriately situated under this heading, and is consequently subject to the authority of the court.

The above examples clearly establish that the court recognized the right of individuals to undertake legal action against unlawful and arbitrary arrest and detention, evidencing a clear willingness to use its power to review the administrative actions of the state. These same examples clearly illustrate that the source of the right was often irrelevant; indeed, the court often used multiple arguments based on different possible sources, using them as the hypothetical basis for a conclusion that was going to be reached in any case. In these instances, the adoption of the Basic Law would essentially, at least in the case of the High Court of Justice further reinforce pre-existing tendencies.

### ***Ombudsman***

After Israel and the PLO signed the Declaration of Principles in 1993, Yasser Arafat established a Palestinian Independent Commission for Citizens' Rights (PICCR) (this later became the Independent Commission for Citizens' Rights (subsequently ICHR)). This initiative was an important development, signaling the PA's interest in the protection of rights and freedoms. PICCR was established by decree before the establishment of the PA in 1994; this decree was adopted by Yasser Arafat, in his joint capacity as chairman of the PLO and President of the "State of Palestine" (which was declared in Algiers in 1988 and recognized by dozens of states), in anticipation of the Oslo Accords and the establishment of the PA. The PICCR/ICHR became operative in 1994, and was published in the Palestinian official journal in 1995. The Presidential Decree sets out duties and responsibilities of ICHR in the following terms: "to follow-up and ensure that different Palestinian laws, by-laws and regulations, and the work of various departments, agencies and institutions of the State of Palestine and the Palestine Liberation Organization meet the requirements for safeguarding human rights."<sup>44</sup>

The Basic Law subsequently introduced an Independent Commission for Human Rights into the system, a measure which was supposed to be established by law. Up until the current date, no such law has been passed and the ICHR continues to act as if it is the commission stipulated in Article 31.

In 2016 the ICHR issued its 21<sup>st</sup> annual report, retrospectively engaging with events over the course of 2015.<sup>45</sup> In addition to highlighting the many human rights challenges confronting the ICHR (which are detailed in more depth by the narrative reports within the document<sup>46</sup>) and Palestinians more generally, the ICHR also listed a number of

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60/95 and HCJ/Gaza – Case 209/2001); second, with reference to the decision, taken by security forces, to close an association - see HCJ/Ramallah – Case 85/98. Interestingly, the use of "sovereign acts" in all these cases always involved some decision or action undertaken by security forces. This reflects the fact that the issues the courts dealt with were largely arose as a consequence of the "security chaos" within territories under PA control – it was not, to this extent, attributable to a deliberate rejection of due process by the PA security forces. As I will show in later sections of this paper, these cases often impinged upon what both the security forces and their commander in chief (the PA President) regarded as their international obligations.

<sup>44</sup> ICHR official website: <http://www.ichr.ps/en/1/1/84/About-Us.htm>

<sup>45</sup> ICHR official website: <http://ichr.ps/en/1/6>

<sup>46</sup> ICHR official website: <http://ichr.ps/en/1/1/89/Annual-PlansNarrative-Reports.htm>

achievements – most notably it referred to how, in its capacity as a Ombudsman, it had represented victims in court.

## **V. Stalled Constitutionalism**

In this section I seek to show that the PA's formal commitment to the Basic Law was not accompanied by coherent and concerted action that was directed towards the establishment of a system of limited government, rule of law, liberty and equality.

### ***An Adherence to the Basic Law – Whenever Convenient***

The Basic Law established a mechanism through which a successor to the president could be elected. This proved to be useful in November 2004 when Arafat died. The Basic Law established the foundation for a peaceful transition of powers, resulting in the PLC speaker being appointed as an interim president. Elections were scheduled to be held within a 60-day limit, after which Mahmoud Abbas was elected as Yasser Arafat's successor.<sup>47</sup>

The Basic Law was amended in 2005, which provided both the President and PLC members with a four-year mandate. This entrenchment of periodic elections – a reiteration of the Palestinian commitment to documentary constitutionalism – was not matched by a similar commitment upon the part of the PA. In open violation of the 2005 amendment to the Basic Law, there have been no successors to the 2005 (Presidential) and 2006 (Legislative) elections. President Abbas continues to rule sections of the West Bank by decree while Hamas's control of the Gaza Strip is sustained through the use of force. The composition of the cabinet has changed in the meantime, but these changes have not been approved by the dysfunctional PLC.

The Basic Law regulated the process through which governments were formed and dissolved, establishing the PLC's confidence as an essential precondition for any incumbent government. It has played an important role in the years since the office of Prime minister was established (2003), providing impetus towards the establishment of an autonomous collegial organ while distinguishing its responsibilities from those of the President, despite some overlaps. The 2006 legislative elections (in which Hamas was victorious) helped to further consolidate this autonomy – helping to set the cabinet further apart from both the president and the PLO. It should nonetheless be acknowledged that the rules regulating the President's nomination of the Prime Minister were deliberately not codified,<sup>48</sup> while other details were not included within the canonical text upon the basis that they were so obvious that it was not necessary to entrench them in the Basic Law. This inference was made with regard to the PLC's vote of

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<sup>47</sup> Refer to Article 37 of the Basic Law.

<sup>48</sup> This was explicitly stated in the explanatory Memorandum which accompanied the Amended Basic Law of 2003: "The Council decided during the review of the amended law that it would not be necessary to add provisions dealing with Prime Minister's preparation in all matters related to the formation, resignation or dissolution of the cabinet to the President of the National Authority, on the grounds that this is a political tradition that does not require being put into a separate article in the text of the law."

confidence within government programs, and it also applied to the content of the written ministerial declaration.<sup>49</sup>

This inference failed to acknowledge the fact that these details were not obvious at all. This was shown in 2006, when in outlining its program, Ismail Haniya's Hamas government rejected the request, made by both the PA and PLO Executive Committee, that it should explicitly reference the PLO. In its defence, the government could cite the fact that there was nothing within the Basic Law that obliged the cabinet to refer to the PLO as the unique representative of the Palestinian people. In the absence of a (textual) legal obligation, the Hamas government did not feel that it was necessary to make this reference.

The internal divide resulted in the President, Fatah and the International Quartet boycotting the Hamas-led government. As a consequence, the President sought to establish a 'shadow government' – a group of Presidential advisors who would provide guidance on matters pertaining to finance, foreign affairs and security, thus bypassing the government, which retained the support of the majority of the PLC.

### **(Unconstitutional) State Security Courts**

The Basic Law requires that military courts be regulated by 'special laws' that limit their scope of application to military affairs.<sup>50</sup> There is no basis within the Basic Law for 'State Security Courts' established by [Presidential] decree.<sup>51</sup> In searching for a legal basis for this innovation, President Arafat was forced to invoke previously established legal pretexts (including emergency British and Egyptian emergency regulations!) There are numerous problems with these courts; firstly, they are established by decree; secondly, and this follows by logical extension, they are not established by law; finally, they subject civilians to military-style procedures, rules and regulations. As a consequence, Palestinian civilians were forced to answer to a judge different from their 'natural judge'.

Both anomalies – courts established by decree and civilians judged by military courts – completely contradict both Basic Law provisions and the broader rule of law. This helps to explain why the situation became particularly intolerable after the Basic Law entered into force in 2002. It was only after 2003, when various reforms were initiated, that the Minister of Justice – in the absence of a decree or a court decision – took the decision to bring these courts to an end. After being elected in 2005, President Abbas promised to ensure that all decisions taken by State Security Courts will be reviewed by ordinary courts – according to Human Rights Watch, this promise was not kept in subsequent years.<sup>52</sup>

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<sup>49</sup> Refer to Article 66 of the Basic Law.

<sup>50</sup> Refer to Article 101 of the Basic Law: '[...] 2. Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.'

<sup>51</sup> For more about the State Security Court, see Amnesty International, *Palestinian Authority: Prolonged Political Detention, Torture and Unfair Trials*, PALESTINE YBK. INT'L. L. 327, 344 [1996/1997].

<sup>52</sup> *Palestinian Authority: Death Sentences Surge in West Bank, Gaza: 11 Sentenced to Death in 2008* (Human Rights Watch, 15 December 2008), <<https://www.hrw.org/news/2008/12/15/palestinian-authority-death-sentences-surge-west-bank-gaza>>.

Indeed, military courts which function upon the basis of the PLO Revolutionary Code are still in place; this is despite the fact that these courts do not uphold basic standards and, in some cases, apply the death penalty.<sup>53</sup> Although the constitutional basis of these courts has been challenged, the relevant constitutional authority (at the time, the High Court acting as Constitutional Court) neglected to engage with this challenge, instead dismissing them upon the basis of a range of formalities.<sup>54</sup> After seizing control in Gaza since 2007, Hamas established its own military courts – in certain cases subjecting also civilians to military rules – for example in cases where civilians are condemned in cases of “treason” or collaboration with Israel). It shall be noted that death penalties were also applied in the Strip despite the fact that they lacked the President Abbas’s endorsement (which is a constitutional requirement, based Article 109 of the Basic Law).<sup>55</sup>

### ***(Non) Justiciable Rights***

The adoption of the Basic Law signaled a clear break with previous legal regimes. It established the Supreme Constitutional Court, a specialized and independent court that has the power to review the constitutionality of laws or regulations; that can be petitioned directly by individuals; and that can strike down laws adopted by the legislature. However, the legal record shows that the Supreme Constitutional Court did not play an active role in protecting basic rights and freedoms or human rights. The case history of both the Supreme Court – in its capacity as Constitutional Court – and the Supreme Constitutional Court (operational since 2016, when President Abbas nominated the panel of judges) – show that judicial review is still incapable of making entrenched rights and freedoms justiciable in Palestine.

Looking back in the existing case law, it is possible to find just one instance, in which the High Court of Justice<sup>56</sup> makes explicit reference Article 10 of the Basic Law. Article 10 makes very general reference to “basic human rights and freedoms” before imposing on the PA an obligation to “work without delay to become a party to regional and international declarations and covenants that protect human rights.”

The petition against the PA challenged its lack of action in ensuring that disabled people enjoyed full access to public places. The Basic Law was used upon an essentially supplementary basis. In all likelihood, the Court would have justified its decision with reference to Disabled Rights Law no.4 (1999). In citing an additional justification for its intervention and affirmative decision, the High Court of Justice referenced its mandate to address, whenever it is imposed by the lack, to address itself to both actions and inactions upon the part of the public authorities.

There are several indications which suggest that the PA committed to those obligations under international human rights law<sup>57</sup> although given that the PA is a non-state which is

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<sup>53</sup> For more, see Mutaz M. Qafisheh, *Human Rights Gaps in the Palestinian Criminal System: A United Nations Role?* 16 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 358, 358-377 (2012)

<sup>54</sup> Constitutional Complaint (n 1) of 2009.

<sup>55</sup> For more, see, Tariq Mukhimar, *HAMAS RULE IN GAZA: HUMAN RIGHTS UNDER CONSTRAINT* (2013).

<sup>56</sup> HCJ/Ramallah – Case 56/2005.

<sup>57</sup> The Interim Agreement (Article XIX) which was signed in 1995 contained a very similar clause: ‘Human Rights and the Rule of Law Israel and the Council shall exercise their powers and responsibilities pursuant

not possessed of sovereignty, these commitments would be adhered to as a custom or convention. However, after the General Assembly recognized Palestine as a non-member state,<sup>58</sup> President Abbas, in his capacity as the President of the State of Palestine, ratified several Human Rights treaties.<sup>59</sup>

This ratification makes the PA accountable to international human rights treaties. This applies despite exceptional circumstances (the ongoing occupation) and the objective character of the PA (a non-state actor which is not possessed of sovereignty, the main characteristic of statehood). It is however important to note that this ratification was not accompanied by a conversion of internal laws, so as to make them consistent with these treaties. In addition, applications of the Basic Law do not, in being applied to the existing legal framework, invoke or directly apply human rights treaties.

## VI. Conclusion

In this paper, I began by observing that the PA's Basic Law entrenches the main pillars of constitutionalism. This is, taking into account the past of both Palestine and the Palestine Liberation Organization (PLO), a significant development. I suggested that the commitment of political actors to the principles and values of Constitutionalism should be understood to precede the written constitution itself (the Basic Law), often coming to function as an independent set of reference points. In reflecting upon the legal practice of the PA, I argued that the transition from constitutionalism to a written constitution had been profoundly problematic, resulting in the pronounced absence of a consolidated governmental practice that institutionalizes Constitutionalism. In my view, Constitutionalism remained, at best, documentary, with the consequence that the PA's political system remained stalled.

The kind of political system that was put in place by the Basic Law was a substantial part of the problem. Upon closer reflection, the outline of the PA can be said, *grosso modo*, to correspond to the semi-presidential model of political authority. Semi-presidentialism is, to a substantial extent, defined by the fact that it permits, contingent upon election outcomes, drastic changes in the political system. It would therefore be completely misleading to conceive of the Palestinian political settlement as tending towards a distinct political system. It is instead apparent that the type of political will be profoundly influenced by electoral outcomes, the results of which will substantially impact upon interactions between different branches of government and the central organs of the state.

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to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law.'

<sup>58</sup> Refer to the relevant United Nations General Assembly Resolution (A/RES/67/19), which passed on 29 November, 2012. Out of 193 UN member states, 138 voted in favor, with nine voting against and 41 abstaining. <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/19)>.

<sup>59</sup> D Hatuqa provides a detailed account of the treaties that were ratified by President Abbas in 2014. See 'Paradigm shift': Palestinians join treaties', Aljazeera (22 April 2014).

<<http://www.aljazeera.com/news/middleeast/2014/04/shift-palestinians-join-treaties-2014418111950813313.html>>.

The Semi-presidential system can potentially divide into three different subtypes: Firstly, a consolidated political majority (where the President, the government, and the legislative body are from the same majority party); secondly, a divided political majority (where the President's party differs from the majority within the legislative body/the government; finally, a divided political minority (in which neither the President nor the government has the support of a majority of the population or the elected assembly).<sup>60</sup>

It is astonishing to note that, despite its relatively short life, the PA passed through the three subtypes: beginning as a consolidated political majority (this was the situation, with limited exceptions, between 2003-2006) then progressing to a divided political majority (between 2006-2007, the President and a majority of the PLC/government were drawn from different political parties) before coming to rest (from 2007 to the present in the West Bank) as a divided political minority.

It is similarly instructive – and also astonishing – to note that international support to the PA did not directly contribute to the establishment of a popularly accountable PA. This was clearly illustrated by the aftermath of the 2006 elections, when the establishment of a Hamas government (which corresponded to the second sub-type of a divided political majority) resulted in an international boycott of the new government.

After Hamas's seizure of the Gaza Strip in 2007, President Abbas took the decision to declare a state of emergency. Salam Fayyad's government – which was largely composed of technocrats who lacked political legitimacy - was formed by Presidential decree. Successive governments (serving under Fayyad and then Rami Hamdallah) continue to exert control over PA-administered sections of the West Bank. Mahmoud Abbas, who is similarly afflicted by the lack of a popular mandate, continues to serve as President. During these years, the PLC has not convened and the political divide between the two territories has widened.

A further degree of complexity is added by the fact that the Basic Law was amended in 2003. Mahmoud Abbas initially served in this role, resigning after less than six months due to repeated conflicts with Arafat, who was suspicious that the international community were seeking to, through the transfer of powers to the prime minister, build up an alternative point of political engagement. When Abbas was elected as President in 2005, the prospect of an empowered prime minister had lost its appeal for the international community, a state of affairs that was further reinforced, and indeed substantially accentuated, by the election of a Hamas government in 2006.

In concluding, I would observe that the form of the political system was not only contingent upon the election outcome. Other factors, such as the relation of this outcome to other considerations, including the peace process, the overarching two-state framework, and Quartet conditions, inevitably came into play. There is a clear suspicion that Constitutionalism, for both Palestinian elites and the broader international community was not valued in itself, but was instead valued to the extent that it aligned or coincided with these wider points of reference. Given this fact, it is difficult to envisage how Palestinians can move beyond a situation in which Palestinian constitutionalism is at best documentary and the political system remains stalled.

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<sup>60</sup> Cindy Skach has explored the ways in which different electoral outcomes impact upon the composition of the domestic political system: Skach, *supra* note 24, at 93-121.