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What Political System for Palestine?

Lessons Learnt from the Political Crisis of, and the Institutional Deadlock in, the Palestinian Authority Form of Government according to the Basic Law

Asem Khalil*

Introduction

This paper speculates about the political system for the state (to be) of Palestine (if any).¹ The point of departure is the Palestinian Authority (PA), in control, since 1994, of *parts* of the occupied Palestinian territory, i.e. the West Bank, including East Jerusalem, and Gaza Strip. One may object, rightly: “Why do you intend to study the PA, if you are interested in the State (to be) of Palestine?” The simple answer would be, because I am not an astrologer. I cannot read the future. I do not have the authority, the knowledge or the will to do so. A more insistent reader, not satisfied with this explanation may observe, rightly, that the PA is substantially different from the state (to be) of Palestine, the former being a self-government authority while the latter refers to a sovereign entity. Besides, the argument may continue, each has different constitutional grounds to start with: the Basic Law (*hereinafter* BL) for the former, and the Palestinian Constitution for the latter.²

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¹ While I use the term ‘Palestine,’ I limit my analysis to that entity possibly to form the state (to be) of Palestine, i.e. the territory occupied by Israel in 1967 (West Bank, East Jerusalem included, and Gaza Strip) within the two states solution. Accordingly, any possible consideration of the Palestinian political system outside the above framework goes beyond my interest and will be only indirectly relevant for my purposes in this paper.

² Drafting a ‘constitution’ was initially related to the ‘Palestinian state’ declared in Algiers in 1988. Nevertheless, initial drafts appeared only after the Oslo Agreements, thus, undertaking the limitations imposed by the agreements with Israel in the constitutional text, and the new realities that came from them. The Basic Law is not a constitution for a sovereign state; it is transitional and will be replaced by the constitution, once (and if) the state is established. The Palestinian Legislative Council adopted the BL in 1997, endorsed by former

Justifying the use of the PA as point of departure for the speculation on the political system for a future Palestine requires deeper digging. Two sets of reasons justify this use of the PA. The **first** is related to the way institutions usually function; they tend to aim for self-preservation, and the PA is no different. Since its establishment, in fact, as many have observed, the center of political gravity switched from the Palestine Liberation Organization (*hereinafter* PLO) towards the PA,³ and that the Basic Law, accordingly, is becoming central in any debate between Palestinian factions and political parties.⁴ Although it refers to a validity

President Arafat on 2002. It was later on amended (in 2003 and 2005) and still applies in the territories under PA control. On a different account, a legal committee was formed in 1999 with the task of drafting a Palestinian Constitution in preparation for statehood. Yasser Arafat appointed Minister *Nabil Sha'ith* as its Chairman. This Committee was composed of qualified Palestinian constitutionalists and jurists, following an agreement with the Arab League to form an advisory committee of experts. The Draft of the Palestinian Constitution was completed on 14 February 2001, while negotiations with Israel totally collapsed. The same text was the object of revision in 2003 (a second and third draft were subsequently published) and of interest in the international arena, as important groundwork towards statehood. The text is available on the PA Ministry of Foreign Affairs official website: <http://www.mofa.gov.ps/ar/cp/plugins/spaw/uploads/files/Constitution.pdf> An English version is available in: Nathan J. Brown, *The Third Draft Constitution for a Palestinian State: Translation and Commentary* (Ramallah: Palestinian Center for Policy and Survey Research, 2003).

³ The centrality of the PA and the BL is done on the price of many other narratives, including the “liberation of Palestine” discourse, deemed largely old-fashioned, but also the two-state solution as per the partition plan, but this and other are not central to my argument here. For more about impact of the creation of the PA on the PLO, see: Lamis Andoni, “The PLO at the Crossroads,” 21 *Journal of Palestine Studies* 1 (1991): 54-65; Omar M. Dajani, “Stalled between Seasons: the International Legal Status of Palestine during the Interim Period,” 26 *Denver Journal of International Law and Policy* 1 (1997): 27-92; Jamil Hilal, “PLO Institutions: The Challenge Ahead,” 23 *Journal of Palestine Studies* 1 (1993): 46-60; Ali Jarbawi, “Palestinian Politics at a Crossroads,” 25 *Journal of Palestine Studies* 4 (1996): 29-39.

⁴ It is true that factions often transgressed BL provisions, that “national consensus” often prevails over BL provisions, and that Hamas control by force of Gaza Strip as much as many legal undertakings of the PA in WB since the declaration of state of emergency violate the letter and spirit of the BL. However, there was never a complete rejection of the BL as such. Rather, the violation of the BL is explained often as a different narrative or interpretation of the BL (such as the disagreement over the possibility to call for a referendum, anticipated elections, emergency powers of the President and the government), as acting according to the spirit of the BL rather than its letter (the emergency powers of the president), or simply as a preliminary consensus

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that extends to the interim period,⁵ the BL, adopted by the Palestinian Legislative Council (*hereinafter* PLC) in 1997, was endorsed by President Arafat only in 2002, some three years after the end of the “five years period” dedicated for the interim period. Furthermore, in 2005, the BL was actually amended and introduced a four-year mandate for legislative and presidential elections.⁶ This suggests that what was initially perceived as ‘temporary’, ‘transitory’ or ‘interim’ (i.e. the law governing the PA) is unexpectedly becoming a much longer-lasting development.

Second, even when (and if) the state of Palestine is established, there is not necessarily a creation of order out of disorder, on the image of God who creates everything *ex nihilo*. Any reference to a new beginning will only be a necessary legal fiction to signal the new era that the establishment of the state will usher in. The state of Palestine will not make *tabula rasa* of previous legal systems and institutions,⁷ but will build upon what is already there, largely created by the PA itself. In other words, the “PA” as a legal system and a set of political

needed for its amendment (as in the case of 2005 amendments following national agreement on electoral system and the acceptance of Hamas to enter political process).

⁵ Article 115 of the BL of 2003 reads as follows: “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.” Translated by Institute of Law, available at: <http://muqtafi2.birzeit.edu>

⁶ Article 1 of The Basic Law of 2005 Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003 amended articles 36 and 47/Clause 3. Article 36 (after amendment) reads as follows: “The term of the presidency of the National Authority shall be four years. The President shall have the right to nominate himself for a second term of presidency, provided that he shall not occupy the position of the presidency more than two consecutive terms.” Article (47) Clause 3 (following amendment) reads as follows: “The term of the Legislative Council shall be four years from the date of its being elected and the elections shall be conducted once each four years in a regular manner.”

⁷ The BL adopted this technique with regards to the legal system in force in the WBGs. Article 118 of the BL of 2003 reads as follows: “Laws, regulations and decisions in force in Palestine before the implementation of this law shall remain in force to the extent that they do not contradict the provisions of this Basic Law, until they are amended or repealed, in accordance with the law.” The Draft Constitution for a Palestinian State (I will *hereafter* refer to as Draft Palestinian Constitution, DPC) seems to adopt a similar approach, as appears in article 189: “Official institutions shall continue to exercise their competencies according to constitutional and legal rules that regulate them until the time that the legislation required by the Constitution is promulgated.”

Cited in: Brown, *The Third Draft*, 75.

institutions will continue to live on in the state of Palestine. The BL has created constitutional and political arrangements, as well as interests and institutions that will be difficult to dislodge.⁸ Thus, the PA is, inevitably, shaping the state (to be) of Palestine and that in order to speculate about the political system for a future Palestine it is important and relevant to understand the PA political system.⁹

Some may find the above justifications unconvincing. They may simply observe that the PA had failed, its political system is completely blocked, and the BL is dead letters.¹⁰ Accordingly, they may conclude, it is useless to use the PA political system as point of departure for the speculation over the political system for the state (to be) of Palestine.

One finds it difficult to discard the above skepticism regarding the current state of affairs of the PA. However, the failure of the PA political system (the premise of the above argument) does not justify the conclusion that this also means the failure of the PA's Basic Law and government infrastructure for a future Palestine. On the contrary, it is possible to state that such failure stresses the need to study the political system of the PA and to analyze the

⁸ Nasser H. Aruri and John J. Carroll, "A New Palestinian Charter," 23 *Journal of Palestine Studies* 4 (1994): 8.

⁹ The DPC -that I consider as being the only 'official version' of state Palestine have thought of, at least within the framework of the two-state solution- it appears clearly that the BL does not differ much from the of Palestine would look like, and the way power will be shared and managed, can be traced in the DPC, central in public debate between 2001 and 2003. Since the DPC adopts, *grosso modo*, similar political structures and provisions, I can dare suggesting using the PA political system as point of departure for my analysis. For a comprehensive comparison between BL and DPC, see: Asem Khalil, *Constitutional Framework of the Future Palestinian State. Synthesis of Leading Palestinian Thinking and Public Perceptions* (UNSCO & Institute of Law – Birzeit University, forthcoming).

¹⁰ The deadlock reached its peak with Hamas opting for the use of force in Gaza Strip in June 2007, which remains, since then, in complete control of Gaza Strip under siege. The PA under Mahmoud Abbas, and his appointed government, continues to control the West Bank. Although surfaced only after Hamas' surprising victory this crisis did not appear from the scratch. This paper show how the BL *contributed* to such a deadlock. However, one shall notice that I use the word "contributed" because there are many other reasons related to the failure of the BL into helping to resolve conflict over power in the PA, including the negative role played by Israel as occupation states, and the negative role of the dependency over international funds. This and many other factors need to be taken in consideration, but they go beyond the limited objectives of this paper, and, accordingly, I have to leave them for further research and analyses.

reasons that stand behind the failure of the BL in providing suitable mechanism for power-sharing, and, when conflicts arose between political actors, for conflict resolution. In this way, by pointing out the deficiencies in the PA political system as a whole, this paper contributes to the prognosis for what is need to plan the future Palestinian state.

On a more significant level, this paper suggests that the failure of the Basic Law to settle conflicts between branches of government and organs can partially be explained by the kind of constitutional product the PA had at disposal. Recognizing the existence of serious problem in the BL, however, shall not be interpreted as arguing that the BL needs to be rejected as a constitutional text ruling the PA. With this in mind, rather than rejecting the BL, this paper argues for the rejection of some of the assumptions that one may have with regards to the BL, both to its role and importance in the Palestinian legal system, and the way its provisions can be interpreted. Thus, this paper does not question whether the BL matters; rather, it starts from the principle that it does and focuses on the ways in which it does.

This paper's objective is not to provide answers to the constitutional crisis that the PA is currently facing, or to search the BL for possible answers to the issues at the center of the discord between concerned political actors. Rather it intends to suggest a different paradigm for understanding the BL and for the way it *should* be interpreted for a future state. Such a paradigm may indeed inadvertently shed light on many of the current constitutional questions that are debated nowadays in the territories under PA control, and may in fact provide new directions for decision-makers to exit the current constitutional crisis. It shall be noted, however, that, although personally convinced of the revolutionary character that such paradigm-shift may have for the current interpretation of the BL, this paper does not attempt to assess its possibilities or magnitude; rather, this intends to give initial insight and call for further research in this domain.

In this paper, I will first test the PA political system in light of the BL of 2003, and show how the PA political system contained the seeds of its own destruction, and how the BL not only failed to help with managing the power struggle between competing factions, instead contributed to the ultimate deadlock. I will then suggest a different framework of analysis that may give a different reading of the current PA political system and offer, to some extent, insight into the political system of the (state to be) of Palestine.

Before proceeding, though, a note on the paper's framework must be given, in order to avoid misunderstandings. Despite the big expectations readers may have reading the title, this paper is limited in its scope and ambition. The title, indeed, may be taken to mean one of two different narratives: the first is descriptive, i.e. how the political system for Palestine *is* (or *will be* in the future), and the second is normative, i.e. how the political system for Palestine *ought to be*, based on standards from the outside boundaries of the 'pure science of law.'¹¹ To do so, issues of principle (based on religious, moral, philosophical or even sociological narratives), or interest (economic justifications, efficiency, governability, etc.) appear to play a major role in framing the outcome of the analysis. A purely positivist approach, on the other hand, does not focus on explaining or justifying an existing normative order, but use it as point of departure, as a matter of fact or as a matter of social practice.¹² To do so, two methods of inquiry are possible: on the one hand, the analytical which is largely theoretical, based on the system of norms (that a legal positivist would be more interested into doing), and the sociological and *sociolegal*, dependent on empirical data from the 'real life'. In this paper, I will make a theoretical construction about the PA political

¹¹ The reference here to the contribution of Hans Kelsen's pure theory of law which he defines as "a theory of positive law in general... As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics." Hans Kelsen and Max Knight (trans.) *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967), 1. Much earlier, Austin, in his famous lectures on jurisprudence, has summarized what is to be named 'legal positivism': "The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it var[ies] from the text, by which we regulate our approbation and disapprobation." Cited in: Brian H. Bix, "Legal Positivism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Blackwell Publishing Ltd, 2005), 29-30.

¹² There is no one unique positivist approach towards the nature of law. For Austin, law is a command (an order backed by a threat) by a sovereign. Hart introduced the distinction between "primary rules" and "secondary rules." He then insisted on the need for a "rule of recognition" which is the acceptance of system's officials (as insisted upon by Hart) in order for a legal system to exist. As for Kelsen, who built his theory in a distinctly different theoretical foundation (a neo-kantian derivation), all legal norms are to be understood in terms of an authorization to an official to impose sanctions while the validity of legal norms depends on a Basic Norm (that is presupposed), see: Bix, "Legal Positivism," 32-33.

system, that needs to be complemented by empirical data about the way political system in the real life; and because I am interested in the ‘political system’ -perceived in the narrow sense as a description of the way the three branches of government are separated and the way power is shared, checked, and balanced- my main focus will be on the BL as a political system.¹³

The PA Political System

The issue of defining the current PA political system has always been and remains central in public debate. Palestinians tend to disagree over not only the way the political system should be but even on the way the current PA political system is qualified. This is at least partially due to the confusion between a descriptive and prescriptive accounts, i.e. between the ‘*is*’ and the ‘*ought-to-be*’. The confusion between both accounts is deplorable, since points of departure (assumptions and questions) and arrival (propositions and answers) are completely different. Some argued, indeed, that the PA political system is a Presidential system, or that it should be so; others that it is Parliamentarism, or, again that it should be so; others, use rationalized parliamentarism, semi-presidentialism or a “mixed” (half and half) version, or that it should be so.¹⁴ Based on the BL provisions,¹⁵ one may ask, what does the PA Political System look like? The following offers some insights.

¹³ The BL is indeed, a constitution-like text, regulating the three powers, including list of human rights and regulating way BL-amendment (2/3 majority of the Palestinian Legislative Council). The BL, thus, can be considered a unitary-written-formal constitution, deemed supreme within the PA legal system after Oslo, or at least since 2002 (when promulgated by the PA President) and its updated version (following introduction of the office of Prime Minister) in 2003 and the amendments of 2005. For more, see: Asem Khalil, *The Enactment of Constituent Power in the Arab World: The Palestinian Case* (Fribourg: Helbing & Lichtenhahn, 2006, PIFF, Etudes et Colloques. 47 vols), 210-221. For sure the “constitution,” in the material sense, goes beyond the BL, as a formal constitution for the PA, and reference need not to be limited to what appears in the BL as such.

¹⁴ I have reviewed elsewhere the existing literature in Arabic and English relating to Palestinian political system and Palestinian constitution, and have presented those different positions. For more, see: Khalil, *Constitutional Framework*.

Some have undertaken an extreme position; rejecting the possibility of giving the qualification of “political system” for an authority without real powers, under occupation and before statehood. Without entering in the merit of the later position, I need to exclude it here, despite the serious issues it can raise, and proceed in a more realistic and pragmatic way in my analysis.

First, the PA President, just as PLC members, is elected by Palestinians (of West Bank, including East Jerusalem and Gaza strip). This direct election excludes mutual political responsibility; in other words, both institutions (the PLC and the Presidency) are mutually-exclusive. The President does not need the confidence of the PLC and the President cannot dissolve the PLC. Some suspect that Presidentialism is the best qualification for such a system. However, a pure presidential system does not accept sharing executive power with a prime minister/government/cabinet or so, which is the case of the PA. Presidentialism, thus, needs to be excluded.

Second, the PA cabinet, headed by a Prime Minister (since the introduction of the office in 2003 BL amendments) acts as a collegial body. It is deemed as having the highest executive and administrative power, responsible to the PLC, a parliament-like body. Ministers can be chosen from the PLC and from outside, and they do not need to resign from their office as PLC members. This is typical of a parliamentary system. On the contrary, a presidential system, as much as a semi-presidential French like system, (although in different modalities), in need of distinction and separation between the executive and the legislative organs, tends to exclude such a possibility. The PA system does not resemble a pure Parliamentary system, in that a pure parliamentary system does not perceive a head of state that blocks legislation, declare a state of emergency, adopt decree laws, or designate high officials and judges, including the Supreme Court and the Supreme Constitutional Court judges, without the approval by other powers. A pure parliamentary system does not tolerate a duality in the

¹⁵ There are here two ways of dealing with the PA political system. A more comprehensive approach will not be limited in the BL texts (the law on the book), but rather the way power is shared and exercised in the real world. To do so there is a need for a different kind of data and research than the ones I dispose, or that I may be able to present. Political scientists, sociologists and anthropologist may have better things to tell than I do, in my capacity of jurist, with regards to how power is shared, managed and exercised in the real life; they can tell more about politics, including conflicts and compromises, and the way it determine and shape decision-making process. The law in action, rather than the law in the book, may be much more interesting and attractive, because it pictures in a better and clearer way the existent power relations and the way authority is exercised and managed. For such an enterprise, maybe, empirical data, rather than theoretical and analytical inputs, may be more needed. Without undermining the relevance of the first question, I cannot promise to provide an exhaustive answer, but only some hints that may help into framing future debates and researches, but let me leave this issue for later stage in my presentation.

executive power and does not tolerate rigid separation between the executive and the legislative body. Pure parliamentarism needs to be excluded.

Third, some of the above characteristics are present in a semi-presidentialism system. In fact, the PA President, directly elected, coexists with a cabinet, at the head of the PA executive power. This duality is typical of semi-presidential system, *à la française*. The PA cabinet is composed of a prime minister and a number of ministers. The Basic Law holds that the cabinet is considered to be a council of ministers. The Prime Minister, not the PA President, chairs the council of ministers. The President, however, can issue Presidential decrees without the signature of the prime minister or any ministers. It is the President, and the President alone, that has power to issue, under certain conditions, decree-laws. It is also the President alone who can declare the state of emergency. In other words, the President exercises his 'executive powers' directly, and not through ministers. The maximum that can be said is that the President is assisted by the council of ministers in doing his job; but this means also that the President does not need the approval of the council of ministers to exercise his power. This makes the Palestinian president similar to the presidential system *à l'américain*, but qualification has been initially discounted, at first place.

The above and many other examples¹⁶ may explain -and can be used to excuse- the confusion that one may find with regards to the way the PA political system should be described or qualified. The above examples suggest, indeed, that the confusion is largely related to the unclear vision reflected in the BL itself. How, then, to qualify this system? Answering this question is not purely an academic exercise. It requires the assessment of how a system functions, who has the power to make decisions, and who controls and 'checks' whom. In other words, while focusing on the power relations between branches of government, we are interested in the larger issues of representation and the legality and legitimacy of governmental actions.

To answer this, the confusion created by the Basic Law must be put aside; a pragmatic analysis is required. The above examples show that it is possible to exclude the qualifications

¹⁶ Those examples can be given with regards to other two important pillars of constitutions, the listing of basic human rights (see for example Nathan J. Brown, "Constituting Palestine: The Effort of Writing a Basic Law for the Palestinian Authority," 54 *Middle East Journal* 1 (2000): 25-43) and the constitutional review of legislation.

of the government as being pure presidentialism (which refers here to a US-like system) and pure parliamentarism (which refers here to a UK-like system). In the absence of alternative available systems in constitutional law,¹⁷ one can suggest semi-presidentialism as the closest system to qualify the PA political system. To do so, however, the issue of whether the semi-presidential system itself can be considered a constitutional type must be put aside, along with whether it is different from Parliamentarism and presidentialism or whether it is an alteration of elements existing in both systems.¹⁸

¹⁷ A third system is also present and to some extent can be presented here, that is the *directorate* system, applicable mostly in Switzerland. The interesting about this system is that it is that it can be the closest political system to qualify the PLO system, in which an executive committee is chosen from within the Palestinian National Council (a parliament like body). This system is also similar to the way Oslo agreements envisaged the Council governing the Autonomous territories (the 'Council'), from which an executive body is chosen (with the difference in that the executive body is headed by an elected President, who is, *ex officio*, the head of the Council, whose members are, themselves, to be elected. For more about the similarities between the PLO system and the way Oslo envisaged the Council, see: Khalil, *Constitutional Framework*.

However, since the BL adopted a completely different system than the one envisaged in the Interim agreement, I will leave it aside. For those interested in issues of constitutional borrowing, it may be curious here to study the reasons behind the rejection of such a constitutional model. Such a rejection (qualified by some as negative borrowing) may tell us more about the constitutional borrowing than the system that was effectively adopted. In other words, the non-borrowing, or the negative borrowing tells us more because often one knows what he for sure doesn't want, but not necessarily what he exactly wants. It is easier to say what we are not, than to say explicitly what we are. For more, see: Kim Lane Scheppele, "Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models," 1 *Int.IJ. Const. L.* 2 (2003): 296-324.

¹⁸ Cindy Skach, "The "newest" separation of powers: Semipresidentialism," 5 *Int.IJ. Const. L.* 1 (2007): 94. While presidentialism is often presented as a qualification of the US system, and parliamentarism as a qualification of the UK system, France is only one of many examples that can be cited to show how a semi-presidentialism would look like. The constitution of the Weimer republic -from which the French Fifth Republic seems to be influenced- as much as the constitutions of many states that were adopted after decolonization and many of Eastern Europe constitutions following end of communism, as much as of Russia. The common characteristics between those systems are what distinguish them from pure presidentialism and pure parliamentarism, but this does not make of any of those systems a possible model to refer to as 'semi-presidentialism.'

Semi-Presidentialism

Semi-presidentialism, as a system, may be one of three different sub-types, according to (legislative and presidential) electoral choices and the way the cabinet is composed: 1) A consolidated political majority, where the President, the government, and the legislative body are from the same majority party; 2) A divided political majority, where President belongs to a party different from that of the legislative body, thus, of the government; 3) A divided political minority, where neither the President nor the government enjoys support of a majority.

While the first subtype is the 'less dangerous' system, in terms of stability and efficiency and the less risky in terms of a democratic system, the third one is the combination of potentially the most problematic kind of presidentialism— divided government— with potentially the most problematic kind of parliamentarism — minority government.”¹⁹

It is astonishing to note that, despite its relatively short life, the PA has passed through the three subtypes, beginning with the “less-dangerous” system, i.e. the consolidated political majority (from 2002-2006, with some intervals), moving to a divided political majority (from 2006-2007, with the President and PLC/government belonging to different political affiliations), and becoming the most dangerous sub-type, i.e. the divided political minority (from 2007 to the present, in the West Bank).

The clear support by international funding agencies for this last subtype of a divided political minority, despite its clear democratic deficiency, is especially noteworthy.²⁰ These agencies believe that the PA's rule by decree, emergency, or exception may provide an opportunity for effectuating economic, security and political reform. Such a regime, however, has increasingly been questioned by a significant part of the actors in the political system, endangering the transition to democracy, the establishment of a constitutionalism (intended to limit government powers rather than only empowering it), and the respect of civil and

¹⁹ Skach, "The "newest" separation," 105.

²⁰ In fact, it was only after the formation of an emergency government in 2007 (chaired by Prime Minister Salam Fayyad) that the international funds and aids for the PA were reinstated and negotiation with Israel restarted (Annapolis).

political rights. Such a tension may lead to complete breakdown of the PA itself - and some consider it to already have done so.

The above descriptions of the PA political system insinuate that the PA political system contained the seeds of its own destruction. However, nothing in this argument should be interpreted as questioning semi-presidentialism in and of itself; on the contrary, it may be rightly stated that it can be a success story. To show that a successful semi-presidentialism can be a system that avoids the worse-case-scenario sub-type, i.e. the divided minority government, some authors suggest a triple pre-conditions test: 1) institutionalized party system, in which regular election within the party and a transparent selection of leadership is necessary; 2) an adequate electoral system (having to choose between two normative objectives, i.e. governability on the one side, better realized by majority system, and representation on the other, better realized by proportional representation), and 3) the partisanship of individual president and the necessary support by and of a political party.²¹

In the light of this triple pre-conditions test, it is possible to understand why semi-presidentialism for the PA was a failure, and why it could not be otherwise in this situation. In fact, the PA political system suffers from the lack of institutionalization of political parties, the changes in the electoral system seems to be done strictly to accommodate political contingencies rather than concerns over the creation of a functioning system, and the non-partisan affiliation of the President largely using technocrat governments.

The Basic Law as Part of the Problem

In the first section I demonstrated how the Basic Law created (or rather codified) a distorted political system. It contained contradictory provisions, giving different signals that led to different directions. This is why the BL was not an adequate tool for drawing boundaries between different power holders. It did not help to share power and avoid clashes between PA organs, nor did it provide adequate tools for resolving them. The BL was not part of the solution; rather, it was part of the problem.

One can conjecture a plausible solution for the puzzles that found in the BL. This may include, inter alia, the consideration of some textual, contextual, and purposive

²¹ Skach, "The "newest" separation," 105-7)

interpretations.²² There is a way to come up with an intelligent explanation for such a mess. It is also possible and correct to say that, taken individually, many of the BL provisions may be (successfully) practicable in other systems, i.e. each provision may be conceived, individually, as being rational and functional. Taken as a whole, however, it is not possible to conclude that the BL draws up a rational or functional political system.²³

Furthermore, those who try to check the BL and try to find a coherent story to tell, somehow commit a fatal error: they err in assuming that the BL –or any constitutional text– mandates a comprehensive and rational system, i.e. a system that functions to achieve necessities, or that it provides a rational scheme for action. It is this assumption which makes us believe that the constitution is engineered (regardless of who is the engineer), and it is this assumption, I believe, that needs to be rejected.

In doubting the correctness of such an assumption, I make use of conclusions of various studies, published by researchers in different fields, who are interested in constitutions in the “new era:” the fourth (or so) era of constitutionalism or the new constitutionalism (since the 1990s). For them, the key words used by scholars to qualify the constitutions of the new era are “syncretism,”²⁴ “*bricolage*,”²⁵ and even “distortion.”²⁶ Such a reading of the way

²² Although interested in judicial review in constitutional law, Philip Bobbit had individualized six forms of arguments that can be useful in any interpretation of constitutional texts: Historical (intent of the framers), textual (language of the Constitution), structural (relationships among constitutional provisions), doctrinal (reliance on judicial precedence), ethical (moral commitments reflected in the Constitution), and prudential argument (seeking balance between costs and benefits of particular rule). For more, see: (Rubin 1997, 559).

²³ One may object that the argument I make is illogical, for it is impossible to conclude that summing up rational provisions may lead us to irrational total (as if I'm saying, the total of positive is negative). This objection may be sustained in mathematics, but there is no reason to conclude that rationalized parcels lead necessary to a rationalized whole, since a rational whole necessitates a coherence in the objectives, which is something that goes beyond each provision taken individually.

²⁴ For more, see: Julian Go, "A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000," in *Constitutionalism and Political Reconstruction*, edited by Saïd Amir Arjomand (Leiden – Boston: BRILL, 2007): 89-114.

²⁵ Using a term made familiar to social scientists by Claude Lévi-Strauss, who wrote that the kind of reasoning a bricoleur makes is that of: “do with "whatever is at hand," that is to say with a set of tools and materials... [that] bears no relation to the current project, or indeed to any particular project, but is the contingent result of

constitutions are made (or re-made, in some cases), finds the use of local and foreign material, the first available to them, often translated, in a pick-and-choose way, and acts by assembling a text with various contradictory provisions.

This assemblage of a constitution is not a compromise intended as halfway between two extremes, in which each gives up something for the sake of agreement. Rather it is an extreme exchanged for another elsewhere (public space, here, is perceived as various parcels or fields)²⁷ ending by having a collection of opposites in the same text. Such a syncretism is not intended to be a synthesis but rather a collection of thesis and anti-thesis in a very spontaneous way and without reflection. In such a context, no provision in the Constitution is indispensable or integral to any overall meaning: many provisions on which there may be a disagreement simply disappear, while many others can appear 'from above,' in one of the different stages of constitution - drafting, discussing, or even endorsing. Such a situation

all the occasions there have been to renew or enrich the stock." Cited in: Mark Tushnet, "The Possibilities of Comparative Constitutional Law," 108 *Yale L. J.* 6 (1999): 1285-6.

²⁶ Wiktor Osiatynski, "Paradoxes of Constitutional Borrowing." 1 *Int.J.J. Const. L.* 2 (2003): 244-268.

²⁷ In this sense, I may argue, the reference to Islam and shari'a in the BL was not necessarily meant to change anything on the way the PLO and the PA perceives the authority it exercises, rather it was a compromise in the way I mean it, necessary for attracting a portion of the Palestinian population, and was necessary in later stage to include Hamas in the political process (it is interesting to notice, that the electoral program of Change and Reform, the list formed by Hamas in the 2006 legislative election, included a promise to introduce changes in BL article 4 (clause 2) that read as follows "The principles of Islamic Shari'a shall be a principal source of legislation." Hamas prefers *the* instead of *a* (making it similar to the Egyptian constitutional reference to *shari'a*). See section 5 of electoral program of "Change and Reform List" available at: http://www.palestine-info.info/arabic/palestoday/reports/report2006_1/entkhabat06/entkhabat_tashre3i_06/program/5_1_06.htm. I believe that the discussion regarding the formulation of the reference to Islam and *shari'a* covers a more subtle issue, not tackled at all in the BL (again, avoidance of taking decision) that is the separation between personal status issues and the maintenance of the duality of jurisdiction of *shari'a* (for Muslims) and religious (for Christian communities) courts over personal status issues. In other words, for the PA it was much more important to regulate political issues related to the new authority than touching very hot issues (religiously, socially and culturally speaking). This is the case of: (1) personal status issues (different codes are still applicable for Christian communities, and Muslims. While for Muslims, there are two codes, one (Jordanian) for the WB, and the other (Egyptian) for GS); (2) penal codes, where Jordanian and British mandate codes still apply respectively in WB and GS.

pushes one to suspect that the only decision undertaken by the constitution-framers is, indeed, to avoid taking decisions, for the sake of agreement on a text.²⁸

If the preceding reading and interpretation of the constitution-making in the new era is deemed correct in the Palestinian context – and I believe it is so –²⁹ it is then very naïve to return to the BL looking for ready-made answers, as if it expresses a comprehensive and a coherent project, or a rational and pre-determined will.³⁰

²⁸ I may here go further in suggesting that there may be some intention to create a text that wouldn't necessarily function. Such an approach may be the one of those who profit from the previous system and are not enthusiastic about changing it, while at the same time, not being able to stop the process and change, endorsed in the new codified constitutional text. This is however another issue and needs to be left aside, at least at this point.

²⁹ I have followed the drafting process of the BL and DPC elsewhere, for more see (Khalil 2006, 216-221). Nathan Brown followed in details the drafting process of the BL since its first inception and he seems to explain the product at hand (the BL as it was finally adopted by the PLC) partially as a result of the materials used by the drafters of the BL: "The Palestinians who first tool on the task of drafting a constitution... began with previous documents as a starting point. What made their situation unusual, however, was that their constitutional tradition though potentially rich, lacked both unity and clarity. The problem for Palestinians is not that they lack constitutional traditions but that they have too many..." Brown, "Constituting Palestine," 34. For more about earlier drafts of the BL and the DPC, see, *inter alia*, Anis Al-Qasem, "Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period," *Palestine Yearbook of International Law* VII (1992/1994): 187-211; Anis Al-Qasem, "The Draft Basic Law for the Palestinian National Authority," in *The Arab-Israeli Accords: Legal Perspective*, edited by E. Cotran and M. Chibli (London-the Hague-Boston, 1997, CIMEL Book Series No.1): 101-135; Nasser H. Aruri and John J. Carroll, "A New Palestinian Charter," 23 *Journal of Palestine Studies* 4 (1994): pp.5-17; Zaha Hassan, "The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism," 16 *Florida Journal of International Law* 4 (2004): 897-927; Adrien K. WING, "The Palestinian Basic Law: Embryonic Constitutionalism," 31 *Case Western Reserve Journal of International Law* (1999): 383-414.

³⁰ One important note can be added here, and it applies on all written constitutions. The fact is that a written constitution, as a law, is legislated by group of individuals and organs. The legislature (contrary to other law maker, such as the judge) is not confined to legal discourse. A legislator, motivated by public policy discourse, is typically trying to reach decisions that have desirable social consequences, not ones that fit with, or build upon existing legal doctrine. It is then erroneous to return to *legislated* law, including the BL, in research for coherence and for rationality of the whole, within the existing legal and political systems. For more, see Edward L. Rubin, "Law And and the Methodology of Law," *Wis. L. Rev.* 3 (1997): 550-1.

So what is the point being defended here? In fact, my approach seems destructive, because a positivist approach is used to dismiss it. My suggestion is not to reject the BL as such, but rather to reject the assumptions one may have when she wants to interpret the BL, in that it necessarily expresses a rational will or scheme, as if it includes a system that needs to work necessarily.

Having the above in mind, in order to understand the mechanisms and the ways powers are separated, shared and balanced in the territories under PA control, there is a need to go beyond the BL, to extend the discussion beyond the PA.³¹ Accordingly, the political system for Palestine is not the qualification that can be done based on the president-Palestinian Legislative Council relationship, or President-cabinet relationship, but relates the Palestinian Authority to the PLO itself, and both to the state to be, and how each of these relationships relates to historical Palestine and to Palestinians as a nation.

The Basic Law Impact on Political Actors, and vice versa

Overall, this analysis can lead us to an optimistic observation over the BL, its role and its place in the Palestinian legal and political system, a plausible speculation for a future government and the suggestion of a new paradigm for the understanding of the current state of affairs in the territories under PA control that may help in shaping the political system for Palestine. From the outset I have insisted on discussing the political system as it 'ought-to-be' (legally speaking), thus putting aside the way political actors act in 'real life,' and how public authorities may interact, often in defiance of the law, including the BL. This dichotomy is sometimes referred to so as to deplore the public authorities on the one hand or, on the other, to doubt the relevance and usefulness of the BL as a legal document. I suggest reading this reality, which is in no way exclusive to the PA, in a different way.

³¹ This means there is a need to take into consideration other factors: 1) the preexisting laws in force in the West Bank and Gaza Strip before the PA was created; 2) international law, including International Human Rights law and International Humanitarian law; 3) the right to self-determination in light of the partition plan, the right of return in the light of the two-state solution, refugeehood, statelessness and citizenship; 4) the place of the PLO and the role it plays in relation to the PA, but also in relation to the state (to be) of Palestine; 5) the West Bank/Gaza Strip dilemma, and as it goes beyond the current Fatah-Hamas discordance; 6) the impact of occupation over the Palestinian political system, and how the establishment of a state would not necessarily signify the end of dependency over Israel or over the international community.

The BL, indeed, may have reflected existing power relations, and may have had, at the beginning, little direct impact on the power holders. This is the clear explanation for the centrality of the figure of President Arafat. In fact, the BL codified *grasso modo* most of the current state of affairs prior to its endorsement. In other words, the centrality of the office of president in the PA system is largely explained by the centrality of the figure of Arafat himself. However, one must admit that some BL provisions were, at least as written, revolutionary. For example, the BL granted the PLC the authority to bypass the presidential veto over legislation.³² The introduction of that provision did not change much with regards to Arafat's power to block any legislation he wanted and he did that many times. However, after Arafat died, Abbas at the very least always respected that provision, as far as is known.

In other words, changes in the person who is exercising a public function and historical circumstances may put in motion provisions long ignored by others that have been suspended and nearly anaesthetized. This can lead one to speculate that BL provisions which have been considered useless in light of the previous forms of government under the Basic Law, may suddenly be resurrected, and given new life. This means also that certain provisions, once introduced, may take a life of their own, independently of the original project that justified it.

This argument is double-sided, for it suggests that the changes in the positions of persons holding public office mean also changes in the way the BL is interpreted or in the way it is applied, and for this one can look to a different example: The introduction of the office of prime minister in the 2003 amendments was in a way intended to limit the prominent role of the presidential position, at the time held by Arafat. The introduction of the office of prime minister was more important than clarify his tasks. This technique of leaving issues on which

³² Article 41 of the BL of 2003 reads as follows: "1) The President of the National Authority shall promulgate the laws voted by the Palestinian Legislative Council within thirty (30) days of their transmittal to him. The President may refer a law back to the Legislative Council with his observations and the reasons of his objection within the same period. Otherwise, the law will be deemed promulgated and will be published in the *Official Gazette* 2) If the President of the National Authority returns the proposed law to the Legislative Council in conformity with the time limit and conditions specified in the previous paragraph, the Council shall debate the law again. If the Council passes the law a second time by a majority of two-thirds of its members, the proposed law shall be considered approved and shall be immediately published in the *Official Gazette*"

there is a disagreement (clear demarcation of the Prime Minister real job) for later stages was the price for having the text endorsed, but this amendment surely did not help clarify the respective powers of President and Prime Minister.

Abbas was the first appointed prime minister, but he resigned less than six month after his nomination. For some observers, the resignation came as a result of different political visions.³³ I suspect, however, that the resignation came as a natural result of the lack of a clear mandate and powers for the prime minister, as will happen whenever a prime minister is not ready to play the game without knowing the rules: this was the case of Abbas. When on the contrary, Ahmad Qure'i, following Abbas' resignation, became the prime minister, disagreements with Arafat were often resolved within the Fatah revolutionary council, as an internal political party issue.³⁴ This meant the prevalence of Arafat's position for his own weight and powers, but also for making good use of his various capacities.³⁵

On the contrary, when Abbas became President in January 2005, the insistence over transfer of powers from the President to the government or to the prime minister became less evident, and even led to a push for powers returned to the president. This tendency largely intensified following Hamas' victory in the 2006 elections. The tendency was converted, and, both Israel and the international community preferred doing business directly with the Mahmoud Abbas-PA government (thus emphasizing the office of President as an institution that deals with this 'crisis') and not the Hamas-PA government. Since then, changes have

³³ Hani Al-Masri, "Al-Hukouma Al-Falasteniyya Al-Jadeeda: Azmat Asma wa Hakaeb, Am Khelaf Seyase?" ("The New Palestinian Cabinet: A Crisis of Names, Portfolios, or Political Disagreement?"), 14 *Majallat Adderassat Al-Falasteniya* 54 (2003): 20.

³⁴ For more about this issue, see: Khalil, *Constitutional Framework*.

³⁵ Arafat was at the same time the chairman of the PLO executive committee (thus member of the PLO Palestinian National Council and Palestinian Central Council), he is also the President of the state of Palestine declared in Algiers in 1988, and recognized by more than hundred states. He was appointed as President of the PA, and later on elected as President of the PA in 1996, and remained in office until his death in November 2004. He was also the chairman of Fatah revolutionary council, the chairman of the National Security Council. Until 1999, he was acting as minister of interior, and until 2003, he was acting as prime minister. Those and many other official functions were all in the hand of Arafat and he used his different capacities according to the situation. Most importantly, Arafat, until his death, maintained strict control over the public money, having exclusive control over the PA money.

been introduced to the roles and power-sharing structure of the government (this time through presidential decrees, and, when Hamas controlled Gaza by force, through emergency regulations), with the support and encouragement of the international community. The fragmentation between West Bank and Gaza strip, Fatah and Hamas, and others, is reflected in the options and suggestions done for ending the crisis. The needed balance is no more between the three branches of government, but rather is between the legislative body and the role of the President alone, as both pretend to have, through the justification of popular election, legitimacy, each having their own government, their own security forces, and their own portions of land they control. Each pretend to have the last word in disputes arising between Palestinians, each accuse the other of misinterpreting and misusing the Basic Law, while at the same time offering a completely different interpretation of the same BL provisions.

Conclusion: in Search for a New Paradigm?

This conclusion stresses out the need, not to review answers, but to pose the right questions. To do so, a different paradigm may be suggested for the Palestinian political system: the Weimer republic, its constitution and the discussions that accompanied it, from Hans Kelsen to Carl Schmitt.³⁶ It is indeed the Weimer republic not the French constitution that was the first constitution to adopt a system similar to what was termed in this paper as semi-presidentialism. In fact there are even some studies that suggest that Charles de Gaulle and his assistants were familiar with the Weimer constitution when revolutionary changes were introduced, and the Fifth republic was born.³⁷

Kelsen and Schmitt, in fact, held opposite opinions with regards to the role of parliaments, political parties, democracy and compromises. The most important of these differences comes when faced with a constitution that offers contradictory provisions: Schmitt

³⁶ For more about the Weimer Republic crisis and the legal theory debate that accompanied it, see: Arthur J. Jacobson and Bernard Schlink, "Introduction Constitutional Crisis The German and the American Experience," in *Weimer: A Jurisprudence of Crisis*, edited by Arthur J. Jacobson and Bernard Schlink (Berkeley, Los Angeles, London: University of California Press, 2000), 1-39.

³⁷ Saïd Amir Arjomand, "Constitutional Development and Political Reconstruction from Nation-Building to New Constitutionalism," in *Constitutionalism and Political Reconstruction*, edited by Saïd Amir Arjomand (Leiden – Boston: BRILL, 2007), 30.

suggested a way out of the crisis, not through the Parliament, but rather the President, who decides the 'state of exception.' Hans Kelsen, the father of the specialized Constitutional Court, suggested that democratic deliberations, under the final scrutiny of a Constitutional Court, are the only way out of such a dilemma.³⁸ This debate, as detailed here, I believe, can be introduced as a paradigm for the analysis of and reflection over the Palestinian constitutional system, but also, and most importantly, as a paradigm to look for solutions for the current crisis in the Palestinian political system as a whole. Both theories of law (upheld by Schmitt and Kelsen) are attractive for different publics, though are open to criticism. Both in fact reach the same conclusion, though using different, even opposite, paths, that it is the release of the hands of 'politics' itself from any legal constraints that offers the solution. Is there an alternative?

This issue cannot be addressed here, but the dilemma of the appropriate method in jurisprudence is present.³⁹ The accusations made against legal positivism on the one hand⁴⁰ and the critique to the Schmitt theory, especially on the light of the controversy related to his

³⁸ Saïd Amir Arjomand explicate the tension and dilemma that accompanied the Weimer republic constitutional crisis: "The tension between Presidentialism and court-centered constitutionalism is also classically discussed in the Weimer constitutional debates. In 1928 and 1929, Kelsen offered a theoretical justification for constitutional courts by elevating the principle of constitutional legality above parliamentary legislation and arguing that its technical interpretation and the determination of the constitutionality of legislative and administrative acts was a non-political function, and therefore required a body of experts in constitution law... In 1931, Carl Schmitt argued that, in view of the inconsistencies of the Weimar Constitution and the evidently political nature of judicial review by the constitutional court, it was the duty of the President, by virtue of his direct election by the people (his plebiscitary legitimacy) and his independence from factional party politics, to act as the "guardian" (*Hüter*) of the constitution." Kelsen responded by reaffirming that the politically neutral constitutional court, and not the elected President (whose powers were defined by the constitution and who was therefore an interested party in the determination of constitutionality), was the organ entitled to the authoritative interpretation of the constitution. The constitutional court was therefore the true "guardian of the constitution." Arjomand, "Constitutional Development," 29 (citations omitted).

³⁹ Bix, "Legal Positivism," 31.

⁴⁰ The discussion is best represented in the famous debate (done on paper, Harvard Law Review) in 1958 between H. L. A. Hart and Lon L. Fuller. For more, see: H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 4 (1958): 593-629; Lon L. Fuller, "Positivism and the Separation of Law and Morals - A Reply to Professor Hart," 71 *Harvard Law Review* 4 (1958): 630-672.

role in the early Nazi regime,⁴¹ on the other, are far from being resolved. These issues and others provide only a glimpse of what a debate over the current constitutional crisis in Palestine would look like, and should be considered for building a legal theory that fits a country still under occupation, whose territory (historical Palestine) was partitioned by a UN General Assembly decision, and whose people are largely refugees and stateless, dispersed throughout the world.

When looking back to history and introducing the paradigm of the Weimer republic for present-day Palestine, we have the advantage of reading that history in the light of successive events that were not evident at the time of the theoretical discussion between Schmitt and Kelsen, for both of them, i.e. the rise of Nazism, the demise of the Weimer Republic, the Second World War, and the atrocities that accompanied it.⁴² We have the advantage of using their theoretical discussion as a paradigm in light of successive developments, at both the international and domestic levels, i.e. the codification of human rights in many international conventions while at the same time, most constitutions had codified basic rights in constitutional texts. The puzzle for Palestinians, and the challenge, is to continue to believe in the validity of human rights discourse as a valid framework for their legitimate demand of independence, autonomy, and statehood.

The revival of the rule of law in light of the revolution for human rights that followed the Second World War altered the meaning of the rule of law that is emerging gradually and signals a shift in the legal order and political organization.⁴³ It is impossible to cover all

⁴¹ Jeffrey Seitzer and Christopher Thornhill, "An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context," in *Constitutional Theory*, by Carl Schmitt, edited by Jeffrey Seitzer, translated by Jeffrey Seitzer (Durham and London: Duke University Press, 2008), 1.

⁴² As an example of the Second World War, one can refer to the role of Constitutional Courts, as projected by Kelsenian / Austrian model. As rightly noted by Arjomand, "... although Kelsen had considered his constitutional court as the guardian of the constitution, he significantly excluded the protection of constitutional rights from its jurisdiction. The protection of human rights was added to the functions of the Kelsenian model after World War II, and has become one of the primary functions of constitutional courts in the new constitutionalism, just as they assumed the function of guiding the transition to democracy." Arjomand, "Constitutional Development," 12.

⁴³ Ibid, 19.

possible theories that deal with this change, but here can be limited to the works of two academics who have established themselves at the forefront of constitutional democratic thinking,⁴⁴ Ronald Dworkin⁴⁵ and Jürgen Habermas.⁴⁶ In such theories, rights are primordial and constitute the basis for a real democracy.

The problem with such theories, developed within and by western democracies, is that they both presume the existence of a state, and their whole theoretical constructions depart from that assumption. In the Palestinian context, where the attempt is to build a liberal state without statehood, can at best be described as problematic, and at worse as counterproductive and catastrophic. A different way is needed to understand the way democracy can be exercised under occupation and before statehood, or as a step towards ending occupation and building the state. The process is converted 'up-side-down' for the Palestinians, and its impact on theorizing about Palestinian political system need still to be build from scratch. This paper offers only a first glance.

⁴⁴ For a comparison between both theories, see: Cornelia Schneider, "The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy UCL Jurisprudence Review (2000): 101-121.

⁴⁵ For more, see: Ronald Dworkin, "Equality, Democracy, and Constitution: We the People in Court," 28 *Alberta Law Review* 2 (1990), 324.

⁴⁶ For more, see: Jürgen Habermas, "Reconciliation through the Public Use of Reason Remarks on John Rawls' Political Liberalism," *Journal of Philosophy* 3 (1995), 109.